

# Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care

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*This Article offers a new analytical framework for understanding the distributive role of legal regulation in the interaction of “home” and “work.” Using this framework, the Article maps the “double exceptionalism” of the family in U.S. federal employment law. It suggests that employment law treats familial care responsibilities as exceptional in two different ways: first, through family leave benefits that affect the primary labor market, labeled here “affirmative exceptionalism”; and, second, through the exclusion of in-home care workers from protective employment legislation in the secondary labor market, labeled here “negative exceptionalism.” This double exceptionalism of the family in employment law serves as a basis for an assessment of the distributive outcomes of employment law across class and gender lines. The Article shows that the combined study of affirmative and negative exceptionalism—of how employment law affects the availability of labor, as well as the working conditions, of both care workers and their employers—is crucial to a holistic understanding of the formative and distributive effects of employment law on markets of care. A central implication is that employment law should be understood as an accessible, if obdurate, legal tool which holds the potential for achieving distributional shifts from current social and political divisions of power among members of households and classes alike.*

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## I.

### INTRODUCTION

The debate concerning the redistributive potential of legal rules is one of the most important and vigorously fought issues in contemporary public policy, economic theory, and legal thought. Is "intervention" in freedom of contract in order to mandate a benefit to protect a vulnerable group—such as consumers, employees, or tenants—an effective way to bring about redistribution? Or do such mandated protections end up harming the groups

they attempt to help? The current financial crisis and reevaluation of contemporary market regulation render the questions of how to achieve effective income redistribution and what the role of legal rules is in this process even more pertinent. This Article offers a new framework for thinking about these questions in the context of employment regulation in markets of care. I look at the protections granted to workers with familial care responsibilities<sup>1</sup> in the Family and Medical Leave Act of 1993 (FMLA) and the application of protective employment regulation<sup>2</sup> to the employment relationship of in-home care workers.

The U.S. economy aspires to full employment of all adult citizens.<sup>3</sup> Yet, a central challenge to this goal is the tension between the demands of care and work, which makes it difficult for workers with familial care responsibilities to participate in the labor market. Moreover, parents across income levels attest that the competing demands of family and work are some of the most significant concerns in their daily lives.<sup>4</sup> The main legal field where these tensions and challenges are dealt with is employment law. In response to the rise of the dual earner family—in which both parents participate in the labor market—many countries have adopted family leave provisions that allow parents to take days off work in order to tend to family members without fear of losing their jobs. Such leave provisions are a form of protective labor market regulation because they redistribute the

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1. I use the term "familial care" to signify the type of labor and attention traditionally associated with the work of the housewife (i.e. cooking, cleaning, and taking care of dependent family members) when the work is paid for in a 'market' setting or unpaid for in a 'family' setting. In the context of this Article, familial care includes both menial and spiritual care activities (for an elaboration on this distinction, see Dorothy Roberts, *Spiritual and Menial Housework*, 9 YALE J.L. & FEMINISM 51 (1997)). Indeed, care work bundles together various occupations that, when commodified, are usually categorized as part of the secondary labor market. These are low wage, unskilled, precarious jobs that are done mostly by minority and immigrant women. There is a growing body of literature that conceptualizes care work as a category of occupations. See CARE WORK: THE QUEST FOR SECURITY (Mary E. Daly ed., ILO 2001); CARE WORK: GENDER, CLASS, AND THE WELFARE STATE (Madonna Harrington Meyer ed., 2000); JANET BODDY ET AL., CARE WORK: PRESENT AND FUTURE (2005). An additional element of a housewife's traditional roles is related to sex. Although in my general conceptualization sex work is an integral part of care work as well as familial care, for the purpose of this paper sex work is framed out of the discussion.

2. The term protective regulation refers to a type of legal rule that aims to bring about redistribution by making certain contractual terms mandatory in order to protect groups whose members, for various reasons, are not in a bargaining position to contract for those terms themselves. Examples include insurance-like compulsory terms in consumer contracts, housing codes, and virtually all protective employment legislation.

3. See, e.g., Full Employment and Balanced Growth Act, 15 U.S.C. §§ 3101-3152 (2006).

4. See Michael R. Frone et al., *Antecedents and Outcomes of Work-Family Conflict: Testing a Model of the Work-Family Interface*, in WOMEN EMPLOYEES AND HUMAN RESOURCE MANAGEMENT 133, 147-48, 150-51 (Nalini Sastry & Subrata Pandey eds., 2000). It is interesting to note that the researchers found no gender or race differences in experiencing work-family stress.

employee's costs of care in terms of time and financial resources among employees, employers, and the state.

Traditionally, legal scholarship that studies the interface between the labor market and the needs of familial care focuses on familial accommodation mandates ("FAM"), such as mandated benefits to a workers' family members (e.g., health insurance) and provisions prohibiting discrimination based on familial status, but also, notably, family leave. In this literature, the understanding of employment law is reduced to its effects on a very particular and salient employment relationship—that of the employers and employees in the *primary* labor market—while losing sight of employment relationships in the *secondary* labor market, also deeply implicated in the care-work field.<sup>5</sup> The tendency to focus on the primary market creates a narrow and often inaccurate picture of the realities of care provision and the distribution of care responsibilities along gender and class lines. In fact, much of the work in markets of care takes place in the secondary labor market, which is regulated by a very different employment law framework than the one associated with the primary labor market.

Employment law shapes familial care choices not merely by accommodating workers with family obligations in the workplace through FAM, but also by regulating the employment of in-home care workers.<sup>6</sup> The regulation of in-home care work shapes the cost and availability of care-work. As a result, such regulation contributes to family decision-making regarding care provision, since a family's decision whether to self-service or purchase in-home care services is heavily determined on the prices of the services and the supply of workers.

Employment law, therefore, has a much more complicated role in shaping the care-work matrix than previously understood. This article embarks on a holistic assessment of the distributive effects of employment law's regulation of care-related relationships. I find that employment law treats familial care responsibilities as exceptional in two different ways: first, through family leave benefits that affect the primary labor market; and, second, through the exclusion of in-home care workers from protective

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5. Primary and secondary labor markets are terms taken from labor economics literature and theories about labor market segmentation. Under the market segmentation model the labor market is not one coherent unit but rather includes two structurally distinct markets: a primary labor market and a secondary labor market. Primary market jobs "possess several of the following characteristics: high wages, good working conditions, employment stability, chances of advancement, equity, and due process in the administration of work rules." Secondary market jobs, on the other hand, "tend to have low wages and fringe benefits, poor working conditions, high labor turnover, little chances of advancement, and often arbitrary and capricious supervision." PETER B. DOERINGER & MICHAEL J. PIORE, *INTERNAL LABOR MARKET AND MANPOWER ANALYSIS* 165 (1971).

6. In-home care workers are workers who provide familial care in the employer's home, rather than an institutional setting. Nannies, domestic workers, health aides, and babysitters all provide in-home care services.

employment legislation in the secondary labor market. I label family leave provisions “*affirmative exceptionalism*” because workers with familial care obligations receive favorable and additional rights in relation to other workers who do not have families or who are not responsible to their families’ needs in a way that requires them to take time off work. In turn, I label the exclusion of in-home care work “*negative exceptionalism*” because it entails providing less protection to in-home care workers, due to their employment within the family, than is provided to other workers in the secondary labor market.

This “*double exceptionalism*” of the family in employment law is the basis for my assessment of the distributive outcomes of employment law across class and gender lines. I offer two interventions in the existing distributive analysis literature and in literature that studies the tensions between the demands of family and work (care-work literature). First, I intervene in the debate concerning the redistributive potential of legal rules in general and family leave mandates in particular. This legal debate attempts to assess the consequences of protective legal rules and to understand whether and how protective private law rules can redistribute benefits towards the groups they aim to help.<sup>7</sup> To this literature, I add a new analytical model for conceptualizing the distributive outcomes of family leave mandates. I propose adding to the classical distributive element of *material delivery*—or ‘who gets what’—four additional distributive elements: *commodification*, the level of dependency on the labor market for economic survival; *stratification*, ways in which the welfare state serves to structure class and social status; *familialization*,<sup>8</sup> the degree to which social policy entrenches (or relaxes) women’s and men’s economic dependence on the family and their care-providing role in the family; and *intra-household division of labor*, social policy’s effect on male and female contribution to household care work.

The proposed distributive framework provides a complex and detailed picture of the interaction of employment law with familial care provisions and, more generally, of the potential for redistribution through legal rules.

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7. See, e.g., Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1096, 1136-40, 1186-97 (1971); Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361, 362 (1990); Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 230-31 (2000); Duncan Kennedy, *The Ex Post Distributive Case for “Insurance Like” Compulsory Terms in Consumer Contracts 1-4* (1998) (unpublished manuscript, on file with author); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 9 (2005).

8. The stratification, de-commodification and de-familialization elements are taken from the work of welfare state scholar Gøsta Esping-Andersen. See GØSTA ESPING-ANDERSEN, *SOCIAL FOUNDATIONS OF POSTINDUSTRIAL ECONOMIES* 21-26, 35-79 (1999) [hereinafter: *SOCIAL FOUNDATIONS*]; GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 52-70 (1990) [hereinafter: *THREE WORLDS*].

Applying this distributive framework to the affirmative exceptionalism of the family in the FMLA, I argue that it is meaningless to say that the unpaid family leave granted in the FMLA is either beneficial or harmful to all workers with family care responsibilities or to all women. Depending on individual familial and market contexts, the leave may be beneficial or costly to different workers.

Second, I apply the analytical framework discussed in the previous paragraph to the regulation of the secondary market of in-home care, elucidating the crucial role played by employment law in shaping markets of care and familial care-provision decisions.

Part II surveys the legal literature that assesses the distributive effects of protective private law rules. While the literature primarily explores the regulation of other kinds of contractual relationships—namely, the distributive outcomes of housing codes and consumer protections—their study has framed the methodological ground for distributional analysis and serves as a basis for intervention in the care-work context. The last Section of Part II offers my distributional analysis of the FMLA and assesses its distributive effects as a tool for affirmative exceptionalism.

Part III begins by mapping out the employment protections of in-home care workers in the United States. Due to the negative exceptionalism of in-home care workers—their exclusion from various protective employment law rules—the default rules of the employment contract become the main regulatory tool that governs these employment relationships. I apply the analytical framework developed in Part II to explore the distributive outcomes of the negative exceptionalism of U.S. employment law, as it applies to care workers (primarily by way of exclusion). Drawing on the distributive analyses in Parts II and III, the Article concludes in Part IV with some insights regarding the potential for redistribution through legal rules in general and in markets of care in particular.

## II.

### AFFIRMATIVE EXCEPTIONALISM: THE WORKER WITH FAMILIAL CARE RESPONSIBILITIES AND FAMILIAL ACCOMMODATION MANDATES

Historically, under the industrial-era (Fordist) employment model, family responsibilities were incorporated in the employment relationship through the family wage. The concept of the family wage was based on the single-earner family model: families consisting of husband, wife, and children, in which the husband was a breadwinner and the wife stayed home to care for the family. The family wage was supposed to cover the economic needs of the family unit, and women's role in the wage economy

was therefore secondary to that of men. Accordingly, in many countries women's wages were officially<sup>9</sup> or unofficially<sup>10</sup> set at about half the wage earned by men. Under this social arrangement the worlds of work and family were supposedly separate and their meeting point was solely through the wage. The backbone of this social pact was the assumption that the male-breadwinner's wage was sufficient to support his family. The main familial obligation of the male worker was to financially provide for his family, while the wife provided for familial care needs.<sup>11</sup>

As far as the family wage model ever reflected actual familial patterns, there are strong indications that it no longer does. The two sets of assumptions—the ideal family and the ideal worker—have been severely challenged in today's social and economic climate. In an economic and social order in which governments promote full market participation and where most women are employed, divorce rates are high, single parenting is prevalent, a contingent workforce is growing, and technological innovations and global economic pressures affect constant changes in the labor market, the "family wage" that provided support for the traditional, ideal worker and his family has cleared the stage for a new relationship between the family and the labor market.<sup>12</sup>

Yet, under the current paradigm of employment law in the United States, workers' familial care obligations are still most commonly understood to stand outside the basic scope of the employment contract. As introduced above, given the historic vision of the family wage and the rooted image of the ideal worker, today's paradigmatic worker is still expected to contract as if employment were his/her principal time commitment, while familial care remains external to the employment relationship. The result is a clash between two paradigms, the ideal worker on the one hand and the realities of familial care in markets that consist mostly of dual earner households on the other.<sup>13</sup>

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9. Australia officially set women's wages as half that of men until 1972. See Christine Short, *Australian Women's Pay 1907-2002: Still Not Equal*, 14 MAKING THE LINK ch. 7, at 3 (2003), available at [http://www.lmsf.mq.edu.au/LMSF\\_docs/mtl/mtl14/mtl14\\_ch\\_7.pdf](http://www.lmsf.mq.edu.au/LMSF_docs/mtl/mtl14/mtl14_ch_7.pdf); DEBORAH MITCHELL & STEVE DOWRICK, CTR. FOR ECON. POLICY RESEARCH, AUSTL. NAT'L UNIV., CANBERRA, DISCUSSION PAPER NO. 308, WOMEN'S INCREASING PARTICIPATION IN THE LABOR FORCE: IMPLICATIONS FOR EQUITY AND EFFICIENCY (1994).

10. See, e.g., U.S. CENSUS BUREAU, HISTORICAL INCOME TABLES, tbl. P-40, available at <http://www.census.gov/hhes/www/income/histinc/p40.html> (last visited Feb. 2009) (showing that from the 1960's to the 1980's women's earnings were approximately 59% of men's).

11. Hilary Land, *The Family Wage*, 6 FEMINIST REVIEW 55, 56-58, 59-62 (1980).

12. Nancy Fraser, *After the Family Wage: Gender Equity and the Welfare State*, 22 POL. THEORY 591, 592 (1994).

13. See Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 56 (1979).

Today, the main way in which a worker's familial obligations are incorporated in the employment relationship is through special provisions allowing workers to take time off to tend to family needs, such as child birth or the illness of a parent, spouse, or child. Under U.S. federal law, these rights are granted by the FMLA. Legal rules providing the worker with time off to care for family responsibilities are a type of accommodation mandate: legal requirements "that employers take special steps in response to the distinctive needs of particular, identifiable demographic groups of workers."<sup>14</sup> In our case the demographic group at issue is people with familial care responsibilities, which today is still mostly, though not always, a euphemism for women.<sup>15</sup>

This Part will explore how accommodation mandates operate in relation to familial care obligations and the distributive consequences of FAM. Section A frames the construction of FAM as affirmative exceptionalism through a discussion of the at-will employment rule, its application to familial responsibilities, and the enactment of protective legislation, such as the FMLA. Section B discusses the potential of redistribution through legal rules by engaging the argument that FAMs harm the people they are designed to protect. Section C offers a new model for conceptualizing the distributive consequences of FAM.

### A. The Rules

#### 1. Employment At Will

The prevailing and most influential norm that regulates employment relationships in the United States is the common law rule of employment-at-will (EAW): unless otherwise stated in the contract, parties can terminate the employment relationship at any moment, for any reason, and without

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14. See Jolls, *supra* note 7, at 231; Sharon Rabin-Margalioth, *Anti-Discrimination, Accommodation and Universal Mandates—Aren't They All the Same?*, 24 BERKELEY J. EMP. & LAB. L. 111, 128-29 (2003). The term "accommodation mandates" will be discussed at greater length in Section II(B) below.

15. Under the current social order women bear a disproportionate caregiving burden. Accordingly, wherever I write "workers with familial care responsibilities," I could substitute the general category "women." However, it does not have to be the case and it is not always the case. Some men are also disadvantaged in the labor market by familial care obligations and some women are not. In order to avoid re-inscription of traditional gender expectation and roles in this analysis I choose to use the gender neutral term "workers with familial care responsibilities," rather than "women." This is not to ignore the fact that women are the main group that is harmed and/or benefited by the policies discussed. Accordingly, at times and when required, I do distinguish and refer to the disparate effect of the mandates on women and on men.



notice.<sup>16</sup> Proponents of EAW justify the rule on traditional grounds of liberty, freedom of contract, and equal bargaining power between parties.<sup>17</sup> These assumptions of 'freedom' and mutuality in employment contracts have been heavily criticized, mostly by pointing out that there is structural inequality in bargaining power between labor and capital in the traditional employment setting.<sup>18</sup> Critics of EAW posit that the rule allows the exercise of arbitrary power by the employer, who enjoys a stronger economic position than the employee.<sup>19</sup>

Criticism of EAW has prompted state and federal legislation that protects employees from arbitrary dismissal on certain grounds. Federal and state anti-discrimination legislation are examples of important restrictions on employers' prerogative to dismiss workers of certain groups. The FMLA, granting employees the right to take leave days due to personal or family illness without fear of dismissal, represents another legislative attempt to shift some of the bargaining power originally allocated to the employer by the EAW rule.

EAW's criticism also led courts to soften the implications of the EAW rule by creating various exceptions. For example, in a number of cases courts have recognized public policy exceptions to the EAW rule in order to promote various public policy goals such as free speech or union activity.<sup>20</sup>

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16. For the origins and historical development of the employment at will rule in employment contracts, see Jay Fineman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

17. The rationale of the EAW rule was explained in the often quoted *Payne v. Western Atlantic Railroad*, 81 Tenn. 507, 518-19 (1884): to be a system of voluntary exchange, "[M]en must be left, without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se. It is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer." *Id.* *Payne*, however, involved a defamation suit and not the question of employee discharge.

18. The EAW has been criticized on various grounds. It was criticized for entrenching the structural economic inequality in employer-employee bargaining, as well as for ignoring information gaps between employers and employees and entrenching inefficient employer biases in hiring, retention and promotion of certain workers. For other critiques, see Drucilla Cornell, *Dialogic Reciprocity and the Critique of Employment At Will*, 10 CARDOZO L. REV. 1575 (1989); Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 BERKELEY J. EMP. & LAB. L. 111 (2006).

19. For an eloquent expression of this position, see Lawrence E. Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1405-06, 1413-14, 1435 (1967). For a general discussion of the inequality in bargaining power in the employment relationship, see Claus Offe & Helmut Wessenthal, *The Two Logics of Collective Action: Theoretical Notes on Social Class and Organizational Form*, 1 POLITICAL POWER AND SOCIAL THEORY 67 (1980).

20. The vast majority of states recognize a public policy exception to the EAW doctrine. See, e.g., *Green v. Ralee Eng'g Co.*, 960 P.2d 1046 (Cal. 1998); *Petermann v. Int'l Bhd. of Teamsters*, 344 P.2d 25 (Cal. Ct. App. 1959); *Fitzgerald v. Salsbury Chemical, Inc.*, 613 N.W.2d 275 (Iowa 2000); *Nees v. Hock*, 536 P.2d 512 (Or. 1975). For example, some courts recognized dismissals that restricted an

Such an approach could have theoretically been used to protect workers with familial care responsibilities. However, courts have been reluctant to carve out public policy exceptions to the EAW rule based on structural labor market inequalities that disadvantage workers with familial care responsibilities.<sup>21</sup>

For example, in *Upton v. JWP Businessland*, the Supreme Judicial Court of Massachusetts decided that the employer was not violating public policy when he discharged a single mother after she refused to stay late because she needed to care for her young son. In her argument, the employee suggested that legislation promoting care and protection of children establishes a public policy requiring employers to refrain from making unreasonable work demands on workers with familial care obligations.<sup>22</sup> The court rejected this argument and found the employer not liable for the discharge.<sup>23</sup> The court stated that "there is no public policy which mandates that an employer must adjust its expectations, based on a case-by-case analysis of an at will employee's domestic circumstances, or face liability for having discharged that employee."<sup>24</sup>

The court's position in *Upton* highlights how family and the labor market are conceptualized as operating in two separate spheres. The clash between the competing demands on a caregiver's time is perceived as a thoroughly private matter, rather than a burden that could or should be shared between the realms. Protective statutory schemes, such as the FMLA, are designed to remedy this situation, offering employees some protection from the clashing demands of market and family. The *Upton* position reflects a mode of legal reasoning that imagines an ideal worker who, when contracting for employment, is assumed to be free of other attachments and obligations. It also highlights the rigid boundaries that courts uphold between family and market. This position has significant distributional consequences. As further discussed in Part III, in the context of care work this broad interpretation of the EAW rule is a crucial factor in the distribution of the cost of care between primary market workers and the secondary market care workers they employ.

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employee's freedom of speech or union activity as violating public policy. See, e.g., *Glenn v. Clearman's Golden Cock Inn, Inc.*, 13 Cal. Rptr. 769 (Cal. Ct. App. 1961) (regarding union activity); *Chavez v. Manville Prods. Corp.*, 777 P.2d 371 (N.M. 1989) (regarding free speech).

21. See, e.g., *Upton v. JWP Businessland*, 425 Mass. 756 (1997); *Lloyd v. AMF Bowling Ctrs., Inc.*, 985 P.2d 629 (Ariz. Ct. App. 1999); *Hundley v. Dayton Power & Light Co.*, 774 N.E.2d 330 (Ohio. Ct. App. 2002); *Hampton v. Armand Corp.*, 834 A.2d 1077 (N.J. Super. Ct. App. Div. 2003); *Ackerman v. Quilcene Sch. Dist. No. 48*, 117 Wash. App. 1087 (Wash. Ct. App. 2003); *Rivera v. Cherry Hill Convalescent Ctr.*, No. 04-2449, 2006 U.S. Dist. LEXIS 30117 (D.N.J. May 17, 2006).

22. 425 Mass. at 758.

23. *Id.* at 759-60.

24. *Id.*

The result of the position expressed in *Upton* is not entirely negative for women. Accommodating workers' familial care responsibilities through shorter working hours or extra leave days might make this group of workers more expensive to employ and therefore less desirable for hire. If employers know that women, as proxy for workers with familial care obligations, have a right protected by law to take days off, work less hours, and generally have less flexibility in their work day, employers might prefer hiring men. As far as *Upton* encourages parity in the employment costs of men and women its outcome is positive for women as a group. Redistributing some of the cost of familial care to employers can harm workers with such responsibilities because employers are hesitant to employ or promote these workers. I will discuss this "side effect" of protective legal rules in part B below. At this point it will suffice to note that the unwillingness of courts to acknowledge the inter-relationship between family and market can therefore indirectly protect women, particularly mothers, from even deeper hiring and promotion discrimination.<sup>25</sup> This side effect would be a non-issue were mothers and fathers to equally share familial care obligations. Given the current social order, however, it is possible that the indirect consequences of this opinion are not entirely negative for women.

The default rule of employment, EAW, goes a long way in determining the interface between family and market, and negotiating the competing demands of work and care. The employee in *Upton* may have won the case in a jurisdiction with another default rule, such as "just cause" or "good faith" dismissal. The effects of different default rules on the work-family interface are crucial to an understanding of the care market structure and to trends in household divisions of labor. This is especially important because the majority of laws that aim to relieve work-family conflicts include significant exceptions, leaving many employment relationships—those of secondary market workers, new workers, and workers of small employers—to the default rules of employment.

## 2. *Legislated Protections*

In recent decades, many countries have enacted legislation that protects workers with familial care responsibilities from dismissal, as well as adverse treatment in hiring, promotion, and working conditions.<sup>26</sup> The goal

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25. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1305-07, 1332-35 (2007).

26. For legislation protecting workers with familial care responsibilities in Europe, Canada and the United States, see Richard N. Block, *Work-Family Legislation in the United States, Canada and Western Europe: A Quantitative Comparison*, 34 PEPP. L. REV. 333 (2007); Theresa Bresnahan-

of such legislation is to reallocate the costs of familial care so that the government or employers will carry some of the fiscal burden. These reforms express an aspiration for full adult employment, and more specifically, the promotion of women's participation in the labor market.

Protective employment legislation in the context of familial care commonly assumes two main regulatory forms: anti-discrimination mandates and accommodation mandates. Anti-discrimination mandates (such as Title VII<sup>27</sup>) protect designated groups from adverse discriminatory treatment.<sup>28</sup> Accommodation mandates require the employer to take special steps in response to workers' distinctive needs.<sup>29</sup> Accommodation mandates are designed either as targeted mandates, which serve the needs of a particular group of workers (such as the Americans with Disabilities Act (ADA)<sup>30</sup> and the Pregnancy Discrimination Act (PDA)<sup>31</sup>), or as universal mandates, which respond to the needs of all workers (such as the Occupational Safety and Health Act (OSHA)<sup>32</sup>).

For descriptive purposes this section distinguishes between accommodation mandates and anti-discrimination measures.<sup>33</sup> Later, I refer to both types of regulations as FAM.

#### a. *Anti-Discrimination Mandates*

The federal anti-discrimination regime in the U.S in relation to familial care obligations is defined and construed narrowly.<sup>34</sup> While sex (under Title VII) and pregnancy (under the PDA) are protected grounds, workers with familial care responsibilities are not recognized as a suspect group.<sup>35</sup>

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Coleman, *The Tension Between Short-Term Benefits for Caregivers and Long-Term Effects of Gender Discrimination in the United States, Canada and France*, 15 NEW ENG. J. INT'L & COMP. L. 151 (2009).

27. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2006).

28. See Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431, 433-57 (1966).

29. Jolls, *supra* note 7, at 231.

30. Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2010).

31. Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2010).

32. Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2010).

33. See Rabin-Margalioth, *supra* note 14, at 123-29. Rabin-Margalioth's insight is that accommodation mandates for workers with familial care responsibilities and mandates prohibiting the discrimination of people with familial responsibilities are in effect identical, since both impose a cost on the employer, the cost is passed on to the employees (in the form of suppressed wages), and employees who do not value and utilize the benefit cross-subsidize those who do. *Id.* Both regulative strategies therefore lead to inter-employee redistribution through cross-subsidization.

34. Other jurisdictions may provide wider protections based on marital status, parenthood, and family responsibilities. For wider constructions of family related protections, see, e.g., Fair Work Act, 2009, c. 3, § 351(1) (Austl.) (prohibited grounds for dismissal); Employment (Equal Opportunities) Law, 5748-1988, LSI 215 (Isr.).

35. In May 2007, the Equal Employment Opportunity Commission (EEOC) issued guidelines dealing with unlawful disparate treatment of workers with caregiving responsibilities. See U.S. EQUAL

Litigants and legal scholars have tried to propose an interpretation of Title VII that will afford protection to workers with familial care responsibilities, arguing that discrimination against an employee due to her familial care responsibilities is in fact gender-based discrimination.<sup>36</sup> Such claims have proved to be relatively unsuccessful.<sup>37</sup> It is widely agreed that Title VII, in its current form, is too limited to offer protection to workers with familial care responsibilities.<sup>38</sup>

#### b. *Familial Accommodation Mandates*

Familial Accommodation Mandates (FAM) redistribute part of the costs of care from workers with familial care responsibilities to employers and/or governments. In some cases, such as the FMLA, the mandate takes the form of the right to take a certain period of unpaid leave without risking the loss of one's job. Other possible models of FAM include paid leave, funded by the employer, by the state, or through combined contribution.<sup>39</sup>

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EMPLOYMENT OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), available at <http://www.eeoc.gov/policy/docs/caregiving.html> (last visited Oct. 2009). However, while this step might suggest a shift in the administrative mind-set, it does not amount to a binding regulatory change. The document begins by noting that "[t]his document is not intended to create a new protected category . . . ." *Id.*

36. The Center for WorkLife Law at the University of California, Hastings College of the Law provides significant research and support for litigation that seeks to link family responsibilities to protections that exist under current anti-discrimination law. WorkLife Law has coined the term "Family Responsibility Discrimination" (FRD). See Mary C. Still, CTR. FOR WORKLIFE LAW, LITIGATING THE MATERNAL WALL: U.S. LAWSUITS CHARGING DISCRIMINATION AGAINST WORKERS WITH FAMILY RESPONSIBILITIES (2006), available at <http://www.worklifelaw.org/pubs/FRDreport.pdf>; Joan Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 106 (2003). However, few cases led to the recognition of FRD through linking it to sex discrimination. See Williams & Segal, *supra*.

37. See Mary Becker, *Caring for Children and Caretakers*, 76 CHI.-KENT L. REV. 1495, 1517 (2001); Peggie R. Smith, *Parental Status Employment Discrimination: A Wrong Need of Right?*, 35 U. MICH. J.L. REFORM 569, 575-80 (2002). Williams & Segal discuss various failed cases. They explain the litigation failure by finding "fault" in each case: they identify cases with negligent legal service, unsuitable legal claims, and problematic plaintiffs. Williams & Segal, *supra* note 36, at 103-06. However, it is difficult to be convinced by their argument that FRD actually exists as an active legal category when there are so many cases to the contrary.

38. See, e.g., Kathryn Abrams, *Cross-Dressing in the Master's Clothes*, 109 YALE L.J. 745, 755-57 (2000); Becker, *supra* note 37, at 1517; Nancy Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 149-53 (1989); Laura Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of the Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 374, 391-92, 398-407 (2001); Peggie R. Smith, *Accommodating Routine Parental Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1455-59 (2001).

39. See REBECCA RAY ET AL., CTR. FOR POL'Y AND ECON. RES., A DETAILED LOOK AT PARENTAL LEAVE POLICIES IN 21 OECD COUNTRIES 33-34 (2008), available at <http://www.cepr.net/>

Section 102 of the FMLA gives employees the right to take up to twelve weeks of unpaid leave upon the birth or adoption of a child, in order to care for a specified family member<sup>40</sup> with a serious health condition,<sup>41</sup> or because of the employee's own serious health condition. New workers (under one year of employment) and workers of small employers (with fewer than fifty employees) are excluded from FMLA protection.

The FMLA is the only accommodation tool used in U.S. federal employment legislation to accommodate family-work conflicts.<sup>42</sup> Among the thirty member countries in the Organization for Economic Co-operation and Development (OECD countries), only the United States and Australia do not provide paid maternity leave,<sup>43</sup> and the United States is one of the few countries that does not provide any form of paid sick leave. This unfavorable compromise—the FMLA's willingness to provide leave, but at an unpaid rate—was the result of a long legislative process that left many of the act's original supporters unsatisfied.<sup>44</sup> In contrast, supporters of the act argue that it strikes a reasonable balance between providing some protection for workers with familial care responsibilities and the costs of employment and retention, thus avoiding the pitfall of harming the protected group.<sup>45</sup> The main achievement of the FMLA is that it grants workers the right to retain their jobs despite taking time off work, and the right to be restored to

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documents/publications/parental\_2008\_09.pdf (including description of policies in Belgium p. 5, Canada p. 7, Finland p. 10, France p. 12, Norway p. 22, Spain p. 26, and Sweden p. 28). For a discussion of possible financing schemes for paid family leave, see Lester, *supra* note 7, at 50-66.

40. The section grants leave to take care of a child, spouse, or parent. "Son or daughter" is defined as being under eighteen or over eighteen and incapable of self care due to mental or physical disability. Family Medical Leave Act ("FMLA") § 101(12), 29 U.S.C. § 2611(7) (2006 & Supp. III 2009). "Spouse" is defined as "husband or wife." *Id.* § 2611(13).

41. A serious health condition is defined as "illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." *Id.* § 2611(11).

42. Some states offer more generous arrangements. For example, California became a pioneer in 2004 when it passed a paid family leave law that offers up to six weeks of partial-wage-replacement family leave benefit. See RONA LEVINE SHERRIFF, CAL. SENATE OFFICE OF RESEARCH, BALANCING WORK AND FAMILY (2007), available at <http://www.paidfamilyleave.org/pdf/paidfamily07.pdf>. At least 21 other states introduced bills to expand unemployment insurance programs to provide wage replacement to parents following the birth or adoption of a child. See LISSA BELL, NAT'L PARTNERSHIP FOR WOMEN & FAMILIES: MAKING FAMILY LEAVE MORE AFFORDABLE: STATE PAID LEAVE INITIATIVES IN 2004 AND PRIOR STATE LEGISLATURES 5 (2004), available at <http://www.hhh.umn.edu/centers/wpp/afterbirth/pdf/bell.pdf>; RAY, *supra* note 39.

43. WILLEM ADEMA & PETER WHITEFORD, ORGANISATION FOR ECON. CO-OPERATION & DEV., BABIES AND BOSSES: RECONCILING WORK AND FAMILY LIFE—A SYNTHESIS OF FINDINGS FOR OECD COUNTRIES 104 (2007), available at [http://www.oecd.org/document/45/0,3343,en\\_2649\\_34819\\_39651501\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/45/0,3343,en_2649_34819_39651501_1_1_1_1,00.html).

44. Michael Selmi, *Is Something Better than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL'Y 65, 71 (2004).

45. See *id.*

the same or an equivalent employment position.<sup>46</sup> During the leave period, the employee does not accrue seniority or employment benefits, but is still covered by a health plan if the employer already provides one.<sup>47</sup> Finally, the FMLA prohibits employers from discriminating against employees who demand and exercise their rights under the act.<sup>48</sup>

Paid family leave is not mandated by the FMLA, yet some employers grant paid leave in their employment contracts. Paid leave on an employer-voluntary basis is available in the U.S. labor market mostly to the unionized workforce and to professionals at the highest income levels.<sup>49</sup> Small business employers, business that rely on temporary workers, and businesses that employ mainly unskilled, low-income workers usually do not provide paid leave, and so these workers rely solely on the unpaid leave secured by the FMLA, if it applies to them at all. Those who do have access to some form of paid leave, such as paid sick leave, are sometimes able to use these paid leave days to 'cover' family leave.<sup>50</sup> However, paid sick leave is available to only about half of all workers in the private sector and the wage replacement is usually partial.<sup>51</sup>

The FMLA has been heavily criticized. The business community argues that the period of leave is too long and the criteria for granting leave too permissive.<sup>52</sup> Employee advocates argue that leave options are limited in scope and coverage, the small employer exclusion is too wide and the definition of family too narrow, and that the current structure of leave provisions does not challenge the gendered division of labor.<sup>53</sup> The central criticism of the FMLA, however, focuses on the fact that the leave is unpaid, meaning that it is available only to those who can afford to assume

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46. FMLA § 104.

47. *Id.*

48. *Id.* § 105.

49. U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES (2007), available at <http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf>. A 2000 survey found that fewer than half of private employers (42%) provided fully or partially paid maternity leave and even fewer offered workers fully or partially paid leaves of absence to care for a seriously ill family member or newborn (31%). See U.S. DEP'T OF LABOR, FMLA SURVEY: BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS tbl.5.6 (2001), <http://www.dol.gov/asp/archive/reports/fmla/APPX-A-1-Tables.htm>.

50. U.S. CENSUS BUREAU, MATERNITY LEAVE AND EMPLOYMENT PATTERNS: 1961-1995 12 tbl.G (2001).

51. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES 12 tbl.8 (2004).

52. Peter A. Susser, *The Employer Perspective on Paid Leave & the FMLA*, 15 WASH. U. J.L. & POL'Y 169, 169-71 (2004).

53. Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 770-71 (2000) (arguing for six weeks of paid leave for either mother or father).

familial care responsibilities at the cost of a consistent paycheck.<sup>54</sup> Additionally, it is now widely agreed that the FMLA did not achieve many of its gender-equality goals.<sup>55</sup> Fifteen years after its enactment, most FMLA leave is taken for the purpose of self care, the gender wage gap remains significant, many professions are still gender segregated, and women continue in their roles as primary caretakers.<sup>56</sup> While the FMLA failed to reach its gender-equality related goals, it did improve the working conditions of all workers by providing job-protected sick leave days. This aspect of the Act mostly benefits low-wage workers, since typically sick leave is not contractually provided for such workers, leaving them exposed to the risk of losing their job due to (even moderate) illness.

### B. Redistribution Through Legal Rules—What Is at Stake?

Policy discussions surrounding accommodation mandates are nested within a larger policy debate about the potential for redistribution through legal rules. One important argument made by those who object to protective legal rules is that these rules harm the groups they intend to benefit.<sup>57</sup> Generally, the argument goes, the protective rule harms the group it aims to help because the eventual cost of the protection is shifted from the duty bearer, to the protected group through higher prices and lower wages; or, if this shift is prevented by legal sanction, the costs of redistribution are sustained by another “innocent” group (such as employees or customers that are not members of the protected group) that must then cross-subsidize

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54. Katharine B. Silbaugh, *Is the Work-Family Conflict Pathological or Normal Under the FMLA? The Potential of the FMLA to Cover Ordinary Work-Family Conflicts*, 15 WASH. U. J.L. & POL'Y 193, 193-95 (2004).

55. In *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), Chief Justice Rehnquist described the goals of the FMLA as enhancing labor market and household equality. He said, “By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.” 538 U.S. at 737.

56. “By far, the FMLA is most frequently used by employees for their own serious illness—a fact that has effectively transformed the statute from one involving family leave to one involving sick leave.” Selmi, *supra* note 44, at 67. Silbaugh cites data showing that “the ‘Medical’ in ‘Family and Medical Leave Act’ has, in practice, swamped the leave taken by new parents.” Silbaugh, *supra* note 54, at 202.

57. This argument is made mostly by economists and law and economics scholars. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 504-07 (7th ed. 2007); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 124-27 (2d ed. 1989); Louis Kaplow & Steve Shavell, *Why the Legal System Is Less Efficient than the Income Tax System in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994). However not all law and economics scholars agree on this point. See Christine Jolls, *Behavioral Economic Analysis of Redistributive Legal Rules*, 51 VAND. L. REV 1653 (1998).



the protected group. Therefore, the argument concludes, protective legal rules are an ineffective tool for redistribution. In response, some progressive legal scholars, who accept the basic premise of cost shifting, show that depending on different market contexts, individual preferences, and institutional and legal design settings, the regressive distributive outcome of protective legal rules can be overcome.<sup>58</sup>

This section begins by presenting the main arguments against redistribution through legal rules and the progressive responses to these arguments. Building on this literature, I add my own contribution to the progressive argument for the redistributive potential of legal rules in the context of FAM.

### *1. Arguments Against Redistribution Through Legal Rules*

There are two main objections to redistribution through legal rules. The first objection concerns the feasibility of reaching redistribution using protective legal rules due to cost shifting, and the second refers to market efficiency.

In the context of labor markets, the basic economic argument for cost shifting was modeled by Lawrence Summers in his partial equilibrium cost theory model.<sup>59</sup> Summers demonstrated how a mandatory requirement to provide a benefit to employees, one that increases labor costs, prompts employers to adjust their demand for labor. In other words, increased labor costs due to mandated benefits lead to a decrease in labor demand because employers must compensate for the additional costs imposed. Employees thus enjoy non-monetary compensation, as mandated by statute, and, depending on their valuation of the mandated benefit, are willing to work more for the same wage. The post-mandate equilibrium is therefore lower wages, meaning that employees' willingness to work for lower wages depends on the value they attach to the benefit. According to Summers' model, the mandated benefit is efficient only if employees value it more than its cost. Regardless of employees' valuation of the benefit, the mandate will not lead to redistribution from employers to employees because of cost shifting.<sup>60</sup> This model is often used in policy and scholarly debates regarding the design of protective contract rules, such as consumer protection, tenant protection, and employee protections. Following Summers' model, the argument is that redistribution through protective legal rules is ineffective due to cost shifting.

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58. See *supra* note 7.

59. See Lawrence H. Summers, *Some Simple Economics of Mandated Benefits*, 79 AM. ECON. REV. 177 (1989).

60. *Id.*; see also Jolls, *supra* note 7, at 255-57.

The second objection to redistribution through legal rules concerns efficiency. The argument here is that protective legal rules are inefficient in comparison to other redistributive means, such as tax and spend measures. Tax and spend redistributive measures do not require the expensive enforcement mechanism of the courts and give the money directly to protected group members (the poor, women, the disabled, etc.).<sup>61</sup> Given that the focus of this article is cost shifting and the feasibility of redistribution through protective legal rules, the discussion will not encompass a thorough review of efficiency critiques.<sup>62</sup>

## 2. *Progressive Responses*

### a. *Regressive Redistribution Can Be Prevented*

Progressive legal scholars have developed a response to the argument against redistribution through legal rules: the regressive distributional impact of protective legal rules can be overcome if background rules are in place to prevent cost shifting. An example of this claim is Bruce Ackerman's argument against the inevitability of cost shifting.<sup>63</sup>

Ackerman suggested that policy makers can predict cost shifting that results from protective legal rules and overcome its effects by creating rules and enforcement practices that prevent passing on the cost of protective rules. Ackerman uses the example of housing codes. The conservative argument asserts that heavy enforcement of housing codes will increase costs and push some landlords out of the market, decreasing the supply of housing and increasing rents. In response, Ackerman suggests that even if housing codes increase the cost of property for sub-standard housing landlords ("slumlords"), the extra cost will not shift to slum tenants if the housing codes are vigorously enforced throughout a specific housing market and if the government provides housing subsidies to tenants, thereby

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61. POSNER, *supra* note 57, at 504-07; Kaplow & Shavell, *supra* note 57.

62. A detailed critique of the efficiency criterion, as it is used in law and economics literature, is beyond the scope of this article. Here I am interested in the question of the feasibility of reaching redistribution through legal rules and not in the normative debate regarding efficiency and redistribution. For progressive critiques of efficiency, see, e.g., Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769 (1979); Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 465 (P. Newman ed., 1998); Duncan Kennedy, *Cost Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). A third objection, which is even further from the focus of this article and that I will therefore not elaborate upon, is that it is morally unjustifiable to make the party to which the cost was redistributed by the rule (employers, co-workers, landlords, sellers, etc.) carry its burden. For the progressive response to this argument, see Ackerman, *supra* note 7, at 1170-72.

63. Ackerman, *supra* note 7.

ensuring that there are enough units even after some landlords exit the market.<sup>64</sup>

In a similar vein, Duncan Kennedy suggests that the enforcement of housing codes will increase, rather than reduce, the supply of low-income housing. This will be the case so long as enforcers target buildings that landlords were "milking": buildings maintained at a lower standard than otherwise appropriate were the landlord to keep the building in operation indefinitely. In these cases landlords neglect buildings because they predict that in several years the cost of building maintenance might exceed rental income (due to increased costs of heating oil, a changing neighborhood, etc.), and therefore eventually their best option will be to abandon, rather than sell, the building. As a result they attempt to reduce maintenance expenditure to the minimum since preserving the building is no longer an objective. If enforcement efforts target these landlords, it risks pushing out of the market landlords who were at risk of abandoning their buildings in any case, and might deter some landlords from such "milking" behavior and induce greater building preservation.<sup>65</sup> Ackerman and Kennedy's examples suggest that protective legal rules such as housing codes can be effective tools of redistribution if enforcement strategically takes into account potential cost shifting and counters it.

In the context of accommodation mandates, Christine Jolls has made a similar argument.<sup>66</sup> Jolls' model is based on Summers' partial equilibrium cost theory model. The working assumption of Jolls' model is that accommodation mandates impose costs on employers that are directly related to the employment of protected groups. The additional costs discourage the employment of protected workers, unless employers can shift those costs to protected group members via lower wages. Consequently, the mandate enhances discrimination against protected groups in terms of wages and hiring. Jolls shows, however, that through binding anti-discrimination regulations, cost shifting can be avoided, especially if the workplace is composed of protected and unprotected workers so as to allow for cross-subsidization.

According to Jolls' analysis, the binding effect of anti-discrimination law serves as a countervailing force by preventing wage and hiring

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64. *Id.* at 1097-98.

65. Duncan Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U. L. REV. 485, 505-06, 519 (1987). Kennedy's writings provide arguments for protective legal rules in the context of debtor protection and consumer protection as well. See Duncan Kennedy, *Cost-Benefit Analysis of Debtor Protection Rules in Subprime Market Default Situations*, in BUILDING ASSETS, BUILDING CREDIT 266 (Eric Belsky & Nicolas Retsinas eds., 2005); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 596-614 (1982).

66. Jolls, *supra* note 7, 226-29, 242-61.

discrimination of the protected group.<sup>67</sup> If the workplace is integrated, in the sense that it is composed of members of both groups, then the cost shifts to those workers who do not value the benefit, either because they do not have families or because another family member already fills the caregiving role. If the workplace is segregated and consists solely or mainly of members of the protected group, regardless of whether or not the wage and hiring restrictions are binding, the employer can reduce workers' wages since there is no diverse group of workers with whom to compare the protected workers' wages in order to prove discrimination. This last scenario is a partial explanation for the wage effect of occupational segregation, so that occupations dominated by women are generally characterized by lower wages, in contrast to professionally comparable occupations.

Turning to the FMLA, with its unpaid leave provision, Jolls predicts that women will internalize the cost of FAM through reduced wages. However, it seems that Jolls' prediction works only under the assumption that most women are employed in gender segregated occupations, where no cross-subsidy is possible. While her general point about accommodation mandates is optimistic, in relation to the FMLA Jolls confirms the conservative objection to accommodation mandates.<sup>68</sup> Though Jolls' distributional model is useful, her analysis of the FMLA is open to criticism, particularly if a long-run outcome of the FMLA will be market desegregation and enabling easier integration of women in male dominated workplaces.

The responses developed by Ackerman, Kennedy and Jolls emphasize the importance of predicting unintended consequences of protective legislation and the potential for enforcement mechanisms to counter-balance the effect of cost shifting. These responses show that cost shifting is not inherent in protective legal rules, that through strategic implementation it can be overcome, and that a contextual, case-by-case analysis is necessary to determine the distributional effect of protective legal rules.

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67. *Id.* at 242-51.

68. For a detailed and insightful analysis of the distributive effect of paid FAM that builds on a similar logic, see Lester, *supra* note 7, at 58-59. Lester's piece offers a normative defense to paid family leave. Lester concludes that FAM will, under current conditions, lead to regressive distributional outcomes, *id.* at 58-59, and suggests paid family leave is necessary to achieve redistribution, *id.* at 61-62.

*b. Some Cost Shifting Is Not Harmful to the Protected Group*

Yet another response to the cost shifting model was developed by Duncan Kennedy, this time in the context of consumer protections.<sup>69</sup> Kennedy analyzed the distributive effects of insurance-like compulsory terms, such as producer mandated warranties for hazardous products, and found that cost shifting to the protected group is not regressive if, *ex ante*—at the time of purchase—the protected group values the mandated benefit less than its cost to the producer.<sup>70</sup> This scenario leads to redistribution because the producer, the benefit provider, bears a greater cost than what is shifted to the protected group, for example, through a price increase. Kennedy argues that compulsory terms in consumer contracts are desirable from a distributive point of view only if: (1) the protective terms function as insurance, and (2) the *ex-post*—after purchase—situation of the consumer, after pay-outs by the insurance scheme, is better than her situation without the compulsory term.<sup>71</sup>

The foundation of Kennedy's conclusion regarding redistribution is based on an *ex-post* analysis of the distributive effects of consumer contracts. Whereas an *ex-ante* analysis would find that the compulsory term in the contract led to regressive redistribution, an *ex-post* analysis looks at the distributive outcomes after, for example, the hazardous product explodes and harms the consumer who then collects, due to the compulsory term in the contract, insurance-like payments. Kennedy shows how a consumer's *ex-ante* valuation is inaccurate as a result of wealth effects and imperfect information.<sup>72</sup> Accordingly, Kennedy concludes, it is more appropriate to evaluate the distributive effects of protective legal rules the moment the compulsory term becomes effective. In this way, compulsory terms lead to significant redistribution from producers to consumers.

Recall that Summers' model suggested that protective rules do not redistribute, as a result of cost shifting, but that they are efficient if the protected group (buyers) value the benefit more than its cost to providers (producers). In contrast, Kennedy's argument is that redistribution occurs only when the protected group values the mandated benefit less than its cost to the provider. This position highlights the tradeoff between redistribution and efficiency.

Richard Craswell offered a different response to the argument that protective legal rules lead to regressive redistribution.<sup>73</sup> Like Kennedy, his

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69. Kennedy, *supra* note 7.

70. *Id.* at 4-9.

71. *Id.* at 3.

72. *Id.* at 8, 23-24, 32-33, 40-43.

73. Craswell, *supra* note 7.

response is based on the valuation of the benefit by the protected group. Craswell's response challenged the tradeoff between efficiency and distribution. He attempted to show how the assumption that lies at the center of Kennedy's analysis, that "buyers are more likely to benefit from a rule if sellers are unable to pass along much of their costs," is false.<sup>74</sup>

Applying Summers' cost shifting model in the context of product liability law, Craswell argues the following: because the cost of products need not remain stable, when sellers are required to add a warranty, they increase the cost of the product, shifting the cost of protective rules to buyers.<sup>75</sup> The increased cost of the product and warranty is distributed between different groups of buyers. Buyers who value the warranty more than the added cost are de-facto subsidized by buyers who value the warranty less than or equal to the added cost.<sup>76</sup> Craswell demonstrates that cross-subsidization depends on the valuation of legal rules. Therefore, even if some of the cost of the warranty is shifted to consumers, the rule remains efficient for those who value the warranty more than its cost. The buyers' benefit is thus the gap between the cost of the product and warranty, and their higher valuation of the warranty. Depending on their valuation of the warranty, rules will have varying effects on different groups of buyers. In short, the cost increase will push some buyers out of the market, and those who value the warranty more than its cost will be cross-subsidized by those who value it less than its cost.

Craswell suggests, therefore, that if sellers are unable to pass the cost because buyers' valuation of the warranty is lower than the products' new higher cost, the rule is not necessarily good for all buyers.<sup>77</sup> Further, under certain circumstances, a mandated protection actually benefits the protected group, such as when the seller shifts the cost and consumers are willing to pay the additional price. Therefore, protective legal rules are preferable to consumers, even if they internalize the cost without redistribution to the sellers.<sup>78</sup>

Kennedy and Craswell's attention to the protected group's valuation of the benefit shows that the tradeoffs produced by protective legal rules are not necessarily between efficiency and distribution, but also between levels of redistribution. If choosing between an efficient legal rule that does not redistribute (cost shifted to protected group), an efficient legal rule that marginally redistributes (cost shifted but consumer valuation is higher than the cost increase), and an inefficient legal rule that radically redistributes

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74. *Id.* at 362.

75. *Id.* at 366-68.

76. *Id.* at 372-73.

77. *Id.* at 395-98.

78. *Id.* at 383-84, 398.

(none of the cost is being shifted to the protected group), the choice depends on distributive preferences.

This debate has established three elements that are pivotal in the assessment of the distributive potential of legal rules: first, the risk of cost shifting and the institutional potential for countering it through an in-depth understanding of the legal and economic context in which the rule is embedded; second, the importance of assessing valuations of the benefits provided, as well as the significance of its timing (ex-post/ex-ante) in order to capture the full distributive effect of the rule; and third, the existence of distinct interests within a seemingly homogenous protected group. The fragmentation of seemingly-unified interests is exposed when we identify cross-subsidization that occurs either due to difference in valuation among individuals of the targeted group or under the institutional—economic and legal—context. These elements can guide our understanding of the full distributive affects of FAM, as well as the design for effective FAM. Building on this debate, I offer a new framework that explores the distributive consequences of the FMLA. The analysis tracks the distributive impact of FAM, and shows that, while FAM can generally improve the labor market position of workers with familial care responsibilities, they do not necessarily help all workers with such responsibilities. Different accommodation mandates have different distributional effects and none of them straightforwardly and unilaterally improve the position of workers with familial care obligations in the labor market.

### C. *The FMLA: A Distributional Analysis*

The distributional framework I offer involves five elements: material delivery, stratification, de-commodification, de-familialization, and intra-household division of labor.

The first element, material delivery, or “who gets what,” looks at the redistribution of wealth and asks how much targeted groups actually gain from a given policy: how did the situation of the targeted group materially change following the policy’s implementation? The following three elements—stratification, de-commodification, and de-familialization—derive from political economy scholarship, suggesting that these three additional elements should be taken into account in order to accurately capture important distributive outcomes of social policy.<sup>79</sup> Stratification

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79. The three elements are taken from the influential work of sociologist Gøsta Esping-Andersen, who developed them in the context of identifying the distributive outcomes of welfare states. The first two—stratification and de-commodification—were introduced in his pioneering work from 1990, in which Esping-Andersen suggested a novel framework through which to study the origins and trajectories of social policy, and, more importantly, to analyze, evaluate, and qualitatively compare the

describes ways in which the welfare state serves to structure the quality of social citizenship. The underlying assumptions here are that, while the welfare state is supposed to be an equalizing force that minimizes stratification, it also produces stratification, and that "[t]he organization features of the welfare state help determine the articulation of social solidarity, divisions of class, and status differentiation."<sup>80</sup> This element looks at how welfare policy shapes class and social status. De-commodification measures the degree to which social rights "permit people to make their living standard independent of pure market force,"<sup>81</sup> thus diminishing a citizens' status as a commodity. This element looks at the level of dependency on the labor market required for economic survival. Greater market dependency means greater commodification. De-familialization measures the degree to which social policy frees men and women from family obligations and examines whether care responsibilities are a private, familial, or public-social matter. The more care rendered in private, the greater the familializing effect of the regime.<sup>82</sup> Familialization and commodification do not necessarily preclude each other. Social policy can produce intense dependence on the market (commodification) and on the family (familialization). This will be the product of social policy that seeks to "privatize" dependence, discourage dependence on the state and encourage dependence on the "private" institutions of the family and market.

The fifth element is Intra-Household Division of Labor (IHDOL). This element shifts our focus from distribution between market and family, and between employers and employees or between different groups of employees in the labor market, to distribution within the family. The IHDOL element focuses on the policy's effect on male and female contributions to household care work. It questions the extent to which policies entrench, transform, or disrupt the traditional breadwinner/housewife division of labor, in which men are the financial providers and women are the providers of care. Adding the IHDOL element to the above framework suggests that measures of familialization or

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distributive outcomes of post-industrial capitalist welfare states. ESPING-ANDERSEN, *THREE WORLDS*, *supra* note 8. The de-familialization element was introduced in his 1999 book *SOCIAL FOUNDATIONS OF POST INDUSTRIAL ECONOMIES*. See ESPING-ANDERSEN, *SOCIAL FOUNDATIONS*, *supra* note 8, at 47-72.

80. ESPING-ANDERSEN, *THREE WORLDS*, *supra* note 8, at 55.

81. *Id.* at 3.

82. Esping-Andersen added the de-familialization element to his later work in response to feminist criticism that his analysis ignored the role of the family in welfare provision. He defines de-familialization as "the degree to which households' welfare and caring responsibilities are relaxed—either via welfare state provision, or via market provision . . . . A de-familializing regime is one which seeks to unburden the household and diminish individual's welfare dependence on kinship." ESPING-ANDERSEN, *SOCIAL FOUNDATIONS*, *supra* note 8, at 51.



de-familialization are important but not sufficient to an understanding of what happens in the household.

The five evaluative elements provide a nuanced toolkit for describing and assessing the distributive effects of policies concerning familial care. This new distributive framework presents three main improvements to existing models. First, the framework goes beyond the material or pecuniary dimension to examine the ways in which legal regulation also distributes power, opportunities, time, and bargaining endowments, and thus shapes power relations in a broad sense. Second, the analytical model exposes the multiple layers on which any given legal regime operates and the complex distributive outcomes that may result from various regulatory combinations. The model therefore unpacks the concept of distribution and the tradeoffs embedded in legal regulations or reform proposals. Finally, the framework helps identify the complex set of interests implicated by particular policies and avoids the assignment of unified interests to identity groups, such as members of the same family, class, or sex. For example, the framework exposes the fact that we cannot talk coherently about the interests of women vis-à-vis men, or employers vis-à-vis employees, as if they were one-dimensional, unified groups. Thus, rather than talk about the interests of "women" in general, the analysis acknowledges that the interests of women who employ care workers and women that are themselves care workers often diverge.

Building on the progressive responses to the argument against redistribution through legal rules, as surveyed in Section B, the working assumption of this framework is that conflicting interests arise not only between traditional interest groups, but also within them, resulting in the formation of unexpected coalitions. Thus, the framework divides groups along the following lines: high and low income workers with familial care responsibilities and high and low income workers in the general workforce without familial care responsibilities. The following analysis focuses mainly on the primary labor market and covers only those workplaces protected by FAM.<sup>83</sup>

### *1. Material Delivery*

The material delivery element of the distributional analysis model concerns the potential of redistribution through legal rules: what are the mandates' material and monetary effects on the people they are supposed to help? Under Summers' partial equilibrium cost theory model, the

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83. In Part III the article will turn to the distributional effects on workers that are excluded from the scope of FAM and other protective employment rules, mostly secondary labor market workers, with a special focus on care workers.

assumption is that employers shift the cost of accommodation mandates to the protected group, leading to a decrease in the protected groups' wages or employment levels.<sup>84</sup> Jolls' model complicated this picture by highlighting the importance of workplace composition and the background rules of anti-discrimination.<sup>85</sup>

Three important factors that affect the distributional outcome of FAM are either missing or misused in this conventional analysis: the interaction between the market, family, and state in a given social and legal context; the interaction of FAM with other universal leave policies available to all employees; and, the role of anti-discrimination law and market composition.

Though Jolls has drawn attention to the role of anti-discrimination law and market composition, her analysis fails to accurately apply these factors to the FMLA, leading to an inaccurate distributive assessment.<sup>86</sup> In terms of anti-discrimination law, she assumes that Title VII applies to employees with familial care responsibilities.<sup>87</sup> With respect to market composition, Jolls suggests that most women work in gender-segregated occupations anyway, and therefore, without the option of cross-subsidization, they internalize the cost of the accommodation mandate in the form of reduced wages. Yet, one of the goals of the FMLA is to reduce job segregation by adapting the traditional workplace to the needs of workers with familial care responsibilities. Thus, even if the FMLA causes wage reductions in the short term,<sup>88</sup> it can also enable women's market participation via higher paying jobs in the future. The result might mean a less segregated labor market.<sup>89</sup>

The FMLA's structure for unpaid leave applies a single set of rules to sick leave, family leave and parental leave. Pooling these types of leave days into the same provision means that all workers—including those that are not primary care takers or those that have no children or family—can

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84. Summers, *supra* note 59.

85. Jolls, *supra* note 7.

86. Jolls, *supra* note 7, at 298-99.

87. See discussion *supra* Part II.A.2 (suggesting that Title VII in fact does not provide much protection to workers with familial care responsibilities).

88. Jolls does not find data supporting this finding in the United States. She turns to cite data about parental leave in Europe to support her prediction. Jolls, *supra* note 7, at 296-97. However, European leaves tend to be more costly to employers because the leaves are paid, longer, and at times mandatory. Lester, *supra* note 7, at 3, 83. Therefore assuming that the FMLA will lead to the same result seems unwarranted.

89. After assessing the FMLA as a redistributive failure, in the last paragraph of her discussion Jolls briefly mentions this, suggesting that the FMLA may have a "composition effect, moving women into, or keeping them in, better, higher-level jobs." Jolls, *supra* note 7, at 299. But she hardly presses this idea, and only ambiguously notes that if this is true then "the aggregate effects may be more mixed and more complex." *Id.* at 299.

use the FMLA for self-care. The structure of the FMLA avoids any significant material redistribution of the cost of care from people with familial care responsibilities to the employer or the general workforce. Indeed, studies show that the FMLA did not achieve such redistribution: 52% of the workforce took leave for personal health reasons and 13% took leave to care for a seriously ill parent.<sup>90</sup> This means that the majority of leave days were not taken due to the illness of a child. Still, women employees took more FMLA leave days than men.<sup>91</sup> This means that while people do not take more leave because they are parents—that is, parents are not more costly workers than non-parents—women take more leave than men, presumably because they care for their own needs and that of their families. This makes the female workforce somewhat more costly to employ.

The extra cost imposed on employers is relatively small given that during the leave period the employee is not paid and does not accrue seniority or employment benefits. The only cost to employers is that of replacing the worker and, if health insurance is provided, continuing health insurance payments. Following Craswell's analysis, the fact that workers internalize most of the costs of care, resulting in no redistributive effect, does not necessarily mean that the mandate is harmful to workers with familial care responsibilities.<sup>92</sup> If workers with familial care responsibilities highly value leave days, they might be willing to pay for them in the form of lost income. Workers' choice to utilize the leave, therefore, might suggest that it is in fact beneficial for them because they value the leave more or equal to its cost. The fact that women take leave more often than men suggests that women—due to personal preference and/or social constraints<sup>93</sup>—value the benefit more. Regardless of this result, whether viewed as efficient in a narrow sense or not, the mandate clearly does not meet the goal of redistribution of care work and income between the sexes.

Studies showing that women's wages were not adversely affected by the FMLA support the fact that the FMLA did not introduce significant

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90. U.S. BUREAU OF LABOR STATISTICS, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES (2007), available at <http://www.bls.gov/ncs/cbs/sp/ebsm0006.pdf>.

91. Research shows that 58% of FMLA leave takers are women and 42% are men. *Id.*

92. Craswell, *supra* note 7, at 362, 371-72.

93. The reason for such preference can be varied: it may be induced by the gender wage gap, leading women to value the larger income of their husbands more than their own smaller wage loss; or they may not have a choice—if they have no free income to hire a care worker (and the wage they would lose is not enough to provide for care services), they will have to take the leave even if they value it less than the wage. Finally, this may also reflect an authentic valuation by some women who prefer to care for their family. Accordingly, one cannot stop the distributional analysis at suggesting that this reflects women's 'preference.' Rather we need to go beyond the material to examine the other four elements of the analysis.

costs to employers with a female workforce.<sup>94</sup> This is true in both segregated workplaces, where cross-subsidization by men is not available, and in integrated workplaces, where cross-subsidization is possible. Within integrated workplaces, an argument that due to binding anti-discrimination law the new costs shifted to the general workforce rather than to workers with familial care responsibilities seems to me to be inaccurate for two reasons. First, there were no wage effects in segregated workplaces, where there is no male workforce to subsidize costs. Second, in the United States there is no binding anti-discrimination law that prohibits discrimination based on familial care responsibilities. Sex and pregnancy-based anti-discrimination law might offer some protection to workers, but unfriendly care-related workplace policies are often not easily identifiable as gender-based discrimination.<sup>95</sup>

The low extra cost to employers, which in turn translates to low cross-subsidization, means that a majority of the costs of leave remain with the family, and are borne directly by the employee who takes the leave. This helps to explain why it is mostly women who take family leave: in a labor market in which women on average earn less than men, a rational household will opt for women to take unpaid leave in order to avoid forgoing the higher wage earned by the father. The FMLA does help women by ensuring they can keep their job after taking leave, yet, given that the cost of leave does not shift to the market or state, the FMLA offers little intervention in the material outcomes of a gendered division of labor. Accordingly, the FMLA does not significantly help the people it aims to benefit—workers with familial care responsibilities, specifically women—and it “may do little to alter the status quo.”<sup>96</sup>

In terms of material delivery, the insignificant redistributive effect of the FMLA is not a necessary characteristic of unpaid FAM. Rather, it is the result of the interaction between the FMLA, with its wider scheme of employment protections, and the lack of protected leave in federal and most state employment laws. In a different context, unpaid family leave might benefit people with familial care responsibilities. This may occur once employment law offers universal paid leave to the general workforce. This is, for example, the situation in Australia.

Australia offers an interesting comparison because, along with the United States, it is the only other OECD country that does not provide paid

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94. Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL'Y ANALYSIS & MGMT. 281, 294-99 (1999).

95. See discussion *supra* Part II.A.2.

96. Jolls, *supra* note 7, at 296-97; Lester, *supra* note 7, at 37 (citing studies that show that the FMLA has insignificant effects on female labor force behavior).

maternity leave.<sup>97</sup> While there is no universal entitlement for paid parental leave in Australia, there is a right to twelve months of unpaid parental leave.<sup>98</sup> However, while parental leave is unpaid, workers are eligible for four weeks of annual paid leave,<sup>99</sup> as well as 10 days of paid personal leave per year<sup>100</sup> and, in some cases, several weeks of paid "long service leave."<sup>101</sup> A parent can therefore arrange to take other forms of paid leave, such as annual or long service leave, during her parental leave, thereby deducting from the overall 12 months period.<sup>102</sup> Moreover, unlike the United States, Australian workers are directly protected against discrimination on the basis of their sex, parental status, and familial responsibility.<sup>103</sup>

When isolated from the rest of the leave matrix, Australia's parental leave is similar in structure to the FMLA.<sup>104</sup> At first blush, the unpaid FAM regimes of the United States and Australia appear to operate equally in terms of material effects. In both jurisdictions workers with familial care responsibilities bear the costs of family leave, meaning that the gender status quo is left relatively untouched. Yet, the unpaid component of the Australian FAM is modified by the ability to use paid annual leave and long

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97. Fair Work Act, 2009, ch. 2 § 70 (Austl.). Following a social debate about maternity leave, the Australian government introduced in 2004 a "baby bonus," a welfare-style flat rate benefit, transferred to the mother at birth, irrespective of financial need or labor market participation. See Australian Taxation Office Home Page, What is Baby Bonus, available at: <http://www.ato.gov.au/individuals/content.asp?doc=/content/33906.htm&page=1&H1> (last visited Dec. 2009); Marian Baird, *Orientations to Paid Maternity Leave: Understanding the Australian Debate*, 46 J. OF INDUS. RELATIONS 259, 266 (2004). Accordingly, it is doubtful whether it will be accurate to characterize Australia currently as not providing any maternity payment. *Id.* at 265. It should be noted that the benefit was highly controversial among feminists. See *id.* at 265-66.

98. Fair Work Act, 2009, ch. 2 § 70 (Austl.). For a discussion of the development of parental leave in Australia see Marian Baird, *Paid Maternity Leave in Australia: HREOC's Valuing Parenthood*, AUSTL. REV. PUB. AFFS., June 14, 2002.

99. A full time employee working regular hours accrues four weeks of annual paid leave for each year of employment. Fair Work Act, 2009, ch. 2 § 87(1) (Austl.). Annual leave is cumulative. *Id.* § 87(2).

100. After a year of employment a full-time employee accrues ten days of paid personal leave. *Id.* § 96. Personal leave can be taken due to personal illness or injury (sick leave), or to provide care and support for an employee's immediate family or household member who requires care or support due to personal illness or injury, or an unexpected emergency (carer's leave). *Id.* § 97.

101. Employees are entitled under some agreements and awards to additional leave beyond her annual leave, known as Long Service Leave, provided that they stay with a particular employer for a certain length of time. *Id.* § 113. While the act does not guarantee such rights it does preserve award terms that deal with long service leave. *Id.*

102. *Id.* § 79.

103. *Id.* § 772(1); Sex Discrimination Act, 1984, ch.1 § 7A (Austl.).

104. Having such a long period available to new mothers does run the risk of the leave harming the workers it is trying to help. Beside the additional cost to employers that might be shifted to the workers (depending on workplace composition and binding anti-discrimination law), taking such long leave might reduce women's workplace attachment and lead to devaluation of human capital. See, e.g., Jeanne Fagnani, *Parental Leave in France*, in PARENTAL LEAVE: PROGRESS OR PITFALL? 79 (Peter Moss & Fred Devin eds., 1999).

service leave.<sup>105</sup> The availability of paid leave days equally available to all workers and combined with a longer period of unpaid leave, as triggered by pregnancy and childbirth, means that new parents, especially new mothers, impose relatively little additional cost on employers. The internalization of costs by the protected group is also minimized by making maternity leave a latent component of leaves taken by the general workforce. Only when new mothers take unpaid leave or leave that is longer than their combined paid leave rights,<sup>106</sup> do effects similar to those of the FMLA result, such as cost internalization by the family, including some minimal wage and hiring effects. The Australian model, combining maternal leave with a background of paid universal leaves available to the whole workforce, and parental anti-discrimination law, leads to a more significant class and gender redistribution: the leave is available to all workers, not only to those who can afford it,<sup>107</sup> and women, at least theoretically, cannot be discriminated against in hiring or wage because of their suspect status as possible or actual primary care takers.

Along the axis of material delivery and depending on the employment law regime, the distributive outcome can diverge, even among regimes that use unpaid leave. Summers' model suggests that even if familial leave were paid, the distributive consequences would remain the same and costs would shift back to workers through lower wages or lower employment rates.<sup>108</sup> However, if paid FAM were established in an integrated workplace operating under a binding anti-discrimination legal regime, the costs would shift to all workers through cross-subsidization. Moreover, under a paid leave regime paid by the government and funded through taxes, the costs of familial care would be distributed equally among taxpayers and workers with familial care responsibilities would not internalize the majority of costs through foregone wages and foregone personal leave days.

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105. In 2005, 73% of working mothers who gave birth used leave; 37% used a combination of paid and unpaid leave; 14% used only paid leave; and 22% used only unpaid leave. AUSTRALIAN BUREAU OF STATISTICS, MATERNITY LEAVE ARRANGEMENTS 2 (2007), available at [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/2DC476A215C81A80CA25732F001C9D91/\\$File/41020\\_Maternity%20leave%20arrangements\\_2007.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/2DC476A215C81A80CA25732F001C9D91/$File/41020_Maternity%20leave%20arrangements_2007.pdf). The remaining 27% did not use leave at all, with the majority of these women leaving their job. *Id.*

106. The average leave taken by new mothers is 34 weeks—a longer period than all the universal leaves combined. *See id.*

107. However, there is some regressive redistribution in the sense that workers with familial care responsibilities are likely to use days allocated to take care of their own health condition in order to take care of family members. For this reason it is suggested that "the standard still reflects the assumption that the normative worker is 'unencumbered,' and also privileges those fitting the pattern of the standard worker of the Industrial era." *See* ROSEMARY OWENS & JOELLEN RILEY, *THE LAW OF WORK* 322 (2007).

108. Summers, *supra* note 59.

In social-democratic welfare states, such as the Scandinavian countries, which offer generous paid family leave and binding anti-discrimination laws, employers side-step the additional costs imposed by the generous leave granted to women workers through labor market segregation and reduced wages in feminized occupations.<sup>109</sup> Thus, workers with familial care responsibilities bear the costs in a segregated labor market, while in integrated workplaces that operate under binding anti-discrimination laws that protect workers on the basis of sex, marital and parental status, the costs are spread throughout the general workforce. Still, under-enforcement continues to affect hiring and promotion rates, promulgating the proverbial glass ceiling.

Moreover, even when leave is paid for by the government, anti-discrimination laws are binding, and the workplace is integrated, some cost internalization by workers with familial care responsibilities persists. For example, workers on leave generate costs with respect to their substitution while on leave and continuing contribution to health insurance payments. Whenever FAM are used more frequently by the targeted group, the costs seem to disadvantage protected workers in that, regardless of the financing solution chosen by policy makers<sup>110</sup> and whether the benefits overlap with universal leaves or not, the resulting costs make the employment of the protected group more expensive. Therefore, due to the residue of additional cost that remains even under paid leave, the rule risks causing some harm to the group it aims to help.

## 2. *Beyond Material Delivery*

While the distributive analysis focused only on material delivery it turned out that even under the most generous FAM regime, the employer will most likely shift some of the cost of the mandate to the protected group. In this section the analysis will proceed beyond the material delivery element to examine the distributive effects of FAM on four additional elements: commodification, familialization, stratification, and intra-household division of labor (IHDOL).

### a. *Commodification and Familialization*

Granting workers the right to FAM has a de-commodifying effect in that it reduces workers' dependence on their individual bargaining power

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109. See Marianne Nordi Hansen, *The Scandinavian Welfare State Model: The Impact of the Public Sector on Segregation and Gender Equality*, 11 WORK, EMP., & SOC'Y 83, 90-96 (1997); Jill Rubbery & Colette Fagan, *Gender Segregation in Societal Context*, 9 WORK, EMP., & SOC'Y 213, 219, 233-34 (1995).

110. Common ways for governments to finance paid leave are via payroll tax and general revenue financing. See Lester, *supra* note 7, at 50-57.

vis-à-vis their employer by granting them the right for unpaid leave days regardless of their labor market bargaining position. In other words, they can spend more time outside the labor market without jeopardizing their employment and livelihood. The level of de-commodification depends on the details of the mandate, namely, whether it is paid, its length, and its interaction with other leave mandates such as parental leave, sick leave, and annual leave. Granting a targeted group the right to leave does not come at the expense of other workers since commodification and de-commodification are not a zero sum game: deeper de-commodification of one worker does not mean less de-commodification to another. Accordingly, de-commodification through accommodation mandates does not involve cost shifting or cross-subsidizing.

The structure and design of FAM have an important role in shaping the distributive outcomes in terms of commodification and familialization. The main element is whether the leave is paid or unpaid. However, other elements, such as the availability of paid universal leave, the length of the leave, and the availability of welfare benefits, are also highly determinative.

I will begin by considering only the paid/unpaid element in a stylized, non-contextual, hypothesis. I will then incorporate the additional elements when analyzing the distributive effects of the FMLA as it interacts with the U.S. labor market and the U.S. welfare state.

If familial leave is unpaid, the FAM regime can have two effects. On the one hand, it can lead to the intense commodification of low-income workers with familial care responsibilities.. Absent other financial sources of support—such as familial support (an employed spouse or family wealth), welfare state support (de-commodifying instruments such as a “baby bonus” or children’s allowance) or the availability of other paid leave days<sup>111</sup>—a low-income worker cannot afford to take leave and the result of the unpaid leave will be commodification. On the other hand, unpaid leave can lead to de-commodification if the worker enjoys the availability of leave days and funds them by using alternative sources: family, the welfare state, or a universal leave regime. These sources allow the worker to withdraw from paid labor for a period of time determined by the length of the available job-protected leave and the relation between wage levels upon return to the labor market and the extent of financial support available independent of the market.

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111. The option to use leave days for familial care out of a universal paid leave matrix (such as sick leave, annual leave, etc.) can be seen as having a similar effect to that of paid familial leave—de-commodification and de-familialization. However, the effects are parallel and not identical because the worker using universal leave days gets paid but is required to “cannibalize” her other leave days, and accordingly enjoys less leave days for her own health or recreational needs, which represents a form of cost internalization. See, e.g., Fair Work Act, 2009, ch. 2 § 79 (Austl.) (the FAM regime in Australia).



These two scenarios regarding commodification relate to the effect of social policy on enhancing or relaxing familial dependence—familialization and de-familialization. When job-protected leave is unpaid and the worker has no other sources of financial support, the effect may be commodification and de-familialization, meaning that either the worker will need to return to work after a minimal period of leave or forego her right to leave altogether. When the worker has other sources of financial support, the effect is de-commodification and familialization. In such cases, where the worker is not fully dependent on market labor for economic survival, the length of leave becomes crucial. If the available job-protected unpaid leave is extensive, the effect of de-commodification is familialization, which may in turn decrease the worker's incentive to maintain or develop market-based human-capital. Thus, if most users of FAM are indeed women, de-commodification and familialization may compel a reduction in their labor market participation because the work cycle is interrupted by long periods of leave, thereby decreasing the employee's incentive to invest in the development of human capital. Due to gendered social norms that encourage women, rather than men, to take care leave, familialization affects women at a disproportionate rate. The familializing effect therefore results from a combination of gendered expectations, the wage gap between men and women, and reduced incentives for women to maintain or develop market-based human capital. A short leave period, however, might reduce the effects of familialization.

If the leave is paid, both the form in which the mandate is financed and the potential for cost shifting play a crucial role in determining the mandate's overall distributive effects. If the employer pays the leave and shifts the additional cost of the imposed mandate to the targeted group via reduced wages, which is possible in segregated workplaces where anti-discrimination laws are ineffective, the effects are similar to those of unpaid leave. Thus, when non-market support alternatives are available to the worker during the leave period, the result of paid leave is de-commodification and familialization; and, when no other support alternatives are available to the worker, the result of paid leave is commodification and de-familialization. However, in the latter case, when no other sources of support are available to the worker and the employer shifts the cost to the worker, the commodifying and de-familializing effects are attenuated by the fact that the paid leave regime acts like a savings account (or mandatory insurance)—the worker does not receive a financial benefit. Instead the regime forces her to receive wages in such a way that makes funds available to her when a family member is ill.

If the leave is paid and the cost is not shifted to the worker, the effect is de-commodification and, potentially, de-familialization, in the sense that the worker is dependent on neither family nor market for economic

survival. If the leave is extensive, the overall effect might familialize the worker and encourage frequent and lengthy absences from the workplace, thus decreasing her market value as an employee, weakening her attachment to the workplace, and decreasing her investment in the development of human capital. From a worker's perspective, the only scenario under which FAM lead to a desirable outcome is in the rare case where the leave is paid, the cost does not shift to the worker, and the leave is of a moderate length, so as to not incentivize extensive absences at the cost of human capital investments.

These stylized hypotheticals do not account for the indeterminacy of the effects of FAM regimes in certain contexts. When all regime elements are taken into account, FAM have complex, highly indeterminate, and ambiguous distributional outcomes along the commodification and familialization indices. Even without contextual complications, the above analyses bring into question the assumption that either paid or unpaid leave is better, from a distributional perspective, for all women or, more generally, for all workers with familial care responsibilities.

The multiple distributive outcomes of unpaid FAM become clearer in a contextual analysis. The federal FAM regime produces only a marginal de-commodifying effect. First, the leave is job-protected but unpaid, meaning that there is a continued dependency on the market during the time of leave. This has the greatest impact on low-income workers, specifically single parents who are less able to afford taking leave.<sup>112</sup> Further, the regime commodifies low-income workers more intensely because they are the least likely to enjoy access to health insurance, a pertinent issue given that employers may require a physician to certify that the employee or a family member is suffering from a serious health condition. A low-income employee with a sick child not sick enough for the emergency room might not be able to take leave days both because she cannot afford to lose income during her time off nor can she afford to take her child to a doctor.<sup>113</sup>

Second, the FMLA twelve-week leave period is short in comparison to the international standard<sup>114</sup> and to other OECD countries,<sup>115</sup> providing for a less generous and weaker de-commodifying right to workers. This is most evident in that other OECD countries provide separate leave mandates to workers for additional reasons, such as sickness and vacation, while in the

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112. Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 47 (2007).

113. *Id.* at 57.

114. The international standard of parental leave is fourteen weeks of paid leave. See Maternity Protection Convention, Art. 4 May 20, 2000, 40 I.L.M. 2.

115. Sakiko Tanake, *Parental Leave and Child Health Across OECD Countries*, 115 THE ECON. J. F7, F17-18 (2005). The average leave granted in the eighteen OECD countries studied in Tanake's research (1969-2005) is 18.2 weeks of job-protected paid leave. *Id.* at 12.

United States, the twelve-week period is all the leave that workers have access to unless the employer voluntarily provides for additional leave.

Third, distinctions between parental leave, sick leave, and family leave collapse in that all three mandates overlap within the same twelve-week period of unpaid leave provided by the FMLA. If the FMLA aims to accommodate workers with familial care responsibilities, improve their position in the workplace, and encourage their market participation, then merging leave types defeats these goals because it fails to adapt workplace expectations and culture to the needs of workers with familial care obligations. If it is recognized that familial care obligations require time off work, but no such time is dedicated solely for this purpose, then under the U.S. FAM regime it can be argued that workers with familial care obligations are left more deeply commodified than their unencumbered co-workers. Finally, the lack of direct anti-discrimination protection to workers with familial care obligations leaves them vulnerable to discrimination in dismissal, hiring, promotion, and working conditions.

As the analysis above suggests, the U.S. FAM regime is relatively commodifying for workers with familial care responsibilities, an effect that is both beneficial and harmful. It is narrowly beneficial for women to the extent that by granting short unpaid leave it does not undermine women's attachment to the workforce, and therefore works against the social forces that discourage women from investing in human capital, and decreases familial and state dependence. The FAM regime is harmful for the same reasons that make all commodification harmful: it leaves workers heavily dependent on market forces for survival. Workers with familial care responsibilities do not fit the ideal worker model and, accordingly, they are more likely to find themselves harmed by unrestricted employer discretion and discrimination in the workplace and dependent on other sources of income.

The American FAM regime also has a familializing effect. It is important to understand that the FMLA operates in the context of an ungenerous welfare state and a wide gender wage gap. The United States follows a minimalist welfare state model<sup>116</sup> that only meagerly supports those who find themselves chronically unemployed and becomes available only when both labor market and familial support fail. The temporary, minimal and residual welfare benefits provided to the unemployed are

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116. In political economy literature the United States is categorized as a liberal welfare state. Liberal welfare states are characterized as providing residual (rather than universal) welfare benefits, emphasizing individual responsibility (rather than social solidarity), and, most importantly in this context, relying mostly on the market (rather than the state) for provision of welfare services. The term "liberal welfare state" is taken from the influential welfare state typology developed by the European political scientist Gøsta Esping-Andersen. See ESPING-ANDERSEN, *THREE WORLDS*, *supra* note 8, at 27.

designed to increase dependency on private sources of income: the labor market (commodification) or the family (familialization). The wage gap pushes women towards familialization, making every hour that women invest in the market, on average, worth less than the time invested by men, thereby inducing an economically rational household to prefer that the woman, rather than the man, take unpaid leave when familial care needs arise. The wage gap operates in conjunction with the minimalist welfare state and the FAM regime to cause women's familialization.

So far, the analysis suggests that the effect of the FMLA is either deep commodification or deep familialization. However, the effect is more complex. The FMLA operates against the background of the U.S. welfare state that itself is ideologically Janus-faced: one face is liberal and strives to achieve gender equality, women's market participation (commodification), and relaxed familial dependency (de-familialization). The other face is conservative and works towards women's familialization and gender and class stratification. The two outlooks are expressed through different policy clusters in the system.

Under the liberal face familial care is viewed as a private responsibility best served by the market, rather than the state. The state steps in temporarily and only for families with the lowest-income so as to encourage self-sufficiency through, for example, market employment of parents and market provision of child care.<sup>117</sup> Under the main federal childcare welfare instrument, the Temporary Assistance for Needy Families Grant (TANF), first established in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), a temporary childcare subsidy serves as a means to reach the goal of full employment. Child care is seen as a necessary resource required in order to allow unemployed mothers to join the labor market. Providing child care is therefore not a goal in and of itself but rather instrumental to the goal of labor market participation, much like transportation and training subsidies are.<sup>118</sup> TANF exemplifies a minimalist welfare state approach to familial care, wherein childcare is perceived as a private responsibility. In other words, state-sponsored child care offers assistance only for a limited period of time and on the condition that the welfare recipient uses that time to achieve self-sufficiency through employment. This gender-blind and temporary form of cash assistance seeks to achieve de-familialization in order to enable commodification.

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117. ESPING-ANDERSEN, *SOCIAL FOUNDATIONS*, *supra* note 8, at 74-78.

118. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 451, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

The conservative face becomes evident when TANF's details are examined (the general eligibility criteria and the period of eligibility)<sup>119</sup> as well as when the background economic conditions that shape the labor market for those who are ineligible or off-welfare are taken into account. The TANF's emphasis on employment is highly individualized in that each adult family member is expected to work, but this trend is weakened by policies that encourage traditional nuclear family units,<sup>120</sup> prevention of out of wedlock pregnancies,<sup>121</sup> and dependence on spousal payment of child-support.<sup>122</sup> It is here that we discover that the U.S. scheme presses towards familialization.<sup>123</sup>

Understanding both the conservative and liberal faces of the regime reveals a regime that pushes towards both commodification and familialization. The U.S. welfare regime offers a short period of state dependency during which welfare recipients are expected to gain market skills. State support is then withdrawn and replaced by either market dependency (employment, commodification) or familial dependency (traditional marriage, familialization). Commodification, however, depends on labor market options, and the realities of the U.S. labor market make it difficult for unskilled women to find flexible jobs that are well-paying enough to allow them to support their families and afford child care on a

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119. Since the 1996 reform, the program emphasizes family self-sufficiency and aims to move recipients into work in what is known as the "from welfare to work" policy. This is accomplished by (1) a five-year eligibility cap for assistance, (2) a requirement to work after two years of cash assistance, and (3) compulsory participation in work-related activities such as training, job search, community service, or employment (30 hours per week for single parents; 35-55 hours per week for two-parent families). About 10% of TANF funds go toward work activities, transportation, and work support. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM SEVENTH ANNUAL REPORT TO CONGRESS 21-22 (2006) [hereinafter TANF REPORT].

120. For example, the Healthy Marriage initiative is a voluntary program that encourages "the formation and maintenance of two-parent families." See U.S. Dep't of Health & Human Services, Healthy Marriage Initiative, <http://www.acf.hhs.gov/healthymarriage/about/mission.html> (last visited Feb. 2009).

121. This initiative makes state funding dependent on reducing the incidence of out-of-wedlock pregnancies. TANF REPORT, *supra* note 119, at 50. The reduction of the "illegitimacy ratio" is seen as a remedy to poverty since "[o]nly 5.4 percent of married households live below the poverty level, compared to 10.0 percent of all households, 13.5 percent of male-headed households with no spouse, and 28.0 percent of female-headed households with no spouse." *Id.* at 50.

122. Under TANF's "Child Support Enforcement Program," single parents otherwise eligible for TANF must cooperate with child support enforcement efforts in order to receive TANF benefits. *Id.* at 43. The program aims to ensure that "children are supported financially and emotionally by both of their parents." *Id.*

123. See SHARON HAYS, FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM 16-17 (2003) ("Although the attention paid to state efforts at placing welfare recipients in jobs has led many to believe that work requirements are the centerpiece of this legislation, a reading of the Personal Responsibility Act makes it appear that the intent of lawmakers was to champion family values above all else.").

single income.<sup>124</sup> The interplay between the welfare regime and the U.S. labor market may push low-income women, specifically primary care takers who bear the expense and responsibility of childcare, into familial dependence. The outcome of the Janus-faced regime is that increased familialization operates in conjunction with increased commodification, leaving two ways to avoid public welfare dependency: through family or market solutions. Although de-familialization is promoted by temporary day-care subsidies, it is encouraged only to the extent that it enables commodification.

The FMLA reflects the dual structure of the U.S. welfare state. While the conservative face points in the directions of familialization and gender and class stratification, the liberal face points in a different direction, compromising the goals of the conservative face: gender equality, commodification, and de-familialization. By allowing for only limited periods of unpaid leave, the FAM regime increases the labor market participation of workers with familial care responsibilities, and enhances labor market attachment. Yet this de-familialization also means that women are commodified—their dependency on the labor market is deepened. Thus, the de-familialization of workers with familial care responsibilities leads to commodification. Yet the conservative face finds its expression, via familialization, in the FMLA as well: as far as the FMLA makes workers with familial care responsibilities more costly to employers, it might make the labor market even less friendly and less receptive to such workers. Accordingly, since under the FMLA labor market participation remains at odds with familial care responsibilities, in certain contexts the unpaid leave might push women out of the market altogether.

The FMLA strikes a compromise between familialization and de-familialization in the sense that neither is complete. The effects of familialization are inchoate. While the unpaid leave secured through the FMLA does not add significant costs to employers, some additional costs are involved, such as finding a replacement and distributing the work among other employees. This marginal, yet additional, cost leads to a limited familializing effect, to the extent that employers are reluctant to hire workers with familial care responsibilities or pay them adequate wages. Likewise, de-familialization is both coerced and partial. For example, because low-income female workers depend on the market for economic survival, they are left with little choice but commodification and de-familialization in the form of unfavorable working conditions. Exiting the labor market is thus not a viable option for these women. Their choices are limited to renegotiating gender roles with their spouses, assuming a spouse

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124. O'Leary, *supra* note 112, at 56-57.

exists, leaving their children with family members, contracting with a low quality day care, or neglect.

The resulting regime is therefore contradictory. The FAM regime disrupts the gender order in that it induces the labor market participation of women; however, it does so without challenging entrenched notions of the ideal worker or workplace structure. Accordingly, the U.S. regime reiterates the dual commodification and familialization structure outlined above.

Another paradox emerges if we compare the effects of FAM on workers with families to those without families. Some argue that shifting the cost of child-care to the workplace comes at the expense of childless women.<sup>125</sup> This group of women is adversely affected because, on the one hand, they endure general sex discrimination—as potential childbearers and primary caretakers—but on the other, they do not enjoy the benefits associated with childbearing, such as leave days. For this reason, feminist legal scholar Mary Anne Case argues that we should take “F” out of FAM.<sup>126</sup> In thinking about accommodation mandates, Case argues, scholars should not focus on familial care responsibilities alone, but also on the “flexible accommodation of a wide range of life goals.”<sup>127</sup> Case notes, “[I]n addition to being, in my view, more equitable and more normatively desirable, arguing that benefits such as an increase in flexible scheduling of job responsibilities should be available to employees regardless of their parental status would broaden the coalition for such change and potentially reduce the possibility for zero-sum games among employees.”<sup>128</sup> Accommodation mandates, therefore, should not be linked to familialization or de-familialization at all, but only to de-commodification. The employer and the government, Case implies, must remain indifferent to how workers utilize their time or expand the list of justified reasons to include elements beyond familial care obligations.<sup>129</sup>

This discussion suggests that the FMLA partially endorses the goal Case promotes. Of course, as Case argues, the Act can construct a wider or all-encompassing list of reasons for granting leave, such as a right to universal annual leave regardless of how the leave time is spent. Yet, while the FMLA aims to “balance the demands of the workplace with the needs of families,”<sup>130</sup> the claim that this regime favors workers with families over

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125. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753 (2001).

126. *Id.* at 1757.

127. *Id.* at 1767.

128. *Id.* at 1768.

129. *Id.* at 1768-69, 1781-84.

130. See Family Medical Leave Act, 29 U.S.C. § 2601 (2006 & Supp. III 2009).

other workers is inaccurate since all workers, regardless of their familial situation, may find these leave days useful. The Act provides twelve weeks of leave to all workers because, even if one does not have children, she still has a vulnerable body and may have parents in need of assistance.

The universal structure of the FMLA translates into minimal cross-subsidization of workers with familial care obligations by workers without such obligations. Minimal cross subsidy means minimal redistribution: the material costs remain with workers bearing familial care responsibilities. In fact, it is the FMLA's universal rather than targeted application that limits its potential to shape the workplace and accommodate the needs of workers with familial care responsibilities. If one believes that workers without children should not subsidize other workers' decisions to bear children, then this is a good outcome; but if one believes that the workplace needs to enable the equal employment of workers with familial care responsibilities (mostly women), even at the cost of cross-subsidization by a wider pool of workers, including non-parents, then this outcome is undesirable.

*b. Stratification*

The U.S. FAM regime consists of significant exclusions.<sup>131</sup> For example, the FMLA does not cover employees who work for an employer less than one year, part time workers,<sup>132</sup> or those who work for a small employer.<sup>133</sup>

These exclusions impact low-income workers at a disproportionate rate.<sup>134</sup> Not only are they the least likely to afford unpaid leave, but even if they are granted the right, low-income workers are most likely employed only temporarily and for small employers, meaning that they are excluded from FMLA protection.<sup>135</sup> Moreover, under the FMLA an employer may require certification by a health care provider to support the request for

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131. Stratification and IHDOL are discussed briefly, but receive more attention in Part III of this article, when the analysis focuses on the effect of employment law on secondary-market care workers.

132. "The term 'eligible employee' means an employee who has been employed . . . (i) for at least 12 months by the employer . . . (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." Family and Medical Leave Act (FMLA) of 1993 § 101(2)(A), 29 U.S.C. § 2611(2)(A) (2006).

133. "The term 'eligible employee' does not include . . . (ii) any employee of an employer who is employed at a worksite at which such employer employs less than 50 employees." *Id.* § 2611(2)(B)(ii).

134. Both the small business exemption, the probationary period exemption, and the part time worker exemption have a disparate impact on low-wage workers. See O'Leary, *supra* note 112, at 42-44.

135. See *id.* at 43. "More than half of all low-wage workers are employed by small businesses. Small businesses are more likely to employ workers with a high-school education or less, and small businesses are more likely to employ individuals receiving public assistance. Moreover, because only women can become pregnant and women disproportionately provide caregiving, low-wage women workers were most severely impacted by this exemption." *Id.*



leave.<sup>136</sup> Since many low-income workers do not have health insurance,<sup>137</sup> such certification is a particularly difficult requirement to meet.

Accordingly, the FMLA leaves class stratification undisturbed. It only covers long-term workers employed by medium and large employers who can afford health care and time off work. The result is that only about half of all workers, and less than one-third of employed new mothers, receive FMLA protection.<sup>138</sup>

c. *Intra-Household Division of Labor*<sup>139</sup>

The FMLA was judicially interpreted to affect both the workplace and the home. As Chief Justice Rehnquist suggested in *Hibbs*, “[b]y setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving.”<sup>140</sup> In reality, however, there is no evidence that the FMLA significantly affected IHDOL. While it is argued, from a gender equality perspective, that “increasing men’s involvement in caregiving is the necessary corollary to increasing women’s workforce participation,”<sup>141</sup> this outcome is not evident. Operating against a social background where women are generally the primary caregivers,<sup>142</sup> and against a wide gender wage gap,<sup>143</sup> the FMLA’s gender-neutral approach does not create incentives for households to challenge traditional IHDOL. It is therefore not surprising that studies of the effect of the FMLA on IHDOL and the allocation of care-related leave taking among men and women show no significant changes in the distribution of familial care responsibilities.<sup>144</sup> An unpaid leave is more likely than other types of familial leave to disincentivize households from changing IHDOL patterns since, given the gender wage gap, men’s opportunity costs are, on average,

136. See Family and Medical Leave Act § 103(a), 29 U.S.C. § 2613(a) (“An employer may require that a request for leave . . . be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate.”)

137. See MICHELLE M. DOTY & ALYSSA L. HOLMGREN, THE COMMONWEALTH FUND, UNEQUAL ACCESS: INSURANCE INSTABILITY AMONG LOW-INCOME WORKERS AND MINORITIES 2-3 (2004), available at [http://www.commonwealthfund.org/usr\\_doc/doty\\_unequalaccess\\_ib\\_729.pdf](http://www.commonwealthfund.org/usr_doc/doty_unequalaccess_ib_729.pdf).

138. Christopher J. Ruhm, *Policy Watch: The Family and Medical Leave Act*, 11 J. ECON. PERSP. 175, 177 (1997).

139. Analysis of IHDOL outcomes is rather straightforward: accommodation mandates, at least in the short term, rarely lead to redistribution of care responsibilities within households.

140. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 737 (2003).

141. Lester, *supra* note 7, at 79.

142. Kessler, *supra* note 38, at 378-80.

143. Selmi, *supra* note 53.

144. See Charles Baum, *Has Family Leave Legislation Increased Leave-Taking?* 15 WASH. U. J.L. & POL’Y 93, 107, 112 (2004); Paulina T. Kim, *The Family and Medical Leave Act of 1993: Ten Years of Experience*, 15 WASH. U. J.L. & POL’Y 1, 4-6 (2004).

higher than women's. Indeed, studies show that, while most leaves are taken due to a worker's own health needs,<sup>145</sup> among new parents women are much more likely than men to take the FMLA-provided leave.<sup>146</sup>

The same outcome emerges in a paid leave system. As long as a gender wage gap persists, and unless taking parental leave is mandatory for both parents, a household that seeks to maximize income still opts for keeping the higher earning household member in the labor market and withdrawing the lesser earning household member. It appears, then, that men, and more specifically fathers, have so far proven resistant to taking on significantly more of the familial care burden.<sup>147</sup>

Gradually, labor markets across the western world and in the United States are becoming less segregated, with more employment opportunities open to women,<sup>148</sup> a narrowing wage gap,<sup>149</sup> and men's increasing contributions to household care work.<sup>150</sup> The process is occurring at an extremely slow pace, with FAM and anti-discrimination laws playing some part in bringing about this tectonic change. Until this transformation is completed, it is important to recognize that FAM impose both costs and benefits to the people it aims to help.

The distributional analysis shows that, in the context of familial care, employment law is a complicated distributive tool. The five-pronged distributive framework developed above conceptualized the different effects of care-related policies on gender consciousness, institutional development, and material distribution. The process includes trade-offs, sometimes

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145. COMM'N ON FAMILY AND MEDICAL LEAVE, *A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES* 94 fig. 5.2 (1996) (showing that 60% of FMLA-covered leave is taken because of a worker's own health problems), available at [http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key\\_workplace](http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key_workplace); DEP'T OF LAB., *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: THE FAMILY AND MEDICAL LEAVE SURVEYS 2-5* tbl.2.3 (2000), available at <http://www.dol.gov/asp/archive/reports/fmla/chapter2.pdf>.

146. *BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS*, *supra* note 145, at A1 tbl.4.17 (2000), available at <http://www.dol.gov/whd/fmla/appendixa-1.pdf>.

147. Researchers consistently find that women spend much more time than men in caregiving activities for family members. Suzanne Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79 *SOCIAL FORCES* 19, 193-95, 198, 209, 213-16 (2000).

148. See GENDER SEGREGATION: *DIVISIONS OF WORK IN POST-INDUSTRIAL WELFARE STATES* 13 (Lena Gonäs & Jan Karlsson eds., 2006).

149. See U.S. CENSUS BUREAU, *HISTORICAL INCOME TABLES* tbl. P-40 (2009), available at <http://www.census.gov/hhes/www/income/histinc/p40.html>. Gender earning ratio data shows slow but steady progress. While in 1960 the ratio of the annual averages of women's and men's median annual earnings in the United States was 60.7, in 2007 it stood at 77.8 (the highest earning ratio as of yet). U.S. BUREAU OF LABOR STATISTICS, *HIGHLIGHT OF WOMEN'S EARNINGS IN 2007* 4, 55 (2008), available at <http://www.bls.gov/cps/cpswom2007.pdf>.

150. A series of studies suggests that in the United States from the 1960s to the 21st century, men's contribution to housework doubled, increasing from about 15 percent to over 30 percent, with the most dramatic change being in child-care. See Kimberly Fisher et al., *Gender Convergence in the American Heritage Time Use Study*, 82 *SOC. INDICATORS RESEARCH* 1, 12-13 (2006).

between different groups of women, between men and women, or between different classes of workers and, at other times, within the balance of family and work in an individual's life.<sup>151</sup> Although it is important that these trade-offs are identified, accounted for, and mitigated, it is also clear that under any kind of FAM some costs will persist. The costs of the FMLA, in terms of material delivery, are real, but so are the benefits of increased de-commodification (relaxed market dependency), de-familialization (relaxed familial dependency), and changed IHDOL. The detailed distributive analysis shows that the FMLA is an imperfect distributive measure: it does not meaningfully challenge workplace expectations and a labor market structure which still revolve around the image of the ideal worker. Primary care takers still bear most of the cost of familial care as well as costs in terms of time, resources, and social status. But it also suggested that in relation to the primary labor market, this is a step in the right direction.

The analysis so far has focused on care provided by family members and on the rights granted to workers with familial care responsibilities in the primary labor market, where FAM and other leaves and protections apply and are more likely to be enforced. But the analysis cannot stop here; the effects of employment law on markets of care and on the distribution of care lie in its explicit, statutory protections, as well as in its exclusions. The following Section focuses on the way employment law regulates the work of care takers.

### III.

#### NEGATIVE EXCEPTIONALISM: THE EMPLOYEE IN THE FAMILY

In this Part I argue that employment law provides further accommodation to primary labor market workers with familial care obligations through the exclusion of in-home care workers from various elements of protective employment regulation, thus making in-home care services more affordable and accessible to primary market workers.<sup>152</sup> I call this relationship "negative exceptionalism" because care workers are

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151. In this I join Naomi Cahn's and Michael Selmi's plea to realize that in work-family reforms we cannot have it all. Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289, 312 (2003).

152. It should be noted that immigration law—by design or due to enforcement problems—allows access to the cheap work of migrant care workers, thereby providing further benefit to families. For the purpose of the discussion now, the nationality of the worker is less relevant since employment protections, at least in theory, apply to citizens and non-citizens alike, regardless of their legal status. Naturally, migrant workers, and especially undocumented migrant workers, are more vulnerable workers since they are less likely to know about their rights, let alone insist on their enforcement. Aspects of the weaker bargaining powers of migrant workers are determined by the structure of immigration regimes. However, this Article focuses on employment law and therefore the role of immigration law and policy will not be further developed.

excluded from employment law protections due to the particular characteristics of employment within a household.<sup>153</sup> In-home care workers, who perform comparable services outside the home—in offices, day care centers, hospitals, and retirement homes—are not subjected to the same exclusions.

In this section, I focus on the application of employment law to the secondary market of care work, which I label the negative exceptionalism of familial care in employment law. Additionally, I show that it is the default rule of the employment contract (EAW), rather than protective legislation, that shapes the working conditions of care workers.

Paid in-home care work is part of the secondary labor market in the sense that it is characterized by “low wages and fringe benefits, poor working conditions, high labor turnover, little chance of advancement, and often arbitrary, capricious supervision.”<sup>154</sup> The category of in-home care workers, as used herein, includes home care workers for the elderly and disabled, childcare workers, and domestic workers. While there are some important differences between these occupations,<sup>155</sup> significant similarities allow for their conflation. First, employment law treats these workers similarly.<sup>156</sup> Second, from the employee perspective, these occupations are often interchangeable in that there is a high potential for mobility. For example, the same workers move from one form of care work to another, sometimes engaging in various types of care work concomitantly.<sup>157</sup> Third, this workforce has common characteristics: women, often racial/ethnic minorities or immigrants, predominate.<sup>158</sup>

Even within the secondary labor market, however, care work is a highly stratified occupation. The stratification runs mostly along the lines

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153. While in Part II I focused on affirmative exceptionalism of familial care and analyzed the distributive effects of FAM on the primary labor market, here I focus on the effect of employment law on secondary market in-home care workers. The combined study of dual exceptionalism in employment law is crucial to a holistic understanding of the formative and distributive effects of employment law on markets of care.

154. DOERINGER & PIORE, *supra* note 5, at 165.

155. These different types of in-home work have much in common: they are all considered ‘unskilled work’ and all involve household care activities. Yet, they have been treated differently by policy makers. Long-term care for the elderly or the disabled is often subsidized or funded by the government, and involves a third party employer, such as a manpower agency. Child-care and domestic work, on the other hand, are only marginally, if at all, subsidized via tax deductions and are generally viewed as private household responsibilities. See Peggie Smith, *Aging and Caring in the Home: Regulating Paid Domesticity in the Twenty-First Century*, 92 IOWA L. REV. 1835, 1840 (2007).

156. *Id.*

157. See RHACEL S. PARREÑAS, *SERVANTS OF GLOBALIZATION: WOMEN, MIGRATION AND DOMESTIC WORK* 153-54 (2001).

158. DOMESTIC WORKERS UNITED & DATACENTER, *HOME IS WHERE THE WORK IS: INSIDE NEW YORK’S DOMESTIC WORK INDUSTRY* 7 (2006), available at <http://www.datacenter.org/reports/homeiswheretheworkis.pdf>.

of the income level of the family that employs the worker. Generally speaking, high-income families offer better wages and more specialized work.<sup>159</sup> Middle and low-income families pay less and yet expect the employee to serve most of the care and domestic needs of the household.<sup>160</sup> The stratified structure of the market causes some difficulties in generalizing about the working conditions of care workers, but, regardless, they share two characteristics: the patchy application of protective employment law to care work and the difficulty of enforcing what little protections apply in the private setting of the home.

Existing scholarship on care work is haunted by images of domestic slavery, violence, and exploitation. Accordingly, it is perceived as an inherently oppressive "structure of exploitation."<sup>161</sup> While it is likely that in-home care workers are more vulnerable to exploitation than other workers,<sup>162</sup> I maintain that this characteristic is not inherent in all care work situations. Care workers are strategic actors working within a system where they are the subjects and objects of power.<sup>163</sup> Care work can and does provide low-income women with a source of income that can be preferable to alternate opportunities, especially when the worker is a labor migrant.<sup>164</sup>

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159. For example, in the book *THE NANNY DIARIES*, family X has one employee that works as a nanny and another that works as a housekeeper that does the cooking and cleaning. EMMA MCLAUGHLIN & NICOLA KRAUS, *THE NANNY DIARIES* (2003). The book draws on the authors' experiences as nannies for wealthy families in Manhattan. See Barnes & Noble, *Meet the Writer: Emma McLaughlin & Nicola Kraus*, <http://search.barnesandnoble.com/Nanny-Returns/Emma-McLaughlin/e/9781416585671#TABS> (last visited Dec. 2009).

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

161. MARY ROMERO, *MAID IN THE U.S.A.* 142 (1992); see also JUDITH ROLLIN, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 155 (1986) ("The relationship between domestics and their employers is extraordinarily multi-dimensional and complex, but, at its essence, I will argue, is one of exploitation").

162. In-home care workers' vulnerability derives from the fact that care workers, being unskilled and mostly of minority groups (and at times undocumented), often have few market alternatives, and are therefore in a weak bargaining position. Their vulnerability further arises from the fact that they are employed in private households where employers feel protected from a supervising public eye, and where gender, race, and class hierarchies—care workers positioned at the bottom of all three—can more readily run amok. Finally, their vulnerability stems from their exclusion from various protective employment laws. For an insightful comparison of the vulnerability of care workers and sex workers, see MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 282 (1999).

163. See PARREÑAS, *supra* note 157, at 195.

164. Sociologist Mary Romero, who studied domestic workers of Mexican descent who were born and raised in the U.S., found that care work entails a paradox: "on the one hand, cleaning houses is degrading and embarrassing; on the other, domestic service can be higher paying, more autonomous, and less de-humanizing than other low-status, low-skilled occupations . . ." ROMERO, *supra* note 161,

For many, care work offers an income above the minimum wage, flexibility, and the possibility of a personal connection to the employer. This is not to suggest that, as currently structured, paid care work is a good job; care work may often be a low-paying, stigmatized, isolated, and physically and emotionally draining occupation.<sup>165</sup> Yes, some of these problems are not inherent, but rather are the result of employment law design and application.

The framework used here takes into account both the negative and affirmative exceptionalism of the family in employment law; in other words, the way employment law affects both care workers and their employers. This framework bridges the stark division between unpaid and paid in-home care work that is evident in current scholarship, because the employers of care workers are most likely themselves labor market participants, trying to negotiate their familial responsibilities and their careers.<sup>166</sup> Constructing a framework that revolves around care work itself, regardless of who does it, overcomes the divide between paid and unpaid care work.<sup>167</sup> Studying care work in the context of family and market exposes the productivity of the work done within the household, irrespective of who does the labor and whether it is paid or unpaid.

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at 12; see also PARREÑAS, *supra* note 157, at 172 (noting that in her study of Filipina care workers in Los Angeles and Rome, the Filipina care workers' immigration entails contradictory class mobility).

165. PIERRETTE HONDAGNEU-SOTELO, DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE 12, 47, 65-66 (2001).

166. In a 1999 article, Peggie Smith argued that literature about paid domestic work has been absent from the debate. Peggie Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U.L. REV. 851, 852-53 (1999). However, in the decade that passed there has been increased attention to paid domestic work in academic literature. This emerging literature is mostly about exploitation of in-home care workers and is separate from literature about the care/work conflict of primary market workers. See, e.g., Naomi Chan, *The Coin of the Realm: Poverty and the Commodification of Gendered Labor*, 5 J. GENDER RACE & JUST. 1 (2001); Lobel, *supra* note 160, at 89; Melanie Ryan, *Swept Under the Carpet: Lack of Legal Protections for Household Workers—A Call for Justice*, 20 WOMEN'S RTS. L. REP. 159 (1999); Smith, *supra* note 155, at 1835; Iryll S. Umel, *Cultivating Strength: The Role of the Filipino Workers' Center COURAGE Campaign in Addressing Labor Violations Committed Against Filipinos in the Los Angeles Private Home Care Industry*, 12 UCLA ASIAN PAC. AM. L.J. 35 (2007).

167. Commonly, the treatment of household labor is found in two distinct bodies of literature, one analyzing the unpaid work of housewives and the other discussing the paid work of domestic care workers. See BRIDGET ANDERSON, *DOING THE DIRTY WORK? THE GLOBAL POLITICS OF DOMESTIC LABOUR* 11 (2000). There are some efforts to change that tendency within feminist literature. See, e.g., Jacqueline Andall, *Hierarchy and Interdependence: The Emergence of a Service Caste in Europe*, in GENDER AND ETHNICITY IN CONTEMPORARY EUROPE 39 (2003). These two bodies of literature often attempt to challenge the public/private and market/family dichotomies, but often reproduce these same dichotomies by failing to conceptualize issues of paid and unpaid housework within the same analytical framework. Sociologist Mary Romero overcame the separation in her research by focusing on domestic workers' "double day": the housework domestic workers do when their workday is over. ROMERO, *supra* note 161. Since Romero there have been some others who adopted this approach, mainly in relation to migrant domestic workers. See, e.g., RHACEL S. PARREÑAS, *CHILDREN OF GLOBAL MIGRATION: TRANSNATIONAL FAMILIES AND GENDER WOES* (2005).

Section A examines the application of protective employment laws to care workers in the United States; Section B explores the interaction between default contractual rules and familial care obligations; and Section C analyzes the distributive impact of this negative exceptionalism—the exclusion of care workers from protective employment legislation—on in-home care workers and the families that employ them.

### A. *The Rules*

All in-home care workers in the United States are excluded from coverage under the National Labor Relations Act (NLRA)<sup>168</sup> and the Occupational Safety and Health Act (OSHA).<sup>169</sup> Additionally, care workers directly employed by the family for which they work are excluded from the FMLA<sup>170</sup> and Title VII<sup>171</sup> under each act's respective small business exclusion clauses. Following successful lobbying, care workers are now covered by the Social Security Act,<sup>172</sup> and some are covered by the Fair Labor Standards Act (FLSA).<sup>173</sup> However, the FLSA excludes care workers who are "employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves."<sup>174</sup> Department of Labor regulations define companionship services as household work related to the care of an aged or infirm person.<sup>175</sup> These services include meal preparation, bed making, laundry and other personal services incidental to

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168. 29 U.S.C. §§ 151-168 (2006). The NLRA protects the rights of employees to engage in collective bargaining. See 29 U.S.C. § 152(3) (defining "employee" as "any employee . . . but shall not include any individual employed . . . in the domestic service of any family or person at his home . . .").

169. 29 U.S.C. §§ 651-678 (2006). OSHA is designed to prevent work-related injuries, illnesses, and deaths by issuing and enforcing standards for workplace safety and health. 29 U.S.C. § 651. The act itself does not exclude domestic workers, but the Department of Labor's regulations interpreting the act exclude in-home domestic workers. See 29 C.F.R. § 1975.6 (2009).

170. 29 U.S.C. § 2611(B)(ii) (2006 & Supp. III).

171. 42 U.S.C. § 2000e(b) (2006).

172. See Smith, *supra* note 166, at 856, 889, 920.

173. 29 U.S.C. §§ 201-219 (2006). The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards. When the FLSA was enacted all domestic and farm workers were excluded from its application. Fair Labor Standards Act of 1938, ch. 676 §§ 3, 6(a), 7(a), 13(5)-(6), 52 Stat. 1060.

174. 29 U.S.C. § 213(15) (2006).

175. See 29 C.F.R. § 552.6 (2009) ("[T]he term companionship service shall mean those services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work: *Provided, however*, that such work is incidental, i.e., does not exceed 20 percent of the total weekly hours worked") (emphasis added); see also *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 167 (2007) (discussing and affirming this exclusion).

the care of the elderly, so long as the general household work does not exceed twenty percent of the total hours worked by the companion per week.<sup>176</sup> This means that workers that are not defined as providing companionship service, such as nannies, housekeepers, and other domestic workers who do not engage in care for the elderly or the disabled, and are not employed on a casual basis, are covered by the FLSA's time and wage requirements.<sup>177</sup>

The in-home care work industry, like many other secondary labor markets, is characterized by low levels of compliance with employer contribution to care workers' social security and with the FLSA's wage and hour standards.<sup>178</sup> One of the important problems identified by care workers related to the lack of application (or enforcement) of the FLSA's overtime compensation requirement, which leads to the "absence of set parameters between their work and rest hours."<sup>179</sup>

The result is that, both by design and non-compliance, the main legal mechanisms that regulate the employment relationship of care workers are the default contract rule of employment at will (EAW) and the background rules of criminal, tort, and property law. At a minimum, the worker is shielded by background rules that protect against rape, negligence, and withholding of wages. Due to exclusions from protective legislation, the employment relationship of in-home care workers is often referred to as "informal."<sup>180</sup> This, however, is an inaccurate legal characterization. While the worker is *de jure* and *de facto* excluded from protective legislation, background rules are still in force, even if access to their enforcement is inhibited for various reasons, such as the reluctance of undocumented workers to report abusive working conditions.

Specifically, the EAW rule provides workers with no other protection, save for the right to a paid wage and the ability to exit the employment relationship at will. These minimal rights leave care workers intensely commodified, although the level of commodification varies by worker and determines their market power and ability to bargain for better working conditions.

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176. See 29 C.F.R. § 552.6 (2009).

177. *Id.*

178. DOMESTIC WORKERS' RIGHTS IN THE UNITED STATES: A REPORT PREPARED FOR THE U.N. HUMAN RIGHTS COMMITTEE IN RESPONSE TO THE SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES 3 (2006), available at [http://www.globalrights.org/site/DocServer/Domestic\\_Workers\\_report-\\_FINAL.pdf?docID=5503](http://www.globalrights.org/site/DocServer/Domestic_Workers_report-_FINAL.pdf?docID=5503) [hereinafter DOMESTIC WORKERS' RIGHTS].

179. ROMERO, *supra* note 161, at 120.

180. MARTHA CHEN ET AL., MAINSTREAMING INFORMAL EMPLOYMENT AND GENDER IN POVERTY REDUCTION: A HANDBOOK FOR POLICY-MAKERS AND OTHER STAKEHOLDERS 15 (2004).



### B. *Care Workers' Employment Law: A Distributional Analysis*

This section identifies the distributional consequences of negative exceptionalism of familial care in employment law. The analysis of positive exceptionalism in Part II focused on the distributional effects of FAM on primary labor market workers. However, FAM affect only one aspect of care work: the unpaid care that primary market workers provide their families with. While this is the traditional understanding of the way employment law shapes familial care, employment law also affects markets of care by excluding care workers from protective employment legislation and by tolerating violations of protective employment rules. The exclusion of the secondary market care worker makes paid care work more affordable for those located in the primary labor market. Accordingly, I apply the evaluative framework used for FAM to provide a more accurate picture of the effects of employment law on distribution of care costs.

#### 1. *Commodification, Familialization, Stratification*

The exclusion of in-home care workers from protective employment legislation intensifies care workers' commodification in relation to other workers. Their employment is less secure, with fewer mandatory benefits. At the same time, for women intensified commodification also means stronger de-familialization, greater economic independence, and, in this minimal sense, a disruption of traditional gender roles.

While a heightened level of de-familialization for women is often perceived as a feminist goal that encourages economic independence,<sup>181</sup> its benefits—in the case of in-home care workers—are questionable on three grounds. First, this assumes that all women share the relationship that middle and upper class women have to the labor market. While upper and middle class women strive to enhance employment participation and labor market attachment, low-income women have a longer tradition of labor market participation.<sup>182</sup> Consequently, the presumption that de-familialization is required in order to achieve commodification is class biased. Second, while care workers' dependence on their own family is relaxed, their dependence on another family is enhanced. In other words, it should be asked whether doing traditional "women's work" in the home of another is truly de-familializing. Third, due to their extensive commodification, care workers' de-familialization possibly runs too deep.

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181. See, e.g., JULIA S. O'CONNOR ET AL., *STATES, MARKETS, FAMILIES: GENDER, LIBERALISM AND SOCIAL POLICY IN AUSTRALIA, CANADA, GREAT BRITAIN AND THE UNITED STATES* 19-23 (1999).

182. Diane F. Halpern & Susan E. Murphy, *From Balance to Interaction: Why the Metaphor Is Important*, in *FROM WORK-FAMILY BALANCE TO WORK-FAMILY INTERACTION: CHANGING THE METAPHOR* 4-5 (Diane F. Halpern & Susan E. Murphy eds., 2005); see also ROLLIN, *supra* note 161, at 48-59.

Live-in care workers are available 24-hours a day at the employer's home, enjoying some leave days but neither statutory family leave (due to FMLA exclusion) nor limits on their work hours (due to FLSA exclusion). This can be characterized as de-familialization run amok.

The availability of commodified, de-familialized care workers in the secondary market benefits the primary market. In a way, care workers fill the traditional function that a housewife<sup>183</sup> occupied under the male-breadwinner family model. Live-in care workers enable the preservation of the labor market model of the 'ideal worker'—unencumbered by familial care obligations—a male norm that assumes female worker assimilation. This model accepts, uncritically, the underlying norm rather than question whether the workplace should be structured around it. Conceptually, the ideal worker, around whom the contemporary labor market is structured, might have a family and require few extra days of leave to care for family members, a need that is accommodated by the FMLA. Yet, when both parents participate in the labor market, full time primary market employment is made feasible only when there is someone else that takes care of the needs of dependent family members on a day-to-day basis.<sup>184</sup> The existence of care workers is therefore a necessary background assumption of the primary labor market. The availability and affordability of care workers is crucial for a functioning labor market. The affordability of in-home care workers is facilitated by care workers' negative exceptionalism, leading to care workers' de-familialization and commodification, which enables many families to contract for in-home care.

Care workers in the United States are excluded, by design, from almost all employment protection, and when employment laws do apply, a wide zone of non-compliance and under-enforcement ensures that their labor remains affordable. The result is a highly stratified care market in which most care workers are vulnerable, underpaid, commodified and de-familialized. Their employers, therefore, enjoy the benefits of relatively inexpensive and flexible care services that allow them to engage in demanding primary labor market jobs.

The question of distribution in markets of care revolves around the question of who should subsidize the costs of in-home care. Under its current structure, U.S. employment law distributes the costs to care workers

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183. See, e.g., Lisa Belkin, *What a Working Woman Needs: A Wife*, N.Y. TIMES, June 5, 2005, available at <http://www.ncsu.edu/awf/What%20a%20Working%20Woman%20Needs-%20A%20Wife%20-%20New%20York%20Times.html>.

184. Silbaugh, *supra* note 54, at 195-98 (explaining that the FMLA's 'serious health condition' requirement was interpreted to include medical emergencies and not routine work-family balancing challenge).

themselves through their exclusion from employment protections, which in turn leads to their commodification and de-familialization. Secondary market care workers, therefore, support the primary labor market through their inferior working conditions, making it possible for primary market workers to balance work and family obligations to the extent secured by the FMLA and wage and hour laws. This structure is further entrenched by rampant non-compliance with the few rights care workers do have<sup>185</sup> and the minimal job security and employment conditions under the EAW model.<sup>186</sup>

If the default employment contract rule included some recognition of differences in bargaining power, the regressive distributional effect could be less significant and the stratification not as deep. Under a default rule of good faith or just cause dismissal, care workers could enjoy an employment contract that sets ground rules for work hours, wages, and leave rights, even when workers are excluded from protective legislation. These standards, though lower than those set by formal accommodation mandates and protective legislation, could grant a disadvantaged care worker rights beyond those she can bargain for. Thus, the EAW default rule plays an important role in shaping markets of care by enhancing care workers' vulnerability.

Commodification anxiety, the fear of turning care services into a market commodity, is evident in the regulation of care work.<sup>187</sup> Care work straddles a fine line between work and family, public and private, and, accordingly, the regulation of care work stands in limbo between the two regulatory traditions. The care worker provides a market service, but is not perceived as a regular employee that deserves the same rights and protections.<sup>188</sup> This approach keeps care work arrangements more vague and unarticulated than other employment relations, perhaps protecting the notion that paid care work is not a pure market transaction, but that some emotion and personal attachment make it less market-oriented and more family-like, thereby justifying its exclusion from protective legal rules.<sup>189</sup> These exclusions reflect the liberal political tradition and its reluctance to intervene and regulate intra-household distribution of income and power.<sup>190</sup> If the care worker is perceived as "one of the family," then the regulative

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185. Debra Cohen-Whelan, *Protecting the Hand that Rocks the Cradle: Ensuring the Delivery of Work Related Benefits to Child Care Workers*, 32 IND. L. REV. 1187, 1193 (1999).

186. See DOMESTIC WORKERS' RIGHTS, *supra* note 178, at 3-4.

187. INTERNATIONAL LABOR ORGANIZATION, DECENT WORK FOR DOMESTIC WORKERS 10-12 (2008), available at [http://www.ilo.org/public/english/protection/condtrav/pdf/dw\\_eng.pdf](http://www.ilo.org/public/english/protection/condtrav/pdf/dw_eng.pdf).

188. *Id.*

189. *Id.* at 12-15.

190. Lisa Philipps, *Public Perspectives on Privatization: Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization*, 63 LAW & CONTEMP. PROBS. 111, 113, 117, 127 (2000).

exclusions are consistent with traditional approaches towards intervention in the family: the state refuses to determine whom one can hire as a care worker, what is the minimum wage for such work, and how many hours they work.<sup>191</sup> Care workers' exclusion from protective regulation seems like exceptionalism when looked at from the labor market perspective, but less so if understood as part of the regulation of the household. The partial and exclusionary application of employment law to care workers reflects social perceptions of how care work is inherently unquantifiable and personal, even when paid for.<sup>192</sup>

In the context of the EAW regime, the negative exceptionalism of care workers from employment law protections leaves care workers heavily commodified and further stratifies the labor market. The by-product of these exclusions is cheap care services that support the de-familialization of primary market workers, who can more easily afford in-home care services. These exclusions also benefit the primary labor market as a whole by enabling it to continue operating under the ideal worker model.

## 2. *Intra-Household Division of Labor*

One would expect that as care work became more affordable, and as households transferred more care tasks to the market, household members would be left with less domestic chores and a more equal distribution of the remaining care responsibilities. However, in all OECD countries, despite varying regulatory regimes of care markets and care work, there remains a significant gap between the time men and women spend on domestic work.<sup>193</sup> In the United States, women still engage in unpaid care work much more frequently and for much longer periods of time than do men.<sup>194</sup> While these studies show that women spend less time on unpaid care work than they did a decade ago, this is most likely not the result of redistribution

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191. Frances Olsen showed how the concept of "non-intervention" in the family (much like non-intervention in the market) does in fact express state involvement in preserving the status quo. See Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504-05 (1983) (arguing that states begin with an assumption that regulation of the family is more intrusive than regulation of the free market and is therefore harder to justify).

192. Guy Mundlak & Hila Shamir, *Between Intimacy and Alienage: The Legal Construction of Domestic and Carework in the Welfare State*, in MIGRATION AND DOMESTIC WORK 161, 168 (Helma Lutz ed., 2008).

193. See Fisher et al., *supra* note 150; ESPING-ANDERSEN, SOCIAL FOUNDATIONS, *supra* note 8, at 57-60.

194. BUREAU OF LABOR STATISTICS, AMERICAN TIME USE SURVEY—2008 RESULTS 3 (2009), available at <http://www.bls.gov/news.release/atus.nr0.htm> ("On an average day, 20 percent of men did housework—such as cleaning or doing laundry—compared with 50 percent of women. 38 percent of men did food preparation or cleanup, compared with 65 percent of women. On the days that they did household activities, women spent an average of 2.6 hours on such activities while men spent 2.0 hours.").

of care work between men and women, but rather due to the advent of technology, service markets, and the redistribution of care work among women of different socio-economic classes. While the existence of a well-developed and affordable care market in the United States means that men do even less work than they would if care work was more expensive and less accessible, it does not mean that men take on a significantly greater share of care responsibilities.

### 3. *Material Delivery*

In the United States, due to care workers' negative exceptionalism, it costs less to employ care workers than almost any other worker legally employed in the labor market. Their exclusion benefits not only the households that purchase their services, but also the primary labor market as a whole. Care work exclusions result in minimal material redistribution from the family to the worker since almost nothing but her bargaining position determines the worker's wage and working conditions. Considering the relatively low labor costs coupled with the fact that in-home care is the preferred setting for familial care,<sup>195</sup> it is not surprising that the market for in-home care work continues to grow.<sup>196</sup> This is especially the case for in-home care of the elderly and disabled, cited as one of the fastest growing industries in the United States.<sup>197</sup>

*Long Island Care at Home v. Coke*<sup>198</sup> explores the cost reduction reasoning behind the exclusion of care workers. In *Coke*, the plaintiff challenged the FLSA's companionship service exemption of home care workers.<sup>199</sup> The Second Circuit upheld the exemption as it applied to private employers, but invalidated the exemption in relation to third party employers, such as home care agencies.<sup>200</sup> The U.S. Supreme Court

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195. If families can afford in-home care, they often prefer it because it is flexible and allows for individual attention. See Smith, *supra* note 155, at 1837.

196. *Id.* at 1837; BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 2010-2011 EDITION (2009), available at <http://www.bls.gov/oco/ocos326.htm#outlook> (last visited Dec. 2009); Daniel E. Hecker, *Occupational Employment Projections to 2014*, MONTHLY LAB. REV., Nov. 2005, at 75-76 (projecting 56% growth in the demand for home aides).

197. OCCUPATIONAL OUTLOOK HANDBOOK 2010-2011 EDITION, *supra* note 196, (2009) available at [http://www.bls.gov/oco/oco2003.htm#occupation\\_d](http://www.bls.gov/oco/oco2003.htm#occupation_d) (last visited Dec. 2009) (home health aides and personal and home care aides are listed as third and fourth in the list of occupations with the fastest growth. The first two occupations with the fastest growth being biomedical engineers and network systems and data communications analysts); see also Nicholas Confessore & Sarah Kershaw, *As Home Health Care Industry Booms, Little Oversight to Counter Fraud*, N.Y. TIMES, Sept. 27, 2007, at 27, available at <http://www.nytimes.com/2007/09/02/nyregion/02fraud.html>.

198. 551 U.S. 158 (2007).

199. For the language of the companionship exemption, see *supra* note 175 and accompanying text.

200. *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 133, 135 (2d Cir. 2004) (upholding Department of Labor regulation 29 C.F.R. § 552.109(a), which provides that the exemption covers workers employed by private households as well as those employed by third parties).

reversed unanimously and upheld the companionship service exemption.<sup>201</sup> While the Court based its decision on the regulatory power and discretion of federal agencies, the discussion at oral argument reveals an additional underlying concern.<sup>202</sup> Justice Stephen Breyer said:

Did Congress intend to cover, which I guess is a growing situation, that there is an old woman or man and they're very sick and they live in their house, there's only one way to keep them from having to go to an institution. Their children hire a companion to look after them. Now, that's a third party . . . I live in San Francisco. My mother lives in Massachusetts. Now, if I hire a companion to live in Massachusetts, that companion does not work about a private home of the person, me, by whom she is employed. So if we're being literal and if you [the lawyer representing the worker] win this case, I don't see how this works—and I'm worried about this, obviously—and I think it's probably very common, that all over the country it's the family, the children, the grandchildren . . . who [are] paying for a companion for an old, sick person so they don't have to be brought to an institution. And if you win this case, it seems to me suddenly there will be millions of people who will be unable to do it. . . . It is a very worrisome point.<sup>203</sup>

This comment expresses a concern that, without a companionship exemption to the FLSA, the preference of many elderly or disabled individuals and their families to receive care at home will go unmet due to the high cost of out-of-home institutional care. Moreover, it reveals that the exemption is structured to provide a de-facto benefit to employers, in the form of reduced employment protections for care workers, in order to make their work affordable. Thus, employers of care workers are free to enter a primary labor market that only marginally recognizes familial care obligations.

Applying Summers' model here would suggest that the exclusion of care workers from employment law protections should have the effect of increasing care workers' wage compared to a regime that would enforce such protections, and accordingly increase the supply of workers.<sup>204</sup> If U.S. employment law were reformed to impose protections on the secondary market of care workers, a predictable effect—absent a separate subsidy mechanism—is the decrease in wages of in-home care workers. Still, even under this model, wages would decrease only if workers were paid at a level beyond the minimum wage or if minimum wage regulations were not enforced. If the wage is flexible and reduced by the amount of the new

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201. *Long Island Care*, 551 U.S. at 169-175.

202. Transcript of Oral Argument at 26-28, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) (No. 06-593).

203. *Id.*

204. Summers, *supra* note 59, at 180-81.

costs, workers would internalize the whole cost of the protection. Even where this cost is internalized by the workers, if workers attached a value to the benefits that exceeds their wage reduction, then employment rates would not fall and the market would not shrink despite the protections.

In two different situations, however, the market may shrink as a result of imposing protective laws. The first situation is when care workers value the benefit less than their wage reduction and thus exit the market in response (decline in supply). The second situation that may lead to lower employment rates is rigid wages imposed by minimum wage laws on care workers. When the wage is rigid due to minimum wage regulation, additional costs imposed by protective legal rules cannot be passed on to workers. As a result, the price of care work rises and some employers cannot afford the care (decline in demand).

The outcome of this analysis is rather grim: employment law creates and entrenches the vulnerability of care workers. This is the result of negative exceptionalism, the exclusion of in-home care workers from protective legislation, which leaves only the default rules of employment contracts as the main regulatory tool. This negative exceptionalism also reduces the cost of in-home care work, allowing for its accessibility and affordability. As a result, the costs imposed on the secondary market of care workers become a benefit to primary market employers and employees, providing for a cheaper care solution to workers with familial care responsibilities.

#### IV.

#### CONCLUSION

This article makes three contributions to the ongoing debate about the potential for redistribution through legal rules and, specifically, the effect of employment law on the distribution of familial care along gender and class lines.

First, redistribution through legal rules, and specifically through FAM, is possible and, if properly designed, may avoid harming the people it is trying to help. In the United States, the effects of employment law on distribution in markets of care shows that distribution through legal rules poses great challenges. The main challenges are avoiding cost shifting to the protected group, dealing with unintended consequences of accommodation mandates (such as exacerbation of gender inequalities), and providing affordable care while maintaining care workers' employment rights. Still, while these challenges are formidable, they are neither inherent nor unmanageable.

The study of the interaction between employment law and the paid and unpaid markets of care suggests that, while individual market contracting

seems to replicate market inequalities, there are in fact institutional variations within markets of care that can enable redistribution. Institutional design aimed to enable redistribution does not overcome all of the problems presented by individual contracting, namely, the fact that care work remains a secondary market job, but, through (1) attention to the default rules of the employment contract, (2) the application and enforcement of protective employment law to primary as well as secondary labor sectors, and (3) the interaction of employment law with welfare policies, institutional and distributive transformation is plausible. More specifically, in the context of FAM, variations in accommodation mandate funding, leave length, labor market composition (integrated and segregated), the binding effect of discrimination law, and the interplay between familial leave and other leaves available to the general workforce are determinative factors in shaping the redistributive potential of mandates. This outcome suggests that legal rules can lead to progressive redistribution.

It also follows that granting rights to workers, such as the right to family leave, does not, by itself, imply significant redistribution. Details of the right's application, the background rules to which it applies, and enforcement mechanisms, are all crucial in determining the scope of redistributive effects and even whether the right actually harms its intended beneficiaries. At the same time, the argument that granting unpaid leave results in regressive distribution proves to be inaccurate. If unpaid leave is provided in a regulatory environment where universal paid leaves are available, then the unpaid character of family leave does not intensify commodification or familialization, nor does it lead to full cost internalization.

Second, in order to fully understand the distributive outcome of FAM, a wider framework is required: one that looks at material outcomes, but also examines the non-pecuniary effects of commodification, familialization, stratification, and IHDOL. Thus, it is important to understand the legal, social, and economic context in which protective legal rules operate. Specifically, in the context of FAM, the framework requires taking into account the availability of universal leave, the default rules of the employment contract, the persistence of a gender wage gap, the application of and compliance with protective employment regulation in the secondary market of care work, and the background rules of welfare and immigration law. All of these features are key to the operation of FAM and their distributive outcomes.

The five-pronged distributional framework exposed the trade-offs embedded in stated policies, such as the FMLA, and the complexity of legal regulation given market and social realities. By emphasizing the



multilayered effects of legal regulation, the distributive framework provides a lens, and a new vocabulary, through which to identify the inter-related—sometimes conflicting or reinforcing—effects of commodification, stratification, de-familialization and IHDOL on class and gender material distribution. This analysis invites new ways to think about the normative space that exists between home and work, spurring the need for legal reform.

Third, the double exceptionalism of the family helps to explain the relationship between employment law and markets of care. Regulation of the primary labor market as it relates to workers' familial care obligations through FAM is tied to regulation of the employment of in-home care workers, a sector within the secondary labor market. These disparate elements of employment law are closely linked because relegating care work to the secondary market—where protective employment legislation, partly by design and partly by enforcement failure, does not apply—provides a benefit to primary market workers who procure the labor of care workers. Accordingly, the traditional focus on FAM as the sole variable explaining how employment law distributes the cost of care between employers and employees is misplaced.

The picture that emerges after analyzing both the affirmative and negative exceptionalism of the family in employment law is tellingly circular: contractual default rules in the primary labor market provide no protections to workers with familial care obligations. In the name of gender equality, employment legislation devises protective schemes that enable primary market employees to engage in a limited amount of non-commodified care work, yet even after protections are extended contractual default rules resurface as the primary source of regulation in the secondary employment relationship of care workers, in essence benefiting the primary labor market through reduced protection of workers in the secondary market.

In the context of employment law, this article addressed the potential of legal rules to affect redistribution in markets of care. The focus on existing institutional arrangements, regulatory provisions, and their practical constraints stems from a belief that a nuanced understanding of these elements is crucial to any attempt to rethink, innovate, and improve the social organization of care, which is in grave need of reform. Finally, if the arguments in this article prove persuasive, employment law should be understood as an accessible, if obdurate, legal tool that holds the potential for achieving significant distributional shifts among household members and socio-economic classes alike.

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