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The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States†

The Paper offers a new analytical framework for the study of the regulation of family relations. The framework builds on distributive models of the welfare state, and goes beyond the family-state dyad to include the market as a sphere in which the family is meaningfully regulated. The offered framework challenges the traditional boundaries of family law and suggests an understanding of the institution of the family as defined through its interaction with the institutions of the labor market and the welfare state. The framework is applied to welfare state regimes of familial care in the United States and Israel—child care in the United States (federal), and long-term care for the elderly in Israel. The comparative distributive analysis shows that viewing the family from outside traditional Family Law leads to a relaxation of some of the exceptional characteristics of the legal concept of the family, as well as to a realization that family regulation is intimately connected to broad social policy debates about citizenship, social status, labor market, and wealth distribution.

I. INTRODUCTION

The regulation of the family¹ occurs in multiple legal sites. The traditional site of legal regulation of the family is what is known (and

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1. By *family* here I mean social units that are created by biological or affective ties and that are recognized as families by law. While the myriad meanings of the term ‘family’ in different legal fields and across time is beyond the scope of the Article,

taught in law schools) as “Family Law.” Family Law traditionally focuses on regulating relations between family members, mainly encompassing the legal regulation of marriage and its alternatives, divorce, child custody, parental status, and parental rights. Family Law in the traditional understanding (capitalized here) therefore defines the boundaries of the family as a legal concept, and the legal relationships between family members. Yet there are various other sites of legal regulation that heavily influence and shape the family, without committing to the distinctiveness of the family as Family Law does. Many fields of private and public law include family-targeted provisions that influence and regulate the family at different levels. From contract to property, through torts, criminal, welfare, tax, employment, and immigration law—to name a few—these fields of law apply to the family legal regulation principally associated with the regulation of market relations and/or state/citizen relations. This paper offers a framework for bringing the family into the study of these more public areas of law, what Janet Halley in her Introduction calls Family Law 2,² and for introducing market regulation to the study of Family Law.

The comparative focal point in this paper is welfare regimes, and specifically their treatment of familial care giving. If we see welfare law as an area of legal regulation that directly addresses the status of husband, wife, and child, we can observe how it shapes family dynamics and bargaining positions of family members, and therefore familial relationships. Specifically, welfare law reshuffles the boundaries between the labor market, the welfare state, and the family in providing individual and familial welfare and social security, and in the process affects the division of labor between family members. Studying the regulation of the family in the context of welfare law reveals that while the family unit in post-industrial economies lost many (though certainly not all) of its productive functions, it still operates as a private welfare system.³ Welfare regimes in different countries conceptualize different roles for the family in the provision of social security to its members, and in this role the family unit remains an important economic actor. The family is therefore not only a

it is important to recall that the family is not a “natural” or “timeless” social unit. See Martha A. Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, UTAH L. REV. 387, 389-93 (1993).

2. Challenging Family Law’s exceptionalism, Halley develops a typology of “Family Laws”: Family Law 1 refers to the traditional understanding of family law as outlined earlier in this paper; Family Law 2 includes explicit family-targeted provisions in legal fields outside traditional family law; Family Law 3 includes legal rules that contribute structurally but silently to the ways in which family life is lived and the household structured. See Part I to the Introduction of this volume.

3. Janet Halley, *What is Family Law? A Genealogy*, YALE J.L. & HUMAN. (forthcoming, 2011); See also Anne Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL. REV. 4 (2010).

site of affection, altruism, and emotion, but also of economic production and dependence.

In Part II, I suggest that in order to study family regulation outside Family Law, comparative legal scholars can draw on frameworks developed by the welfare state theorists⁴ to explore the division of labor between the welfare state,⁵ the labor market, and the family. I then offer an analytical framework as a basis for conceptualizing the distributive effects of different legal welfare regimes on the family and on different family members. In Part III, I compare the welfare regimes of familial care in the United States and Israel. These capitalist welfare states are both liberal in the sense that they mostly rely on the market (rather than the family or the state) for the provision of familial care. The cross-jurisdictional study reveals the potential variance in distributive outcomes possible even within regimes that rely on the market for provision of welfare services. It further shows the important role of welfare law and social policy in shaping the family and the relationship of its members to each other and to the labor market and the state. Part IV offers some concluding remarks.

II. WELFARE LAW AS FAMILY LAW

This Article builds on the insight of political economist Gøsta Esping-Andersen. In the context of welfare state theory, Esping-Andersen showed that in order to understand the function of welfare states and their distributive effects, one cannot focus only on classic welfare state functions, mainly state expenditure. Rather, an exploration of the welfare provided by families and markets (especially the labor market) is equally crucial to the understanding of the operation of the welfare state.⁶ Here I apply this insight to the study of the regulation of the family, in an attempt to go beyond the family-state dyad and to include the market as a sphere in which the family is meaningfully regulated.⁷ This analysis brings to the foreground the

4. See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990) [hereinafter *ESPING-ANDERSEN, THREE WORLDS*]; GØSTA ESPING-ANDERSEN, *SOCIAL FOUNDATIONS OF POSTINDUSTRIAL ECONOMIES* (1999) [hereinafter *ESPING-ANDERSEN, SOCIAL FOUNDATIONS*].

5. I use the term welfare state to mean not merely the discrete range of income transfers and social services but rather, more broadly, to refer to “the state’s larger role in managing and organizing the economy”; see *ESPING-ANDERSEN, THREE WORLDS*, *supra* note 4, at 2.

6. *ESPING-ANDERSEN, THREE WORLDS*, *supra* note 4, at 21. “The welfare state cannot be understood just in terms of the rights it grants. We must also take into account how state activities are interlocked with the market’s and family’s role in social provision”; and a later admission and correction of his own lack of attention to the family, see *ESPING-ANDERSEN, SOCIAL FOUNDATIONS*, *supra* note 4, at 47.

7. In the rest of the Article I use Esping-Andersen’s terminology of the state-market-family institutional triad, but let me clarify what I use it for. I do not see the state-family-market institutions as distinctly separate. The market and the family in

fact that the market and the family are not polar opposites but rather complement each other in the provision of care solutions, and together with the welfare state (and under its orchestration), create the framework and the conditions in which productive and reproductive activities take place.

I propose an analytical framework consisting of five criteria for assessing the distributive outcomes of welfare regimes of familial care and the way they form roles, expectations, and endowments in the family. The first three criteria were developed by Esping-Andersen in his study of the distributive effects of the welfare state—*de-commodification, de-familialization, and stratification*. To these I add two elements that derive from the particular interest in distribution within the family. One is *intra-household division of labor* which pays particular attention to specific gender effects, and the other is *material delivery* that concerns class effects (distribution of wealth). Here is a description of the five criteria that make up the proposed framework for a distributive analysis of family regulation:

De-commodification measures the degree to which social rights “permit people to make their living standard independent of pure market force,”⁸ thus diminishing the citizens’ status as “commodities.” *De-commodification* loosens market dependency, and an optimal level of *de-commodification* therefore requires “that citizens can freely, and without potential loss of job, income, or general welfare, opt out of work when they themselves consider it necessary.”⁹

De-Familialization measures the degree to which an individual’s familial care responsibility is relaxed due to either state provision or market provision. In a familialistic regime, public policy assumes that households must carry the principal responsibility for their members’ welfare. A *de-familializing* regime, on the other hand, is one which unburdens the household and relaxes the individual’s welfare dependence on kinship.¹⁰ This element is in a sense parallel to the *de-commodification* element: while in that case we examined re-

post-industrial economies are not free from the state. The state is the enabling condition for both family and market, and it determines the form and content of these institutions by its rules and formalities. Yet, this triangle is a useful descriptive tool to conceptualize the three institutions as distinguished locations of dependency. I therefore follow Esping-Andersen’s triangular model mostly to signify the different forms of individual dependency that result from different institutional configurations that allocate the provision of welfare services to the family, the market or the state.

8. ESPING-ANDERSEN, *THREE WORLDS*, *supra* note 4, at 3. Note that the term *commodification* here does not have its common meaning within political theory as “the process of something becoming understood as a commodity, as well as the state of affairs once this has taken place” (MARTHA ERTMAN & JOAN WILLIAMS, *RETHINKING COMMODIFICATION* 1 (2005)). Instead, it signifies a much narrower relationship between the individual and the market. The *commodification index* looks at the individual’s *dependence on the labor market* for economic survival.

9. *Id.* at 23. Accordingly minimal *de-commodification* policy must include some paid sick leave, paid parental leave, and unemployment insurance.

10. ESPING-ANDERSEN, *SOCIAL FOUNDATIONS*, *supra* note 4, at 51.

ducing market dependency for economic survival, here we observe reducing familial dependency both of the carer, and of the caree. However, it is worth noting that this criterion, as used by Esping-Andersen, focuses mostly on the carer and the negotiation of her dependence/independence under different welfare regimes.

Stratification describes ways in which the welfare state serves to structure the quality of social citizenship. The stratification variable focuses on the way in which the welfare state distributes income and shapes class and status,¹¹ and can be measured by poverty levels, income distribution, education structure and opportunities, and so on. The claim here is that while the welfare state is supposed to be an equalizing force that addresses stratification, it also produces stratifying outcomes.¹² Accordingly, there is nothing inherently equalizing or conservative in the welfare state per se, rather it is the institutional division of labor and the distributive mechanisms adopted that cultivate the fabric of social solidarity.¹³

The *Intra-household Division of Labor* (IHDOL) element is used to lift the family unit's "veil" and to understand the operation of individuals within it. While the de-commodification, de-familialization, and stratification elements map the set of distributive outcomes—in the sense of dependencies and hierarchies—that result from social regulation, IHDOL focuses on what happens within the family and how "public" regulation affects the distribution of labor, leisure, and care responsibilities within it. The IHDOL element focuses on a policy's effect on male and female contribution to household care work. It questions the extent to which policies entrench, transform, or disrupt the traditional breadwinner/housewife division of labor, in which women are the providers of care and men are the economic providers. Adding the IHDOL element to Esping-Andersen's framework suggests that measures of de-familialization and de-commodification are important but not sufficient to reveal what actually happens in the household as a result of social policy.

The *Material Delivery* element looks at the redistribution of wealth and asks how much targeted groups actually gain from a given policy. The focus of the previous four elements of the analytical framework was on distributive consequences that go beyond the material. Yet, the material consequences need to be crystallized as well. Moreover, the material delivery element suggests that we cannot learn about wealth outcomes merely from the commodification and stratification elements. "Who gets what" is crucial to an understanding of the resulting distribution of power in society, in markets, and in households.

11. ESPING-ANDERSEN, THREE WORLDS, *supra* note 4, at 57.

12. *Id.* at 55, 109.

13. *Id.* at 58.

The resulting analytical structure is a five-pronged framework, that includes de-commodification, de-familialization, stratification, IHDOL, and material delivery, for the comparative study of distributive outcomes of familial regulation—a framework that can be applied both within Family Law, and outside of it.¹⁴ The distributive analysis that is generated through the application of these evaluative elements is generalized and stylized. The five-pronged framework is surely not exhaustive.¹⁵ Yet, the analysis in Part III will show that, when these five elements are used together, the distributive analysis is far more likely to catch important—and often unnoticed or unintended—policy outcomes, and to reach beyond material advantage to include power, opportunities, and dependencies.

Here I offer a few closing comments on the method:

First, the framework complicates two pivotal concepts in liberal theory: independence and identity. The framework aims to show that individual independence is not absolute. Rather, social policy and regulation negotiate dependency on the state, the market, or the family, or, more likely, on some combination of the three: individuals depend on at least one of these for personal economic survival and welfare. Analyzing social policy using this framework has the potential therefore to expose the ideological backbone of the liberal concept of economic dependence, independence and self-sufficiency. At the same time, the proposed analytical framework exposes a complex reality of identity and class politics. It avoids typifying the winners and losers of social policy in broad categories: labor vs. capital, rich vs. poor, men vs. women. The distributive framework attempts to reach beyond these dichotomies, to unveil the more complex social reality in which conflicting interests arise not only between groups but also within them. While this may be daunting to social movement politics that depend on group solidarity, it does allow for unexpected coalitions to form around real common interests.

Second, while each of the five elements adds valuable information to the understanding of distributive outcomes, their real analytical power lies in their interaction. For example, in order for women to commodify themselves and participate in the labor market

14. For an application of this approach in Employment Law, see Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care* 30 BERKELEY J. EMP. & LAB. L. 404 (2010).

15. One aspect that can be added, depending on the context, is attention to the role played by civil society. Some have tried this exercise, tracing allocation of responsibility for individual welfare between the state, the individual, the market, and civil society; see Christian Aspalter, *Different Worlds of Welfare Capitalism* (Pol'y & Gov't Discussion Paper No. 80, Australian National University, 2001). However, due to interest in the family in liberal welfare states, where civil society's interaction with familial care is relatively limited, and in order to focus the analysis I chose here to maintain the traditional state-market-family triangle, and to leave the civil society aspect aside.

they must first be *de-familialized*, at least to some extent.¹⁶ Accordingly, we see a tight relationship between commodification and de-familialization and vice versa. However, due to the operation of background rules of private law (property, contracts, etc.), the relationship between the two is not necessarily straightforward and predictable. Thus, a policy that aims to increase the market participation of low-income women through a stringent welfare-to-work program may simultaneously push women into marriages and increased familialism when the policy interacts with a labor market in which the jobs available for unskilled women are low-wage, precarious, and with no social benefits. Accordingly while the relationships between the five elements are an important part of this framework, they are not stable and constant. The interaction between the different elements is affected by a wider range of social practices as well as background legal rules.

Third, the goal here is mostly descriptive, though normative implications (discussed in Part IV) are rife. The framework is an analytical tool designed to reveal more fully the distributive outcomes of a given care-related legal regulation or reform proposal. By taking into account the effects of care-related policy vis-à-vis each of the five distributive elements, the framework aims to translate dogmatic positions into distributive outcomes. The analytical breakdown of policy outcomes into the five elements can function as a new vocabulary for discussing the effects of institutional arrangements, a vocabulary by which actors with different values and political commitments can find common ground, and/or can identify more accurately the nature and extent of their disagreements. For me, it facilitates my own interest in furthering a range of normative and academic goals: distributive justice, gender and class equality, a post-modern understanding of identity and politics, and a legal realist conception of the operation of legal regulation in markets. I hope that this framework can also be effectively used by those who do not share my convictions and commitments and can constitute a common vocabulary between people who disagree with each other on these issues.

III. REGULATION OF THE FAMILY IN THE WELFARE STATE: FAMILIAL CARE POLICIES IN THE UNITED STATES AND ISRAEL

The manner in which care is provided within families is rarely thought of as part of Family Law, or as subject to legal regulation at all. Virtually all jurisdictions uphold some kind of a general duty of care toward one's familial dependents and child neglect is deemed to

16. Ann Shola Orloff, *Gender and the Social Rights of Citizenship: The Comparative Analysis of Gender Relations and Welfare States*, 58(3) AM. SOCIOLOGICAL REV. 303, 318-20 (1993).

be criminal, but, apart from liability to third parties and the extreme case of neglect, care provision within families is understood to be part of the realm of private decision making, outside the scope of legal regulation.¹⁷ However, a closer study of welfare policy suggests that familial care provision is indeed regulated, albeit outside of Family Law, via market and welfare-state mechanisms.

A. *A Comparative Study of Liberal Welfare Regimes*

The two countries I investigate—the United States and Israel—can be characterized as liberal welfare states. A liberal welfare regime is marked by reliance on market provision of welfare services.¹⁸ It is a regime in which “people are primarily responsible for their own welfare.”¹⁹ The state and the family are marginal in relation to the market, yet because private solutions are preferred to public ones, the family is seen as a default service provider that individuals should rely upon before turning to state-provided benefits and services. State benefits are modest, and predominantly means-tested and need-based. They are supposed to reach the poor and are provided at low levels, sufficient for mere subsistence, so as not to disincentivize people from participation in the paid labor market. The state creates and encourages the market passively (by guaranteeing a mere minimum) or actively (by subsidizing private welfare schemes).²⁰ Liberal regimes exemplify a “service-passive” welfare state, but the passive state can be supplemented by a relatively developed, cheap, and accessible, market option. The United States, Canada, and Australia belong to the liberal regime of welfare capitalism,²¹ and, as will be explained next, so does Israel.

The comparative study of two welfare states characterized as liberal implies that in both cases the basic institutional configuration—in the sense of the division of labor between the labor market, the family, and the welfare state—will not greatly diverge. The United States is the paradigmatic liberal welfare state.²² Israel since its in-

17. Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504-07 (1982-83).

18. ESPING-ANDERSEN, SOCIAL FOUNDATIONS, *supra* note 4, at 74-75.

19. Robert E. Goodin et al., *The Real Worlds of Welfare Capitalism*, in THE WELFARE STATE READER 170, 172 (Christopher Pierson & Francis G. Castles eds., 2000).

20. ESPING-ANDERSEN, THREE WORLDS, *supra* note 4, at 26.

21. ESPING-ANDERSEN, SOCIAL FOUNDATIONS, *supra* note 4, at 87. The common English-speaking character of these countries led them to be known in the literature as “welfare laggards” and gave rise to the “English awfulness thesis.” Francis G. Castles & Deborah Mitchell, *Worlds of Welfare and Families of Nations*, in FAMILIES OF NATIONS: PATTERNS OF PUBLIC POLICY IN WESTERN DEMOCRACIES 93, 94, 112 (Francis G. Castles ed., 1993).

22. JULIA S. O’CONNOR ET AL., STATES, MARKETS, FAMILIES: GENDER, LIBERALISM AND SOCIAL POLICY IN AUSTRALIA, CANADA, GREAT BRITAIN AND THE UNITED STATES, 13 (1999); ESPING-ANDERSEN, THREE WORLDS, *supra* note 4, at 75-55.

ception has had a mix of social-democratic and corporatist regimes.²³ However, since the 1980s, Israel has been increasingly adopting characteristics of liberal welfare states.²⁴

Esping-Andersen concluded that the characteristics of the liberal welfare state lead to *low levels of de-commodification*, since most services and benefits are dependent on market attachments rather than on the basis of citizenship, they lead to *market dualism (high levels of stratification)* cultivated by the residual approach to welfare.²⁵ The liberal welfare state characteristics also entail *medium levels of de-familialization*, since markets are encouraged to replace household self-servicing but the relative price of private services makes market substitution available only to those who can afford it.²⁶

Many theorists, including Esping-Andersen, assume that the welfare state's emancipatory power lies in its ability to curtail market forces. In fact, this is the logic of Esping-Andersen's de-commodification index: it measures a welfare regime's capability to protect workers from market dependency. The liberal welfare state is therefore seen as a "welfare laggard"²⁷ because of its reliance on the market as a primary supplier of welfare services. The study of two liberal welfare states which, as we will see shortly, rely on different mechanisms for welfare market-reliance and exhibit markedly different distributive outcomes provides an opportunity to explore whether there is indeed something inherently negative, in distributive terms, in opting for the market for provision of care.²⁸ The analysis asks whether the liberal regime necessarily leads to a particular set of distributive outcomes in relation to income and gender inequality. It does this by asking how different liberal welfare state configurations shape bargaining power in families and in markets.

B. *Familial Care Policies in the United States and Israel*

In liberal welfare states various child-care services are provided predominantly by the market (rather than the state). Yet various countries, even liberal ones, employ different combinations of subsidies, tax breaks, and other regulatory mechanisms that shape care

23. See AVRAHAM DORON, IN DEFENSE OF UNIVERSALITY: A CHALLENGE TO ISRAEL'S SOCIAL POLICIES (1994) (Hebrew).

24. See Ben-Zion Zilberfarb, *From Socialism to Free Market - The Israeli Economy, 1948-2003*, 11(1) ISRAEL AFFAIRS, 12 (2005); Avraham Doron, *Israel's Welfare Regime: Trends of Change and their Social Effects*, 5(2) ISRAELI SOCIOLOGY, 417 (2003) (Hebrew). While the liberal regime may not be dominant in all welfare state functions in Israel, it can be said to be dominant in the domain of familial care provision.

25. ESPING-ANDERSON, SOCIAL FOUNDATIONS, *supra* note 4, at 75-77.

26. *Id.* at 66-67. In the area of familial care, when there are flourishing markets of private care providers, the liberal regime can score relatively high in the de-familialization index.

27. See also O'CONNOR ET AL., *supra* note 22, at 3.

28. *Id.* at 30.

markets in order to increase the accessibility of child care solutions to parents of all income levels. These subsequently shape family dynamics and familial roles.

The following analysis will examine the regulatory tools the United States and Israel employ for shaping markets of care and care distribution within families. I analyze two comparable cases: (1) child care in the United States (federal), and (2) long-term care for the elderly and disabled in Israel. The combined analysis aims to reveal the versatility of liberal welfare state institutional arrangements and distributive outcomes when dealing with similar challenges. Although child care and old age care are two distinct areas of social policy, with different politics and histories, they are comparable when we locate the issue of dependency at the core of family-related policies.²⁹ Young children and the elderly are two groups of family dependents whose care has traditionally been seen as women's responsibility. These care responsibilities typically imply continuous assistance in performing daily activities in a way that often impedes labor market participation by care-giving family members, and thus similarly affects those caregivers' household and market bargaining positions.³⁰ The development of accessible and affordable child care and old age care are therefore seen as complementarily important steps towards enhancing labor market participation (commodification) and the de-familialization of family caregivers.³¹

1. Child Care in the United States

a. The Legal Framework

Welfare-based child care³² in the United States is characteristic of liberal regimes: it is residual in nature, it encourages and assumes individual responsibility for care needs, and it encourages the creation of market alternatives to familial care, while creating disincentives for intra-familial care solutions. The main³³ federal pol-

29. MARTHA A. FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 121-41 (2004).

30. Andrew Leigh, *Informal Care and Labor Market Participation*, 17 *LABOR ECONOMICS* 140, 140-41 (2010).

31. Eliza K. Pavalko & Kathryn Henderson, *Combining Care Work and Paid Work: Do Workplace Policies Make a Difference*, 28 *RESEARCH ON AGING*, 359, 360-61 (2006); Michael Fine, *The Responsibility for Child Care and Aged Care: Shaping Policies for the Future* (Social Policy Research Paper No. 105, 1999).

32. I focus on very young, pre-school, children due to the high intensity of care required at this age. Indeed, studies suggest that women's labor force participation is strongly correlated with the ages of their children; see Linda J. Waite, *Working Wives and the Family Life Cycle*, 86 *AM. J. OF SOC.* 272, 289-90 (1980) ("the younger the child, the less likely is the mother to be active in the job market"). Accordingly, discussion of the length of the school day is outside the scope of this Article.

33. Other less expansive federal programs that fund various elements of child care are the following: (1) *Social Service Block Grant Program* (SSBG): funds states for the provision of social services directed towards achieving economic self-support,

icy instruments in this area are the Temporary Assistance for Needy Families Grant,³⁴ the Child Care and Development Block Grant,³⁵ and the Child and Dependent Grant Tax Credit.³⁶ Here is a brief description of the system, with analysis to follow in section (ii).

Temporary Assistance for Needy Families Grant: Until 1996, the centerpiece of the United States child care policy was Aid to Families with Dependent Children (AFDC). AFDC was replaced in the 1996 Welfare Reform Act: The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) with the Temporary Assistance for Needy Families Grant (TANF). The TANF program, like the AFDC program that preceded it, is a monthly cash assistance program that provides residual welfare benefits, including child care subsidies, to low-income families with dependent children under the age of eighteen, based on stringent means tests. Unlike the AFDC, the Welfare Reform Act imposes work requirements on TANF recipients and strictly limits the duration of their eligibility. It is directed equally at dual and single-parent families.³⁷ The TANF program is highly residual in nature: it aims to aid only the lowest income families, and only temporarily.³⁸ Since the 1996 reform, the program emphasizes family self-sufficiency, and purports to “move recipients

self-sufficiency, preventing or remedying neglect, abuse, or the exploitation of children and adults; see Office of Community Services, Social Services Block Grant: Focus Report (2007), http://www.acf.hhs.gov/programs/ocs/ssbg/reports/ssbg_focus_2007/child_care.html (last visited June 16, 2010). (2) *Child Care and Adult Care Food Program* (CACFP): a program that provides meals and snacks to children and adults in day care centers. (3) *Head Start*: a national program that provides grants to local (public and private) non-profit and for-profit agencies to provide comprehensive pre-school child development services to economically disadvantaged children and families. See Office of Head Start in the Administration of Children and Families, *Head Start Program Description*, http://www.acf.hhs.gov/programs/ohs/about/index.html#prog_desc (last visited June 16, 2010).

States can also use their own funds to provide, subsidize, and enhance the quality of child care services. For discussion of child care local funding decisions, see SCOTT GROGINSKY ET AL., *FINANCING CHILD CARE* (National Conference of State Legislatures, 2000).

34. Personal Responsibility and Work Opportunity Reconciliation Act Of 1996, Pub. L .No. 104-139, §§ 101-116, 110 Stat. 1996.

35. Child Care and Development Block Grant Act, 42 U.S.C. § 9858. (1990).

36. 26 U.S.C. § 21 (1986).

37. The Department of Health and Human Resources suggests that the AFDC created a disincentive for marriage that was corrected with its replacement by TANF. Yet, TANF does impose a more demanding work requirement from two-parent families, in relation to single parent families. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *TEMPORARY ASSISTANCE FOR NEEDY FAMILIES 53* (8th Report, 2009) http://www.acf.hhs.gov/programs/ofa/data-reports/annualreport8/TANF_8th_Report_111908.pdf (last visited June 16, 2010) [hereinafter TANF 8th report].

38. NATIONAL WOMEN’S LAW CENTER, *CHILD CARE SUBSIDY REPORT*, 6-7 (2005), <http://www.nwlc.org/pdf/nwlcstatechildcareassistancepolicies2009.pdf> (last visited June 16, 2010) [hereinafter CCS Report].

into work,³⁹ in what is known as the “from welfare to work” policy. This is accomplished by a five-year eligibility cap for assistance, a requirement to work after no more than two years of cash assistance, and compulsory participation in work-related activities such as training, job search, community service, or employment.⁴⁰

However, encouraging market participation (commodification and de-familialization) is only one part of the overall TANF purpose of ending dependency on government benefits. TANF is also a familizing project: one of its goals is to increase “the percentage of children who are raised by two parents in a healthy marriage.”⁴¹ The program includes a “Healthy Marriage Initiative” which aims “[t]o help couples, who have chosen marriage for themselves, gain greater access to marriage education services, on a voluntary basis, where they can acquire the skills and knowledge necessary to form and sustain a healthy marriage.”⁴² State application of the initiative varies and includes voluntary marriage education programs for adults and high-school students, relationship education for non-married parents, raising awareness of the value of marriage, encouraging pre-marital marriage education or counseling, and/or limiting the permissible grounds for divorce.⁴³

Finally, TANF includes a Child Support Enforcement Program which aims to ensure that “children are supported financially and emotionally by both of their parents.”⁴⁴ Single parents otherwise eligible for TANF must cooperate with child support enforcement efforts in order to receive TANF benefits. Here again we see the program’s strong preference for private rather than public dependency.

Child Care and Development Block Grant: Beyond establishing TANF, PRWORA also replaced child care funding for low-income families with a single integrated Child Care and Development Block Grant (CCDBG) from the federal treasury to states, contingent on the states’ following Congressionally-set rules. Unlike TANF, which uses child care subsidy as a means to an end, CCDBG’s main goal is to subsidize child care costs. This program attempts to provide quality child care services for low-income family members⁴⁵ who work, train

39. Administration for Children and Families, Office of Family Assistance, TANF Fact Sheet, http://www.acf.hhs.gov/opa/fact_sheets/tanf_factsheet.html (last visited June 16, 2010).

40. TANF 8th Report, *supra* note 37, at 16, 106-09.

41. Administration for Children and Families, Office of Family Assistance, Healthy Marriage Initiative, <http://www.acf.hhs.gov/healthymarriage/about/mission.html#ms> (last visited June 16, 2010).

42. *Id.*

43. TANF 8th Report, *supra* note 37, at viii, 39-50. For a discussion of the Healthy Marriage Initiative, see ROBERT CHERRY, WELFARE TRANSFORMED 145-61 (2007).

44. TANF 8th Report, *id.* at viii, 33-38.

45. Eligibility for CCDBG services is limited to families with income at or below eighty-five percent of the State Median Income (SMI) for a family of the same size. Overall, states report an average income eligibility level equivalent to sixty-one per-

for work, or attend school, or whose children are receiving protective services. Unlike TANF, once eligibility is determined, families continue to receive child care assistance as long as they continue to meet the eligibility criteria (mainly means tests and work-activity tests); they are re-evaluated every six to twelve months.⁴⁶ Child care providers serving families funded by CCDBG must meet basic health and safety standards set by the states.⁴⁷ Besides that, there is no universal regulation of the quality or provision of child care services.

Child and Dependent Care Tax Credit: A different approach to state subsidy of child care and encouragement of private care solutions is expressed in the Federal Child and Dependent Care Tax Credit. The tax credit allows a tax reduction of up to thirty-five percent of qualifying care expenses,⁴⁸ and up to a limit of \$3,000 for the care of one person.⁴⁹ To qualify for the tax credit, expenses must be paid for the care of a child under the age of thirteen or for the care of a spouse or dependent unable to take care of him or herself. Expenses do not qualify if paid directly to a dependent (such as a wife or an older child) or to a non-dependent parent of a child. Naturally, the tax reduction applies only to those who earn taxable income; low-income families with little or no federal income tax obligations cannot receive the benefit. Further, the credit applies only if the expenses are “work-related,” that is, are required to enable work, search for work, or full-time education. Most states also offer a child- and dependent-care tax credits or deductions that are based on the federal credit scheme. Few go beyond it to offer more generous credits, negative taxation, or a comparable benefit to families with no income.⁵⁰

Finally, separate legislation ensures that low-income workers with children enjoy the *Earned Income Tax Credit* (EITC). The EITC is a credit against federal income liabilities, and can operate as a neg-

cent of SMI. See CHILD CARE BUREAU, CHILD CARE AND DEVELOPMENT FUND: REPORT OF STATE AND TERRITORY PLANS 2006-2007 129-32 (2007), <http://nccic.acf.hhs.gov/pubs/stateplan2006-07/stateplan.pdf> (last visited June 16, 2010) [hereinafter CCDF Report].

46. States can transfer a portion of TANF dollars (up to thirty percent) to CCDBG. When the money is transferred the eligibility criteria that apply are those of CCDBG, and not the stricter and more temporary TANF criteria.

47. For state requirements for child care licensing, see National Resource Center for Health and Safety in Child Care, Individual States' Child Care Licensure Regulations, <http://nrckids.org/STATES/states.htm> (last visited June 16, 2010). Only about half the states require that all center based providers to be licensed. CCDF Report, *supra* note 45, at 255-81.

48. The amount of the credit is determined by gross income. The credit declines as income rises. Only annual income of less than \$15,000 qualifies for the full thirty-five percent credit.

49. Internal Revenue Service, Child & Dependent Care Credit, <http://www.irs.gov/newsroom/article/0,,id=106189,00.html> (last visited June 16, 2010); and INTERNAL REVENUE SERVICE, CHILD AND DEPENDENT CARE EXPENSES, 2-3 (Publication 503, 2008), <http://www.irs.gov/pub/irs-pdf/p503.pdf> (last visited June 16, 2010).

50. *E.g.*, the Child Care Tax Credit in Oregon, Arkansas, Colorado, and Maine.

ative tax for cases in which the credit exceeds tax liabilities. The benefit is highly targeted to reach the poorest families: it is means-tested and depends on marital status and number of qualifying children.⁵¹ The maximum credit is available to single mothers with two or more qualifying children.

b. Distributive Analysis

The American child care policy is Janus-faced: it follows two seemingly contradictory trends—one face (I will call it the *liberal face*) aims for gender equality, commodification, and de-familialization. The other face (I will call it the *conservative face*) looks in the direction of familialization as well as gender and class stratification. The two different outlooks are expressed in different element clusters in the system.⁵²

The liberal face is the one most often associated in welfare state literature with the U.S. welfare regime. Child care is seen as a private responsibility best served by the family and the market. The state steps in temporarily and only for families of the lowest income in order to encourage a shift to “self-sufficiency” through market employment of parents and market provision of child care. Under the main child care welfare instrument, TANF, a temporary child care subsidy serves as a means to reach the goal of full employment—much like the provision of transportation and training. TANF exemplifies the liberal welfare state approach to child care as a private responsibility; child care is a public concern only as far as its public provision helps promote the ends of full employment and self-sufficiency. Thus, the approach entails gender-blind temporary cash assistance with the professed goal of de-familialization, in order to enable labor market participation (i.e., commodification).

Under the liberal face the U.S. system gets a high score on the de-familialization index. Indeed, despite its low expenditure on child care and lack of regulation of child care providers, the United States manages to maintain high levels of de-familialization, measured by women’s market participation (in the United States in 2007 65.9% of the women and 77.8% of the men were employed).⁵³ The EITC (low-income tax credit) and TANF elements such as the work require-

51. Parents with children under the age of nineteen, and who are single or heads of households with an annual earned income of less than \$34,500 qualify for the credit.

52. I expressed this understanding of the U.S. regime of familial care as Janus-faced in the context of employment law in Shamir, *supra* note 14. The terms liberal and conservative here echo Esping-Andersen’s welfare state regime typology and suggest that the United States, while being a paradigmatic liberal welfare state, has strong familialist and conservative under-currents.

53. OECD Online library, OECD Factbook 2009: Economic, Environmental and Social Statistics, <http://titania.sourceoecd.org/v1=903185/cl=26/nw=1/rpsv/factbook2009/06/01/01/index.htm> (last visited June 16, 2010). In comparison, women workforce participation rates in Italy are 46.6%, in France 59.4%, in Sweden 73.2%

ments and time limits,⁵⁴ lead to a significant increase in market participation among low-income women, and to reduced welfare participation rates.⁵⁵

The goal of achieving “independence” is possibly the most important objective in the American welfare system. Dependency is perceived as a situation that must be avoided. It is important to note, however, that dependency here means depending on the state, while dependency on private sources such as the family and the market qualifies as independence.⁵⁶ TANF expresses this hierarchal view of dependency: state-dependency (i.e., dependency on welfare) is the most undesirable condition that one must be moved out of; family-dependency is encouraged through the Healthy Marriage Initiative, as long as it is not accompanied by domestic violence, and is expressed through the requirement to comply with child support enforcement efforts as a pre-condition for welfare eligibility. Still, most efforts and funds are dedicated to increased labor market dependency (a.k.a. “independence”) as the most desirable condition with best results for all adult family members (e.g., “from welfare to work;” a tax credit scheme that does not apply to stay-at-home moms; and the CCDBG budgetary prioritization of employment-enabling assistance over other forms and types of benefits). And indeed, TANF is considered a success in getting people off welfare and into the labor market: since its adoption, welfare caseloads have been significantly reduced and the employment of “welfare mothers”—the group with the greatest difficulty integrating into the labor market—has increased.⁵⁷ The goal, from the outlook of the liberal face, is to get all members of society—including mothers and single parents—into the labor market; but if that fails, the regime prefers the unemployed to be in a family (preferably marital) setting where a breadwinner—and not the state—can provide for them.

The *conservative face* is evident in the formulation of the limits of welfare schemes—the eligibility criteria, the periods of eligibility, and the background economic conditions that shape the labor market in which those ineligible or off-welfare need to find their place. It is

and in Norway 74.6%. The average women workforce participation in OECD countries is 57.5%.

54. An important aspect of the success of PROWRA in reducing welfare dependency and increasing market participation has been the fact that it was implemented during a period of significant economic growth. Thus macroeconomic change was also an undeniably important factor.

55. Hamming Fang & Michael Keane, *Assessing the Impact of Welfare Reform on Single Mothers*, 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 9 (2004).

56. For the changing meaning of the word “dependency” and the ideology it serves, see Nancy Fraser & Linda Gordon, *A Genealogy of Dependency*, 19(2) SIGNS 309, 324 (1994).

57. Mary Corcoran et al., *How Welfare Reform Is Affecting Women’s Work*, 26 ANNU. REV. SOCIOL. 241, 251-52 (2000); Rebecca Joyce Kissane & Richard Krebs, *Assessing Welfare Reform, Over a Decade Later*, 1 SOC. COMPASS 789, 791 (2007).

here that we discover that the U.S. scheme strongly presses toward familialization. While the emphasis on employment in the TANF welfare scheme is highly individualized (each person is expected to work), the individualistic bent is “softened” by encouragement of traditional family units (expressed in the Healthy Marriage Initiative), by attempts to prevent single-parent families (expressed in a policy to decrease out-of-wedlock births), and by enforcement of parental child-support. These TANF goals are familializing objectives—encouraging the creation and preservation of traditional nuclear families.⁵⁸

The regime offers a short period of state dependency in which welfare recipients are supposed to gain market skills and/or marriage skills. State support is then withdrawn to be replaced by either market dependency (commodification, employment) or familial dependency (traditional marriage, familialization). Commodification, however, depends on labor market options. The realities of the employment market in the United States make it difficult for many unskilled women to find jobs that are flexible and well-paying enough for them to keep a job and support their families on a single income. The interplay of the welfare regime and the U.S. labor market therefore ends up pushing low-income women (as primary care takers who bear the expense and responsibility of child care) into marriage⁵⁹ as a form of familial dependence.

The outcome of the Janus-faced regime is that increased familialization is promoted under the conservative face and operates in conjunction with increased commodification, which is promoted under the liberal face. Each stands as a method to avoid public welfare dependency through private—family or market—solutions. While de-familialization is promoted by (temporary, partial) day care subsidies, it is encouraged only to the extent that it enables commodification. Familialization and commodification therefore do not preclude each other under this regime. The simultaneous push of some women towards commodification and/or familialization seems incoherent and even contradictory when the different underlying logics of the family and the market are spelled out, and when the costs and benefits of family dependence versus market dependence are made explicit. Yet, this duality is consistent with the liberal ideological framework in which both the family and the market are elements of the “private” in relation to the “public” sector.⁶⁰

The Janus-faced approach does not influence everyone in the same way. The U.S. familial care regime has different effects on dif-

58. See also SHARON HAYS, *FLAT BROKE WITH CHILDREN: WOMEN IN THE AGE OF WELFARE REFORM* 17 (2003).

59. Though not out of the labor market. Marriage does not necessarily free them from the need to work.

60. Olsen, *supra* note 17, at 1501-02.

ferent individuals depending on social roles (or gender), familial situations, income levels, and occupations (specifically in this context, whether they are themselves care workers or not). I turn now to map these distributive consequences using the five pronged analytical framework developed above.

i. Effects on High and Middle Income Households

Commodification and familialization: In this system, high and middle income families fare relatively well on the de-familialization front. They get a marginal benefit through the Child and Dependent Care Tax Credit, though this benefit is often negligible: the actual credit amounts are generally too small to make a difference in consumer behavior for families that can claim even the maximum credit.⁶¹ However, even without a direct subsidy to high income households, the labor market structure and immigration policy ensure that these families can usually afford to purchase care services in a developed and diverse child care market.⁶²

The United States deals with the cost of care for middle and high income families mostly by labor market regulation and immigration policies. It relies on a “softly” regulated care work sector with a high tolerance for employment law violation, facilitating substandard employment in the care sector. And it counts on a flow of a cheap labor force (consisting mostly of migrant women) to sustain the supply side of the care market. Many care workers are often relatively new immigrants and undocumented migrant workers,⁶³ who, due to their market vulnerability, are willing to work for less pay than “legal” care workers (citizens or documented migrants) would. Accordingly, with or without the tax credit, high and middle income families can often afford a wide range of child care solutions. This trend facilitates relatively high levels of de-familialization of men and women in these households.

IHDOL: Women in high income households can choose to work or stay at home. Most of them in the United States, though surely not

61. LOUISE STONEY, *LOOKING INTO NEW MIRRORS: LESSONS FOR EARLY CHILDHOOD FINANCE AND SYSTEM-BUILDING*, 17 (Horizons Initiative, 1998).

62. It should be noted that families in the low-middle income bracket are relatively disadvantaged by what is perceived as “the middle-class parent penalty” that afflicts families whose income is high enough to disqualify them from receiving the EITC and CCDBG child care subsidies, but whose income is too low to enjoy the benefit of the Dependent Child Care Tax Credit. These families receive no government assistance towards the cost of child care, leading to reduced incentives, as well as ability, for both parents to join the labor market. See David Ellwood & Jeffrey Liebman, *Middle Class Parent Penalty: Child Benefit in the U.S. Tax Code*, (NBER Working Paper No. W8031, 2000).

63. Care workers share common characteristics: these occupations are dominated by women, often of racial or ethnic minorities, and/or immigrants. See DOMESTIC WORKERS UNITED, *HOME IS WHERE THE WORK IS: INSIDE NEW YORK’S DOMESTIC WORK INDUSTRY 3* (2006).

all, seem to “opt-in” and participate in the paid labor market.⁶⁴ Among middle income families, both parents often need to work in order to remain in the middle income bracket. For both income levels, the dual-income household in the United States is sustainable for various reasons, but most dominantly by the availability of a wide range of affordable care-services. The availability of such services means that the potential challenge posed by the dual earner household structure to the gendered division of labor is alleviated: women in these households do less care work because they and their partners can buy the services of care workers. In turn, men are only marginally required to “pitch in” and carry some of the burden of care work: this occurs to the extent that the child care solution proves insufficient or when it falters.⁶⁵ Therefore in middle income households the outcome of the regime shifts household work from the family (both parents) to the market (care worker, mostly women who usually belong to ethnic or racial minorities), and only marginally challenges the traditional household division of labor. Among high income households the regime either has the same shifting effect (when both parents work) or, where women opt out of market participation, the outcome is an entrenchment of the gendered division of labor.

ii. Effects on Low-Income Households

Material delivery and stratification: According to the residual logic of the liberal welfare state, shaping the incentives and income flow of low-income or no income families is the main objective of welfare policy. The result of heavy reliance on markets is a dualist structure of care provision that replicates market inequality. Low-income households, in a sense, get the shorter end of the stick of the liberal welfare policy of unsubsidized market provision of child care. When service workers—cleaners, home-helpers, or child-minders—are paid minimum or below-minimum wage, families are generally able to afford their services as long as they themselves are not low-wage workers. TANF attempts to correct this stratifying result through child care subsidies targeting low-income families. However, this method works only to a limited extent. Many of the families that need the benefits and could have been eligible do not receive the benefits due to various systemic failures such as problems of information,

64. For a discussion concerning women in high income households opting out of paid labor, see Lisa Belkin, *The Opt Out Revolution*, NY TIMES, Oct. 26, 2003, <http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html>; LINDA HIRSHMAN, GET TO WORK 8 (2006). While this trend is definitely worth noting, opting out is not a luxury woman in the lower-middle and low-income bracket can afford. Studies show that the main problem low-income women face is under-employment rather than over-employment. See Michael Selmi & Naomi Cahn, *Women in the Workplace: Which Women, Which Agenda?* 13 DUKE J. GENDER L. & POL'Y 7, 10-14 (2006).

65. Suzanne Bianchi et al., *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79(1) SOCIAL FORCES 191 (2000).

bureaucratic burdens, and long waiting lists.⁶⁶ Even for those who qualify, TANF benefits are scant. Many low-income families are relegated to low-quality—mostly unregulated—child care or intensified familialization. Such limitations reinforce, rather than disrupt, the stratified market structure in which high quality day care is not accessible to low-income TANF recipients. The promotion of parental choice in day care services—one of TANF's professed goals—turns out to be almost illusory. The result is a relatively egalitarian gender outcome (at least in terms of market participation rates) but a stratified child care system which replicates existing class lines. The limited social provision effort in its current configuration is unable, and does not attempt, to significantly change market inequality patterns that stratify by class.

Commodification and familialization: TANF's work requirements and restricted time limits make its recipients, at least after a certain period of time (two to five years), fully dependent on the market for income; while the child support system and the Healthy Marriage Initiative push in the direction of traditional familial dependence. This means that the effect of the U.S. regime on low-income workers (excluding for the moment those engaged in care work) and the unemployed is twofold: temporarily, while training, studying, or looking for a job, welfare recipients' dependency on the labor market and their care obligations to family members are reduced—here the regime brings about temporary de-commodification and de-familialization—but the end purpose, and long run, is eventual intense commodification and/or familialization once the eligibility period expires. In other words, in the long run, vulnerability to market forces (commodification) and familial dependence (familialization) is not relaxed by the scheme.

The eventual commodifying effect of the U.S. scheme on low-income workers applies to both sexes: even considering the training provided by the welfare-to-work programs, the work opportunities available to welfare recipients are in the low-skilled sectors of the economy. These sectors are characterized by low wages, few opportunities for promotion, high turn-over, and minimal or sub-standard working conditions.⁶⁷ Thus, people leaving welfare programs participate in the labor market in sectors in which workers often experience

66. See CCS Report, *supra* note 38; Susan Clampet-Lundquist et al., *Making a Way Out of No Way: How Mothers Meet Basic Family Needs While Moving from Welfare to Work*, in *WORK-FAMILY CHALLENGES FOR LOW-INCOME PARENTS AND THEIR CHILDREN* 203 (Ann Crouter & Alan Booth eds., 2004).

67. African-American men and women and members of other minority groups suffer this more acutely due to a labor market that still discriminates against them in hiring, promotion opportunities, and wages. See Susan Tinsley Gooden, *Race and Welfare: Examining Employment Outcomes of White and Black Welfare Recipients*, 4 *J. OF POVERTY* 21 (2000).

intense commodification.⁶⁸ While the commodification aspect affects both sexes, the incentive towards familialization affects low-income women more acutely than low-income men. Women are required to participate in a labor market in which they can expect to earn on average less than men, as well as enduring other forms of discrimination.⁶⁹ Moreover, women are more likely than men to end up dealing with familial care emergencies thereby facing the employment-related harms that shorter hours and absence from work often evoke. Given the interplay of the welfare state, the labor market, and prevailing gender norms, it should not be surprising that while single mothers are a significant and growing portion of the labor market, they are also one of the poorest groups in the United States.⁷⁰

Mapping the alternatives made available by the liberal regime to individuals in low-income households is helpful in understanding the de-familialization and de-commodification effects of the system on the households that it targets. In a contemporary low-income typical (partnered) family,⁷¹ a single earning breadwinner's wage is not sufficient for economic survival. In this situation the woman in the family has several options:⁷² the woman can (A) stay with her husband, and join the labor market, part time or full time, depending on her employment options in relation to the cost of child care⁷³; she can (B) leave her husband and get a job that will be sufficient to support her children; or (C) leave her husband and receive welfare: but at the current structure this will be for a limited time of two to five years,

68. Corcoran et al. *supra* note 57, at 254. People who got off welfare and were employed "were disproportionately employed in . . . occupations with low median wages."

69. *Id.* at 257. "Work has increased among recipients since welfare reform, but most women who leave welfare take low-wage unstable jobs that offer few benefits; a large minority of leavers work part-time; and many have low-income and experience material hardship."

70. Fang & Keane, *supra* note 55.

71. This is not to suggest that the two-parent household modeled on a male breadwinner and a female care-taker ever was or now is the dominant family model. As far as this model ever reflected familial patterns, there are strong indications that it is no longer the case. See Nancy Fraser, *After the Family Wage: Gender Equity and the Welfare State*, 22(4) *POLITICAL THEORY*, 591, 594 (1994). However, for the purpose of the stylized analysis here it can be helpful to begin from the family model because that most typically captures the imagination of policy makers, reformers and regulators.

72. The analysis here assumes that: a) at the ex-ante situation the wife didn't work, b) at the ex-post position the children will stay with the wife, and c) while married, the couple will be eligible for very little or no welfare support. All of these assumptions can be flipped but are used here to model a paradigmatic scenario that will exemplify classic tradeoffs.

73. I share Linda Hirshman's general impatience with the assumption that child care costs should be subtracted, not from the family's overall income, but only from the wife's income. As Hirshman says: "if it takes two people to make a baby, why is the cost of child care the woman's burden alone?" Hirshman, *supra* note 64, at 58. However, I nonetheless make this assumption because I am interested in exploring the woman's options on her own, without regard to a spouse's income.

during which she will receive some training and some work experience, but eventually she will have to go off welfare and participate in gainful employment facing child care cost without assistance.

Under all these alternatives the low-income woman eventually joins the labor market, thereby demonstrating the successful commodifying/de-familializing effect of the system. When she joins the market, as suggested above, the jobs available to her are mostly "secondary market jobs": dead end, low-income, inflexible jobs with poor working conditions, and most likely no health care benefits.⁷⁴ She might be able to do this on her own (option B) if she has some skills and access to cheap child care and social support. Otherwise receiving welfare (option C) is the better option since then she can develop her skills and gain work experience while getting the TANF assistance package. If she is in a healthy marriage (option A), staying married seems to remain the best option for her, though, because the household income will be higher and the increase will probably not fully offset the cost of supporting her husband and children.

The critical questions in determining her best option become: Will a family member care for her children while she works, and if not, how much will she have to pay (especially in relation to her own wage) for other secondary market workers to take care of the children? She might be herself a highly paid care worker paying for a lower paid care worker to do the job.⁷⁵ The likelihood of her successfully entering the labor force is a function of the likelihood that she can make enough money to pay for child care so that her employment can produce a net gain. Accordingly, the availability of cheap migrant care workers benefits women at the high end of the secondary market as well as those at the low end of the primary market. It therefore appears that the availability of migrant work improves the position of some low-income women as well, since it frees them to enhance their own earning capacity and engage in gainful employment.

IHDOL: The effect of the welfare regime on the household division of labor in low-income households depends on men's and women's level of employment (full-time or part-time) as well as on their employability. Generally, most part-time contingent work in the United States is done by low-income women.⁷⁶ In such households, the welfare regime does not significantly change the gendered divi-

74. See PETER B. DOERINGER & MICHAEL J. PLORE, *INTERNAL LABOR MARKET AND MANPOWER ANALYSIS* 165 (1971).

75. Liesel Schillinger, *A Nanny Nightmare: Living Without One*, N.Y. TIMES May 27, 2007 available at <http://www.nytimes.com/2007/05/27/fashion/27books.html> (last visited Aug. 10, 2010). "[M]ost nannies are not hired by socialites in white-glove buildings, but by cash-strapped working women, who turn over to them a substantial portion (sometimes all) of their earnings."

76. Guy Standing, *Global Feminization Through flexible Labor*, 17 WORLD DEV. 1077 (1989); Guy Standing, *Global Feminization Through Flexible Labor: A Theme Revisited*, 27 WORLD DEV. 583 (1999).

sion of labor, since care work will still be done by a woman. However, due to the growing service economy, in some urban settings women are more employable than men.⁷⁷ In these contexts it is more likely to see men assuming more household responsibilities, and to see couples exchanging and re-defining traditional roles.⁷⁸ Overall, however, the regime mostly entrenches traditional gender roles, with some marginal disruption due to the prevalence in some areas of low levels of male employment.

Within the wider group of low-income households it is worth signifying separately two types of individuals that are particularly affected by the U.S. welfare regime (with potential overlap between the groups): low-income care workers, and low-income single parents.

iii. Effects on Care Workers

Stratification: The working conditions in markets of care in the United States, similar to the conditions in various other unskilled occupations, are characterized by low-income, long hours, weak enforcement of employment protections, and—an element unique to the care work industry—live-in employment. Such relatively unattractive labor markets tend to “attract” mainly those with few other employment options: ethnic minorities and migrant (documented and undocumented) workers. Accordingly, most in-home care workers in the United States today are migrant women and women of color.⁷⁹ The effect of the U.S. regime on care workers constitutes two narratives that haunt most work-migration stories. One is the narrative of success and wealth: the American economy allows migrant workers to earn income in a flourishing and mobile labor market. For migrant workers the availability of these jobs opens the opportunity to come to the United States (legally or otherwise) and earn income higher than is available in their home countries. The second narrative emphasizes the various types of harm suffered by migrant workers: the

77. “In some urban areas women are now more employable than men, but they see few benefits from this situation, as their new incomes often go to support their struggling families,” SCOTT SERNAU, *WORLDS APART: SOCIAL INEQUALITIES IN A GLOBAL ECONOMY*, 163 (2005). Furthermore, in the recent economic recession men lost their jobs more frequently than women. See Floyd Morris, *In this Recession More Men Are Losing Jobs* N.Y. TIMES, Mar. 13, 2009, available at <http://www.nytimes.com/2009/03/14/business/economy/14charts.html> (last visited June 16, 2010).

78. See the following international studies: Anne Solaz, *Division of Domestic Work: Is There Adjustment between Partners when One is Unemployed? Evidence from French Couples*, 3 REV. OF ECON. OF THE HOUSEHOLD 387, 396-99, 407-08 (2005); Derek Wilkinson, *Change in Household Division of Labour Following Unemployment in Elliot Lake 7* (ELTAS Analysis Series No. 2A3, Paper presented to the 27th Annual Meeting of the Canadian Sociology and Anthropology Association. May 31, 1992), available at <http://inord.laurentian.ca/pdf/2a3.PDF>.

79. DOMESTIC WORKERS UNITED, *supra* note 63, at 3. This has characterized domestic work in the United States since the 1970s. See also ALANA ERICKSON COBLE, *CLEANING UP: THE TRANSFORMATION OF DOMESTIC SERVICE IN 20TH CENTURY NEW YORK CITY* 18 (2006).

U.S. regime is scant in providing visas for child care and domestic work thus increasing workers' vulnerability; it allows low wages and long hours of work with few labor protections (extreme commodification); and it often requires workers to leave their families in their country of origin. The interests of these workers and their families are rarely taken into account in policymaking processes since they are outsiders to the body politic. It therefore can be argued that the availability of much of the cheap and accessible child care supplied to American women of all classes is achieved through this trade-off between opportunity and vulnerability that pervades the employment experience of (mostly minority and immigrant female) care workers.

By attracting mostly migrant workers to supply child care services, the current U.S. policy also affects former care workers,⁸⁰ mostly low-skilled African-American women. These women, who used to be the main group providing domestic labor,⁸¹ are now only marginally represented in this sector.⁸² It is likely that some African-American women were priced out of the market, and perhaps into becoming welfare recipients, by the influx of migrant workers lowering market prices. Indeed in many other low-skilled and unskilled jobs it is claimed that Latinos are taking over the jobs of African-Americans.⁸³ While these claims are rarely heard in the context of care work—possibly because being a domestic worker is a sign of such low status that groups are happy to be disassociated from it—it is arguably the case that some un-skilled African-American women are disfavored by the current U.S. child care regime, and that they could have benefited from being employed in the care sector if there

80. In the debates over immigration it is commonly argued that even if immigration is beneficial to some, the gain is at the expense of low-skilled workers who compete directly for jobs. See an overview of the debate in Susan Pozo, *The Many Guises of Immigration Reform*, in *ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION* 1-6 (Susan Pozo ed., 1986).

81. Women of color traditionally performed domestic and care work in the United States from 1450-1860 mostly as part of slavery, and from 1870-1970 as secondary market workers, see *DOMESTIC WORKERS UNITED*, *supra* note 63, at 3.

82. The sector is still racialized in the sense that it is now dominated by migrant women of color. JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW BLACK WOMEN, WORK AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985); DAVID M. KATZMAN, *SEVEN DAYS A WEEK: WOMEN AND DOMESTIC WORK IN INDUSTRIALIZING AMERICA* (1981).

83. Daniel B. Wood, *Rising Black-Latino Clash on Jobs*, *THE CHRISTIAN SCIENCE MONITOR*, May 25, 2006, available at <http://www.csmonitor.com/2006/0525/p01s03-ussc.html> (last visited June 16, 2010). It should be noted that a precise relationship between the presence of immigrants and the loss of black jobs has not been clearly proven in research. See George Borjas, *Immigrants and the U.S. Labor Market*, in *ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION*, *supra* note 80, at 15-20. However, in the case of care work, originally the scenario was one of substitution rather than internal competition or complementarity. Today, when the market is dominated by migrant care workers, new waves of immigrants might be competing with "veteran" immigrants on care work jobs.

was less supply side competition (either due to closed borders, or through state-provided or more heavily regulated child care).

iv. Effects on Low-Income Single Parents

Familialization and commodification: Most researchers agree that the 1996 welfare reform significantly increased labor market participation of parents in low-income households, although critics object that those employed do not necessarily achieve levels of economic self sufficiency, and that they experience as much material hardship as welfare recipients.⁸⁴ However, there is no one clear answer in the literature to whether the familializing effects of PROWRA were achieved. PROWRA clearly attempts to promote the creation and preservation of traditional nuclear families, to encourage single mothers to get married, to strengthen the financial responsibility of non-resident fathers, and to reduce out-of-wedlock births.⁸⁵ Yet researchers reach mixed results as to its success levels: some suggest that PROWRA has not substantially promoted marriage,⁸⁶ while others contend that the strict work requirements do manage to encourage low-income, young women to marry as an alternative source of income and financial stability.⁸⁷ Similarly, there is only limited evidence that welfare reform has led to a decline in out-of-wedlock births.⁸⁸ What can be said with greater certainty is that the effect of the U.S. regime can (and aspires to) function as an incentive for single parents to stay in familial relationships or create new ones. Once the five-year eligibility cap expires, the welfare state will

84. Kissane & Krebs, *supra* note 57, at 794.

85. At the declaratory level, three out of the four TANF goals are familializing goals: "assisting needy families so that children can be cared for in their own homes," "preventing out-of-wedlock pregnancies," and "encouraging the formation and maintenance of two-parent families." Only one—"reducing the dependency of needy parents by promoting job preparation, work and marriage," relates to commodification. See <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited June 16, 2010).

86. Most research does not suggest that TANF has substantially promoted marriage. See Marianne Bitler et al., *The Impact of Welfare Reform on Marriage and Divorce*, 41 DEMOGRAPHY 213 (2004); Pamela Loprest & Sheila Zedlewski, *The Changing Role of Welfare in the Lives of Low-Income Families with Children*, (Urban Institute, Research Paper No. 73, 2006); Jane Mauldon et al., *Attitudes of Welfare Recipients toward Marriage and Childbearing*, 23 POPULATION RES. & POL'Y REV 595 (2004).

87. David Fein, *Will Welfare Reform Influence Marriage and Fertility? Early Evidence from the ABC Demonstration*, 24 EVALUATION AND PROGRAM PLANNING 427 (2001); Lisa Gennetian & Cynthia Miller, *How Welfare Reform Can Affect Marriage: Evidence from an Experimental Study in Minnesota*, 2 REV. OF ECON. OF THE HOUSEHOLD 275 (2004).

88. Ann Horvath-Rose & Elizabeth Peters, *Welfare Waivers and Nonmarital Childbearing*, in FOR BETTER AND FOR WORSE: WELFARE REFORM AND THE WELL-BEING OF CHILDREN AND FAMILIES 222 (Greg Duncan & Lindsay Chase-Lansdale eds., 2002); Paul Offner, *Welfare Reform and Teenage Girls*, 86 SOC. SCI. QUARTERLY 306 (2005); Rebecca Blank, *What We Know, What We Don't Know, and What We Need to Know about Welfare Reform* (National Poverty Center Working Paper Series no. 07-19, 2007).

not provide any aid for child care funding. At this point, the main help the welfare regime offers is the counseling and skills provided by the Healthy Marriage Initiative.

As this analysis suggests, the U.S. child care policy is important for understanding American family dynamics, and it is fraught with ambiguities. Chief among them, in this context, is the mix of individualist (market-driven) and familialist messages. The result is a gender-blind policy that aims to empower women as well as men into “independence” (read: dependence on the market) while respecting and supporting familial care obligations. However, the low benefit levels, the strict eligibility requirements and time limits, coupled with other characteristics of the U.S. labor market—a dual primary/secondary labor market, few and relatively un-enforced labor protections, and the supply of cheap migrant labor—lead to commodification and familialization. The regime, in the long run, aims to contribute to women’s workforce participation but, at least among low-income women, not to their equal market participation. Public child care provision is temporary and ungenerous and does not significantly alter IHDOL. Nor does it materially change women’s inferior market position attributable to weaker labor market attachment resulting from motherhood. For these and other reasons, the regime does not significantly alter market stratification.

In order to understand and map these effects of law and policy on families it is necessary to look outside the family, to welfare state policy and market regulation. Analytically overcoming the family-market dichotomy, and understanding the wider institutional arrangements that shape families therefore has the potential of enriching our understanding of family dynamics, bargaining power within families, and familial roles that are often assumed as given and wholly extra legal (whether cultural or natural), in traditional Family Law scholarship.

2. Old-Age Care in Israel

In this section I use the same methodology to study the corresponding Israeli welfare program in the area of old-age care. Much like the case of child-care in the United States, the analysis of the Israeli Long-Term Care Benefit (*Gimlat Siuud*)⁸⁹ offers a revealing example of the role of social policy in shaping familial relationships and defining needs, expectations, and dependencies within the family.

89. Social Security Act § 224, 1522 S.H. 258 (1995) (Isr.) (Hebrew).

a. The Legal Framework

Israel offers long-term care benefits for elderly citizens who require aid in performing routine daily activities. The benefit is age tested (recipient must be of mandatory retirement age), income tested,⁹⁰ and tested for dependency levels. The dependency test, or Activities of Daily Living (ADL) evaluation, determines the extent to which the applicant can independently perform daily living tasks. An applicant who cannot perform those tasks receives an “in kind” provision of care.

Depending on the ADL test, a recipient can be found eligible for either 9.75 hours, 16 hours, or 18 hours of care per week.⁹¹ Once eligibility is determined, the state does not itself provide the service. Rather, in the liberal tradition of a “service-passive” state, it pays a private agency to provide the applicant with in-home care service. In that sense the long-term care benefit does not differ much from child care subsidies previously discussed. However, state involvement in the provision of the old-age long-term care benefit is much more complex than it first appears.

The ADL test serves another purpose besides determining long-term care benefit eligibility. Both those eligible for long-term care benefit and those who pass the dependency test but not the income test, are eligible to apply to the relevant governmental agency for a permit to employ a migrant worker as home care aides.⁹² Once the application is approved, the recipient has to turn to the Ministry of Internal Affairs, which is in charge of immigration matters, and to a licensed private manpower agency, which will process the request for a migrant care worker and supply the service. If the person in need of care passed the dependency test but not the income test, she will have to pay the full cost of employing a care worker, but the option of hiring a migrant worker, rather than a local resident, significantly reduces her costs. If a person in need of care was found eligible for the benefit, part of the worker’s wage is paid with the long-term care benefit. The benefit, however, is not paid directly to the worker or the

90. The income test looks at the income of the applicant and his spouse (when there is one) and does not include the earnings of the applicant’s children. Furthermore the income test is relatively generous. See Hillel Schmid, *The Israeli Long-Term Care Insurance Law: Selected Issues in Providing Home Care Services to the Frail Elderly*, 13(3) HEALTH & SOC. CARE IN THE COMMUNITY 191, 192 (2005).

91. Social Security Act § 224. National insurance institute of Israel, pension rates for long-term care. See <http://www.btl.gov.il/English%20Homepage/Benefits/LongTerm%20Care/Pages/benefitrates.aspx> (last visited Aug. 16, 2010) (Hebrew).

92. Ministry of the Interior, *Criteria for Eligibility For Employing Foreign Workers*, see <http://www.moit.gov.il/NR/exeres/F7AAF2E8-5308-4EE6-9D25-A87A94668F0F.htm> (last visited June 16, 2010) (Hebrew).

benefit recipient; rather, it is paid to the manpower agency which then pays the worker's wage.⁹³

If the worker is employed full time, thus exceeding the hours paid for by the long-term care benefit, the care recipient pays the manpower agency for the extra service hours. However, employing a full time migrant care worker, under the current system, does not require increasing the worker's wage in a comparable ratio to the increase in work hours. Although manpower agencies are obliged to comply with specific legislation that requires them to pay workers at least the minimum wage,⁹⁴ they often end up paying less.⁹⁵ The wage paid to the worker above the long-term care benefit is an amount that even upper-tier low-income households can afford when they are assisted by the long-term care benefit.

There is no administrative cap on the number of migrant care workers that can enter Israel. Demand for workers is determined the number of visas issued. Between 1996 and 2003 the number of Israeli residents who were found eligible and applied for such a visa increased by 350% while the number of the elderly and disabled increased by only 25%.⁹⁶ A recent report suggests that if current trends and policy persists, by 2025, 108,000 migrant care workers will work in Israel, which means that every fifth elderly person in Israel will be aided by a migrant care worker.⁹⁷ This can be explained by the significant de facto subsidy provided by the combined effect of the relatively generous long-term care benefit, the immigration policy, and the lax enforcement of the employment rights of migrant workers employed by manpower agencies.

93. In 2008 the National Insurance Institute began a three year experiment in which service recipients can receive cash transfers instead of an in-kind benefit. The experiment aims to enable beneficiaries of old-age care benefit to employ care workers directly, without the mediation of private manpower agencies. The experiment targets beneficiaries who already employ an in-home care worker full time, and specifically excludes those cared for by family members. See Social Security Act § 225A, 1522 S.H. 258 (1995) (Isr.); National Insurance Institute, Long-Term Care Benefit: Cash Instead Of Services, Information Pamphlet (2008), http://www.btl.gov.il/Publications/booklet/hebrew_booklet/Documents/gimlat%20seid_a4_2_3.pdf (last visited June 16, 2010) (Hebrew).

94. Employing Migrant Workers (Illegal Employment) Act 1349 S.H. 112 (1991) (Isr.) and Employment of Migrant Workers by Manpower Agencies Act 1578 S.H. 201 (1996) (Isr.).

95. NIVI KLEIN, THE KNESSET'S INFORMATION AND RESEARCH DIVISION, MIGRANT WORKERS IN THE CARE INDUSTRY 4-7 (2006) (Hebrew).

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

97. See TSVI ECKSTEIN ET AL., EMPLOYING MIGRANT WORKERS: REPORT FOR THE CAESAREA FORUM FOR ECONOMIC NATIONAL POLICY, 21 (2010), available at http://www.idi.org.il/events1/CaesareaForum/Pages/WM_c.aspx (last visited June 25 2010) (Hebrew).

b. Distributive Analysis

The Israeli long-term care regime shapes inter-generational familial relationships and dependencies. Unlike the U.S. child care system, many aspects of the regime are universal rather than targeted. Therefore my analysis begins with a discussion of the effects on all households, regardless of income, and then focuses on an unintended consequence of the regime—the creation of a thriving market for domestic work provided by migrant workers—while looking at the effect on middle income households and care workers.

i. Long-Term Care: Effects on Households of All Income Levels

Stratification, familialization, and commodification: Through the combination of the guest-worker immigration policy and the long-term care benefit, the state provides a direct subsidy to low-income individuals by paying about half the wage of a full time migrant care worker, as well as an indirect “subsidy” to middle-income and high-income individuals who did not pass the income test but receive migrant workers’ employment permits. These high-income and middle-income families are subsidized by the ability to employ cheap labor. This result lead to reduced market stratification: many upper-low income and middle income families that had previously been unable to employ an Israeli worker to care for them or for a family member, can now afford to employ a migrant home care aide.⁹⁸ The combination of the welfare regime, the issuance of guest workers visas, and the migrant workers’ substandard working conditions made the services of home care aides accessible to families across a broad spectrum of income levels (excluding of course the poorest families) thus changing patterns of care and family obligations. This leads in turn to a higher degree of de-familialization across society.

This Israeli policy has affected the level of care families are able to buy for dependent family members as well as the levels of direct one-on-one care they can now avoid. Women, traditionally the main providers of unpaid care in Israel, are the ones most directly affected by the entrance of cheap unskilled labor. The de-familialization level of Israeli women, as well as their commodification levels, increased across the class divide⁹⁹: the levels of market participation (full time)

98. Comparing the wages of migrant workers and local workers, an inter-ministry report found that a migrant worker, if paid fully and in accordance with the law, will be paid two-thirds of what an equivalent Israeli worker will be paid. See MIGRANT WORKERS REPORT, *supra* note 96.

99. It should be noted that there are great disparities between the labor market participation of Jewish women (approximately eighty percent of women twenty-five to fifty-five) and non-Jewish women (approximately twenty-five percent of women between twenty-five to fifty-five). These disparities have only marginally changed in

by women increased¹⁰⁰ as did, most probably, their time for leisure. Increased de-familialization also directly affects the bargaining endowment of women in families and their exit options, by increasing women's ability to "commodify" themselves.

Such changes further affect family structure and living arrangements. Given the relatively easy access to affordable home-care aides, it is becoming less and less common for elderly parents to move in with their grown children. This entails a greater notion of "independence" for the elderly, though obviously this independence is limited to relaxed dependence on familial care-giving of the recipients of care, and enhanced dependence on care workers as well as for those eligible for the long-term care benefit, on the state. This scheme further introduces the Israeli society to new types of living situations and new kinds of semi-familial relationships between the disabled or elderly and migrant care givers who become substitute family members. This is not to suggest an ideal scenario of "new families": the vulnerability and hierarchy embedded in the situation means that some of these carer-caree relationships are painful, exploitative, and abusive, some are reported to be warm, meaningful, and positive, and many others are plainly complicated, as are most intense familial and employer-employee relationships.

IHDOL: How much care work men do is also a function of the welfare regime. A policy providing live-in care for the elderly most clearly de-familializes women, but this also means less familial care-related expectations even from men. If Israeli policy instruments allow Israeli women to do less care work, under current social conditions we can imagine that men do less too. If a man's elderly mother can now live in her own home safely, with the help of a live-in migrant care worker, this can mean several things—the mother will not live with the man's family, the man will therefore see his mother less, worry about her less and take care of her less because someone else is taking care of her needs—all suggesting that under the Israeli regime men are also de-familialized. While the regime can be characterized as decreasing stratification and enhancing class equality in this area of old age care, as well as enabling gender equality by mak-

recent years. ORLY ALMAGOR-LOTEN, *THE KNESSET'S INFORMATION AND RESEARCH DIVISION, WOMEN'S EMPLOYMENT AMONG THE ARAB CITIZENS OF ISRAEL* (2008) (Hebrew).

100. In 2008 approximately seventy-two percent of women between the ages of twenty-five to fifty-five participated in the labor market, a distinct increase from the low sixty percent rates of the 1980s. Naturally migrant care work is far from being the sole reason for the increase but can definitely be seen as an element of it, especially given a significant bump in women's labor market participation in the early 1990s. See CENTRAL BUREAU OF STATISTICS, *PERCENT IN CIVILIAN LABOR FORCE BY AGE, POPULATION GROUP, AND SEX* (2005), http://www.cbs.gov.il/saka_y/01_02.pdf (last visited June 16, 2010) (Hebrew).

ing it possible for more women to work, it does not produce gender equality in terms of the gendered division of labor.¹⁰¹

ii. Domestic Work: Effects on Middle Income Households

Stratification and de-familialization: While the policy increased de-familialization across society, it also caused an unintended consequence with particular significance for the middle class. With the increasing number of care workers entering Israel, many such workers shifted to work as domestic workers and nannies. Migrant workers coming to Israel are mainly limited to work in the sectors of construction, agriculture, and care work (for the elderly and the disabled), and cannot be issued a visa for the purpose of working in the domestic work and child care sectors. Until 2006 the guest worker visa structure was a binding system¹⁰² under which worker visas were restricted to employment by one specific employer. Leaving that employer—whether for better employment options, abuse, or any other reason—cost the worker her legal status in Israel. Nevertheless, many workers opted to take the risk and leave their legal employers for better employment conditions elsewhere in Israel.¹⁰³ Accordingly, an inadvertent result of the care worker visa regime was the opening of another flourishing care market in Israel—that of low-wage, undocumented nannies and domestic workers.¹⁰⁴ With the lowering costs of domestic labor many middle class families could now afford to pay a migrant worker to do domestic work or care for their children. As for the migrant workers, such employment opportunities often provided them a better income and greater flexibility than

101. NIZA BRKOVITCH, *THE ISRAELI MODEL: TWO BREADWINNERS, ONE CARE GIVER* (Adva Center Report, 2006) (Hebrew).

102. HCJ 4542/02, *Kav LaOved et al v. The State of Israel* (2006) (Unpublished, Tak-Al 2006(1) 4336) (Hebrew). In 4542/02 the High Court of Justice declared that the binding system—a system that bound (through visa limitations) each worker to a single employer—was unconstitutional. Following this opinion, a new arrangement was created. Under the new arrangements, workers may shift among employers within the same sector of the labor market. A private placement agency then has supervisory capacities and is supposed to undertake quarterly home visits to ensure the proper working conditions of the care workers as well as the caree's satisfaction. If there are problems in the relationship between the elderly caree and the care worker, the agency can place the care worker with a new employer and replace her with a new migrant worker. See ECKSTEIN ET AL., *supra* note 97, at 21-22.

103. The phenomenon of moving from documented to undocumented stay in the host country is common in guest worker visa programs that employ the binding system. The same situation existed with Mexican Bracero workers in the United States. See Mai Ngai, *Braceros, Wetbacks, and the National Boundaries of Class*, in *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 127, 146-47 (2004).

104. The inter-ministerial committee report explained this trend as resulting from “the common skills required for care work and domestic work and due to the temporary nature of their employment by the person in need of care.” *MIGRANT WORKERS REPORT*, *supra* note 96, at 25.

working legally as home care aides. The unintended consequence of the migrant care worker visa policy is therefore further de-familialization of the middle class through the emergence of a supply of cheap labor for the provision of other forms of family and domestic care.

iii. Effects on Care Workers

Stratification and Material Delivery: Such developments in the labor market did not just affect the middle class. Statistics gathered by an inter-ministerial committee assigned to evaluate the binding system and the guest worker visa in Israel, suggested that the employment of legal as well as illegal migrant workers led to increased unemployment rates in the Israeli workforce and a rise in the number of Israeli households that rely on welfare (the number of households that rely on income supplement benefits grew fivefold between 1990 and 2002).¹⁰⁵ While direct causation between the two phenomena is questionable,¹⁰⁶ it is safe to assume that at least in the area of care work, nannying, and domestic work, some Israeli and legal-migrant low-income local workers (mainly women) who previously worked in these sectors found themselves priced out of the market by undocumented migrant workers, and turned to the state welfare system for subsistence. Thus the cross-society egalitarian impact of the long-term care benefit and the guest worker regime must be balanced against the loss of jobs that were previously held by some local low-income workers.

The Israeli case is an example of a liberal, market-reliant welfare state that through a combination of welfare law and immigration law manages to create a relatively egalitarian apparatus for insiders (residents and citizens)—in which middle class as well as some low-income members can purchase in-home care, but that does so at the cost of employing a non-resident and therefore more vulnerable work force. The whole system could not have functioned without the supply of cheap migrant labor. It therefore seems that those who are bearing the main cost (or providing the subsidy) for equality are often outsiders, whose interests are rarely taken into account in the design of welfare policy. Migrant workers are invited as guest workers under the implicit condition that they will not expect full permanent residency or citizenship and the rights that accompany such status. The link between welfare state enlargement and the exposure of subordinate groups, such as migrant workers, to unmediated market

105. MIGRANT WORKERS REPORT, *supra* note 96, at 27-28.

106. The report did not deal with arguments questioning the causal relationship between migrant work and increased welfare reliance, such as the argument that an increase in welfare recipients is a result of wider market restructuring, or that the labor sectors opened to migrant workers are (for the most part) in sectors and industries that Israelis did not occupy in any case.

forces has been recognized as part of the logic of the welfare state, and is often seen as emanating from the need for labor market flexibility, when markets are faced with rigidities caused by an expansion of social rights.¹⁰⁷ From this viewpoint, the distributive outcome of the Israeli long-term care benefit and the care worker guest visas seems less like an egalitarian success and more like an accentuated version of traditional welfare state logic and operation. It therefore raises questions whether behind every welfare state success, there is a group that pays a price, and whether such a price can be an acceptable cost.

IV. CONCLUSION

In this concluding section, I reintroduce my own political and normative goals of increasing women's equality and decreasing class stratification. How does the foregoing distributive analysis—especially taken comparatively—assist in finding ways of pursuing those goals using social policy?

The examination of familial care regulation within the liberal welfare regime allows us to explore the distributive potential of markets. Comparing the case of child care in the United States and old age care in Israel suggests that there is redistributive potential in providing familial care through the market, yet this potential is limited. In Israel the long-term care benefit, coupled with the guest-worker visa arrangement, enables families across income levels to provide in-home care for the dependent elderly. This in turn enables women's higher level of labor market participation and attachment. The result, roughly stated, is de-familialization for traditional caregivers (mostly women), as well as de-familialization and de-commodification of the recipients of care, and lower levels of stratification within the Israeli citizenry. In the United States, a child-care regime that seeks to discourage dependence on the state has succeeded in producing intense dependence on the market (commodification) for some and intense dependence on the family (familialization) for others, depending on income and family unit structure. The general effect on middle and low-income women is a high rate of labor market participation, leading to wide commodification and de-familialization.

Yet, some distributive effects of market provision of welfare services seem to be unavoidable. In both countries some level of de-commodification is achieved by welfare state benefits, yet workers remain largely dependent on wages. Given wage dependence, unemployment becomes a serious social risk that can be somewhat

107. Gary Freeman, *Migration and the Political Economy of the Welfare State*, 485 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 51 (1986); Zeev Rosenhek, *The Exclusionary Logic of the Welfare State: Palestinian Citizens in the Israeli Welfare State*, 14(2) INT'L SOC. 195, 197-99 (1999).

reduced but not overcome. Similarly, some level of stratification remains inherent in the market structure. In Israel, the care regime shifts care work from within the Israeli citizenry to migrant care workers, thus dislocating stratification rather than fully alleviating it. In the United States, the child care regime enables and encourages women to join the labor market, providing a short period of de-commodifying, de-familialization assistance via TANF to the poorest families. However, the resulting high rate of women's labor market participation leaves class stratification mostly unaltered. Furthermore, neither of the case studies suggest that market based solution to familial care provision significantly impacts Intra-household Division of Labor. In both countries women who participate in the labor market do engage in less care and domestic work in their own households than housewives, but the work is shifted mostly to other women and not to their male partners.

While this analysis does not reveal provision of care through markets to be a strong equalizing force, it does allow a shift in emphasis from deeming market provision of care as detrimental to any redistributive social policy, toward engaging with questions of degree (e.g., given a permanent residue of stratification, how can it be minimized?), and paying attention to possible trade-offs. For instance, the U.S. case showed that low-wage migrant labor in the home does not have a homogenous effect on all women and not even on all low-income women: it benefits some migrant laborers and some low-income citizens but harms others. The Israeli case exemplified how a controlled immigration policy that is implemented in combination with welfare benefits can make care services for the elderly and the disabled available at all income levels, leading to income redistribution and de-familialization across society. In both of these examples some harmful effects are unavoidable, but the analysis shows that with some regulative creativity and institutional imagination, other problematic market elements can be relaxed. The outcome is not a world of complete equality, far from it, but it does allow a conceptualization of a range of politically viable reforms (even if the choice is between imperfect options and requires compromises) that can lead to significantly more egalitarian outcomes—and, down the road, create room for further, more comprehensive reforms. In an age of still-dominant neo-liberal, market-reliant policies, welfare alternatives that turn to the market can provide appealing options to progressives seeking to establish feasible and redistributive domestic welfare systems.

Moreover, the distributive analysis of familial care policies suggests that if we want to understand the operation of social institutions of either the market or the family, a wider view is required—one which includes the interactions between, and division of labor between, institutions. It suggests that in order to understand

the distribution of power within families we need to pay attention to the surrounding market realities, the welfare state alternatives that individuals within households have, and the role played by market actors and state policies in the provision of familial care. Further, viewing the family from outside Family Law relaxes some of the exceptional characteristics of the legal concept of the family and shows that regulation of the family (in and outside Family Law) is intimately connected to wide social policy debates about citizenship, social status, labor market, and wealth distribution.