Labour, Migration and Gender Bias

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Attention is often given to the affect on labour markets caused by the movement of people across borders. Each nation struggles to determine its immigration policies to meet the goals of that nation. Often these goals include economic development, humanitarian concerns and family reunification. The economic development prong of these interests usually leads to the adoption of an employment preference system of admissions which is designed to allow migrants to enter the country who will participate in the growth of the economy but not interfere with the employment of the workers already present in the country. The systems used to determine which workers can enter are often expressed in facially neutral race and gender terms. An examination of the employment preference system under the formal equality or gender neutral approach will often lead to a conclusion that the system is not discriminatory. In immigration law as in other areas of the law, some women will benefit from and will be served by this system. It is though, as Catherine MacKinnon has stated:

> The women that gender neutrality benefits, and there are some . . . are mostly women who have achieved a biography that somewhat approximates the male norm, at least on paper.[1]

Take for example the US employment preferences system for immigration. Visas available for employment-based immigrants have been increased in recent amendments to the immigration law. However, the preference system expresses a preference for skills that men value most and are most likely to possess. From the perspective of intending immigrants, women who possess skills that enable them to obtain only low-paying jobs, that is, most women, will not benefit from these preferences. From the perspective of a US employer, the employment preference system only minimally takes into consideration areas where women would more likely be benefited.[2] These are the areas as Robin West puts it "in which we are most clearly

[1] Catharine A. MacKinnon, Toward a Feminist Theory of the State 225 (1989), with discussion at 215-234.
[2] See generally, Brady, Susan L. Comment. "Female troubles": the plight of foreign household workers pursuing lawful permanent residency through employment-based immigration. 27 Hous. J. Int'l L. 609-646 (2005).

unlike men", areas where women have greater involvement such as in child-raising, housework and caring for elderly or disabled relatives.[3]

Historically, household work has been devalued because it was generally considered women's work and work that is unpaid. Under the preference system, household work is devalued as a source of employment for immigrants. Individuals qualifying for the "highly skilled" work preferences may even avoid the requirement of having an employer petition on their behalf because their skills are considered to be a benefit to our economy even if no specific employer requests their presence. Nannies, caregivers and other household workers were generally not considered a benefit to the economy.

The highest preference category created with the 1990 amendments to the US immigration law includes aliens with extraordinary ability, outstanding professors and researchers and multinational executives and managers. Persons qualifying for this category are not required to go through the time consuming labor certification process, and persons qualifying as "extraordinary aliens", as indicated by the alien having received national or international acclaim with recognized achievements in their field of expertise, are not required to have an employer petition on their behalf.[4] Regulations were adopted, defining extraordinary ability as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor."[5] The inferior social and economic status held by women in most countries makes it unlikely that women will benefit in significant numbers from this preference or even most of the existing employment preference system.

Women continue to be employed in lower- paying jobs than men. Just as equal pay for equal work means equality only if women have access to the same jobs, a facially neutral preference system indicates equality only if the system provides for equality of access. Employment has historically been gender-segregated,[6] jobs that women hold are devalued, and

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[3] Robin L. West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 Fla. L. Rev. 45, 58 (1990).

[4] INA §§ 203(b)(1), 204(a)(1)(C). Section 203(b)(1), 8 USC § 1153, as enacted by Section 121 of the Immigration Act of 1990, act of Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 4978; effective Oct. 1, 1991, and amended, through an amendment to the INA of 1990, by Section 302(b)(2) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Act of Dec. 12, 1991, Pub. L. No. 102-232, 105 Stat. 1733.

[5] 8 CFR § 204.5(h)(1)

[6] See Miller L, Neathey F, Pollard E, Hill D , Occupational Segregation, Gender Gaps and Skill Gaps , Working Paper 15, Equal Opportunities Commission, May 2004, available at http://www.employment-studies.co.uk/pubs/summary.php?id=eocwps15 ; National Comm'n On Working Women, Working Poor Women in the United States: No Way Out 17 (1988) (listing female sex-segregated jobs); Deborah L. Rhode, Occupational

women are paid the lowest wages not only in the United States but in most countries.[7] In employment discrimination, the concept of comparable worth addresses gender-segregation by taking into consideration these gender disadvantages present in the labor market.[8] A similar approach should be used in establishing a preference system. An anticipated response to my conclusions about gender inequities in the preference system is that the heavier concentration of women in spouse-based visa categories simply reflects immigrant women's individual choice to be wives or homemakers instead of participating in more skilled jobs. This is like the "lack of interest" defense used in employment discrimination cases which if successful allows an employer to avoid liability.[9] The constraints that cause the occupational inequality for access to the preference system are ignored.[10] Many women seeking to immigrate have had little opportunity for education in their home countries and have a skill level that is classified in receiving countries as low-level. Often these women also have sole responsibility for childcare. Therefore the possibilities for admission are limited because of the gender disadvantage present in the preference system. For example, even though the preference system generally provides that unused visas in one category can be used for an oversubscribed category, the INA prohibits use of unused visas for the unskilled laborer category. As Professor Medina has pointed out, the administrative agencies charged with administering the immigration laws have defined childcare

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Inequality, 1988 Duke L.J. 1207 (1988); D'Vera Cohn & Barbara Vobejda, For Women, Uneven Strides in Workplace, Wash. Post, Dec. 21, 1992, at A1 (reporting on census data that revealed progress for women in white-collar jobs, but little progress in blue-collar employment where women are only 3% of the construction workers). See generally Gender Segregation in Employment in Europe http://www.guidance-research.org/EG/equal-opps/gender/EOG1/genchalwomlm/EOgenwhygsiem.

[7] See, e.g, Dr. Isik Urla Zeytinoglu, Employment of Women and Labour Laws in Turkey, 15 Comp. Lab. L.J. 177(1994); Helsinki Watch & Women's Rights Project, Hidden Victims in Post-Communist Poland (1992) (reporting on exclusion of Polish women from higher paying jobs and positions of power).

[8] See generally, Andrea Giampetro-Meyer, Resurrecting Comparable Worth as a Remedy for Gender-based Wage Discrimination, 23 Sw. U. L. Rev. 225(1994). For a thorough and interesting discussion of pay equity in Great Britain, see Steven L. Willborn, a Secretary and a Cook (1989).

[9] See, e.g., EEOC v Sears, Roebuck & Co., 628 F Supp 1264 (N D Ill 1986) This description of the approach used in this case is from Vicki Schultz & Stephen Petterson, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, 59 U. Chi. L. Rev. 1073, 1097 (1992) [n 10] where the authors describe it as an "employer. . . seek[ing] to rationalize the patterns of segregation revealed by statistical evidence by arguing that such patterns resulted not from discrimination, but from protected class members' own lack of interest in the higher-paying jobs in which they are underrepresented." The authors conclude that such a defense lessens the potential impact of Title VII.

[10] For a thorough discussion of the relationship between the law and the occupational inequality that results from institutional and other constraints see the work of Deborah L. Rhode in Deborah L. Rhode, Justice and Gender, ch. 8 (1989); Deborah L. Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163 (1988). Deborah L. Rhode, Occupational Inequality, 1988 Duke L.J. 1207 (1988).

and household labor such that it will always be placed in the oversubscribed unskilled worker category.[11]

Other requirements of the agencies are also considered unreasonable. An employer's request for an alien employee to enter the US as a skilled or unskilled worker whether it is for a temporary or permanent position usually requires that the Secretary of Labor certify that U.S. workers will not be displaced.[12] The Department of Labor requirements make it extremely difficult to obtain an approval for live-in household workers. The labor department has determined that if a job requirement is unduly restrictive then a business necessity must be shown. In the seminal case on live-in workers, *In re Marion Graham*,[13] the standard for obtaining certification was established. If a worker is required to live on the employer's premises, the requirement is considered unduly restrictive unless the employer documents that it arises from a business necessity.[14] The factors considered in determining whether a live-in requirement is essential to the reasonable performance of the job duties include the employer's occupation or commercial activities outside the home, the circumstances of the household, and any extenuating circumstances which may exist. Often requests are simply considered to be the personal preference of the employer to have a worker live on the premises and not sufficient to establish business necessity. Therefore, requests for live-in household or caregiver employees are only rarely granted.[15] It is clear that there is a demand for domestic workers but Congress and the agencies assigned the task of administering the preference have devalued this concern.

During the hearings on the 1990 Act, Representative Morella of Maryland pointed out the effect on women:

> I am particularly concerned about the limitation of the numbers for low-skilled workers to 10,000 per year; this is far below the demonstrated need for these visas. This limit on employer-sponsored immigration of low-skilled workers will prevent many American workers, especially women, from pursuing careers

[11] See Medina, supra note 5 . In April 1994, the Department of Labor announced the creation of a new skilled worker category for nannies in response to a labor certification request filed by a woman attorney in Washington, D.C. The category was immediately rescinded with the Department of Labor announcing that further research and study was needed. See 71 Interpreter Releases 559, April 25, 1994.

[12] INA § 212(a)(5)(A), 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of CFR.

[13] 88-INA-102 (Mar. 14, 1990) (en banc) (BALCA).

[14] 20 CFR § 656.21(b)(2)(iii)

[15] In the Matter of Joanne and David Fields, Employer on Behalf of Laura Santacruz-Cabascango, 91-INA-2, November 23, 1992 (BAlCA)(Because the working hours for each of them are long and unpredictable, a live-in worker is a necessity.)

> while also caring adequately for their families. Thus, children, the elderly, and the disabled will be seriously and adversely affected.[16]

The provision was enacted with the 10,000 limit.[17] If Congress had been willing to accept Representative Morella's views, or at least give them serious consideration,[18] we might never have had what is now referred to as the "Zoe Baird problem."[19] It appeared at one point that because women were more likely to have been responsible for hiring childcare givers and household workers, it would not be possible to appoint the first woman Attorney General. The solution apparently was to look for a woman who was least likely to have such problems, a woman with no childcare responsibilities.

An examination of employment-based immigration in countries other than the US also reveals the need to scrutinize the systems for adverse affects on women. For example, similar problems existed under the UK system which established six separate sets of work permit arrangements established in addition to the Higher Skilled Migrant Programme.[20] Recently, the UK adopted a points-based system which in some ways is similar to the skilled migration programs for entry to Australia and Canada.[21] This system establishes tiers instead of preference

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[16] 136 Cong. Rec. H12358-03, H12364. Representative Morella urged Congress to provide for at least 19,000 visas.

[17] See INA s 203(b)(3)(A)(i) (skilled workers), (iii) (other workers), 203(b)(3)(B) (limiting the number of visas available to unskilled workers to only 10,000 per year).

[18] There are of course other considerations relevant to this inquiry, one of the most important being the worker employed in these positions. I discuss this in Part IV. C. Infra.

[19] Zoe Baird was being considered for appointment as Attorney General of the United States in 1993. During the course of her confirmation hearings it was revealed that she had made a "technical violation" of the immigration law by hiring two undocumented workers in violation of the IRCA. See Hearing of the Senate Judiciary Comm,; Subject: Confirmation Hearing for Zoe Baird, Fed. News Serv., Jan. 19, 1993, available in LEXIS, Exec Library, Fednew File. Her nomination was subsequently withdrawn. Adam Pertman, First Woman Attorney General Nominated as Clinton Sets Team, Boston Globe, Dec. 25, 1992, at 1; David Johnston, Clinton's Choice for Justice Dept. Hired Illegal Aliens for Household, N.Y. Times, Jan. 14, 1993, at A1. Michael Kelly, Clinton Cancels Baird Nomination for Justice Dept.: Strong Opposition, N.Y. Times, Jan. 22, 1993, at A1; David Johnston, Clinton Not Fazed by Nominee's Hires, N.Y. Times, Jan. 15, 1993, at A15; Jill Smolowe, How It Happened; The Baird Debacle Grew Out of a Selection Process in Which Clinton Aides Acted Hastily and Cavalierly in Brushing Aside an Early Warning, Time, Feb. 1, 1993, at 31.; Don Oldenburg, The Zoe Factor: Pitfalls on the Path to Legitimate At-Home Child Care, Wash. Post, Jan. 25, 1993, at B5 .

[20] Anneliese Baldaccini, EU and US Approaches to the Management of Immigration: The United Kingdom 19 (Jan Niessen et al. eds., 2003), available at http://www.migpolgroup.com/uploadstore/UK.pdf.

[21] Valerie Preston with Wenona Giles, Employment Experiences of Highly Skilled Immigrant Women: Where Are They in the Labour Market? (2004)

categories like the US, but they serve the same purpose and have similar results for immigrant women.[22]

[22] See generally, Managing Migration: The Points Based System - Home Affairs Committee – Thirteenth Report, Ch. 6 Points criteria: fair, transparent, flexible? para. 102, available at http://www.publications.parliament.uk/pa/cm200809/cmselect/cmhaff/217/21709.htm