

PANDEMICS, PRIVATIZATION, AND THE FAMILY

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From disparities in healthcare quality and coverage to housing and employment insecurity, the COVID-19 pandemic has highlighted existing inequalities in American society. But critically, the pandemic has also exacerbated these inequalities, particularly those that exist within the family. As work and school activities have shifted from schools and other public sites to the home, and employment has become more precarious, more and more Americans have found themselves struggling to reconcile the demands of the workplace with household responsibilities and their new roles shepherding children through the travails of remote education.

Much has been made of the pandemic's particular effects on professional women, who have disproportionately assumed the twin burdens of work and caregiving during these extraordinary times. These burdens, coupled with the collapse of service industries in which women are disproportionately employed, have prompted women to leave the workforce in record numbers. The consequences of this exodus of women from the workforce cannot be understated. Indeed, some argue that this "she-cession" will erase decades of hard-won progress for working women, while also exacerbating race and class inequalities.

But speaking of these dynamics solely in the register of economic disruption, gender inequality, and work-family conflict overlooks a crucial player in this landscape: the state. As this Essay argues, not only has the pandemic revealed endemic inequality, it has also highlighted the state's thin support for caregiving and family responsibilities, as well as the underlying presumption that the family will serve as a means of privatizing care and dependency. It is only in recentering the state, and being clear-eyed about its conscription of the family (and those within it) in the discharge of public functions, that we can be clear-eyed about the inequalities that are produced—and exacerbated—by the privatization of care.

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INTRODUCTION

This fall, in the midst of the devastation of the COVID-19 pandemic, Americans faced yet another disruption—the death of Supreme Court Justice Ruth Bader Ginsburg.¹ However, unlike the response to the other institutional disruptions experienced during the pandemic, such as the decisions whether and how to close borders, shutter schools, and develop and implement testing protocols, the governmental response to a vacancy on the Supreme Court was swift and sure. Within one week of Justice Ginsburg’s death, President Trump had nominated her eventual replacement, then-Judge Amy Coney Barrett, and the machinery of a Senate confirmation process was underway.²

In a lavish ceremony in the White House Rose Garden, President Trump introduced his nominee to the American public. In his remarks, the president emphasized both Judge Barrett’s sterling credentials and her family.³ As President Trump noted, Judge Barrett and her husband were parents to seven children, two of whom had been adopted from Haiti with considerable physical challenges, and one of whom was born with Down Syndrome.⁴ And in her remarks accepting the nomination, then-Judge Barrett echoed this theme, noting both the joys and challenges of having a large family.⁵ She also nodded to the pandemic’s impact on her family life, wryly acknowledging that, when South Bend, Indiana’s schools shuttered in the spring, she and her husband took on the challenging task of operating “the Barrett E-Learning Academy.”⁶

¹ Linda Greenhouse, *Ruth Bader Ginsburg, Supreme Court’s Feminist Icon, Is Dead at 87*, N.Y. TIMES (Sept. 18, 2020), <https://www.nytimes.com/2020/09/18/us/ruth-bader-ginsburg-dead.html>.

² See *Remarks by President Trump Announcing His Nominee for Associate Justice of the Supreme Court of the United States*, TRUMP WHITE HOUSE (Sept. 26, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-announcing-nominee-associate-justice-supreme-court-united-states> (announcing the nomination of Judge Barrett to the Supreme Court).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

Judge—now Justice—Barrett’s situation is exemplary on a number of fronts. At a time of incredible national and personal disruption, she has managed to achieve one of the pinnacles of success in the legal profession. Her example stands in stark contrast to the many American women who have watched their professional lives crater under the pressures that the pandemic has imposed on American families.⁷

From disparities in healthcare quality and coverage to housing and employment insecurity, the COVID-19 pandemic has highlighted existing inequalities in American society.⁸ But critically, the pandemic has also *exacerbated* these inequalities, particularly those that exist within the family. As work and school activities have shifted from the physical domain of the public sphere to the home, and employment has become more precarious, more and more Americans have found themselves struggling to reconcile the demands of the workplace with household responsibilities and their new roles shepherding children through the travails of remote education.⁹ Not surprisingly, the onus of this new normal has fallen on women, for whom the demands of pandemic caregiving now threaten hard-won gains in the marketplace.¹⁰

⁷ See, e.g., Jessica Bennett, *'I Feel Like I Have Five Jobs': Moms Navigate the Pandemic*, N.Y. TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/parenting/childcare-coronavirus-moms.html> (reporting that “women seemed to be the most affected” by the pandemic).

⁸ See Ibram X. Kendi, *What the Racial Data Show*, ATLANTIC (Apr. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/coronavirus-exposing-our-racial-divides/609526> (discussing the “racial pandemic within the viral pandemic”); Dan Keating, Ariana Eunjung Cha & Gabriel Florit, *'I Just Pray God Will Help Me': Racial, Ethnic Minorities Reel from Higher Covid-19 Death Rates*, WASH. POST (Nov. 20, 2020), <https://www.washingtonpost.com/graphics/2020/health/covid-race-mortality-rate> (discussing the pandemic’s disproportionate impact on people of color in part due to “broader systemic issues, such as access to primary care”); Khushbu Shah, *How Racism and Poverty Made Detroit a New Coronavirus Hot Spot*, VOX (Apr. 10, 2020, 11:15 AM), <https://www.vox.com/identities/2020/4/10/21211920/detroit-coronavirus-racism-poverty-hot-spot> (discussing the intersection of racism and poverty making Detroit residents vulnerable to COVID-19); James Louis-Jean, Kenney Cenat, Chidinma V. Njoku, James Angelo & Debbie Sanon, *Coronavirus (COVID-19) and Racial Disparities: A Perspective Analysis*, J. RACIAL & ETHNIC HEALTH DISPARITIES, Oct. 6, 2020, at 5 (discussing the underlying health inequalities that have resulted in Black Americans dying disproportionately during the COVID-19 pandemic).

⁹ See, e.g., MICHAEL KARPMAN, DULCE GONZALEZ & GENEVIEVE M. KENNEY, URB. INST., PARENTS ARE STRUGGLING TO PROVIDE FOR THEIR FAMILIES DURING THE PANDEMIC 7 (2020), <https://www.urban.org/research/publication/parents-are-struggling-provide-their-families-during-pandemic> (discussing how widespread job losses, reduction in work hours, and childcare closures in the wake of the pandemic have impacted families).

¹⁰ See Bennett, *supra* note 7 (reporting that women were more likely to express concerns about the impact of the pandemic on their income, and that because women make less money, couples may decide that women’s careers must “take the hit”). As the Centers for Disease Control (CDC) has noted, two out of every three caregivers in the United States are women. *Women, Caregiving and COVID-19*, CDC, <https://www.cdc.gov/women/caregivers-covid-19/index.html> (last visited Mar. 1, 2021).

Much has been made of the pandemic's particular effects on professional women, who, as COVID-19 shuttered public institutions and prompted families to retreat into their homes, disproportionately assumed the mantle of educating, coaching, and caring for children.¹¹ Forced to bear the brunt of these expanded caregiving responsibilities without the network of schools, daycare centers, and childcare providers once available to help shoulder the burden, professional women have left the workforce in record numbers.¹² The consequences of this exodus of women from the workforce cannot be understated. As some have argued, this “she-cession” could erase decades of hard-won progress for working women.¹³

This Essay does not purport to solve the crisis of gendered caregiving that the pandemic has produced, nor does it provide a prescription for disrupting the gendered nature of caregiving that has long persisted in our society. Instead, it offers an alternative lens through which to view the inequalities that the pandemic has surfaced and exacerbated. Specifically, this Essay argues that, not only has the pandemic revealed endemic societal inequalities, it has also highlighted the shallow nature of state support for caregiving and family responsibilities. Throughout the pandemic, coverage of the childcare crisis has focused largely on *the family* and its inability to

¹¹ See, e.g., Bennett, *supra* note 7.

¹² According to the U.S. Bureau of Labor Statistics, there were 2.2 million fewer women in the labor force in October 2020 than there were in October 2019. *Employment Situation News Release: The Employment Situation – October 2020*, U.S. BUREAU LAB. STAT. (Nov. 6, 2020, 8:30 AM), https://www.bls.gov/news.release/archives/empst_11062020.htm; see also Kathryn A. Edwards, *Women Are Leaving the Labor Force in Record Numbers*, RAND CORP. (Nov. 24, 2020), <https://www.rand.org/blog/2020/11/women-are-leaving-the-labor-force-in-record-numbers.html> (analyzing in depth labor force participation by both men and women during the pandemic). Although labor economists have focused on the impact of caregiving responsibilities on women's employment, it is worth noting that the pandemic's impact was keenly felt in the service and hospitality industries where women are disproportionately represented. As restaurants, hotels, retail, and other businesses shuttered, many women—especially working-class women—saw their employment prospects dim. See Eleni X. Karageorge, *COVID-19 Recession Is Tougher on Women*, U.S. BUREAU LAB. STAT.: MONTHLY LAB. REV. (Sept. 2020), <https://www.bls.gov/opub/mlr/2020/beyond-bls/covid-19-recession-is-tougher-on-women.htm> (discussing the ways in which COVID-19 has more dramatically impacted women, particularly as “the crisis has battered industry sectors in which women's employment is more concentrated—restaurants and other retail establishments, hospitality and health care”); Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey & Michèle Tertilt, *The Impact of COVID-19 on Gender Equality* 1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26,947, 2020), <http://www.nber.org/papers/w26947> (observing COVID-19's significant “impact on service occupations with high female employment shares, such as restaurants and hospitality”).

¹³ See Edwards, *supra* note 12 (discussing the “she-cession”); Alisha Haridasani Gupta, *Why Some Women Call This Recession a ‘Shecession,’* N.Y. TIMES (May 9, 2020), <https://www.nytimes.com/2020/05/09/us/unemployment-coronavirus-women.html> (same).

balance the increased demands of work and caregiving.¹⁴ This focus on the family reflects extant policy choices, framing the conflict that the pandemic has produced as a private matter that families should solve independently, using their own resources.

It is not surprising that the conflict produced by the pandemic is presented as the responsibility of individual families. Much of American social welfare policy is organized around the idea that the family is principally responsible for accommodating dependency.¹⁵ On this account, the family is responsible for both the physical work of caregiving, which typically falls to women, and the economic labor that financially accommodates dependency, which typically falls to men.¹⁶

But framing dependency as a private, family matter and as a disparity between men and women in the allocation of family and household

¹⁴ See, e.g., Suzanne M. Edwards & Larry Snyder, *Yes, Balancing Work and Parenting Is Impossible. Here's the Data*, WASH. POST (July 10, 2020, 6:00 AM), https://www.washingtonpost.com/outlook/interruptions-parenting-pandemic-work-home/2020/07/09/599032e6-b4ca-11ea-aca5-ebb63d27e1ff_story.html (discussing how parents balanced managing their children's school, homework, and other obligations with their own professional and personal responsibilities); Elliot Haspel, *Bail Out Parents*, ATLANTIC (Aug. 20, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/where-bailout-parents/615415> (discussing how closures of schools, childcare programs, and summer camps, as well as all-virtual schooling, have left parents "mentally and financially" depleted, and focusing on the economic interest in parents returning to work); Claire Cain Miller, *Three Things Lockdowns Have Exposed About Working and Parenting*, N.Y. TIMES (Apr. 27, 2020), <https://www.nytimes.com/2020/04/27/upshot/coronavirus-exposes-workplace-truths.html> (discussing how the pandemic has highlighted the "all hours" responsibilities parenting requires); Christina Caron, *'It Is a Nightmare Out Here': Seattle Parents Struggle to Balance Work and Child Care*, N.Y. TIMES (Mar. 17, 2020), <https://www.nytimes.com/2020/03/17/parenting/seattle-child-care.html> (discussing the impact of Seattle's school closures on local parents' work and childcare responsibilities).

¹⁵ Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2187 (1995) [hereinafter Fineman, *Masking Dependency*] (discussing how in the American state, "[d]ependency, 'naturally' assigned to the family, is privatized"); Jennifer S. Hendricks, *Essentially a Mother*, 13 WM. & MARY J. WOMEN & L. 429, 464 (2007) (describing legal regulation of the family as "a system that privatizes dependence, placing responsibility for caretaking on the family rather than the state"); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 193 (2007) (observing that states have "recognized families as a means to privatize dependency, particularly the dependency of children on their parents and the financial and emotional dependencies thought to arise when individuals share a household"). "Accommodating dependency" in this way refers to, as Martha Fineman has explained, "assum[ing] responsibility for both the inevitable dependent—the child or other biologically developmentally dependent person—and the derivative dependent—the caretaker." MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 36–37, 228 (2004) [hereinafter FINEMAN, *THE AUTONOMY MYTH*].

¹⁶ Fineman, *Masking Dependency*, *supra* note 15, at 2188 (discussing how the burdens of caretaking and economic support are allocated unequally as "the uncompensated tasks of caretaking are placed with women while men pursue careers that provide economically for the family but also enhance their individual career or work prospects").

responsibilities pulls focus from another actor that also plays a role in creating and exacerbating these inequalities: the state. Indeed, amidst the media coverage of the difficulties that families are facing during the pandemic, there has been little mention of the state's role in cultivating our existing landscape. Nor has there been discussion of the state's longstanding use of the family as a means of privatizing dependency and care.

The state of public schooling during the pandemic is emblematic of this dynamic. As schools were shuttered and instruction shifted to remote learning, it became clear that, for many Americans, school does not simply serve an *educational* function; it is also a critical part of the childcare infrastructure that allows many to participate in the workplace and economy.¹⁷ Indeed, in the absence of in-person schooling, it has become painfully obvious that, outside of school, there is actually very little state support, and almost no public infrastructure, for caregiving and caregivers. Put simply: The state provides public education, but the family is supposed to provide everything else. In the face of the pandemic, the state's limited contribution to family caregiving—public education—has dwindled further,¹⁸ and the family has been expected to take up the slack, stepping in to facilitate privately the provision of a core state function.

But if the pandemic has laid bare these inequalities and the threadbare safety net available to families, it also provides an opportunity for interrogating these defaults and imagining something else. It is only in re-centering the state, and being clear-eyed about its conscription of the family (and those within it) in the discharge of public functions, that we can confront the inequalities that are produced—and exacerbated—by the privatization of care.

This Essay proceeds in four parts. Part I considers the family's role as a means of privatizing dependency. As it explains, American public policy long has regarded the family as the institution best situated to accommodate

¹⁷ See Eliza Shapiro & Patrick McGeehan, *Big New Obstacle for Economic Recovery: Child Care Crisis*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/nyregion/nyc-school-daycare-reopening.html> (discussing the ways in which school closures led to intractable childcare difficulties); Julia H. Kaufman, Laura S. Hamilton & Melissa Kay Diliberti, *Which Parents Need the Most Support While K-12 Schools and Child Care Centers Are Physically Closed?*, RAND CORP. (2020), https://www.rand.org/pubs/research_reports/RRA308-7.html (discussing the ways in which parents struggled to reallocate time and resources to accommodate their students' needs during school closures).

¹⁸ In the spring of 2020, nearly all U.S. states and territories ordered or recommended school building closures for the remainder of the academic year. Stacey Decker, Holly Peele, Maya Riser-Kositsky, Hyon-Young Kim & Emma Patti Harris, *The Coronavirus Spring: The Historic Closing of U.S. Schools (A Timeline)*, EDUC. WK. (July 1, 2020), <https://www.edweek.org/ew/section/multimedia/the-coronavirus-spring-the-historic-closing-of.html>.

the care of children (and other dependent persons). Not surprisingly, this privatization often has race, gender, and class implications.¹⁹ The allocation of caregiving duties typically falls along gendered lines, with women assuming the bulk of caregiving within the family. This traditional (gendered) division of labor privileges families that hew to the conventional male breadwinner, female caregiver model—a model that is more elusive among minority families, the poor, and families headed by same-sex couples.²⁰

The privatization of dependency within the family not only pervades American welfare policy, but also underlies our broader discourse around caregiving responsibilities. As evidence of this dynamic, Part II considers the media's coverage of the pandemic and its impact on families, women, and the economy. As it maintains, the discourse around the pandemic has focused on private actors and institutions, and in so doing, has framed the pandemic—and the response to its hardships—as private choices and challenges shaped largely by internal family dynamics and market pressure. On this account, the pandemic's devastating impact on women's employment results from the uneven distribution of caregiving within the family and women's "choices" to prioritize family caregiving above market work. Almost entirely absent from the discourse is any mention of the state and its role in cultivating the conditions under which such choices are made.²¹

Part III seeks to refocus our attention on the state and its role in

¹⁹ See *infra* Part III.

²⁰ There is a significant body of literature discussing how same-sex couples may both defy—and replicate—traditional gender norms. See, e.g., Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 770–78 (2012) (discussing the ways in which opponents to same-sex marriage rooted their objections in terms of protecting traditional gender roles, and how same-sex couples may destabilize that vision by presenting a more egalitarian family structure); see also Deborah A. Widiss, Elizabeth L. Rosenblatt & Douglas NeJaime, *Exposing Sex Stereotypes in Recent Same-Sex Marriage Jurisprudence*, 30 HARV. J.L. & GENDER 461, 498–504 (2007) (analyzing the same-sex marriage debate in the context of government programs that promote heterosexual marriage and concomitant stereotypes about gender roles within marriage). But see Laura A. Rosenbury, *Work Wives*, 36 HARV. J.L. & GENDER 345, 381–82 (2013) (“[S]ome same-sex couples replicate gendered divisions of care in order to emphasize that their relationships are no different from the mixed-sex unions recognized and supported by the state.”). Similarly, many have discussed the ways in which the American state operates to reinforce Eurocentric, white family structures to the detriment of racial minorities. See generally Laura Ann Foster, *Social Security and African American Families: Unmasking Race and Gender Discrimination*, 12 UCLA WOMEN'S L.J. 55 (2001) (discussing the ways in which the Social Security system discriminates against African American families, who are more likely to have two-earner homes); Melissa Murray, *Black Marriage, White People, Red Herrings*, 111 MICH. L. REV. 977, 986–87 (2013) (discussing how Black families “frequently have departed from or modified” the male breadwinner-female dependent model).

²¹ See *infra* Part II.

accommodating dependency. As the pandemic has made clear, the state’s primary contribution to family caregiving has been the provision of public education. However, over the course of the pandemic, even this singular contribution has dwindled, leaving the family to take up the slack. In the face of school closures, the family, once again, has served as a means of privatizing dependency, stepping in to facilitate privately the provision of education, a core state function.²² The Conclusion brings the discussion full circle, focusing on Justice Barrett’s confirmation hearings as an example of the privatized discourse of caregiving and its implications.²³

I

DEPENDENCY AND THE AMERICAN WELFARE STATE

The American state has long afforded protection to a “private realm of family life which the state cannot enter.”²⁴ In this way, the state has preserved the family as a site of self-governance, defined by private choices with which the state will rarely interfere. But carving out the family unit as a zone of privacy has other consequences. In addition to providing the family with the freedom and privacy to govern itself, the state also vests the family with the *responsibility* to govern—and care for—itsself. As this Part explains, the American welfare state relies heavily on the family to accommodate dependency, while providing little assistance or subsidy to help shoulder this burden. And, though this model is ostensibly gender-neutral, as we explain, it has in fact operated to reinforce traditional sex roles with respect to the allocation of caregiving responsibilities within the family.

A. *Accommodating Dependency—Welfare State Models*

As Professor Martha Fineman has observed, the question of dependency is inevitable in advanced societies.²⁵ In order to sustain society, members must reproduce, giving birth to children who, for some period of time, will require care.²⁶ By the same token, at various points in the human life cycle, individuals may experience intermittent or sustained bouts of dependence, such as an illness or infirmity that requires sustained

²² See *infra* Part III.

²³ See *infra* Part IV.

²⁴ *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); see *Troxel v. Granville*, 530 U.S. 57, 68–69 (2000) (“[T]here will normally be no reason for the State to inject itself into the private realm of the family.”).

²⁵ See FINEMAN, *THE AUTONOMY MYTH*, *supra* note 15, at 35 (“[A] state of dependency is a natural part of the human condition and is developmental in nature. . . . [D]evelopmental dependency should at least be regarded as both universal and ‘inevitable.’”).

²⁶ *Id.*

caregiving.²⁷ And as individuals age, they may again require dedicated caregiving. In this way, all societies must grapple with the issue of dependence and the concomitant requirement of care.

The options for accommodating dependency and care within society typically lie between two extremes: “ensuring collectively that the needs of those who cannot care for themselves are met, or assigning the responsibility to private parties or institutions.”²⁸ With this in mind, sociologist Gøsta Esping-Andersen has identified three “welfare-state regimes” that exist along a continuum between these two positions: the corporatist welfare state, the social democratic welfare state, and the liberal welfare state.²⁹ As Esping-Andersen explains, each model is defined by the respective allocation of responsibility for dependency between the state, the market, and the family.³⁰

The Netherlands and much of Scandinavia reflect one end of this continuum—the social democratic welfare state model.³¹ This model emphasizes universalism, or the “decommodification of social rights” as a means of providing a basic standard of living for all citizens, regardless of their class status, and higher taxation. Direct government engagement in social provision “crowds out” market-based interventions and preempts family-driven social provision.³² That is, the state plays a principal role in accommodating dependency, subsidizing the costs of “familyhood” and providing direct transfers to those in need of social assistance.³³

Somewhere between the two poles is the corporatist welfare state, which is characterized by contributory social insurance programs that sustain differentiation based on occupational status. This model is focused on preserving a “post-industrial,” status-based social order, one in which rights are correlated with “class and status.”³⁴ In this model, seen, for example, in France and Germany, the market and the family are the principal means of social provision. But critically, the market holds no special appeal as a locus of social provision; the state is “perfectly ready to displace the market as a provider of welfare,” or as a means of accommodating dependency, so long

²⁷ *Id.*

²⁸ Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1992 (2018).

²⁹ See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 26–27 (1990).

³⁰ *Id.* 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 the family’s role in social provision.”).

³¹ *Id.* at 27–28 (describing the social democratic model).

³² *Id.*

³³ See *id.* at 141 (describing how one of the goals of the modern welfare state is “to square the dilemmas of having children and working”).

³⁴ *Id.* at 27.

as doing so is consistent with preserving the existing social hierarchy.³⁵

At the other end of the continuum is the liberal welfare state model, which is typically associated with the United States. Under this model, “citizens are constituted primarily as individual market actors’ who must generally ‘seek their [own] welfare in the market.’”³⁶ With its embrace of market-based solutions and the administration of social provision by private institutions and individuals, this model is often characterized as embodying a neoliberal ethos.³⁷ In the liberal welfare state model, the state has very little role in accommodating dependency. Instead, this model relies principally on the family (and the family’s participation in the market) as a means of privatizing dependency.³⁸ Accordingly, American families bear most of the costs of “the biological reproduction of the next generation along with the subsistence, socialization, education, and caregiving of existing generations.”³⁹ Through their participation in the market, families are expected to “shoulder their own financial weight,” accommodating and

³⁵ *Id.*

³⁶ Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1122 (2019) (alteration in original) (quoting John Myles, *How to Design a “Liberal” Welfare State: A Comparison of Canada and the United States*, 32 SOC. POL’Y & ADMIN. 341, 344 (1998)).

³⁷ See, e.g., Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL’Y REV. 459, 469 (2019) (discussing the values shared by liberal theory and neoliberalism, including “negative rights—rights to freedom from unwarranted state regulation or intervention—and a restrained state”); Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 39 (2014) (describing how the “U.S. welfare state tracks neoliberal principles,” such as “commitments to market distribution and to the minimal state”).

³⁸ In this sense, the dialogue between the family and the market may be described as deeply economic and includes other dimensions of privatization beyond childcare. For example, Professor Allison Anna Tait has described the myriad ways in which high-wealth families operate as independent units of governance, separate and apart from the rules that govern ordinary families—and state legal and regulatory schemes encourage and incentivize such conduct. See generally Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981 (2020). Similarly, other scholars have observed how the American state’s privatization of support has encouraged families to amass—and hoard—institutional wealth. See Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 39–42 (2018) (“As the state has created many mechanisms that enforce the ideal of family as a private support system, transfer of wealth within the family . . . may incentivize families to retain wealth in order to fulfill their role as private providers of such basic needs such as health, caregiving, and education.”). Others have noted that the state’s emphasis on the family as a means of privatizing dependency has tangible economic implications. See, e.g., Goldburn P. Maynard, Jr., *Addressing Wealth Disparities: Reimagining Wealth Taxation as a Tool for Building Wealth*, 92 DENV. UNIV. L. REV. 145, 150 (2014) (discussing how the state’s emphasis on “the sanctity of private ownership and respect for family privacy” can impact the scope and efficacy of economic policies).

³⁹ Deborah Dinner, *The Divorce Bargain: The Fathers’ Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 84 (2016); see also Stolzenberg, *supra* note 28, at 1992 (observing that United States policy “requires American families to bear most of the costs of social reproduction”).

absorbing the costs of dependency without resort to external assistance.⁴⁰

To the extent that the American liberal welfare state offers any subsidy or entitlement to the family, it “tends to ratify market distributions rather than upend them.”⁴¹ That is, in the absence of positive constitutional entitlements to subsidy or aid, “welfare programs exist at the sufferance of political actors, and the programs’ terms reflect neoliberal commitments.”⁴² For example, Social Security, the principal social insurance program in the United States, allocates benefits based on the beneficiary’s past employment—as Professor Anne Alstott observes, the program’s benefits “reward high earnings and steady participation in the workforce.”⁴³ To the extent the liberal welfare state offers income transfers or other subsidies to families, the benefits are often meager and come with strict requirements. For example, state welfare programs, like Temporary Aid to Needy Families, “feature time limits, work requirements, and other conditions that ensure that poor individuals and their families subsist primarily on their market earnings.”⁴⁴

B. *Gender and the Privatization of Caregiving*

As the preceding Section makes clear, the American welfare state model prioritizes the privatization of dependency within the family. Critically, the relationship between the family and the market in privatizing dependency helps to explain the gendered division of labor that has persisted in the American family. Feminist scholars have long noted that, although the liberal welfare state model is ostensibly gender-neutral,⁴⁵ its emphasis on privatization produces a gendered division of labor in the discharge of

⁴⁰ Stolzenberg, *supra* note 28, at 1992 (quoting Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 214 (2017)); *see also* MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 34 (2010) (describing the legal approach to families in the United States as one that views dependency as “properly confined within families, where the autonomous adults who head these families will properly manage it”).

⁴¹ Alstott, *supra* note 37, at 26.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Alstott, *supra* note 37, at 26.

⁴⁵ *See* Lisa Philipps, *Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization*, 63 L. & CONTEMP. PROBS. 111, 117 (2000); Martha MacDonald, *Gender and Social Security Policy: Pitfalls and Possibilities*, 4 FEMINIST ECON. 1, 10 (1998); Ingrid Palmer, *Public Finance from a Gender Perspective*, 23 WORLD DEV. 1981, 1983 (1995); Katherine Scott, *The Dilemma of Liberal Citizenship: Women and Social Assistance Reform in the 1990s*, 50 STUD. POL. ECON. 7, 15–16 (1996); Isabella Bakker, *Identity, Interests and Ideology: The Gendered Terrain of Global Restructuring*, in GLOBALIZATION, DEMOCRATIZATION, AND MULTILATERALISM 127, 127 (Stephen Gill ed., 1997); SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* 81–109, 111–31 (1998). *See generally* JANINE BRODIE, *POLITICS ON THE BOUNDARIES: RESTRUCTURING AND THE CANADIAN WOMEN’S MOVEMENT* (1994).

responsibility for social welfare. As these scholars explain, the liberal welfare state's privatization of dependency within the market and the family rests on the assumption of a (male) breadwinner who is engaged in the market work in order to provide for the family.⁴⁶ The breadwinner's wages support a (female) caregiver whose primary role is providing care to dependents in the home.⁴⁷

The imprint of this gendered division of labor is evident in American social welfare programs.⁴⁸ Entitlement programs, such as Social Security and unemployment insurance, are structured as wage replacement measures in which benefits are available to workers based on their labor market participation.⁴⁹ Historically, such programs have been framed and administered with male workers in mind.⁵⁰ To the extent women have been eligible for such benefits, it has often been on account of their status as dependent spouses of working men or in their capacities as mothers of fatherless children.⁵¹ More often, women are welfare state beneficiaries in their own right through means-tested programs like Aid to Dependent

⁴⁶ See Philipps, *supra* note 45, at 114–15; Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264, 283 (1989) (“[T]he system prefers those who have successfully fulfilled men's traditional breadwinner role over those who fulfilled women's traditional roles.”).

⁴⁷ See ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 7 (updated ed. 2014); Arianne Renan Barzilay, *Power in the Age of In/Equality: Economic Abuse, Masculinities, and the Long Road to Marriage Equality*, 51 AKRON L. REV. 323, 366 (2017); Naomi Cahn, *The Power of Caretaking*, 12 YALE J.L. & FEMINISM 177, 191 (2000).

⁴⁸ See generally SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* (1998) (analyzing the gendered implications of New Deal federalism and the rise of the administrative state); Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967, 987–93 (2008) (discussing the gendered practices associated with and implications of programs such as the G.I. Bill) [hereinafter Murray, *When War Is Work*].

⁴⁹ See Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421, 1495 (1993) (“Social Security Old-Age Benefits are deliberately structured as a vehicle for wage replacement.”).

⁵⁰ See Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 106–07 (2002) (discussing how work relief programs were socially understood as male programs because of the gendered nature of work); Murray, *When War Is Work*, *supra* note 48, at 988–89 (discussing the “emphasis on men's work and women's dependence” fostered by welfare programs); Becker, *supra* note 46, at 271 (“Social security contributes to the differential distribution of financial security between women and men by affording much better financial security . . . to those who have successfully fulfilled traditional male breadwinner roles than to those who have fulfilled female roles.”).

⁵¹ See Murray, *When War Is Work*, *supra* note 48, at 967 n.2, 988 (acknowledging that “much of the New Deal's programs and legislation were based on the gendered understanding of men as workers and women as their dependents”).

Children⁵² and the Supplemental Nutrition Assistance Program,⁵³ which provide subsidies to caregivers based on need.⁵⁴ As a number of scholars have observed, the structure of the American welfare state mirrors the gender divide, with men qualifying for benefits based on their market participation and women frequently qualifying for benefits based on their attachment to a worker-beneficiary or through their roles as caregivers.⁵⁵ In this regard, American social welfare policy both mirrors the gendered logic of caregiving while further entrenching the presumption that dependency is a *private* responsibility to be accommodated by the family using whatever gains individual family members may obtain in the market. Throughout the life cycle, market work supports homebound caregiving through wages or deferred earnings (pensions, retirement accounts, and Social Security payments). Indeed, it is only when this market-family model fails—for example, when a breadwinner is unavailable—that the state steps in to fill the gap by subsidizing dependence and caregiving with survivor benefits or public assistance. And even in the circumstance of providing benefits to surviving beneficiaries, the state’s support cannot be characterized as subsidy or unqualified support—it too is predicated on the deceased family member’s prior market participation and is simply a transfer of the beneficiary’s “entitlement” to his surviving family members.

C. Privatization and the Family

The ethos of family privacy that predominates in American law

⁵² The Aid to Dependent Children (“ADC”) program, initially part of the Social Security Act of 1935, was intended to provide financial assistance to low-income mothers. *See* Social Security Act, ch. 531, §§ 402–06, 49 Stat. 627–29 (1935). Though the ADC was purportedly gender-neutral, however, those administering ADC still, in practice, “evaluated women and children in terms of the men who should have been providing for them but were not.” Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299, 360 (2002).

⁵³ The Supplemental Nutrition Assistance Program (“SNAP”) is the current name of the national food stamp program instituted with the Food Stamp Act of 1964. Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703 (1964).

⁵⁴ Murray, *When War Is Work*, *supra* note 48, at 989–90; *see also* Patricia Cohen, *Recession with a Difference: Women Face Special Burden*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/business/economy/women-jobs-economy-recession.html> (discussing the ways in which the Aid to Dependent Children program encouraged women to stay home with their children and not compete with men in the labor force).

⁵⁵ Murray, *When War Is Work*, *supra* note 48, at 989; *see, e.g.*, LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 74 (1998) (“[Social Security] penalized women who ‘earned their own way’ and ‘rewarded women who remained in stable marriages and were supported by their husbands.’”); Jeff Manza, *Political Sociological Models of the U.S. New Deal*, 26 ANN. REV. SOCIO. 297, 304 (2000) (noting that New Deal relief was aimed at men, with the assumption being that women and children would be supported by male breadwinners).

complements the logic of the liberal welfare state and the family's role in privatizing dependency. As Professor Anne Alstott explains, the federal Constitution “grants individuals wide latitude to assert negative liberty—that is, freedom from state intervention—in family life. But individuals have no constitutional right to claim any distribution of resources other than that produced by the marketplace.”⁵⁶ State-level family law regimes complement the federal system by “creat[ing] legal space for individuals to exercise negative liberty” but offer no “broad mandate to foster family life.”⁵⁷ Instead, the state functions as a “neutral ‘nightwatchman,’”⁵⁸ there to authorize private ordering and to adjudicate private disputes, but “otherwise fading into the background.”⁵⁹ On this account, the state gives the family a wide berth, intervening only when necessary to prevent violence or harm to children or vulnerable adults.

Family privacy goes hand in hand with the logic of privatization and the gendered division of labor that it produces. So long as the family accommodates dependency and provides care, the state takes little notice of *how* these obligations are discharged. It does very little to ensure that caregiving obligations are evenly distributed among adults within the family unit. This stands in stark contrast to the state's efforts to integrate the marketplace. Since at least the 1950s, the government, whether at the federal or state and local levels, has worked assiduously to ensure more inclusive access to the market and employment.⁶⁰ By contrast, there have been far fewer government efforts to disrupt the gendered nature of care within the family.⁶¹

⁵⁶ Alstott, *supra* note 37, at 25.

⁵⁷ *Id.* at 26.

⁵⁸ Melissa Murray & Karen Tani, *Something Old, Something New: Reflections on the Sex Bureaucracy*, 7 CALIF. L. REV. ONLINE 122, 151 (2016).

⁵⁹ *Id.* at 151.

⁶⁰ See DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 105 (2004) (noting that twenty states had passed equal pay laws by the end of the 1950s); Arianne Renan Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55, 87–90 (2016) (discussing the legislative anti-discrimination movement in the 1960s, which included the passage of the Equal Pay Act and Title VII of the Civil Rights Act of 1964); Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 HARV. L. REV. 1307, 1333–34 (2012) (“[T]he second half of the 1960s was also a deeply formative period in sex discrimination law.”); John J. Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2583 (1994) (discussing how “[o]ver the past fifty years, the body of law prohibiting discrimination in employment has grown enormously in terms of the extent of geographic coverage, the range of covered employers, the array of protected workers, and the spectrum of prohibited practices” due to a combination of state and federal law).

⁶¹ The Family and Medical Leave Act (“FMLA”), the signature federal legislative family leave program, is instructive on this point. See Family and Medical Leave Act of 1993, 29 U.S.C. § 2601.

Put differently, the state, through its allocation of caregiving responsibilities to the family and its corresponding reticence to intervene to shape conduct within the family unit, has effectively extricated itself from any conversation regarding the discharge of responsibility for dependency and caregiving within the family. In so doing, the state has tacitly invited those seeking to disrupt or reform these traditional (gendered) caregiving roles to focus on the caregivers and the family—rather than the state—for solutions. In this way, the very nature of our discourse about dependency and caregiving centers on the family and what the family and its individual members can do to better accommodate and discharge their caregiving responsibilities. There is virtually no acknowledgment that the state may play a role in structuring the allocation of responsibility to the family, nor is there robust discussion of the state’s role in cultivating the conditions in which these responsibilities are discharged. Instead, these discourses of dependency center the family, rather than the state, as both the origin of the problem and the likely solution to it. As Part II observes, these discourses have taken on an additional dimension during the COVID-19 pandemic and the “crisis of caregiving” it has wrought.

II

DISCOURSES OF DEPENDENCY

The privatization of dependency within the family not only pervades American welfare policy, but also underlies our broader discourse around caregiving responsibilities. The recent focus on the gendered impact of the

Although it was intended to provide gender-neutral leave benefits for family care, disrupting the traditional gendered allocation of such responsibilities, the FMLA reflects the liberal welfare state’s investment in the market and privatized caregiving of certain family care responsibilities. *See id.* § 2612(a)(1). However, because the leave is unpaid, the decision to take FMLA leave often reflects both the gendered and economic realities of caregiving and wage-earning. The traditional allocation of caregiving to women, coupled with a persistent gender wage gap in employment, means that often the beneficiaries of FMLA leave benefits are women. Put differently, the efficiencies of gendered caregiving, in tandem with men’s higher wage-earning potential, make it more likely that women will take advantage of FMLA benefits. On this account, the landmark law does not live up to its aspirations for gender-neutral caregiving. Indeed, it may further entrench the gendered division of care that has long existed within the family. *See, e.g.,* Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 58–59 (2004) (noting that the FMLA’s “[g]ender neutrality does not guarantee equality” because “[a]lthough the mandate of gender-neutral leave does not explicitly reinforce [gender] stereotypes . . . the FMLA does nothing to change those beliefs or the caretaking and leave-taking patterns that flow from them”); Michael Selmi, *Family Leave and the Gender Wage Gap*, 78 N.C. L. REV. 707, 759–70 (2000) (arguing that the FMLA has made only a minimal practical difference but has reinforced existing gender inequalities in the workplace); *see also* Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1 (2007) (discussing how the FMLA fails in its gender-equity project because it fails to provide for low-wage working women).

COVID-19 pandemic illustrates this point. As many commentators have observed, the pandemic has produced a crisis of caregiving.⁶² As the virus swept across the world, daycare centers⁶³ and schools closed.⁶⁴ State-imposed shelter-in-place orders and medical guidance urged individuals to limit contact to immediate family members, prompting many families to forego the assistance of nannies, babysitters, and extended family members.⁶⁵ In addition to being stripped of this assistance, many parents began working from home, commingling workplace obligations and family

⁶² See, e.g., *100 Years After Women's Suffrage, Work Remains in Achieving Equality*, PBS (Aug. 16, 2020, 5:30 PM), <https://www.pbs.org/newshour/show/100-years-after-womens-suffrage-work-remains-in-achieving-equality> (discussing the “crisis of caregiving for women across the socio-economic spectrum” posed by COVID-19); DIANA BOESCH & KATIE HAMM, CTR. FOR AM. PROGRESS, *VALUING WOMEN'S CAREGIVING DURING AND AFTER THE CORONAVIRUS CRISIS* (2020), <https://www.americanprogress.org/issues/women/reports/2020/06/03/485855/valuing-womens-caregiving-coronavirus-crisis> (discussing caregiving challenges exacerbated by COVID-19).

⁶³ As early as April 17, 2020, nearly half of all childcare centers reported they were completely closed due to the coronavirus. See NAT'L ASS'N FOR EDUC. *YOUNG CHILDREN, FROM THE FRONT LINES: THE ONGOING EFFECT OF THE PANDEMIC ON CHILD CARE 1* (Apr. 17, 2020), https://www.naeyc.org/sites/default/files/globally-shared/downloads/PDFs/resources/topics/naeyc_coronavirus_ongoingeffectsonchildcare.pdf.

While many states have treated daycare centers differently than schools, daycare facilities nationwide have been subject to widespread closures to varying degrees throughout the course of the pandemic. See, e.g., Brooke Wolford, *Reopened Day Care Centers Shut Down Again in Several States. Here's Why*, MIA. HERALD (June 19, 2020, 6:18 PM), <https://www.miamiherald.com/news/coronavirus/article243670537.html> (discussing daycare center closures in multiple states); Emily Sohn, *When Can Child Care Resume?*, N.Y. TIMES (May 4, 2020), <https://www.nytimes.com/2020/05/04/parenting/child-care-resume-questions.html> (noting that sixteen states had mandated closures of childcare facilities to all children except those of essential workers and that many other daycare facilities had chosen to close in response to the pandemic).

⁶⁴ See Rebecca Winthrop, *Covid-19 and School Closures: What Can Countries Learn from Past Emergencies?*, BROOKINGS INST. (Mar. 31, 2020), <https://www.brookings.edu/research/covid-19-and-school-closures-what-can-countries-learn-from-past-emergencies> (noting that all fifty states had closed their schools due to coronavirus, a scope of closure that was “unprecedented in history”).

⁶⁵ See Chuxuan Sun & Lauren Russell, *The Impact of COVID-19 Childcare Closures and Women's Labour Supply*, VOX EU: CEPR (Jan. 22, 2021), <https://voxeu.org/article/impact-covid-19-childcare-closures-and-women-s-labour-supply> (noting that implementation of “stay-at-home orders to curb the spread of COVID-19” led parents to lose “access to reliable childcare” and highlighting that “[i]n the US, prior to the pandemic, 24% of children aged 5 and younger received centre-based care . . . , and 60% participated at least one [sic] weekly in some type of non-parental care arrangement,” whereas “[b]y mid-March and early April, 16 states had mandated the closure of childcare centres, potentially limiting the ability of parents to access childcare,” and “[a]nother 20 states imposed class size restrictions”). For example, California’s March 19, 2020 shelter-in-place order required “all individuals living in the State of California to stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors” Cal. Exec. Order No. N-33-20 (Mar. 19, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.19.20-attested-EO-N-33-20-COVID-19-HEALTH-ORDER.pdf>.

responsibilities under the same roof.⁶⁶ The situation reached a fever pitch when it became clear that schools would remain shuttered and parents would, for a significant period of time, be responsible for shepherding their children through the uncharted territory of remote schooling.⁶⁷

As many noted, the collision of work responsibilities and family caregiving duties during the COVID-19 pandemic drove many families to the brink.⁶⁸ But more troublingly—though perhaps not surprisingly—the burden of these difficulties seemed to rest most heavily on women. Many reports have documented the pandemic’s deleterious economic impact on women and their employment.⁶⁹ Unemployment levels for women have skyrocketed during the pandemic; in April of 2020, the unemployment rate for adult women shot to 15 percent, up from 3.1 percent in February, and women accounted for 55 percent of the over 20 million jobs lost in that month.⁷⁰ For the first time in nearly six years, the economic downturn saw women leaving the workforce at a higher rate than men.⁷¹ This is particularly

⁶⁶ See Ruth Igielnik, *A Rising Share of Working Parents in the U.S. Say It’s Been Difficult to Handle Child Care During the Pandemic*, PEW RES. (Jan. 26, 2021), <https://www.pewresearch.org/fact-tank/2021/01/26/a-rising-share-of-working-parents-in-the-u-s-say-its-been-difficult-to-handle-child-care-during-the-pandemic> (“Over the course of the pandemic, there has been an increase in the share of working parents who say it is difficult to handle child care responsibilities. At the same time, many working parents have experienced professional challenges while trying to balance their work and family responsibilities . . .”).

⁶⁷ See, e.g., Eric Weddle & Jeanie Lindsay, *McCormick: Schools Challenged By E-Learning, Will Likely Stay Remote Through Summer*, WFYI INDIANAPOLIS (Apr. 21, 2020), <https://www.wfyi.org/news/articles/mccormick-schools-challenged-by-e-learning-will-likely-stay-remote-through-summer>.

⁶⁸ See *supra* notes 17–18 and accompanying text. Indeed, according to a January 2021 survey, effects of the COVID-19 pandemic include “tens of millions of people . . . out of work and struggling to afford adequate food and pay the rent”; a dramatic increase in adults in households with children reporting they did not have enough to eat; increased difficulty in ability to pay for household expenses, particularly in households with children; and skyrocketing levels of unemployment, among other effects. *Covid Hardship Watch: Tracking the COVID-19 Recession’s Effects on Food, Housing, and Employment Hardships*, CTR. ON BUDGET & POL’Y PRIORITIES (last updated Mar. 15, 2021), <https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and>.

⁶⁹ See, e.g., BOESCH & HAMM, *supra* note 62; Anu Madgavkar, Olivia White, Mekala Krishnan, Deepa Mahajan & Xavier Azcue, MCKINSEY & CO., *COVID-19 and Gender Equality: Countering the Regressive Effects* (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects> (discussing how women are more vulnerable to COVID-19 economic effects, particularly because the virus is significantly increasing the burden of unpaid care).

⁷⁰ Alisha Haridasani Gupta, *Why Some Women Call this Recession a ‘Shecession’*, N.Y. TIMES (May 9, 2020), <https://www.nytimes.com/2020/05/09/us/unemployment-coronavirus-women.html>; Press Release, U.S. Bureau Lab. Stat., Employment Situation Summary (Oct. 2, 2020), <https://www.bls.gov/news.release/empsit.nr0.htm>.

⁷¹ See SARAH COURY, JESS HUANG, ANKUR KUMAR, SARA PRINCE, ALEXIS KRIVKOVICH &

true for women of color: As the *New York Times* observed, this “she-cession” has “a predominantly nonwhite, female face.”⁷²

The pandemic’s economic impact on women goes beyond rising rates of unemployment in sectors and industries where women are overrepresented. Statistics show that during the pandemic, women have continued to shoulder a greater share of childcare and household responsibilities than do men—even in households where both parents work. Indeed, mothers are more than three times as likely as fathers to be responsible for caregiving during the pandemic and more than 1.5 times as likely to be spending an additional three hours per day on housework and childcare.⁷³ This empirical reality means that women are significantly more likely than men to report being unable to work due to school closures and the onset of other caregiving responsibilities.⁷⁴ Critically, the impact and pressure of increased caregiving responsibilities within the home has contributed to women leaving the workforce in record numbers.⁷⁵

But even as data suggest that the pandemic—and the increased caregiving responsibilities that it has produced—has facilitated the exodus of women from the workforce, the public discussion of this phenomenon has been framed in the same narrow, individualized terms that traditionally characterize our discourses of dependency. For example, much of the media discourse on the “she-cession” has framed women’s exodus from the

LAREINA YEE, MCKINSEY & CO., WOMEN IN THE WORKPLACE 2020 (2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace> (finding that women of color are more likely to have been laid off or furloughed during the pandemic); CLAIRE EWING-NELSON, NAT’L WOMEN’S L. CTR., FOUR TIMES MORE WOMEN THAN MEN DROPPED OUT OF THE LABOR FORCE IN SEPTEMBER (2020), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/10/september-jobs-fs1.pdf>. These data make clear the pandemic’s impact on women—particularly professional women who have left the workforce due to the increase in family responsibilities. It is worth noting that the pandemic has also impacted low-income and minority women who may not be in a position to leave the workforce to accommodate increased caregiving responsibilities. See Meredith Covington & Ana H. Kent, *The “She-Cession” Persists, Especially for Women of Color*, ST. LOUIS FED. RES. (Dec. 24, 2020), <https://www.stlouisfed.org/on-the-economy/2020/december/she-cession-persists-women-of-color>. In some cases, the pandemic’s economic impact has implicated whole industries, like hospitality and retail sales, where women are disproportionately represented. *Id.*

⁷² Gupta, *supra* note 70; see also COURY ET AL., *supra* note 71 (finding that women of color in the workforce were disproportionately impacted by COVID-19).

⁷³ COURY ET AL., *supra* note 71.

⁷⁴ Rasheed Malik & Taryn Morrissey, *The COVID-19 Pandemic Is Forcing Millennial Mothers Out of the Workforce*, CTR. FOR AM. PROGRESS (Aug. 12, 2020, 5:00 AM), <https://www.americanprogress.org/issues/early-childhood/news/2020/08/12/489178/covid-19-pandemic-forcing-millennial-mothers-workforce> (“Millennial mothers are nearly three times more likely than Millennial fathers to report being unable to work due to a school or child care closure.”).

⁷⁵ EWING-NELSON, *supra* note 71 (noting that of the 1.1 million workers over the age of twenty who left the workforce, 865,000 (80 percent) were women, and nearly half of these women were Black or Latina).

workforce during the pandemic as a *choice*. On this account, confronted with the increasing demands of pandemic caregiving, women have *opted out* of the work force. Various media outlets report that significant numbers of women are considering “downshifting their career or leaving the workforce” in light of increased pandemic responsibilities, and that “mothers are significantly more likely to be thinking about taking these steps than fathers.”⁷⁶ We are told that the pandemic is “forcing many women to make a difficult choice and drop out of the workforce altogether;”⁷⁷ or that working mothers are “consider[ing] downshifting” or “dial[ing] back their careers” during the pandemic.⁷⁸

On this logic, the difficult “choice” that women face results from the confluence of unforeseen circumstances—the pandemic—and the unequal and gendered division of labor within families. On one level, it suggests that such difficult choices would be unnecessary if there was no pandemic. That is, in the absence of pandemic conditions, this balancing act would not be so difficult. Individual families would be able to send their children to school or daycare, or otherwise engage paid caregivers, allowing their adult members to seamlessly blend their twin obligations to the market and the family.

On another level, however, this narrative acknowledges the pandemic and its extraordinary burden but suggests, however implicitly, that these difficulties could be overcome if the individual circumstances of each family were different. That is, if husbands shouldered a greater share of carework and household responsibilities, women would not feel the onus of pandemic caregiving so acutely. Either way, the solution lies with the family and the individuals within it. On this logic, in the absence of a raging pandemic, the family could balance the conflict between work and home by outsourcing certain aspects of caregiving. But in the midst of a rampant pandemic, families should instead take steps to more equitably divide the extraordinary demands of caregiving. Indeed, the state’s policy actions in the wake of the pandemic illustrate both its desire to discharge allocation of care to the family—and the ways in which even this assistance, perhaps robust in theory, was rendered feeble in practice. For example, many families struggled to qualify for (or, if qualified, to obtain) expanded unemployment

⁷⁶ COURY ET AL., *supra* note 71.

⁷⁷ Avie Schneider, Andrea Hsu & Scott Horsley, *Enough Already: How the Pandemic Is Breaking Women. Multiple Demands Causing Women to Abandon Workforce*, NPR (Oct. 2, 2020, 1:40 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/02/919517914/enough-already-multiple-demands-causing-women-to-abandon-workforce>.

⁷⁸ Lauren Weber & Vanessa Fuhrmans, *How the Coronavirus Crisis Threatens to Set Back Women’s Careers*, WALL ST. J. (Sept. 30, 2020, 12:01 AM), <https://www.wsj.com/articles/how-the-coronavirus-crisis-threatens-to-set-back-womens-careers-11601438460>.

benefits or stimulus payments specifically provisioned for COVID-19 relief.⁷⁹ And for families who qualified or could obtain benefits, these were often woefully insufficient to provide even for the family's basic needs.⁸⁰ In both scenarios, public policy and public discourse reflect the liberal welfare state's typical approach to dependency—framing the accommodation of dependency as a set of private decisions about caregiving that are negotiated individually within the family unit.

But the focus on the family and the individual choices of family members overlooks a critical actor in cultivating the conditions in which these private choices are made: the state. To be sure, for many women, leaving the workforce to help care for children *is* a deliberate choice—but it is a choice that is made within constrained circumstances. And critically, the constrained circumstances in which such choices are made result from the

⁷⁹ See, e.g., David Brancaccio, Nova Safo & Alex Schroeder, *Families That Didn't Get \$500 Stimulus Payments for Children Now Have Another Chance*, MARKETWATCH (Aug. 17, 2020), <https://www.marketwatch.com/story/if-you-didnt-get-a-500-stimulus-check-for-your-child-it-should-be-coming-soon-2020-08-14> (noting, for example, how many “low-income parents fell through the cracks [on receiving stimulus relief] if they did not file tax returns” or meet the deadline to inform the government of their family composition); Areeba Haider, *12 Million People Have Been Excluded from Emergency Increases in SNAP Benefits*, CTR. FOR AM. PROGRESS (July 28, 2020, 9:01 AM), <https://www.americanprogress.org/issues/poverty/news/2020/07/28/488085/12-million-people-excluded-emergency-increases-snap-benefits> (noting how millions of families across the country have been excluded from emergency SNAP benefits during the pandemic because “the law excludes households who were receiving the maximum benefit before the passage of the relief package”); Jackie Mader, *With Help Slow to Come from Washington, a Veteran's Family Gets by Washing Cars, Skipping Meals*, HECHINGER REP. (Oct. 17, 2020), <https://hechingerreport.org/with-no-help-coming-from-washington-a-veterans-family-is-left-with-nowhere-to-turn> (describing the “tangle of red tape” one family faced in procuring benefits); Jessica Menton, *We Shouldn't Have to Beg': Americans Struggle Without Unemployment Aid as Congress Stalls on Extending Benefits*, USA TODAY (Aug. 25, 2020, 12:01 AM), <https://www.usatoday.com/story/money/2020/08/25/unemployment-benefits-americans-struggle-with-delayed-300-unemployment-coronavirus-stimulus/3411294001> (describing the ways in which certain families are rendered ineligible for federal relief if they do not receive enough in state benefits).

⁸⁰ See Ashley Burnside, *Families Can't Get By on Cash Assistance*, CTR. FOR L. & SOC. POL'Y (Sept. 2, 2020), <https://www.clasp.org/blog/families-can-t-get-cash-assistance> (“Average housing costs in [Boone County, Kentucky] alone cost \$1,007 – nearly the entire monthly UI benefit.”); Ben Popken, Ezra Kaplan & Jo Ling Kent, *Unemployment Diary: Families Struggle to Survive After Additional Benefits Expire*, NBC NEWS (Aug. 3, 2020), <https://www.nbcnews.com/business/economy/unemployment-diary-families-struggle-survive-after-additional-benefits-expire-n1235714> (“[S]ome of the 32 million unemployed Americans are resorting to food banks for the first time in their life.”); Knez Walker, Jessica Hopper, Stephanie Fasano, Meredith Frost & Allie Yang, *How 2 Families Are Struggling to Stay Afloat Through COVID-19 Unemployment*, ABC NEWS (Apr. 15, 2020, 8:30 AM), <https://abcnews.go.com/US/families-struggling-stay-afloat-covid-19-unemployment/story?id=70145375> (One family member shared that “[t]he unemployment benefits payment totaled \$450, only about a third of what he says he typically brings home, and not even close to what the family needs”).

decision to privatize dependency within the family, the state's reluctance to robustly support the family in discharging these responsibilities, and the state's thin response to a global health crisis.

As discussed in Part I, the assignment of caregiving responsibilities to the family—not the state—is central to the structure of American social welfare policy.⁸¹ By contrast, other welfare-state regimes have more robust systems in place to support family life.⁸² This level of support is absent in the United States, where, as Professor Maxine Eichner has described, there is a “strong expectation . . . that families will go it alone.”⁸³ Without a robust social safety net, American families must shoulder caregiving and its costs independently. For many, this means maintaining employment in order to maintain employer-provided healthcare coverage, assuming responsibility for researching and financing safe and affordable childcare, and constructing and financing independently a web of caregiving support.⁸⁴ This is rooted in a distinctly neoliberal worldview, in which “issues formerly considered collective, such as the management of economic risk, [are shifted] from government to individual families.”⁸⁵

Even before the pandemic took hold, this privatized model of accommodating dependency and caregiving took a toll on the American family.⁸⁶ Both working- and middle-class families have long struggled to balance work and family demands and to meet caretaking and development needs in the absence of meaningful assistance from the state.⁸⁷ Indeed, in response to the rising costs of raising a family, and in the absence of greater state support, women have entered the workforce—both for their own professional satisfaction but also to compensate for their partners' stagnant earnings or to provide a second income necessary to support the family.⁸⁸ In

⁸¹ See Tonya L. Brito, *What We Talk About When We Talk About Matriarchy*, 2013 MICH. ST. L. REV. 1263, 1287 (“The general reluctance of the state to expand and strengthen its system of social welfare can be described as a regime of private insurance.”).

⁸² See *supra* notes 28–44.

⁸³ Eichner, *supra* note 40, at 220.

⁸⁴ See Murray, *supra* note 20, at 997.

⁸⁵ Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1558 (2006).

⁸⁶ See Eichner, *supra* note 40, at 215; see also Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515, 517–18 (2013) (noting that economic insecurity has increased for all Americans, but particularly for those with low incomes, limited education, racial minorities, young workers, and single parents, and that more Americans are qualifying for and seeking help from the public safety net).

⁸⁷ See Eichner, *supra* note 40, at 215, 229–32.

⁸⁸ See generally Elizabeth Warren, *The Growing Threat to Middle Class Families*, 69 BROOK. L. REV. 401 (2004) (discussing the decline of the middle class as a result of the inadequate social safety net).

this way, many families “have tried to build their own safety nets, sending all adults into the workforce.”⁸⁹ But in some cases, even these efforts have fallen short; low-income families, for example, “are particularly vulnerable to financial shock events that can lead to job disruption” and economic instability.⁹⁰

As the demands of pandemic caregiving have pushed overburdened families to the brink, the limits of the American model of privatized care have become more obvious. More importantly, the pandemic has also surfaced the meager state support available to families to support caregiving. As noted above, the United States does not offer paid family leave, nor is there a deeply entrenched norm of paid family leave or other subsidies for caregiving.⁹¹ Indeed, the most robust form of state support for families and caregiving comes in a surprising form—education. For many families, school is not simply a place to educate children—it also provides crucial caregiving support and scaffolding for adult workforce participation. And during the pandemic, when this scaffolding collapsed, as school became remote and home-based, the entire apparatus that enabled many caregivers to work collapsed as well.

Referring to the shuttering of schools as a “collapse” is perhaps too generous. Certainly, this scaffolding came down in spectacular fashion, but it would be more precise to say that the shift to remote, home-based schooling practically operated as another kind of tactical privatization. No longer able to administer and operate in-person schools, the state implicitly delegated this core public function to the family to operate and administer with limited support and oversight. To this end, throughout the summer, as

⁸⁹ *Id.* at 405.

⁹⁰ Sternberg Greene, *supra* note 86, at 523. This illustrates the need to push the discourse beyond gender roles and the allocation of caregiving within the family to consider more broadly the ways in which a failing social safety net may exacerbate inequality more generally, including racial and socioeconomic inequality. Obviously, any consideration of the family and caregiving responsibilities will give rise to a gender-based critique, but as this Essay suggests, considering the way in which the pandemic has revealed the vulnerabilities of the state welfare system carries implications beyond the gendered allocation of caregiving responsibilities.

⁹¹ Perhaps the most robust of the limited subsidies available is the Child Tax Credit, which is a refundable tax credit worth, in 2020–2021, up to \$2,000 per qualifying child and \$500 per qualifying dependent for those below a specific income threshold (\$200,000 for single filers; \$400,000 for married couples filing jointly). *See* 26 U.S.C. § 24(a), (h). The American Rescue Plan Act of 2021 temporarily expands and modifies the Child Tax Credit in various ways. For 2021, the credit is made fully refundable; the earned-income threshold is erased; the credit is increased to \$3,600 per child under six years old and \$3,000 for children aged six to seventeen years old; the income thresholds are adjusted down (\$75,000 for single filers, \$112,500 for head-of-household filers, and \$150,000 for married joint filers); and the Treasury Department is directed to issue half of the credit in advance through regular installments starting as early as July 1, 2021. *See* Pub. L. No. 117-2 § 9611 (codified at 26 U.S.C. §§ 24(i), 7527A).

localities struggled to “flatten the curve,”⁹² there was little coordinated discussion of schools or the prospect of reopening safely.⁹³

The following Part considers the landscape of pandemic education. Specifically, it seeks to locate the pandemic and its educational challenges in the broader project of state-provided education. As it explains, public education is perhaps the most robust form of subsidy and support that the state provides to families. While we do not tend to think of public education as part of the network of caregiving support available to families, the pandemic has made clear that, for many families, school is a crucial part of the caregiving network on which they rely. Accordingly, families have experienced the pandemic’s profound impact on school operations not solely as an educational crisis⁹⁴ but also as a caregiving crisis. And, once again, in the wake of the state’s withdrawal, families themselves have been forced to step in to fill the void and find solutions for the safe reopening of school systems across the country—and for their own children.

III

PRIVATIZATION AND THE PANDEMIC—PUBLIC EDUCATION

The public education system stands apart as perhaps the most robust form of state support for families and caregiving. But the pandemic reveals how precarious this support really is. In the absence of reliable access to in-school education, already-overburdened families have been forced to assume greater responsibility for a crucial state function—educating children. And while this kind of privatization has exacerbated existing inequalities, those with ample resources have, as ever, been able to supplement these gaps with private solutions.

A. The Provision of Public Education

As discussed in Part I, with rare exceptions, responsibility for

⁹² See Jenny Gross & Mariel Padilla, *From Flattening the Curve to Pandemic: A Coronavirus Glossary*, N.Y. TIMES (Mar. 18, 2020), <https://www.nytimes.com/2020/03/18/us/coronavirus-terms-glossary.html>.

⁹³ See Megan Leonhardt, *‘No Solid Answers’: The Scramble to Reopen Schools Leaves Teachers with Concerns*, CNBC (July 22, 2020, 9:27 AM), <https://www.cnbc.com/2020/07/23/the-scramble-to-reopen-schools-worries-teachers.html>.

⁹⁴ Many have highlighted the long-term effects the COVID-19 pandemic may have on the millions of students in the public education system—and on the system itself. See, e.g., Emma Dorn, Bryan Hancock, Jimmy Sarakatsannis & Ellen Viruleg, *COVID-19 and Student Learning in the United States: The Hurt Could Last a Lifetime*, MCKINSEY & CO. (June 1, 2020), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime> (discussing how the pandemic will exacerbate achievement gaps between white and non-white students and result in billions of dollars of lost economic potential).

caregiving has been carved out as a *private* endeavor to be discharged by families.⁹⁵ The pandemic has highlighted the meager level of state support that exists for caregiving and has highlighted the ways in which the state's privatization of dependency has reinforced the gendered distribution of caregiving obligations.

However, the state has not entirely abdicated its role in supporting the family. Various tax credits exist, providing modest support for caregiving, and home mortgage interest deduction incentivizes home ownership as a form of wealth building for middle- and upper-class families.⁹⁶ But these subsidies are modest and often pitched at different income levels. The most consistent—and broad—form of state support for caregiving comes in the form of the state's proffered guarantee of public education.⁹⁷

As the Supreme Court observed in *Brown v. Board of Education*, “education is perhaps the most important function of state and local governments.”⁹⁸ However, the state's interest in providing public education is not entirely altruistic; education confers a particular set of benefits that often accrue to the state's advantage. Specifically, public education inculcates a set of common values and skills that are necessary for maintaining and advancing democracy,⁹⁹ increasing economic output,¹⁰⁰ and

⁹⁵ See *supra* Part I.

⁹⁶ There is a significant body of literature discussing tax benefits and economic incentives available to families. See, e.g., Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1975) (discussing the ways in which available tax credits define the family unit and shape familial responsibilities); Lily L. Batchelder, Fred T. Goldberg, Jr. & Peter R. Orszag, *Efficiency and Tax Incentives: The Case for Refundable Tax Credits*, 59 STAN. L. REV. 23, 32–38, 43 (2006) (discussing tax credits available to families); Shannon Weeks McCormack, *America's (D)evolving Childcare Tax Laws*, 53 GA. L. REV. 1093 (2019) (analyzing the evolution of American tax laws related to childcare).

⁹⁷ The United States Supreme Court has declined to recognize a federal constitutional right to a minimally adequate education. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973). However, the Court has observed that, given longstanding “[c]ompulsory school attendance laws and the great expenditures for education,” it has “an abiding respect for the vital role of education in a free society.” *Id.* at 29–30 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)). Indeed, the constitutions of all fifty states include education provisions setting forth a system of free public schools. See EMILY PARKER, EDUC. COMM'N OF STATES, CONSTITUTIONAL OBLIGATIONS FOR PUBLIC EDUCATION 4–22 (2016), <http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf> (providing a fifty-state overview of state constitutional provisions).

⁹⁸ 347 U.S. 483, 493 (1954).

⁹⁹ See, e.g., ANGELA E. FRALEY, SCHOOLING AND INNOVATION: THE RHETORIC AND THE REALITY 5 (1981); Derek W. Black, *The Fundamental Right to Education*, 94 NOTRE DAME L. REV. 1059, 1098–99 (2019); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 344–48 (2006).

¹⁰⁰ See, e.g., John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 235–36 (2016); Eric A. Hanushek & Ludger Woessmann, *Education*

preparing individuals to participate meaningfully in market work. Put differently, education yields considerable externalities for the state, including “social cohesion, democratic benefits, law and order, [and] economic growth.”¹⁰¹ In this way, education is mutually beneficial for families and the state. Education supports the family by educating children and subsidizing the work productivity of parents (and their employers). And this, in turn, supports the neoliberal market-family dynamics that fuel the liberal welfare state.

Despite the significant benefits for the state, however, and even as public-school enrollment has increased,¹⁰² government support for public education at both the state and federal level has fallen.¹⁰³ Though some states saw modest increases to school funding prior to 2008,¹⁰⁴ in 2014 almost two-thirds of states provided less per-pupil funding for K-12 schools than they did before the 2008 recession.¹⁰⁵ Indeed, in almost half of the states that cut school-funding budgets after the recession, the cuts were significant—more than ten percent.¹⁰⁶ And, as a share of the economy, state capital funding for

and Economic Growth, in 2 INT’L ENCYCLOPEDIA OF EDUC. 245 (Penelope Peterson, Eva Baker & Barry McGaw eds., 2010); Eric A. Hanushek, Jens Ruhose & Ludger Woessmann, *Economic Gains from Educational Reform by US States*, 11 J. HUM. CAP. 447, 448–49 (2017).

¹⁰¹ See, e.g., Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL’Y 189, 194, 217 (2016) (quoting James Tooley, *In Defence of Markets in Educational Provision*, in EDUCATION AND THE MARKET PLACE 137, 143 (David Bridges & Terence H. McLaughlin eds., 2005)) (discussing education’s status as a “quasi” public good because of the ability to exclude citizens from receiving it).

¹⁰² See *Introduction, Digest of Education Statistics: 2018*, NAT’L CTR. FOR EDUC. STATS. (2018), <https://nces.ed.gov/programs/digest/d18> (noting the 31% increase in elementary enrollment, 23% increase in secondary enrollment, and 837% increase in prekindergarten enrollment between 1985 and 2018).

¹⁰³ See Lisette Partelow, Jessica Yin & Scott Sargrad, *Why K-12 Education Needs More Federal Stimulus Funding*, CTR. FOR AM. PROGRESS (July 21, 2020, 5:00 AM), <https://www.americanprogress.org/issues/education-k-12/reports/2020/07/21/487865/k-12-education-needs-federal-stimulus-funding> (noting that “even in 2015, most states were still spending below 2008 levels” and that “[a]t the national level, state spending on education declined during the [2008] recession and for many years afterward”); MICHAEL LEACHMAN, KATHLEEN MASTERSON & ERIC FIGUEROA, CTR. ON BUDGET & POL’Y PRIORITIES, A PUNISHING DECADE FOR SCHOOL FUNDING 1 (2017), <https://www.cbpp.org/sites/default/files/atoms/files/11-29-17sfp.pdf> (“Public investment in schools . . . has declined dramatically in a number of states over the last decade.”).

¹⁰⁴ See *How Has Education Funding Changed Over Time?*, URBAN INST., <https://apps.urban.org/features/education-funding-trends> (last visited Mar. 10, 2021) (providing an interactive chart illustrating changes in funding pre- and post-2008).

¹⁰⁵ MICHAEL LEACHMAN, NICK ALBARES, KATHLEEN MASTERSON & MARLANA WALLACE, CTR. ON BUDGET & POL’Y PRIORITIES, MOST STATES HAVE CUT SCHOOL FUNDING, AND SOME CONTINUE CUTTING 1–2 (2016), <https://www.cbpp.org/sites/default/files/atoms/files/12-10-15sfp.pdf>.

¹⁰⁶ *Id.*

schools was, on average, fifteen percent lower in 2018 than in 2008.¹⁰⁷

The diminution of state support has contributed to the already-deteriorating landscape for the over fifty million students enrolled in public schools nationwide.¹⁰⁸ The physical structures of public K-12 institutions are often in disrepair and unsafe,¹⁰⁹ problems experts attribute to a yawning, multi-billion dollar budget gap in funding for facilities.¹¹⁰ Many schools lack basic resources.¹¹¹ Teachers report paying hundreds or thousands of dollars out of pocket merely to outfit their classrooms with basic supplies.¹¹² These and other failures have prompted many families with public-school children to fill the void.¹¹³ In other words, as the state reduces the subsidy it provides in the form of public education, the family has absorbed the cost—and, not surprisingly, families with greater resources have greater flexibility to fill the gap that the state’s divestment in public education creates.¹¹⁴

¹⁰⁷ *Budget Cuts and Lost Learning: Assessing the Impact of COVID-19 on Public Education: Hearing Before the H. Comm. on Educ. and Lab.*, 116th Cong. 4 (2020) (statement of Michael Leachman, Vice President for State Fiscal Policy, Center on Budget and Policy Priorities).

¹⁰⁸ *Fast Facts*, NAT’L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts> (last visited Mar. 2, 2021).

¹⁰⁹ *See, e.g.*, AM. SOC’Y CIV. ENG’RS, 2017 INFRASTRUCTURE REPORT CARD (2017), <https://www.infrastructurereportcard.org/wp-content/uploads/2016/10/2017-Infrastructure-Report-Card.pdf> (“Recent government statistics show that a significant numbers [sic] of public school facilities are not in acceptable condition.”); DEBBIE ALEXANDER & LAURIE LEWIS, NAT’L CTR. FOR EDUC. STATS., *CONDITION OF AMERICA’S PUBLIC SCHOOL FACILITIES: 2012–2013: FIRST LOOK 3–4* (2014), <https://nces.ed.gov/pubs2014/2014022.pdf>.

¹¹⁰ *See* 21ST CENTURY SCH. FUND, NAT’L COUNCIL ON SCH. FACILITIES & THE CTR. FOR GREEN SCHS., *STATE OF OUR SCHOOLS: AMERICA’S K-12 FACILITIES 4* (2016), <https://www.centerforgreenschools.org/state-our-schools> (“In total, the nation is underspending on school facilities by \$46 billion – an annual shortfall of 32 percent.”); *see also* AM. SOC’Y CIV. ENG’RS, *supra* note 109 (attributing facilities failures to a \$38 billion annual underinvestment in school facilities nationwide).

¹¹¹ *See* Valerie Strauss, *I Am A Scavenger’: The Desperate Things Teachers Do to Get the Classroom Supplies They Need*, WASH. POST (Jan. 3, 2020, 3:22 PM), <https://www.washingtonpost.com/education/2019/11/08/i-am-scavenger-desperate-things-teachers-do-get-classroom-supplies-they-need/>; Melissa Smith, *When Students Have Neither Books Nor Desks*, AFT VOICES (May 3, 2018), <https://aftvoices.org/when-students-have-neither-books-nor-desks-516a16309b18>.

¹¹² *See* Josephine Sedgwick, *25-Year-Old Textbooks and Holes in the Ceiling: Inside America’s Public Schools*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/reader-center/us-public-schools-conditions.html>.

¹¹³ *See* Osamudia James, *The Political Economy of Pandemic Pods*, 96 N.Y.U. L. REV. ONLINE 89, 98–99 (2021) (discussing the ways in which “state abdication” of managing school inequality causes “responsibility for educational quality and academic outcomes [to be] placed directly at [the family’s] feet”).

¹¹⁴ The advantages of affluence are not limited to tangible, material benefits. As Professor LaToya Baldwin Clark has discussed in the context of special education, wealthy, white families are able to convert their economic capital (wealth) and social capital (potential resources an individual can access by way of their investment in social relationships) into *cultural capital*

These gap-filling efforts are varied. Some families have decamped from public schools to private schools, choosing to divest from the project of public education entirely.¹¹⁵ Others take a different route, remaining in public schools but relying on private means to supplement gaps in public education. For example, families with means may privately supplement their children's education at the individual level by contracting out resources such as academic tutors.¹¹⁶ As public schools cut funding for extracurricular activities, families dissatisfied with reduced extracurricular offerings may supplement their children's education with club sports and private music and arts instruction.¹¹⁷

To be sure, the ability to supplement meager public-school offerings varies substantially according to income. Private arts instruction and club sports fees can amount to thousands of dollars annually, and travel for club sporting events may require thousands more, as well as a considerable outlay of parental time.¹¹⁸ In addition to being able to better absorb the cost of private instruction, wealthier families may also be in a better position to access educational "enrichment," whether in the form of organized art and music programs or through extracurricular visits to art galleries, museums,

(institutional knowledge and behavioral strategies) that equip them to advocate more effectively for their children. See LaToya Baldwin Clark, *Beyond Bias: Cultural Capital in Anti-Discrimination Law*, 53 HARV. C.R.-C.L. L. REV. 381, 419–31 (2018). As she explains, "[p]arents with wealth can spend their economic capital to purchase and invest in the cultural capital of advocates, who possess the knowledge needed to effectively advocate on behalf of" a child, while "[s]ocial capital allows parents to tap into their various social networks for access to information they may not otherwise have access to, such as knowledge of whether a requested service is an actual limitation or a denial tactic used by the school district." *Id.* at 423.

¹¹⁵ For example, in Massachusetts, public school enrollment fell by nearly four percent in fall 2020 as many students from public schools transferred into private schools or home schooling, with experts saying they had never seen a statewide enrollment drop that size. See James Vaznis, *Public School Enrollment Plummets Statewide Amid Coronavirus Pandemic*, BOS. GLOBE (Nov. 24, 2020, 11:30 AM), <https://www.bostonglobe.com/2020/11/24/metro/public-school-enrollment-plummets-across-massachusetts-amid-coronavirus-pandemic>. Similarly, New York City public schools have lost 31,000 students, or about 3.4%, of their enrolled students this year. See Alex Zimmerman, Amy Zimmer & Gabrielle LaMarr LeMee, *NYC Public Schools Have Lost 31,000 Students This Fall, Preliminary Data Show*, CHALKBEAT (Nov. 11, 2020, 6:52 PM), <https://ny.chalkbeat.org/2020/11/11/21561651/nyc-school-enrollment-drop>.

¹¹⁶ See Andrea Guthmann, *Tutors, Private Test Prep Coaches, Homework Therapists. Rich Kids Have All the Academic Advantages Money Can Buy. But at What Cost?*, CHI. TRIB. (Apr. 5, 2019 5:00 AM), <https://www.chicagotribune.com/lifestyles/sc-fam-wealthy-kids-education-advantages-0409-story.html>.

¹¹⁷ See generally Elizabeth Stearns & Elizabeth J. Glennie, *Opportunities to Participate: Extracurricular Activities' Distribution Across and Academic Correlates in High Schools*, 39 SOC. SCI. RSCH. 296, 303 (2009) (hypothesizing that poorer school districts are more likely to cut extracurricular offerings and finding that school size and poverty levels influence the number and types of extracurricular activities available).

¹¹⁸ See Michael Godsey, *The Inequality in Public Schools*, ATLANTIC (June 15, 2015), <https://www.theatlantic.com/education/archive/2015/06/inequality-public-schools/395876>.

or historical sites. Indeed, the affluent are nearly twice as likely as low-income families to engage in such activities.¹¹⁹

Wealth and access to resources may also enable other forms of subsidy to public schools. Consider, for example, the parent-teacher association, or PTA, which assists schools by tapping affluent parents' wallets and networks as part of a largely deregulated school funding endeavor.¹²⁰ These organizations supplant public funds with private dollars,¹²¹ which can be used to provide curricular resources, augment equipment and facilities, and hire staff.¹²² The financial impact of these organizations, which can rake in millions per year in the wealthiest communities,¹²³ can be so significant that, in some cases, schools receiving sizable PTA grants have earned a special name: "public privates."¹²⁴ Unsurprisingly, these resources are not equally distributed, as ten percent of all PTA earnings nationwide are spent at schools that serve just one-tenth of one percent of the country's students.¹²⁵ This can result in discrepancies of thousands of per-student dollars between schools with profitable PTAs and those without this private funding stream.¹²⁶

Taken together, these private efforts to supplement gaps in public education can lead to inequality in and outside of the classroom, as children

¹¹⁹ See JEREMY REDFORD, STEPHANIE BURNS & L. JANE HALL, NAT'L CTR. FOR EDUC. STATS., STATISTICS IN BRIEF: THE SUMMER AFTER KINDERGARTEN: CHILDREN'S EXPERIENCES BY SOCIOECONOMIC CHARACTERISTICS 17 (2018), <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2018160> ("A higher percentage of children [in the kindergarten class of 2010–11] from nonpoor households (63 percent) than from near-poor (44 percent) and poor (32 percent) households visited an art gallery, museum, or historical site.").

¹²⁰ See Brittany C. Murray, *PTAs, Parent Involvement, and the Challenges of Relying on Private Money to Subsidize Public Education*, PHI DELTA KAPPAN (Apr. 29, 2019), <https://kappanonline.org/pta-parent-involvement-private-money-public-schools-murray>.

¹²¹ See Laura McKenna, *How Rich Parents Can Exacerbate School Inequality*, ATLANTIC (Jan. 28, 2016), <https://www.theatlantic.com/education/archive/2016/01/rich-parents-school-inequality/431640>.

¹²² See Brittany Murray, Thurston Domina, Linda Renzulli & Rebecca Boylan, *Civil Society Goes to School: Parent-Teacher Associations and the Equality of Educational Opportunity*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 41, 42 (2019).

¹²³ See, e.g., Opinion, *Why Shouldn't New York's Wealthiest P.T.A.s Share With Its Neediest Schools?*, N.Y. TIMES (Jan. 12, 2020), <https://www.nytimes.com/2020/01/12/opinion/new-york-pta.html>; Reema Amin & Amy Zimmer, *Find Out How Much Your School's PTA Raises (or Doesn't)*, CHALKBEAT (Dec. 2, 2019, 7:40 PM), <https://ny.chalkbeat.org/2019/12/2/21113658/find-out-how-much-your-school-s-pta-raises-or-doesn-t#PTA%20chart>.

¹²⁴ See McKenna, *supra* note 121.

¹²⁵ See Suzanne Cope, *The Power of a Wealthy PTA*, ATLANTIC (Nov. 5, 2019), <https://www.theatlantic.com/education/archive/2019/11/pta-fundraising-schools/601435>.

¹²⁶ See Opinion, *supra* note 123. For example, at Public School 58 in Brooklyn, PTA earnings corresponded to an additional \$2,085 per student during a single academic year; by contrast, the PTA at Public School 194 in Manhattanville raised only a total of \$391, or about \$2 per student, that same year. See Amin & Zimmer, *supra* note 123.

of wealthier families participate in a wider variety, and frequency, of enrichment activities.¹²⁷ And there is mounting evidence that participation in these types of extracurricular activities is critical to personal, academic, and professional success; students who are involved in extracurriculars command higher salaries, advance further in their careers, and have greater self-discipline, self-esteem, and resilience, as well as lower levels of drug use and truancy.¹²⁸

But critically, the privatization of public schooling does not just fuel economic inequalities among students; it may also exacerbate gender inequalities within families. The coordination of extracurricular activities—and the transporting of children to and from such activities—often falls to women.¹²⁹ Indeed, some women report that the effort to coordinate school and extracurricular schedules, appointments, practices, and the like is tantamount to a second job.¹³⁰ The fundraising and programming efforts of school PTAs is also often the province of women, who are more likely to be actively involved in their children’s schools, whether through the PTA or as classroom volunteers.¹³¹ Moreover, this gendered impact is class contingent. Single mothers, women in low-wage work, and those in jobs with less flexibility and autonomy are less likely to have the time or the resources to construct and maintain this kind of extracurricular scaffolding or to be able to participate in their children’s schools to the same degree.¹³²

¹²⁷ See Kaisa Snellman, Jennifer M. Silva & Robert D. Putnam, *Inequity Outside the Classroom: Growing Class Differences in Participation in Extracurricular Activities*, 40 VOICES URB. EDUC. 7 (2015); Chuck Collins, *The Wealthy Kids Are All Right*, AM. PROSPECT (May 28, 2013), <https://prospect.org/economy/wealthy-kids-right> (discussing a researcher’s finding that by age six, wealthier children spent as many as 1,300 hours per year more than less affluent children on activities such as music lessons and summer camp).

¹²⁸ See Snellman et al., *supra* note 127, at 10–11.

¹²⁹ See Megan Brenan, *Women Still Handle Main Household Tasks in U.S.*, GALLUP (Jan. 29, 2020), <https://news.gallup.com/poll/283979/women-handle-main-household-tasks.aspx> (showing that women in heterosexual relationships are more often responsible for planning family activities, and caring for children on a daily basis, than their male partners); Bennett, *supra* note 7 (discussing how mothers shoulder the burden of “invisible work,” like planning, cooking, and anticipating their families’ needs).

¹³⁰ See Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1431–32 (2015) (describing the “second shift” of household labor that burdens women in addition to their paid labor).

¹³¹ In 2009, men made up just ten percent of the membership of the national PTA. Lisa Belkin, *Dads in the PTA*, N.Y. TIMES (Jan. 6, 2009), <https://parenting.blogs.nytimes.com/2009/01/06/dads-in-the-pta>.

¹³² Studies show that family structure plays a critical role in the investment families are able to make in their children’s childcare, schooling and extracurricular activities, as married parents spend nearly twice as much on an absolute level than do single parents. See Orestes ‘Pat’ Hastings & Daniel Schneider, *A Quarter of U.S. Parents Are Unmarried, and That Changes How Much They Spend on Their Kids*, PBS NEWS HOUR (Sept. 17, 2019), <https://www.pbs.org/newshour/economy/a-quarter-of-u-s-parents-are-unmarried-and-that->

Taken together, these developments make clear that, in the face of considerable state divestment from public education, the family has, once again, stepped in to fill the gaps. And critically, affluent families have, in the normal course, been better able to subsidize public education with private solutions than their low-income peers. As the following section maintains, this same pattern of privatization has once again been laid bare in the effort to re-open schools during the pandemic.

B. *Privatizing Public Education in a Pandemic*

As numerous commentators have observed, the prospect of operating a K-12 public education system in the midst of a pandemic was uncharted terrain for most school districts.¹³³ Beginning in February 2020, as it became clear that the pandemic was not merely a temporary threat, federal, state, and local departments of education alike faced the difficult decision of whether to close their doors. Officials weighed the risks of closing schools—eliminating a crucial source of social services support to needy families, stripping many working families of necessary childcare, and the difficulties of remote learning for students—against the risks that schools, if allowed to continue operating, could become vectors for disease transmission.¹³⁴ Eventually, nearly all states recommended closing their buildings for the remainder of the academic year, choosing instead to operate through distance learning plans.¹³⁵ And while many districts reopened their doors in the fall of 2020 to begin the 2020–2021 academic year, many have since shuttered or moved to hybrid models as virus cases again rose.¹³⁶

changes-how-they-invest-in-their-kids. Adjusting for income differences, however, the gap in single and married parents goes away, meaning that single parents spend roughly an equivalent percent of their income on their children. *Id.*

¹³³ See Valerie Strauss, *When Will Schools Reopen? It Depends on Where You Live, Who's in Charge and Whether They Believe Anthony Fauci*, WASH. POST (Apr. 13, 2020), <https://www.washingtonpost.com/education/2020/04/13/schools-reopen-coronavirus> (discussing the differences between states and districts in closing schools, distance learning, and safety precautions and disagreements between officials on making virus-related decisions).

¹³⁴ See Anna North, *The Debate over Reopening America's K-12 Schools, Explained*, VOX (July 10, 2020, 7:50 AM), <https://www.vox.com/2020/7/10/21310099/schools-reopen-open-reopening-trump-public-covid>.

¹³⁵ See Decker et al., *supra* note 18.

¹³⁶ For example, New York City and Boston, two of the largest school districts in the country, announced in fall 2020 amid rising coronavirus numbers that they would entirely close their doors. See Eliza Shapiro, *New York City to Close Public Schools Again as Virus Cases Rise*, N.Y. TIMES (Nov. 18, 2020), <https://www.nytimes.com/2020/11/18/nyregion/nyc-schools-covid.html>; Marc Fortier & Abbey Niezgod, *Boston Public Schools Shift to All Remote Learning Due to Spike in COVID Cases*, NBC BOSTON (Oct. 21, 2020, 7:36 PM), <https://www.nbcboston.com/news/education/boston-public-schools-shift-to-all-remote-learning-due-to-spike-in-covid-cases/2215661>.

Importantly, these closing and reopening decisions were—and have continued to be—made against a backdrop of catastrophic budget cuts resulting from the pandemic and the resulting economic recession.¹³⁷ Given these unprecedented safety concerns and crushing budgetary limitations, decisions about whether and how to reopen schools have not been easily—or uniformly—made. In the absence of clear federal or state guidance, school districts were forced to make difficult decisions with limited information.¹³⁸ In many cases, these districts were unprepared for the work that would attend projects, such as building a remote instructional system and sanitizing and equipping school facilities for socially distanced learning.¹³⁹ Once again, many districts relied on families to fill those gaps.

Unsurprisingly, families in affluent communities deftly implemented solutions, at both the institutional and individual student level, to combat the pandemic's impact on education. At the institutional level, many wealthy school districts and individual schools independently crafted, with very limited state guidance, their own individual reopening and remote education

¹³⁷ *Budget Cuts and Lost Learning: Assessing the Impact of COVID-19 on Public Education: Hearing Before the H. Comm. on Educ. and Lab.*, *supra* note 107 (statement of Michael Leachman); Sophie Tatum, *Public Schools at Risk over States' Projected Budget Deficits Due to Coronavirus*, ABC (June 15, 2020, 3:09 PM), <https://abcnews.go.com/Politics/public-schools-risk-states-projected-budget-deficits-due/story?id=71245982>. School budgets as of the time of this writing had on average been slashed some fifteen to twenty percent. See Cory Turner, *America's School Funding Crisis: Budget Cuts, Rising Costs and No Help in Sight*, NPR (Oct. 23, 2020, 7:00 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/10/23/926815076/americas-school-funding-crisis-budget-cuts-rising-costs-and-no-help-in-sight> (explaining how states initially faced school budget cuts between twenty to thirty percent, but the federal CARES Act decreased these expected cuts).

¹³⁸ See Sarah Mervosh & Shawn Hubler, *As the Coronavirus Comes to School, a Tough Choice: When to Close*, N.Y. TIMES (Aug. 3, 2020), <https://www.nytimes.com/2020/08/03/us/school-closing-coronavirus.html>; Leslie Brody & Lee Hawkins, *Reopening Schools Try to Decide When They Should Close Again Due to Coronavirus Cases*, WALL ST. J. (July 30, 2020), <https://www.wsj.com/articles/reopening-schools-try-to-decide-when-they-should-close-again-due-to-coronavirus-cases-11596101401>.

¹³⁹ Sean Cavanagh, *Four of Every 10 Districts Not Ready for Remote Learning During Coronavirus Outbreak, Survey Shows*, EDWEEK MKT. BRIEF (Mar. 14, 2020), <https://marketbrief.edweek.org/marketplace-k-12/41-percent-districts-say-cant-remote-learning-coronavirus-shutdowns>; see also Tara García Mathewson, *Coronavirus Is Poised to Inflation Inequity in Schools*, HECHINGER REP. (Mar. 11, 2020), <https://hechingerreport.org/coronavirus-is-poised-to-inflation-inequality-in-schools/> (“Most schools are completely unprepared – or at best, woefully underprepared – for coronavirus and virtual learning.”); Chris Cerf & Hanna Skandera, *Cerf & Skandera: In the Current Crisis, Schools Were Totally Unprepared to Keep Learning Going. States Must Ensure This Never Happens Again*, THE 74 (Apr. 29, 2020), <https://www.the74million.org/article/cerf-skandera-in-the-current-crisis-schools-were-totally-unprepared-to-keep-learning-going-states-must-ensure-this-never-happens-again> (analyzing many localities' failures to “find innovative solutions” amidst the pandemic, and observing that “most districts across the country were not ready for what hit them”).

plans.¹⁴⁰ And once again, affluence and access to resources and networks shaped the efficacy of these efforts.¹⁴¹ For example, parents in wealthy schools considered the prospect of raising thousands of dollars to revamp aging ventilation systems and improve building air quality.¹⁴² Other parent groups purchased tents and other supplies necessary for outdoor learning¹⁴³ or set up teams to create “social isolation” centers to offset the challenges of remote instruction.¹⁴⁴ Some education officials, including those in New York City, the nation’s largest school system, explicitly called on PTAs to use their private funding to finance these endeavors and supplement public budgets for reopening.¹⁴⁵

For students in wealthier neighborhoods or neighborhoods with a high incidence of parents with professional backgrounds, this meant that parent groups could draw on expertise and resources within their own communities to address reopening concerns.¹⁴⁶ Parents who were architects, physicians, or epidemiologists, for example, could lend their expertise, free of charge, to ensure a more successful reopening.¹⁴⁷ By contrast, schools in less-affluent

¹⁴⁰ See Michael Elsen-Rooney, *In Some NYC Districts, Wealthier Schools Have More Students Return to In-Person Classes than Low-Income Schools*, N.Y. DAILY NEWS (Oct. 18, 2020), <https://www.nydailynews.com/new-york/education/ny-nyc-school-reopening-inequities-20201019-ye6xozir35bndewfnfgulmkiui-story.html>.

¹⁴¹ For example, while wealthy families have been able to tap into parent associations during the pandemic to afford “tents to move class outdoors,” other families in less affluent districts have been able to raise only “meager amounts to buy basics like pencils for students.” Moriah Balingit, *New York City is Reopening Its Schools for Working Families. But Many Students of Color Are Staying Home*, WASH. POST (Sept. 25, 2020), <https://www.washingtonpost.com/education/2020/09/25/nyc-schools-students-of-color>.

¹⁴² See Elsen-Rooney, *supra* note 140 (describing how a parent from P.S. 118 suggested the PTA raise \$10,000 to improve the school’s air quality).

¹⁴³ *Id.*

¹⁴⁴ Moriah Balingit & Laura Meckler, *Schools Close over Coronavirus Threat, Raising Concerns About Disruption*, WASH. POST (Mar. 9, 2020), <https://www.washingtonpost.com/local/education/schools-close-over-coronavirus-threat-raising-concerns-about-disruption/2020/03/09/ea74e528-622b-11ea-acca-80c22bbee96fstory.html>.

¹⁴⁵ Alex Zimmerman, *NYC Schools Can Hold Classes Outside This Fall, and Chancellor Suggests Well-Funded PTAs Could Help Pay for It*, CITY (Aug. 24, 2020, 6:41 PM), <https://www.thecity.nyc/education/2020/8/24/21400133/nyc-schools-can-hold-classes-outside-this-fall-ptas-could-help-pay-for-it>.

¹⁴⁶ For example, parents seeking private educational solutions mobilized on social media, where they matched with other students and private tutors and teachers. See Melinda Wenner Moyer, *Pods, Microschools and Tutors: Can Parents Solve the Education Crisis on Their Own?*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/07/22/parenting/school-pods-coronavirus.html>. One mother on the page noted most parents introducing themselves had “nice careers” and that parents in less privileged communities may not have access to similar social media groups. *Id.*

¹⁴⁷ For example, parent architects who were part of a space planning and development committee of the Detroit Waldorf School drew up plans for fourteen wood pavilions to shelter

communities were tasked with crafting their own plans with limited guidance and access to fewer resources.¹⁴⁸ This dynamic not only exacerbates inequalities between schools and communities, such as disparities in access to basic needs, physical and mental health resources, and technology,¹⁴⁹ but it also further entrenches the state's reliance on the family as a means of privatizing functions that should ostensibly be discharged by the state.

The uneven closing and reopening guidance has also prompted families with means to further privatize education at an individual level by retreating to private schools that are better able to finance and accommodate a safe reopening.¹⁵⁰ Indeed, enrollment at public schools across the country fell, as many parents elected to home-school or enroll their children in private institutions.¹⁵¹ Conversely, matriculation at many private schools, including

outdoor classrooms, while a parent with ties to the construction industry helped find equipment and supplies. Erin Einhorn, *Schools Seeking Alternative to Remote Learning Try an Experiment: Outdoor Classrooms*, NBC NEWS (Aug. 5, 2020, 6:01 AM), <https://www.nbcnews.com/news/education/tents-yurts-snowsuits-schools-seeking-alternativess-remote-learning-move-classes-n1235809>. In Texas's Dripping Springs Independent School District, a collection of parents and community members, including an epidemiologist and several medical professionals, were able to form a task force alongside school personnel "charged with studying conditions related to COVID, considering health and safety protocols, and making recommendations to the board regarding" back-to-school plans. *Task Force*, DRIPPING SPRINGS INDEP. SCH. DIST., <https://www.dsisdtx.us/Page/2752> (last visited Mar. 2, 2021). Similarly, in Illinois, a University of Chicago chief medical officer and parent of a student at Oak Park River Forest High School in District 200 served on the district's Medical Advisory Team. Michael Romain, *OPRF Students Return to Classes, Expert Talks Safety*, WEDNESDAY J. OAK PARK & RIVER FOREST (Feb. 3, 2021), <https://www.oakpark.com/2021/02/03/oprf-students-return-to-classes-expert-talks-safety>.

¹⁴⁸ Low-income families, or families with non-English speaking adults, adults without a formal education, or who may feel intimidated by technology, have expressed particular difficulty navigating the educational landscape during the pandemic. See Zaidee Stavely, *Low-Income Parents Turn to Neighbors, Family for Help with Distance Learning*, EDSOURCE (Aug. 28, 2020), <https://edsource.org/2020/low-income-parents-turn-to-neighborhood-networks-for-help-with-distance-learning/639061> (discussing the "informal networks" of neighbors, nonprofit organizations, and extended family members non-affluent families have had to cobble together during the pandemic).

¹⁴⁹ See Liz Mineo, *Time to Fix American Education with Race-for-Space Resolve*, HARV. GAZETTE (Apr. 10, 2020), <https://news.harvard.edu/gazette/story/2020/04/the-pandemics-impact-on-education> (discussing gaps in technology access in a Q&A with the former Massachusetts Secretary of Education, Paul Reville).

¹⁵⁰ See Naomi Martin, *Families with Means Leave Public Schools for Private Schools or 'Learning Pods,' Raising Concerns About Worsening Educational Inequality*, BOS. GLOBE (Aug. 8, 2020, 4:48 PM), <https://www.bostonglobe.com/2020/08/08/metro/families-with-means-leave-public-schools-private-schools-or-learning-pods-raising-concerns-about-worsening-educational-inequality>; Zimmerman et al., *supra* note 115.

¹⁵¹ All Things Considered, *Pandemic Seems To Be Driving School Enrollment Down*, NPR *Investigation Shows*, NPR (Oct. 7, 2020, 4:06 PM), <https://www.npr.org/2020/10/07/921287309/pandemic-seems-to-be-driving-school-enrollment-down-npr-investigation-shows>.

those with pandemic-appropriate amenities like outdoor learning tents and grade-level learning pods, boomed.¹⁵²

And even among those parents who have remained in public schools, the impulse toward privatization persists. Eager to maintain some modicum of normal socialization and safety for their children, many wealthy families have opted to form “pods” in which a small group of students learn together under the supervision of adults in the family or, in some cases, a hired instructor.¹⁵³ Indeed, an entire teacher-for-hire industry has bloomed during the pandemic.¹⁵⁴ For those with the deepest pockets, there are tonier options still: luxury resorts have begun offering “academy” packages where students have access to test-prep tutoring, art electives and movement breaks, or “hands-on” learning programs that outfit students with full classroom setups—and the assurance of safety—in their upscale facilities.¹⁵⁵

But these privatized responses to a collective catastrophe come at an economic and social cost that, for many, is beyond reach.¹⁵⁶ With these inequities in mind, some education advocates view work-arounds like “pandemic pods” as examples of “opportunity hoarding,” which further exacerbate educational disparities.¹⁵⁷ Some also argue that these private solutions further exacerbate racial disparities in educational quality by contributing to an already-segregated school system.¹⁵⁸ As they explain, “pods” are likely to be occupied by children whose families are already networked with one another through neighborhoods, friendship circles, and

¹⁵² See Alex Williams, *The Little Fraught Schoolhouse*, N.Y. TIMES (Aug. 2, 2020), <https://www.nytimes.com/2020/08/01/style/wealthy-rich-parents-coronavirus-schools-hamptons.html> (describing how one private school in the Hamptons received more applications than ever for their fall classes).

¹⁵³ See Moyer, *supra* note 146.

¹⁵⁴ Jillian Berman, *From Nanny Services to ‘Private Educators,’ Wealthy Parents Are Paying up to \$100 an Hour for ‘Teaching Pods’ During the Pandemic*, MARKETWATCH (July 23, 2020, 5:51 AM), <https://www.marketwatch.com/story/affluent-parents-are-setting-up-their-own-schools-as-remote-learning-continues-its-the-failure-of-our-institutions-to-adequately-provide-for-our-students-11595450980>.

¹⁵⁵ Hannah Seligson, *Posh Pod or Resort Academy? The Rich Head Back to School in a Pandemic*, TOWN & COUNTRY (Sept. 18, 2020), <https://www.townandcountrymag.com/society/money-and-power/a33912536/coronavirus-learning-pod-rich-parents>.

¹⁵⁶ For a detailed discussion of the creation and impact of these “pandemic pods,” as well as the inequalities that attend these and other such private interventions, see generally James, *supra* note 113.

¹⁵⁷ Laura Meckler & Hannah Natanson, *For Parents Who Can Afford It, a Solution for Fall: Bring the Teachers to Them*, WASH. POST (July 17, 2020, 11:57 AM), https://www.washingtonpost.com/education/fall-remote-private-teacher-pods/2020/07/17/9956ff28-c77f-11ea-8ffe-372be8d82298_story.html.

¹⁵⁸ Clara Totenberg Green, *The Latest in School Segregation: Private Pandemic ‘Pods,’* N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/opinion/pandemic-pods-schools.html>.

other points of affinity.¹⁵⁹ On this account, pods are very likely to be racially and socio-economically homogeneous.

This dynamic may be further exacerbated by the particular circumstances of the pandemic itself. Not only does “podding” require considerable financial resources, but also parents who administer pods may have particular requirements aimed at promoting optimal safety and minimizing disease exposure and transmission. This may mean limiting pod invitations to those families whose situations appear “safe” or less risky—families that they already know and trust. Such impulses may compound racial and socioeconomic disadvantages. Students whose family members are frontline workers who risk frequent exposure to the virus, or those who live in multi-family housing, may be considered suboptimal “pod” prospects. And critically, in many states, the majority of frontline and essential workers are people of color.¹⁶⁰ On this account, children from such families may be less likely to participate in pods because of financial constraints and may be less welcomed because of perceived risk of exposure to the virus.¹⁶¹

Of course, exclusion from racially homogenous educational opportunities is not a new phenomenon for many families of color. On this account, the pandemic may provide families of color with strong incentives to work within their communities to create their own education solutions. However, as Professor Erica Turner observes, this kind of intra-community cooperation may be elusive. Within communities of color, families have traditionally relied on elders and fictive kin to cobble together caregiving networks. Given the virus’s pronounced effects on the elderly and communities of color, this kind of caregiving network may pose “further risks” to individuals and the community as a whole.¹⁶²

The turn to, and increasing need for, private solutions during the pandemic has, to be sure, exacerbated racial, gender, and class inequities. Families with means have more fluidly accessed private solutions to supplement a lagging public system, while those with less have been consigned to make do with the state’s limited offerings and that which is available in their own networks. More critically, however, the pandemic

¹⁵⁹ *See id.*

¹⁶⁰ N.Y.C. OFFICE OF THE COMPTROLLER, NEW YORK CITY’S FRONTLINE WORKERS (Mar. 26, 2020), <https://comptroller.nyc.gov/reports/new-york-citys-frontline-workers> (noting that seventy percent of healthcare workers and seventy-seven percent of childcare, food, homeless, and family services workers in New York City are Black, Asian or Hispanic).

¹⁶¹ *See Green, supra* note 158.

¹⁶² ERICA O. TURNER, SARA CHRISTOPHERSON, ANNALEE GOOD, JYNELLE GRACIA, ERIKA HAGEN, AMY HILGENDORF, MAXINE MCKINNEY DE ROYSTON & JAMI WOOD, EQUITY IN PANDEMIC SCHOOLING: AN ACTION GUIDE FOR FAMILIES, EDUCATORS, & COMMUNITIES 1 (2020), <https://education-reimagined.org/resources/equity-in-pandemic-schooling-an-action-guide-for-families-educators-and-communities>.

makes stunningly clear that not only does the state rely on the family to accommodate dependency in the ordinary course, it also expects the family, in times of profound crisis, to assume—and address—the burdens of the state’s failures. Considered alongside the “she-cession,” the delegation of education to the family during the pandemic underscores the ways in which the state’s privatization of dependency has long strained the American family unit—and how the pandemic has continued to draw upon the family’s resources to meet a collective crisis.

IV

CONCLUSION—SCENES FROM A CONFIRMATION

At first blush, the pandemic and the shuttering and reopening of public schools may seem unrelated to the nomination and confirmation of a Supreme Court justice. However, Justice Barrett’s confirmation in many ways reflects the themes surfaced in this Essay. Not only did the specter of the family—and the privatization of dependency—loom large in the President’s introduction of his nominee, but it also shaped the discourse of confirmation hearings. There, Barrett’s family was again—literally and figuratively—front and center.

The nominee appeared before the Senate Judiciary Committee flanked by her husband, children, and five of her siblings.¹⁶³ Throughout the hearing, senators on both sides of the aisle celebrated her ability to successfully balance her career as a federal appellate judge and law professor with the considerable demands of a large family.¹⁶⁴ To this end, she was praised not just as a legal “superstar”¹⁶⁵ but as a “tireless” and “remarkable” mother who was “a walking example of how young children and demanding work can

¹⁶³ Associated Press, *Amy Coney Barrett Introduces Family During Hearing*, YOUTUBE (Oct. 13, 2020), <https://www.youtube.com/watch?v=VNWudiYCNYY>.

¹⁶⁴ *Nomination of the Honorable Amy Coney Barrett To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 116th Cong. at 2:46:39 (2020), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states> (remarks of Sen. Thom Tillis, calling Barrett “a remarkable mother” with “seven beautiful children” who, “in spite of being busy . . . makes time to be involved in her community”); *id.* at 44:25 (remarks of Sen. Charles Grassley, calling Barrett a “tireless mother of seven,” and noting that she was an adoptive mother); *Nomination of the Honorable Amy Coney Barrett To Be an Associate Justice of the Supreme Court of the United States (Day 2) Before the S. Comm. on the Judiciary*, 116th Cong. at 45:08 (2020), <https://www.judiciary.senate.gov/meetings/nomination-of-the-honorable-amy-coney-barrett-to-be-an-associate-justice-of-the-supreme-court-of-the-united-states-day-2> (remarks of Sen. Dianne Feinstein, praising Barrett’s family for “sit[ting] still, quiet,” and saying she had “done a very good job,” then asking Barrett to introduce her family to the panel).

¹⁶⁵ Claire Cain Miller & Alisha Haridasani Gupta, *Why ‘Supermom’ Gets Star Billing on Résumé for Public Office*, N.Y. TIMES (Oct. 14, 2020), <https://www.nytimes.com/2020/10/14/upshot/barrett-harris-motherhood-politics.html>.

co-exist.”¹⁶⁶ And meaningfully, her nomination to a seat on the highest court in the land was credited as a new brand of feminism in which women with discipline, tenacity, and grit “truly can do it all.”¹⁶⁷

To be sure, these comments were testimonials to Justice Barrett’s remarkable career and historic nomination. But critically, these exchanges also highlight the discourse that generally attends the family and its role in privatizing dependency. By its terms, this narrative frames the successful blending of family and professional life as the product of personal choices and the appropriate deployment of private resources. Put differently, for Justice Barrett, “having it all” was a determined *choice*—one facilitated, she eventually acknowledged, by a devoted spouse, extended family, and the financial wherewithal to engage an army of “fearless babysitters.”¹⁶⁸ But regardless of *how* this delicate balance was achieved, the assumption is that this equipoise is a personal responsibility—a *private* responsibility—to be undertaken by the individual and the family independently, without assistance from the state.

In many ways, the discourse surrounding the pandemic’s impact on the family and the narrative of Justice Barrett’s success are opposite sides of the same coin. In much the same way the pandemic’s impact on women and families has been framed as the regrettable result of intrafamilial decisions to distribute caregiving responsibilities along gendered lines, Amy Coney Barrett’s professional success has been framed as the result of her own (smart) choices, decisions, and skillful management of the demands of working motherhood. On one side of the coin, private choices and decisions result in women losing ground in the labor force; on the other, canny choices and decisions result in one woman summiting the highest pinnacle of her profession. Entirely absent from either discussion is the state’s role as a player in the equation. For example, there is little discussion of the state’s feeble efforts to address the persistent gender wage gap that contributes to the expendability of women’s paid work in the political economy of the family. Nor is there discussion of the unforgiving work conditions that have failed to accommodate the changes in caregiving that the pandemic has engendered. And while some have attributed the “she-cession,” at least in

¹⁶⁶ Kate Bachelder Odell, Opinion, *Amy Coney Barrett Sets an Example for Working Mothers*, WALL ST. J. (Sept. 28, 2020, 12:32 PM), <https://www.wsj.com/articles/amy-coney-barrett-sets-an-example-for-working-mothers-11601310736>.

¹⁶⁷ Alex Swoyer & Gabriella Muñoz, *Amy Coney Barrett Redefines Feminism: ‘A New Role Model for Women Instead of the One Size Fits All,’* WASH. TIMES (Sept. 29, 2020), <https://www.washingtontimes.com/news/2020/sep/29/amy-coney-barrett-supreme-court-nominee-redefines-> (quoting Sen. Joni Ernst).

¹⁶⁸ *Remarks by President Trump Announcing His Nominee for Associate Justice of the Supreme Court of the United States*, *supra* note 2.

part, to the family's expanded responsibility for overseeing at-home learning, there is little discussion of the state's unprecedented delegation of this core state function to the private sphere and the family. Nor is there a more broadly coordinated indictment of the state's utter failure to discharge core public functions in a time of national crisis—or to provide continued support and subsidy to families to get through this crisis.

To be sure, this Essay does not purport in its limited pages to solve, in whole or in part, the problems that result from the state's delegation of responsibility for dependency to the family. Our aim is far narrower: to surface how the pandemic—and the discourse surrounding its impact on caregivers and dependents—is a powerful illustration of both the family's centrality to the American welfare state and the failures of the welfare state's neoliberal ethos. Focusing on the allocation of caregiving responsibility centralizes the discussion on the private choices of individuals, rather than on the state's failure to provide broad and systemic interventions—to the pandemic and ongoing question of accommodating dependency.¹⁶⁹ The relentless focus on family decision-making and the allocation of household labor within families diverts attention from the structural and systemic factors that shape decision-making and choice within families—and the race, gender, and class inequalities that these choices produce. As Professor Jessica Calarco explains, the narrow focus on choices made within the family prevents us from “us[ing] our sociological imaginations . . . to think about social problems as structural problems” and to interrogate the systemic forces, including those that function under the auspices of the state, that operate beyond individual control.¹⁷⁰

As importantly, the focus on individual-level decisionmaking avoids the more pressing question of whether our current social welfare model, with its reliance on the market and the family, continues to make sense in a society with endemic racial and socioeconomic inequities, uneven access to health care and childcare, and uneven educational and employment prospects.¹⁷¹ Put differently, centering the discussion on how individual families have (or have not) adapted to the COVID-19 crisis—and indeed, any crisis—ignores the reality that the family's efforts to shoulder these incredible pressures are inextricably tied to the failures of the American welfare state.

¹⁶⁹ See Murray, *supra* note 20, at 998.

¹⁷⁰ Anne Helen Petersen, “Other Countries Have Social Safety Nets. The U.S. Has Women,” CULTURE STUDY (Nov. 11, 2020), <https://annehelen.substack.com/p/other-countries-have-social-safety> (interviewing Professor Calarco).

¹⁷¹ *Id.*