

Michigan Law Review

Volume 114 | Issue 6

2016

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Stephen Lee

University of California, Irvine School of Law

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Recommended Citation

Stephen Lee, *Productivity and Affinity in the Age of Dignity*, 114 MICH. L. REV. 1137 (2016).

Available at: <https://repository.law.umich.edu/mlr/vol114/iss6/14>

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PRODUCTIVITY AND AFFINITY IN THE AGE OF DIGNITY

*Stephen Lee**

THE AGE OF DIGNITY: PREPARING FOR THE ELDER BOOM IN A CHANGING AMERICA. BY *Ai-jen Poo* with *Ariane Conrad*. New York and London: The New Press. 2015. P. 176. \$25.95.

INTRODUCTION

Americans are living longer than ever before. The decline in the infant mortality rate, a reduction in heart disease- and cancer-related deaths among adults, and the successes of other public-health initiatives help explain our newfound national longevity.¹ Traditionally, the elderly have been cared for by family members, but the “elder boom”—and the uncertain period of care it invites—is testing the limits of what families can do on their own. While our lives have gotten longer, our pockets have not necessarily gotten deeper. The strict policies on eldercare-related leave that most workplaces continue to maintain exacerbate this reality.² The challenges posed by the elder boom go beyond finding enough money to pay for services. Even the wealthy among us—who can afford outside help—have reasons to worry about securing care for their elders: labor studies project a shortage of caregivers in future labor markets.³ All of this forces an urgent question: Who will take care of us once we are too old to take care of ourselves? Ai-jen Poo,⁴ a nationally recognized activist and 2014 MacArthur “genius grant” recipient, takes up this question in *The Age of Dignity: Preparing for the Elder Boom in a Changing America*.⁵

* Professor of Law, University of California, Irvine School of Law. For helpful comments and conversations, I am grateful to Kerry Abrams, Alan Hyde, and Hiroshi Motomura. Alisha Ansari and Kristen Burzynski provided excellent research assistance. Sommer Engels, Will Martin, Jenny Stone, and the rest of the *Michigan Law Review* staff improved the piece immeasurably. Please direct comments and questions to slee@law.uci.edu.

1. See JIAQUAN XU ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., NCHSDATA BRIEF No. 168, MORTALITY IN THE UNITED STATES, 2012 (2014), <http://www.cdc.gov/nchs/data/databriefs/db168.pdf> [<http://perma.cc/SAS9-N3kW>].

2. See THE COUNCIL OF ECON. ADVISERS, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., NINE FACTS ABOUT AMERICAN FAMILIES AND WORK 12, 15 (2014), https://www.whitehouse.gov/sites/default/files/docs/nine_facts_about_family_and_work_real_final.pdf [<http://perma.cc/Z3KD-S6EF>].

3. See Peggie R. Smith, *Elder Care, Gender, and Work: The Work–Family Issue of the 21st Century*, 25 BERKELEY J. EMP. & LAB. L. 351, 351–52 (2004).

4. Director, National Domestic Workers Alliance.

5. The book was ghost written with Ariane Conrad.

In tracing the consequences of the coming elder boom, Poo begins with the observation that existing federal programs offer very little support for those in need of home care (pp. 35–36). She notes that Americans overwhelmingly prefer to care for their elders at home with the help of family, but that such an arrangement is simply too costly for most families (pp. 2, 5). Programs like Medicaid provide some coverage for home-care services but only for those at the lower end of the wage scale (pp. 36–37). Such a policy most directly affects middle-class Americans who have no meaningful options when it comes time to care for an elder (pp. 32–36). Meanwhile, the difficult work of home care, domestic work, and nursing is often performed by immigrant women, and especially unauthorized immigrant women, which means that caregivers are often underpaid⁶ and lacking in basic workplace protections.⁷ Caregiving takes place at home beyond the public’s view, which makes detecting labor and employment violations virtually impossible.

The Age of Dignity concludes with a call for a “comprehensive federal policy of caring” that makes eldercare more affordable for those who need it and less exploitative of those who provide it (p. 154). Poo’s vision for reform includes a number of different interventions, ranging from expanding the availability of tax breaks (thus alleviating some of the burden borne by middle-class families)⁸ to the bolstering of existing labor protections (thus ensuring a safer and more dignified workplace for caregivers).⁹ *The Age of Dignity* also offers support for comprehensive immigration reform that includes a path to citizenship, a reduction in deportations, and a system for managing future flows of care workers (pp. 163–65). It is this last aspect of the book that I focus on in this Review. Poo argues that immigration reform should include “channels for workers to migrate legally to the United States in the future to work as care workers” and that these channels should include anti-exploitation features like “portable status” to prevent wards and their families from exploiting these workers (p. 164). This Review examines Poo’s choice to lodge her vision of reform within the labor migration system. Pushing for greater opportunities and stronger protections for labor migrants offers intuitive appeal. After all, Poo advocates on behalf of elder-care workers. But the intuitive choice is not an inevitable one, or even the *best* one depending on one’s larger aspirations.

6. See Rhonda J. V. Montgomery et al., *A Profile of Home Care Workers from the 2000 Census: How It Changes What We Know*, 45 GERONTOLOGIST 593, 595 (2005); Peggie R. Smith, *Who Will Care for the Elderly?: The Future of Home Care*, 61 BUFF. L. REV. 323, 328–29 (2013).

7. See Peggie R. Smith, *Work Like Any Other, Work Like No Other: Establishing Decent Work for Domestic Workers*, 15 EMP. RTS. & EMP. POL’Y J. 159 (2011).

8. For example, Poo advocates for raising the payroll tax cap, or expanding the base for Social Security income to cover passive income, or providing a tax credit to those whose incomes are too high to qualify for Medicaid but too low to pay home-care costs out-of-pocket. Pp. 156–57.

9. For example, Poo supports raising the national minimum wage and providing paid sick days. See, e.g., pp. 161–62.

To start with, caregiving work undermines what I call the “productivity/affinity” binary, which undergirds our immigrant admissions system. The vast majority of immigration rules allow individuals to migrate to the United States *either* as workers *or* as family members, which reflects an underlying policy preference for those who are “economically productive” or those with whom current members of the national polity feel an “emotional affinity.” But caregiving work possesses elements of both types of migrants without neatly fitting into either category. Although many caregivers operate within the informal economy, their work certainly counts as economically productive work—especially considering how they enable family members to continue earning income (usually in the formal economy). At the same time, the nature of caregiving reflects the kind of emotional and physical support most commonly assumed to be provided by blood-based family members. Caregivers, then, occupy the interstitial space separating the workplace and the home, acts of labor and acts of intimacy, and all too often, the outer worlds of men and the inner spheres of women.

The challenges Poo describes fit within a growing body of immigration scholarship that explicitly or implicitly questions the productivity/affinity binary.¹⁰ And in the most pointed contribution to this conversation, immigration scholars have suggested that the family-based migration system might do better at filling labor gaps in the low-wage and unskilled market than the employment-based system. In this Review, I briefly canvas what our family-based and employment-based migration systems can and cannot do, as well as what neither can do, to help manage future flows of eldercare workers. More generally, I hope to use *The Age of Dignity* as an opportunity to invite other immigration scholars to consider the membership implications of caregiving, especially of our elders. Confronting instances in which (adult) children care for their (elderly) parents in many ways upends visions of caregiving memorialized in the immigration code, which largely privileges parents caring for their children.¹¹ As *The Age of Dignity* compellingly shows,

10. See, e.g., Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7, 9 (2013) (considering the advantages of family-based immigration in accordance with integration, labor, and social engineering rationales); Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1287–88 (2012) (evaluating the benefits and consequences of the federal government’s delegation of immigration-selection authority, especially its delegation of such authority to employers and families); Alan Hyde, *The Law and Economics of Family Unification*, 28 GEO. IMMIGR. L.J. 355, 357 (2014) (arguing that, although the United States’ family-based approach to immigrant admission has been considered controversial, family unification visas are economically beneficial to the United States because immigrants admitted under such a system are likely to be economically productive).

11. See, e.g., 8 U.S.C. § 1153(a)(1) (2012) (allowing citizens to sponsor their unmarried sons and daughters); *id.* § 1153(a)(2) (allowing lawful permanent residents to sponsor their children and unmarried sons and unmarried daughters); *id.* § 1153(a)(3) (allowing citizens to sponsor their married sons and married daughters). *But see id.* § 1151(b)(2)(A)(i) (allowing citizens over twenty-one years of age to sponsor their parents).

caregiving runs in multiple directions across several generations in immigrant families. Uncles and aunts care for nephews and nieces, and grandparents tend to grandchildren.¹² These issues are crying out for scholarly examination.

This Review proceeds as follows. Part I summarizes *The Age of Dignity*. Part II explains how this segment of immigrant workers challenges the productivity/affinity binary that dominates immigration law's formal migration rules. Part III shows how this binary sets up dual migration streams, both of which could account for future flows of care workers. As Part III shows, the example of the eldercare industry nicely illustrates how the employment-based and family-based migration systems simply represent two different ways of filling labor needs. I then conclude.

I. THE PEOPLE WHO CARE FOR US AS WE GROW OLDER

It is well-established that immigrants are overrepresented at the bottom of the labor market. Nearly one-fifth of all construction, food service, and agricultural workers were born elsewhere, but that ratio does not come close to foreign-born representation within private households in which nearly half of all workers are foreign-born.¹³ There are simply not enough domestic workers to fill these jobs. People are living longer than ever before, which means that a record number of people will eventually need care as they transition out of the paid workforce into their twilight years. The “baby boomer” generation will be at the front of this elder boom. The numbers are startling. As Poo explains: “We know that 70 percent of individuals who are sixty-five years of age or older need some form of long-term services and support. With the elder boom, the total number of individuals needing long-term care is projected to grow from 12 million to 27 million by 2050” (p. 154).

Public benefits in the form of Medicaid cover some of the costs of caregiving, but these benefits target low-income Americans. Eligibility is tied to income, which means that those who are fortunate enough to climb out of poverty must do so at the cost of surrendering their eligibility for eldercare assistance (p. 37). Of course, none of this affects the wealthy who can afford the costs of caregiving either at home or at a caregiving facility.¹⁴ But the vast majority of Americans who are neither “impoverished enough” to qualify for public benefits nor wealthy enough to pay their own way struggle mightily. Poo recognizes that most caregiving transpires informally between and among family members (p. 26). But the economic costs of caregiving

12. See Hyde, *supra* note 10, at 380–82.

13. AUDREY SINGER, BROOKINGS, IMMIGRANT WORKERS IN THE U.S. LABOR FORCE 5 (2012), http://www.brookings.edu/~media/research/files/papers/2012/3/15%20immigrant%20workers%20singer/0315_immigrant_workers_singer.pdf [<http://perma.cc/PAV9-YTUV>].

14. See p. 65 (noting that access to eldercare support “is a mark of privilege”).

exact a particularly steep toll on those belonging to the “sandwich generation,” which Poo describes as those who are “struggling in isolation to manage the demands for care and attention from two generations—the one that came before and the one that came after theirs—alongside work and everything else life brings” (pp. 26–27). All of this fosters an eldercare system separated into “two tiers of care,” neither of which, Poo explains, serves middle-income Americans: “Medicaid for the poor, often in nursing homes, and privately financed residential or home care for the wealthy, with wide disparities in access and quality” (p. 154).

Poo’s lucid and detailed description of the demand side of the eldercare industry complements the poignant and moving analysis of that industry’s supply side—that is, of the workers attending to the emotional and physical needs of wards and their families. The universe of caregivers is a heterogeneous one. By Poo’s account, registered nurses, geriatricians, certified nursing assistants, home health aides, personal-care assistants, and home attendants—among others—all populate the universe of those paid to care for the elderly (pp. 37, 84–85). This workforce, Poo explains, is the fastest growing workforce in the country (p. 89).

Two themes run throughout the story that Poo tells. The first has to do with the inherent *uncertainty* that surrounds eldercare work. Eldercare often goes unacknowledged within public debates about caregiving, and it is certainly less acknowledged than the caregiving of children (p. 54). Whereas children reflect a parent’s hopes, dreams, and ambitions, the elderly—a parent’s parent—signify a life of past glory and inevitable defeat. Moreover, people rarely know exactly when an elder’s caregiving needs will actually materialize. A child’s progression toward independence follows a regimented and predictable set of markers: preschool (sometimes), kindergarten, elementary, middle, and high school, and perhaps college (at least for the privileged among us). These milestones not only create widely shared moments of self-reflection, celebration, and growth—they also provide a clear set of goals for financial planning purposes. In other words, they provide start and stop dates for the economic dimension of caregiving. By contrast, an elder’s decline toward dependence rarely provides similar certainty. Indeed, it provides little certainty beyond the vague notion that care will be required sometime later in life. Sudden events of misfortune—strokes, heart attacks, accidents, and the like—can create huge caregiving needs and their concomitant steep costs (p. 54). All of this makes planning for eldercare emotionally draining and financially difficult.

Poo articulates a second theme in terms of *respect*, or rather, the inability or refusal of society to recognize eldercare work *as work*. *The Age of Dignity* is filled with voices of those workers who encounter this demeaning attitude on a daily basis (p. 72). Poo’s account of the elder-caregiving industry reaffirms an important observation that feminist legal scholars have long championed: domestic work and caregiving are economically productive forms of work. As Professor Smith observes:

Similar to child care, elder care bears the mark of a social order that continues to privilege the ideology of separate spheres. A strong assumption endures that women are better equipped than men to attend to the private realm of family life and associated caregiving responsibilities, irrespective of women's status as waged workers. Caregiving, be it in the form of elder care or child care, is deemed the special province of women.¹⁵

In line with this view, Poo points out that more than 44 million individuals are providing unpaid care to family members, which would cost about \$375 billion a year if they were paid (pp. 58–59), thus confirming that this subordinating view continues to shape the lives and livelihoods of our nation's elder caregivers.

In describing the caregiving industry, Poo highlights how the structure of the employment relationship can impact working conditions. Traditional labor and employment protections apply to formal employer-worker relationships. In many cases, however, the caregiving employment relationship is an informal one—at least for those in the middle class.¹⁶ The informality describes both the process by which workers are recruited and hired as well as the training that workers may have received prior to entering that employment relationship (pp. 85–86). The result of these relationships forged within the “gray market” is confusion and fuzziness surrounding the terms and conditions of employment (p. 86). As Poo observes, “many individual employers don't consider themselves formal employers at all—they just think of themselves as paying for ‘a little help’ ” (p. 86).

In other instances, caregivers obtain caregiving-work opportunities through an agency that brokers the hiring process (p. 85). In these instances, the caregiving agency acts as the “employer” for labor and employment purposes, while the elderly and their families function as consumers (p. 86). Although the formal nature of these caregiving relationships brings workers out of the gray market, other market realities keep caregivers marginalized (pp. 86–87). Poo points out that more than 40 percent of direct-care providers work less than full-time, which means they often have to juggle many different clients (and therefore different care needs and schedules) to piece together full-time income (p. 87). In still other instances, the government serves as the broker (p. 87). While the ward or ward's family may set the terms of care, some states have care policies in which the state bears the financial responsibility over the workers' salaries.¹⁷ But whether eldercare workers are hired directly by families or by third-party enterprises, Poo unambiguously asserts that “in the intimate space in which caregivers work,

15. Smith, *supra* note 3, at 362–63; see also Alice Kessler-Harris, *In Pursuit of Economic Citizenship*, 10 Soc. POL. 157 (2003); Noah D. Zatz, *Supporting Workers by Accounting for Care*, 5 HARV. L. & POL'Y REV. 45, 58–59 (2011) (explaining the way in which the economy overlooks the productivity of home-care workers).

16. See pp. 85–86.

17. This is precisely the arrangement that some states offer under their Medicaid policies. See *Harris v. Quinn*, 134 S. Ct. 2618, 2624 (2014).

the ‘us versus them’ model no longer serves” (p. 115). Families and workers, she insists, need new tools to reshape the terrain of the industry.

II. PRODUCTIVITY AND AFFINITY IN IMMIGRATION LAW

The Age of Dignity shines a particularly bright light on the outsized role that immigrants play in the eldercare workforce. As Poo notes early in the book, the caregiving workforce is the fastest growing segment of the national workforce, which underlies an important policy challenge: finding enough workers to fill this labor-market gap (pp. 3–4). And this is why so much of the book paints a portrait of immigrants standing at the ready. As baby boomers retire and leave behind 82 million jobs, Poo suggests that 35–40 percent of those jobs will probably have to be filled by immigrants and their sons and daughters (pp. 93–94). All of this leads to Poo’s conclusion that our immigration system should be reformed, and not just by creating a pathway to citizenship for those who are already here without authorization. A key part of that reform includes managing future flows of migrant workers.¹⁸ Poo explains:

Such channels, if they are created, must include portable status, so workers are not bound by their status to one employer, creating a modern-day slavery-like relationship. Learning from past guest-worker programs that have undercut wages and hurt the quality of jobs in an industry, we must ensure that jobs created through a work-visa program for caregivers are jobs that pay a living wage with equal worker protections. (p. 164)

Embedded within this vision is a key assumption: the only legal tools available to identify and protect future care workers are those that currently govern the modern employment-based immigration system. I agree with Poo’s larger point, namely that immigration reform can help meaningfully alleviate labor shortages within the eldercare industry only if such reform includes greater and better migration opportunities for future care workers. But I want to broaden the parameters of the discussion she hopes to generate. Laws governing labor migration represent only one set of reform tools to consider.

The vast majority of formal migration flows through two streams: labor migration and family-based migration. These two migration streams, in turn, are organized around two principles: economic productivity and affinity with current members. Caregivers do not easily fit into either category, which helps explain the significant number of workers whose journey into the eldercare industry required paying someone to help them cross over a border or involved entering to tour but staying to work.

18. In addition to the opportunity for unauthorized care workers to regularize their status, and for existing migrant workers to have access to expanded visa opportunities, Poo also endorses reallocating enforcement resources “away from excessive immigration law enforcement strategies” which have created a “human rights crisis” within immigrant communities. P. 164.

Under current labor migration rules, employers are empowered to sponsor a wide range of foreign-born workers. These noncitizens are sorted into various skills categories, and the admissions system values them for the benefits these skills offer our economy. Usually, this means filling labor gaps;¹⁹ sometimes, this means the jobs and other economic benefits these noncitizens create through their consumption of goods and services.²⁰ Migrants whose basis for membership is economic productivity can almost never self-petition.²¹ Therefore, labor migrants almost always must rely on employers to file petitions on their behalf as sponsors. To curb the possibility of employers abusing the visa system—by seeking out foreign-born workers as a way of diluting the labor pool and thereby undermining the bargaining position of citizens and other authorized workers—Congress has imposed caps on the number of visas that can be allocated in any given year.²² But nearly all of the types of migrants who can benefit under these rules share one characteristic: they possess a skill set that directly bolsters the economy through work or investment. And perhaps more importantly, most of these visas are for jobs that do not easily serve wards and their families who are in need of eldercare services *at home*.

A second migration stream is organized around familial relationships. Indeed, the vast majority of permanent-resident visas are allocated to family members of citizens and lawful permanent residents—that is, to family members of current members of the national community. I call these “affinity migrants.” Unlike the labor-migration regime, which focuses on a migrant’s skill set, our family-based migration system examines whether a candidate for admission evinces an emotional closeness, or affinity, with current members. Within this system, the most favored categories of affinity are “immediate relatives”: citizen spouses can sponsor their noncitizen spouses, citizen parents can sponsor their (relatively young) noncitizen children, and (relatively old) individual citizens can sponsor their noncitizen parents.²³ So favored are these forms of affinity that Congress imposed no cap on the number of migrants that could be admitted into the United States through these channels.²⁴ Beyond the immediate-relative category, different versions of this same basic, nuclear family-focused arrangement allow for migration flows, though they operate with some cap restrictions.²⁵

19. Immigration and Nationalization Act, 8 U.S.C. § 1153(b)(1)–(3) (2012).

20. *Id.* § 1153(b)(5).

21. One category of migrant that is allowed to self-petition is investors. *See id.* § 1153(b)(5)(A) (making visas available to those “engaging in a new commercial enterprise”). Although the economic contribution made by investors differs from that of workers—they bring capital, not labor—an investor migrant’s value is measured in significant part on the basis of work benefits. *See id.* § 1153(b)(5)(A)(ii) (requiring the migrant’s investment to “benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or [other authorized workers]”).

22. *See id.* § 1151(d).

23. *See id.* § 1151(b)(2)(A)(i).

24. *Id.*

25. *See id.* §§ 1151(c), 1153(a).

The productivity/affinity binary helps clarify why so many immigrants work within the caregiving industry without authorization and without a meaningful opportunity to regularize their status anytime in the foreseeable future. Consider first the categories for labor migration. The majority of those categories focus on skilled workers.²⁶ These are the jobs that typically require some degree of formal education and training. They also reflect norms that define workplaces in the public sphere and within the formal economy. Some parts of the caregiving workforce might qualify for such visas. A prime example is foreign-born nurses. Because the Department of Labor—the agency that regulates the impact of migration on the working conditions of citizens and other authorized workers—has determined that nurses are perpetually in demand, foreign-born nurses can often be “fast tracked” toward a green card and into the caregiving market.²⁷ But nurses typically work out of hospitals, which limits their ability to fill the caregiving labor gaps in eldercare centers or at a client’s home. Beyond nurses, most caregivers operating within the home-healthcare industry would qualify for visas as workers “performing unskilled labor,” which is a subset of a broader, catchall “other workers” category.²⁸ But this category expressly caps the number of visas available for “other workers” at 10,000 per year.²⁹

At the formal level, these migration rules create independent pathways toward admission, which puts some pressure on applicants to figure out fairly early on in the admissions process whether they want to join the nation’s labor pool or its familial-relative pool. In other words, these rules incentivize potential migrants either to highlight their work history, skill set, and education, or the depths of their emotional ties, the commingled nature of their assets, and their willingness to care for their (citizen) loved ones through thick and thin within these legal categories. Compared to other systems, these categories can appear rigid and reductionist. A points-based system, for example, governs Canada’s high-skilled worker immigration policy in which applicants for admission can demonstrate that they possess a number of criteria that in the aggregate lead to a designated point total.³⁰ The criteria include traits like “education” and “work experience”—traits that

26. 8 U.S.C. § 1153(b)(1)–(3).

27. Ordinarily, workers have to submit to a labor-certification process to ensure that a foreign-born worker does not displace a U.S. worker, but the Department of Labor has categorically exempted foreign-born nurses from this requirement. See 20 C.F.R. §§ 656.5, .15(c)(2) (2014).

28. This category is called “[s]killed workers, professionals, and other workers.” 8 U.S.C. § 1153(b)(3). “Other workers” are defined as those “who are capable . . . of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.” *Id.* § 1153(b)(3)(A)(iii).

29. See *id.* § 1153(b)(3)(B) (imposing a 10,000 annual cap); see also Kerry Abrams, *Becoming a Citizen: Marriage, Immigration, and Assimilation*, in *GENDER EQUALITY* 39, 46 (Linda C. McClain & Joanna L. Grossman eds., 2009).

30. For a helpful overview of the Canadian system, see Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 *N.Y.U. L. REV.* 148, 171–76 (2006).

track the U.S. labor migration system—but also include “adaptability,” which accounts for whether a potential migrant is traveling with a spouse or has relatives already living in Canada.³¹ In contrast to the “all-or-nothing” approach to migration in the United States, the Canadian system rewards migrants for possessing some traits that track economic productivity and some that track affinity, which in the aggregate can establish “worthiness” of Canadian membership. This design choice recognizes the reality that individuals arrive at our shores as fathers *and* laborers; they cross borders as sisters *and* workers. Or to paraphrase Professor Motomura, while we may ask for workers, in reality we often get families.³²

Despite the formal rigidity of the U.S. admissions system, the separate migration streams do interact and allow migrants to obtain a broader set of benefits that go beyond the traits for which they were selected once they become insiders. Most notably, migrants who enter or adjust their status as “immediate relatives”—that is, as the spouses, young children, or parents of a citizen—can obtain lawful permanent resident (LPR) status, which immediately confers on them the right to work.³³ And those who obtain LPR status as workers—that is, those who were sponsored by an employer—have access to benefits that enable them to remain close to their family members. Any spouse or child that the beneficiary has at the time the visa is issued also obtains the visa on equal terms as a derivative beneficiary.³⁴ Labor migrants also have the privilege of sponsoring their foreign-born spouses and children.³⁵ And of course, any temporary-visa holder can obtain a green card through marriage so long as that noncitizen effectuated a proper entry into the United States.³⁶ Ultimately, then, while the immigration code unmistakably prefers to *admit* migrants for productivity *or* affinity purposes, once they are admitted, migrants enjoy a limited suite of benefits, allowing them to stretch beyond the traits for which they were selected.

31. See *Six Selection Factors – Federal Skilled Workers*, GOV'T CAN., <http://www.cic.gc.ca/english/immigrate/skilled/apply-factors.asp> [<http://perma.cc/6PRG-RDAC>].

32. Hiroshi Motomura, *We Asked for Workers, but Families Came: Time, Law, and the Family in Immigration and Citizenship*, 14 VA. J. SOC. POL'Y & L. 103, 103 (2006). This is a take on Swiss writer Max Frisch's famous observation: “[W]e asked for workers, but people came.” *Id.* (citing MAX FRISCH, ÜBERFREMUNG I, IN SCHEIZ ALS HEIMAT? 219 (1990)).

33. See 8 U.S.C. § 1151(b)(2)(A)(i) (defining “immediate relatives” as “children, spouses, and parents of a citizen of the United States”). The immigration code expressly prohibits “unauthorized” immigrants from working in the United States. Importantly, in defining the term “unauthorized alien,” the relevant provision excludes LPRs from that category. See *id.* § 1324a(h)(3).

34. *Id.* § 1153(d). This derivative-beneficiary rule applies to those who are admitted through family-based and diversity channels as well. *Id.*

35. *Id.* § 1153(b)(3).

36. This is a significant caveat, by the way: nearly 60 percent of all unauthorized immigrants entered without inspection—that is, crossed the border surreptitiously. See Sara Murray, *Many Here Illegally Overstayed Their Visas—Those Who Entered Legitimately Account for 40% of the 11 Million Total, Complicating Attempts to Craft New Legislation*, WALL ST. J., Apr. 8, 2013, at A4.

III. CHOOSING BETWEEN PRODUCTIVITY AND AFFINITY

Poo's call for managing future flows of care workers would require re-locating migration opportunities so that more visas (both permanent and temporary) would be available for care workers as labor migrants. But another solution would be to expand affinity migration opportunities. If a core feature of the eldercare services industry is consumer uncertainty—that is, getting by without eldercare help one day, then desperately needing it the next—then creating a flexible and available labor pool should guide any reform effort. Professor Abrams observes that jobs in the highly skilled labor market and those in the low-skilled or unskilled markets raise distinct regulatory challenges. Whereas highly skilled workers such as engineers or physicians typically obtain semipermanent jobs, low-skilled workers often operate in seasonal or temporary terms.³⁷ This leads Abrams to conclude that affinity migrants—all of whom obtain the authorization to work as a benefit of their family-based visa—might represent a better pool to tap for low-skilled and unskilled workers.³⁸ Abrams continues: “The current immigration system largely ignores this kind of work as an official matter; the employment-based system, requiring a lengthy labor certification process, is ill-equipped for a market that involves private employment by families, often part-time or last-minute in nature.”³⁹ In other words, to the extent our immigration system expects new members to evince traits of economic productivity, it is important to remember what our labor migration rules can and cannot do. To the extent we prize worker flexibility—as wards and their families do—an employer-based admissions system may be no better (and it may be a great deal worse) than a family-based system for identifying workers to fill gaps in the low-wage labor market.

Reframing family-based migration as an alternative channel for encouraging the migration of economically productive migrants helps reorient ongoing discussions about which familial relationships ought to be recognized within our admission system. At the very least, this reframing suggests that legislators should not do away with the sibling category so casually, at least if they are serious about addressing the eldercare labor gap. In 2013, for example, the Senate passed a bill that eliminated the sibling category for lawful permanent residence. But for citizens with children, these siblings provide important caregiving as uncles and aunts.⁴⁰ Given the flexibility offered by family-based migrants, sometimes the right answer is the obvious one, which in this case would be simply to provide an expeditious path to citizenship. The horizontal nature of caregiving only strengthens this point.

37. Abrams, *supra* note 10, at 20.

38. Abrams observes: “[T]o the extent that Congress wants a labor force that is truly flexible—both in terms of when its members work and under what conditions—family-sponsored immigration may provide a better mechanism for it.” *Id.*

39. *Id.* at 22.

40. See Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. § 2212 (2013).

As Poo observes, caregiving becomes more manageable when siblings share the responsibility, working as a team in collaboration with professional caregivers.⁴¹

This discussion also casts a new light on existing conceptions of “the family” within immigration case law. More specifically, it points to a larger set of consequences of construing existing family-based migration benefits in an overly narrow manner. For example, in *INS v. Hector*, a deportable noncitizen had “the functional equivalent of a parent-child relationship” with her nieces, both U.S. citizens. The Supreme Court concluded that these relationships could not form a basis to establish “extreme hardship” to a “child,” which is what the relevant statute required to obtain equitable relief from deportation.⁴² Under a conventional understanding, the harm in that case is the denial of a benefit to a child despite having the functional equivalent of a relationship entitling her to a green card. But the harm runs in the other direction as well. The sponsor—that is, the “functional” parent—loses out on living near someone who could care for her as she gets older. More recently, in *Scialabba v. Cuellar de Osorio*, the Supreme Court considered the Child Status Protection Act, which addresses the problem of children who have “aged out” of the immigration pipeline—that is, those who were under twenty-one (and therefore eligible for a visa) at the start of the process had a visa been available but who are over twenty-one (and therefore ineligible for a visa at least on the original basis) by the time a visa becomes available.⁴³ Although the legal issue turned on a question of agency deference within the *Chevron* doctrine, the court arrived at its conclusion by construing a legislative ambiguity in favor of a strict vision of the family in which only parent-child relationships deserved recognition within the immigration code.⁴⁴ While both of these cases concerned the extent to which immigration law could be stretched to accommodate childcare needs, they perpetuated the larger, stodgy vision of the kind of family that could drive future flows of migration. In doing so, they limited our sense of the kinds of reforms that are possible in solving our eldercare needs.

For the purposes of filling labor gaps, affinity migrants may not be perfect substitutes for labor migrants. Skeptics might raise two concerns. One concern with counting on affinity migration to fill labor gaps is that it ignores other, less drastic alternatives—that is, alternatives like guest-worker programs that secure workers without conferring permanent membership benefits. Guest worker programs are designed to maintain worker flexibility while avoiding what some perceive to be the negative externalities associated with surplus migration flow. For this reason, many economists and members of Congress have argued in favor of limiting the number of family-based visas and reallocating them to the skilled-worker category within the employment-based system. This position rests on the assumption that labor

41. See pp. 56–59, 83–84.

42. 479 U.S. 85, 87–88 (1986).

43. 134 S. Ct. 2191 (2014).

44. *Id.*

migrants are more economically productive than affinity migrants. Professor Hyde explains why this assumption is mistaken because, among other reasons, it assumes that the relevant economic unit is the individual.⁴⁵ In the context of migration, Hyde argues that the relevant economic unit is the family. In other words, migrants (often women) who provide unpaid child-care or assistance in small businesses enable other family members (usually men) to obtain increased earnings.⁴⁶ Thus, as a practical matter, the choice between labor migration and family-based migration is not a choice between productivity and affinity, but rather could plausibly be understood as a choice between different types of economic productivity, between skilled and unskilled workers. Increasing affinity migration opportunities would simply reflect the choice to prioritize unskilled migration to help fill a labor gap.

In an important sense, managing future flows by increasing affinity migration opportunities would better account for the ways in which immigrants learn about new employment opportunities. As has been long documented, newcomers learn about where to go for work from their friends and family.⁴⁷ A U.S. citizen who sponsors her sister as a “sibling” will be in many instances more inclined to point her sister to a job opportunity than would an employer sponsoring that same sister as a “worker.” While employers, like families, operate within a larger network of employers and firms, they have very little incentive to provide access to that network for fear that their workers will move on to better employment opportunities. Put differently, having expended significant costs in sponsoring a new worker, the petitioning employer has very little incentive to serve as a bridge to the larger labor market—at least until that worker has been employed long enough to justify those front-end costs.

Another concern with using affinity migration to fill labor gaps is that it does not directly confront the systemic refusal to recognize eldercare as work. Or as Professor Nakano Glenn observes: “Legislatures and courts have dealt with paid care workers as though they are quasi-family members rather than as fully autonomous workers. And, because they have walled off the private household as off limits to public regulation, they have taken a hands-off approach to domestic employment, including home care.”⁴⁸ If the goal of reforming our system is to ensure that eldercare workers get respect and recognition *as* workers, then Poo’s vision of reform—one grounded in a labor migration system—makes more sense.

Recall the world that *The Age of Dignity* inhabits: a world of round-the-clock support, which fits within traditional conceptions of what we expect family members to provide (p. 84). Yet, their “in betweenness” creates conditions ripe for exploitation. As a matter of law, caregivers are exempt from

45. See Hyde, *supra* note 10, at 369–70.

46. See *id.* at 378, 382.

47. See Monica Boyd, *Family and Personal Networks in International Migration: Recent Developments and New Agendas*, 23 INT’L MIGRATION REV. 638 (1989).

48. See EVELYN NAKANO GLENN, FORCED TO CARE 129 (2010).

several key labor and employment protections.⁴⁹ The ambiguous status of caregivers gives employers cover to categorize and recategorize workers as necessary to meet an employer's needs. To formally admit an immigrant as a spouse (probably as a wife) diminishes the work she performs and does not directly confront the respect deficit these workers experience. Such reforms run the risk of ignoring the value of the "emotional labor" which "expands the workday but does not increase income."⁵⁰ In the related context of the au pair-exchange program,⁵¹ Professor Chuang notes that the "host family" trope and other notions of false kinship "play an important role in both masking and preserving the power differences between employer and employee."⁵²

Whether future flows are managed using a family-based or employment-based migration tool, eldercare will continue to defy easy categorization. In the same way that our labor migration rules only incompletely measure a migrant's productivity, our family-based admissions system also excludes migrants with deep emotional and affective ties with current members. The familial relationships recognized by the immigration code as a

49. Peggie R. Smith, *Home Sweet Home? Workplace Casualties of Consumer-Directed Home Care for the Elderly*, 21 NOTRE DAME J.L., ETHICS & PUB. POL'Y 537, 545–51 (2007) (summarizing the various labor protections home-care workers do not receive). In recent years, the federal courts have, for the most part, continued to whittle away at labor protections for home-care workers. In *Harris v. Quinn*, 134 S. Ct. 2618 (2014), the Supreme Court confronted the question whether personal assistants, who were state employees to the extent that they were paid by the state (but hired by those in need of assistance), could be compelled to pay an agency fee to support a union bargaining on their behalf even if they did not wish to join the union. The Court held that compelling these workers to pay this agency fee violated the First Amendment. *Id.* Relatedly, in 2013, the Department of Labor (DOL) reversed its longstanding rule that home-care workers who were employed by third parties (such as agencies) rather than directly by customers (such as those in need of eldercare) would be exempt from minimum-wage and overtime laws. A group of trade associations representing third-party employers affected by these new labor protections challenged the DOL's rule. Although the D.C. Circuit affirmed the new rule protecting home-care workers employed by third parties, those workers employed directly by households continued to be exempt from those protections. See *Home Care Ass'n of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015). See also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (affirming a DOL regulation exempting "companionship services" workers from federal wage and hour protections).

50. María Ibarra, *Emotional Proletarians in a Global Economy: Mexican Immigrant Women and Elder Care Work*, 31 URB. ANTHROPOLOGY & STUD. CULTURAL SYS. & WORLD ECON. DEV. 317, 323 (2002); see also María de la Luz Ibarra, *Mexican Immigrant Women and the New Domestic Labor*, 59 HUM. ORG. 452, 454 (2000) (defining "[e]motional labor" as the "taken-for-granted effort of managing 'feeling to create a public observable facial and bodily display' that produces the proper state of mind in others") (quoting ARLIE RUSSELL HOCHSCHILD, *THE MANAGED HEART* (1983)).

51. The program allows immigrants to visit the United States temporarily as part of a "cultural exchange" program, which often includes childcare support. 22 U.S.C. § 2451 (2012); Exchange Visitor Program, 22 C.F.R. § 62.31 (2014). Although the cultural exchange program was created in 1961, au pairs were excluded under these visas between 1961 and 1986. See Statement of Policy Regarding Exchange Visitor Au Pair Programs, 57 Fed. Reg. 46,676 (Oct. 9, 1992) (to be codified at 22 C.F.R. pt. 514).

52. Janie A. Chuang, *The U.S. Au Pair Program: Labor Exploitation and the Myth of Cultural Exchange*, 36 HARV. J.L. & GENDER 269, 311 (2013).

proper basis for membership offer only a rough proxy for emotional intimacy and a commitment to mutual support. In some important ways, the ambiguity of the expectations placed on workers enables them to ascribe different meanings to the work. Drawing from her ethnographic work on eldercare workers in Santa Barbara, California, Professor Ibarra offers a detailed look into the lives of Mexican immigrant women, or *Mexicanas*, who drive the eldercare industry in that community. She found that many workers preferred working for wards and their family members within the informal market, rather than for nursing homes in the formal market, because doing so allowed them to engage in more personalized caregiving. Just as nannies operate as “functional” parents,⁵³ eldercare workers assume the role of surrogate son, daughter, spouse, or family member charged with overseeing a person’s well-being at the end of his or her life.

But more to the point, the ambivalence that both sides feel in identifying unfairness and neglect can perpetuate exploitation. Although knowing and intentional acts of exploitation exist,⁵⁴ many recipients (and their family members) view caregivers as pseudokin and as a “part of the family” (p. 90). This emotional closeness stands in tension with a focus on hours worked and wages paid, which is the kind of analysis labor enforcement requires (pp. 90–91). As for the caregivers themselves, concern for their elderly clients might deter them from pushing back too forcefully against the demands of difficult and bullying members of the client’s family. These caregivers may wonder whether their clients will receive adequate care should they get fired for their insubordination.⁵⁵ On the client’s side, as Poo explains, the family may always wonder whether a caregiver’s support reflects a labor of love or the profit-maximization principle (p. 90).

The eldercare industry is inextricably tied to the lives of migrants. Foreign-born individuals work throughout the industry, especially those who entered or remain in the United States without authorization. And because an unauthorized workforce enables and perpetuates exploitation, the eldercare industry reflects an intensified version of this regulatory challenge. At the same time, our nation’s immigration laws and systems present a potential solution. Relaxing our migration laws to provide work authorization for more immigrants would not only empower these workers to assert their rights as workers (thereby mitigating the harms of exploitation), it would also help fill the labor gap by growing the pool of caregivers. In its current iteration, our immigration system lacks both the flexibility and imagination to help alleviate the burdens of elder caregiving, but that is not to say that it will never be equipped to do so. Changes to our migration policy, both minor and major, can help redirect migrant flows to help fill the labor gaps that currently plague our eldercare system.

53. See Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving*, 94 VA. L. REV. 385, 442 (2008).

54. *Id.*

55. See p. 91 (noting that most caregivers do not address problems with their working conditions because they fear being fired).

CONCLUSION

In recent years, legislators intent on reforming the immigration system have advocated for reducing the number of affinity migrant visas in the interest of growing the pool of productivity migrants. This has been part of a larger effort by some legislators to draw attention to the needs of elders.⁵⁶ The clearest example of this is the Border Security, Economic Opportunity, and Immigration Modernization Act of 2013,⁵⁷ a comprehensive immigration reform bill passed by the Senate but languishing in the House. This bill eliminates the sibling-based immigrant category, thus curtailing the stream of affinity migrants.⁵⁸ Instead, it advances a points-based system, which allows those types of family relations to be one factor among many that can be applied toward a self-petitioned admissions application.⁵⁹

Historically, efforts to remake the American sponsor-driven admissions system into a points-based system have been associated with efforts to reallocate visas in a way that favored workers. As Hyde shows, during the early 1980s, as the nation geared up for comprehensive immigration reform, many argued in favor of siphoning off visas from the affinity migration system and into the labor migration system. According to these advocates, reweighting the migration streams this way would attract to our shores those with higher human capital and, relatedly, slow the migration of those crossing our borders (especially our southern border).⁶⁰ But a points-based system merely reflects a design choice and it does not inevitably favor one type of worker over another. Importantly, the Senate bill would allow points to be earned through caregiving.⁶¹ Thus, depending on how that trait is weighted, a newly designed admissions system could provide caregivers with the opportunity to regularize their status as caregivers.

In the end, *The Age of Dignity* provides a great service by drawing national attention to the coming crisis that is born of fortuity. My aim in this

56. In 2012, for example, Senator Harkin introduced a resolution with the statement that “a comprehensive approach to expanding and supporting a strong home care workforce and making long-term services and supports affordable and accessible . . . is necessary to uphold the right of seniors . . . to a dignified quality of life.” 158 CONG. REC. S3087 (daily ed. May 10, 2012).

57. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

58. *Id.*

59. *Id.*

60. See Hyde, *supra* note 10, at 362–63.

61. The new system would have allowed for two tiers of applicants. Those in Tier 1 would be allowed to earn points on the basis of ten different factors: “[e]ducation,” “[e]mployment experience,” “[e]mployment related to education,” “[e]ntrepreneurship,” “[h]igh demand occupation,” “[c]ivic involvement,” “English language,” “[s]iblings and married sons and daughters of citizens,” “[a]ge,” and “[c]ountry of origin.” S. 744 § 2301(a)(2). Tier 2 applicants would earn points through the application of nine factors: “[e]mployment experience,” “[s]pecial employment criteria,” “[c]aregiver,” “[e]xceptional employment record,” “[c]ivic involvement,” “English language,” “[s]iblings and married sons and daughters of citizens,” “[a]ge,” and “[c]ountry of origin.” *Id.*

short Review has been to convince immigration scholars to redirect some of our attention toward this public policy challenge, given that so much of the eldercare puzzle could be solved with the reformation of our nation's immigration laws. If nothing else, I hope I have shown that the labor gap in the eldercare market is yet one more problem that could be addressed by creating some opportunity for the 11 million unauthorized immigrants within the United States to begin regularizing their status.⁶²

62. See BRYAN BAKER & NANCY RYTINA, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 2 (2013), http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf [<http://perma.cc/V776-RTG6>].