

## Immigration and the 100-Year Life

*Eleanor Brown*

The quality of a civilization is judged by how well older people are treated.

—Pope Benedict XVI<sup>1</sup>

One of every two babies born today will live until age 100. This chapter is about the immigration-related implications of this remarkable demographic change, which only five decades ago would have seemed inconceivable. Even with medical advances, as our population ages, a larger proportion of the population will be unable to live independently. Immediately the question arises: Who will care for our elderly population? The US will need many more care workers and, overwhelmingly, they will be migrants.

While, in the popular imagination, elder care is typically associated with nursing homes, a report from the Department of Health and Human Services estimates that fewer than 5 percent of seniors reside in institutional settings like nursing homes.<sup>2</sup> The senior population overwhelmingly continues to reside at home. Thus, most care workers will not work in hospitals or nursing homes; rather most care work will be delivered in the home. Much of this home care will not be subsidized by government; the US stands out among rich OECD countries in the relatively paltry sums that it dedicates to long-term care for seniors.<sup>3</sup> Most home care is paid for by a

<sup>1</sup> Pope: *Societies Are Judged by How They Treat Elderly, Who Are an Asset for Young People*, PIME ASIA NEWS (Nov. 12, 2012), <http://www.asianews.it/news-en/Pope:-Societies-are-judged-by-how-they-treat-the-elderly,-who-are-an-asset-for-young-people-26331.html>. (Please note that due to space constraints, this chapter is only lightly footnoted.)

<sup>2</sup> National Library of Medicine, *Providing Healthy and Safe Foods As We Age: Workshop Summary* (2010), [https://www.ncbi.nlm.nih.gov/books/NBK51841/#:~:text=Only%204.5%20percent%20\(about%201.5,million\)%20live%20in%20the%20community](https://www.ncbi.nlm.nih.gov/books/NBK51841/#:~:text=Only%204.5%20percent%20(about%201.5,million)%20live%20in%20the%20community).

<sup>3</sup> OECD, *Spending on Long Term Care* (2020), <https://www.oecd.org/health/health-systems/Spending-on-long-term-care-Brief-November-2020.pdf> (the US does not figure in this OECD study on long-term care); Celli Hortsman, Evan D. Gumas & Gretchen Jacobson, *U.S. and Global Approaches to Financing Long-Term Care: Understanding the Patchwork*, THE COMMONWEALTH FUND (2023), <https://www.commonwealthfund.org/publications/issue-briefs/2023/feb/us-global-financing-long-term-care-patchwork#:~:text=How%20U.S.%20Long%20Term%20Care,out%20of%20pocket%20spending> (the Commonwealth Fund Study makes

patchwork of financial sources – very occasionally with state aid, but mostly with funds from seniors themselves, their children, and nonfamilial sources, such as nonprofits and churches.<sup>4</sup>

It bears emphasis: Most of this at-home care is *unpaid* and provided by family members. However, *paid* home care has been steadily growing. Twenty-five percent of senior citizens need significant assistance with “ADL” (activities of daily living).<sup>5</sup> With over 55 million people who are senior citizens, the percentage of people who now need paid help is already significant and will surely continue to rise. This is also true because of compositional effects; with lower fertility, a larger portion of the population becomes older. Even if eighty becomes the new sixty, that still means a higher percentage of the total population will be frail, and a lower percentage of the population will be available to help them.

We have long understood the implications of the aging population for health care – this is a primary reason that the growth of jobs in the healthcare sector has long outpaced the growth of jobs in the regular economy. Further, the pace of growth for home-care aides is even more extraordinary. One recent report projected that between now and 2026, jobs in home-care settings will grow by 41 percent.<sup>6</sup> Yet, while the pace of growth of jobs remains high, the salaries are modest. Pay for aides is not much higher than the minimum wage in most states.

Trends are already clear. The home-care sector looks a lot like other sectors in which Americans are typically *not* employed and undocumented migrants dominate. One need only think, for example, of farm work – a field dominated by undocumented labor. This work is difficult, and the pay is low. Moreover, home-care work is particularly well suited to the undocumented population since it is difficult for immigration officials to police work that occurs inside people’s homes.

How has the US typically managed the need for a large and steady group of low-skilled workers? There is a large gap between what immigration institutions purport to do and what actually happens. That is, the stated goal of immigration institutions is twofold. First, these institutions seek to ensure that aliens are screened *ex-ante* (i.e., preentry) for suitability to particular visa types; and second, that they are sanctioned if they do not abide by the terms of their visas. Thus, if the US is looking for a law-abiding temporary elder-care worker, it would screen for a “short-term” type, with caregiving skills and no criminal record.

clear that the US spends a smaller share of its health expenditure on long-term care than other countries).

<sup>4</sup> See Hortsman et al., *supra* note 3.

<sup>5</sup> Howard E. LeWine, *Two-Thirds of Seniors Need Help Doing One or More Daily Activities*, HARVARD MEDICAL SCHOOL (Dec. 13, 2012), <https://www.health.harvard.edu/blog/two-thirds-of-seniors-need-help-doing-one-or-more-daily-activities-201312136942#:~:text=We've%20known%20for%20some,of%20daily%20living%20without%20help>.

<sup>6</sup> Alexia Fernández Campbell, *Home Health Aides for the Elderly: Who Will Care with Them?* Vox (Aug. 21, 2019), <https://www.vox.com/the-highlight/2019/8/21/20694768/home-health-aides-elder-care>.

With respect to screening and sanctioning, the reality is that this system only works right now for *skilled workers*. If a visa candidate is a computer scientist with a prospective job in Silicon Valley, the candidate is carefully screened ex-ante or preentry – she must submit her academic credentials, her prospective job, and undergo a detailed background check. It should be noted that the visa type for which the computer scientist is eligible (typically H1B) provides a path first to permanent residency, and later to citizenship. This means that the formal system carefully screens for those with the right qualities to not only do skilled work but also become American citizens. Therefore, the potential sanction is clearly implicit. A skilled person who does not abide by their visa terms potentially forfeits their opportunity for American citizenship. Again, here I am describing the system for *skilled workers*. For *unskilled workers*, the outcome, in sharp contrast to the skilled system, involves the de facto permanent residence of 12 million undocumented persons, the overwhelming majority of whom have never been screened or sanctioned.

How did this come to be? Outside of guest worker programs, which are primarily used for seasonal agriculture (H2A) and tourism and other seasonal industries (H2B), there is no equivalent system of comprehensive preentry screening for low-skilled workers. In some countries, such as the anglophone Caribbean Islands, which are the highest source of guest workers on a per-capita basis, the state seeks to reduce unemployment and buttress remittances by sending citizens overseas. Thus, the state works alongside American agricultural and tourism companies to recruit potential low-skilled guest workers to apply for visas. The state then helps these otherwise poorly resourced guest workers to source and submit the required visa application paperwork at the US Embassy.

Thus, if you are a farm worker or tourism worker from Jamaica or Antigua, you may receive help. But as a practical matter, most low-skilled workers who are poor residents of developing countries simply lack the resources to compile the documentation, pay the visa fees, and undergo a screening process. Moreover, many American companies are perfectly willing to hire undocumented persons. Thus, if you are low-skilled and seeking work in the US as a practical matter, your easiest choice is to cross the border without documentation, or to enter on some other sort of easier-to-acquire visa, such as a visitors' visa (B2), knowing fully well that you will work in violation of the visa's terms.

Law Professors Eric Posner and Adam Cox explain how this system has evolved. For the low-skilled portion of the population, as a practical matter, rather than screening all persons (as they are required to do in theory on the basis of their obligations under law to screen ex ante), immigration officials have only pursued those who commit non-immigration-related crimes. Thus, in reality, the system as it relates to low-skilled workers is an ex-post system in which undocumented entrants, who later provide evidence of undesirability (through their contact with the criminal justice system), are screened only after their entry, and then deported.

For low-skilled workers, the system is currently designed to sidestep ex-ante screening and ex-post sanctioning (unless the low-skilled worker commits a non-immigration-related crime).

Difficulties in negotiating compromises on immigration reform reflects that many Americans are unconvinced that policymakers and immigration enforcement officials can design, and enforce, a credible program in which temporary workers will in fact be temporary.<sup>7</sup> To build broad-based political support for a temporary worker elder-care program, policymakers will have to design a program that in fact screens for workers who are competent caregivers, who are seeking temporary work, and who will keep with the terms of their visas and return to their countries of origin. Recognizing that for decades the political climate has been decidedly restrictionist, political actors have long sidestepped hard questions about how to design a program that will admit large numbers of low-skilled migrants who actually comply with the temporary terms of their visas. This is why the 100-year life matters for immigration. Perhaps the aging of the population and the inevitable need for care workers will force policymakers to confront these questions.

A large population of elderly citizens will likely mean that the US will have a large population of temporary workers who have no reasonable prospect of becoming permanent residents. The influential political philosopher Michael Walzer has warned of the dangers of a long-term population of temporary residents without the rights and responsibilities of citizenship in constitutional democracy. His view is that most (if not all) persons admitted should have a path to permanent residency and citizenship. Many law professors (including myself) share his expansionist sentiments. Yet, as law professors, we also need to confront the reality that most Americans do not share our expansionist inclinations. Whatever our inclinations may be, there is a desperate need for an academic focus on institutional design. Specifically the need to focus on how immigration institutions can do what Americans want them to do – screen for migrants who abide by the rules of their visas and sanction those who do not.

I believe that I have a model for how such immigration institutions may be designed. My own region of origin – the Caribbean – currently supplies many home-care aides in two states with disproportionate representation of seniors, Florida and New York. As a scholar of “low-skilled” migration from the Caribbean, in this chapter I consider questions of immigration institutional design in light of lessons learned from how Caribbean home-care aides currently work and travel. In Section 15.1, I provide details of the lives of these undocumented workers to consider how we might incentivize compliance with immigration rules.

In Section 15.2, I contend that Caribbean workers who are working (*ultra vires*) while on “visitors” (B2) visas have already provided a model that institutional design

<sup>7</sup> Daniel Costa, *Temporary Migrant Workers or Immigrants*, 6 RUSSELL SAGE FOUND. J. OF THE SOC. SCI. (2020), <https://muse.jhu.edu/article/777518>.

experts might want to replicate. Caribbean home-care aides on visitors' visas understand that they are not supposed to work. However, since the B2 visa permits a maximum of a six-month stay after entry, they also understand that they are unlikely to be penalized for working as long as they do not stay in the US for longer than six months on any one visit. If they violate this rule, the US is unlikely to renew their visas.

Thus, they have devised a system to comply with the six-month rule – job splitting. This is a pattern whereby home-care aides split their work between two workers, each of whom works for six months per year before turning over the job to a companion care worker for the remaining six months. Thus, each worker is in fact temporary. In any given year, they spend no more than six months in the US, before returning to their country of origin and then coming again the following year. The workers comply with the six-month rule because they feel secure in the knowledge that they will be permitted to come the following year. This pattern typically continues over several years. An upside of job splitting is that it leads to continuity of care, since the elders who they care for have the same two caregivers over several years. This is important; indeed, continuity of care is prioritized in the elder-care literature.

That this system persists not only for “low-skilled” workers who pick tomatoes but also for “low-skilled” workers who care for grandparents speaks volumes about the long-term likelihood of its persistence. But this is unnecessary. In Section 15.3, I argue that most of these workers are in fact “good types,” who could have been favorably screened ex-ante for elder-care visas. I propose that we urgently devise a system that permits temporary entry of elder-care workers. If they are permitted long-term temporary visas in which they can work in the US for a few months per year over several years, they have every incentive to comply.

We must confront the reality of a shadow system of undocumented persons in home care and design a system to replace it. Postponing such questions is no longer sustainable in light of the 100-year life.

### 15.1 A MODEL FOR ELDER CARE: LESSONS FROM CARIBBEAN HOME-CARE AIDES

In the popular imagination during the pandemic, elder care became synonymous with nursing homes. However, most elderly Americans do not live in nursing homes. Nor do scholars of elder care want them to live in nursing homes. There had been an increasing consensus among scholars that we need to prioritize “aging in place,” that is, noninstitutional solutions to elder care, with an emphasis on keeping the elderly in their homes and communities.<sup>8</sup> The pandemic has reinforced this sentiment. Based on data, over 23 percent of people who died from COVID

<sup>8</sup> Wei-Duan Porter et al., *Interventions to Prevent or Delay Long-Term Nursing Home Placements for Adults with Impairments: A Systematic Review of Reviews*, 35 J. GEN. INTERN. MED. 2118 (2020) (an excellent summary of the “aging in place” literature).

complications in the US were nursing home residents.<sup>9</sup> The disastrous impact of COVID in institutional settings has underlined the need for more sustainable elder care, particularly in-home elder care. Thus, I begin with a different population, which I believe distinctively illustrates the challenges of redesigning an immigration system to provide sustainable care to an aging population: home-care aides.

I have spent most of my life in a region of the world – the Caribbean – that disproportionately supplies the workers who take care of the American elderly. Although formal data are hard to find (perhaps because so many persons are undocumented), it is inarguable that the Caribbean supplies the majority of home-care aides in at least two regions of the country, namely Florida and New York (the first of which has the second-highest proportion of elderly populations). This chapter is based in part on research into Caribbean migrant workers, many of whom are home-care aides.

Of the migrant workers who have been seriously studied (primarily in agriculture, construction, tourism, and food plants), workers in elder care are undoubtedly the least studied population. Home-care aides are by definition “out of sight.” While this population has been insufficiently studied within the US (perhaps because so many of them live in the homes of their elderly employers and are paid in cash), the same is not true in the Caribbean. The home-care aide population regularly sends money to their countries of origin and, in so doing, provides a steady pool of cash to their families and their countries.

Much information can be ascertained from their remittances, which have become indispensable to the foreign exchange reserves of Caribbean central banks. Their sizable earnings provide a clue to the unique importance of this population – not only to their countries of origin but also to elderly Americans. It is not an exaggeration to say that in-home elder care in both Florida and New York would collapse if Caribbean migrant workers disappeared.

How did home-care workers providing services “under the table” become so important? The oft-told narrative is as follows. A New York or Florida family has a parent or grandparent who is no longer able to live independently. The family visits a few nursing homes and finds either the facilities unattractive or the costs prohibitive, despite having access to Medicare since state coverage of nursing home care is paltry in the US (certainly in comparison to other rich OECD countries). Moreover, for many families, nursing home workers seem overextended, raising concerns as to whether their elderly relative would be properly cared for.

Of course, in-home elder care also has its challenges – for example, the provision of care is governed by a patchy network of licensing and regulations (with some

<sup>9</sup> Priya Chidambaram, *Over 200,000 Residents and Staff in Long-Term Care Facilities Have Died from COVID-19*, KAISER FAMILY FOUNDATION (Feb. 2, 2022), <https://www.kff.org/policy-watch/over-200000-residents-and-staff-in-long-term-care-facilities-have-died-from-covid-19/#:~:text=Long%2DTerm%20Care%20Facility%20Residents,of%201%2F30%2F2022>.

localities having no licensing requirements or regulatory framework at all) – leading to concerns about the quality of care. Naturally, many families prefer in-home care. Moreover, many discover that they can provide care for their grandparent more cheaply through in-home care, particularly when such care is subsidized by state insurance that may provide an in-home care aide for a few hours each week (typically the state will only subsidize those who are home *healthcare* aides, that is, those who have some basic medical training). However, usually the state will provide only a fraction of the care that the elderly relative needs. Thus, many families supplement their state-subsidized care with lower-cost options; they hire home-care aides who are undocumented and pay them under the table. In the absence of a formal state-supported care infrastructure (such as exists in many other developed countries, including in Western Europe), families create a home-care infrastructure themselves.

In New York and Florida, home-care aides are predominantly Caribbean women<sup>10</sup> who are not licensed<sup>11</sup> even though families are clearly satisfied with their services as evidenced by their multi-year tenure with the same families. How do these women come to be home-care aides? For a Caribbean woman who is not university educated (and thereby ineligible for most skilled work visas in the US), there are basically three options to work in the US. The first is what we typically think of as agricultural guest work – a yearly sojourn (at least pre-COVID) on an H2A visa to work on a US farm for several months. For most women, unfortunately, agricultural visas are not a practical option; their recipients are overwhelmingly men. The second option is to be a documented guest worker in the tourism or other seasonal sector on an H2B visa. This, for example, might involve working in a hotel in Aspen, Colorado. These guest workers unsurprisingly pay taxes. They also incur other expenses, such as living expenses for staying in staff quarters that are deducted from their salaries by the hotels. From a take-home pay perspective, the most desirable option for many Caribbean women is the third option, namely, undocumented care work. I use the word “undocumented” to mean *both* those who are either working without any visa whatsoever (the popular understanding of the term “undocumented”) *and* those who have visas that preclude legal work but who work anyways.

<sup>10</sup> Jeanne Batalova, *Immigrant Health-Care Workers in the United States*, MIGRATION POLICY INSTITUTE (Apr. 7, 2023), <https://www.migrationpolicy.org/article/immigrant-health-care-workers-united-states-2021> (the percentage representation of Caribbean people among home healthcare aides would be expected to be higher in both New York and Florida, which are the two highest receiving states for Caribbean migrants. The same report notes that New York and Florida have the highest proportion of home healthcare aides who are immigrants).

<sup>11</sup> Meghan Gallagher, *The Truth behind Home Health Aid Certifications*, O'NEIL INSTITUTE FOR NATIONAL & GLOBAL HEALTH LAW: GEORGETOWN LAW (Feb. 15, 2018), <https://oneill.law.georgetown.edu/the-truth-behind-home-health-aide-certification-requirements> (“there is no formal education requirement . . . to secure a position as an HHA”).

Why is care work so popular? Having spoken to Jamaicans who have done tourism work and home-care work, they will explain that they are better off as undocumented home-care aides than as documented guest workers. The money is steady, their living expenses are often covered since many live in their clients' homes, and they avoid tax obligations. Nearly every Jamaican knows of some relative or friend working as a home-care aide in the US. (I say this as a native Jamaican, with only slight exaggeration!)

Some of these home-care aides are "undocumented," in the popular understanding of the term, in that they have typically overstayed their B2 visas (known informally as visitor's visas). I highlight a few of the terms under which visitor's visas are typically issued. First, the visa applicant is expected to provide accurate information about her travel intentions and her historical behavior, that is, including her historical record of abiding with the terms of visas. That is, if she is applying for a visitor's visa, she should really be intending to make a short-term visit. Second, the visa recipient agrees that she will not impose welfare costs on the government. Third, the visa recipient agrees only to visit and not work, as well as to exit the US within the prescribed time period, which for B2 visas is six months after entry. Some Jamaicans who work under the table initially enter on B2 visas that then expire. They then become undocumented in the typical understanding of the term since they no longer have visa documentation.

However, there is a different pool of home-care aides that I would like to highlight for the purposes of this chapter because their work patterns provide important lessons about institutional design. Many Caribbean home-care aides who engage in unauthorized work have come up with unconventional and interesting mechanisms of maintaining their job security. Setting aside the fact that they are working (a clear violation of the terms of their B2 visas), they take pains not to overstay. That is, on every visit, they make sure they stay no more than six months after their initial entry. In so doing, they seek to preserve the possibilities that their visas will be renewed. Thus, the pattern is as follows. Beverly, a hypothetical in-home aide, enters on January 1, Year 1. She leaves on June 30, Year 1. She returns to her country of origin for the rest of the calendar year. In Year 2, she enters on January 1 and leaves on June 30, returning to her country for the rest of the year. And so the pattern continues.

If Beverly is only in the US for six months, is her job surely at risk? Not so. In order to maintain the continuity of her work with elderly clients, she "splits" her job. That is, Beverly is the home-care aide for the first six months. She is then replaced by Janet – a sister, a cousin, or a close friend – who works as the home-care aide for the other six months. I refer to this pattern as job splitting.

## 15.2 WHY JOB SPLITTING MATTERS

Any competent immigration lawyer would agree that these Jamaican women who work while they are on visitor's visas are not in fact complying with their visa terms.



Yet on further examination, what these women do is in fact quite innovative. What is striking about job splitting is that these women do not “overstay” while simultaneously maintaining their employment for when they return. They have in essence created a type of “de facto” job security. That is, an elder-care worker may only work for six months of the year, but she has done it for the last ten years.

Moreover, for students of the literature on elder care, there is an unanticipated benefit of their efforts to avoid overstaying while maintaining their jobs. Job splitting has the upside of helping to ensure continuity of care for their elderly clients. Continuity of care is a major theme in the elder-care literature. That is, by splitting the job, Janet and Beverley are able to provide elder-care services to one client for ten years. Rather than receiving services from many different home-care aides, the client only receives services from Beverley and Janet.

Researchers have long emphasized that continuity of care matters for patient well-being. Immigration institutional design has clear implications for patient well-being and longevity. Researchers have long emphasized that continuity of care matters for patient well-being, and the COVID pandemic only served to reinforce its importance. Indeed, continuity of care may have life-or-death implications. During the pandemic, elderly persons who were cared for at home by one long-term caregiver were less likely to be exposed to COVID infections, to be hospitalized, or to die than their counterparts in nursing homes. Additionally, one study contends that an elderly person fares better when the worker who takes care of her perceives herself to be the long-term caregiver of that elderly person. Why is this? Persons who believe themselves to be long-term caregivers are more likely to advocate for their clients to receive good health care, or to speak candidly about what they perceive to be in the best interests of their patients.

In support of this theory, I turn to the nursing home context. There appear to be differential outcomes in infection and death rates in those nursing homes with long-term employees with minimal turnover versus those homes where turnover rates are higher.<sup>12</sup> Again, one reason for these differential outcomes is obvious. A high-turnover staff is more likely to introduce infection to a nursing home. But there are other reasons. Where staff turnover was lower, staff were more likely to be invested in providing good care to the nursing home residents and to advocate for COVID prevention protocols to protect the residents.

Surely this is relevant to planning for the 100-year-old citizen. As we prepare for a world where centenarians become the norm, I argue that this is the model that the US should try to emulate when addressing questions of institutional design in immigration – creating incentives for migrants who care for the elderly to invest in the longevity of their jobs. Migrants who invest in the longevity of their jobs are

<sup>12</sup> Lacey Loomer et al., *Association between Nursing Home Staff Turnover and Infection Control Citations*, 57 HEALTH SERV. RES. 322 (2022) (a good summary of the literature on the connection between nursing home staff turnover and infection control).

typically also invested in the longevity of their patients. If they are secure in the knowledge that their visas will be renewed – provided that they abide by the terms and do not overstay – they will be invested in the well-being and good health of their clients, who they will be likely to serve over several years.

### 15.3 DESIGNING A SYSTEM WITHIN RESTRICTIONIST POLITICAL REALITIES

In a landmark book, Law Professor Hiroshi Motomura calls on Americans to treat lawful immigrants as “Americans in Waiting,” largely entitled to the benefits of citizenship. Motomura is concerned primarily with what the larger goals of immigration should be, given the underlying constitutional and moral commitments of American democracy. His work typifies the expansionist flavor of much immigration law scholarship. Scholars typically focus on admitting more migrants, for longer periods, and with a more robust group of rights. Although I am very sympathetic to these expansionist goals, I believe that they are not realistic in light of current political constraints, given that the dominant immigration sentiments appear to be restrictionist.

What do I mean by restrictionist constraints? Most Americans want fewer immigrants who are long-term permanent residents. Moreover, they are skeptical of temporary migrant programs, believing that guest workers will inevitably overstay and become long-term residents. Although restrictionist policies were promoted most passionately by the Trump administration, it is already clear that restrictionist immigration policies have outlived President Trump. One need only consider what appears to be an emerging bipartisan political backlash to the perceived increase in the numbers of persons applying for asylum at the southern border.<sup>13</sup>

A more realistic view of what is possible with restrictionist political realities is articulated by Law Professor Cristina Rodriguez, who quite clearly understands the inevitable trade-off between the number of migrants admitted and the rights they receive upon admission. She termed this trade-off “the admissions-status dynamic.” Responding to Motomura’s challenge to treat more migrants as “citizens-in-waiting,” Rodriguez characterizes the challenge as follows:

According to the dynamic, more immigration translates into diminished support for immigrants’ rights, and more robust immigrants’ rights translate into less support for immigrant admission. To put it crudely, if cheap labor is suddenly transformed into expensive citizens in waiting, the doors to immigrants may well close altogether. If we commit to treating immigrants as citizens, we may well erode what support exists for largescale immigration, giving rise to policies that more strictly limit the

<sup>13</sup> Jonathan Weisman & Nicholas Fandos, *G.O.P. Gets the Democratic Border Crisis It Wanted*, N.Y. TIMES (Sep. 8, 2023), <https://www.nytimes.com/2023/09/08/us/politics/gop-migrants-blue-cities.html>.

number of people permitted to enter. Such restrictions would be justified on the ground that we must be highly selective about those we admit given that they will be presumptively entitled to join our political community. In short, a society may be willing to absorb large-scale immigration only if it can maintain tight control over the benefits that accrue to immigrants, reserving for citizens alone the most expensive or most valued goods of citizenship. Trends in immigration law and policy in the United States reflect this trade-off.<sup>14</sup>

Rodriguez's perspective is relevant to any program aimed at admitting elder-care workers. If Rodriguez is right (as I believe she is), realistic immigration proposals will need to assure Americans that the elder-care workers who are being admitted will not be long-term members of the political community, with entitlements to the benefits that come with this status. The US's refusal to design an immigration system that includes these assurances is, in part, responsible for the large undocumented population. Any program designed to recruit guest workers specifically to provide elder care needs to clearly establish that these workers are temporary.

The key in my mind is not only to look for ex-ante signals of temporary intent but also to incentivize compliance. If guest workers are assured that they could come for six months, with a near guarantee of visa renewal if they abided by the terms of their visa requirements, they will take compliance seriously.

Other incentives for compliance could also be built in. For example, a portion of their earnings might be held in escrow to be released when they return to their country of origin. However, these other incentives will pale in importance to the primary incentive – namely an assurance of visa renewal if they comply. These guest workers would be not unlike the aforementioned Caribbean home-care aides, who are “self-enforcing” precisely because they feel secure that their visitors' visas will be renewed as long as they do not stay in the US longer than six months.

Moreover, to ensure continuity of care, one of their visa requirements might be that they provide care services to clients who they have serviced in the past (with a clear exception if the client dies). This would provide an additional incentive to do what the Caribbean home-care aides are already doing. That is, they return to provide care services to their former employers, secure in the knowledge that their jobs will be waiting for them the following year when they return. It is possible to model “de jure” after what Caribbean home-care workers have been doing “de facto.”

We already know that most of these workers are in fact “good types” who would likely have been favorably screened. We know this because of the market – these elder-care workers would hardly have been able to maintain employment with the same family over several years if they were not providing competent care services. Moreover, recall Cox and Posner, finding good visa applicants is primarily an

<sup>14</sup> Cristina Rodriguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111 (2008).

informational problem; a state is seeking to find enough information to ascertain whether a potential entrant matches its type preferences. Notably, the communities of origin for Caribbean elder-care workers are small and tightly knit – if a person has a poor reputation, the word will spread. If someone is an incompetent caregiver, they are unlikely to get referrals or positive recommendations from other care workers (who are always being asked for referrals). Of course, the state cares about matters that families may not care about (e.g., their inclination to comply with their visas), so family approval is not the final word, but it is surely a good sign.

There would of course be other requirements. For example, in conducting visa screening, the US might quite reasonably want to conduct detailed background checks, such as ensuring that the applicant has no history of abuse against the elderly. However, these prospective elder-care workers are not Silicon Valley-bound computer scientists; they cannot present university diplomas or letters from professors and employers in the formal market to serve as testament to their background and character. Yet overcoming the challenges of ex-ante screening in nontraditional populations – whose members may lack access to the resources needed to credibly document their backgrounds – seems particularly possible in the small Caribbean countries from which the elder-care workers that I have described in this chapter originate.

These workers typically originate from small towns and villages – they are known at multiple levels of community life. Indeed, this is precisely how Canada screens its guest workers – relying on Caribbean governments to share information about visa candidates ascertained through cooperation with clubs, churches, and other community organizations. That Spain has been able to implement a similar model in screening guest workers from Morocco – a much larger country with arguably a more challenging risk profile than the Caribbean Islands – is indicative that the utility of this approach of transnational cooperation to augment screening capabilities goes beyond small island countries of origin.

Finally, to maintain certain standards of care, one might also want to institute some sort of licensing regime, in which those who have demonstrated some historical competence in elder care receive a certificate licensing them to provide elder care in the US. If a person has historically been involved in elder care (such as the aforementioned Caribbean women), they should be initially eligible even if they lack formal credentials, while providing them an incentive to pursue additional training to maintain their licenses in the future. Since such licensing is typically provided by the states rather than the federal government, the federal government might simply want to stipulate that visa recipients demonstrate that they have met licensing requirements, to provide an additional incentive for caregivers to become licensed.

#### 15.4 CONCLUSION

What we will end up with is a large population of people who are in essence guest workers in perpetuity – assured of the right to return if they only stay a few months

and leave and return to their country of origin every year. This of course is precisely what the political philosopher Michael Walzer has warned against – the presence of a long-term pool of persons who live in perpetual “guest-workerness,” with no realistic means of participating in the democratic experiment. Would a great constitutional democracy really tolerate the presence of such a population within its borders?

This of course is an important question for any constitutional democracy to grapple with. But it appears to be a question that Americans have already answered – even if some of us find the answer deeply troubling. For example, Americans already tolerate guest workers in perpetuity in their farm work and tourism worker programs – it bears emphasis that a significant proportion of visa recipients in these programs are multi-year repeat participants. And the huge undocumented population is in essence a *de facto* population of permanent residents with no political voice of their own – they are typically only able to act politically through their allies. Thus, what Americans are prepared to tolerate is perfectly clear; the question of the “justice” of what they perceive to be tolerable is different. I believe the outline of the guest worker program for elder-care workers is practicable within the aforementioned political constraints. As we approach the era of the 100-year life, this provides a clear model for how we might proceed to design a system that provides a robust pipeline of well-screened migrant workers.