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# The Privatized American Family

Maxine Eichner

*University of North Carolina School of Law*, [meichner@email.unc.edu](mailto:meichner@email.unc.edu)

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# THE PRIVATIZED AMERICAN FAMILY

Maxine Eichner\*

*“The central dilemma of public policy today is how to reconcile the imperatives of deregulated markets with enduring human needs.”*<sup>1</sup>

*“The philosophy of the traditional, minimalist welfare state was to establish a safety net, a haven of last resort, for those demonstrably unfit or unable to work. . . . [T]he modern, advanced welfare state has deliberately abandoned the minimalist philosophy . . . . The goal is to allow individuals to harmonize working life with familyhood, to square the dilemmas of having children and working, and to combine productive activity with meaningful and rewarding leisure.”*<sup>2</sup>

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1 JOHN GRAY, *FALSE DAWN: THE DELUSIONS OF GLOBAL CAPITALISM* 132 (1998).

2 GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* 141 (1990).

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## INTRODUCTION

The family in the United States is often considered private, but increasingly it has become privatized. U.S. law and public policy, through its welfare-state regime,<sup>3</sup> used to buffer families from market forces.<sup>4</sup> It did so most prominently through subsidizing women to stay home to care for children, but also through absorbing a range of financial costs and risks that can threaten families.<sup>5</sup> Today, however, our law and public policy are premised on the view that families should shoulder their own financial weight.<sup>6</sup> How families function is therefore dictated by how well the adults within them negotiate market forces in order to form and sustain stable partnerships, how much bargaining power and skill these adults have to arrange the caretaking and human development that children and others require, and whether any of the many risks that can befall families—for example a child developing a chronic illness—come to pass. While most advanced democracies have

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3 As Gøsta Esping-Andersen puts it, “[t]o talk of ‘a [welfare-state] regime’ is to denote the fact that in the relation between state and economy a complex of legal and organizational features are systematically interwoven.” ESPING-ANDERSEN, *supra* note 2, at 2.

4 I use the term “markets” to refer to a system of decentralized exchange relations in which buyers and sellers of a good interact with the end of facilitating trade of that good. One of the goods subject to trade, in my use of the term, is human labor. By the term “market forces,” I mean the system of decentralized forces of supply and demand that determine whether particular goods and services are produced, and how they are distributed.

5 See, e.g., Aid to Dependent Children Act, Pub. L. No. 74-271, tit. IV, 49 Stat. 620, 627–29 (1935) (codified as amended in scattered sections of 42 U.S.C.) (grants to states for aid to dependent children), *repealed by* Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, § 103(a), 110 Stat. 2105, 2112 (1996); see also *infra* Part II.

6 For documentation of the claim that U.S. families are absorbing more risks and greater costs than in the past, see JACOB S. HACKER, *THE GREAT RISK SHIFT: THE NEW ECONOMIC INSECURITY AND THE DECLINE OF THE AMERICAN DREAM* (rev. ed. 2008); ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS PARENTS ARE GOING BROKE* (2004).

adopted a range of public policies to buffer families from market forces, the United States stands alone in the degree of its failure to do so.<sup>7</sup>

How well does the current privatized-family model support contemporary U.S. families? This is an important question given that the family is an institution central to individual wellbeing and to a vigorous society, not least because of the caretaking and human development that families support.<sup>8</sup> Put simply, all humans need significant amounts of caretaking. This is the case particularly in childhood, but also at other points of life, such as in times of sickness and old age. Children also need significant cultivation to allow them to take their place in society, including social, moral, and academic education and job preparation, all of which is referred to here as human development. While neither caretaking nor human development can be provided only by families, as most societies are structured, including our own, families are key players in their provision.

Yet, as this Article demonstrates, the privatized-family model is taking a significant toll on American families.<sup>9</sup> This model's effects are particularly devastating for poor, and progressively, for working-class families, where marriage and other stable partnerships have increasingly disappeared, and caretaking and human development have been significantly impaired. Yet, as I show, middle-class families too are struggling with balancing work and family demands in this system. Indeed, the privatized-family model means that most American families meet the caretaking and human development needs of children less well than families in other wealthy countries. In addition, this system has negatively affected the pace and texture of citizens' family and personal lives and has taken a significant toll on the wellbeing of individuals (particularly the most vulnerable), families, and society.

This Article calls for abandoning the privatized-family model, as well as the laissez-faire theory of market regulation on which it is premised. Although this model is often presented as quintessentially American,<sup>10</sup> I will show that its fundamental tenets were developed only in the late twentieth century.<sup>11</sup> Before then, the U.S. welfare state was built on the understanding that government had an integral role in ensuring that families were both supported and protected from the harshest effects of the industrial econ-

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7 See ESPING-ANDERSEN, *supra* note 2, at 52 tbl.2.2 (finding other Organisation for Economic Co-operation and Development (OECD) countries' welfare states "decommodif[y]" family provision far more than the United States); JANET C. GORNICK & MARCIA K. MEYERS, *FAMILIES THAT WORK: POLICIES FOR RECONCILING PARENTHOOD AND EMPLOYMENT* 58 (2003) (finding American laws support families far less than comparison countries).

8 See MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* (2010); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

9 See *infra* Section I.B.

10 See RICK SANTORUM, *IT TAKES A FAMILY: CONSERVATISM AND THE COMMON GOOD* xi (2005) (presenting theory of laissez-faire market regulation as consistent with "our founders' vision for the pursuit of the common good in a civil society").

11 See *infra* Part II.

omy.<sup>12</sup> That welfare-state model was imperfect in many ways, including that it was built on a model of “separate spheres,” in which women stayed home to accomplish caretaking while men performed paid labor.<sup>13</sup> Yet it encompassed the important recognition that the state must temper the effects of market forces on families.

This Article then goes on to make the case that the rollback of the welfare state at the end of the twentieth century unwisely abandoned this important compact.<sup>14</sup> Policymakers revoked welfare-state protections on the ground that the separate-spheres model on which it was premised was outmoded given women’s increasing labor force participation. Yet instead of repeal, I argue, reformers should have transformed regulation of the market-family intersection to protect families given these changing family patterns. I offer my “buffered-spheres” model of the welfare state as a viable construct for what renewed regulation between market and family should look like in the twenty-first century.<sup>15</sup> In brief, this model returns us to the view that the distribution of conditions necessary for sound families is a basic responsibility of government, rather than a task best left to the invisible hand of the market. This model would use regulation to support workers having adequate time in the domestic realm, including for children, to ensure that families have the necessary support for their important caretaking and human development tasks.

This Article makes several contributions to legal literature. It is the first to propose a general theory for regulating the family-market relationship to support the wellbeing of families, not to mention the first to propose a “buffered-sphere” model. Only a few legal scholars who focus on families have considered the increasingly negative effects that market forces are having on family wellbeing.<sup>16</sup> Most of those who have done so have focused on a significantly narrower range of issues. For example, family law scholars have considered the ways that market forces negatively affect the ability of families to perform particular functions, such as obtaining adequate childcare or accessing early childhood education and have proposed particular policy solutions, sometimes framed in terms of correcting “market failure.”<sup>17</sup> Yet no

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12 See *infra* Part II.

13 Feminist historians, most prominently Alice Kessler-Harris, have demonstrated that the welfare state was premised on a “gendered imagination,” insofar as it assumed that women would provide unpaid caretaking. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 5–6 (2001).

14 See *infra* Section II.B.

15 See *infra* Part III.

16 I briefly did so in an earlier essay. Maxine Eichner, *The Family, In Context*, 128 HARV. L. REV. 1980 (2015) (book review). For the few instances in which scholars have focused on the relationship between market forces and families, see JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014); Meredith Johnson Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659.

17 See, e.g., Lourdes Benería, *Globalization, Women’s Work, and Care Needs: The Urgency of Reconciliation Policies*, 88 N.C. L. REV. 1501 (2010) (arguing for adoption of policies that

U.S. legal scholar has crystallized the theoretical issue of state regulation of market forces on families generally and articulated a model of regulation that supports families.<sup>18</sup>

Furthermore, no scholar has used the contrasting theories of the government's relationship to families underlying, on the one hand, the twentieth-century welfare state and, on the other hand, the dismantling of welfare-state protections at the end of the century, to explain what has gone awry for contemporary U.S. families. In discussing the shift between these two theories, this Article contests the standard progress narrative told by feminist scholars about the erosion of the welfare state's underlying ideology of separate spheres, which conceptualized women as uniquely suited to the domestic realm and childrearing, while viewing men as properly suited to the public world and the role of breadwinner.<sup>19</sup> I make the case that the elimination of separate-spheres policies, rather than their transformation to reflect new,

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reconcile work and family in many countries); Harbach, *supra* note 16, at 661 (suggesting policy solutions for market failures including "more active and explicit government intervention in the childcare market").

18 June Carbone and Naomi Cahn have come closest, discussing the ways that increased economic inequality is negatively affecting poor and working-class American families. See CARBONE & CAHN, *supra* note 16. I extend that to focus on the way that market forces negatively affect American families across all classes. Outside of the legal academy, Jacob Hacker, a political scientist, has demonstrated that the welfare state has become less effective in shielding families from financial risk. See, e.g., HACKER, *supra* note 6. This Article focuses instead on how market forces, including the heightened financial risks to which families are subjected, affect the ways that families' function.

19 For a discussion of how the twentieth-century welfare state was built on the ideology of separate spheres, in which women performed caretaking and men worked in the paid workplace, see KESSLER-HARRIS, *supra* note 13. For accounts that see the erosion of protective legislation as progress for women, see generally NANCY WOLOCH, *A CLASS BY HERSELF: PROTECTIVE LAWS FOR WOMEN WORKERS, 1890s–1990s* (2015) (analyzing the negative consequences of women-only protective legislation, including how these laws worked to sustain the tradition of viewing women as less equal than men and encouraged the abridgement of women's citizenship); Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CALIF. L. REV. 755, 761, 827 (2004) (noting that, in the eyes of the legal feminists, as long as women were regarded as the center of home and family life, the courts would not give sex-discriminatory laws heightened scrutiny "given women's inability to claim the 'discrete and insular minority' status," and that laws would continue to be upheld that "asymmetrically allocated benefits and reinforced sex-based dependencies" (footnote omitted) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938))); and Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J. AM. HIST. 188, 194, 223–24 (1991) (analyzing how prominent feminists used the legal system to promote their respective goals—protective legislation for working women or legal equality between the sexes—and showing that equality was best achieved by diminishing the differences in men's and women's roles in society and emphasizing women's equal footing with men).

nonsexist family patterns, stifled the important role of government in supporting families.<sup>20</sup>

Finally, this Article is the first to critique the current narrow vision of the role of government expressed in recent law, sometimes known as “neoliberalism,”<sup>21</sup> based on the wellbeing of families.<sup>22</sup> This restricted vision construes the role of government as limited to supporting free markets and economic efficiency rather than in terms of furthering a broader range of public goods.<sup>23</sup> This Article argues that while markets are often useful tools to distribute a wide range of goods, market distribution should not be allowed to undermine families and the important functions that they serve. Where it does, the state must regulate markets to support families. Put another way,

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20 A few scholars, though, have shown that legislation that regulated women’s paid-work conditions based on the view that women’s primary role was in the home—legislation that had largely been considered antifeminist in recent work—in fact sought to further women’s equality by substantively redressing work conditions for women that contributed to gender imbalances in the workplace. See, e.g., Arianne Renan Barzilay, *Parenting Tille VII: Rethinking the History of the Sex Discrimination Prohibition*, 28 YALE J.L. & FEMINISM 55 (2016).

21 By “neoliberalism,” I refer to the contemporary political doctrine that sees the central function of the state as maintaining free markets, rather than regulating to promote public goods like equality or justice. This doctrine resuscitates much of classical liberal economics that supports laissez-faire regulation of the market, including Adam Smith and John Stuart Mill, but more narrowly conceives of the state’s proper purposes than this earlier work. See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005) (“Neoliberalism is . . . a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”); see also Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 784 (2003) (“[N]eoliberal (free market) ideology assert[s] that state *abstention* from economic protection is the foundation of a good society.” (footnote omitted)).

22 One other scholar, Anne Alstott, considered the way that particular features of neoliberalism—its focus on negative liberty, laissez-faire market distributions, and the minimal state—dominate U.S. family law, although she has not developed a sustained critique of the way that these features are harming U.S. families. See Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25 (2014).

23 I use the term “free market” as a shorthand way to refer to markets that are not regulated with social welfare objectives in mind. As a number of commentators have pointed out, the term “free market” is a misnomer; markets require significant regulation to keep them “free.” See KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME 76–80 (2d. ed. 2001). In David Harvey’s words:

The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist . . . then they must be created, by state action if necessary.

HARVEY, *supra* note 21, at 2.

when the invisible hand does not provide the conditions that support sound families, the hand of government must intervene.<sup>24</sup>

A caveat before I begin: in advocating state action to support families, I am not nostalgically seeking the return of the traditional, patriarchal family. To the extent that that model ever dominated,<sup>25</sup> it is and should be long past.<sup>26</sup> Because the relationships that sustain us and in which caretaking and human development occur come in many forms, in my view, the groupings considered to be families for purposes of state support should be broadly drawn.<sup>27</sup>

Part I of this Article describes the privatized-family model that dominates U.S. law and policy today, as well as the negative effects this model is having in the contemporary United States. Part II turns to U.S. history, investigating the national conversation regarding the appropriate relationship among the government-market-family triad. As historian Robert Self put it, competing narratives of the place of families are “deeply etched in competing narratives of national identity,” and are fundamental to our social contract.<sup>28</sup> Part II

24 Cf. JOHN GRAY, ENLIGHTENMENT’S WAKE: POLITICS AND CULTURE AT THE CLOSE OF THE MODERN AGE 91 (1995) (“[M]arket institutions are useful devices, not articles of faith. Their scope, varieties and limits cannot be known *a priori*, but are to be assessed tentatively and provisionally. Such assessment will turn on the contribution they make to human well-being and their impact on valuable cultural traditions and forms of common life.”).

25 As historian Stephanie Coontz shows, the iconic vision of the American family as a nuclear family headed by a breadwinner father, a homemaker mother, and their children takes a particular model of the family produced by a set of converging forces in the mid-twentieth century and inaccurately conceptualizes this as *the* correct and timeless picture of the American family. STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP (1993).

26 In 2012, only 20% of U.S. households were composed of married couples with children under eighteen, down from 40% in 1970. JONATHAN VESPA, JAMIE M. LEWIS & ROSE M. KREIDER, U.S. DEP’T OF COMMERCE, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2012, at 1 (2013), <https://www.census.gov/prod/2013pubs/p20-570.pdf>. The great majority of these households do not fit the “Ozzie and Harriet” model: only 24% of married mothers with children under the age of fifteen were stay-at-home mothers with a breadwinner father. *Id.* at 26.

27 I have elsewhere proposed such a broad definition of the groupings that I argue should receive state support. See EICHNER, *supra* note 8, at 104–05.

28 In tracking this conversation, this Article seeks to focus on what historian Robert Self refers to both as our “national mythology” and our “social contract” regarding the relationship between families, markets, and government. ROBERT O. SELF, ALL IN THE FAMILY: THE REALIGNMENT OF AMERICAN DEMOCRACY SINCE THE 1960s, at 3–4 (2012). I do not assume that the mythology regarding families acts as the sole driver of government policies; instead, I adopt the far more modest assumption that the two are related, and that this mythology gives these policies political and cultural legitimacy. Put another way, the ideas traced here are what Luc Boltanski and Eve Chiapello call “the spirit of capitalism,” meaning the ideological changes that help to legitimate the capitalist system, here as applied to families. LUC BOLTANSKI & ÈVE CHIAPELLO, THE NEW SPIRIT OF CAPITALISM 3, 8 (Gregory Elliott trans., 2005) (internal quotation marks omitted); see also MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 55 (Talcott Parsons trans., 1958) (“In order that a manner of life so well adapted to the peculiarities of capitalism could . . . come to domi-



first considers the narratives that supported the rise of the twentieth-century welfare state, which regulated the market to support families. It then contrasts these with the justifications for dismantling welfare-state protections at the end of the century, which introduced the privatized-family model.<sup>29</sup> I argue that the vision underlying this newer regulatory model does not adequately support the important functions that families serve.

Finally, Part III offers my “buffered-spheres” model as a better alternative for regulating the market-family relationship. This model would delink provision of the conditions families need to thrive from their individual market power. Under this model, the state would no longer stand aside as a neutral party when it comes to whether families can obtain the necessary conditions for sound families, but would actively facilitate these conditions. In today’s economy, this means that regulation would not only encourage adults to work, as it does today, but would also ensure parents publicly paid parental leave, ensure children optimal early childhood education while parents work, and support all adults being able to go home at the end of the workday.

## I. THE PRIVATIZED AMERICAN FAMILY

Recent social science research has tracked the disappearance of marriage in poor and working-class families, as well as linked this phenomenon to changes in the economy. Furthermore, a burgeoning array of research reveals the increasing stress experienced by American families as they try to balance breadwinning with family life. The goal of this Part is to weave this research together with comparative research on welfare-state regimes to bring into focus how the United States’ *laissez-faire* approach to market regulation undercuts families and harms their caretaking and human development functions.

### A. *Privatized Family Policy*

As the epigraph from Gøsta Esping-Andersen at the beginning of the Article suggests,<sup>30</sup> welfare-state regimes in most advanced democracies ensure conditions that support healthy families, assist them in reconciling work and family life, and insulate their caretaking and human development activities from market pressures. When it comes to public support for families, however, the United States is an outlier. The strong expectation here is that families will go it alone.

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nate others, it had to originate somewhere, and not in isolated individuals alone, but as a way of life common to the whole groups of men.”).

29 Jacob Hacker and Paul Pierson date the rise of the narrow, probusiness vision of government to the 1970s, when big business began to organize politically and pump millions of dollars into think tanks that disseminated probusiness ideology to the public. See JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 95–115 (2010).

30 See ESPING-ANDERSEN, *supra* note 2, at 141.

For one thing, we privatize the cost of raising children far more than other wealthy countries. A middle-income American family can expect to spend \$233,610 (in 2015 dollars) to raise a child from birth through age seventeen.<sup>31</sup> That is almost one-quarter of the median family's salary for those years.<sup>32</sup> Adding a college degree, which is increasingly necessary to ensure a child's financial security and increasingly expensive, can increase that figure by three-quarters of that amount again.<sup>33</sup> Far more of children's costs are socialized in other wealthy countries. For example, while the United States and Sweden spend roughly the same amount overall on children when public and private spending are totaled, the United States publicly spends 0.7% of GDP on family benefits, while Sweden spends 3.6%—more than five times as much.<sup>34</sup> To take another example, French families receive public support through paid family leave on the birth of a child, followed in turn by universal daycare, preschool, public school with subsidized after-school activities and summer camps, and then, finally, college, which requires only a small parental contribution.<sup>35</sup> In contrast, public spending for U.S. children is concentrated on middle and late childhood, rather than early childhood, and primarily on public school education.<sup>36</sup>

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31 MARK LINO ET AL., U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2015, at ii (2017), <https://www.cnpp.usda.gov/sites/default/files/crc2015.pdf>; Abha Bhattarai, *It's More Expensive Than Ever to Raise a Child in the U.S.*, WASH. POST (Jan. 10, 2017), [https://www.washingtonpost.com/news/business/wp/2017/01/10/its-more-expensive-than-ever-to-raise-a-child-in-the-u-s/?utm\\_term=.ec9cf4e15f29](https://www.washingtonpost.com/news/business/wp/2017/01/10/its-more-expensive-than-ever-to-raise-a-child-in-the-u-s/?utm_term=.ec9cf4e15f29).

32 CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. DEP'T OF COMMERCE, INCOME AND POVERTY IN THE UNITED STATES: 2013, at 5 (2014), <https://www.census.gov/content/dam/Census/library/publications/2014/demo/p60-249.pdf> (calculated based on 2013 median family salary of \$51,939).

33 See Bhattarai, *supra* note 31 (estimating a four-year degree “would add an extra \$181,480 at private university and \$80,360 at a public one”).

34 CHILD TRENDS, WORLD FAMILY MAP 2015: MAPPING FAMILY CHANGE AND CHILD WELL-BEING OUTCOMES 35 tbl.3 (2015), <http://www.childtrends.org/wp-content/uploads/2015/09/2015-39WorldFamilyMap2015.pdf>.

35 Pamela Druckerman, *The Perpetual Panic of American Parenthood*, N.Y. TIMES (Oct. 13, 2016), [http://www.nytimes.com/2016/10/14/opinion/the-perpetual-panic-of-american-parenthood.html?\\_r=0](http://www.nytimes.com/2016/10/14/opinion/the-perpetual-panic-of-american-parenthood.html?_r=0); Kim Keating, *Family Leave in the U.S. and Europe: A Comparison*, HUFFINGTON POST (June 9, 2015, 9:54 AM), [http://www.huffingtonpost.com/kim-keating/family-leave-in-the-us-an\\_b\\_7543298.html](http://www.huffingtonpost.com/kim-keating/family-leave-in-the-us-an_b_7543298.html).

36 In 2007, the United States was ranked thirty-first out of thirty-two OECD and partner countries in the amount spent on public funding during early childhood. See OECD, CHILD WELL-BEING MODULE: PUBLIC SPENDING BY AGE OF THE CHILD 2 chart IN2.1.B (2011), [www.oecd.org/els/social/family/database/CWBM](http://www.oecd.org/els/social/family/database/CWBM) [hereinafter PUBLIC SPENDING BY AGE OF THE CHILD] (showing that the United States spends just over ten percent of public funding during children's first five years and the remainder distributed fairly equally in middle childhood (ages 6–11 years) and late childhood (ages 12–17 years)). Most of its public spending on children is focused on education. OECD, EDUCATION AT A GLANCE: OECD INDICATORS 2012, UNITED STATES 6 (2012), <https://www.oecd.org/unitedstates/CN%20-%20United%20States.pdf>, [hereinafter EDUCATION AT A GLANCE]. The OECD is an organization of thirty-five countries, most of which are regarded as having high-income econo-

The U.S. system of privatization sets a finite ceiling on the resources that a child receives.<sup>37</sup> Children cannot generally contribute financially to their upbringing until at least their midteens, and likely later. Yet abundant research shows that children need significant material provision in their early years to flourish later in life. Privatizing children's upbringing means that this provision will be confined to their parents' resources.<sup>38</sup> Given that most adults have children relatively early in their career arc, most children have access to far fewer resources than would be available if the cost of children were pooled, so that parents could contribute over the course of their work lives.<sup>39</sup> Children's access to resources is still more restricted by the fact that young families today have more educational debts than in the past and must pay far more, comparatively, for housing than did their parents.<sup>40</sup> This ceiling means that the amount spent on children by families varies tremendously based on the family's income. For example, lower-income families are likely to spend \$212,300 per child through age seventeen. Higher-income families will spend more than double that, or about \$454,770, according to the U.S. Department of Agriculture.<sup>41</sup>

This privatization also means that there is no minimum floor on the amount of resources a child receives if the parents' financial resources are inadequate. Because of this, U.S. children are far more vulnerable to their parents' poverty, as well as to economic shocks experienced by their parents, than children in other countries.<sup>42</sup> Yet parents are among the Americans most likely to experience economic shocks. As Jacob Hacker observes:

[F]ully a quarter of "poverty spells" in the United States—periods in which family income drops below the federal poverty line—begin with the birth of a child, [and] . . . the presence of children in the household is the single best predictor that a woman will end up filing for bankruptcy.<sup>43</sup>

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mies; the United States is a member. See *Members and Partners*, OECD, <http://www.oecd.org/about/membersandpartners> (last visited Oct. 12, 2017).

37 See Gøsta Esping-Andersen, *A Child-Centred Social Investment Strategy*, in *WHY WE NEED A NEW WELFARE STATE* 26, 51 (2002).

38 I owe this point to conversations with Fernando Filgueira.

39 See Merike Blofield et al., *The Pluralization of Families*, in *INTERNATIONAL PANEL FOR SOCIAL PROGRESS* ¶ 21 (2017), [https://comment.ipsp.org/sites/default/files/pdf/chapter\\_17\\_-\\_the\\_pluralization\\_of\\_families\\_ipsp\\_commenting\\_platform.pdf](https://comment.ipsp.org/sites/default/files/pdf/chapter_17_-_the_pluralization_of_families_ipsp_commenting_platform.pdf) (noting that young couples are at risk of poverty "due to the start of both their productive and reproductive cycle[s]").

40 In 1984, median household wealth of older families was four and a half times what it was for younger families. By 2003 it was thirteen and a half times as great. HACKER, *supra* note 6, at 96, 99 (citing WARREN & TYAGI, *supra* note 6). As a result, young couples put far more debt on credit cards than their parents did. *Id.* at 98–99.

41 Bhattarai, *supra* note 31.

42 See Bradley L. Hardy, *Childhood Income Volatility and Adult Outcomes*, 51 *DEMOGRAPHY* 1641, 1641 (2014); James P. Ziliak et al., *Earnings Volatility in America: Evidence from Matched CPS*, 18 *LAB. ECON.* 742, 742 (2011).

43 HACKER, *supra* note 6, at 101.

Indeed, American families are expected to bear significantly more financial risk than in the past as a result of the casualization of employment, the demise of guaranteed benefit pensions, increased health care costs if a family member has a medical problem, and other economic changes.<sup>44</sup> Yet with the notable exceptions of the politically endangered Affordable Care Act for health insurance and the also politically endangered Consumer Financial Protection Bureau to guard consumer financial transactions, no new public policies have been enacted to buffer families from these risks.<sup>45</sup>

The fact of privatization does not mean that Americans spend less on social welfare than do citizens in Europe. Overall, the United States spends roughly the same amount on these goods as do countries with robust welfare states.<sup>46</sup> In fact, for many items, including health care and college education, Americans spend significantly more.<sup>47</sup> American parents, however, spend these dollars privately as consumers—paying them directly to

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44 Although two-parent families in the United States have generally been more stable financially than other family forms, as Jacob Hacker notes, “married couples with children have nonetheless seen a dramatic increase in the instability of their incomes over the last two decades.” HACKER, *supra* note 6, at 91. Pretax and transfer family income instability rose 35% between 1980 and 2012. Further,

the total debt held by Americans has ballooned as a share of income, especially for families with children. As a share of income in 2004, total debt—including mortgages, credit-card debt, car loans, and other liabilities—was more than 125 percent of income for the median married couple with children, or more than three times the level of debt held by married families without children, and more than nine times the level of debt held by childless adults.

*Id.* at 94.

45 See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 5, 7, 12, 15, 22, 26, 28, 31, and 42 U.S.C.); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

46 In Gøsta Esping-Andersen’s words, “macroeconomically speaking, total welfare costs will probably not change much however we combine markets and state. Denmark and the United States occupy the polar extremes in terms of public social spending but end up virtually identical when we examine total net social outlays.” GØSTA ESPING-ANDERSEN, *THE INCOMPLETE REVOLUTION: ADAPTING WELFARE STATES TO WOMEN’S NEW ROLES* 105 (2009). Thus, while Denmark’s and the United States’ social welfare outlays may appear vastly different—Denmark spent 30% of GDP on public social outlays in 2013, compared to the United States spending under 20% in 2010—once taxation and tax-based subsidies are adjusted for and private spending on social welfare is included, the amounts are 26% of GDP for Denmark and 30% for the United States. See *id.* at 108–09; OECD, *SOCIAL EXPENDITURE UPDATE: SOCIAL SPENDING IS FALLING IN SOME COUNTRIES, BUT IN MANY OTHERS IT REMAINS AT HISTORICALLY HIGH LEVELS* 1, 8 (2014), [https://www.oecd.org/els/soc/OECD2014-Social-Expenditure\\_Update19Nov\\_Rev.pdf](https://www.oecd.org/els/soc/OECD2014-Social-Expenditure_Update19Nov_Rev.pdf) (analyzing data from Social Expenditure database (“SOCX”).

47 See DAVID SQUIRES & CHLOE ANDERSON, *THE COMMONWEALTH FUND, U.S. HEALTH CARE FROM A GLOBAL PERSPECTIVE*, (2015), <http://www.commonwealthfund.org/publications/issue-briefs/2015/oct/us-health-care-from-a-global-perspective> (comparing health-care costs across the globe and determining that the United States spent far more on healthcare in 2013 than any other country analyzed); NAT’L CTR. FOR EDUC. STATISTICS, *EDUCATION EXPENDITURES BY COUNTRY 2* fig.2 (2017), <https://nces.ed.gov/programs/coe/>

preschools, doctors, colleges, and private pension plans—while citizens who live in countries with robust welfare states pay these dollars to the government as taxpayers, which then publicly provides the good or pays private providers to do so.<sup>48</sup>

The key difference between the United States and countries with robust welfare states is not *how much* is spent overall, but *for whom* and *for what* this money is spent, as well as on the social welfare payoffs that result.<sup>49</sup> While well-to-do American families provide important goods like early childhood education (ECE) for their children, they pay for them privately. In families who cannot afford to provide goods like ECE, the children simply do not receive them.<sup>50</sup> In contrast, in countries with generous welfare states, spending is far more equal among children. This means, overall, that middle-class children in Denmark have roughly the same amount spent on them as in the U.S. system, but poor Danish children have considerably more spent on them than poor U.S. children, while well-off Danish children have less spent upon them than U.S. children.<sup>51</sup>

This is not to say that the United States winds up spending as much on every social welfare item as do their counterparts in robust social welfare regimes. On items like family leave and early childhood education, for example, Americans do pay less, even taking into account private spending.<sup>52</sup> Given the significant positive relationship between both family leave and early childhood education with children's wellbeing, however, Americans' reduced spending reduces the social welfare payoff.<sup>53</sup> On other items like college, the combination of public and private spending is higher per capita in the United States than in European countries, but spending is weighted far more toward students from well-to-do families.<sup>54</sup>

Countries with robust welfare states also help harmonize work with family responsibilities through generous paid leaves on the birth of a child (the

pdf/coe\_cmd.pdf (demonstrating that the United States spends more than almost any other country in annual expenditures per full-time student for postsecondary education).

48 See ESPING-ANDERSEN, *supra* note 46, at 109.

49 See *id.* at 110 (“The really relevant question has to do with *who* are the winners and losers, and what may be the second-order consequences [such as parents not taking family leaves that would benefit children], when we opt for one or another public-private mix.”).

50 See *infra* note 186.

51 See ESPING-ANDERSEN, *supra* note 46, at 109.

52 See EDUCATION AT A GLANCE, *supra* note 36, at 4 (“[T]otal public and private expenditure on early childhood education as a percentage of GDP (0.4%) is below the OECD average (0.5%).”); OECD, FAMILY DATABASE: KEY CHARACTERISTICS OF PARENTAL LEAVE SYSTEMS 9 chart PF1.6.D (2017), [http://www.oecd.org/els/family/PF1\\_6\\_Public\\_spending\\_by\\_age\\_of\\_children.pdf](http://www.oecd.org/els/family/PF1_6_Public_spending_by_age_of_children.pdf) (public expenditures of OECD countries on parental leave; United States not included because it has no publicly funded program in 2013).

53 See *infra* notes 168–72, 180–87 and accompanying text.

54 “Across all OECD countries, 30% of the expenditure on higher education comes from private sources, while 62% in the U.S. does.” “The odds that a young person in the U.S. will receive higher education if his or her parents do not have an upper secondary education are just 29%, one of the lowest levels among OECD countries.” EDUCATION AT A GLANCE, *supra* note 36, at 1.

average for OECD countries is just over one year's paid leave),<sup>55</sup> followed by subsidized daycare and then publicly provided early childhood education, as well as laws enabling parents to work fewer hours.<sup>56</sup> For older children, school hours coordinate with parents' work schedules.<sup>57</sup> In the United States, by contrast, the only law parents have to ease work-family conflicts is the Family and Medical Leave Act of 1993 (FMLA), which provides twelve weeks of unpaid leave following the birth or serious illness of a child.<sup>58</sup> This means that economic forces drive whether family members can take leaves and the extent of such leaves. The United States provides no protection against requiring employees to work long hours,<sup>59</sup> no parity of wages or benefits for workers who work part-time, and has not developed any comprehensive system for providing, subsidizing, or even regulating early childcare education.<sup>60</sup> Further, school hours do not coordinate with parents' standard

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55 See OECD, FAMILY DATABASE: TRENDS IN PARENTAL LEAVE POLICIES SINCE 1970, at 1 (2016), [https://www.oecd.org/els/family/PF2\\_5\\_Trends\\_in\\_leave\\_entitlements\\_around\\_childbirth.pdf](https://www.oecd.org/els/family/PF2_5_Trends_in_leave_entitlements_around_childbirth.pdf).

56 See GORNICK & MEYERS, *supra* note 7; ARIANE HEGEWISCH & JANET C. GORNICK, INST. FOR WOMEN'S POLICY RESEARCH, STATUTORY ROUTES TO WORKPLACE FLEXIBILITY IN CROSS-NATIONAL PERSPECTIVE (2008); JANE WALDFOGEL, WHAT CHILDREN NEED (2006).

57 See Katrine Benhold, *German Women Cast off a Taboo on the Way to Work*, N.Y. TIMES (Jan. 24, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9c06e0dd1630f937a15752c0a9669d8b63> (discussing expansion of school hours in German schools to accommodate working mothers).

58 Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601–54 (2012)). Five states have passed laws requiring companies to give workers paid sick days to care for themselves or family members. See CAL. LAB. CODE §§ 245–249 (West 2017); CONN. GEN. STAT. §§ 31-57s–31-57w (2014); MASS. GEN. LAWS, ch. 149, §§ 148C–148D (2017), *invalidated by* CSX Transp., Inc. v. Healey, 861 F.3d 276 (1st Cir. 2017); OR. REV. STAT. § 653.606 (2017); VT. STAT. ANN. tit. 21, §§ 481–87 (2017). In California, paid family leave for birth and adoption lasts for up to six weeks during the course of a calendar year and covers roughly 55% of employee earnings up to a maximum weekly benefit amount. See *Calculating Paid Family Leave Benefit Payment Amounts*, CA.GOV, [http://www.edd.ca.gov/Disability/Calculating\\_PFL\\_Benefit\\_Payment\\_Amounts.htm](http://www.edd.ca.gov/Disability/Calculating_PFL_Benefit_Payment_Amounts.htm) (last visited Oct. 12, 2017). Additionally, New Jersey and Rhode Island currently have paid family leave programs in place, and New York recently passed a paid family leave act to take effect in 2018. N.J. STAT. ANN. § 43:21-39.3 (West 2017); 28 R.I. GEN. LAWS § 28-48-2 (2017); *New York State Paid Nation's Family Leave Program*, NY.GOV, <https://www.ny.gov/programs/paid-family-leave-strong-families-strong-ny> (last visited Oct. 12, 2017).

59 The United States provides no cap on mandatory hours, but instead simply requires that employers must pay extra for overtime beyond forty hours per week. See Fair Labor Standards Act of 1938, Pub. L. 75-718, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–19 (2012)).

60 See GORNICK & MEYERS, *supra* note 7, at 197; see also Jonathan Cohn, *The Hell of American Day Care*, NEW REPUBLIC (Apr. 29, 2013), <https://newrepublic.com/article/112892/hell-american-day-care>.

working hours,<sup>61</sup> few publicly provided programs fill children's summer time,<sup>62</sup> and college largely depends on parents' financial means.<sup>63</sup>

### B. *The Contemporary Privatized Family*

Privatized-family policy would matter little if families flourished in the absence of government policies to support them. That is hardly the state of affairs in the contemporary United States, however, where market forces have put families between a rock and a hard place. The difficulties are different, and certainly more severe, for those in the lower-income strata, where market forces have destabilized family forms. Yet families at all income levels are now stressed by the play of market forces on them and have had their caretaking and human development functions impaired as a result.

#### 1. Privatized-family forms

At the bottom of the economic ladder, market forces have profoundly damaged the forms families take during the last half century. In the 1970s, 67% of adults without high school degrees between the ages of twenty-five and sixty were in intact first marriages; by the 2000s, that figure had dropped to 39%.<sup>64</sup> In the meantime, nonmarital births rose precipitously—83% of first births in 2010 to high school dropouts were to unmarried mothers.<sup>65</sup> An astounding 96% of births to African American high school dropouts happen outside marriage.<sup>66</sup> In 2011, among unmarried women (ages fifteen to

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61 See WALDFOGEL, *supra* note 56, at 173.

62 See, e.g., KJ Dell'Antonia, *The Families that Can't Afford Summer*, N.Y. TIMES (Jun. 4, 2016), <https://www.nytimes.com/2016/06/05/sunday-review/the-families-that-cant-afford-summer.html>.

63 See Robert Farrington, *Too Poor for College, Too Rich for Financial Aid*, FORBES (June 17, 2014) <https://www.forbes.com/sites/robertfarrington/2014/06/17/too-poor-for-college-too-rich-for-financial-aid/#294e660c6922>; Matt Krupnick, *Low-Income Students Struggle to Pay for College, Even in a State that Provides Help*, PBS NEWSHOUR (Aug. 18, 2015), <http://www.pbs.org/newshour/updates/low-income-students-struggle-pay-college-even-state-still-provides-help/>.

64 NAT'L MARRIAGE PROJECT, *THE STATE OF OUR UNIONS: MARRIAGE IN AMERICA* 21 fig.3 (W. Bradford Wilcox et al. eds., 2010), <http://stateofourunions.org/2010/when-marriage-disappears.php>.

65 KAY HYMOWITZ ET AL., *KNOT YET: THE BENEFITS AND COSTS OF DELAYED MARRIAGE IN AMERICA*, 18 fig.10B (2013), [nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf](http://nationalmarriageproject.org/wp-content/uploads/2013/03/KnotYet-FinalForWeb.pdf); Andrew J. Cherlin et al., *Nonmarital First Births, Marriage, and Income Inequality*, 81 AM. SOC. REV. 749, 752 (2016) (finding that 34.3% of people without high school degrees had nonmarital children in 2010). The increase in nonmarital births appeared to level off beginning in 2008. See CHILD TRENDS DATA BANK, *BIRTHS TO UNMARRIED WOMEN: INDICATORS ON CHILDREN AND YOUTH* 3 fig.1, 9 app.1 (2015) [http://www.childtrends.org/wp-content/uploads/2015/03/75\\_Births\\_to\\_Unmarried\\_Women.pdf](http://www.childtrends.org/wp-content/uploads/2015/03/75_Births_to_Unmarried_Women.pdf).

66 CARBONE & CAHN, *supra* note 16, at 14. The trend of increasing births to unmarried women continued until 2008 but has since stabilized and even declined slightly. See Brady E. Hamilton et al., *Births: Final Data for 2014*, 64 NAT'L VITAL STATS. REP., no. 12, at 2 (2015).

fifty) who had a child in the last year, those with less education had higher percentages of nonmarital births. For instance, among those who had not completed high school, 61% had a nonmarital birth. In contrast, among those who had a bachelor's degree or more, 9% had a nonmarital birth.<sup>67</sup>

While the rise in nonmarital children was originally seen as a racial issue,<sup>68</sup> it is now recognized as associated with the underclass generally.<sup>69</sup> This shift is not, it should be emphasized, a simple function of changing preferences.<sup>70</sup> Most unmarried mothers believe that marriage is the best basis for family life and would like to marry.<sup>71</sup> Furthermore, most nonmarital children are born to cohabiting couples.<sup>72</sup> Yet the mothers of these children do not marry their partners in considerable part because they do not believe their partners to be economically stable.<sup>73</sup> For example, decades ago, William Julius Wilson traced the rising rates of out-of-wedlock births in African American inner-city communities to the decline of industrial jobs in cities.<sup>74</sup> This reduced the pool of men that women considered eligible for marriage because many were not stable economic partners.<sup>75</sup> Excluding unemployed and imprisoned African Americans from the pool, Wilson calculated that fewer than fifty "marriageable" men were left for every

67 GRETCHEN LIVINGSTON & D'VERA COHN, PEW RESEARCH CTR., LONG-TERM TREND ACCELERATES DURING RECESSION: RECORD SHARE OF NEW MOTHERS ARE COLLEGE EDUCATED 2 (2013).

68 See, e.g., DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 22–23 (1965), <https://web.stanford.edu/~mrosenfe/Moynihan%27s%20The%20Negro%20Family.pdf>.

69 See Frank F. Furstenberg, *If Moynihan Had Only Known: Race, Class, and Family Change in the Late Twentieth Century*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 94, 108 (2009); see also NAT'L MARRIAGE PROJECT, *supra* note 64, at 23–24.

70 Although unmarried mothers still prefer to marry, norms regarding the acceptability of nonmarital childbearing have also changed. See Cherlin et al., *supra* note 65, at 752 ("In the 2006 to 2010 [National Survey of Family Growth], 78 percent of women and 70 percent of men strongly agreed or agreed with the statement, 'It is okay for an unmarried female to have a child.' . . . This acceptance creates the opportunity for respectable family formation outside of marriage.").

71 See KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 6 (2005); see also Cherlin et al., *supra* note 65, at 752 ("[E]ven as the percentage of the population that is currently married decreases, marriage is still seen as the best basis for family life, even among the low-income population." (citation omitted)); Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 FUTURE CHILDREN 117, 122–23 (2005).

72 See Kristen Harknett & Sara S. McLanahan, *Racial and Ethnic Differences in Marriage After the Birth of a Child*, 69 AM. SOC. REV. 790, 796 fig.2 (2004); Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 617–18 (2004).

73 See Harknett & McLanahan, *supra* note 72, at 808.

74 See, e.g., WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY 82–84 (1987).

75 *Id.*



hundred African American women between the ages of twenty and twenty-four.<sup>76</sup>

In recent decades, this same drop in marriage and rise in nonmarital births has spread to the middle tier of adults, composed of those who have graduated high school but not college. In the 1970s, working-class families had the same intact first marriage rates as college graduates—73%.<sup>77</sup> By the 2000s, however, their marriage rates had dropped to 45%, compared to the well-educated's rate of 56%.<sup>78</sup> Meanwhile, of all births among women in this group, the rate of nonmarital births has risen from 13% in 1982 to 42% between 2006 and 2008.<sup>79</sup>

Here, too, researchers have tied these changes to the transformation in the U.S. economy beginning in the 1990s, which sharply increased instability and un- and underemployment among blue-collar American men.<sup>80</sup> Economic pressures also mean that, even when working-class adults marry, they are more likely to divorce than well-educated couples,<sup>81</sup> resulting in what sociologist Andrew Cherlin has dubbed the “marriage-go-round.”<sup>82</sup>

The increased instability of relationships among those with low and moderate education produces a number of negative consequences. Most importantly, single parenthood negatively affects children's life chances by

76 *Id.*; see also CARBONE & CAHN, *supra* note 16, at 71.

77 NAT'L MARRIAGE PROJECT, *supra* note 64, at 21 fig.3.

78 *Id.*

79 *Id.* at 23–24.

80 For one particularly dramatic graphic presentation of the loss of manufacturing jobs in that period, which had traditionally been held largely by working-class men, see Global Macro Monitor, *Chart of the Day: US Manufacturing Employment, 1960–2012*, CREDIT WRITEDOWNS (May 1, 2012), <https://www.creditwritedowns.com/2012/05/chart-of-the-day-us-manufacturing-unemployment-1960-2012.html>. For an excellent discussion of the relationship between macroeconomic changes and the destabilization of working-class families, see CARBONE & CAHN, *supra* note 16, at 75–77. Robust data at the aggregate level correlate the rise of nonmarital births with the rise of economic inequality and instability. Although the evidence is less robust when it comes to demonstrating how this increase in inequality causally affects nonmarital births at the individual level, significant data now support this conclusion. See, e.g., WILSON, *supra* note 74, at 82–84; Cherlin et al., *supra* note 65, at 759–62; McLanahan, *supra* note 72, at 617–18. As Cherlin et al. conclude: “For both women and men, the greater the availability of middle-skilled jobs, the greater the likelihood of marrying prior to having a first birth. Moreover, the indicators of both women's and men's jobs are significantly associated with marrying for women and men.” *Id.* at 762.

81 June Carbone and Naomi Cahn point out that the declining wages of men in this tier have made it financially necessary for these wives to work for pay. Yet many wives find their jobs less rewarding and less accommodating of family responsibilities than their peers with college diplomas. See CARBONE & CAHN, *supra* note 16, at 99–100. This, and the fact that these families cannot afford the time- and labor-saving services to which professional couples can resort, like nannies and house-cleaning services, strains their marriages, which contributes to their rising rates of divorce. See *id.* at 100; see also PAUL R. AMATO ET AL., *ALONE TOGETHER: HOW MARRIAGE IN AMERICA IS CHANGING* 79 (2009).

82 ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* (2009).

decreasing the amount of care and resources they receive.<sup>83</sup> This instability also increases loneliness. In one recent survey, almost half of adults (49%) who had been divorced for up to twenty years described themselves as lonely, as did 40% of those divorced for more than twenty years.<sup>84</sup> The decline of stable relationships also helps explain why Americans report themselves to be less satisfied with their lives than the citizens of fourteen other OECD countries, despite the fact that they are significantly wealthier.<sup>85</sup> In the words of one expert: “A stable marriage, good health, and enough—but not too much—income are good for happiness. . . . Unemployment, divorce, and economic instability are terrible for it.”<sup>86</sup>

## 2. Privatized-family function

The privatized-family model affects not only family form, but also the way that families function. The increased levels of economic insecurity and inequality Americans have experienced, in combination with the absence of government buffers, have profoundly altered the boundaries between work and family in ways that negatively affect families’ wellbeing. While most families have lost as a result of this competition, poor families have lost the most. Yet even the families of the well-to-do lose considerably from competing to ensure their hard-fought place in the economic hierarchy.

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83 See CARBONE & CAHN, *supra* note 16, at 15–16, 79; JAMES J. HECKMAN, *GIVING KIDS A FAIR CHANCE* 19 (2013). Experts disagree on how much the deficits seen in single-parent families could be counteracted by strong welfare policies. Yet there is no doubt that in our privatized-family system, divorce has significant negative effects on outcomes for children. As Arlie Hochschild summarizes the situation:

After divorce, not only are fathers physically absent, but they reduce contact with their children and, over time, give them less money. A national study found that, three years after divorce, half of American divorced fathers had not visited their children during the entire previous year and thus did not perform the most basic form of care. After one year, half of divorced fathers were providing no child support at all, and most of the other half paid irregularly or less than the court-designated amounts. . . . So, taken together, recent trends in the class structure, certain demographic shifts, and family decline have shifted the population in need of care, radically reduced social supports on the home front, and moved a good deal of the burden of care from men to women.

ARLIE RUSSELL HOCHSCHILD, *THE COMMERCIALIZATION OF INTIMATE LIFE: NOTES FROM HOME AND WORK* 216 (2003) (footnotes omitted).

84 C. WILSON & B. MOULTON, *LONELINESS AMONG OLDER ADULTS: A NATIONAL SURVEY OF ADULTS 45+*, at 23 (2010), [http://assets.aarp.org/rgcenter/general/loneliness\\_2010.pdf](http://assets.aarp.org/rgcenter/general/loneliness_2010.pdf).

85 OECD, *Life Satisfaction*, OECD BETTER LIFE INDEX, <http://www.oecdbetterlifeindex.org/topics/life-satisfaction/> (last visited Oct. 13, 2017).

86 Bruce Stokes, *The Happiest Countries in the World*, ATLANTIC (June 8, 2011), <http://www.theatlantic.com/business/archive/2011/06/the-happiest-countries-in-the-world/240103/>.

a. Reconciling work and family

All market societies must balance paid work with the caretaking and development activities that make society flourish. Yet the privatized-family model demands that families must strike this balance on their own. The result has been that American families have been overwhelmed by conflicting demands of work and family.

To begin with, American workers work significantly more hours than workers in most wealthy countries. Full-time workers reported an average forty-seven-hour workweek in 2014; only four in ten workers worked the supposedly standard forty-hour workweek.<sup>87</sup> On an annual basis, the 1789 hours that the average American worker works amounts to roughly ten more weeks a year than workers in Germany (1366), nine weeks more than workers in the Netherlands (1420), and is even more than workers in the notoriously hard-working country of Japan (1729), whose workers are so exhausted that their government has put reducing work hours on the national agenda.<sup>88</sup>

Americans did not always work longer hours than workers in other countries. In the 1960s, they worked an average number of hours for workers in wealthy, developed countries.<sup>89</sup> Since then, however, most of these other countries funneled increases in productivity into reducing work hours;<sup>90</sup> meanwhile, the United States funneled these increases into the pockets of the top one percent.<sup>91</sup> In fact, while the income of U.S. families has risen since the 1970s, those gains largely came from women's entry into paid work.<sup>92</sup> The total paid workload of two-parent families increased by an average of 12.5 hours per week between 1965 and 2000—a massive transfer of the hours of family members into paid work from the domestic sphere.<sup>93</sup>

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87 Lydia Saad, *The “40-Hour” Workweek Is Actually Longer—by Seven Hours*, GALLUP (Aug. 29, 2014), <http://www.gallup.com/poll/175286/hour-workweek-actually-longer-seven-hours.aspx>.

88 OECD, *Hours Worked*, OECD DATA, <https://data.oecd.org/emp/hours-worked.htm> (last visited Oct. 13, 2017) (based on 2014 data); Justin McCurry, *Clocking Off: Japan Calls Time on Long-Hours Work Culture*, GUARDIAN (Feb. 22, 2015), <https://www.theguardian.com/world/2015/feb/22/japan-long-hours-work-culture-overwork-paid-holiday-law>.

89 Michael Huberman & Chris Minns, *The Times They Are Not Changin': Days and Hours of Work in Old and New Worlds, 1870–2000*, 44 EXPLORATIONS ECON. HIST. 538, 542 tbl.1 (2007).

90 See HACKER & PIERSON, *supra* note 29, at 24–27.

91 See LAWRENCE MISHEL ET AL., *THE STATE OF WORKING AMERICA* 57–95 (12th ed. 2012); see also HACKER & PIERSON, *supra* note 29, at 24–27.

92 Lawrence Mishel, *Vast Majority of Wage Earners Are Working Harder, and For Not Much More: Trends in U.S. Work Hours and Wages over 1979–2007*, ECON. POL'Y INST., Jan. 30, 2013, at 4, [http://www.epi.org/publication/ib348-trends-us-work-hours-wages-1979-2007/#\\_ref1](http://www.epi.org/publication/ib348-trends-us-work-hours-wages-1979-2007/#_ref1).

93 See SUZANNE M. BIANCHI ET AL., *THE CHANGING RHYTHMS OF AMERICAN FAMILY LIFE* 48–53 (2006); Michael Hout & Caroline Hanley, *The Overworked American Family: Trends and Nontrends in Working Hours, 1968–2001*, at 11 (June 2002) (unpublished working paper) (on file with The Survey Research Ctr. at the Univ. of Cal., Berkeley), [http://ucdatadev.berkeley.edu/rsfcensus/papers/Working\\_Hours\\_HoutHanley.pdf](http://ucdatadev.berkeley.edu/rsfcensus/papers/Working_Hours_HoutHanley.pdf).

Two-earner families in the United States—more than half of all American couples—now spend an average of 82.7 hours a week at their paid jobs,<sup>94</sup> compared to 63.4 hours for Dutch parents, and 74.3 hours for Swiss parents.<sup>95</sup> Indeed, almost two-thirds (64%) of American couples working full-time report a total of eighty or more hours a week.<sup>96</sup> The comparable figure for Denmark is less than a third (31.6%).<sup>97</sup> Even more startling, 19% of dual-earner U.S. couples with children work more than one hundred hours a week; the relevant comparison figure in the Netherlands is 1.2%.<sup>98</sup>

These long hours are not simply a matter of preference. Most spouses employed full-time—59% for wives and 45% for husbands—preferred to work fewer hours or not at all.<sup>99</sup> Furthermore, most do not work these hours because they are engaged in their jobs. In a recent Gallup survey, only 31.5% of employees stated that they were “engaged” in their work, where engagement was defined as involved, enthusiastic, and committed to their work.<sup>100</sup> Another 51% stated they were “not engaged”; and 17.5% deemed themselves “actively disengaged.”<sup>101</sup>

One reason that Americans work so hard is the failure of U.S. law to help reconcile work with family responsibilities.<sup>102</sup> For example, in contrast to a number of OECD countries that provide one year’s paid parental leave, U.S. law mandates just twelve weeks unpaid leave.<sup>103</sup> Yet the American economy’s combination of increased economic inequality and considerable economic

94 Carla Medalia & Jerry A. Jacobs, *Working Time for Married Couples in 28 Countries*, in *THE LONG WORK HOURS CULTURE: CAUSES, CONSEQUENCES AND CHOICES* 137, 149 tbl.6.3 (Ronald J. Burke & Cary L. Cooper eds., 2008).

95 *Id.*

96 *Id.*

97 *Id.*

98 *Id.* There are countries in which dual-earner couples work more hours on average than Americans, but these countries—Portugal, Latvia, the Philippines, Taiwan, Chile, Mexico, Poland, and Hungary—are much poorer than the United States. *See id.*

99 AMATO ET AL., *supra* note 81, at 112–13.

100 Amy Adkins, *Majority of U.S. Employees Not Engaged Despite Gains in 2014*, GALLUP (Jan. 28, 2015), <http://www.gallup.com/poll/181289/majority-employees-not-engaged-despite-gains-2014.aspx>.

101 *Id.* In contrast, 94% of women and 91% of men report that being a good parent is one of the most important things or very important in their life; only 51% of women and 49% of men said that being successful in a high-paying career or profession was the most or one of the most important priorities. EILEEN PATTEN & KIM PARKER, PEW RESEARCH CTR., *A GENDER REVERSAL ON CAREER ASPIRATIONS* 4 (2012), <http://www.pewsocialtrends.org/files/2012/04/Women-in-the-Workplace.pdf>.

102 *See, e.g.*, GORNICK & MEYERS, *supra* note 7; JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000); Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1317–18 (2008); Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN’S L.J. 77, 78 (2003).

103 *Cf.* OECD, *supra* note 55, at 45.

insecurity also contribute to Americans' long work hours.<sup>104</sup> For example, while American workers receive significantly less paid vacation time than workers in other countries (because other countries mandate paid vacation),<sup>105</sup> Americans do not even take all of their paid vacation time.<sup>106</sup> As Harvard economist Richard Freeman observed, employees are significantly more likely to take less vacation time the more insecure they feel on their job.<sup>107</sup>

Indeed, the growing gap between good jobs and bad jobs in the United States,<sup>108</sup> combined with increasing economic inequality and insecurity, create, in Prof. Freeman's words, both a carrot and stick that push Americans to work long hours:

The carrot is that Americans who work hard have a better chance of being promoted, moving up in the wide distribution of earnings, and experiencing substantial earnings increases. The stick is that Americans who lose their jobs suffer greatly because the United States has a minimal safety net for the unemployed. . . .

In addition, the wide U.S. earnings distribution creates huge incentives for workers to choose higher-paid occupations, such as investment banking, over occupations that pay less because much of their output consists of social externalities, such as science or math; to move across country in pursuit of better jobs; to change jobs frequently; and to quit their job when they have problems at their workplace. In the United States more than in other coun-

104 For discussions of the increase in economic insecurity, see HACKER, *supra* note 6; WARREN & TYAGI, *supra* note 6; *supra* notes 44–45 and accompanying text. For documentation of the increased inequality in the United States, see HACKER & PIERSON, *supra* note 29; THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Arthur Goldhammer trans., 2013).

105 See GORNICK & MEYERS, *supra* note 7, at 178–80; Robert W. Van Giezen, *Paid Leave in Private Industry over the Past 20 Years*, 2 BEYOND THE NUMBERS, no. 18, 2013, at 2 tbl.1, <https://www.bls.gov/opub/btn/volume-2/paid-leave-in-private-industry-over-the-past-20-years.htm>. American employees who receive paid leave get an average of ten paid days for one year's employment, fourteen days for employees employed for five years, through twenty days for employees employed for twenty years. In contrast, most OECD countries mandate by law that employees must receive four to six weeks paid annual vacation days per year. OECD, *FAMILY DATABASE: ADDITIONAL LEAVE ENTITLEMENTS FOR WORKING PARENTS 1* (2016), [https://www.oecd.org/els/soc/PF2\\_3\\_Additional\\_leave\\_entitlements\\_of\\_working\\_parents.pdf](https://www.oecd.org/els/soc/PF2_3_Additional_leave_entitlements_of_working_parents.pdf).

106 One study conducted in 2010 found that only 57% of American workers took all of their available leave; in contrast, 89% of French workers took all their vacation time. *French Most Likely to Use All Vacation, Japanese Least: Poll*, REUTERS (Aug. 6, 2010), <http://www.reuters.com/article/us-vacations-poll/french-most-likely-to-use-all-vacation-japanese-least-poll-idUSTRE6753LI20100806>.

107 RICHARD B. FREEMAN, *AMERICA WORKS: CRITICAL THOUGHTS ON AN EXCEPTIONAL U.S. LABOR MARKET* 60 (2007).

108 In 1980, more than 90% of the U.S. workforce worked for an employer. Today, more than a third are freelancers, contractors, or temporary workers. Susan Adams, *More than a Third of U.S. Workers Are Freelancers Now, but Is That Good for Them?*, FORBES (Sept. 5, 2014), <https://www.forbes.com/sites/susanadams/2014/09/05/more-than-a-third-of-u-s-workers-are-freelancers-now-but-is-that-good-for-them/#5646d2b621c3>.

tries, work is paramount in how people live, and that creates problems of work and family life balance.<sup>109</sup>

As another Harvard economist, Benjamin Friedman, noted, Americans' rise in work hours began at exactly the same time in the early 1970s that the gains of increasing productivity stopped being widely shared, which increased inequality.<sup>110</sup>

These same factors—the absence of laws that help reconcile work and family and the response to inequality and insecurity—also contribute to the short parental leaves that U.S. parents take. Most women and the vast majority of men do not take even the twelve weeks unpaid leave they are entitled to by law.<sup>111</sup> In many cases, this is because they cannot afford to: low-paid women are the least likely to receive paid maternity leave. Only 18% of mothers without a high school diploma get paid parental leave compared with 66% of women with a bachelor's degree.<sup>112</sup> Yet, even college graduates do not take all the leave available to them, albeit often for reasons connected

109 FREEMAN, *supra* note 107, at 59; *see also* Wendy R. Boswell et al., *I Cannot Afford to Have a Life: Employee Adaptation to Feelings of Job Insecurity*, 67 PERSONNEL PSYCHOL. 887, 888 (2014) (finding that employees who considered their jobs insecure made less use of organizational support programs and were more likely to allow work demands to permeate their personal time); *id.* at 906 (“This finding is consistent with predictions drawn from previous empirical research that has identified a link between job insecurity and strain . . . .”); Magnus Sverke et al., *No Security: A Meta-Analysis and Review of Job Insecurity and Its Consequences*, 7 J. OCCUPATIONAL HEALTH PSYCHOL. 242 (2002) (finding that employees become unable to detach from work at even modest perceptions of job insecurity).

110 Benjamin M. Friedman, *Work and Consumption in an Era of Unbalanced Technological Advance*, 27 J. EVOLUTIONARY ECON. 221, 230 (2015); *see also* Alberto Alesina et al., *Work and Leisure in the United States and Europe: Why So Different?*, in 20 NAT'L BUREAU OF ECON. RESEARCH, MACROECONOMICS ANNUAL 2005, at 1, 42 (Mark Gertler & Kenneth Rogoff eds., 2005) (“Hours worked have fallen, especially in continental European countries characterized by strong unions, extensive welfare coverage, high taxation, and prevalence of social democratic governments, all factors that [ ] reduce inequality. Hours worked have not fallen in the United States and (to a lesser extent in the United Kingdom and Ireland) because these are countries with less extensive welfare, less intrusive regulations, less powerful union movements, and more inequality. The bottom line is that hours worked fell in countries that can be characterized by the continental European model and did not fall in the countries with the American model (with Britain and Ireland in between).” (citation omitted)). *See generally*, Alberto Alesina et al., *Inequality and Happiness: Are Europeans and Americans Different?*, 88 J. PUB. ECON. 2009 (2004).

111 *See* 29 U.S.C. § 2612(a)(1) (2012) (“[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period.”); *Id.* § 2614 (setting forth “[e]mployment and benefits protection”); U.S. DEP'T OF LABOR, DOL FACTSHEET: PAID FAMILY AND MEDICAL LEAVE (2015), <https://www.dol.gov/wb/paidleave/PDF/PaidLeave.pdf>; U.S. Dep't of Labor, *Foreword* to DAVID CANTOR ET AL., BALANCING THE NEEDS OF FAMILIES AND EMPLOYERS: FAMILY AND MEDICAL LEAVE SURVEYS, at viii, x (2001), <http://www.dol.gov/whd/fmla/foreword.pdf>.

112 Sharon Lerner, *Is 40 Weeks the Ideal Maternity Leave Length?*, SLATE (Dec. 22, 2011), [http://www.slate.com/articles/double\\_x/doublex/2011/12/maternity\\_leave\\_how\\_much\\_time\\_off\\_is\\_healthiest\\_for\\_babies\\_and\\_mothers\\_.html](http://www.slate.com/articles/double_x/doublex/2011/12/maternity_leave_how_much_time_off_is_healthiest_for_babies_and_mothers_.html).

with their professional roles.<sup>113</sup> The overall result is that nearly one-third of employed women (29%) report taking no maternity leave at all.<sup>114</sup> Of the 71% of women who do, the average length is 10.3 weeks.<sup>115</sup> This is far less time than the year generally taken by their European OECD counterparts.<sup>116</sup> U.S. fathers take even less time.<sup>117</sup> In a recent study, more than three-quarters of white-collar fathers surveyed reported they took one week leave or less; of these, 16% took no time off.<sup>118</sup> More than 75% of the fathers stated that they would like to have had more time off with their newborns.<sup>119</sup>

U.S. parents are pressed to work long and hard in paid work, but it turns out that they are also pressed to parent hard in the privatized-family system. Even as parents are spending more hours at work, their hours actively caring for children have increased to record highs. Between 1965 and 2010, married mothers increased the time they spent actively caring for their children, despite their rising work hours, from an average of 10.5 hours to 13.7 hours per week.<sup>120</sup> This increase did not come from routine caregiving time, such as feeding children, clothing them, or bathing them, which all held steady during this period. Instead it came from a rise in interactive activities like playing with and reading to children.<sup>121</sup> Single mothers' time on childcare also rose from 7.5 hours in 1965 to 11.8 hours per week in 2010.<sup>122</sup> Married

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113 DAVID M. BLAU, *THE CHILD CARE PROBLEM: AN ECONOMIC ANALYSIS* (2001); ESPING-ANDERSEN, *supra* note 46, at 24, 84–85.

114 U.S. DEP'T OF HEALTH & HUMAN SERVS., *WOMEN'S HEALTH USA 2011*, at 54 (2011), <https://mchb.hrsa.gov/whusa11/hstat/hsrhm/pages/233ml.html>.

115 *Id.*; see also JoNel Aleccia, *Two Weeks After Baby? More New Moms Cut Maternity Leave Short*, TODAY (Sept. 27, 2013), <http://www.today.com/health/two-weeks-after-baby-more-new-moms-cut-maternity-leave-4B11229443> (“About two-thirds of U.S. women are employed during pregnancy and about 70 percent of them report taking some time off, according to most recent figures from the National Center for Health Statistics. The average maternity leave in the U.S. is about 10 weeks, but about half of new moms took at least five weeks, with about a quarter taking nine weeks or more, figures showed.”).

116 ESPING-ANDERSEN, *supra* note 46, at 24; see also OECD, *FAMILY DATABASE: USE OF CHILDBIRTH-RELATED LEAVE BY MOTHERS AND FATHERS* (2016), <https://www.oecd.org/els/family/PF2-2-Use-childbirth-leave.pdf> (analyzing the use of leave by employed mothers in 2013 in OECD countries).

117 See Lauren Weber, *Why Dads Don't Take Paternity Leave; More Companies Offer New Fathers Paid Time off, but Many Fear Losing Face Back at the Office*, WALL ST. J. (June 13, 2013), <http://www.wsj.com/articles/SB10001424127887324049504578541633708283670> (finding that “men are reluctant to take time off for a variety of reasons, ranging from a fear of losing status at work to lingering stereotypes about a father's role in the family”).

118 BRAD HARRINGTON ET AL., *THE NEW DAD: CARING, COMMITTED AND CONFLICTED* 15 (2011), <http://www.bc.edu/content/dam/files/centers/cwf/pdf/FH-Study-Web-2.pdf>.

119 *Id.*

120 Brigid Schulte, *Making Time for Kids? Study Says Quality Trumps Quantity*, WASH. POST (Mar. 28, 2015) (discussing the work of sociologist Melissa Milkie).

121 Suzanne Bianchi et al., *Maternal Employment and Family Caregiving: Rethinking Time with Children in the ATUS 13* (Dec. 1, 2005) (unpublished manuscript), <http://www.atusers.umd.edu/wip2/papers/Bianchi.pdf>.

122 *Id.*

fathers' time also rose, nearly doubling from 2.6 hours to 6.5 hours per week.<sup>123</sup>

As with the rising work hours, these rising parenting hours are likely a response to rising economic inequality and insecurity.<sup>124</sup> Parents are putting more time and energy into children to give them an edge in our increasingly insecure and unequal society.<sup>125</sup> No longer is being "pretty good" enough to ensure children have a comfortable life. Ninety-two percent of children born in 1940 had higher earnings at age thirty than their parents did at the same age, yet only fifty percent of children born in 1980 had the same.<sup>126</sup> Even a college education will not guarantee success: assuming graduates get a job at all, they certainly are no longer assured job benefits and an adequate pension on retirement.<sup>127</sup> Meanwhile, the share of college graduates in "low-wage jobs," defined as paying \$25,000 a year or less in today's dollars, has risen to about 20%, from roughly 15% in 1990.<sup>128</sup>

The increase in parenting time has been far greater in high-income families than those below, particularly from fathers.<sup>129</sup> Well-to-do parents now perform what one sociologist calls "intensive cultivation"—taking their children to weekend sports, ballet, music lessons, math tutors, and involving

123 *Id.*

124 In one researcher's words, "There are a lot of cultural pressures for intensive parenting—the competition for jobs, what we think makes for a successful child, teenager and young adult, and what we think in a competitive society with few social supports is going to help them succeed." Schulte, *supra* note 120.

125 In a *New York Times* blog post, Stanford Professor of Education Sean Reardon described "the growing perception that early childhood experiences are central to winning a lifelong educational and economic competition." Sean F. Reardon, Opinion, *No Rich Child Left Behind*, N.Y. TIMES (Apr. 27, 2013), <https://opinionator.blogs.nytimes.com/2013/04/27/no-rich-child-left-behind/>; see also News Release, N.Y.U., *NYU Study Examines Top High School Students' Stress and Coping Mechanisms* (Aug. 11, 2015) [hereinafter *N.Y.U. Study*], <http://www.nyu.edu/about/news-publications/news/2015/august/nyu-study-examines-top-high-school-students-stress-and-coping-mechanisms.html> ("[S]chools, parents, and students may feel caught in a cycle of escalating demands and expectations, largely out of their control and driven by greater societal factors.").

126 David Leonhardt, Opinion, *The American Dream, Quantified at Last*, N.Y. TIMES (Dec. 8, 2016), <http://www.nytimes.com/2016/12/08/opinion/the-american-dream-quantified-at-last.html>. Furthermore, the few children who earned less than their parents were still doing well, because they were the children of the well-to-do. *Id.*

127 See HACKER & PIERSON, *supra* note 29, at 28–31; LAWRENCE MISHEL ET AL., *supra* note 91, at 228; see also CHARLEY STONE ET AL., CHASING THE AMERICAN DREAM: RECENT COLLEGE GRADUATES AND THE GREAT RECESSION 2–3 (2012), [http://www.heldrich.rutgers.edu/sites/default/files/products/uploads/Chasing\\_American\\_Dream\\_Report.pdf](http://www.heldrich.rutgers.edu/sites/default/files/products/uploads/Chasing_American_Dream_Report.pdf) (finding that in a study of 444 "recession era" college graduates, 12% of graduates were unemployed or underemployed and many graduates were disappointed with their salaries).

128 Jordan Weissmann, *The Growth of College Grads in Dead-End Jobs (in 2 Graphs)*, ATLANTIC (Jan. 16, 2014), <https://www.theatlantic.com/business/archive/2014/01/the-growth-of-college-grads-in-dead-end-jobs-in-2-graphs/283137/>.

129 ESPING-ANDERSEN, *supra* note 46, at 100. The most recent research, though, suggests that parents below the middle class are closing this gap somewhat. See Daphna Bassok et al., *Socioeconomic Gaps in Early Childhood Experiences: 1998 to 2010*, 2 AERA OPEN (2016).



themselves in their children's schools.<sup>130</sup> Much of this cultivation is aimed at getting children into more elite colleges to secure their economic futures.<sup>131</sup>

The hours of paid and unpaid work make for long days and weeks for American parents. By one count, married mothers who work full-time have a combined total workload of sixty-eight hours a week, counting paid and unpaid work (including childcare and housework).<sup>132</sup> For single mothers, the total workload is still higher.<sup>133</sup> Although married men perform less unpaid work than their wives, they work more hours in paid work for a total of a sixty-seven hour workweek—only one hour total work less than their wives.<sup>134</sup> This makes the workload in middle-class, two-parent families where both parents work full-time 135 hours a week when paid and unpaid work are totaled—close to ten hours a day, seven days a week for each parent.<sup>135</sup>

This workload is overwhelming for many, if not most, American families.<sup>136</sup> Sixty percent of mothers who work full-time say balancing home and work is difficult, including twenty percent who say it is very difficult.<sup>137</sup> Fifty-two percent of fathers say this balance is difficult.<sup>138</sup> The increasing stratification of the work force into an overworked, highly paid professional class versus an underworked, underpaid working class means that the pressures of reconciling home and work are highest in the top socioeconomic stratum—the people who, at first blush, might seem to be the “winners” in our privatized-family system.<sup>139</sup> Thirty years ago, professionals worked shorter days

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130 Sabrina Tavernise, *Education Gap Grows Between Rich and Poor*, *Studies Say*, N.Y. TIMES (Feb. 9, 2012), <http://www.nytimes.com/2012/02/10/education/education-gap-grows-between-rich-and-poor-studies-show.html> (“The pattern of privileged families today is intensive cultivation,” said Dr. [Frank] Furstenberg, a professor of sociology at the University of Pennsylvania.”); see also ESPING-ANDERSEN, *supra* note 46, at 72.

131 See Tavernise, *supra* note 130 (“This has been particularly true as more parents try to position their children for college, which has become ever more essential for success in today’s economy.”).

132 BIANCHI ET AL., *supra* note 93, at 172–73.

133 *Id.* at 55 tbl.3.4.

134 *Id.*

135 *Id.* at 116.

136 See generally BRIGID SCHULTE, *OVERWHELMED: WORK, LOVE, AND PLAY WHEN NO ONE HAS THE TIME* (2014).

137 PEW RESEARCH CTR., *RAISING KIDS AND RUNNING A HOUSEHOLD: HOW WORKING PARENTS SHARE THE LOAD* 5 (2015), <http://www.pewsocialtrends.org/2015/11/04/raising-kids-and-running-a-household-how-working-parents-share-the-load/>.

138 *Id.*

139 This split is obscured by the high average working hours in the United States. In one study, the United States had the largest work deficit by far between hours worked by high- and low-educated men of the eight countries ranked; in eight more countries, low-educated men worked more hours than highly educated men. Peter Frase & Janet C. Gornick, *The Time Divide in Cross-National Perspective: The Work Week, Education and Institutions that Matter*, 91 SOC. FORCES 697, 710 fig.3 (2013).

than lower paid workers.<sup>140</sup> Now couples in the top quintile work two to three times as many hours annually as their lowest-quintile peers, and about 20% to 30% more hours than middle-quintile peers.<sup>141</sup> Seventy percent of mothers with a college degree report that it is difficult for them to balance work and family life.<sup>142</sup> Similarly, 61% of college-graduate fathers report work-life stress.<sup>143</sup>

This time crunch is exacerbated for the almost half (47%) of adults in their forties and fifties who are either raising a young child or financially supporting a grown child and who have a parent age sixty-five or older.<sup>144</sup> Most of the care that older Americans receive comes from family members.<sup>145</sup> Fifty-three percent of Americans with an aging parent who requires aid “say caring for their parents is stressful.”<sup>146</sup>

To cope with the overload, parents spend far less time on housework than they used to.<sup>147</sup> They multitask when they can, trying to accomplish their compacted hours of housework while watching children, which itself induces stress.<sup>148</sup> They also empty out the other areas of their life besides

140 JOAN C. WILLIAMS & HEATHER BOUSHEY, *THE THREE FACES OF WORK-FAMILY CONFLICT: THE POOR, THE PROFESSIONALS, AND THE MISSING MIDDLE 6–8* (2010), <https://cdn.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf>.

141 Timothy Smeeding, *Government Programs and Social Outcomes: The United States in Comparative Perspective* tbl.8 (Lux. Income Study, Working Paper No. 426, 2005), <https://pdfs.semanticscholar.org/5507/5b25155b719f72fa9640177f187bdaa074e0.pdf>.

142 PEW RESEARCH CTR., *supra* note 137, at 5.

143 *Id.* These differences hold even when controlling for the fact that college-educated parents are more likely to work full-time. See EILEEN PATTEN, PEW RESEARCH CTR., *HOW AMERICAN PARENTS BALANCE WORK AND FAMILY LIFE WHEN BOTH WORK* (2015), <http://www.pewresearch.org/fact-tank/2015/11/04/how-american-parents-balance-work-and-family-life-when-both-work/>.

144 PEW RESEARCH CTR., *FAMILY SUPPORT IN GRAYING SOCIETIES 11* (2015), <http://www.pewsocialtrends.org/2015/05/21/4-caring-for-aging-parents/>.

145 KIM PARKER & EILEEN PATTEN, PEW RESEARCH CTR., *THE SANDWICH GENERATION 7* (2013), <http://www.pewsocialtrends.org/2013/01/30/the-sandwich-generation/> (“When aging adults need assistance handling their affairs or caring for themselves, family members often help out. Among those with a parent age 65 or older who needs this type of assistance, 31% say they provide most of this help, and an additional 48% say they provide at least some of the help.”).

146 PEW RESEARCH CTR., *supra* note 144, at 41.

147 Women spend much less time on housework now—eighteen hours a week—than they did in 1965—thirty-two hours a week. KIM PARKER & WENDY WANG, PEW RESEARCH CTR., *MODERN PARENTHOOD 27* (2013), <http://www.pewsocialtrends.org/2013/03/14/modern-parenthood-roles-of-moms-and-dads-converge-as-they-balance-work-and-family/> (based on 2011 statistics). Fathers have made up for only some of women’s reduction in hours. *Id.* at 32 (noting that men’s housework hours per week rose from four hours in 1965 to nine hours in 2011); see also ESPING-ANDERSEN, *supra* note 46, at 30–32; Bianchi et al., *supra* note 121, at 13.

148 Indeed, it may be the fact that mothers multitask more than fathers that accounts for women’s sense that they perform more work. In 2011, sociologists Shira Offer and Barbara Schneider found that mothers spend, on average, ten extra hours a week multitasking than do fathers, “and that these additional hours are mainly related to time spent

work and children. As one group of researchers reported: “Couples in 2000 were substantially less likely than couples in 1980 to eat together, visit friends together, go out for leisure activities together, or work on projects around the house together.”<sup>149</sup> Forty-four percent of mothers who work full-time say they spend too little time with their partners.<sup>150</sup> One of the casualties of this system is marital quality. Those who reported that their own or their spouse’s job interfered with family life report a lower quality of marriage.<sup>151</sup>

Another casualty is leisure time. Roughly six in ten (59%) full-time working mothers say they do not have enough time away from their children to get together with friends or to pursue hobbies and other interests.<sup>152</sup> Furthermore, 71% of married mothers and 78% of single mothers report that they have too little free time for themselves.<sup>153</sup> Among fathers, 57% say they do not have enough leisure time away from their children.<sup>154</sup>

This system also takes a substantial toll on the wellbeing of American parents.<sup>155</sup> Robust research shows a significant negative link between U.S. parenthood and several different dimensions of mental health, including generalized distress and depression.<sup>156</sup> Further, American parents report being significantly less happy than nonparents—the biggest happiness gap between parents and nonparents by a substantial margin of twenty-two countries that researchers examined.<sup>157</sup> The researchers attributed these differences to variations among countries in public policies supporting families.<sup>158</sup>

#### b. Children’s wellbeing

While the privatized-family system serves parents poorly, by far its biggest casualty is children. This results from requiring families to order their lives

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on housework and childcare.” Shira Offer & Barbara Schneider, *Revisiting the Gender Gap in Time-Use Patterns: Multitasking and Well-Being Among Mothers and Fathers in Dual-Earner Families*, 76 AM. SOC. REV. 809, 809 (2011). The researchers also concluded that “multitasking plays an important role in mothers’ experiences of emotional stress.” *Id.* at 829.

149 AMATO ET AL., *supra* note 81, at 67.

150 PEW RESEARCH CTR., *supra* note 144, at 8.

151 AMATO ET AL., *supra* note 81, at 122.

152 PEW RESEARCH CTR., *supra* note 144, at 9.

153 BIANCHI ET AL., *supra* note 93, at 135.

154 *Id.*

155 See, e.g., Jennifer Glass et al., *Parenthood and Happiness: Effects of Work-Family Reconciliation Policies in 22 OECD Countries*, 122 AM. J. SOCIOLOGY 886 (2016) (analyzing the effects of parenthood on the emotional wellbeing of parents compared to nonparents).

156 See, e.g., Ranae J. Evenson & Robin W. Simon, *Clarifying the Relationship Between Parenthood and Depression*, 46 J. HEALTH & SOC. BEHAV. 341, 354 (2005); Sara McLanahan & Julia Adams, *Parenthood and Psychological Well-Being*, 13 ANN. REV. SOCIOLOGY 237, 248 (1987); Sara McLanahan & Julia Adams, *The Effects of Children on Adults’ Psychological Well-Being*, 68 SOC. FORCES 124 (1989).

157 Portugal had the next largest happiness gap, at 9.5%. In eight of these countries—Portugal, Hungary, Spain, Norway, Sweden, Finland, France, and Russia—parents reported being happier than nonparents. See Glass et al., *supra* note 155, at 907 tbl.3.

158 *Id.* at 914 (“In those countries with the strongest policy packages, the parental deficit in happiness was completely eliminated . . .”).

around the economic demands of the market, rather than the wellbeing of children. A voluminous body of research demonstrates that “[v]irtually every aspect of early human development, from the brain’s evolving circuitry to the child’s capacity for empathy, is affected by the environments and experiences that are encountered in a cumulative fashion, beginning early in the prenatal period and extending throughout the early childhood years.”<sup>159</sup> The privatized-family system squanders the potential of most children by failing to support an environment structured around their needs. As with adults, the children at the bottom of the economic spectrum do the worst in this system; yet even those at the top are harmed.

The fact that American parents take only ten weeks average leave on the birth or adoption of a child—when they take leave at all<sup>160</sup>—may be necessary to put food on the table in the privatized-family system. It is, however, too short to support children’s wellbeing.<sup>161</sup> One cross-national study that tracked wellbeing in sixteen countries that extended maternity leaves from a starting mean duration of ten weeks to an ending mean duration of twenty-one weeks concluded that a ten-week increase in paid leave reduced infant mortality rates by between 2.5% and 3.4%.<sup>162</sup> A U.S. study helps explain these results, showing that when mothers returned to work within twelve weeks of birth, their children were less likely to be breastfed, which imparts health benefits, and were also less likely to get doctors’ visits and immunizations.<sup>163</sup> Longer leaves also have developmental benefits for children: children born after Norway added four months of paid leave to its twelve months unpaid leave had lower high school dropout rates and higher IQs.<sup>164</sup> Other studies link shorter maternity leaves with increased depression rates in mothers<sup>165</sup>—a condition that significantly affects children’s outcomes.<sup>166</sup>

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159 NAT’L RESEARCH COUNCIL AND INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 6 (Jack P. Shonkoff & Deborah A. Phillips eds., 2000); see also James J. Heckman, *Skill Formation and the Economics of Investing in Disadvantaged Children*, 312 SCIENCE 1900, 1900 (2006) (stating that “[e]arly family environments are major predictors of cognitive and noncognitive abilities” in children).

160 See *supra* notes 111–19 and accompanying text.

161 See DEANNA S. GOMBY & DOW-JANE PEI, EXECUTIVE SUMMARY, NEWBORN FAMILY LEAVE: EFFECTS ON CHILDREN, PARENTS AND BUSINESS 2 (2009) (noting that the benefits provided to the child by family leave often depend on the “length of the leave”).

162 Christopher J. Ruhm, *Parental Leave and Child Health*, 19 J. HEALTH ECON. 931, 947 (2000).

163 Lawrence M. Berger et al., *Maternity Leave, Early Maternal Employment and Child Health and Development in the US*, 115 ECON. J. F29, F29 (2005).

164 Pedro Carneiro et al., *A Flying Start? Maternity Leave Benefits and Long Run Outcomes of Children* 22 (Inst. for the Study of Labor, Discussion Paper No. 5793, 2011), <http://ftp.iza.org/dp5793.pdf>.

165 Rada K. Dagher et al., *Maternity Leave Duration and Postpartum Mental and Physical Health: Implications for Leave Policies*, 39 J. HEALTH POL. POL’Y & L. 369, 369 (2014); Pinka Chatterji & Sara Markowitz, *Does the Length of Maternity Leave Affect Maternal Health?* (Nat’l Bureau of Econ. Research, Working Paper No. 10206, 2004), <http://www.nber.org/papers/w10206.pdf>.

Furthermore, once parents return to work, the long hours required of U.S. employees in the privatized-family system mean that most families place their children in some form of paid caretaking. More than three-quarters of preschool-age children with working mothers are placed in nonparental care—roughly half for more than thirty-five hours a week.<sup>167</sup> A large body of evidence shows that high-quality preschool significantly improves children's futures.<sup>168</sup> Yet few U.S. children receive such high-quality care. Instead, our privatized system has resulted in what an aptly titled *New Republic* article called “the hell of American day care.”<sup>169</sup> In this system, experts rate the majority of care provided to be “fair” or “poor”; only 10% of care is rated “high-quality.”<sup>170</sup> In the words of Marcy Whitebook, the director of the Center for the Study of Child Care Employment at the University of California, Berkeley, “We’ve got decades of research, and it suggests most child care and early childhood education in this country is mediocre at best.”<sup>171</sup>

Much of the problem involves the mismatch between young families' budgets and the cost of good-quality daycare. High-quality care requires low caregiver-child ratios and well-educated and well-trained caregivers—each of which costs significant amounts.<sup>172</sup> In 2011, the average annual cost of such high-quality, center-based infant care was more than the annual in-state tuition at public, four-year colleges in thirty-five states; for a four-year-old, average costs exceeded tuition in nineteen states.<sup>173</sup> A family with a two-year-old child enrolled in such center-based childcare would pay more than forty per-

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166 Pinka Chatterji et al., *Effects of Early Maternal Employment on Maternal Health and Well-Being*, 26 J. POPULATION ECON. 285, 299 (2013).

167 LYNDA LAUGHLIN, U.S. DEPARTMENT OF COMMERCE, WHO'S MINDING THE KIDS? CHILD CARE ARRANGEMENTS 6 fig.2, 9 tbl.3 (2013), <http://www.census.gov/prod/2013pubs/p70-135.pdf>.

168 See, e.g., HIROKAZU YOSHIKAWA ET AL., INVESTING IN OUR FUTURE: THE EVIDENCE BASE ON PRESCHOOL EDUCATION (2013) (finding that ECE improves reading and math skills, and socio-emotional development and health); Frances A. Campbell et al., *Adult Outcomes as a Function of an Early Childhood Educational Program: An Abecedarian Project Follow-Up*, 48(4) DEVELOPMENTAL PSYCHOL. 1033 (2012) (finding that the effect of ECE on educational attainment extends well into adulthood); David Deming, *Early Childhood Intervention and Life-Cycle Skill Development: Evidence from Head Start*, 1 AM. ECON. J. 111, 111 (2009) (finding long-term benefits of Head Start); Flavio Cunha & James Joseph Heckman, *Investing in Our Young People* 9 (Inst. for the Study of Labor, Discussion Paper No. 5050, 2010), [www.econstor.eu/bitstream/10419/44199/1/631911804.pdf](http://www.econstor.eu/bitstream/10419/44199/1/631911804.pdf) (finding that early preschool programs “promote greater efficiency in learning in school and reduce problem behaviors”).

169 Cohn, *supra* note 60.

170 *Id.*

171 *Id.*

172 See Deborah Phillips & Gina Adams, *Child Care and Our Youngest Children*, 11 FUTURE CHILDREN 35 (2001).

173 CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILD CARE 7 (2012), [http://www.actionforchildren.org/up\\_doc/costofcarereport.pdf](http://www.actionforchildren.org/up_doc/costofcarereport.pdf).

cent of the average wage.<sup>174</sup> Because of the prohibitive cost, most moderate- and low-income families instead put their children in informal arrangements, such as family daycares or with relatives.<sup>175</sup> Yet children placed in such arrangements significantly underperform those cared for in center-based settings.<sup>176</sup> By one count, only 9% of these informal arrangements were considered “good,” while 35% were considered “inadequate.”<sup>177</sup> Across all daycare settings, the median annual salary for paid workers was \$19,430—less than a parking lot attendant or janitor.<sup>178</sup>

Contrast the privatized-family system with the welfare states of other OECD countries. In response to research establishing the significant benefits of ECE in children’s early years,<sup>179</sup> most of those countries have made ECE both free and readily available.<sup>180</sup> Japan, the United Kingdom, and Denmark enroll upward of 96% of four-year-olds in ECE.<sup>181</sup> In contrast, the United States enrolls 69% of four-year-olds—ranking twenty-sixth among OECD nations in enrollment.<sup>182</sup> The gap is even larger in enrollment for three-year-olds. Seven countries, including France, Norway, and Italy, enroll

174 CHILD CARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILD CARE 6 (2014), <http://www.childcarenet.org/about-us/data/2014-parents-and-the-high-cost-of-child-care-report>.

175 LAUGHLIN, *supra* note 167, at 2 tbl.1, 8 (“Children in poverty with an employed mother relied to a greater extent on grandparents (30 percent) and fathers (29 percent) than on day care centers (16 percent) or family day care providers (4 percent) for their care.”); Daphna Bassok et al., *supra* note 129, at 13 (“Among lower-income children, there was a shift out of formal child care and into parental care.”).

176 See, e.g., Raquel Bernal & Michael P. Keane, *Child Care Choices and Children’s Cognitive Achievement: The Case of Single Mothers*, 29 J. LABOR ECON. 459, 462, 504 (2011); Susanna Loeb et al., *How Much Is Too Much? The Influence of Preschool Centers on Children’s Social and Cognitive Development*, 26 ECON. EDUC. REV. 52 (2007); Pamela A. Morris et al., *Effects of Welfare and Employment Policies on Young Children: New Findings on Policy Experiments Conducted in the Early 1990s*, 19 SOC. POL’Y REP. 3, 11 (2005).

177 ELLEN GALINSKY ET AL., THE STUDY OF CHILDREN IN FAMILY CHILD CARE AND RELATIVE CARE: HIGHLIGHTS OF FINDINGS 81 (1994); see also Bruce Fuller et al., *State Formation of the Child Care Sector: Family Demand and Policy Action*, 77 SOC. EDUCATION 337, 354 (2004); NICHD Early Child Care Research Network, *Poverty and Patterns of Child Care*, in CONSEQUENCES OF GROWING UP POOR 100, 127–28 (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997).

178 See Cohn, *supra* note 60.

179 See, e.g., YOSHIKAWA ET AL., *supra* note 168.

180 OECD, EDUCATION TODAY 2010: THE OECD PERSPECTIVE 13 (2010), <http://www.oecd.org/berlin/46299897.pdf>.

181 JULIANA HERMAN ET AL., CTR. FOR AM. PROGRESS, THE UNITED STATES IS FAR BEHIND OTHER COUNTRIES ON PRE-K (2013), <https://www.americanprogress.org/issues/education/reports/2013/05/02/62054/the-united-states-is-far-behind-other-countries-on-pre-k/>; see also EDUC., AUDIOVISUAL AND CULTURE EXEC. AGENCY, KEY DATA ON EARLY CHILDHOOD EDUCATION AND CARE IN EUROPE 62 fig.C1 (2014), [eacea.ec.europa.eu/education/eurydice/documents/key\\_data\\_series/166en.pdf](http://eacea.ec.europa.eu/education/eurydice/documents/key_data_series/166en.pdf) (data for 2011); OECD FAMILY DATABASE, ENROLMENT IN CHILDCARE AND PRE-SCHOOL 3 chart PF3.2.A, [www.oecd.org/els/soc/PF3\\_2\\_Enrolment\\_childcare\\_preschool.pdf](http://www.oecd.org/els/soc/PF3_2_Enrolment_childcare_preschool.pdf).

182 HERMAN ET AL., *supra* note 181.

at least 90% of all three-year-olds in preschool. In the United States that number is just over 50%.<sup>183</sup> And although children from low-income families are the ones who would benefit most from good-quality ECE,<sup>184</sup> they are the least likely to receive it.<sup>185</sup> Yet later interventions do not make up for developmental deficits incurred in children's early years.<sup>186</sup>

After U.S. parents return to work, the privatized-family system means that they must prioritize work over family responsibilities compared to par-

183 *Id.*

184 Children from low-income families who attend good-quality ECE have higher IQs, are less likely to need placement in special education programs, do better in school, and become more productive citizens than children who do not. See W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, 5 *FUTURE CHILDREN* 25, 44–45 (1995), [http://www.princeton.edu/futureofchildren/publications/docs/05\\_03\\_01.pdf](http://www.princeton.edu/futureofchildren/publications/docs/05_03_01.pdf); Janet Currie, *Early Childhood Education Programs*, 15 *J. ECON. PERSP.* 213 (2001); Clara G. Muschkin et al., *Impact of North Carolina's Early Childhood Initiatives on Special Education Placements in Third Grade* (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 121, 2015), <http://www.caldercenter.org/sites/default/files/WP%20121.pdf>; see also EDUC., AUDIOVISUAL AND CULTURE EXEC. AGENCY, *supra* note 181, at 17 (“PIRLS 2011 data show that the beneficial impact of ECEC on reading achievement is stronger for children from families with a low level of education, than for those children who have at least one parent with tertiary level education.”).

185 See, e.g., NAT'L ASS'N OF CHILD CARE RES. AND REFERRAL AGENCIES, *BREAKING THE PIGGY BANK: PARENTS AND THE HIGH PRICE OF CHILD CARE 3* (2006), [tallgrassstudios.com/ClientWebsites/weneedearlycare/weneedcarebackup/downloads/BreakingthePiggyBank.pdf](http://tallgrassstudios.com/ClientWebsites/weneedearlycare/weneedcarebackup/downloads/BreakingthePiggyBank.pdf). The largest program of publicly funded ECE is the federally funded, state subsidized Head Start Program, which provides means-tested education for three- and four-year-olds. Head Start serves children from birth to age five from families with low income (measured using the Poverty Guidelines), homeless children, and children from families receiving public assistance. Programs may enroll up to 10% of children from families that are income ineligible for Head Start, as well as 35% of children from families who are income ineligible but remain below 130% of the poverty guideline. See *Frequently Asked Questions About Head Start*, EARLY CHILDHOOD LEARNING & KNOWLEDGE CTR., <https://eclkc.ohs.acf.hhs.gov/about-us/article/frequently-asked-questions-about-head-start> (last visited Sept 24, 2017). In 2015, Head Start served only 42% of income-eligible children. Just 4% of eligible children were served by Early Head Start, which serves children from zero to age three. EARLY CHILDHOOD LEARNING & KNOWLEDGE CTR., *HEAD START PROGRAM FACTS FISCAL YEAR 2015* (2015), <https://eclkc.ohs.acf.hhs.gov/hslc/data/factsheets/docs/head-start-fact-sheet-fy-2015.pdf>; Press Release, Nat'l Ctr. for Children in Poverty, Report: Large Numbers of Children Underserved by Federal and State Early Care and Education Programs (Nov. 2013), [http://www.nccp.org/media/releases/release\\_154.html](http://www.nccp.org/media/releases/release_154.html); see also Julie Blair, *Only 42 Percent of Eligible Children Participate in Head Start*, *EDUC. WEEK* (Nov. 25, 2013), [http://blogs.edweek.org/edweek/early\\_years/2013/11/only\\_42\\_percent\\_of\\_eligible\\_children\\_participate\\_in\\_head\\_start.html](http://blogs.edweek.org/edweek/early_years/2013/11/only_42_percent_of_eligible_children_participate_in_head_start.html). Overall, government programs to assist low-income families do not come close to satisfying the available need; many have extensive waiting lists. By one estimate, only roughly 30% of low-income families receive any financial assistance for center-based childcare. Sarah J. Glynn, *Fact Sheet: Child Care*, *CTR. AM. FOR PROGRESS* (Aug. 16, 2012), <https://www.americanprogress.org/issues/economy/news/2012/08/16/11978/fact-sheet-child-care/>.

186 See Currie, *supra* note 184; Kevin Fiscella & Harriet Kitzman, *Disparities in Academic Achievement and Health: The Intersection of Child Education and Health Policy*, 123 *PEDIATRICS* 1073, 1075 (2009) (“Early intervention is far more effective than remediation . . .”).

ents in other countries. For example, although eating meals as a family is an important indicator of adolescent flourishing,<sup>187</sup> a 2007 UNICEF report ranked the United States twenty-third out of twenty-five OECD countries in terms of the percentage of teens who ate dinner with their parents several times a week.<sup>188</sup> Increasingly, too, the schedules of U.S. employees are dictated by high-tech scheduling systems that maximize employer profits by moving workers from place to place and time to time to match customer demand. These irregular schedules shred employees' family lives, erode marital stability, make planning for child care a nightmare, and interfere with breastfeeding.<sup>189</sup>

Further, while most employees' work schedules include working mid to late afternoon, U.S. public schools are not coordinated to match these schedules, as they are in robust welfare states. As a consequence, many children go unsupervised when they return from school. Five percent of six to nine-year-olds are latch-key kids with no parent at home for some time each week, as are 23% of ten-year-olds and 44% of twelve-year-olds.<sup>190</sup> Even older children left home alone are at risk in this system: juvenile crime, drugs, alcohol, sex, and other risky behavior increase dramatically during unsupervised afternoon hours.<sup>191</sup>

### c. Children in poor families

While few children do particularly well in the privatized-family system, poor children undoubtedly have the worst outcomes. In other wealthy countries with robust welfare states, these children would be significantly more likely to be raised by two parents in an intact household,<sup>192</sup> and would have

187 CHILD TRENDS, *supra* note 34, at 39 (citing NICOLE ZARRETT & RICHARD M. LERNER, *WAYS TO PROMOTE POSITIVE DEVELOPMENT OF CHILDREN AND YOUTH* (2008)).

188 UNICEF, *CHILD POVERTY IN PERSPECTIVE: AN OVERVIEW OF CHILD WELL-BEING IN RICH COUNTRIES* 22, 24 fig.4.2(a) (2007), <http://www.unicef.org/media/files/ChildPovertyReport.pdf>. The most recent update of this report no longer uses parent-child interaction as a measure of child wellbeing. In this update, the United States ranked twenty-sixth of twenty-nine developed countries on child wellbeing, ahead of only Lithuania, Latvia, and Romania. UNICEF, *CHILD WELL-BEING IN RICH COUNTRIES: A COMPARATIVE OVERVIEW* 2 (2013), [https://www.unicef-irc.org/publications/pdf/rc11\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/rc11_eng.pdf).

189 See Jodi Kantor, *Working Anything but 9 to 5: Scheduling Technology Leaves Low-Income Parents with Hours of Chaos*, N.Y. TIMES (Aug. 13, 2014), <http://www.nytimes.com/interactive/2014/08/13/us/starbucks-workers-scheduling-hours.html>; see also HARRIET B. PRESSER, *WORKING IN A 24/7 ECONOMY: CHALLENGES FOR AMERICAN FAMILIES* (2003); Mary Noonan & Phyllis Rippeyoung, *Is Breastfeeding Truly Cost Free? Income Consequences of Breastfeeding for Women*, 77 AM. SOC. REV. 244 (2012).

190 See Jeffrey Capizzano et al., *Child Care Patterns of School-Age Children with Employed Mothers* 8 (The Urban Inst., Occasional Paper No. 41, 2000), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310283-Child-Care-Patterns-of-School-Age-Children-with-Employed-Mothers.pdf>.

191 Mary B. Larner et al., *When School Is Out: Analysis and Recommendations*, 9 FUTURE CHILDREN 4 (1999).

192 See OECD, *FAMILY DATABASE: CHILDREN IN FAMILIES* 1, 2 chart SF1.2A (2016), [http://www.oecd.org/els/soc/SF\\_1\\_2\\_Children\\_in\\_families.pdf](http://www.oecd.org/els/soc/SF_1_2_Children_in_families.pdf) (showing that the United States



their basic material needs met through cash transfers from the state, a parent subsidized to stay home with them most or all of their first year, quality day-care subsidized for the next years, and universally available ECE while their parents work moderate hours—and all that is just before they enroll in primary school.<sup>193</sup> In the United States, these children are more likely to be from single-parent families and to remain poor as a result of meager government transfers. Their mothers are more likely to be stressed from working full-time beginning in their children's infancy, and the children are then likely to be placed in inadequate daycare until they are ready to begin kindergarten. Only at that point are significant public funds invested in them.<sup>194</sup>

Yet, by the time poor children reach public school, unbridgeable gaps exist in achievement and wellbeing between them and other children that will persist through adulthood.<sup>195</sup> As a blue-ribbon panel of experts on integrating the science of early childhood development declared:

A fundamental paradox exists and is unavoidable: development in the early years is both highly robust and highly vulnerable. Although there have been long-standing debates about how much the early years really matter in the larger scheme of lifelong development, our conclusion is unequivocal: What happens during the first months and years of life matters a lot, not because this period of development provides an indelible blueprint for adult wellbeing, but because it sets either a sturdy or fragile stage for what follows.<sup>196</sup>

Indeed, it is tough to imagine a model less likely to produce thriving children than the privatized-family system. Developmental research establishes that young children need, at the very least, three things to become flourishing adults: (1) adequate material resources to sustain them; (2) supportive long-term caretaking relationships with one or more parents; and (3) a stimulating learning culture.<sup>197</sup> U.S. children from poor families are impeded in receiving any of these three, let alone all of them, by the privatized-family model.

To begin with, children cannot survive, let alone thrive, if their families lack sufficient material resources to sustain them at a basic level of wellbeing. In one crude proxy for basic material wellbeing, the infant mortality rate,

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ranks thirty-eighth out of thirty-nine OECD and partner countries in children living with both parents, ahead of only Latvia).

193 See Hélène Goulet, *Child Care in OECD Countries*, in EMPLOYMENT OUTLOOK 1990, at 123 (1990), <https://www.oecd.org/els/emp/4343133.pdf>; OECD, *supra* note 181, at 13; OECD FAMILY DATABASE: PUBLIC SPENDING ON FAMILY BENEFITS (2014).

194 See PUBLIC SPENDING BY AGE OF THE CHILD, *supra* note 36.

195 See ESPING-ANDERSEN, *supra* note 46, at 73; DEBORAH LOWE VANDELL & BARBARA WOLFE, CHILD CARE QUALITY: DOES IT MATTER AND DOES IT NEED TO BE IMPROVED? 98 (2000) (finding that child care quality matters at several levels including happiness and cognitive engagement, language, and social competencies, and that quality of child care affects children's long-term outcomes); Sean F. Reardon & Ximena A. Portilla, *Recent Trends in Income, Racial, and Ethnic School Readiness Gaps at Kindergarten Entry*, 2 AERA OPEN (2016).

196 NAT'L RESEARCH COUNCIL AND INST. OF MED, *supra* note 159, at 4–5.

197 See Esping-Andersen, *supra* note 46, at 111–44.

privatized-family policy fails. The U.S. rate of 6.1 deaths per 1000 is the fourth highest among thirty-four OECD and partner countries, exceeded only by Turkey, Chile, and Mexico.<sup>198</sup> The U.S. rate is significantly higher than the OECD average (despite the fact that it is far wealthier than most of these countries) and more than five times higher than Iceland, the OECD leader, at 1.1.<sup>199</sup> Further, the United States does no better on another key measure of poverty—food insecurity. In 2014, more than 15.3 million American children—more than one in five—lived in a food-insecure household.<sup>200</sup> While the OECD does not itself rank food insecurity, in a Gallup World Poll of food insecurity cited by the OECD, the United States had the fifth highest rate, behind only Mexico, Turkey, Hungary, Chile, and Estonia.<sup>201</sup> Our poverty rate is directly related to the weak redistributive impact of U.S. government policies. France’s social welfare programs reduced its relative poverty rate by 32.5%; the United States’ programs reduced its poverty rate by just 15.1%.<sup>202</sup>

Turning to the issue of supportive parental relationships—clearly there are limits to the capacity of the welfare state to ensure these. The state certainly cannot make parents be good parents. Yet it can help ensure the conditions that support good parenting, for example, through regulating other institutions like the labor market to allow parents adequate time with their children.<sup>203</sup> As discussed, the privatized-family model fails to do this, forcing low-income parents to choose between having time with their children and putting a roof over their heads and food on the table.<sup>204</sup> The U.S. system also does little to reduce economic insecurity and job stress for poor parents,<sup>205</sup> while it contributes to their stigmatization.<sup>206</sup> Yet both stress and

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198 OECD, *HOW’S LIFE? 2015: MEASURING WELL-BEING* 158 (2015), [http://dx.doi.org/10.1787/how\\_life-2015-en](http://dx.doi.org/10.1787/how_life-2015-en) (data from around 2012).

199 *See id.*; *see also* OECD, *HOW’S LIFE IN THE UNITED STATES?* 4 (2016), <http://www.oecd.org/statistics/Better-Life-Initiative-country-note-United-States.pdf>.

200 ALISHA COLEMAN-JENSEN ET AL., U.S. DEP’T OF AGRIC., *HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2015*, at 10 tbl.1B (2015). The rate of food insecurity is based on the number of households who report that they have had difficulty providing enough food for all household members due to a lack of resources at some time during the year. *Id.* at 6.

201 OECD, *SOCIETY AT A GLANCE 2014: OECD SOCIAL INDICATORS* 28 (2014), [http://dx.doi.org/10.1787/soc\\_glance-2014-en](http://dx.doi.org/10.1787/soc_glance-2014-en).

202 Janet C. Gornick & Markus Jäntti, *Poverty*, in *STATE OF THE UNION: POVERTY AND INEQUALITY REPORT* 15, 16 tbl.1 (2016).

203 *See* EICHNER, *supra* note 8.

204 *See supra* subsection I.B.2.b.

205 *See supra* subsection I.B.2.

206 *See* Nancy Marshall, *The Public Welfare System: Regulation and Dehumanization*, in *LIVES IN STRESS: WOMEN AND DEPRESSION* 96, 96 (Deborah Belle ed., 1982); Nancy Goodban, *The Psychological Impact of Being on Welfare*, 59 *SOC. SERV. REV.* 403, 404 (1985); *see also* Leonard I. Pearlin & Joyce S. Johnson, *Marital Status, Life-Strains and Depression*, 42 *AM. SOC. REV.* 704, 704 (1977) (discussing the “depressive consequences of economic hardship, social isolation and parental responsibilities” to which unmarried individuals are more likely to be exposed).

psychological distress have been shown to profoundly influence parenting in ways that impinge on children's wellbeing.<sup>207</sup>

Finally, the privatized-family system ensures that most low-income children will be placed in inadequate learning environments. It stymies low-income parents from developing a positive learning culture at home by leaving them exhausted, stressed, and without the policy interventions that could promote such a learning culture.<sup>208</sup> Further, it ensures that most daycare arrangements available to these parents will be suboptimal, if not downright inadequate.<sup>209</sup>

The result is a society in which class is starkly determinative of a child's future.<sup>210</sup> To take just one measure, the income achievement gaps between well-off children and lower-income children increased significantly between the mid-1970s and early-1990s to about double the testing gap between blacks and whites, although it has declined a small amount since that time.<sup>211</sup> The socioeconomic gap in youth who finish college has also grown.<sup>212</sup> Intergenerational mobility in the United States is far lower than in most other wealthy countries—in one study, the United States was ranked thir-

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207 See Vonnie C. McLoyd, *The Impact of Economic Hardship on Black Families and Children: Psychological Distress, Parenting, and Socioemotional Development*, 61 CHILD DEV. 311 (1990); Vonnie C. McLoyd et al., *Unemployment and Work Interruption Among African American Single Mothers: Effects on Parenting and Adolescent Socioemotional Functioning*, 65 CHILD DEV. 562 (1994).

208 As Gøsta Esping-Andersen notes, the strongest outcomes for poor children are produced in systems that combine income redistribution, cultural changes within families, and ECE. See *supra* note 197 and accompanying text. Indeed, research suggests that a positive home environment that includes a stable, nurturing, caretaking relationship has a greater positive effect on child development than does ECE. VANDELL & WOLFE, *supra* note 195, at 39. Research also demonstrates that programs that support positive relationships between parents and young children have significant positive effects on children's social-emotional outcomes. See Catherine Ayoub et al., *Developmental Pathways to Integrated Social Skills: The Roles of Parenting and Early Intervention*, 82 CHILD DEV. 583 (2011); John M. Love et al., *The Effectiveness of Early Head Start for 3-Year-Old Children and Their Parents: Lessons for Policy and Programs*, 41 DEVELOPMENTAL PSYCHOL. 885 (2005); Carla A. Peterson et al., *Enhancing Parent-Child Interactions Through Home Visiting: Promising Practice or Unfulfilled Promise?*, 29 J. EARLY INTERVENTION 119 (2007); Craig T. Ramey et al., *Persistent Effects of Early Childhood Education on High-Risk Children and Their Mothers*, 4 APPLIED DEVELOPMENTAL SCI. 2 (2000).

209 See *supra* notes 176–77 and accompanying text.

210 See Tavernise, *supra* note 130.

211 Reardon & Portilla, *supra* note 195, at 12. In the authors' words, "the rate of decline from 1998 to 2010 is not trivial. Nonetheless, the gaps were roughly 1.25 standard deviations in 1998; at the rates that the gaps declined in the last 12 years, it will take another 60 to 110 years for them to be completely eliminated." *Id.*

212 See Martha J. Bailey & Susan M. Dynarski, *Inequality in Postsecondary Education, in WHITHER OPPORTUNITY?: RISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* 117, 119 (Greg J. Duncan & Richard J. Murnane eds., 2011) (discussing how the college completion gap grew by about 50% since the late 1980s).

teenth of seventeen countries considered—and particularly low for children born in the bottom quintile.<sup>213</sup>

Worse even than the inequality this system perpetuates is the gross toll it takes in human development. Despite the fact that we spend significantly more on children when they get to public schools than other countries, our children’s academic performance is subpar compared to other countries—likely a result of our lack of investment in earlier years.<sup>214</sup> In 2015, the United States ranked fortieth—well below the OECD average—on the mathematics portion of the Programme for International Student Assessment (PISA), a test administered to fifteen-year-olds in all OECD countries.<sup>215</sup> Twenty-nine percent of U.S. students did not even reach the PISA baseline level two of mathematics proficiency, the level deemed necessary to be productive citizens.<sup>216</sup> In contrast, only 6% of American students were overall top performers on the exam.<sup>217</sup> These U.S. results—a sea of low-performing students along with a light sprinkling of stellar ones—are exactly what we should expect in a steeply banked economic system in which parents’ private means dictate children’s circumstances and life chances.

#### d. Children in well-to-do families

If the privatized-family system benefits no one else, it should certainly benefit the children of well-to-do families. Yet even these children are severely compromised in this system. While intensive parenting helps position young people to succeed economically, it also monopolizes their time and energy. Sociologist Annette Lareau, who spent years studying the parenting styles of middle-class and working-class parents, observed that “the middle-class kids and parents . . . were exhausted from their schedule-driven days. Unlike the middle-class kids, the working-class kids knew how to entertain themselves, had boundless energy, and enjoyed close ties with extended family.”<sup>218</sup>

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213 See ESPING-ANDERSEN, *supra* note 46, at 73; MISHEL ET AL., *supra* note 91, at 152 tbl.3H; Reardon & Portilla, *supra* note 195.

214 See ESPING-ANDERSEN, *supra* note 46, at 115–16.

215 OECD, PISA 2015 RESULTS (VOLUME 1): EXCELLENCE AND EQUITY IN EDUCATION 177 (2016), <http://dx.doi.org/10.1787/9789264266490-en> (noting that in math, the United States ranks fortieth among OECD countries and thirty-eighth among the seventy countries and economies measured).

216 *Id.* at 192. This was well above the OECD average of 23%, and quadruple the rate of the best scorer, Macao (China) at 7%. *Id.*; Peggy G. Carr, *NCES Statement on PISA 2015 Results*, NAT’L CTR. FOR EDUC. STAT. (Dec. 6, 2016), [https://nces.ed.gov/whatsnew/commissioner/remarks2016/12\\_06\\_2016.asp](https://nces.ed.gov/whatsnew/commissioner/remarks2016/12_06_2016.asp).

217 This compares to 35% of Singapore’s students. Carr, *supra* note 216, at slide 28.

218 Laura McKenna, *Explaining Annette Lareau, or, Why Parenting Style Ensures Inequality*, ATLANTIC (Feb. 16, 2012), <http://www.theatlantic.com/health/archive/2012/02/explaining-annette-lareau-or-why-parenting-style-ensures-inequality/253156/>.

These intensively parented children feel significant pressure to succeed.<sup>219</sup> One study of two highly selective private schools found that nearly half (49%) of all students reported feeling a great deal of stress on a daily basis; another 31% reported feeling somewhat stressed.<sup>220</sup> More than a quarter of students (26%) reported clinically significant symptoms of depression.<sup>221</sup> No wonder that American youth have experienced skyrocketing rates of depression and anxiety during the past half-century. By some estimates, five to eight times as many college students meet criteria for major depression and/or anxiety disorder than fifty years ago.<sup>222</sup> One positive thing to say about all this: these frazzled middle-class children are being well prepared to become the frazzled well-to-do parents described earlier in this Article.

## II. THE RISE AND FALL OF THE TWENTIETH-CENTURY WELFARE STATE

### A. *The Rise of the U.S. Welfare State*

U.S. law was not always based on a policy of laissez-faire when it came to the regulation of market forces on families. The twentieth-century welfare state was built on the recognition that markets must be regulated to support families. In the words of Progressive-era reformer Florence Kelley, the “para-

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219 [G]rades, homework, and preparing for college were the greatest sources of stress for [middle-class children of] both genders. . . .

Consistent with the quantitative findings, students described that schoolwork, grades, and college admissions constituted their greatest sources of stress. Students described their workloads, which typically included multiple advanced and college-level classes, as well as both mandatory and optional extra-curricular activities, followed by tutoring for classes and the standardized tests required for college admission, and other activities, such as community service projects and entrepreneurial ventures, that would allow them to distinguish themselves from their high-achieving classmates.

Noelle R. Leonard et al., *A Multi-Method Exploratory Study of Stress, Coping, and Substance Use Among High School Youth in Private Schools*, FRONTIERS PSYCHOLOGY, July 2015, at 1, 5–7, <http://journal.frontiersin.org/article/10.3389/fpsyg.2015.01028/full>.

220 *Id.* at 5. In the past school year, 27% of American teens said they had experienced extreme stress and 55% said they had experienced moderate stress. AM. PSYCHOLOGICAL ASS’N, STRESS IN AMERICA: ARE TEENS ADOPTING ADULTS’ STRESS HABITS? 4 (2014), <http://www.apa.org/news/press/releases/stress/2013/stress-report.pdf>. The report says stress appears to be affecting teens’ performance in all aspects of life. 59% report that managing their time to balance all activities is a somewhat or very significant stressor: “[S]chool is the most commonly mentioned source of stress for teens (83 percent reported that school is a somewhat or significant source of stress).” *Id.* at 4. In a comparison of twenty-two OECD and partner countries of the levels of stress that students feel regarding schoolwork, American children ranked third from highest, behind only Turkey and Spain. OECD, *supra* note 198, at 169.

221 *N.Y.U. Study*, *supra* note 125.

222 See Jean M. Twenge et al., *Birth Cohort Increases in Psychopathology Among Young Americans, 1938–2007: A Cross-Temporal Meta-Analysis of the MMPI*, 30 CLINICAL PSYCHOL. REV. 145, 152 (2010) (showing dramatic increases in anxiety and depression among youths during the last five decades).

dox of Modern Industry” was that the market offered families increased material conditions for a healthy, capacious family life, yet, at the same time, the pressures associated with markets tend “to disintegrate the family.”<sup>223</sup> Kelley’s summary of the ways that market forces harmed families sounds starkly similar to those laid out in Part I of this Article, including that “[v]ast numbers of men never found families at all, because they fear to marry upon insufficient wages insecurely held by reason of the precarious nature of many employments,”<sup>224</sup> that “family life in the home is obviously minimized for all those . . . whose work keeps them travelling,”<sup>225</sup> and that night work “keeps fathers away from home and makes impossible any wholesome domestic companionship.”<sup>226</sup> The solution to this paradox was government. Indeed, Kelley contended that the construction of regulatory states across Western nations during this period should be seen as “a ramified effort to safeguard the family.”<sup>227</sup> Summarizing the need for U.S. legislation, Kelley declared: “The era of unbridled power exercised by irresponsible industry at cost of the family—the fundamental institution of the human race—is slowly drawing to a close.”<sup>228</sup>

Beginning in 1911, state legislatures began to pass mothers’ pensions, directly enrolling the government in providing cash benefits to mothers with children—laying the first bricks in the foundation of the American welfare state.<sup>229</sup> Their rationale was laid out at the 1909 White House Conference on Dependent Children, convened by President Theodore Roosevelt to deal with the problem of children institutionalized in almshouses and orphanages because of their parents’ poverty. Delegates unanimously resolved:

Home life is the highest and finest product of civilization. . . . Children should not be deprived of it except for urgent and compelling reasons. Children of parents of worthy character, suffering from temporary misfortune and children of reasonably efficient and deserving mothers who are without the support of the normal breadwinner, should, as a rule, be kept with their parents, such aid being given as may be necessary to maintain suitable homes for the rearing of the children.<sup>230</sup>

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223 FLORENCE KELLEY, *MODERN INDUSTRY IN RELATION TO THE FAMILY, HEALTH, EDUCATION, MORALITY* 3 (1914).

224 *Id.* at 6.

225 *Id.* at 8–9.

226 *Id.* at 11.

227 *Id.* at 4.

228 *Id.* at 37.

229 Their passage is described in THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992). Some historians would call this early legislation the “social state” rather than the “welfare state,” using the latter term only for legislation passed beginning in the 1930s, which responded to the Great Depression. This Article uses Skocpol’s terminology. *See id.* at 3–4 (disputing the notion that the U.S. welfare state originated only beginning after the Great Depression).

230 EXECUTIVE OFFICE OF THE PRESIDENT, *THE WHITE HOUSE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN* 9 (1909).

Forty states passed pension laws between 1911 and 1920.<sup>231</sup> In addition, by 1919, thirty-eight states passed laws requiring employers to carry industrial accident insurance so that families would not become destitute if a worker was injured.<sup>232</sup> Both states and the federal government then moved on to pass significant limits on child labor, and other protections for families from the perils of industry.<sup>233</sup>

When America entered the New Deal era, the view that government regulation of the market was necessary to support families became the cornerstone of the expanded welfare state.<sup>234</sup> The regulation that emerged was premised on a specific vision of the way that families should function, which historians sometimes call the “ideology of separate spheres.”<sup>235</sup> That vision was built on the middle-class family patterns that emerged early in capitalism, in which men served as breadwinners while women stayed home to manage the house and raise the children—hence the “separate spheres” of the vision.<sup>236</sup> Thus, when mothers’ pensions were transformed into Social Secur-

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231 See generally SKOCPOL, *supra* note 229, at 8–10 (discussing American welfare reforms for women and veterans and their expansion); Mark H. Leff, *Consensus for Reform: The Mothers’-Pension Movement in the Progressive Era*, 47 SOC. SERV. REV. 397 (1973) (discussing the pension movement and its impact).

232 ELIZABETH BRANDEIS, 3 HISTORY OF LABOR IN THE UNITED STATES, 1896–1932: LABOR LEGISLATION, at 575–77 (1966).

233 The Supreme Court subsequently struck down the federal Keating-Owen Child Labor Act of 1916, which put modest limits on child labor, on the ground that it exceeded Congress’s power under the Commerce Clause in *Hammer v. Dagenhart*, 247 U.S. 251 (1918), *overruled in part by* *United States v. Darby*, 312 U.S. 100 (1941). See generally WALTER I. TRATTNER, CRUSADE FOR THE CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 23 (1970).

234 See Seth Koven & Sonya Michel, *Introduction: “Mother Worlds,”* in *MOTHERS OF A NEW WORLD: MATERNALIST POLITICS AND THE ORIGINS OF WELFARE STATES* 1, 4 (Seth Koven & Sonya Michel eds., 1993); see also SKOCPOL, *supra* note 229.

235 See NANCY F. COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780–1835*, at xx–xxii, 1, 33 (1997).

236 See generally Prudence Flowers, *White Ribboners and the Ideology of Separate Spheres, 1860s–1890s*, 25 AUSTRALASIAN J. AM. STUD. 14, 15–16 (2006). The central convention in separate-spheres ideology, which emerged toward the middle of the nineteenth century, was its strong demarcation between the realm of home, on the one hand, and the realm of work, on the other. In this bifurcated typology, home and work were associated with diametrically different activities, values, and genders. Home—newly the realm of women, now that their husbands were leaving for the workplace for long hours each day—was associated with affection, selflessness, and childrearing. In contrast, the realm of work was associated with men, labor, and competition. See *id.* Few free wives worked outside the home, in part because few jobs were open to married women. Only about 5% of free women worked outside the home after marriage in 1880. See Robert A. Margo, *The Labor Force in the Nineteenth Century*, in 2 CAMBRIDGE ECONOMIC HISTORY OF THE UNITED STATES 233–34 (Stanley L. Engerman & Robert E. Gallman eds., 2000). For slaves over age ten, however, the labor force participation rate at mid-century was around 90%, with almost no variation based on age or gender. *Id.* at 210. In 1910, census figures reveal that African American women engaged in paid work disproportionately; 25% of women in the workforce were African American. See U.S. BUREAU OF THE CENSUS, SIXTEENTH CENSUS OF

ity Survivors Insurance and Aid to Dependent Children (ADC) (later Aid to Families with Dependent Children) in 1935,<sup>237</sup> the committee report announced that the measure would free widows from wage earning so they could stay home to “rear [their children] into citizens capable of contributing to society.”<sup>238</sup> Congressman Fuller of Arkansas’s sentimental speech in favor of ADC stressed the same theme:

I can see the careworn and dejected widow shout with joy upon returning from the neighbor’s washtub after having received assurance of financial aid for her children. I see her with the youngest child upon her knee and the others clustered by her, kissing the tears of joy from her pale cheek as she explains they can now obtain clothes and books, go to Sunday school, and attend the public school.<sup>239</sup>

New Deal legislation premised on this model sought to protect the family’s income against the breadwinner’s loss of salary, creating a statutory scheme for unemployment compensation in case of a lost job, and social security retirement when he retired, as well as survivors’ and dependents’ benefits if he died.<sup>240</sup> It also supported women’s roles in homemaking and caregiving when there was no functioning breadwinner.<sup>241</sup>

In sum, when unregulated capitalism failed to produce a healthy realm of family life, the nation turned to government regulation of the market to safeguard the family. In Amy Dru Stanley’s words:

At the heart of the ideological shift that ushered in the regulatory state lay a perception that the spheres of home and market were overlapping in a way that endangered what contemporaries called “the future of the race.” . . .

In the name of the family . . . the market in labor began to be regulated by the state.<sup>242</sup>

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THE UNITED STATES, 1940: COMPARATIVE OCCUPATION STATISTICS FOR THE UNITED STATES, 1870 TO 1940, at 158 tbl.13 (1943).

237 Both Social Security Survivors Insurance and Aid to Dependent Children were initiated by the Social Security Act. *See* Social Security Act, Pub. L. No. 74-271, ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.).

238 McCluskey, *supra* note 21, at 799 (quoting NAT’L CONFERENCE ON SOC. WELFARE, THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935 AND OTHER BASIC DOCUMENTS RELATING TO THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 56 (50th anniversary ed. 1985)).

239 LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1980–1935, at 254–55 (1994).

240 Social Security Act Amendments of 1939, Pub. L. No. 76-379, tit. II, 53 Stat. 1360, 1362–78 (“Federal Old-Age and Survivors Insurance Benefits”); *see* Social Security Act tit. II (“Federal Old-Age Benefits”); *id.* tit. III (“Grants to States for Unemployment Compensation Administration”).

241 *See* Social Security Act tit. IV (“Grants to States for Aid to Dependent Children”); *see also* SKOCPOL, *supra* note 229 (tracing the factors that aided passage of maternalist policies in the United States). *See generally* Koven & Michel, *supra* note 234, at 1, 4.

242 Amy Dru Stanley, *Home Life and the Morality of the Market*, in THE MARKET REVOLUTION IN AMERICA: SOCIAL, POLITICAL, AND RELIGIOUS EXPRESSIONS, 1800–1880, at 74, 91 (Melvyn Stokes & Stephen Conway eds., 1996).



One could easily overstate the U.S. commitment to regulating the market to protect families. Its welfare protections, even at their prime, were relatively weak compared to other wealthy countries.<sup>243</sup> Furthermore, the separate-spheres ideology that it was modeled on was limited by what Alice Kessler Harris has aptly called a “gendered imagination,” in which women’s economic citizenship was subordinated to men’s.<sup>244</sup> To boot, our welfare protections were, from early on, grievously flawed by racism.<sup>245</sup> With all that said, the recognition that markets should serve families, rather than the reverse, and that government served a critical role in ensuring this result, were important ideological underpinnings of the U.S. welfare system.<sup>246</sup>

### B. *The Fall of the U.S. Welfare State and the Rise of Neoliberalism*

The view that the government should regulate market forces when they interfere with family life remained a fundamental underpinning of the U.S. welfare system for the better part of the twentieth century. Beginning in the 1970s, however, the confluence of two separate phenomena—women’s movement into the paid workforce, and the rise of neoliberal ideology portraying government support as harmful to families—began to undermine govern-

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243 See Alberto Alesina et al., *Why Doesn't the United States Have a European-Style Welfare State?*, 2001 BROOKINGS PAPERS ON ECON. ACTIVITY 187, 195 tbl.4 (emphasizing that as far back as 1870, the United States has had lower public welfare than European countries); see also ESPING-ANDERSEN, *supra* note 2, at 52 tbl.2.2 (noting that in 1980, even before most U.S. welfare retrenchment, the U.S. ranked second to lowest of eighteen countries for socializing particular costs associated with pensions, health care, and unemployment insurance; the United States scored a 13.8 on his decommodification scale compared to 27.1 for Japan, 31.1 for Austria, and 39.1 for Sweden); PAUL PIERSON, *DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER AND THE POLITICS OF RETRENCHMENT* 104 (1995) (arguing that even before welfare retrenchment efforts began in the late 1970s, AFDC and the food stamps program “left the American ‘safety net’ far more threadbare than its British counterpart”).

244 As Alice Kessler-Harris puts it: “Inscribed into a network of government policies, expectations about male wage earning legitimized long-standing calls for a ‘family wage.’” KESSLER-HARRIS, *supra* note 13, at 4. See, e.g., *id.* at 96 (unemployment insurance); *id.* at 136 (social security); *id.* at 95 (income tax). After World War II, new programs expanded this gendered set of assumptions to include “greater access to credit, lower mortgage and income tax rates for some male household heads, and special rights to jobs,” to name a few. *Id.* at 5.

245 As Alice Kessler-Harris observes, much of the welfare state was constructed to exclude coverage of African Americans. Charles Houston of the NAACP said of the bill that set up the national system for unemployment insurance, “‘from a Negro’s point of view’ the economic security bill looked ‘like a sieve with holes just big enough for the majority of Negroes to fall through.’” *Id.* at 96. The Fair Labor Standards Act passed in 1938, and left out most women and blacks. *Id.* at 105–06; see also Wendy A. Bach, *The Hyperregulatory State: Women, Race, Poverty, and Support*, 25 YALE J.L. & FEMINISM 317 (2014).

246 SKOCPOL, *supra* note 229; see also Ann Shola Orloff, *From Maternalism to “Employment for All”: State Policies to Promote Women’s Employment Across the Affluent Democracies*, in *THE STATE AFTER STATISM: NEW STATE ACTIVITIES IN THE AGE OF LIBERALIZATION* 230 (Jonah D. Levy ed., 2006).

ment support for the welfare state. Opponents of state support successfully relied on both to roll back existing buffers between families and the market and to preclude the formation of new buffers.

Beginning in the 1970s, the relationship between the spheres of work and family experienced a sea change. Women began to enter the paid workforce in increasingly large numbers and to stay there even after having children.<sup>247</sup> Women's movement into the workplace raised the issue of what to do with welfare-state policies premised on the separate-spheres vision that women would stay home to deal with society's caretaking needs. In this, the United States faced the same issue that many other wealthy Western democracies were confronting, all of which also had welfare states premised on the notion of maternal caretaking.<sup>248</sup> These nations accepted women working in paid work, but still sought to ensure that families could adequately raise children given women's employment, that families had adequate domestic time given the pressures on two-career households.<sup>249</sup> These nations therefore implemented parental leave plans, maximum-hour limits, daycare and early child care education, paid vacation, and so forth. The United States, in contrast, responded to women's movement into the market by withdrawing welfare-state protection for families that had been premised on women's staying at home on the view that they were outmoded in an era in which women worked.<sup>250</sup>

During the same period that women were entering the workforce, the public narrative regarding the relationship of governments, markets, and families began to shift in ways that eroded government support for family protections.<sup>251</sup> This shift did not involve a retreat from recognizing the importance of families. To the contrary, opposition to regulation continued to cast families as a fundamental pillar of society. However, it now conceptu-

247 Between 1975 and 2012, the percentage of women in the U.S. workforce with children under the age of six years grew from 39% to 65%. Women with children between the ages of six and seventeen increased their participation in the workforce from 55% in 1975 to 75% in 2012. U.S. BUREAU OF LABOR STATISTICS, *WOMEN IN THE LABOR FORCE: A DATABOOK 1*, 23–24 (2014), <https://www.bls.gov/cps/wlf-databook-2013.pdf>.

248 See Orloff, *supra* note 246, at 230; see also Koven & Michel, *supra* note 234, at 4.

249 See GORNICK & MEYERS, *supra* note 7, at 15–16; JULIA S. O'CONNOR ET AL., *STATES, MARKETS, FAMILIES: GENDER, LIBERALISM AND SOCIAL POLICY IN AUSTRALIA, CANADA, GREAT BRITAIN AND THE UNITED STATES* (1999); Orloff, *supra* 246, at 232

250 See *infra* notes 254–83 and accompanying text.

251 For the reasons I trace this public conversation, as well as my view about the relationship between this conversation and emerging public policy, see *supra* note 29. A thorough discussion of the reasons for the rise in antigovernment rhetoric of this era is beyond the scope of this paper. Probably the most direct reason, however, is a programmatic effort by big business and a few very wealthy conservative donors to fund think tanks, academics, and other institutions that supported antigovernment rationales. See HACKER & PIERSON, *supra* note 29, at 95–136 (describing big business efforts beginning in 1970s to disseminate probusiness ideology); JANE MAYER, *DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT* 135–43, 157–88 (detailing right-wing funding of think tanks and academics to attack liberal welfare policies).

alized government action as undermining the strength of families. In this view, families flourished only when they were subjected to free-market forces.

The beginning of this shift occurred with Congress's passage of the Comprehensive Child Development Act (CCDA) in 1971 by a bipartisan Senate vote<sup>252</sup> and with broad public support.<sup>253</sup> The CCDA sought to update now outmoded separate-spheres supports for an era in which the majority of women worked for pay, creating a national network of federally funded child care centers that ensured families access based on a sliding-scale payment system.<sup>254</sup> President Nixon, who had announced that early childhood education was one of his administration's priorities, was generally expected to sign the measure.<sup>255</sup> However, conservatives began a campaign against the bill, decrying "government interference" in the family, which eventually caused Nixon to veto the CCDA, citing the legislation's "family-weakening implications."<sup>256</sup> The measure, Nixon claimed, would put the "National Government to the side of communal approaches to child rearing over against [sic] the family-centered approach."<sup>257</sup>

At first blush, the veto of the CCDA could be construed simply as conservative support for the existing separate-spheres welfare model in which wives stayed home. On this reading, conservatives' unwillingness to update the model for working mothers reflected their view that mothers should be home with their kids, and that the government should therefore not subsidize childcare outside the home. Yet this reading of the ideological shift that was occurring is undermined by subsequent developments, most prominently welfare reform in the 1990s. That reform revoked payments to mothers for staying at home and instead insisted that such mothers should be required to work for pay.<sup>258</sup> As that reform showed, what was changing was the reigning vision of the government's role with respect to the relationship between families and the market. The widespread recognition at the end of the nineteenth century that market pressures could be destructive to families, and the broadly shared view that it is government's role to buffer families from these forces, was being turned on its head. In its place, families' subjection to mar-

252 *Child Care Veto*, TIME, Dec. 20, 1971, at 10.

253 See Comprehensive Child Development Act of 1971, S. 2007, 92nd Cong., (returned without approval by President Nixon, Dec. 10, 1971); see also SELF, *supra* note 28, at 128–31; Kimberly J. Morgan, *A Child of the Sixties: The Great Society, the New Right, and the Politics of Federal Child Care*, 13 J. POL'Y HIST. 215, 223 (2001) (68% percent of women and 59% of men reported that the government should provide child care). See generally GILBERT Y. STEINER, *THE CHILDREN'S CAUSE* (1976).

254 SELF, *supra* note 28, at 130; CONG. RESEARCH SERV., *Summary of H.R. 1083—Comprehensive Child Development Act*, CONGRESS.GOV, <https://www.congress.gov/bill/93rd-congress/house-bill/1083> (last visited Oct. 15, 2017) (stating the act would "provide free services for economically disadvantaged children and fees on a sliding scale for others").

255 SELF, *supra* note 28, at 128–31.

256 92 CONG. REC. 46,058–59 (1971) (text of President Nixon's veto message).

257 *Id.* at 46,059. According to Sen. James Buckley (R-N.Y.), the CCDA would "destroy parental authority and the institution of the family." SELF, *supra* note 28, at 276.

258 See *infra* notes 276–79 and accompanying text.

ket forces was being reconceptualized as healthy and normal, while government action was increasingly stigmatized. As Ronald Reagan stated in his 1981 inaugural address: “In this present crisis, government is not the solution to our problem; government *is* the problem.”<sup>259</sup>

Charles Murray’s discussion of families in his influential 1984 book, *Losing Ground*, laid out the newly ascendant construction of the family-market relationship.<sup>260</sup> Ten years before, Daniel Patrick Moynihan had attributed the breakdown in poor African American families to economic forces, specifically the loss of industry from inner cities.<sup>261</sup> Murray instead now contended that the problem was government, not industry. Federal welfare benefits for single mothers, he stated, gave poor women a disincentive to marry, as well as an incentive to divorce more quickly when they did.<sup>262</sup> The solution was therefore to remove these benefits. Signaling the shift from the separate-

259 *Ten Memorable Inaugural Addresses: Ronald Reagan—1981*, REAL CLEAR POLITICS, [http://www.realclearpolitics.com/lists/memorable\\_inaugural\\_addresses/reagans\\_first.html](http://www.realclearpolitics.com/lists/memorable_inaugural_addresses/reagans_first.html) (last visited Oct. 15, 2017) (emphasis added).

260 See CHARLES MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950–1980* (1984). As Jane Mayer describes, “[t]he backstory to *Losing Ground* . . . was a primer on the growing and interlocking influence of conservative nonprofits.” MAYER, *supra* note 252, at 111. Mayer summarizes Murray’s rise from unknown academic to bestselling author and public intellectual with the help of the conservative network of funders. *Id.* at 175–77. But see the works compiled by the University of Wisconsin Institute for Research on Poverty criticizing Murray’s findings and disputing Murray’s thesis “that the poor did not benefit from social policies but that they were substantially harmed by the very programs designed to help them.” Sarah McLanahan, *Charles Murray and the Family*, in *LOSING GROUND: A CRITIQUE* 5 (1985), <http://files.eric.ed.gov/fulltext/ED263295.pdf> [hereinafter *LOSING GROUND: A CRITIQUE*]. The report is composed of the following five works: *Charles Murray and the Family* by Sarah McLanahan, *Comment on Murray’s Analysis of the Impact of the War on Poverty on the Labor Market Behavior of the Poor* by Glen Cain, *Comments on Schooling* by Michael Olneck, *The 1965–1970 Crime Increase as Seen by Charles Murray: A Critique* by Irving Piliavin, and *Social Programs—A Partial Solution to, but Not a Cause of Poverty: An Alternative to Charles Murray’s View* by Sheldon Danziger and Peter Gottschalk. *Id.* at 1. For example, Murray argued that welfare benefits incentivized single mothers to have children and that the elimination of welfare will “reduce births to single teenage girls” and “reverse the trend line in the breakup of poor families.” MURRAY, *supra*, at 227. In response, Sarah McLanahan argues that Murray’s evidence is unfounded because he focuses on the illegitimacy ratio, the ratio of nonmarital births to all live births, instead of the illegitimacy rate, which is the ratio of nonmarital births to the total number of women at risk for such an event. *LOSING GROUND: A CRITIQUE*, *supra*, at 6. McLanahan asserts that the illegitimacy *rate* is the appropriate statistic because it tells researchers “what proportion of nonmarried women are having children out of wedlock” and this number had actually been declining for black women after 1965. *Id.* at 8. In addition, Glen Cain responded to Murray’s contention that poverty increased in the 1970s by providing evidence sharply to the contrary, finding that poverty “show[ed] almost no increase throughout the 1970s” because Cain, unlike Murray, included income from in-kind transfers such as food stamps in his analysis. *Id.* at 14.

261 See MOYNIHAN, *supra* note 68, at 19 (“The impact of unemployment on the Negro family, and particularly on the Negro male, is the least understood of all the developments that have contributed to the present crisis. . . . *The critical element of adjustment was not welfare payments, but work [for the husband/father].*”).

262 MURRAY, *supra* note 260, at 152–53.

spheres regime to the privatized-family regime, Murray stated that such single mothers should be required to find a job and put their children in day-care.<sup>263</sup> In his words: “Why should the mother be exempted by the system from the pressures that must affect everyone else’s decision to work?”<sup>264</sup>

The report issued by President Reagan’s Special Working Group on the Family, headed by Gary Bauer two years later, concurred.<sup>265</sup> Federal spending to address poverty among children in the 1960s and 1970s, the authors asserted, meant that children’s “delinquency rates doubled,” “[t]heir Standardized Aptitude Test (SAT) scores plummeted,” and “[d]rug and alcohol abuse skyrocketed.”<sup>266</sup> To the working group, government action was not simply ineffective in helping families, as conservative opponents had claimed before, but intrinsically at odds with how proper families functioned:

For most Americans, life is not a matter of legislative battles, judicial decrees, and executive decisions. It is a fabric of helping hands and good neighbors, bedtime stories and shared prayers, lovingly packed lunchboxes and household budget-balancing, tears wiped away, a precious heritage passed along. It is hard work and a little put away for the future.

No government commands these things. No government can replicate them.<sup>267</sup>

Indeed, the report concluded, government was the preferred tool of antifamily forces, who believe “that children should be raised in State-approved clinics, that a license should be required for procreation, that tax penalties should be levied against those with large families.”<sup>268</sup> Strengthening families requires not help from government, but instead “turning back to the households of this land the autonomy that once was theirs, in a society stable and secure, where the family can generate and nurture what no government can ever produce—Americans who will responsibly exercise their freedom and, if necessary, defend it.”<sup>269</sup>

According to the report, it was not government regulation of the market that supported healthy families. Instead, “democratic capitalism through ‘its devotion to human freedom, its creation of wealth, and its demand for personal responsibility—made the modern family.’”<sup>270</sup> In this vision, there was

263 *Id.* at 231.

264 *Id.*

265 WHITE HOUSE WORKING GROUP ON THE FAMILY, *THE FAMILY: PRESERVING AMERICA’S FUTURE* (1986), <http://files.eric.ed.gov/fulltext/ED316515.pdf>.

266 *Id.* at 28.

267 *Id.* at 12 (emphasis omitted).

268 *Id.* at 8. This thread of argument picked up on the theme of government overreach on family issues of sex education. As James Robison put it from his pulpit in 1980 while urging his congregants to vote conservative: “Who’s going to lock up that unbridled, excessive, uncontrolled federal government?” SELF, *supra* note 28, at 342.

269 WHITE HOUSE WORKING GROUP ON THE FAMILY, *supra* note 265, at 10.

270 *Id.* at 16 (quoting Allan C. Carlson, *The Family and Free Enterprise*, in *THE WEALTH OF FAMILIES: ETHICS AND ECONOMICS IN THE 1980S* 35, 42 (Carl A. Anderson & William J. Gribbin eds., 1982)).

little constructive role for government. Neoliberalism had arrived in American family policy.<sup>271</sup>

This reorganization of the ideology of the family-market-government triangle underlay the rollback of American welfare policies, beginning with the decentralization of unemployment insurance and Medicaid to the states during the Reagan era,<sup>272</sup> and continuing with welfare reform under President Clinton in 1996.<sup>273</sup> As described by former Senator Rick Santorum, a leading advocate of welfare reform:

Traditional liberal welfare policy is all about transferring income to individuals in such a way that their dependence on government is increased and their dependence on family decreased. We need[ed] to change these safety net programs so that they lead not only to independence from the government but also create [economic] incentives for the formation and maintenance of families.<sup>274</sup>

The 1996 welfare overhaul took a major step toward restructuring government with this new ideology in mind. That reform repealed Aid for Families with Dependent Children (AFDC), which had provided subsidies for poor mothers to stay at home to care for children. In its place, Congress instituted Temporary Assistance for Needy Families (TANF), which required these mothers to work in paid jobs in order to receive government aid, and put a sixty-month limit on this aid to ensure that families do not become permanently dependent on the government.<sup>275</sup> In place of supporting families' carework and human development, TANF's goal was market self-sufficiency.<sup>276</sup> The new, dominant vision of the welfare state was no longer a separate-spheres model regulated by government. In Senator Santorum's description, welfare reform was built on the philosophy of conservatives, who properly "believe in the power of markets more than they do the power of government."<sup>277</sup>

271 As Robert Self put it: "the religious and moral conservatives who became so crucial to Republican fortunes in the 1980s and beyond incorporated their demands for greater moral discipline and 'traditional' families into the free-market, low-tax, and states' rights conservatism of the Reagan coalition with relative ease." SELF, *supra* note 28, at 369.

272 See PIERSON, *supra* note 243, at 104, 156–57.

273 See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, and 42 U.S.C.) (PRWORA instituted Temporary Assistance for Needy Families (TANF) and replaced the Aid to Families with Dependent Children (AFDC) program).

274 SANTORUM, *supra* note 10, at 126.

275 See Personal Responsibility and Work Opportunity Reconciliation Act, tit. I (replacing AFDC with TANF); see also 26 U.S.C. § 32 (2012) (earned income tax credit). Historically, AFDC had a very high benefit reduction rate when a family earned income. See Robert Moffitt, *An Economic Model of Welfare Stigma*, 73 AM. ECON. REV. 1023 (1983).

276 See 42 U.S.C. § 607 (2012) (providing that adult recipients of benefits must work to remain eligible and that the definition of work is defined by each state); *id.* § 608(a)(7) (providing that assistance from TANF will not last longer than five years).

277 SANTORUM, *supra* note 10, at 121.

The imperative that families be subjected to market forces does not eradicate the view that wives should properly stay at home; it simply rejects government's role in accomplishing this goal. Many of those espousing the removal of government supports still adhere to separate-spheres ideology insofar as they believe that families function best when the mother stays at home with her children. For example, the Bauer report, despite lauding the close relationship of markets and families, praised American mothers for avoiding paid work: "Unlike Sweden . . . the mothers of America have managed to avoid becoming just so many more cogs in the wheels of commerce."<sup>278</sup> Yet this vision of separate spheres harks back to the mid-nineteenth century, when market forces themselves were supposed to maintain the proper demarcation between spheres without government action.

The welfare system that has developed in neoliberalism's wake, in contrast to the welfare states of wealthy European democracies, is largely residualist in nature, meaning it is targeted at the least economically advantaged families. In this new configuration, requiring work in the paid workplace with supportive tax policy is conceptualized as producing far less dependency on the government than cash transfers.<sup>279</sup> The result has been that the Earned Income Tax Credit (EITC), passed in 1975 and expanded in subsequent years, has become the major way in which the federal government supports families.<sup>280</sup> Yet while the EITC greatly increased the returns to paid employment for workers at the low end of the labor market, it provides very small benefits to families with quite low incomes because it takes the form of a tax credit.<sup>281</sup>

One of the results of this retrenchment is that the U.S. safety net is, by design, less responsive to external economic shocks suffered by poor and female-headed families than it was thirty years ago.<sup>282</sup> As one researcher put it: "Although safety net transfer programs [including TANF, food stamps, unemployment insurance, and the Earned Income Tax Credit] lower the level of instability, over a 30-year period there is evidence of a decline in the responsiveness of the U.S. safety net to rising [economic] instability over time

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278 WHITE HOUSE WORKING GROUP ON THE FAMILY, *supra* note 265, at 38.

279 *See id.* at 38–39.

280 26 U.S.C. § 32.

281 The more income a person or family earns, the larger the EITC tax credit the family receives until the person or family has reached the maximum allowed by statute. *See* CTR. ON BUDGET AND POLICY PRIORITIES, POLICY BASICS: THE EARNED INCOME TAX CREDIT 1 (2016), <http://www.cbpp.org/research/federal-tax/policy-basics-the-earned-income-tax-credit>.

282 *See* Marianne Bitler & Hilary Hoynes, *The More Things Change, the More They Stay the Same? The Safety Net and Poverty in the Great Recession*, 34 J. LAB. ECON. S403, S406 (2016) ("This finding of less protection [from AFDC benefits] at the bottom and more cyclicity of extreme post-tax and transfer poverty is highly robust across various specifications and measures of the business cycle."); Lisa A. Gennetian et al., *Intrayear Household Income Dynamics and Adolescent School Behavior*, 52 DEMOGRAPHY 455, 473 (2015) (finding income instability to be nearly double in the lowest quintile compared to the highest quintile despite welfare programs).

for female-headed families, black families, and families in the bottom income quintile.”<sup>283</sup>

### III. TOWARDS BUFFERED SPHERES

While the free market may be an adequate mechanism for distributing some goods, as Part I abundantly demonstrates, it is inadequate for distributing the conditions that families need to flourish. It is time to return to the social understanding that once undergirded the welfare state: that we are a society that accepts both the benefits and burdens that come with market society, but that government will support the conditions that families need to thrive.<sup>284</sup> We cannot, of course, return to separate-spheres ideology as a viable model for how the welfare state should be crafted. The notion that women are uniquely suited to the domestic realm has long been properly abandoned. Families today, moreover, are far more diverse than they were in the nineteenth century. Furthermore, the view that family and market are completely separate realms characterized by diametrically opposing characteristics has been roundly undermined by scholars.<sup>285</sup>

We need a new vision of the appropriate relationship between family and market, as well as a renewed understanding of the integral role that government should play in achieving this vision. The vision should channel a considerable portion of the great wealth the United States has achieved through the market away from the current economic free-for-all that advantages few. Instead, it should use this wealth to support families, and particularly children’s wellbeing and human development.

In place of the privatized-family model, or its predecessor, the separate-spheres model, I propose a theory of regulation that I call “buffered spheres.” As with the separate-spheres regulation of the twentieth century, buffered-spheres regulation would recognize the important role that government must play in regulating markets to support families. Yet “buffered-spheres” policies would jettison the notion that either market work or care-taking should be confined to family members of a particular gender or that family protections should be narrowly confined to certain types of families.<sup>286</sup>

Buffered-spheres regulation is premised on the view that the distribution of conditions that families need to thrive should be insulated, or “buffered,” from the distribution of other goods traded on the market. Underlying the

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283 Bradley L. Hardy, *Income Instability and the Response of the Safety Net*, 35 CONTEMP. ECON. POL’Y 312, 313 (2016); see also Bitler & Hoynes, *supra* note 282, at S406; Hardy, *supra* note 42, at 1655 tbl.4 (concluding that changes to U.S. safety net transfer programs between 1981 and 2009 were associated with their diminished ability to shield families from income shocks).

284 See SKOCPOL, *supra* note 229.

285 See, e.g., JEANNE BOYDSTON, *HOME AND WORK: HOUSEWORK, WAGES, AND THE IDEOLOGY OF LABOR IN THE EARLY REPUBLIC* (1994); VIVIANA A. ZELIZER, *THE PURCHASE OF INTIMACY* (2005).

286 See *supra* note 27 and accompanying text.



buffered-spheres approach is the more general principle that the market, while a valuable mechanism to distribute many goods, is not the appropriate mechanism to distribute all societal goods.<sup>287</sup> We recognize this principle when we distribute votes in government elections based on the principle of “one person, one vote” rather than on market power, and when we acknowledge that government jobs should be allocated based on merit rather than wealth.<sup>288</sup>

Limits on market distribution, buffered-spheres theory contends, should apply to the conditions that support families as well. Whether one makes a lot of money in the workplace or the stock market and one’s relative advantage in negotiating with an employer, in this view, might properly determine who should be able to buy a luxury car or a big house, but it should not determine whether families have the basic conditions they need to thrive and whether they can adequately care for family members.<sup>289</sup> Put another way, ensuring that families have the conditions they need to thrive should be adopted as a central commitment of government because of the importance of families, not to mention the importance of children to society’s future, rather than a determination left to the invisible hand.

The theory of buffered spheres would not deny, of course, that many of the goods that support families cost money. Certainly constructing an excellent daycare system, for example, would cost a significant amount. Buffered-spheres theory simply maintains that the decisions regarding how much of this good to provide should be a product of democratic deliberation focused on the importance of families, and that the distribution of these conditions among families should be based on criteria other than market power. In the case of early childhood education, for example, the appropriate principle of distribution would seem to be universal access, given the critical role it can play in children’s development. The same is true for many other goods important for children’s development, such as a substantial parental leave to support children’s wellbeing. While space does not permit a detailed discussion of what buffered-spheres policies would look like, five principles serve as the starting point to implement this regulation in the contemporary United States.

#### A. *Ensuring All Citizens Adequate Time in the Domestic Realm*

Public policy in the United States today gives adults ample incentive to enter the paid workforce but little support to return home to their families at

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287 As readers of political theory will recognize, the important notion that not all goods in all spheres of society should be distributed by the market comes from Michael Walzer’s important but underused book, MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983). I discuss Walzer’s theory as it applies to families in more depth, including his theory’s strengths and weaknesses, in a prior article. See Maxine Eichner, *The Family and the Market—Redux*, 13 THEORETICAL INQUIRIES LAW 97, 117–26 (2012).

288 Cf. WALZER, *supra* note 287.

289 Cf. *id.*

the end of the day. Buffered-spheres policies would support both movements. Its measures would ensure that full-time employees work a true forty-hours-per-week schedule, that employees have paid time off for sick and vacation leave, and that time spent away from paid work can truly be free from such work.

The United States need not reinvent the wheel on constructing such a regulatory framework. The European Union's Working Time Directive (WTD), which currently directs regulation of working time in EU member states, could serve as a model for much of this framework.<sup>290</sup> The WTD sets out detailed rules enforcing its cap on workweek hours, including: which employees should be exempted from such a cap; how to deal with the issues of managerial employees, medical personnel, and the self-employed; and how to address temporary increases in workload. While the WTD imposes a "hard cap" of forty-eight hour workweeks, this hard cap could be adapted to enforce a standard forty-hour workweek, as well as to give employees the right to opt out of the cap—provided they receive extra pay for overtime.<sup>291</sup> The United Kingdom already allows such an opt-out to the WTD weekly-hour cap by individual employees under conditions designed to keep workers from being coerced into entering such agreements.<sup>292</sup> The WTD also contains detailed rules governing the administration of vacation leave and pay.

Regulations should also support employees in taking time away from paid work that is truly time off. Here, too, a European country has already paved the way. A new law in France requires large employers to draft protocols with employees concerning when they can turn off their work phones and avoid checking work email and calls after normal business hours.<sup>293</sup> The United States should follow this lead.

*B. Ensuring Families with Young Children Time and Support for Caretaking and Human Development*

While buffered-spheres policies seek to ensure that all employees have adequate domestic time, they also recognize that parents with young children need still more time to provide the caretaking and human development that children require. Buffered-spheres policies would therefore support parents' integrating the caretaking and human development that children need while still allowing parents to earn their keep.

These policies would, first of all, provide publicly funded parental leave at the time of a child's birth or adoption for a designated period of

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290 Council Directive 2003/88/EC, 2003 O.J. (L 299) (EC).

291 *Id.* art. 6.

292 See *Maximum Weekly Working Hours*, GOV.UK, <https://www.gov.uk/maximum-weekly-working-hours/weekly-maximum-working-hours-and-opting-out> (last visited Oct. 15, 2017).

293 See Alissa J. Rubin, *France Lets Workers Turn Off, Tune Out and Live Life*, N.Y. TIMES (Jan. 2, 2017), <https://www.nytimes.com/2017/01/02/world/europe/france-work-email.html?mcubz=0>; Charlemagne, *France's 6 p.m. Email Ban: Not What it Seemed*, ECONOMIST BLOG (Apr. 14, 2014), <http://www.economist.com/blogs/charlemagne/2014/04/frances-6pm-e-mail-ban>.

months.<sup>294</sup> Once parental leave ends and parents return to work, buffered-spheres policies would ensure that workers with young children still have time to parent adequately. Indeed, research shows that while the quality of ECE is important to children's long-term development, the quality of their home environment has an even larger effect on children's outcomes.<sup>295</sup> This requires policies that guarantee wage and benefit parity for reduced work hours,<sup>296</sup> as well as reasonable amounts of paid leave for routine parenting tasks, including caring for children's illnesses and dealing with emergency school closures.<sup>297</sup> Finally, buffered-spheres policies would support programs that assist parents in providing a nurturing and stimulating home environment for young children.<sup>298</sup>

### C. *Eliminating Child Poverty*

Third, all children should have their basic material needs met, regardless of whether their parents can afford to do so. Cash transfers to the child's family are an effective means of accomplishing this.<sup>299</sup> Still better, where possible, is a policy supporting mothers' paid work at a livable wage while ensuring the child has good ECE.<sup>300</sup> Increasing the availability of publicly funded jobs and restructuring the Earned Income Tax Credit so that it provides more benefit to those at the lowest levels are two means of doing so.<sup>301</sup> Mothers' employment has been shown to increase children's wellbeing over

294 Different factors point in contradictory directions regarding how much leave, between forty weeks and one year, is optimal for children's wellbeing. See Sharon Lerner, *Is 40 Weeks the Ideal Maternity Leave?*, SLATE (Dec. 22, 2011), [http://www.slate.com/articles/double\\_x/doublex/2011/12/maternity\\_leave\\_how\\_much\\_time\\_off\\_is\\_healthiest\\_for\\_babies\\_and\\_mothers.html](http://www.slate.com/articles/double_x/doublex/2011/12/maternity_leave_how_much_time_off_is_healthiest_for_babies_and_mothers.html) (summarizing contradictory research). While health benefits for the child indicate that forty weeks may be the ideal length of leave, some research indicates that daycare for children younger than one-year-old is not developmentally optimal. See ESPING-ANDERSEN, *supra* note 46. To complicate matters further, some research indicates that providing leaves longer than a year results in a decline in maternal employment, which reduces children's wellbeing because of the loss of maternal income. See Blofield et al., *supra* note 39.

295 See VANDELL & WOLFE, *supra* note 195, at iii.

296 For example, Sweden allows parents to work six hours per day at prorated pay until their children reach age eight. GORNICK & MEYERS, *supra* note 7, at 167.

297 Most OECD countries provide a certain number of days of paid leave to care for sick children. OECD, *supra* note 105.

298 See *supra* note 208 and accompanying text.

299 See ARIEL FISZBEIN & NORBERT SCHADY, *CONDITIONAL CASH TRANSFERS: REDUCING PRESENT AND FUTURE POVERTY*, at xi (2009), [http://siteresources.worldbank.org/INTCCT/Resources/5757608-1234228266004/PRR-CCT\\_web\\_noembargo.pdf](http://siteresources.worldbank.org/INTCCT/Resources/5757608-1234228266004/PRR-CCT_web_noembargo.pdf).

300 ESPING-ANDERSEN, *supra* note 46, at 125 ("The incidence of child poverty falls by a factor of 3-4 when mothers work—in particular in the case of lone mothers." (citing Esping-Andersen, *supra* note 37)).

301 See CHILDREN'S DEF. FUND, *ENDING CHILD POVERTY NOW* (2013), <http://www.childrensdefense.org/library/PovertyReport/EndingChildPovertyNow.html>.

the long term because of the material benefits it provides, so long as children have good quality ECE and the mothers' work is relatively low-stress.<sup>302</sup>

As the country with the largest GDP in the world, the United States could certainly afford to accomplish this goal. The poverty gap for the nation as a whole in 2015, meaning the amount it would take to lift all Americans above the poverty line, totaled \$177 billion, or a little less than one percent of the 2015 GDP.<sup>303</sup> A recent calculation by the Urban Institute concluded that one policy package proposed by the Children's Defense Fund would cost \$77.2 billion a year, which would lift 6.6 million children (60%) out of poverty, while improving economic circumstances for 97% of poor children.<sup>304</sup> While certainly both those numbers are high, they are a drop in the bucket of the U.S. economy.<sup>305</sup> Furthermore, outlays to eliminate child poverty would be amply paid back over time: by one estimate, the societal cost of child poverty is equal to 45% of U.S. GDP, mostly because of the link between poverty and school outcomes, health, lost productivity, and criminal behavior.<sup>306</sup> An investment of half of one percent GDP to prevent such losses is more than well worth it.

#### *D. Supporting Caretaking and Human Development Activities Outside of Families*

Buffered-spheres regulation would also support high-quality, universal caretaking and human development outside of the family while parents work for pay. The goal should not simply be to keep children safe while parents work, but instead to provide all children excellent caretaking and human development as they grow. This system of external care would begin with

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302 See generally ROBERT HAVEMAN & BARBARA WOLFE, *SUCCESSING GENERATIONS: ON THE EFFECTS OF INVESTMENTS IN CHILDREN* (1994); ESPING-ANDERSEN, *supra* note 46, at 128; CONSEQUENCES OF GROWING UP POOR (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997); Esping-Andersen, *supra* note 37, at 56 (citing Lisa M. Lynch, *Trends in and Consequences of Investments in Children*, in *SECURING THE FUTURE: INVESTING IN CHILDREN FROM BIRTH TO COLLEGE* (Sheldon Danziger & Jane Waldfogel eds., 2000)).

303 See *POV-28. Income Deficit or Surplus of Families and Unrelated Individuals by Poverty Status*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pov/pov-28.html> (last revised Sept. 7, 2017).

304 CHILDREN'S DEF. FUND, *supra* note 301.

305 *Id.* The reforms would include: increasing the Earned Income Tax Credit for lower-income families with children; increasing the minimum wage from \$7.25 to \$10.10; creating subsidized jobs for unemployed and underemployed individuals ages sixteen to sixty-four in families with children; making childcare subsidies available to all eligible families below 150% of the poverty level; making the Child and Dependent Care Tax Credit refundable with a higher reimbursement rate; basing food stamp benefits on the USDA's Low-Cost Food Plan for families with children; making the Child Tax Credit fully refundable; making housing vouchers available to all households with children below 150% of the poverty level for whom fair market rent exceeds 50% of their income; and requiring child support to be fully passed through to TANF families, fully disregarded for TANF benefits, and partially disregarded for SNAP benefits. *Id.*

306 ESPING-ANDERSEN, *supra* note 46, at 78.

center-based daycare and ECE once parental leave ends and would be integrated with parental work schedules. It would run through primary and secondary education and then conclude after high school with college or technical training at subsidized rates. A number of excellent European coordinated systems could serve as models.<sup>307</sup>

### E. *Reducing Insecurity and Inequality*

Last, but not least, under buffered-spheres policies, the government would seek to reduce both the economic insecurity and inequality of its citizens. As Jacob Hacker and Paul Pierson showed in their excellent book, *Winner-Take-All Politics*, although these features of the economy are often taken as the inevitable product of globalization and capitalism, they are instead a contingent product of a political system that has facilitated both through, among other things, lower taxes at the top, a failure to rein in employer practices that transfer risks to employees and gains to the top one percent, and laws that attack the strength of unions.<sup>308</sup>

Reducing inequality requires reversing all these practices. At the bottom, passage of a generous minimum wage mandate would ensure that workers receive a living wage. At the top, CEOs' pay should be reined in by ensuring that executive pay is based on long-term rather than short-term measures,<sup>309</sup> as well as that CEOs do not have the power effectively to set their own compensation through de facto control of compensation committees and boards of directors.<sup>310</sup> Corporate regulation should require that corporations take into account the interests of all stakeholders, including the public, rather than simply shareholders. Reducing inequality also requires returning to a more progressive tax system.

Reducing insecurity requires, among other things, regulations that ensure employees are not treated as market inputs, but rather as humans who must be treated with dignity, with recognition of their interest in their jobs, as well as the recognition that they have families. Regulations should give employees some rights to bargain over the terms and conditions of their

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307 For a summary of early childhood education policies in a range of wealthy, Western countries, see GORNICK & MEYERS, *supra* note 7, at 197–235. The issue of how to reform higher education to bring it within the ambit of the welfare state is far too complicated to deal with in any detail here. With that said, the problem is not insoluble. Indeed, changing the way that federal financial aid benefits are dispersed to guarantee better access and more affordable education, in the same way that federal mortgages and health care help increase access and affordability, is one promising path to consider. See BEN MILLER & ANTOINETTE FLORES, CTR. FOR AM. PROGRESS, THE CASE FOR FEDERAL HIGHER EDUCATION AFFORDABILITY STANDARDS: LESSONS FROM OTHER SECTORS (2016), <https://www.american-progress.org/issues/education/reports/2016/05/26/136594/the-case-for-federal-higher-education-affordability-standards/> (comparing approaches between the ACA, housing reform, and federal Pell Grants).

308 HACKER & PIERSON, *supra* note 29.

309 Carbone and Cahn describe measures that would accomplish this. See CARBONE & CAHN, *supra* note 16, at 151–52.

310 See *id.* at 148.

jobs, and should encourage employers to respond not just to stock market prices, but to employees' long-term interests. These would include, for example, regulations making it less profitable to hire workers as temporary rather than as permanent employees. Finally, regulations could also improve the condition of those engaged in temp work, enabling the formation of permanent agencies in which workers could enroll and through which they could receive benefits.<sup>311</sup>

While the ultimate goal of the market should be to increase citizens' wellbeing rather than simply to maximize economic growth, the health of markets matter in ensuring that the United States has the resources to support families. This goal would not be served by an inflexible economy in which employers had no power to terminate employees in reaction to market forces. To deal with this concern, the social safety net must be strengthened to help stabilize families in such circumstances. The Danish "flexicurity" system provides one excellent example of such a model.<sup>312</sup> This system combines rules that allow employers flexibility in laying off employees during economic downturns with policies that help to stabilize laid-off workers economically while putting them back into new jobs. The aim of flexicurity is to promote employment security over job security. The system includes, among other things, relatively generous unemployment benefits, and training that gives workers opportunities to update their skills so they are less vulnerable to employment restructuring.<sup>313</sup>

#### CONCLUSION

The family is an institution that is central to individual, community, and national wellbeing. Yet it is in an institution that is also profoundly vulnerable to disruption by market forces. The eradication of the longstanding social compact that the state must buffer families and their caretaking and human development functions from market forces has wreaked havoc on American families. It is past time to use the gains from market society to shore up the wellbeing of U.S. families, rather than to treat the devastation caused by market forces as an inevitable fact of American life.

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311 Esping-Andersen, *supra* note 37, at 126–28.

312 *Flexicurity*, DENMARK.DK, <http://denmark.dk/en/society/welfare/flexicurity> (last visited Oct. 15, 2017) (discussing how flexicurity promotes “employment security over job security”).

313 *See id.*; *see also* HACKER, *supra* note 6, at 29; Duncan Gallie, *The Quality of Working Life in Welfare Strategy*, in WHY WE NEED A NEW WELFARE STATE, *supra* note 37, at 126–27; Anton Hemerjick, *The Self-Transformation of European Social Model(s)*, in WHY WE NEED A NEW WELFARE STATE, *supra* note 37, at 193–94; Frank Vandenbroucke, *Foreword* to WHY WE NEED A NEW WELFARE STATE, *supra* note 37, at ix–x.

