

# QUESTIONING MARKET AVERSION IN GENDER EQUALITY STRATEGIES: DESIGNING LEGAL MECHANISMS FOR THE PROMOTION OF GENDER EQUALITY IN THE FAMILY AND THE MARKET

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## INTRODUCTION

The obstacles for women’s full and equal incorporation in the labor market due to familial care obligations have been at the center of public

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attention in many developed and developing countries. Attempts to more fully and equally incorporate women in the labor market brought with them lively public discussion and disagreements around what women's equal access to the labor market should look like. These debates demonstrated the complexity of optimally tailoring such policies to promote the variety of desirable normative goals underpinning mechanisms of social justice. Taking this complexity and normative variability into account, this Article focuses on designing welfare and tax mechanisms for the promotion of women in the family and the market.

Policy debates in the area often appear to be limited in the choices of available mechanisms they consider in order to promote women in general, and working parents of young children (usually mothers) in particular. Traditionally, policymakers frame their respective initiatives around the classic dichotomy of government versus market: should the government allocate more resources for the provision of social services, or would such resource allocation impose too large a burden on the public fisc and should thus be left for people's own resources and individual choices. In other words, the debate is often framed around two presumably opposing options: either public or private provision of social services. For example, in the context of childcare, the main question often revolves around whether the government should provide or subsidize childcare or not,<sup>1</sup> and whether choices regarding childcare should be left for the family that will choose to provide the care itself or purchase their desired level and form of care in the market.

This Article suggests that tax and welfare policies that promote gender equality require creative thinking about the design of social mechanisms for the promotion of women. It offers a framework for expanding the institutional imagination in order to recalibrate welfare state reforms to promote women. In particular, we advocate the creative use of legal tools and doctrine to dismantle existing dichotomies between private and public, understand the various goals different mechanisms can serve and reassemble them to promote different mixes of normative goals. We propose doing so by looking simultaneously at two fields of redistribution: welfare state benefits and services on the one hand and income taxation on the other. These two fields serve similar goals and accordingly, we argue, should be analyzed in light of the same policy considerations and normative underpinnings. Since the goals of these two fields are comparable, the mechanisms that both fields use should also be compatible.

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<sup>1</sup> If the decision is to publically fund childcare an important subset of questions opens up: From what age? For how many hours? What should be the qualifications of care providers? Are they public employees? How regulated and uniform should early education programs be, if at all, etc.? Yet the preliminary question is often posited in the dichotomous public vs. private form.

Our unified analysis of welfare and tax offers three contributions to existing scholarship. These contributions correspond to the stages of our analysis: In Part I, we ground our analysis in an explicit and multifaceted discussion of the normative considerations that underlie tax and welfare policies: namely, efficiency; distributive justice (including gender equality); and autonomy (including personhood and community). We offer a rich account of each of these normative considerations and its indispensability as a component of a comprehensive policy. We believe that such an account is a crucial starting point for tax and welfare policy design for the promotion of gender equality. In Part II, we outline the wide variety of policy tools on the spectrum between pure market-based policies and strictly state-provided benefits. Breaking the strict dichotomy between private and public allows us to consider policies and mechanisms that use the institutional benefits of both worlds. Accordingly, we are not focused on the characterization of the various arrangements as “public” or “private” and “state” or “market”, but rather, we look more closely at the various features of the numerous arrangements, asking what purposes they serve and what opportunities they provide.

In Part III, we provide an analytical framework as a roadmap for mechanism design that we believe is helpful in evaluating the normative goals certain types of mechanisms can provide. In order to further relax the strict state-market dichotomy so as to enable creative thinking about more nuanced possible institutional options, we build on existing literature to offer a typology of policy solutions along five mechanism-design criteria: universal vs. selective, income dependent vs. fixed sum, in kind services vs. cash transfers, who provides the service (the state, the family or the market) and whether and how the policy seeks to affect intra-household division of labor. We go beyond the state-market distinction in order to model the complex implications, risks, and potential advantages of such seemingly technical criteria, and explain the unique mix of normative goals supported by each of them.

Finally, in Part IV, we explore how the core normative values of efficiency, distribution and autonomy are being served by the different mechanism-design criteria, and how by moving slightly along the various scales, and through the combination of different policy tools, a variety of hybrid mechanisms open up, without necessarily subscribing to the traditional public-private distinction. To demonstrate this, we focus on child-care, seeking to use the creative potential of hybrid private-public mechanisms in order to promote the many—sometimes contradicting—normative goals that coincide in this juncture of family, market and state. In the discussion in this Article we pay more attention to one of the normative goals—autonomy, and show how this normative goal would affect our policy choices using the five mechanism-design criteria. This

is not to say that autonomy is the most important normative goal, but only to show the multiplicity of available options and nuances, and how they unfold through the analytical framework we offer. We more briefly discuss redistribution and efficiency considerations. A more serious consideration of all is obviously required in order to complete the analysis and any serious policy recommendation. This will await a separate articulation.

## I. THE NORMATIVE UNDERPINNINGS OF TAX AND WELFARE POLICIES

Tax and welfare policies are traditionally viewed as a vehicle for distributing the costs and benefits of government in an equitable and efficient manner. Under this canonical description, income tax and welfare policies aspire to achieve the sometimes conflicting goals of efficiently maximizing social welfare while promoting distributive justice.

Efficiency requires that we promote policies that maximize social welfare by maximizing the benefits and minimizing the costs (administrative costs as well as changes in the behavior of market actors) of such policies. In traditional thought, efficiency was understood as minimizing the interference of the tax and transfer system with the free market—that is, ensuring that the economy operates as it would in the absence of taxes.<sup>2</sup> Under this view, the free market (in the absence of market failures) maximizes the wellbeing of its participants. The “wedge” that taxes and transfer payments create between the price paid by the consumer and the price received by the producer interferes with the efficiency of the free market.<sup>3</sup> An efficient tax raises revenues and an efficient allowance provides goods and services while minimizing “deadweight losses” (i.e., the costs of distorting economic decisions). When some activities are taxed more heavily than others, taxpayers are incentivized to avoid heavily-taxed activities in favor of relatively untaxed ones that they would otherwise value less; and when a certain good and service is heavily subsidized, consumers will be drawn to it despite their original preferences.<sup>4</sup> Thus, a central goal of tax reform is often the avoidance of arbitrary differences in tax rates across different types of activities, consumption and investment, which helps to reduce distortions of decisions about what to consume and how to produce it.<sup>5</sup> On welfare policy, as well—all

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<sup>2</sup> See, e.g., JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN'S GUIDE TO THE DEBATE OVER TAXES* 120 (4th ed. 2008).

<sup>3</sup> *Id.* (“This outcome maximizes the well-being of participants in the market in the narrow sense of maximizing the amount by which total dollar-valued benefits exceed total dollar-valued costs, a situation economists describe as ‘efficient.’”).

<sup>4</sup> See *id.*

<sup>5</sup> *Id.* The more recent approach of optimal taxation prescribes that it is desirable to tax more heavily those goods for which demand (and supply) is relatively price insensitive. Thus, in recent years, optimal taxation has been suggested as a way to design a more efficient tax

other things being equal—it is preferable to provide social welfare with the least economic costs. Thus, in the provision of subsidies, we would probably try not to distort the decisions of welfare recipients to engage in certain activities (e.g., find a job, purchase a car) or consume certain goods (e.g., prefer subsidized bread to unsubsidized oranges or select a specific type of childcare). Of course, saving on the administrative costs involved in collecting the revenues and providing the public goods and services is a factor, as the lower such costs, the more efficient our tax and welfare system is. Hence, an efficient welfare system would strive to minimize the costs involved in providing such benefits and to ensure that such benefits reach the ones that could make the best use of them.

As significant as it is, efficiency is not the only goal of desirable public policy. Rather, citizens' taxes, as well as the public goods and benefits provided by the state's welfare apparatus, are expected to promote distributive justice.<sup>6</sup> Identifying the precise prescriptions of justice in the context of tax and transfer is a question (too broad to be comprehensively addressed here)<sup>7</sup> that both entails normative considerations and

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system. See Joseph Bankman & Thomas Griffith, *Social Welfare and the Rate Structure: A New Look at Progressive Taxation*, 75 CAL. L. REV. 1905, 1945 (1987); Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71, 106 (1996); David A. Weisbach, *Line Drawing, Doctrine, and Efficiency in the Tax Law*, 84 CORNELL L. REV. 1627, 1655–56 (1999). But despite the theoretical appeal of optimal taxation, it is not a particularly useful guide for tax policy in practice. It employs differential tax rates (with the highest rates imposed on necessities) and—given the uncertainty as to which goods have relatively price-elastic demand—is susceptible to pressure from special interest groups. See SLEMPROD & BAKIJA *supra* note 2, at 132.

<sup>6</sup> See e.g., HENRY SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 18–19 (1938) (“The case for drastic progression in taxation . . . must be rested on the case against inequality on the ethical or aesthetic judgment that the prevailing distribution of wealth and income reveals a degree (and/or kind) of inequality which is distinctly evil or unlovely”); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP 12 (2002); MICHAEL J. GRAETZ & DEBORAH H. SCHENK, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 25–27 (4th ed. 2002); Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 12 (2006–2007). For examples of the discussion of distributive justice in recent academic literature, see Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991 (2004); Brian Galle, *Tax Fairness* 65 WASH. & LEE L. REV. 1323, 1323 (2008); Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 CHAP. L. REV. 157, 195 (1999). For a review of the political history of taxing the rich, see Reuven S. Avi-Yonah, *Why Tax the Rich? Efficiency, Equity, and Progressive Taxation*, 111 YALE L.J. 1391, 1413–16 (2002) (calling for a new balance between equity and efficiency analysis in tax policy); J.J. Thorndike & D.J. Ventry, *Tax Justice: The Ongoing Debate*. Washington, D.C.: Urban Institute Press; 2002, at 30. For the competing goals and their relations in different welfare states see: Robert E. Goodin, Bruce Headey, Ruud Muffels, & Hank-Jan Dirven, *Reasons for Welfare*, in THE REAL WORLDS OF WELFARE CAPITALISM, 21–36 (1999); Gøsta Esping-Andersen, *After the Golden Age? Welfare State Dilemmas in a Global Economy* in Gøsta Esping-Andersen ed. WELFARE STATES IN TRANSITION: NATIONAL ADAPTATIONS IN GLOBAL ECONOMIES 1, 24–25 (1996).

<sup>7</sup> MURPHY & NAGEL, *supra* note 6, at 73 (“The values that bear on the assessment of public policy are very diverse, so there is much to disagree about. First, there are questions about the legitimate ends of public policy—whether they should be defined by collective self-interest, or the general welfare, or some conception of fairness, including equal opportunity . . .

requires political deliberation. For the purposes of this Article, however, it suffices to note that both taxation and entitlement to public goods should be based on some function of social justice. In traditional tax and welfare literature, distributive justice is often understood as focused on, and measured by material wellbeing—attempting to mitigate the material gaps between members of the community by collecting progressive taxation which is based on taxpayers’ ability to pay<sup>8</sup> and providing benefits based on either a universal basis or on some particular need-based criteria—thus redistributing income among members of the community. Both the tax base (distribution of what)<sup>9</sup> and the tax rates (how much distribution)<sup>10</sup> and certainly the size and nature of the goods and services that

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Second, there are questions about the limits on the authority of the state over the individual, and whether property rights have any part in defining those limits, or whether they are mere conventions designed for other purposes. Third, there are questions about the proper role of responsibility and desert in the determination of people’s economic rewards—and about what individuals can and cannot be held responsible for. Fourth, there are questions about the importance of equality of opportunity, and its relation to inherited economic inequality—and the broader question of what social causes of distributive inequality should be regarded as offensively arbitrary. Finally, there are questions about the importance of freedom of choice in economic life.”)

<sup>8</sup> ADAM SMITH, *THE WEALTH OF NATIONS*, 347 (1937) (“The subjects of every state ought to contribute to the support of the government, as nearly as possible in proportion to their respective abilities: that is, in proportion to the revenue which they respectively enjoy under the protection of the state.”) Though the exact meaning of ability to pay is vague and debatable, it nonetheless reflects the notion that taxpayers should pay their fair share in financing the public fisc (which according to Mill translates to “equal sacrifice” see JOHN STUART MILL, *THE PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY* 485 (1866) (“... all are thought to have done their part fairly *when each has contributed according to his means, that is has made an equal sacrifice* for the common object.”) (emphasis added).

<sup>9</sup> There are numerous interpretations of what constitutes equal distribution in this context. Material wellbeing is certainly part of one’s ability, however, distribution does not and should not focus on material wellbeing alone. Attributes such as health, physical state, family status, gender, prestige, quality of living, and level of education do not necessarily translate into material differences, yet they certainly affect people’s wellbeing. See AMARTYA SEN, *INEQUALITY REEXAMINED* 150 (1992); McCaffery, *supra* note 5, at 106 (“But modern tax systems go well beyond affecting the distribution of money. A consistent limitation of the utilitarian turn in tax theory, as we have seen above, has been to reduce questions of taxation to a single index of resources in a narrowly framed problem of distributive justice. But even if tax were only ever intended to be about such matters, all practical means of seeking distributive justice transcend the single index of wealth, to affect patterns of work, marriage, family, education, savings, investment, charity, and so on. Behaviors, lifestyles, family models, and various market actions are inevitably at stake.”). MURPHY & NAGEL, *supra* note 6, at 57 (“Apart from these very broad questions of social justice, which obviously bear on the way tax policy should relate to inequalities of wealth, disposable income, consumption, and earning power, the aim of avoiding arbitrary sources of inequality can have an influence on the more detailed design of public policy. In relation to taxes, it manifests itself in controversies over the fairness of differential tax treatment of persons with distinguishing characteristics who are in other ways economically comparable. The question arises with respect to savers and spenders, the married and the unmarried, people with children and people without, and so forth.”).

<sup>10</sup> For the case for and against progressive taxation, see Avi-Yonah, *supra* note 6, at 1399–1410.

should be provided by the state are debatable in terms of tax and welfare justice.<sup>11</sup> However, there is no question that tax policy and the welfare state are key venues for advancing justice,<sup>12</sup> and that tax and welfare are key tools (the optimal tool, some even argue)<sup>13</sup> for achieving distributive justice.

Redistribution, in order to improve and somewhat equalize citizens' material wellbeing, is therefore highly important and is seen by some as the main goal of both taxation and spending regimes. Yet, tax and welfare systems affect the distribution not only of wealth but also of social currency such as notions of contribution (e.g., which activities are considered productive (labor) and which are not (housework)), dignity (e.g., by requiring invasive tests in order to collect certain welfare benefits), power, time, dependency (e.g., by incentivizing family care over state owned facilities) and even intra-household division of labor (e.g. by reinforcing traditional gender roles in relation to familial care through providing maternal leave (rather than parental leave) or disallowing the costs of childcare thus incentivizing imputed income of self-provided childcare which—in a tilted labor market—often incentivizes mothers to stay at home).<sup>14</sup> Our proposed framework encompasses material and non-material goods distributed by tax and welfare policies. This approach adopts the feminist critique according to which traditional cost-benefit analysis of social policy design disregards aspects of public policy that effect women's choices.<sup>15</sup> Specifically, we argue that the way tax and welfare policy distributes these non-material elements is an important criteria that should be taken into account in the evaluation of any social policy.

Beyond efficiency and distributive justice, tax and welfare policies have a particularly significant effect on citizens' liberty and their autonomy. Tax levels burden taxpayers' ability to freely conduct their business, and benefits financed through taxation often empower their

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<sup>11</sup> For a classic articulation of the different forms welfare states take, the different goods and services they provide, and the different distributive outcomes varying institutional structures reach, see GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 9–35 (1990).

<sup>12</sup> Cf. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFFAIRS 113, 130 (2005) (“[t]he state makes unique demands on the will of its members. . . and those exceptional demands bring with them exceptional obligations, the positive obligations of justice.”).

<sup>13</sup> See, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

<sup>14</sup> For a demonstration of this argument see e.g., Tsilly Dagan, *Ordinary People, Necessary Choices: A Comparative Study of Childcare Deductions* 11 THEORETICAL INQUIRIES IN LAW 588 (2010).

<sup>15</sup> Rebecca M. Blank, *What Should Mainstream Economists Learn From Feminist Theory?*, in BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 133 (Marianne A. Ferber & Julie A. Nelson eds., 1993); Myra H. Strober, *Can Feminist Thought Improve Economics? Rethinking Economics Through a Feminist Lens*, AM. ECON. REV., 143 (May 1994).

beneficiaries who?, absent public support, might have been unable to freely participate in social lives.<sup>16</sup> The involvement of money (in taxes as well as subsidies) often commodifies interactions, pushing taxpayers as well as welfare recipients to evaluate otherwise incommensurable goods in term of their use value.<sup>17</sup> Less intuitive, perhaps, are the ways in which tax and welfare policies affect citizens' functions in various contexts: their perception of their own identity, as well as their family, community and social interactions.<sup>18</sup> In particular, we argue that tax and welfare policies are powerful social instruments that participate in the construction of choices available for people. They affect—and often limit—the ways in which people perceive themselves and influence the way in which people interact with others. When, for example, such policies acknowledge some differences (e.g., ability to pay, productivity, one's marital status, availability of familial resources, "business" expenses) while ignoring others (e.g., one's disability, her living with a partner, her place of residency, her level of education, her childcare expenses, her level of skill or professional interests) they reinforce a certain conception of an "ideal-type citizen" and undermine alternative understandings of productivity, value, independence, and entitlement. If we assume an ideal-type citizen to be healthy, married, childless (or childcare free), working full time, or living near her workplace, we exclude those who are disabled, single, and have children (or familial care responsibilities), are unable to find long-term stable jobs, or are living away from their (potential) workplaces. These assumptions are not merely expressive. They obviously entail real-life incentives and consequences.<sup>19</sup> Moreover, they often detach interactions from the original context (e.g., governmentally instead of family provided childcare disconnects care from its familial setting). Tax and welfare policies may thus affect not only people's perception of themselves and of others but also their choices (to go out to work, rely on family or on state support, to live away from work, etc.). Assuming enough people change their choices because of such policies, social meanings and norms may

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<sup>16</sup> Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 *YALE J. INT'L L.* 113, 128–130, (2008).

<sup>17</sup> See e.g., Tsilly Dagan, *The Currency of Taxation*, 84 *Fordham Law Review* 2537, 2542–2547, (2016).

<sup>18</sup> See generally Tsilly Dagan, *The Currency of Taxation*, 84 *Fordham Law Review* 2537

<sup>19</sup> Thus, for example, the inclusion of an item (e.g., imputed income) in the tax base increases liability (and provides disincentives for self-provision of services); allowing an item (e.g., the costs of childcare) as a deduction reduces liability (and increases incentives to hire childcare). The way certain incorporations (e.g., nonprofit) are taxed impacts their desirability by either increasing or decreasing the incentive for charitable associations and contributions. With increased incentives, more people may select to outsource services, place their children in childcare, or get involved in charities, thereby affecting social norms and, again, identities. *See id.* At 2540–41.



change. Thus, for example, the allowance of market-based childcare may commodify the parent-child interaction.<sup>20</sup> As a result, tax and welfare policies may affect the ways in which citizens (as taxpayers, workers, and welfare recipients) function within their communities, families, and workplaces. Moreover, the make, size and nature of the communities that people form and the social institutions that they construct may change—and with them the options available for people to pursue.

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The normative goals we outline—autonomy, efficiency, and distributive justice—may be in tension with each other, and thus—as we shall later explain—call for different legal mechanisms. Moreover, different conceptualization of a single normative goal may push towards different policy proposals. Before we turn to that, however, we would like to more closely consider, and critically evaluate, a dichotomous pattern that dominates tax and welfare policy debates—the question of public vs. private responsibility and the division of labor between two seemingly opposing institutions—the state and the market.

## II. BETWEEN THE STATE AND THE MARKET

Traditionally, the categories of the “private” market and the “public” state were conceived as two distinct and separate spheres. Under this view, actors, actions, and resources were regarded as either public or private, conducted either in the realm of the state or the market.<sup>21</sup> Subsequently, each sphere was regarded as a realm with a distinct institutional logic and disparate attributes: the market as the efficient provider of services, and promoter of autonomy due to the variety of options it offers;<sup>22</sup> the state, as the institution that inherently is more attune to distributive

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<sup>20</sup> By commodification in this context we mean detaching interactions and aspects of life from their original—in this case familial—context and transferring them to the realms of the state or market.

<sup>21</sup> For a small sample of the vast array of literature on the Private/Public dichotomy see Symposium, *The Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982); Symposium, *Mediating Institutions: Beyond the Public/Private Distinction*, 61 U. CHI. L. REV. 1213 (1994); Symposium, *The Boundaries of Public Law*, 11 INT’L J. CONST. L. 125 (2013); Symposium, *Public/Private Beyond Distinctions?*, 15 THEORETICAL INQUIRIES L. 1 (2013); There are also countless individual books and articles. See for example PAUL FAIRFIELD, *PUBLIC/PRIVATE* (2005); MARTHA MINOW, *PARTNERS NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD* (2002); *PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY* (Jeff Weintraub & Krishan Kumar eds., 1997); *PUBLIC AND PRIVATE IN SOCIAL LIFE* (S.I. Benn & G.F. Gaus eds., 1983); Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT’L L. 387 (1999); Alan Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987); Paul M. Schoenhard, *A Three-Dimensional Approach to the Public-Private Distinction*, 2008 UTAH L. REV. 635; and *Development in the Law—State Action and Public/Private Distinction*, 123 HARV. L. REV. 1248 (2009–2010).

<sup>22</sup> Tsilly Dagan & Talia Fisher, *Rights for Sale*, 96 MINN. L. REV. 90, 96 (2011).

justice, and the promotor of democratic values.<sup>23</sup> Examples of such views can be found in the discussion about the merits and shortcomings of privatization, specifically in the cases of prisons and hospitals.<sup>24</sup>

However, the dichotomous take on the private-public division has been challenged in the past decades, and has been questioned to a considerable extent.<sup>25</sup> Are public and private really opposing spheres of governance? Questioning voices, such as that of Ralf Michaels, argue that we should re-consider this dichotomy:

Do we not care more about good versus bad governance than we care about state versus non-state governance? And if we do, is the difference state/non-state or the difference public/private really the prime criterion by which to assess governance? . . . Instead of the formal and artificial differentiation state/non-state, we should look for functional differentiations between different modes of governance.<sup>26</sup>

We agree. We see public and private not as opposing rival institutions which demand an either-or selection, but rather as offering a wide array of different possible combinations in which private and public features and mechanisms are combined to recreate public-private hybrids that are neither purely public nor exclusively private. Examples of such public-private hybrids abound: there are more and more ‘public’ programs that function “through the use of agencies, privatized contractors, public-private partnerships, and the creation of markets and quasi-markets in public services,”<sup>27</sup> and increasingly, more private operations that are backed up by public funding and governed by governmental regulation,<sup>28</sup> as governments have been “endowing groups of private actors

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<sup>23</sup> JANET NEWMAN & JOHN CLARKE PUBLICS, POLITICS AND POWER: REMAKING THE PUBLIC IN PUBLIC SERVICES 5 (2009).

<sup>24</sup> For a discussion and critique of the classic arguments made regarding privatization of prisons, see Hadar Aviram, *Are Private Prisons to Blame for Mass Incarceration and Its Evils: Prison Conditions, Neoliberalism, and Public Choice*, 42 *Fordham Urb. L.J.* 411 (2014). For an analysis of the discussion regarding the privatization of hospitals, see Jeffrey Braithwaite, Joanna F. Travaglia & Angus Corbett, *Can Questions of the Privatization and Corporatization, and the Autonomy and Accountability of Public Hospitals, Ever be Resolved?* 19 *HEALTH CARE ANAL.* 13 (2011).

<sup>25</sup> Duncan Kenney, *The Stages of the Decline of the Public/Private Distinction* 130 *U. Pa. L. Rev.* (1982); Joseph W. Singer, *Legal Realism Now*, 76 *CALIF. L. REV.* 465, 482–87 (1988). For a recent account of the Private/Public dichotomy in a neo-liberal age see: Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State* 15 *THEOR. INQ. L.* 1–26 (2014).

<sup>26</sup> Ralf Michaels, *The Mirage of Non-State Governance*, *UTAH L. REV.* 31, 33 (2010).

<sup>27</sup> Newman & Clarke, *supra* note 23, at 3.

<sup>28</sup> MARIANA MAZZUCATO, *THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS* 2 (2013).

with public powers.”<sup>29</sup> Substantial private-public cooperation creates a public-private mix in practically all areas of public life, including provision of security,<sup>30</sup> public health, food safety,<sup>31</sup> pollution control,<sup>32</sup> and historically—the internet,<sup>33</sup> to name a few. Indeed, increasingly in order to understand the changing regulatory landscape we need to pay attention to cooperation and dependency between the state (through its regulation and provision of access to resources) and the market (through its funding and ability to accommodate itself to different projects).

Thus, public and private need be examined not as two distinct spheres, but rather as elements that configured in various hybrids and combinations. We see this flexibility as a potential opportunity to let go of myths of “free” markets and “fair” states in order to create policies and mechanisms that use the institutional benefits of both. Accordingly, we are not focused on the characterization of the various arrangements as public or private and state or market, but rather, we look more closely at the various features of the numerous arrangements, asking what purposes they serve and what opportunities they provide.

We focus, in Part IV, on the context of childcare, looking for new and creative ways to support working parents in balancing the challenges of childcare and careers within their households, if they seek to achieve spousal equality. We seek to use the creative potential of such hybrid private-public mechanisms in order to design mechanisms that would be able to promote the many—sometimes contradicting—normative goals that coincide in this juncture of family, market and state. At times this will require hard choices between competing goals, at others it might not. Below we provide an analytical framework that can help is systemically evaluating the costs and benefits of different mechanisms and ties together mechanism design criteria with the normative goals different types of mechanisms can promote.

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<sup>29</sup> Thomas Sikor, Eva Barlosius, and Waltine Scheumann. *Introduction: Public-Private Relations and Key Policy Issues in Natural Resource Governance* in Thomas Sikor ed., *PUBLIC AND PRIVATE IN NATURAL RESOURCE GOVERNANCE: A FALSE DICHOTOMY?* 1 (2008). See also Martha Minow & Jody Freeman, *Introduction: Reframing the Outsourcing Debates* in Martha Minow & Jody Freeman eds. *GOVERNMENT BY CONTRACT: OUTSOURCING AN AMERICAN DEMOCRACY* 1–20 (2009).

<sup>30</sup> DEBORAH D. AVANT, *THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY* (2005).

<sup>31</sup> Julie Guthman, *The Polanyian Way? Voluntary Food Labels as Neoliberal Governance*, 39 *ANTIPODE* 456–478 (2007); Ching-Fu Lin, *Public-Private Interactions in Global Food Safety Governance*, *FOOD & DRUG L.J.* 143, 160 (2014).

<sup>32</sup> Tom Tietenberg *The Tradable Permits Approach to Protecting the Commons: What Have We Learned?*, in: *THE DRAMA OF THE COMMONS* (Elinor Ostrom, Thomas Dietz, Nives Nives Dolšak, Paul C. Stern, Susan Stonich, and Elke U. Weber eds.) 197–232 (2002).

<sup>33</sup> See MAZZUCATO, *supra* note 28, at 110–111.

### III. TRANSLATING NORMATIVE GOALS INTO LEGAL MECHANISMS

The private/public characteristic of any given mechanism is often perceived—as discussed in the previous Part—as a key element in its design. We suggest that instead of looking at the institution providing the service we should be attentive to a series of mechanism design criteria can help us decipher more closely the relationship between the normative goals and the chosen mechanism. A key question in policy design is how to translate normative goals into policies that manage to promote these goals, even as they encounter the complexities of bureaucratic implementation,<sup>34</sup> are used by “bad men” who will seek ways to evade the law and its consequences,<sup>35</sup> and confront other factors that may lead to unintended consequences.<sup>36</sup> This is what we seek, in a highly-stylized manner, to achieve here. A distinguishing factor for us in discussing the normative and distributive goals of a given policy is not whether the state or the market are the key institutions providing the benefit, but rather a different set of questions that look at the nature of the benefit or service provided, and its eventual consequences. We are interested in the distributive, efficiency and autonomy outcomes of the policy designed rather than whether it has a state or non-state character. However, leaving the state/non-state as a main criterion does not mean we offer no criteria at all. Based on the two previous sections, this section develops institutional criteria that can assist in the process of policy design of legal mechanisms for the promotion of gender equality in the fields of welfare and tax law/ and build a framework to evaluate the distributive consequences of various institutional public-private mixes.

To methodically decipher the different existing policy mechanisms for the promotion of gender equality and match them with the normative goals, as well as creatively think about possible institutional options, we build on existing literature on the theory of the welfare state and taxation to offer a typology of policy solutions along five mechanism-design criteria. Below we systematically analyze the normative goals advanced by such different legal mechanisms and explain the different mixes of normative goals promoted by them. The five criteria we look at are: (1) who is targeted by the policy (universal vs. selective); (2) in what way the benefit is provided: in kind or through cash transfer; (3) is the benefit provided as a fixed sum or is it income dependent; (4) does the benefit

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<sup>34</sup> See MICHEL CROZIER, *THE BUREAUCRATIC PHENOMENON* 66 (1964); MICHAEL LIPSKY, *STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES* 13–22 (30th ed., 2010); TONY EVANS, *PROFESSIONAL DISCRETION IN WELFARE SERVICES: BEYOND STREET-LEVEL BUREAUCRACY* 39–68 (2016).

<sup>35</sup> Oliver Wendell Holmes, *The Path of Law*, 110 HARV. L. REV. 994 (1997) (addressing Boston University of Law January 8, 1897).

<sup>36</sup> Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 (4) Michigan Law Review, 936–978 (1991).

effect the traditional (gendered) intra household division of labor (IHDOL); and (5) finally, we also look at the actor providing the service/benefit—the state, the market, the family or civil society—and the relationship between the involved actors, as part of the wider institutional investigation, but not as a sole determining factor. Under each one of these criteria, we do not seek to introduce new fictive dichotomies, but rather to explore the myriad reconfigurations that exist once the dichotomous state of mind is relaxed.

### A. *Universal vs. Selective*

A key element that shapes the consequences and effects of any given policy is whether the mechanism targets only low income families, using income tests, or whether it applies universally so that all members (however defined) of society will be equally entitled to the same treatment regardless of economic need.

Selective benefits may seem like a more efficient way to shift resources to designated individuals and therefore appear to have greater redistributive potential. Yet, they may suffer from over or under-inclusiveness, entail high administrative bureaucratic costs, be subject to the pressure of political interest groups and thus become more vulnerable to fiscal cuts, and result in lower quality service or insufficient benefits.<sup>37</sup> Selective benefits may also have a stratifying and stigmatizing effect, and depending on their specific design, may be highly coercive or paternalistic, particularly so when they are designed as strict or all-or-nothing categories that may push marginal recipients to pursue behaviors that will entitle them to the benefits (the best examples are welfare recipients who decrease their earnings in order to qualify for benefits).<sup>38</sup> Universal benefits, on the other hand, are seen as expensive and wasteful, but may prove to be more redistributive when political processes are taken into account, and better promote social equality, solidarity, and autonomy, and are easier to administer.<sup>39</sup>

Naturally, selectivity and universality are a matter of degree. Thus, selective benefits can use generous, wide and more inclusive income

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<sup>37</sup> Walter Korpi & Joakim Palme, *The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries*, 63 AM. SOC. REV., 661, 670–78 (1998); Gillian Lester, *Can Joe the Plumber Support Redistribution? Law, Social Preferences, and Sustainable Policy Design*, TAX L. R. 313, 323–25, 328–39 (2010).

<sup>38</sup> W. J. H. van Oorschot, *Targeting Welfare: On The Functions And Dysfunctions Of Means-Testing In Social Policy*, In P. Townsend, & D. Gordon (eds.), *WORLD POVERTY: NEW POLICIES TO DEFEAT AN OLD ENEMY* 171, 175–78 (2002).

<sup>39</sup> Korpi & Palme, *supra* note 37, at 681–83; Bo Rothstein, *The Future of the Universal Welfare State*, in Stein Kuhnle ed. *THE SURVIVAL OF THE EUROPEAN WELFARE STATE* 217, 218–24 (2003).

tests, solving some of the problems associated with them, mostly ones related to stigma and stratification, and universal benefits can have restrictive eligibility criteria and be more selective, thus weakening their distributive potential.<sup>40</sup> In fact, while this dichotomy is often discussed as a crucial distinguishing characteristic between welfare state regimes, the social democratic model based on universality and the liberal model based on selectivity and policy options,<sup>41</sup> are better thought of as a spectrum in which questions of universality or selectivity are ones of degree, rather than a different kind of benefit all together.<sup>42</sup>

### B. *Fixed-Sum vs. Income-Dependent*

In designing tax and welfare benefits, we can select between a fixed sum mechanism or an income-level dependent mechanism. Each of these choices may promote different normative goals. Income-dependent benefits can be progressive—the benefit increases as the income decreases—or regressive—the benefit increases as the income increases.<sup>43</sup> As a result, income-related benefits can either sustain or increase economic gaps, or they can mitigate economic gaps. Income-dependent benefits and taxes can also be more bureaucratically burdensome as they require reporting of income levels which are not always easily determined. They can also be more intrusive than fixed-sum benefits if they require revealing income levels to public officials or care providers. The latter tend to be more easily and efficiently administered, and often less intrusive to a person's privacy and autonomy as they can be provided without requiring any specific information. Here too, the seemingly sharp distinction between the mechanisms is not inherent. Fixed-sum and income-dependent mechanisms can supplement each other in various ways, such as adding an income-dependent component to an existing fixed-sum one. This can be the case, for example, in relation to old age benefits, where a universal fixed-sum old age benefit can be coupled with an income-dependent pension scheme.<sup>44</sup> This is also the case in the context of child-care, where a universal children's allowance can be coupled with a tax deduction for childcare expenses.

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<sup>40</sup> See van Oorschot, *supra* note 38, at 175–78.

<sup>41</sup> Esping-Andersen, *supra* note 11, at 26–29.

<sup>42</sup> See also Lester, *supra* note 37, at 323–24.

<sup>43</sup> See generally Timothy Besley, *The Principles of Targeting*, in CURRENT ISSUES IN DEVELOPMENT ECONOMICS (1991); For a more recent review of the literature on the benefits and costs of universal versus targeted benefits based on income see e.g., David Brady and Rebekah Burroway, *Targeting, Universalism, and Single-Mother Poverty: A Multilevel Analysis Across 18 Affluent Democracies*, 49 DEMOGRAPHY 719, 721–24 ((2012)). See also Timothy Besley, *Means Testing versus Universal Provision in Poverty Alleviation Programmes*, 57 (225) ECONOMICA, NEW SERIES 119–29 (1990).

<sup>44</sup> Korpi & Palme call this “an encompassing model,” *supra* note 37, at 669.

### C. *Cash Transfers vs. In Kind Services*

Benefits can be provided in-kind by the government or can be subsidized or fully funded by cash transfers to individuals.<sup>45</sup> In-kind services can provide the government some control over the quality and type of services.<sup>46</sup> They can also ensure that public funds will be spent in a controlled and pre-determined manner, leaving recipients less control over their individual use of the funds as well as over the desired level and type of service.<sup>47</sup> Therefore, in-kind services can better promote equality and distributive justice, but may—depending on their openness to experimentation and pluralism—be less attuned to citizens’ preferences, more paternalistic, and less respectful of individual autonomy and liberty.<sup>48</sup> The criteria in-kind services adhere to, although uniform, may be strict, often limited, and bureaucratic (and thus frequently reductive).<sup>49</sup> In-kind services may also be less efficient. Assuming they are not exposed to competition and not focused on profit-making, they may not be designed to incentivize experimentation, responsiveness and improvement.<sup>50</sup>

In contrast, cash transfers tend to promote individual autonomy and choice making capacity. They also may be more efficient if there is a competitive market for the services that is more diverse and responsive to individual preferences regarding quality, cost, and nature of the service.<sup>51</sup> Yet, they can be more commodifying when compared with non-market care (e.g., within the family) for the services entailed, as they

<sup>45</sup> Lester C. Thurow, *Government Expenditure: Cash or In Kind Aid?* 5 *PHILOSOPHY & PUBLIC AFFAIRS* 361–81 (1976); Janet Currie and Firouz Gahvari, *Transfers in Cash and In Kind: Theory Meets the Data*, 46(2) *JOURNAL OF ECONOMIC LITERATURE* 333, 338–52, 373–76 (2008).

<sup>46</sup> Albert Weale, *Paternalism and Social Policy*, *JOURNAL OF SOCIAL POLICY* 157–72 (1978).

<sup>47</sup> Robert E. Goodin, *Freedom and the Welfare State: Theoretical Foundations* 11 *JOURNAL OF SOCIAL POLICY* 149–76 (1982).

<sup>48</sup> Weale, *supra* note 46; AMY GUTMANN, *LIBERAL EQUALITY* 90–91 (1980).

<sup>49</sup> Thus, publicly provided care services often follow strict guidelines of “proper” care (e.g., schedules, dietary preferences, religious rituals and cultural preferences) that are not flexible enough to adhere to the needs of cared-for individuals.

<sup>50</sup> JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT?* 221–32 (1989); though note that public sector innovation is possible and feasible in an institutional environment that fosters and enables it. See e.g.: MARCO DAGLIO, DANIEL GERSON, HANNAH KITCHEN, *BUILDING ORGANISATIONAL CAPACITY FOR PUBLIC SECTOR INNOVATION*, Background Paper prepared for the OECD Conference “Innovating the Public Sector: from Ideas to Impact”, Paris, 12–13 November 2014 (2015).

<sup>51</sup> MORITZ VON GLISZCZYNSKI, *CASH TRANSFERS AND BASIC SOCIAL PROTECTION: TOWARDS A DEVELOPMENT REVOLUTION? PART 2.1*, 28–40 (2015); Jessica Hagen-Zanker, Francesca Bastagli, Luke Harman, Valentina Barca, Georgina Sturge and Tanja Schmidt, *Understanding the Impact of Cash Transfers: The Evidence*, Briefing: Overseas Developing Institute (2016), available at: <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11465.pdf> last accessed Jan. 3 2018.

push service providers and beneficiaries to price-tag their interaction.<sup>52</sup> When comparing state provided in-kind services to market-provided services that are subsidized by the state, the commodifying effect is not as clear. While the money paid for care certainly commodifies the interaction, state-provided care involves no less troubling reductive effects.<sup>53</sup> Cash transfers may also be more deeply stratifying if the cash benefit (whether selective or universal) does not provide sufficient sums to purchase quality services.<sup>54</sup>

As in the previous two mechanism design criteria, some institutional configurations fall in between the stark distinction, such as voucher systems and conditional cash transfers, mixing cash transfers, in different forms, with in kind services.

#### D. *Shaping Intra Household Division of Labor (IHDOL)*

The Intra Household Division of Labor (hereinafter IHDOL) element focuses on the effect of policy on male and female contribution to household work. IHDOL evaluation considers the extent to which the policy entrenches, transforms, or disrupts the traditional breadwinner/housewife division of labor in which women are providers of care and men are breadwinners.<sup>55</sup> The attempt to disrupt traditional gender roles in the household is a relatively new public policy goal. The leading examples often given for such policies are the Scandinavian parental leave programs that incentivize men to take paternal leave by exclusively reserving two months of leave for each parent on a take it or leave it basis.<sup>56</sup> There is more experience in various countries with policies encouraging women to join the paid workforce, and thus often inadvertently shift some housework to men. Nonetheless, studies suggest that this does not necessarily bring with it significant redistribution of house-

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<sup>52</sup> For an explanation of the commodifying effects of price tagging see e.g., . Tsilly Dagan, *The State and the Market: A Parable*, 3 PUB. REASON 44, 47–51 (2011).

<sup>53</sup> *Id.* at 51.

<sup>54</sup> Hagen-Zanker et al., *supra* note 51, at 4–5.

<sup>55</sup> Hila Shamir, *The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States*, 58 AMERICAN JOURNAL OF COMPARATIVE LAW 953, 957 (2010); Hila Shamir, *Between Home and Work: Assessing the Distributive Effects of Employment Law in Markets of Care*, 30(2) BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 404, 427–28 (2010); Hila Shamir, *What's the Border Got To Do With It: How Immigration Regimes Affect Familial Care Provision – A Comparative Analysis*, 19 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY AND THE LAW 601, 621–22 (2011).

<sup>56</sup> In this context see Sweden's parental leave system with its' monetary incentive towards equal take up of leave: Government of Sweden, GENDER EQUALITY IN SWEDEN, *available at*: <https://sweden.se/society/gender-equality-in-sweden/> last accessed Apr. 9, 2018; and Linda Haas & C. Philip Hwang, *The Impact of Taking Parental Leave on Fathers' Participation In Childcare And Relationships With Children: Lessons from Sweden Community*, 11 WORK & FAMILY 85, 85-104 (2008).



hold care work and can lead either to women's "second shift"<sup>57</sup> or to the outsourcing and commodification of care.<sup>58</sup>

Attempts to incentivize a more egalitarian IHDOL aim to promote gendered equality both in terms of opening labor market opportunities to both sexes, and as a result, more egalitarian income distribution.<sup>59</sup> Depending on how coercive the measures are, they may enhance or hinder autonomy and liberty. A more coercive measure will not let family members express their autonomy to choose between household care and market work,<sup>60</sup> while too gentle nudging might not be meaningful enough to enhance the spectrum of choice beyond traditional gender roles and overcome societal customs.<sup>61</sup> The question of efficiency in this respect is intensely debated. Gary Becker has suggested that the gendered division of labor can be explained on efficiency grounds since each spouse's specialization increases the household production function.<sup>62</sup> However, feminist economists have argued that Becker's model is highly simplistic for a multitude of reasons, chief among them is its essentialist assumption regarding women's proclivity to care, which disregards market dynamics and wage inequality and ignores questions of market-based role specialization via outsourced care.<sup>63</sup>

#### E. Which Institution Provides the Service—the State, the Family or the Market?

While our goal in this framework is to move away from understanding the private public dichotomy as the end-all of policy design, we still see importance in identifying the institutional structure of service and

<sup>57</sup> ARLIE HOCHSCHILD, *THE SECOND SHIFT* 3-4 (2d ed., 2012).

<sup>58</sup> Suzanne M. Bianchi, Melissa A. Milkie, Liana C. Sayer & John P. Robinson, *Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor*, 79 *SOCIAL FORCES*, 191, 198-99 (2000).

<sup>59</sup> Shamir *Berkeley Journal of Employment and Labor Law* (2010), *supra* note 55 at 434.

<sup>60</sup> E.g., welfare to work programs that require women to enter the labor market as a condition of social security benefits. See e.g., a discussion of the coercive nature of Welfare to Work programs in the U.S.: Dorothy E. Roberts, *Welfare Reform and Economic Freedom: Low-Income Mothers' Decisions about Work at Home and in the Market*, 44 *SANTA CLARA L. REV.* 1029, 1041-59 (2004).

<sup>61</sup> E.g., Israel's paternal leave is 15 weeks of paid leave. Mothers are required to take the first 6 weeks, one week can be taken simultaneously by both parents and the rest can be taken by either mother or father. The ability to take parental leave—a gentle nudge—barely changed patterns of parental leave taking in Israel. In 2017 a mere 700 men took parental leave, in relation to 130,000 women. See: Tali Heruti-Sover, *After the Legislation: How Many Men Chose To Take Parental Leave In 2017?* *THE MARKER* (Dec. 18 2017) available at: <https://www.themarker.com/career/1.4728828> last visited Jan 3 2018.

<sup>62</sup> See GARRY BECKER, *TREATISE ON THE FAMILY* 102-03 (1991).

<sup>63</sup> Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Costs of Moralizing Care*, 16 *COLUM. J. GENDER & L.* 357, 371-73 (2007); Paula England, *A Feminist Critique of Rational-Choice Theories: Implications for Sociology*, *AM. SOCIOLOGIST* 18-20 (1989), and Ann Mari May, *The Feminist Challenge to Economics* 6 *CHALLENGE* (2014), 45, 54-55.

benefit provision. As mentioned above, provision and administration of services by different institutions can promote different normative goals. While the state can assure a certain scope and level of services, state provision of care services subjects the beneficiaries to the strict, bureaucratic and privacy-lacking official realm of the state, while family or market-provided services often allow for more choice (for some) of the kind, level and amount of services provided.<sup>64</sup> Hence, state provision can be said to be more capable of promoting equality and overcoming the coercive nature of the market (as the level of services would not be subject to recipients' ability to pay), but not necessarily efficiency (as the state would be less capable of matching the benefits with recipients' preferences).<sup>65</sup> The market is considered to be better at promoting efficiency and individual choice, but at the cost of increasing commodification and coercion. The family is considered better in nurturing interpersonal relations, but may also maintain traditional intra-household division of labor.<sup>66</sup> However, as mentioned earlier, the state, market and family are better thought of not as dichotomous institutions but rather as a spectrum of institutional options that can be mixed and reconfigured as well as complemented by each other. Different mixes and hybrids are both common and possible, thus opening new institutional possibilities.

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Each of these policy design criteria reflects tensions between the underlying normative goals, and each represents a distinction between ideal type mechanisms that can, and we argue that should be, broken up and understood as a spectrum of modular tools to be mixed and matched in order to support varying combinations of normative ends. By systematically analyzing mechanism design decisions along these five criteria, our framework can potentially uncover a rich and diverse landscape of institutional possibilities.

In the next section, we use this analytical framework to discuss the nuanced normative implications of legal regulatory mechanisms in the context of infant and early childhood care. We believe that the legal infrastructure that our analysis produces will open paths for creative and

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<sup>64</sup> See discussion in Part II *supra*.

<sup>65</sup> ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 167 (1993) (the "market produces and distributes [commodities] with unsurpassed efficiency and in unsurpassed abundance)."

<sup>66</sup> For a discussion of the ideology of the family and the market as distinct spheres in which the family is a "haven from the anxieties of the modern world" a sphere of altruism and close (but hierarchical) relations, free from commodifying elements see Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. J. 1497, 1499–08 (1983) For a review of the literature regarding the commodifying effects of the market, see e.g., DAGAN & FISHER, *supra* note 22, at 32.

effective tax and welfare policies, as well as enable more fruitful dialogue across disciplines.

#### IV. FROM NORMATIVE VALUES TO (HYBRID) MECHANISMS— THE EXAMPLE OF CHILDCARE

In this final section, we seek to show the value of the proposed analytical framework, focusing on the example of childcare.

There is a wide scope of mechanisms available for the provision of childcare for parents in general and working mothers in particular. While the two “extreme” points on this spectrum may indeed be “the public” (state)—that is governmental provision of free and public childcare, and “the private” (market)—meaning full reliance on the family and the market with no distinct governmental involvement whatsoever; in between these two extremes, there is a great variety of available options.<sup>67</sup> Our offered framework seeks to show that a more productive way to think about policy solution is to relax the crude state v. market dichotomy, and instead focus on the normative goals and nuanced mechanism design criteria that help to achieve these goals to guide our tax and welfare policy. Above we suggested five elements in policy design that could be used to evaluate and design specific tax and welfare policies in more nuanced ways.

In this section we go back to our initial inquiry into the normative goals that underlie tax and welfare policies in order to offer a roadmap for the design of tax and welfare mechanisms, capable of promoting a complex set of values in the context of childcare. We explain how the normative underpinnings of autonomy, efficiency and distribution unfold through the five design mechanisms we identify.

##### A. *Promoting Autonomy in Tax and Welfare Policies*

Autonomy requires more than a single-bullet mechanism. Promoting autonomy requires that we offer a variety of options for parents to choose from, and allow them to freely choose between them—guaranteeing the accessibility and affordability of most options. Autonomy also requires that we treat individuals with equal respect and concern—respecting their personhood through the protection of their identity-form-

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<sup>67</sup> Sweden is an example of a country that provides free public childcare—placing it in the “public” end of the spectrum. Close to the opposite end we find the United States, which offers no public childcare. Yet even the United States takes some involvement, by granting low income families a subsidy to assist with childcare services, as well as tax deductions for childcare expenses.

ing resources and the interactions they cherish.<sup>68</sup> Here too, the dichotomous distinction between “state” and “market” mechanisms is hardly helpful in designing the mechanisms that would best promote autonomy. Arguably “the state” provides limited choice when forcing parents to consume whatever service it provides and thus fails to promote autonomy, and “the market” increases choice by providing a variety of childcare options, but at the price of subjecting parents to another autonomy harming component—commodification. Thus, if we are pushed to choose between “the state” and “the market,” we enter a dilemma between limiting choice on the one hand and commodifying personhood on the other. We believe the framework we developed above can be a more useful tool to conceptualize the different policy options available and the normative goals they can achieve.<sup>69</sup> The challenge is how to take the virtues of each institution—the state, the market and the family—and minimize their drawbacks. To illustrate, let us look back at the five scales.

Selectivity, in its ideal form, empowers those who need it most to be able to make autonomous choices regarding work, family and child raising. In a world of scarce resources, it may thus make more sense to channel resources to those who can benefit from them most. Thus, for example, assuming we have a budget that can allow a selected few to gain free childcare or, instead, have the budget allocated universally and provide small, perhaps even insignificant support to everyone—granting the benefit selectively would presumably have a greater impact on autonomy. Selective benefits however, often have a stigma attached to them, thus, selectively providing benefits may undermine equal respect, as those provided with the benefits are also tagged as needy, which could be humiliating for them, and lead them to under-utilize the benefit.<sup>70</sup> Furthermore, selective benefits generally require costly and intrusive income tests. Finally, selective benefits tend to be less politically stable, since they generally do not enjoy the support for the middle class. Accordingly, these benefits tend to be more vulnerable to budgetary cuts.<sup>71</sup>

The goals should therefore be to target the benefits to increase choice-making capacity for those who lack it and avoid the stigma asso-

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<sup>68</sup> Julia S. O'Connor, *Gender, Class and Citizenship in the Comparative Analysis of Welfare State Regimes: Theoretical and Methodological Issues*, 44(3) THE BRITISH JOURNAL OF SOCIOLOGY 501, 511–14 (1993).

<sup>69</sup> For example, in Sweden, although childcare is provided by the state, thereby creating a presumption that the option will be limited and therefore bad from an autonomy perspective, in fact we find that it offers a variety of options that ameliorate this aspect: for instance, childcare centers which operate for different hours than the normal hours, and ones that teach in minority languages.

<sup>70</sup> See Currie & Gahvari, *supra* note 45, at 347–52.

<sup>71</sup> See *supra* note 37 and accompanying text.

ciated with it as well as the intrusive and costly bureaucracy. One way to bypass this dilemma is through the simultaneous use of tax and transfer policies: provide a universal benefit, but tax individuals progressively. This empowers the neediest without tagging them, and instead of channeling the benefits to those who need it most, channels their costs to those who can better afford them.<sup>72</sup> Due to its universality, such an approach might stabilize the level of spending on such benefits, strengthening access to quality and affordable care not as charity but as a right.<sup>73</sup>

The in-kind to cash transfer scale offers another nuance: provision of in-kind benefits could limit parents' choices. It presents parents with a choice: to use the services provided instead of the childcare of their choice or to provide childcare themselves. Cash transfers on the other hand involve the market or the family in the provision of benefits. By providing parents with cash, we allow them to purchase (or provide within the family) the childcare they prefer. Market involvement is a mixed blessing. On the one hand, the market allows for a plurality of alternatives in the provision of childcare services to evolve. The market would—ideally—offer a great variety of childcare services to match parents' preferences, and unlike in-kind services, the money parents receive could be used for other purposes should they choose to care for their children themselves.<sup>74</sup> On the other hand, however, along with the advantages of the market in the provision and consumption of goods and services, the market also entails two major drawbacks.

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<sup>72</sup> Such an example can be found in Sweden, where all parents have the option of sending their children to almost-completely subsidized childcare facilities (at a minor differing price), however taxes are collected in relation to the amount of earnings. See: Anita Nyberg, Nyberg, *Gender Equality Policy In Sweden: 1970s–2010s*, 2(4) *NORDIC JOURNAL OF WORKING LIFE STUDIES* 67–84 (2012).

<sup>73</sup> JULIA S. O'CONNOR, ANN SHOLA ORLOFF, SHEILA SHAVER, STATES, MARKETS, FAMILIES: GENDER, LIBERALISM AND SOCIAL POLICY IN AUSTRALIA, CANADA, GREAT BRITAIN AND THE UNITED STATES 223–30 (1999); ARNLAUG LEIRA, WELFARE STATES AND WORKING MOTHERS 120–26 (1992).

<sup>74</sup> The hybrid nature of the Netherlands' welfare policy is reflected in the array of different childcare options that parents can choose from. As a baseline, to ensure quality and safety, all care providers—public or private—that receive government funding or subsidies must meet strict regulatory standards. Furthermore, different types of care providers are funded and supported by the government in different ways, leading to myriad care solutions for parents of young children. The options include: day care centers (either for-profit or nonprofit), which offer a traditional “preschool” scheme and to meet the needs of working parents; “private” childminders that look after a maximum of six children, and could well be family members of the children; after-school care which is relevant for school-age children; and flexible options such as playgroups and babysitters. However, the policy subsidies are not extended to parents who care for their own children and are even conditioned on the parents' employment. See: Trudie Knijn & Jane Lewis, *ECEC: Childcare Markets in the Netherlands and England, in PUBLIC OR PRIVATE GOODS?* 154–62 (Brigitte Unger, Daan Van der Linde & Michael Getzner eds., 2017).

The first drawback is the coercive power of the market. When the cash available (or transferred) for the purchase of services is limited, people might be coerced to either select substandard services or give them up altogether (and make alternative use of the funds they receive). Again, thinking creatively along the in-kind to cash transfer scale can offer nuanced solutions. One possible solution to avoid this coercive nature of the market is through a voucher system that preserves market advantages in the provision of a variety of services without limiting them to parents' ability-to-pay in selecting among these services.

The second drawback of the market is the commodificatory aspect of market interaction. By providing cash benefits, the state pushes parents to seek market solutions, thus commodifying care by putting a price tag on a personal and intimate relationship, and discouraging the non-commodified option of care.

The question of who provides the services helps us consider this problem. It is true that the market commodifies childcare. By paying for childcare and by treating care as a commodity, the market reduces the human interaction to a transaction. But the provision of in-kind services by the state is not necessarily less commodifying, as the "one size fits all" nature of governmentally provided services may be even more commodifying in terms of objectifying and standardizing care.<sup>75</sup>

But the question of who provides the benefit helps us understand that cash-transfer is not necessarily limited to market-provided services. Instead, money can also be used to support intra-household care for children (e.g., as a subsidy for stay-at-home parents). When a subsidy is paid for parents to take care of their own children it seems less commodifying than the alternative. True, money is paid and childcare is provided. But the money is actually paid in order to buy the parent out of the job market and free a parent to take care of her child.<sup>76</sup> Thus, cash transfers may increase the choices available to parents not only with regard to the kind and level of market provided childcare, but also it allows them to choose to keep childcare as a non-market interaction.

Finally, intra-household division of labor provides one last perspective on childcare and autonomy. Although family provision of childcare may tilt IHDOL against women, providing a subsidy for market provided care only may equally curtail their autonomy when they prefer to stay at

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<sup>75</sup> See DAGAN & FISHER, *supra* note 22, at 32.

<sup>76</sup> Such an example can be seen in parents' option in Sweden to reduce their working hours by up to twenty-five percent until their child reaches the age of eight. See: Anne Gronlund and Jana Javornik, *Great Expectations—Dual-earner Policies and the Management of Work-Family Conflict: The Examples of Sweden and Slovenia*, 3 FAMILIES, RELATIONSHIPS AND SOCIETIES 51, 54–55 (2014).

home.<sup>77</sup> Thus one way to think about IHDOL is to provide at-home subsidy for childcare only when fathers take part in home caring for children. Or—better yet—to let the parents choose whom stays at home but provide an increased subsidy when the father is the one choosing to stay at home in order to nudge parents to overcome traditional gendered division of labor.

Thus, from the perspective of autonomy, a nuanced mechanism emerges as promoting autonomy—way beyond “state” and “market.” Such mechanisms might, for example, include universal provision of (generous enough) vouchers that are balanced with progressive taxation, provided that such vouchers could be used for any of the following: market provided childcare, state provided care or non-market provision of services within the family in case fathers too take part in childcare.<sup>78</sup>

### B. *Promoting Efficiency in Tax and Welfare Policies*

Efficiency, in our context, implies the provision of the greatest variety and best quality childcare to fit the plurality of parent’s preferences, with the lowest costs.

Who provides childcare services? In standard discussions of the private-public type, the state is often said to be inefficient in the provision of services (childcare included), thus leading to the seemingly inevitable conclusion that market provision of such services must prevail, at least from an efficiency perspective.<sup>79</sup> “The state” however, is not necessarily inefficient in the provision of services.<sup>80</sup> Although it is true that the centralized nature of the state ordinarily lacks the competitive incentives to provide efficient services and to cater to consumers’ preferences (things that the market is supposed to achieve better), the state may not necessarily lack competition, and the market can suffer from market failures

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<sup>77</sup> One way to align such subsidy with the actual preferences of mothers is to allow for a secondary market in such vouchers, allowing women who prefer to stay at home to sell their voucher to women who require more (or more hours of) childcare services. See DAGAN & FISHER, *supra* note 22, at 115.

<sup>78</sup> A partial example of this can be seen in the Netherlands’ childcare system. Parents are provided a subsidy that can be used for a vast variety of childcare options, although these are limited to non-parental care. The Canadian child benefit system, however, is designed to enable parents to choose more freely between a breadwinner and a dual earners model, providing benefits to parental care as well, irrespective of the parents’ participation in the paid labor market. For a description of the Netherlands see PUBLIC OR PRIVATE GOODS? *Supra* note 75; for a description of the Canadian system see Rianne Mahon, Christina Bergqvist & Deborah Brennan, *Social Policy Change: Work-family Tensions in Sweden, Australia and Canada*, 50 SOC. POL. & ADM. 165, 176 (2016).

<sup>79</sup> For a critique of this position see: JANE JENSON & MARIETTE SINEAU, WHO CARES?: WOMEN’S WORK, CHILDCARE, AND WELFARE STATE REDESIGN 37–42 (2001).

<sup>80</sup> Minow, *supra* note 21, at 6–10.

(e.g., externalities and lack of information).<sup>81</sup> Moreover, the market focuses on a single currency—utility (or its proxy, money). But when people seek to promote other (or additional) “currencies” such as affection, a sense of security or intellectual stimulation, the market incentives are not necessarily designed to promote such goals most efficiently.

A possible solution for the lack of competition of state provided care is to have multiple state and market institutions provide childcare and have them compete for “clients.” Regulation can, in other words, unbundle the provision of services from its financial source. The state can offer in-kind services that would compete with market-provided services, and—at the same time—subsidize parents’ choice of either one.<sup>82</sup> This could be done through a voucher or cash transfer system and the state could set prices for its services.<sup>83</sup> Of course such a system can only work if the public system is well funded and can provide real competition to the private system. The baseline of quality of all alternative needs to be set by regulation that ensures some quality control of all providers and sufficient funding to public schools. Alternatively, incentives to construct childcare facilities could also be an effective option.<sup>84</sup> State provision of in-kind childcare services as an alternative, or regulatory supervision of the services provided by the market, could further reduce externalities (imposed, for example, on children), and make the system

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<sup>81</sup> Christos Pitelis & Thmoas Clarke, *Introduction: The Political Economy of Privatization*, in *THE POLITICAL ECONOMY OF PRIVATIZATION* (Christos Pitelis & Thmoas Clarke eds.) 1–5 (2005); Jonas Prager, *Market Failure and Public Sector Failure: Is Privatization a Panacea?* EconPapers (Working Papers from C.V. Starr Center for Applied Economics, NYU) (1990); William L. Megginson & Jeffrey M. Netter, *From State to Market: A Survey of Empirical Studies on Privatization* 39(2) *JOURNAL OF ECONOMIC LITERATURE* 321–89 (2001).

<sup>82</sup> For example. In Sweden along with the generous, high-quality state-run pre-schools, parents may also send their children to charter schools (regulated private schools) and receive a considerable tax credit on the amount paid. See Daniel Beland, Paula Blomqvist, Jorgen Goul Andersen, Joakim Palme & Alex Waddan, *The Universal Decline of Universality? Social Policy Change in Canada, Denmark, Sweden and the UK*, 48 *SOC. POL. & ADM.* 739, 749 (2014). See also the discussion of the Netherlands’ system see *supra* note 75.

<sup>83</sup> This could be facilitated in part by child benefits. Child benefit is a universal benefit provided in many welfare states to families with children. Such a benefit can be found, for example, in: Canada, Israel and Sweden. In Canada and Israel an additional differentiated benefit is given to low-income families. The benefit’s effectiveness in practice depends on whether the sum granted is, in fact, substantial enough to cover for a significant part of the costs of childcare. See *id.* at pp. 748, 750. For Israel see Social Security Institute, *CHILDREN BENEFITS—GENERAL INFORMATION* available at: <https://www.btl.gov.il/English%20Home/page/Benefits/Children/Pages/default.aspx> last accessed Apr. 9, 2018.

<sup>84</sup> This option seems to be gaining more prevalence in recent years. England grants tax exemptions for childcare services given by the employer or by a childcare provider with whom the employer has an arrangement for his employees, granted that the arrangement is supervised. In the Netherlands too, there is a growing number of “company places” due to “stimulus measures.” Sweden too has a growing number of private non-corporate childcare institutions, despite its generous heavily state-subsidized childcare options. See *supra* note 83 at pp.747–49.



more transparent—thus reducing market failures.<sup>85</sup> Importantly, the variety of services should include not only a plurality of market and state provided childcare options, but also an equally plausible in-house provision of (either hired or self-provided) childcare that may be preferred by some parents.

The bottom line is that from the efficiency perspective there are more options than the complete marketization of childcare that can achieve efficient provision of childcare and parents' participation in the workplace. The provision of multiple options by the state, the market and the family for taxpayers to choose from, guaranteeing a certain baseline that all providers comply with, and allowing for competition among the options for public funds (by way of a voucher system,<sup>86</sup> or cash transfers), could provide for such an efficient system. Regulation may be required in order to curtail market failures such as lack of information and externalities. Some elements are key in creating such a system. First, the existence of a public system that provides services at a level can be attractive to the middle classes. Accordingly, sufficient governmental funding to the public option, independent of vouchers, has to be a part of such a policy in order to guarantee the public system is not drained of resources and can offer a competitive alternative to private options.<sup>87</sup> Second, private school pricing and admissions criteria require regulation in order to limit the social inequities associated with voucher schemes.<sup>88</sup> In addition, in order to encourage women's labor market participation some form of care subsidy (e.g., subsidization of tax benefits) can be significant in assisting families to cover the cost of care. By introducing such regulation, individual households will more easily decide to opt for non-parental care thus freeing parents to pursue paid employment. This can allow mothers and fathers to efficiently select their employment as well as childcare options.

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<sup>85</sup> Canada, for example, regulates a substantial portion of childcare facilities. The Netherlands grants higher funding and subsidies to families who send their children to state supervised childcare facilities. For a description of the system in Canada see Martha Friendly, *Taking Canada's Child Care Pulse: The State of ECEC in 2015*, in *MOVING BEYOND BABY STEPS: BUILDING A CHILD CARE PLAN FOR CANADIAN FAMILIES*: 24 *OUR SCHOOLS, OURSELVES* 9–24, 11–14. For the Netherlands see *PUBLIC OR PRIVATE GOODS?* *supra* note 75.

<sup>86</sup> For an in depth discussion of the voucher system in education in the U.S. see: THOMAS L. GOOD AND JENNIFER S. BRADEN, *THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS, AND CHARTERS* (2014); for a critical take on school vouchers, Helen F. Ladd, *School Vouchers: A Critical View*, 16 *THE JOURNAL OF ECONOMIC PERSPECTIVES* 3 (2002). For discussion of successful voucher programs and the importance of sufficient public funding for public options see: Jim Carl, *Parental Choice as National Policy in England and the United States*, 38(3) *COMPARATIVE EDUCATION REVIEW* 294 (1994).

<sup>87</sup> *SCHOOL CHOICE AND SCHOOL VOUCHERS: AN OECD PERSPECTIVE* 6–13 (2017) available at <http://www.oecd.org/edu/School-choice-and-school-vouchers-an-OECD-perspective.pdf> last visited Apr. 9, 2018.

<sup>88</sup> *Id.*

### C. *Promoting Distributive Justice in Tax and Welfare Policies*

On the face of it, it may seem as if selectivity is the most progressive choice amongst tax and welfare policies. In theory when only the people who require assistance actually get it, most public funds are targeted at the most needy segments of society, hence maximizing distribution. This assumption, however disregards the political dimension of the welfare state. In fact, more political stable universal arrangements can reach similar distribution, as explained above, by a combination of higher progressive taxes (or otherwise creatively progressive tax benefits such as the U.S. progressive tax credit for childcare) and universal distribution of benefits.

Moreover, since allocation of public benefits distributes more than simply economic resources, we should take a wider angle at its effects. Thus, allocation of welfare benefits often distributes not only money but also dignity and respect.<sup>89</sup> Hence, when public funds and services are tagged as benefits for the poor, they carry with them a stigma that may be translated into unequal social treatment, and at times, humiliating treatment. Furthermore, selective benefits may be more vulnerable in the political process—as the majority (not entitled to such benefits) may be quick to curtail them.

The allocation of public benefits could also (re)distribute other resources such as gender equality via IHDOL. By encouraging fathers to take an equal part in childcare (e.g., through designated post-natal leaves, longer daycare hours that allow them to equally share child pick-up, or by supporting working mothers in their choice to work outside the house through extra benefits), the tax and welfare system could take part in the distribution of time, leisure, money and power within the family, and hence within society as a whole.<sup>90</sup>

### CONCLUSION

This Article argues for the benefits of expanding our institutional imagination beyond the public-private dichotomy, in order to envision a more nuanced understanding of the mechanisms that make up tax and welfare policies that seek to promote gender equality in the labor market and the household. In demonstrating this, it focuses on the provision of childcare.

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<sup>89</sup> See Elizabeth S. Anderson, *What Is the Point of Equality*, 109 *ETHICS* 287, 306 (1999).

<sup>90</sup> Perhaps the most prominent example is the intricate yet effective bonus system in Sweden. The Swedish post-natal leave system, is renowned for its effects on IHDOL, in addition to childcare facilities which are active during flexible hours that are meant to facilitate parents' working hours. See Government of Sweden, *GENDER EQUALITY IN SWEDEN*, *supra* note 56.

Traditional views see distribution as best achieved via a central state-based system that allocates benefits to all citizens, with special resources dedicated to the most needy parts of society. Our analysis calls for a more nuanced understanding of distribution. We argue that a wider perspective of distributive justice requires taking into account not only economic equality but also gender equality, capabilities and dignity. As a result, we find that a mix of state and market-provided benefits; a mix of universal benefits supplemented by targeted benefits and progressive taxation; establishing in-kind services that do not suppress experimentation and competition but rather nourish it; and using the tax system to offset the regressive characteristics of universal benefits, when combined, can lead us to better distributive outcomes than the either/or traditional views.

The five-pronged framework developed and applied in this Article, and its connection to normative goals, sought to expose the trade-offs embedded in given policies and the complexity of the interaction of legal regulation with market and social realities. The distributive framework can hopefully function as a vocabulary with which to argue about the effects of social policy in relation to the regulation of markets of care and beyond without reducing all reforms merely to the institution that provides them—private or public. By emphasizing the multilayered effects of legal regulation and the multitude of policy design options in the context of childcare, the analytical framework offered provides a lens through which people can identify the inter-related—at times conflicting and at others reinforcing—effects of policy design on autonomy, efficiency and distributive justice.

We hope that this analysis can open new productive ways to think and talk about law and public policy that seek to promote more and better choices for women and men at home and at work. We also hope that this analysis can show that when thinking about innovative welfare and tax policy, we should not assume a unified view of what the market and the state are or of what they do. Using the five mechanism design criteria, we show that neither the state nor the market mean one thing. Both are parts of a multifaceted landscape of private and public actors, shaping a variety of—mostly hybrid—institutions and mechanisms that interact to provide, finance and regulate childcare. The details of this institutional and regulatory landscape, rather than the crude label as private or public, are what could, potentially, enhance efficiency, reinforce our autonomy and support distributive justice among us.

