

2019

# Childcare, Vulnerability, and Resilience

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## YALE LAW & POLICY REVIEW

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### Childcare, Vulnerability, and Resilience

*Meredith Johnson Harbach\**

*The question of how to provide care for America's youngest children, and the quality of that care, is among the most vexed for family law. Despite seismic demographic shifts in work and family, childcare law and policy in the United States still operates on the assumption that childcare is the private responsibility of parents and families rather than a state concern. But this private childcare model, based on unrealistic assumptions in liberal theory and buttressed by an ascendant neoliberalism, is inadequate to today's childcare challenges. This project confronts the inadequacies of the private childcare model. Using Martha Albertson Fineman's Vulnerability Theory as its frame, this Article argues that the state's role with regard to childcare should be primary, rather than supplemental or contingent. Recognizing the universal vulnerability*

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\* Professor of Law, University of Richmond School of Law. For thoughtful reactions and comments, I thank Suzanne Kim, Kimberly Jenkins Robinson, Laura Spitz, and Allison Anna Tait. My work on this project was enriched while I was a Visiting Scholar at the Vulnerability and the Human Condition Initiative at Emory University, 2017-18. I also received generative feedback on the project through various stages at the following workshops: the Family Law Scholars and Teachers Conference; the Workshop on Vulnerability and the Social Reproduction of Resilient Societies; the Southeastern Association of Law Schools Annual Meeting, Works-in-Progress Series; Panel Discussion: Whither Redistribution? Feminism, Neoliberalism, Work, and Family, Law & Society Conference; and the Workshop on Children, Vulnerability and Resilience, Emory Law School, Atlanta, Georgia. I am grateful to a terrific team of research assistants for help with this paper as well as my larger scholarly agenda on childcare law and policy: Alex Cook, Juliet Edwards, Phillip Grubbs, John O'Malley, Kerrigan O'Malley, Emily Palombo, Joseph Scoggins, Liz Tyler, Ivana Wade, and especially Allison Smith. Thanks, also, to the editors at the Yale Law & Policy Review for their thoughtful editing of the piece. This Article is dedicated to my mother, Barbara Smith Johnson, who was a gifted teacher and a passionate advocate for children.

*of children and families and the potential for high-quality care to promote resilience, the state has an obligation to provide the care and support necessary to ensure child wellbeing. With the development of a comprehensive, public childcare system, the state can partner with families to ensure that all children have access to quality childcare, and consequently, increased resilience with greater opportunities to develop and thrive.*

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*If we are to achieve true equality of opportunity, each and every child deserves to have a decent early childhood so they can acquire the skills and competencies to compete and contribute effectively.*<sup>1</sup>

The question of how to provide care for America’s youngest children, and the quality of that care, is among the most vexed for family law and policy. Despite seismic demographic shifts in work and family, childcare<sup>2</sup> law and policy in the United States still operates on the assumption that childcare is the private responsibility of parents and families, rather than the responsibility of the state. But this private childcare model is inadequate to meet today’s childcare challenges. Although parents value high quality care—care that adequately meets children’s social, cognitive, physical, and emotional needs<sup>3</sup>—few American children receive it.

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1. The Saguaro Seminar, *Closing the Opportunity Gap*, HARV. KENNEDY SCH., 2016 32 (2016) [hereinafter *Closing the Opportunity Gap*], <http://www.theopportunitygap.com/wp-content/uploads/2017/08/2016-Working-Group-Report.pdf#page=74> [<http://perma.cc/Y6EB-CMDH>].
  2. For the purposes of this project, I understand “childcare” to be non-compulsory, non-parental care provided for children under age six who have not begun primary school, as well as supplemental care for school-aged children through age eight provided by someone other than parents or legal guardians. I take an expansive view of what childcare comprises, seeing all such care to present opportunities for what, in academic settings, is more frequently termed “early childhood education and care.” See *Parents and the High Cost of Childcare: 2015 Report*, CHILDCARE AWARE OF AM. 16 (2015) [hereinafter *High Cost 2015*], <http://usa.childcareaware.org/wp-content/uploads/2016/05/Parents-and-the-High-Cost-of-Child-Care-2015-FINAL.pdf> [<http://perma.cc/C7EY-FKHW>] (indicating that quality childcare requires early education); *Transforming the Workforce for Children Birth Through Age 8: A Unifying Foundation*, INST. OF MED. & NAT’L RESEARCH COUNCIL (LaRue Allen & Bridget B. Kelly eds., 2015), <http://www.nap.edu/catalog/19401/transforming-the-workforce-for-children-birth-through-age-8-a> [<http://perma.cc/XW6A-8RTE>] [hereinafter *Transforming*].
  3. See EDWARD ZIGLER ET AL., *THE TRAGEDY OF CHILD CARE IN AMERICA* 67 (2009). Current models of quality in early childhood education and care center around interactions between caregiver and child, also known as “process quality.” Process quality focuses on sensitive and responsive caregiving that

Nationwide, overall childcare conditions are bleak, and the average quality of childcare hovers around mediocre. Many parents struggle to access childcare of the quality and type they prefer, often because of resource constraints and sometimes because of childcare “deserts.”<sup>4</sup> The private childcare model isn’t working. And children, families, and society feel the effects of the model’s shortcomings.

The timing could not be more urgent. As academics in a range of disciplines participating in the *Closing the Opportunity Gap* Project report, “[t]he economic and social transformations of the last half-century—rising economic insecurity, growing socioeconomic segregation, the collapse of the low income family, the unraveling of working class neighborhoods, and the decline of a collective sense of responsibility for ‘our kids’—have created a perfect storm of plummeting prospects for the next generation of

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provides emotional support and intentional teaching. See Margaret Buchinal, *Measuring Early Care and Education Quality*, 12 CHILD DEV. PERSP. 3, 4 (2018). Quality is also measured by reference to “structural quality”—the design features and scaffolding characteristics of childcare programs. Aspects of structural quality include caregiver education and training, caregiver-to-child ratios, class size, and childcare leadership and administration. *Id.* The quality model uses structural features—which are easier to measure—as proxies for process quality. The assumption is that strong structural quality enhances process quality and leads to higher quality childcare. *Id.* Newer research suggests that to better understand the aspects of childcare that positively impact child wellbeing, these quality measures should be expanded to include other aspects of childcare provision. *Id.* at 6-7. The National Association for the Education of Young Children also includes cultural competence as a core component of high-quality childcare. *Diversity, Equity, and Cultural Competence*, NAT’L ASSOC. FOR ED. OF YOUNG CHILD., <https://www.naeyc.org/our-work/public-policy-advocacy/cultural-competence> [<https://perma.cc/B7FK-EJSP>]. For further discussion of how experts measure child quality and the social significance of quality care, see Meredith Johnson Harbach, *Nudging Parents*, 19 J. GENDER RACE & JUST. 73, 77-81 (2016) [hereinafter Harbach, *Nudging*]; *infra* notes 197-214 and accompanying text.

4. See Dionne Dobbins et al., *Child Care Deserts: Developing Solutions to Child Care Supply and Demand*, CHILDCARE AWARE OF AM., 2 (2016), <http://usa.childcareaware.org/wp-content/uploads/2016/09/Child-Care-Deserts-report-FINAL2.pdf> [<http://perma.cc/ET6L-EU8R>] [hereinafter Dobbins, *Deserts*].

Americans.”<sup>5</sup> The result is a widening, class- and race-based opportunity gap for children that forestalls upward mobility and leads to what the Saguaro Seminar authors characterize as “the shriveling of the American Dream of opportunity for all.”<sup>6</sup> Early childhood is a critical part of the equation because it is in early childhood that the opportunity gap begins.<sup>7</sup> The most influential domains for early childhood development comprise the “geology” of childhood<sup>8</sup>—parents, families, and childcare.<sup>9</sup> Early investment in childcare reaps especially significant benefits, but early limitations make the opportunity gap more difficult to close.<sup>10</sup> Thus, the failings of our private childcare system are tremendously consequential: When childcare fails, American children fall behind. And the consequences of the opportunity gap aren’t borne fairly across the population. Instead, race and ethnicity exacerbate the gap,<sup>11</sup> with children of color less likely to gain access to high-quality childcare.<sup>12</sup>

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5. *Closing the Opportunity Gap*, *supra* note 1, at 3. Professor Robert Putnam provides a haunting and challenging narrative of this phenomenon in his recent book, ROBERT PUTNAM, *OUR KIDS: THE AMERICAN DREAM IN CRISIS* (2015).
  6. *Closing the Opportunity Gap*, *supra* note 1, at 6. Of course, this dream of opportunity for all has often been more honored in the breach, as enslaved peoples, immigrants, and communities of color frequently have been denied equal access to the American dream.
  7. *Id.* at 24. As early as kindergarten, the opportunity gap is manifest. By then, children from wealthy families are ahead of children among the bottom third socioeconomically by more than a full year. *Id.* at 4.
  8. *See infra* notes 193-96 and accompanying text.
  9. *See Closing the Opportunity Gap*, *supra* note 1, at 26 (focusing on domains of parenting skills, time for parenting, economic security for families, and early childhood education). Next to parents, childcare is the most developmentally significant context for many American children. *See ZIGLER*, *supra* note 3, at 1-2.
  10. *Closing the Opportunity Gap*, *supra* note 1, at 25.
  11. Emma García & Elaine Weiss, *Early Education Gaps by Social Class and Race Start U.S. Children Out on Unequal Footing*, *ECON. POL’Y INST.* 2 (2015), <https://www.epi.org/publication/early-education-gaps-by-social-class-and-race-start-u-s-children-out-on-unequal-footing-a-summary-of-the-major-findings-in-inequalities-at-the-starting-gate> [<https://perma.cc/682K-EE3R>].
  12. Dionne Dobbins, et al., *Unequal Access: Barriers to Early Childhood Education for Boys of Color*; *CHILDCARE AWARE OF AMERICA 2* (Aug. 2016) <http://usa.childcareaware.org/advocacy-public-policy/resources/research/>

This Article continues my work critiquing theories of state-family relationships in the childcare context, and using them as a lens through which to consider the way the state orients itself toward children, parents, and families. In prior work, I have critiqued the state's existing orientation toward families and children vis-à-vis childcare along a number of axes, including preferring childcare arrangements for some families but not others,<sup>13</sup> making faulty assumptions about the functioning of the childcare market,<sup>14</sup> and making faulty assumptions about the ways in which market actors make childcare decisions.<sup>15</sup>

In this paper, rather than critiquing the state's orientation as currently in place, I make a squarely normative argument that the state's orientation must shift: Our private childcare system is not only ineffective as implemented, but also deeply flawed as a theoretical matter and morally wrong in practice. By critiquing neoliberal models of childcare and then reconsidering the state's childcare role through Martha Fineman's Vulnerability Theory,<sup>16</sup> I argue that the state's responsibility with regard to childcare is (or ought to be) primary, rather than supplemental or contingent. In so doing, this project contributes to the emerging field of "Early Childhood Development and the Law."<sup>17</sup> More broadly, by analyzing

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boysofcolor [<https://perma.cc/M789-UVJC>] [hereinafter Dobbins, *Unequal Access*].

13. Meredith Johnson Harbach, *Outsourcing Childcare*, 24 YALE J.L. & FEMINISM 254 (2012) [hereinafter Harbach, *Outsourcing*].
14. Meredith Johnson Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659 (2015) [hereinafter Harbach, *Market Failure*].
15. Harbach, *Nudging*, *supra* note 3.
16. Martha Albertson Fineman has worked over a number of years to develop a robust alternative to liberal theory and the liberal subject—Vulnerability Theory. She is founding director of the Vulnerability and the Human Condition Initiative at Emory University, which provides an academic space in which scholars can develop models of state responsibility based on our lived realities of universal, constant vulnerability. See *Vulnerability and the Human Condition*, EMORY UNIV., <http://web.gs.emory.edu/vulnerability/about/index.html> [<http://perma.cc/ZJ7Z-MG97>]. It was my privilege to be a Visiting Scholar at the Initiative while on sabbatical leave for the 2017-18 academic year. For a more in-depth exploration of vulnerability theory, see *infra* Part II.B.
17. See Clare Huntington, *Early Childhood Development and the Law*, 90 S. CAL. L. REV. 755 (2017).

Vulnerability Theory's implications for childcare, the paper joins a growing body of scholarship deploying Vulnerability Theory across a range of law and policy domains to raise new issues, ask different questions, and critically explore those domains in fresh ways.<sup>18</sup> Finally, this project joins the scholarly literature surfacing the risks of family privatization and reliance on private markets, and suggests a collective way forward in a world of universal and constant vulnerability.

Despite the contemporary significance of childcare law and policy, analysis from a child-centered, developmentally-grounded perspective has been scant in the legal literature.<sup>19</sup> In contrast, this Article uses a child-centered lens to directly confront the inadequacies of the private childcare model, both theoretically and practically. First, reconsidering state responsibility through the Vulnerability lens makes clear that, in contrast to the assumptions of liberal theory,<sup>20</sup> children have a relationship to the state independent of their parents, and that they can make direct claims to state assistance.<sup>21</sup> What is more, Vulnerability Theory posits that the state has an obligation to ensure substantive equality of access and opportunity for children vis-à-vis childcare.

Second, my analysis of childcare as an important asset focuses on the significance of childcare *quality* rather than considering childcare's

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18. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008) [hereinafter Fineman, *Anchoring*].
  19. Much of the early feminist legal scholarship around childcare centered on debates between liberal and cultural feminists about sameness versus difference feminism, and whether recognizing or supporting women's care work essentializes all women as mothers. See Harbach, *Outsourcing*, *supra* note 13, at 261-62 (summarizing debates between feminist legal theorists on care work versus market work). Newer work of family law scholars has recognized the significance of comprehensive childcare as part of the essential structural supports families need to thrive. See, e.g., JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 161 (2014); MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 85 (2010); CLARE HUNTINGTON, FAILURE TO FLOURISH 193-94 (2014); Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 260 (2017) [hereinafter Eichner, *Privatized*]; Maxine Eichner, *Family and the Market—Redux*, 13 THEORETICAL INQUIRIES IN L. 98, 114, 124 (2012) [hereinafter Eichner, *Redux*].
  20. See *infra* notes 31-65 and accompanying text.
  21. See *infra* notes 147-49 and accompanying text.



significance primarily as a question of supporting women's wage work and/or providing more general support for working families. High-quality care promotes equality across income levels, supports child development, and also benefits society more generally. It is now widely understood among experts across disciplines that high-quality care is essential for childhood development, and can have far-reaching effects on child outcomes.<sup>22</sup> Research establishes that children who receive high-quality care are more likely to have better socio-economic and health outcomes, higher academic achievement, lower externalizing behavior, lower arrests, higher employment, and higher earnings.<sup>23</sup> Childcare can either help children begin a developmentally rich journey through education, or place them irreparably behind in the opportunity gap. Early intervention is critical.<sup>24</sup> The losses sustained in early childhood are not easily surmounted. And childcare's benefits aren't limited to children. Instead, childcare generates significant social spillovers, including increased economic activity and development, a more sophisticated future workforce, an increased tax base, and cost savings on education, crime prevention, social services, and public assistance.<sup>25</sup>

The ultimate goal of the project is to articulate an alternative framework through which to understand the state's role vis-à-vis childcare—a public childcare model—and to apply that framework to map out possibilities for a system of comprehensive childcare in the United States. I begin in Part I with an overview of the theoretical underpinnings of our private childcare model, develop how (neo)liberal theory grounds that model, and then expose the disconnect between the expectations of the private childcare model and its operation in the real world. In Part II, I investigate the theoretical alternatives to the failing private model. Building on the insights from Vulnerability Theory and considering childcare through the Vulnerability lens, Part II maps out the theoretical

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22. See, e.g., *Parents and the High Cost of Child Care: 2017 Report*, CHILDCARE AWARE OF AM. 7 (2017), [http://usa.childcareaware.org/wp-content/uploads/2017/12/2017\\_CCA\\_High\\_Cost\\_Report\\_FINAL.pdf](http://usa.childcareaware.org/wp-content/uploads/2017/12/2017_CCA_High_Cost_Report_FINAL.pdf) [<http://perma.cc/46BJ-2QYK>] [hereinafter *High Cost 2017*]; Fineman, *Anchoring*, *supra* note 18, at 7.

23. *High Cost 2017*, *supra* note 22, at 7.

24. See Katherine A. Beckmann, *Mitigating Adverse Childhood Experiences Through Investment in Early Childhood Programs*, 17 ACAD. PEDIATRICS S28 (2017).

25. I address these economic efficiency arguments in-depth in an earlier project. See Harbach, *Market Failure*, *supra* note 14, at 679-84.

foundations for a new, public childcare model. Having deployed these principles to argue for an affirmative state obligation to ensure access to quality childcare, I conclude in Part III by exploring some possibilities for designing a comprehensive childcare system in the United States, and use proposed federal childcare legislation—the Child Care for Working Families Act<sup>26</sup>—as a case study in how we might operationalize a public childcare system in the United States.

At this critical juncture in American society, our law and policy are failing to equalize access to the American Dream for our children.<sup>27</sup> Reimagining the state’s role in childcare, theoretically, and reforming childcare law and policy, practically, has a crucial role to play in this urgent national project.

#### I. PRIVATE CHILDCARE

Contemporary political theory, law, and policy understand childcare in America to be the private prerogative and responsibility of parents, rather than a concern of the state. There is no national blueprint or plan for childcare. Much of the care for young children is provided by a market that is fractured, poorly-organized, and subject to minimal and/or inconsistent licensing and regulation. Recent studies on childcare quality rate most of it as medium to poor, with poor care being even more prevalent for infants and toddlers.<sup>28</sup> What is more, many parents can scarcely afford childcare, much less childcare of high quality. These constraints are felt acutely by low-income families and families of color.<sup>29</sup>

Given the dramatic shifts in who provides care for young children and the persistent need for high quality care, it is worth exploring why the United States, unlike so many of its peer nations, clings to a private

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26. See H.R. 1364, 116th Cong. (2019); S. 568, 116th Cong. (2019); see also S. 1806, 115th Cong. (2017); H.R. 3773, 115th Cong. (2017).

27. *Closing the Opportunity Gap*, *supra* note 1, at 6, 11-13.

28. See J. Lee Kreder et al., *Infant and Toddler Child Care Quality*, NAT’L CTR. FOR CHILDREN IN POVERTY, CHILD CARE & EARLY EDUC. RESEARCH CONNECTIONS 4 (2005), <http://www.researchconnections.org/childcare/resources/6872/pdf> [<http://perma.cc/QD7S-JUXY>].

29. See *infra* notes 166-67, and accompanying text.

childcare model rather than a comprehensive, public system.<sup>30</sup> This Part explores the theoretical backdrop against which childcare in the United States is understood to be private. After a theoretical overview, I discuss how liberal and neoliberal theory mark childcare as private and explain how neoliberalism leads to privatized reliance on parents and the market for childcare services and generates political resistance to public childcare models. I conclude with a discussion of the disparities between our private childcare ideals and the messy reality that is today's childcare market. These insights set the stage for my work in Part II to develop a new theoretical model for understanding childcare as a public responsibility in the United States.

### *A. The (Neo)Liberal Backdrop*

In the United States, the law and policy governing families operates against a theoretical backdrop in which individual liberty and the primacy of well-functioning markets are paramount values. Liberal political theory and neoliberal values ground much of our law and policy in contemporary America. As a liberal welfare state, the U.S. emphasizes self-reliance rather than collective obligations, provides supplemental rather than universal social assistance, and relies on the market for the provision of many important social services.<sup>31</sup> To understand how childcare in the United

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30. In contrast to the United States, most other member countries of the Organisation for Economic Co-operation and Development (OECD) offer universal access to at least one year of early childhood education and care, often via the extension of legal entitlements to care for younger children, coupled with efforts to secure free access for older children. ENGAGING YOUNG CHILDREN: LESSONS FROM RESEARCH ABOUT QUALITY IN EARLY CHILDHOOD EDUCATION AND CARE, OECD 19 (2018), <http://dx.doi.org/10.1787/9789264085145-en> [<http://perma.cc/PU7Y-4CBN>]. Legal entitlements vary, however, from some countries, like Norway and Germany, which cover ages 1-5, to others, which guarantee a place only for one or two years before entering primary school. *Id.* Universal access, however, is not a guarantee of high quality, and the OECD is engaged in critical work to study the incidence and determinants of high-quality care in OECD countries. OECD, STARTING STRONG IN 2017: KEY OECD INDICATORS ON EARLY CHILDHOOD EDUCATION AND CARE 12-13 (2017); see generally OECD, ENGAGING YOUNG CHILDREN, *supra*.

31. Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1746 n.156 (2012) [hereinafter Fineman, *Beyond Identities*].

States has been and remains coded as private and beyond the reach of the state, I briefly review liberal and neoliberal theory before explaining how each has played a role in reinforcing our private childcare model. Values shared by liberal theory and neoliberalism include negative rights – rights to freedom from unwarranted state regulation or intervention – and a restrained state.<sup>32</sup> With presumptively competent, autonomous subjects and efficient markets, state interaction is unnecessary, unwelcome, and exceptional.

The dominant version of liberal theory that has grounded American political thought and law<sup>33</sup> centers around an idealized, liberal subject—an autonomous, competent actor capable of pursuing his or her goals.<sup>34</sup> This autonomous, competent actor is necessarily an adult, because children are not practically or legally capable of autonomy.<sup>35</sup> On this theory of subjectivity, the pursuit of justice and respect for human dignity recognize

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32. See Ann Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 L. & CONTEMP. PROBS. 25, 26-27 (2014).
33. To be clear, there exists a broad range of interpretations of “liberalism” as a theory of the state. See EICHNER, SUPPORTIVE STATE, *supra* note 19, at 8-10 (2010) (describing a variety of conceptions of liberal political theory). For my purposes, the important focus is to identify the salient features of liberal political theory (informed by classical liberalism and economic liberalism) that have informed the United States’ orientation toward families and children through its law and policy: a focus on economic liberty, strong property and other negative rights, government non-intervention, and the paramount importance of autonomy and individualism. For treatment of differing strains of liberal theory and a comparison of negative and positive rights, see, for example GEORGE KLUSKO, THE TRANSFORMATION OF AMERICAN LIBERALISM 42-60 (2017); Jason Brennan & John Tomasi, *Classical Liberalism*, in THE OXFORD HANDBOOK OF POLITICAL PHILOSOPHY 115-32 (David Estlund, ed., 2012); Eichner, *Redux*, *supra* note 19, at 101-102 & n.8.
34. See EICHNER, SUPPORTIVE STATE, *supra* note 19, at 3; Fineman, *Anchoring*, *supra* note 18, at 11-12; Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 ALA. L. REV. 609, 616-17 (2015) [hereinafter Fineman, *Restrained State*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 261-62 (2010) [hereinafter Fineman, *Responsive State*].
35. Consequently, childhood has been recognized as the “Achilles heel” of liberal theory. See Jennifer S. Hendricks, *Renegotiating the Social Contract*, 110 MICH. L. REV. 1083, 1085 (2012) (reviewing EICHNER, SUPPORTIVE STATE, *supra* note 19).

individual liberty and formal equality as primary liberal goods and values.<sup>36</sup> The corresponding role for the state is to protect liberty and refrain from interfering in the liberal subject's pursuit of these aims.<sup>37</sup> Liberal theory thus conceives of the state's role as primarily to protect negative rights and to otherwise act with restraint with regard to the liberal subject.<sup>38</sup>

Liberal theory assumes that families, like the liberal subjects that preside over them, are autonomous. Like individuals, families are self-reliant and capable of providing for themselves.<sup>39</sup> What is more, liberal theory divides our social spheres into "public" and "private." Civil society, the state, and the market (the historically gendered domain of the male patriarch) are the quintessential public sites of collective life. By contrast, the family (the sphere of women and children under authority of the patriarch) is situated within the private sphere, which exists separate from the public domains of the state.<sup>40</sup> The family and family decisionmaking are private—involving private matters, taking place in the private home, and a matter of private responsibility.<sup>41</sup> The state, therefore, should avoid family intervention, leaving families to thrive in the private sphere.<sup>42</sup>

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36. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 4-5, 19-21; *see also* Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 39 (2005); Fineman, *Responsive State*, *supra* note 34, at 257-58; Hendricks, *supra* note 35.

37. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 5; Fineman, *Responsive State*, *supra* note 34, at 258-59.

38. Elizabeth Bartholet, *Ratification of the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 *ANNALS AM. ACAD. POL. & SOC. SCI.* 80, 91 (2011); Fineman, *Anchoring*, *supra* note 18, at 2; Fineman, *Beyond Identities*, *supra* note 31, at 1747; Fineman, *Restrained State*, *supra* note 34, at 609.

39. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 26.

40. *See* LISA DUGGAN, *THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY XI*, at 4-6 (2003).

41. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 25; Harbach, *Market Failure*, *supra* note 14, at 665-66.

42. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 5, 25-26.

Consequently, the family becomes a “black box,”<sup>43</sup>—obscured within the private sphere where state interference is unjustified and undesirable.<sup>44</sup>

While some legal manifestations of liberal theory may have been muted with the rise of the post-war welfare state in the early-to mid-Twentieth Century,<sup>45</sup> the ascent of neoliberal values has served to reinforce a negative, *laissez-faire* orientation of the state. Neoliberalism is the market-inflected manifestation of classic economic liberalism in our law and policy.<sup>46</sup> It is a mode of governmentality that extends market rationality and values to all spheres, making the market the organizing principle for the state and society.<sup>47</sup> Neoliberalism places reliance on market functioning and private ordering as the best means to produce social welfare, placing primary faith in the efficiency of well-functioning markets and consumer choice through rational market decisionmaking.<sup>48</sup>

Neoliberalism prescribes a model citizen-subject based on a marketized society: The neoliberal subject is a rational actor, *homo economicus*, who engages in cost-benefit analysis to make choices and is then responsible for those choices.<sup>49</sup> As such, the neoliberal subject is responsible for all consequences of those choices, even in the face of significant constraints and unequal resource distributions.<sup>50</sup> Personal responsibility is a central value.<sup>51</sup> Thus, on the neoliberal view, justice is simply each individual’s ability to exercise these choices.<sup>52</sup> The state’s

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43. Hendricks, *supra* note 35, at 1084.

44. Fineman, *Anchoring*, *supra* note 18, at 3.

45. Scholars have described that in the post-war decades of the 1930s-70s, United States policy operated against the backdrop of a form of welfare state liberalism in which the state provided families with some protection from market forces. See DUGGAN, *supra* note 40, at XI; Eichner, *Privatized*, *supra* note 19, at 248-59; David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 19 (2014).

46. See Brown, *supra* note 36, at 39; Grewal & Purdy, *supra* note 45, at 1.

47. See Corinne Blalock, *Neoliberalism and the Crisis of Legal Theory*, 77 L. & CONTEMP. PROB. 71, 72 (2014); Brown, *supra* note 36, at 37, 40.

48. See Grewal & Purdy, *supra* note 45, at 6, 13.

49. Brown, *supra* note 36, at 40-43.

50. See DUGGAN, *supra* note 40, at 12-16.

51. See *id.* at 12.

52. See Deborah Dinner, *Beyond “Best Practices”: Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1068 (2017).

primary role is to ensure proper conditions for economic activity and individual prosperity—enabling individuals to access markets to pursue their own interests.<sup>53</sup> Because markets and market actors should reliably produce efficient results, neoliberalism shares liberal theory’s skepticism of state intervention and valorization of negative liberty.<sup>54</sup> Instead, the state’s role is limited to supporting free markets and efficiency, and the neoliberal state employs primarily a hands-off approach to market regulation.<sup>55</sup> Moving one step further, because of the normative appeal of markets, neoliberalism also seeks to privatize a range of social goods and services the state might otherwise provide or subsidize.<sup>56</sup>

Vis-à-vis families, the neoliberal model promotes the privatization of social reproduction and the costs of human dependency, leaving individuals, rather than the state, primarily responsible for the support of families.<sup>57</sup> Neoliberalism views families as thriving via engagement with the market, and conceptualizes state engagement with families as undermining family autonomy.<sup>58</sup> Family goods, like others, are best distributed by the “invisible hand of the market” rather than the state.<sup>59</sup> Families are presumed to be self-supporting, with no need for more robust, affirmative social supports.<sup>60</sup> Thus, vis-à-vis families, the state’s proper role is limited to a reliance on *laissez-faire* resource allocations in the market, and minimal welfare state provisions.<sup>61</sup>

Working together, liberal theory and neoliberalism have served to check more ambitious state supports for the children and their families as unnecessary and unwarranted.<sup>62</sup> Because families are self-reliant and well-

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53. See Blalock, *supra* note 47, at 73, 88.

54. *Id.*

55. See Eichner, *Privatized*, *supra* note 19, at 218-20.

56. See DUGGAN, *supra* note 40, at 12.

57. See Dinner, *supra* note 52, at 1082; Eichner, *Privatized*, *supra* note 19, at 220-24; Alstott, *supra* note 32, at 25.

58. Alstott, *supra* note 32, at 31; Eichner, *Privatized*, *supra* note 19, at 253-55.

59. See Eichner, *Redux*, *supra* note 19, at 97, 100.

60. Eichner, *Privatized*, *supra* note 19, at 220.

61. See Alstott, *supra* note 32, at 28, 38.

62. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 262-63 (2011) (observing that state does little to support families that do not fall below minimum standards); Barbara Bennett Woodhouse, *A World Fit for Children is a World Fit for Everyone*:

functioning,<sup>63</sup> the primary state obligation is to stay out of the way. The state may on occasion become involved in providing positive supports, but only when the private family (or the market) is seen to be in crisis or failing. As a result, the American family is itself largely privatized, primarily supported by private family resources, and the U.S. has markedly lower public spending on child development and family supports than in other, more robust welfare states.<sup>64</sup> This rejection of a positive and supportive role for the state in family life has figured prominently in the childcare context over the years.<sup>65</sup>

*B. Models of Private Childcare*

The privacy and nonintervention norms that flow from liberal theory and neoliberalism understand childcare as a matter of private—not public or state—interest and responsibility.<sup>66</sup> In the discussion that follows, I survey three variations of the private childcare model that have informed and animated our childcare law and policy—what I call the “Private Family Model,” the “Crisis/Contingency Model” and the “Private Market Model.” Consistent with (neo)liberal theory, all three models both reflect and reinscribe the assumption that childcare is private, beyond the reach or responsibility of the state.

1. The Private Family Model

The Private Family Model assumes childcare is provided by the family, typically in the home by a family member (and, most conventionally, the

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*Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817, 850 (2009) [hereinafter Woodhouse, *Ecogenerism*].

63. See Eichner, SUPPORTIVE STATE, *supra* note 19, at 25-26; Martha Albertson Fineman & George Shepherd, *Homeschooling: Choosing Parental Rights Over Children’s Interests*, 46 U. BALT. L. REV. 57, 62 (2016) [hereinafter Fineman & Shepard, *Homeschooling*]; Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & CIV. RTS. L. REV. 307, 310 (2014) [hereinafter Fineman, *LGBT Youth*]; Hendricks, *supra* note 35, at 1084.

64. Eichner, *Privatized*, *supra* note 19, at 220-26.

65. See Harbach, *Market Failure*, *supra* note 14, at 666 & nn.33-34.

66. *Id.* at 662-66.



mother).<sup>67</sup> Recall that liberal theory codes the family as private, both spatially and decisionally.<sup>68</sup> Liberal theory's principle of gendered, separate spheres historically has been expressed in a "family wage" model of family life, in which women perform caretaking in the private sphere of the home while men perform paid labor in the public domain.<sup>69</sup> And the parental rights doctrine assumes that parents will act in the best interests of their children and buffers parental decisions from state oversight.<sup>70</sup> Thus, parental decisions about childcare—especially when provided by them in the home—are shielded from state interaction and responsibility. This traditional, liberal model is shored up by neoliberalism's emphasis on personal – as opposed to state – responsibility.

Neoliberal norms lead to a similar orientation as the family has become "marketized."<sup>71</sup> In the neoliberal state, the Private Family model insists that families themselves are responsible for their own support, and that childcare, like other family goods, will be best distributed by the market's invisible hand. Thus, when parents "outsource" childcare to the market,<sup>72</sup> they are presumed to be self-reliant and well-functioning. The state's proper role is primarily a *laissez-faire* approach to childcare market allocations. What is more, the privatization of childcare through the market is consistent with neoliberalism's core value of privatization.<sup>73</sup> Consequently, (neo)liberal theory has generated family privatization norms that promote a hands-off approach to childcare. The Private Family model sees the family as ultimately responsible for the care of its children, whether provided at home or by the market. As such, this model sees that care as generally beyond the control or concern of the state.

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67. I first described and developed the Private Family Model of Childcare in Harbach, *Market Failure*, *supra* note 14, at 663-67.

68. *Id.* at 661-67.

69. Eichner, *Privatized*, *supra* note 19, at 215-16, 250; Eichner, *Redux*, *supra* note 19, at 104-05.

70. Harbach, *Market Failure*, *supra* note 14, at 662-63. Of course, this deference is not absolute. The *parens patriae* doctrine recognizes the state's authority and obligation to override parental prerogatives and protect children when parental/guardian care is neglectful or abusive.

71. Eichner, *Redux*, *supra* note 19, at 103.

72. *See generally* Harbach, *Outsourcing*, *supra* note 13.

73. *See supra* notes 45-61 and accompanying text.

## 2. The Crisis/Contingency Model

A narrow exception to the Private Family Model is the Crisis/Contingency Model, in which state support for childcare is exceptional and limited, typically in response to perceptions that either particular families, or the country more broadly, is in crisis.<sup>74</sup> For example, the earliest emergence of state-supported childcare came in the first-half of the Nineteenth Century in response to unsupervised children from working families who were in need of care, and later expanded to working-class families.<sup>75</sup> During the Great Depression and again during World War II, federal support for childcare emerged (and then waned) as a means of job creation and facilitating women's participation in the workforce.<sup>76</sup>

These state supports for childcare were supplemented by state policies that provided some buffer for families from market forces and enabled women to stay home to care for children even without the private support of a breadwinner. With the rise of modern industrialism, Progressive Era reformers came to recognize that while the market offered enhanced opportunities for material gain, it also created challenges for family life. The solution, as they saw it, was for the state to regulate markets and provide material support to families when necessary to protect them from market forces. Thus, via mothers' pensions, and later Social Security Survivor's Insurance and Aid to Families with Dependent Children (AFDC), states provided cash benefits to poor mothers and widows without sufficient private support, enabling them to continue to provide care for their children in the home.<sup>77</sup> The Head Start program was enacted in the 1960s as part of President Johnson's war on poverty, with a

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74. See Abby J. Cohen, *A Brief History of Federal Financing for Child Care in the United States*, FUTURE CHILD., Summer/Fall 1996, at 28-31.

75. See Harbach, *Market Failure*, *supra* note 14, at 667.

76. *Id.* at 667-68.

77. Eichner, *Privatized*, *supra* note 19, at 248-52; Eichner, *Redux*, *supra* note 19, at 103-105. As America entered the New Deal era, these subsidies were complemented by other measures that buffered families from the market and helped to ensure the viability of the family wage model, including industrial accident insurance, child labor laws, unemployment insurance, social security, and survivors' and dependents' benefits. Eichner, *Privatized*, *supra* note 19, at 250-51. These programs came to comprise the modern welfare state in the United States, which predominated for most of the Twentieth century. *Id.* at 252.

focus on child development alongside providing social services for families and promoting parental involvement.<sup>78</sup>

With the rise of women's paid employment outside the home, along with the emergence of neoliberalism as a counterpoint to twentieth century's liberal welfare state, the Crisis/Contingency Model underwent a dramatic transformation. Neoliberalism's emphasis on personal responsibility and privatization led to a retrenchment in state programming to support families and protect them from the vicissitudes of the market. Maxine Eichner traces the beginning of this retrenchment to President Nixon's veto of the Comprehensive Child Development Act of 1971, which would have created a national system of federally-funded childcare centers ensuring comprehensive care for all families on a sliding scale.<sup>79</sup> In vetoing the legislation, President Nixon commented with rhetoric that foretold the coming ascendance of a neoliberal approach to family policy: "My one conviction is that the Federal Government's role wherever possible should be one of assisting parents to purchase needed day care services in the private, open market."<sup>80</sup>

What followed toward the end of the twentieth century was a dramatic reversal in American welfare policy, beginning with decentralization of federal programming during the Reagan era, and followed by welfare policy reform under President Clinton.<sup>81</sup> Importantly, in 1996, Congress replaced AFDC with Temporary Assistance to Needy Families (TANF), a federal block grant program aimed at parents that requires them to work in exchange for benefits.<sup>82</sup> TANF ended the AFDC's creation of an entitlement to federal assistance, and instead transformed welfare into a program of temporary assistance conditioned on work.<sup>83</sup> These reforms contracted U.S. welfare policy to a "minimal welfare state," in which means-tested programs for families living in poverty "temporarily mitigate market outcomes but push recipients as quick as possible back into the

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78. See Cohen, *supra* note 74, at 31.

79. Eichner, *Privatized*, *supra* note 19, at 254.

80. 92 Cong. Rec. 46,058 (daily ed. Dec. 10, 1971) (text of Nixon's veto message).

81. Eichner, *Privatized*, *supra* note 19, at 257.

82. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105 (creating TANF block grants to replace AFDC).

83. See Andrew Hammond, *Welfare and Federalism's Peril*, 92 WASH. L. REV. 1721, 1732-35 (2017).

marketplace.”<sup>84</sup> Our current manifestation of the Crisis/Contingency Model of childcare support is a patchwork system of childcare subsidies, primarily through the Child Care Development Block Grant (which provides childcare support and subsidies for TANF recipients), Head Start, and modest supports through the tax system.<sup>85</sup>

Thus, even while allowing limited exceptions to the Private Childcare Model, the Crisis/Contingency Model operates against a backdrop in which parents are personally responsible for providing or purchasing care for their children. Treating state support as limited and exceptional reinforces the norm that childcare is a private matter and a private responsibility, only to be overridden in narrow and time-limited circumstances. Neoliberal reforms to the welfare state have reinforced these narratives of personal responsibility and privatization.

### 3. The Market Model

Finally, the third private childcare model is the Market Model, which reflects the reality that for many families, childcare has been outsourced and is now a service bought and sold on the private market.<sup>86</sup> Here, again, the state plays a limited and secondary role, but with childcare primarily being provided by the market rather than the family or the state. The neoliberal view of marketized families understands families as flourishing in market interactions. On the *homo economicus* model, preference-maximizing parents will exercise rational judgment, weigh costs and benefits, and pursue their desired childcare goals.<sup>87</sup> Family goods will be best distributed by the market’s invisible hand. The self-interested actions of buyers and sellers (autonomous, competent neoliberal subjects) will maximize social outcomes and generate no waste.<sup>88</sup> In the face of a well-functioning, efficient childcare market, the primary state role is to stay out of the way.

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84. Alstott, *supra* note 32, at 40.

85. See CONG. RESEARCH SERV., R40212, EARLY CHILDHOOD CARE AND EDUCATION PROGRAMS: BACKGROUND AND FUNDING, SUMMARY 7 (2016) [hereinafter CRS, BACKGROUND AND FUNDING].

86. I began my description and analysis of the Market Model in Harbach, *Market Failure*, *supra* note 14, at 672-92, and continued that analysis in Harbach, *Nudging*, *supra* note 3, at 88-105.

87. Harbach, *Nudging*, *supra* note 3, at 86.

88. See Harbach, *Market Failure*, *supra* note 14, at 677.

In sum, in the theoretically idealized world of private childcare, parents and families are primarily responsible for providing the care, and as autonomous, competent subjects, have the means and wherewithal to provide or purchase quality care. The childcare market likewise should efficiently allocate childcare resources. Consequently, there is little need for state intervention and support. The problem is that the projections about individuals, families, and markets that underlie these models are not borne out in the real world as an ontological matter, and the conditions that result from the private model are undesirable and unjust as a normative matter.

### *C. Private Childcare in the Real World*

The private childcare theories explored above cannot be reconciled with the realities of our contemporary American childcare system. Despite rosy forecasts about autonomous and self-sufficient families, perfectly-efficient markets, and rational economic decision-making, childcare in America today comes nowhere close to these ideals. Instead, the American childcare system is frequently characterized as being in “crisis,” centered around a poorly organized and chaotic market.<sup>89</sup> In the discussion that follows, I contrast the assumptions and predictions of private childcare models with the conditions of American childcare today.

#### 1. The Private Family Model

First, the Private Family Model of childcare is simply an anachronism in the twenty-first century. While many children received care inside the home for much of the Twentieth Century, childcare has now crossed the private-public divide.<sup>90</sup> Toward the mid-to late-Twentieth Century, the use of non-parental care rose dramatically, and by the turn of the millennium, more children were in non-parental childcare arrangements than were receiving parental care.<sup>91</sup> Currently, many parents outsource childcare to third parties rather than provide that care themselves. Sixty percent of

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89. *Id.* at 669-672.

90. *Id.* at 667.

91. *Id.* at 668.

children between birth and age five are receiving non-parental care.<sup>92</sup> Of those children, 34% are enrolled in center-based care.<sup>93</sup>

Neoliberalism's assumption that families are self-sufficient and self-reliant also fails in the face of the data. The realities of childcare in America make plain that families are not flourishing in their interactions with the childcare market. Instead, resource constraints in an age of increasing economic inequality make it difficult—if not impossible—for parents to either provide care themselves *or* to purchase the level of quality care they prefer for their children. While some are able to exercise true choice, for many families outsourced childcare is more imperative than choice because parental work outside the home is essential for family support.<sup>94</sup>

The cost and accessibility of childcare—especially high-quality childcare—is a particular concern. Although my prior critiques of the childcare market bracketed distributional issues and resource constraints, they come to the fore in this project. Quality care is expensive—prohibitively so for some families. For all families with children, childcare is a top budget item, sometimes even exceeding housing costs.<sup>95</sup> Many parents do not have the financial means to secure the quality of childcare they prefer, and may elect lower-quality care because of affordability concerns.<sup>96</sup> The costs are particularly burdensome for families living at or below the poverty level, especially families of color.<sup>97</sup> In roughly one-third of states, the average annual cost for center-based childcare for a toddler exceeds the average tuition at a public university.<sup>98</sup> The Private Childcare

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92. Jeremy Redford et al., *The Years Before School: Children's Nonparental Care Arrangements from 2001 to 2012*, U.S. DEP'T OF EDUC 6 (2017), <https://nces.ed.gov/pubs2017/2017096.pdf> [<https://perma.cc/C7T9-HTQS>].

93. *Id.*

94. Harbach, *Outsourcing*, *supra* note 13, at 263-68.

95. *The US and the High Cost of Child Care: 2018 Report*, CHILDCARE AWARE OF AM. 35, [https://cdn2.hubspot.net/hubfs/3957809/COCreport2018\\_1.pdf](https://cdn2.hubspot.net/hubfs/3957809/COCreport2018_1.pdf) [<https://perma.cc/M3PD-AMNW>] [hereinafter *High Cost 2018*].

96. *Parents and the High Cost of Childcare: 2014 Report*, CHILDCARE AWARE OF AM. 9-10 [hereinafter *High Cost 2014*]; Louis Manfra et al., *Parent Perceptions About Childcare Quality* 15-16, <https://dss.mo.gov/cbec/pdf/parent-perception-report.pdf> [<https://perma.cc/56ZP-G4NB>] (parents generous with grades and ranking of childcare providers).

97. *High Cost 2018*, *supra* note 95, at 36.

98. *Id.* at 36.

Model, then, doesn't reflect or accommodate the realities of most American families today.

## 2. The Crisis/Contingency Model

Nor does the Crisis/Contingency Model live up to its aspirations of effectively providing temporary and limited childcare support to shore up struggling families. None of the federally-funded programs are serving even half of their eligible populations.<sup>99</sup> Much of the federal funding for early childhood education and care programs has been relatively static over a number of years.<sup>100</sup> Between U.S. fiscal years 2000 and 2012, the total combined spending from the Child Care and Development Fund (CCDF) and Temporary Assistance to Needy Families Program declined 17% when adjusted for inflation.<sup>101</sup> In 2015-16, 31% of eligible children aged 3-5 had access to Head Start, and only 7% of eligible children under age 3 had access to Early Head Start.<sup>102</sup> As of late 2017, data from the Office of the Administration for Children & Families' Office of Childcare reported that monies from the CCDF and related programs were serving only 15% of eligible children.<sup>103</sup> Federal tax benefits have a muted impact, and are largely out of reach for low-income families.<sup>104</sup> Thus, to the extent

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99. *High Cost 2015*, *supra* note 2, at 38-39.

100. See CRS, BACKGROUND AND FUNDING, *supra* note 85, at 3-4 tbl.2. [<https://perma.cc/UEQ3-CUS8>].

101. See Karen E. Lynch, *Trends in Child Care Spending from the CCDF and TANF*, CONG. RESEARCH SERV., R44528 2 (2016), <https://fas.org/sgp/crs/misc/R44528.pdf> [<https://perma.cc/4PYP-ZR7A>].

102. NATIONAL HEAD START ASSOCIATION, 2017 NATIONAL HEAD START PROFILE, [https://www.nhsa.org/files/resources/2017-fact-sheet\\_national.pdf](https://www.nhsa.org/files/resources/2017-fact-sheet_national.pdf) [<https://perma.cc/UYU3-4E8K>].

103. ADMINISTRATION FOR CHILDREN & FAMILIES, OFFICE OF CHILD CARE, PRIORITIES REPORT: FY 2017, <https://www.acf.hhs.gov/occ/resource/priorities-report-fy2017> [<https://perma.cc/6U4N-KHZ9>].

104. The Child and Dependent Care Tax Credit enables families to offset their overall tax liability by a percentage of their childcare costs, but is non-refundable, meaning that low-income tax payers with little or no tax liability get little or no benefit from this credit. See CRS, BACKGROUND AND FUNDING, *supra* note 85, at 10. The Dependent Care Assistance Program (DCAP) allows parents to make pre-tax salary deductions for childcare expenses, but has a limited impact because employers must elect to make the plan available, and

these programs aspire to support families in need of assistance—even temporarily—they fall woefully short.

### 3. The Market Model

The idealized, private Market Model fails, too. Contrary to neoliberal precepts, *laissez-faire* distributions of childcare in the market is not leading to optimal outcomes. As I've analyzed in depth elsewhere, the childcare market fails to operate efficiently and instead manifests multiple failures. First, positive externalities and information problems lead to suboptimally low demand for quality childcare, resulting in classic market failure. High quality childcare generates positive externalities, or spillovers. It benefits not only children, but also families, communities, and society through increased economic activity and development, cost savings on social services, and an increased tax base. But because families themselves factor in only the private, internal benefits of childcare in determining their willingness to pay, the demand for quality is inefficiently low, leading to an under-allocation of quality care in the market.<sup>105</sup> What is more, information deficits make it difficult for parents to understand what childcare quality looks like, and where to find it. These information gaps make it difficult for parents to make accurate childcare decisions in the market, impeding efficiency.<sup>106</sup>

Second, the operation of heuristics and biases in parental decision-making leads to *behavioral* market failure. Despite broad preferences for quality, paradoxically many parents are not actually selecting high quality childcare.<sup>107</sup> In other words when making childcare judgments and decisions, parents (like the rest of us) diverge significantly from the *homo*

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employees must then take advantage of the plan. See Harbach, *Market Failure*, *supra* note 14, at 698. The percentage of workers with access to this benefit has not changed appreciably in recent years. In 2014, 39% of civilian workers had access to employer-sponsored dependent care reimbursement accounts. See Eli R. Stoltzfus, *Access to Dependent Care Reimbursement Accounts and Workplace-Funded Childcare*, BUREAU OF LAB. STAT. 2 (2015), <https://www.bls.gov/opub/btn/volume-4/pdf/access-to-dependent-care-reimbursement-accounts-and-workplace-funded-childcare.pdf> [<https://perma.cc/Q8P3-NBXS>].

105. Harbach, *Market Failure*, *supra* note 14, at 679-84.

106. *Id.* at 684-85

107. Harbach, *Nudging*, *supra* note 3, at 86-88.



*economicus* ideal of perfect rationality.<sup>108</sup> In assessing quality, the operation of heuristics and biases in childcare judgments creates opportunities for parents to miss important data and misjudge quality. For example, optimism bias may lead parents to overestimate the quality of care children receive.<sup>109</sup> Similarly, the operation of heuristics and biases also distort parents' ultimate choice among options in the childcare market. Present bias, for example, may lead parents to make short-term decisions (for example, choosing childcare that is cheaper), that are inconsistent with their longer-term goals (ensuring that children receive high quality care that will generate benefits in the longer run).<sup>110</sup> This imperfect rationality leads to distorted market behavior and is part of the explanation for low demand for quality in the childcare market.

Third, benefits from childcare quality exhibit features of a public good.<sup>111</sup> When provision of public goods is left to private markets, production is inefficiently low. Society thus free rides—benefitting from the positive spillovers of quality care while investing little or nothing. Finally, and significantly, the Market Model cannot address distributional and resource constraints that impact many families who seek quality care for their children. Classical economic theory assumes an initial distribution of resources but takes no position on the equity of that initial distribution.<sup>112</sup> Notwithstanding neoliberal norms to the contrary, the realities of economic inequality and the childcare market belie any claim that childcare is a good best distributed by the invisible hand of the market.

In sum, private childcare in the real world is a far cry from (neo)liberal theorizing. The assumptions underlying the Private Family, Crisis/Contingency, and Market Models do not hold. A central flaw in all three models is their continued insistence that childcare is a private matter, and their inability or refusal to respond to the plain lack of equal access to childcare based on resource constraints (intersecting with race

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108. *Id.* at 94-106.

109. *Id.* at 96-101.

110. *Id.* 101-106.

111. *Cf.* Fineman & Shepherd, *Homeschooling*, *supra* note 63, at 102-103 (characterizing compulsory public education as a public good); Nancy Folbre, *Children as Public Goods*, 84 AM. ECON. REV. 86 (1994).

112. *See* Harbach, *Market Failure*, *supra* note 14, at 677 n.108.

and class), exacerbated by market failures and other stresses on American families.

Overall, because the state views its role as, at most, an adjunct to families and/or the market, childcare law and policy is ambivalent, fractured, and poorly organized. The result is an American childcare system in disarray. Parents, for the most part, can no longer afford to provide care for children themselves (or no longer choose to),<sup>113</sup> but they struggle to afford to pay others for the quality childcare they desire for their children. For a variety of reasons, both structural and behavioral, the demand for quality childcare is sub-optimally weak. And while it varies, the overall quality of care the market does provide is concerningly low.<sup>114</sup>

These models of private childcare are rife with faulty assumptions on the theoretical level and have produced a childcare market that is widely considered to be a “national scandal” and “tragedy” in practice.<sup>115</sup> We need a better way to understand the state’s role, theoretically, and a better way to implement that new role, practically. Parts II and III take up this work.

## II. THEORIZING PUBLIC CHILDCARE

As Part I makes clear, the current American childcare system, relying on private models of childcare, is failing America’s children and families. The antidote—as many other economically-advanced countries have recognized<sup>116</sup>— is a public childcare system, one that recognizes the state’s role as integral to ensuring equal access to high-quality early care and education. Because (neo)liberalism is a descriptively inaccurate and practically ineffective theory on which to base our childcare system, this Part begins by exploring a theoretical alternative. Similar to my earlier calls for a more realistic account of the childcare market and market actors, if we are to address our childcare crisis, we must base our

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113. See Harbach, *Outsourcing*, *supra* note 13, at 263-68.

114. See Harbach, *Market Failure*, *supra* note 14, at 670-72.

115. *Id.* at 669-70.

116. See Innocenti Research Centre, *The Child Care Transition: A League Table of Early Childhood Education and Care in Economically Advanced Countries*, UNICEF 3-5 (2008), [https://www.unicef-irc.org/publications/pdf/rc8\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/rc8_eng.pdf) [<https://perma.cc/QCU5-366R>] (summarizing evolution of childcare from private, familial care to third-party care); *id.* at 12-13 (“Most OECD governments have responded by formulating policy and investing public resources in the provision of early childhood education and care.”)

assumptions about the potential and limitations of human autonomy and agency on a more realistic understanding of the lived human experience.

Several family law scholars have critiqued (neo)liberal models of the state's relationship to families, some by proposing modifications to liberalism and critiquing neoliberalism,<sup>117</sup> and others by proposing alternative models of legal subjectivity and/or bases for state involvement.<sup>118</sup> I do not take a position here on which theoretical alternative is normatively preferable; the rich work in this field makes clear that any number of approaches are possible. In this paper, I consider Martha Albertson Fineman's Vulnerability Theory as an alternative theoretical model on which to ground the state's childcare law and policy. Vulnerability Theory replaces the idealized, neoliberal subject with a more realistic legal subject, which requires a corresponding change in the state's orientation. Descriptively, Vulnerability Theory provides a diagnostic lens through which to better understand our current childcare system and its failures. Practically, this enhanced understanding of our childcare system enables us to develop an alternative to the private childcare models discussed in Part I—a public childcare model, which would better respond to the private childcare realities I described in Section I.C.

I begin by exploring how Vulnerability Theory presents an alternative vision of legal subjectivity that invites us to revisit the nature of our social contract and the state's roles and responsibilities to its citizens. I then turn to explore in more detail how consideration of the vulnerable subject refracts our understandings of the state's relationship to children and families. Finally, I analyze our existing childcare system through the prism of Vulnerability Theory, considering how a Vulnerability analysis might suggest a re-orientation for the state. The coda is my proposal for a public childcare system, based on an understanding of childcare as a site of manifest vulnerability that can reproduce inequality, but also a site for social reproduction of resilient children, families, and communities.

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117. LINDA McCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 9-11 (2006); Alstott, *supra* note 35, at 41-42; Eichner, *Privatized*, *supra* note 19, at 218-19, 252-59; Eichner, *Redux*, *supra* note 19, at 99-101.

118. *See, e.g.*, CARBONE & CAHN, *supra* note 19, at 145-50, 158-59, 160-64; HUNTINGTON, *FAILURE TO FLOURISH*, *supra* note 19, at 109-11; Fineman, *Anchoring*, *supra* note 18, at 19-22.

*A. From (Neo)liberal Theory to Vulnerability Theory*

If the shortcomings of (neo)liberal theory are part of what is driving the failure of America's childcare system, Martha Albertson Fineman's recent work on Vulnerability Theory provides one way forward. Broadly, her project is an critique of (neo)liberal theory's rhetoric of privacy and concomitant state practices of deference and nonintervention. The Vulnerability thesis confronts the false assumptions and constructs of liberal theory, and instead provides a more realistic and contextual understanding of how individuals are situated within and interact with society, institutions, and the state. Vulnerability Theory accomplishes this by critiquing the root of liberalism—the liberal subject— and replacing it with a more accurate and realistic subject around which to negotiate the social contract: the “vulnerable subject.”<sup>119</sup> Ultimately, the Vulnerability paradigm is a theory of state responsibility—one that recognizes the state's responsibility to monitor underlying conditions and oversee institutions and social structures so as to enable more equal opportunities through individual and structural resilience.<sup>120</sup> Vulnerability Theory “raises new issues, poses different questions, and opens up new avenues for critical exploration.”<sup>121</sup>

1. From Autonomy to Vulnerability

The fundamental move in articulating this alternative theory of subjectivity is to replace the liberal subject with the vulnerable subject. Rather than being fully autonomous and competent, we are—all of us—vulnerable, meaning we all live under a constant threat of change and even harm.<sup>122</sup> Vulnerability is the “universal, inevitable, enduring aspect of the human condition,” and it exists throughout our lifecourse, although certain

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119. Fineman, *Anchoring*, *supra* note 18; Fineman, *Beyond Identities*, *supra* note 31; Martha Albertson Fineman, “Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 *Elder L.J.* 71 (2012) [hereinafter Fineman, *Elderly*]; Fineman, *LGBT Youth*, *supra* note 63; Fineman, *Responsive State*, *supra* note 34; Fineman, *Restrained State*, *supra* note 34.

120. Fineman, *Restrained State*, *supra* note 34, at 613.

121. Fineman, *Anchoring*, *supra* note 18, at 9.

122. *Id.* at 11.

developmental stages manifest more vulnerability than others.<sup>123</sup> It is both universal—a condition that all are subject to—and also particular. We are vulnerable because we are *embodied* beings subject to the frailties of our physicality.<sup>124</sup> We are also *embedded* beings, situated within a broader network of social, economic, political, and institutional relationships.<sup>125</sup> Individual vulnerabilities vary in magnitude across the lifecourse of each individual. Vulnerability Theory departs from other conceptions of “vulnerable populations,” which might typically include children, the elderly, and the disabled and are often accompanied with stigma, paternalism, and surveillance.<sup>126</sup> The vulnerable subject instead encompasses the entirety of an individual’s lifespan.<sup>127</sup> Like these other populations, adults, too, can manifest vulnerability or dependency (or both) at various stages, because of physical, situational, or structural factors.

## 2. From Self-Sufficiency to Resilience

Within this theory of vulnerability, the inverse of vulnerability is *resilience*. Resilience is the ability to respond to and offset vulnerability – to “survive and thrive” in society.<sup>128</sup> It is what provides us with the

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123. *Id.* at 8; Fineman, *Beyond Identities*, *supra* note 31, at 1753; *see also* EICHNER, *supra* note 19, at 48-49 (advocating a political theory of citizens as existing along spectrum of autonomy and dependence).

124. Fineman, *Restrained State*, *supra* note 34, at 619.

125. Fineman, *Elderly*, *supra* note 119, at 99; Fineman, *LGBT Youth*, *supra* note 63, at 318-19; Fineman, *Restrained State*, *supra* note 34, at 613, 621-22.

126. Fineman, *Beyond Identities*, *supra* note 31, at 1748-51; Fineman, *Elderly*, *supra* note 119, at 85; Fineman, *LGBT Youth*, *supra* note 63, at 315.

127. Fineman, *Responsive State*, *supra* note 34, at 266.

128. Fineman, *LGBT Youth*, *supra* note 63, at 309; *see id.* at 320-22; Fineman, *Beyond Identities*, *supra* note 31, at 1757; Fineman, *Responsive State*, *supra* note 34, at 269-70. Fineman’s work uses the concepts of vulnerability and resilience as theoretical heuristics; she does not invoke these categories in the more literal sense they may be used in other disciplines. *See* Anna Greer & Martha Albertson Fineman, *Vulnerability as Heuristic: An Invitation to Critique and Reflection*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 1 (2013). Yet despite these differing contexts there is considerable overlap between how Fineman understands resilience, theoretically, and how child development experts understand it,

capacity and material assets to rebound from misfortune and adversity.<sup>129</sup> Resilience is produced by and within society.<sup>130</sup>

Our resilience to vulnerability is dependent on and greatly influenced by the quality and quantity of resources we have, which are often structurally determined,<sup>131</sup> particularly by poverty and inequality.<sup>132</sup> Thus, the extent of our resilience at any particular point in time depends on our cumulative “assets.”<sup>133</sup> Our vulnerability drives us to form bonds, relationships, and institutions for support.<sup>134</sup> These social institutions and systems work both independently and together to provide us with these assets, understood as material, human, and social goods on which we can rely when facing misfortune.<sup>135</sup> The timing of asset acquisition (or deprivation) can be determinative; the positive or negative effects of asset

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practically. In the child development context, for example, resilience is understood as “a positive, adaptive response in the face of significant adversity.” Nat’l Sci. Council on the Dev. Child, *Supportive Relationships and Active Skill-Building Strengthen the Found. of Resilience* 1, 5 (2015) [hereinafter *Resilience*], <https://developingchild.harvard.edu/resources/supportive-relationships-and-active-skill-building-strengthen-the-foundations-of-resilience> [<https://perma.cc/XC8Y-ZEAW>]. Common, defining features of resilience include: a process to harness resources and sustain wellbeing, capacity to function positively after adversity, the ability to successfully adapt to stress, trauma, or chronic forms of adversity, and the process of adapting well to adversity. *Id.* at 1.

129. Fineman, *LGBT Youth*, *supra* note 63, at 320.

130. Martha Albertson Fineman, *Vulnerability and the Institution of Marriage*, 64 EMORY L. J. 2089, 2090 (2015).

131. Fineman, *Beyond Identities*, *supra* note 31, at 1754.

132. Fineman & Shepherd, *Homeschooling*, *supra* note 63, at 78.

133. Fineman, *Anchoring*, *supra* note 18, at 13.

134. Fineman, *Elderly*, *supra* note 119, at 96-98; Fineman, *LGBT Youth*, *supra* note 63, at 320; Fineman, *Restrained State*, *supra* note 34, at 614.

135. Fineman, *Anchoring*, *supra* note 18, at 13-14; Fineman, *Beyond Identities*, *supra* note 31, at 1756-57. Assets come in a variety of forms. They include physical or material assets, human capital assets, social assets, ecological/environmental assets, and existential assets. Fineman, *Anchoring*, *supra* note 18, at 13-15; Fineman, *Responsive State*, *supra* note 34, at 270-72. Robust assets in one context may even offset vulnerabilities in another. Fineman, *Anchoring*, *supra* note 18, at 15-18; Fineman, *Beyond Identities*, *supra* note 31, at 1757.

acquisition can lead to a cascade of positive or negative spillovers.<sup>136</sup> Consequently, while we all experience vulnerability as a constant, because of the differential distribution of assets, we will experience profound differences in resilience, resulting in sometimes profound inequalities of resilience across society. Even the social groupings we form to mitigate our vulnerability are themselves susceptible to vulnerability.<sup>137</sup> Our social institutions – family, market, school, business, and the state itself – can either promote resilience or produce and perpetuate inequality, and thus vulnerability.<sup>138</sup>

### 3. From the Restrained State to the Responsive State

Replacing the liberal subject with the vulnerable subject requires a new role and assumption of responsibility for the state. Our universal vulnerability, from which no person or institution is immune, becomes essential to our understanding of social and state responsibility. Once we acknowledge our universal vulnerability, it becomes clear that complete autonomy and self-sufficiency is illusory.<sup>139</sup> The state is our collective repository of legal and political power; Vulnerability Theory posits that with that power comes responsibility. Because state law and policy help to create and maintain asset-conferring social institutions – families, schools, markets, etc.—it has a correlative duty to ensure that these institutions operate equitably in response to individual and institutional vulnerability.<sup>140</sup> Thus, the reality of universal vulnerability requires a revision to the social contract and the correlating role of the state.<sup>141</sup>

Vulnerability's Theory's answer to our collective vulnerability is a *responsive*, rather than restrained, state.<sup>142</sup> Because all individuals are vulnerable, rather than autonomous, a responsive state must do more than

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136. Fineman, *LGBT Youth*, *supra* note 63, at 321.

137. Fineman, *Anchoring*, *supra* note 18, at 12-13.

138. *Id.*, at 2, 10, 13; Fineman, *Beyond Identities*, *supra* note 31, at 1758.

139. Fineman, *LGBT Youth*, *supra* note 63, at 320.

140. Fineman, *Anchoring*, *supra* note 18, at 6-8, 15; Fineman, *Responsive State*, *supra* note 34, at 269, 272.

141. Fineman, *Anchoring*, *supra* note 18, at 9-10.

142. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 51-53; Fineman, *Responsive State*, *supra* note 34, at 273-74; Fineman, *Restrained State*, *supra* note 34, at 625.

simply protect negative liberties and refrain from interference. The responsive state recognizes that privatization and private responsibility are inadequate responses to inevitable vulnerability. This understanding of state responsibility acts as a counterpoint to (neo)liberalism's insistence that private responsibility and privatization, without state engagement, are sufficient determinants of autonomy. Instead, Vulnerability recognizes state support and collective resilience as prerequisites to exercising autonomy, rather than symptomatic of a lack of autonomy.<sup>143</sup>

Thus, the responsive state has an active role to play in mitigating vulnerability and fostering resilience in individuals, families, communities, markets, and institutions. Rather than simply ensuring freedom from unwanted interference, the state has an affirmative obligation to monitor social institutions to ensure substantive equality of access and opportunity for all vulnerable subjects, across varied and multiple manifestations of vulnerability.<sup>144</sup> The state best fulfills this monitoring role by promoting individual and institutional asset accumulation and resilience.<sup>145</sup> And when institutions fail to operate equitably and inclusively, Vulnerability Theory expects a responsive state to develop law and policy initiatives to remedy inequality and shore up resilience. It can do so through proactive, affirmative law and policy initiatives that acknowledge and respond to vulnerability and unequal distribution of assets, and seek to equalize access and opportunity for all.<sup>146</sup>

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143. Fineman, *Elderly*, *supra* note 119, at 92. This insight is an important response to the idealized notions of autonomy and rugged individualism underlying liberal theory. As the National Scientific Council on the Developing Child has observed, "Resilience requires relationships, not rugged individualism . . . . Despite the widespread belief that individual grit, extraordinary self-reliance, or some in-born, heroic strength of character can triumph over calamity, science now tells us that it is the reliable presence of at least one supportive relationship and multiple opportunities for developing effective coping skills that are essential building blocks for the capacity to do well in the face of significant adversity." *See Resilience*, *supra* note 128, at 7.

144. Fineman, *Responsive State*, *supra* note 34, at 9-10.

145. Fineman, *Anchoring*, *supra* note 18, at 13-15.

146. Fineman, *Responsive State*, *supra* note 34, at 268; Fineman, *Restrained State*, *supra* note 34, at 624.



*B. The Vulnerable Subject in Childhood and the State*

Vulnerability Theory provides theoretical insights into how we might reimagine the focus and scope of the state's responsibility to children and their families – toward a broader understanding of affirmative state obligation. Broadly, in response to the universality and constancy of vulnerability, the state should structure institutions so as to cultivate resilience in children. Moreover, because children's vulnerability is deeply tied to larger family vulnerabilities, and even institutional ones, a responsive state would acknowledge that addressing children's vulnerability and promoting their resilience often will require broader structural supports for their families and other institutions in which they are embedded.

Unlike standard liberal theory, the category of "vulnerable subject" includes children, rather than segregating them into a different class. Rather than occupying an entirely distinct theoretical and legal space, the liminal state of childhood is "the vulnerable subject in childhood."<sup>147</sup> Rather than being subsumed under parental identity and control, children themselves have an independent relationship to the state.<sup>148</sup> Although children are embedded within families, they also exist separately from them. This "mandates an expansion of the social contract to consider the state's relationship to the individual in all stages of life."<sup>149</sup> It also acknowledges that children may make direct claims to state assistance, rather than simply receiving it through their parents as proxies.

Vulnerability Theory also considerably expands the class of individuals and institutions that are potentially unable to adequately care for themselves. Although liberal theory assumes adult parents are autonomous and self-sufficient, Vulnerability Theory makes clear that they may also manifest embodied and embedded vulnerability. Because this paradigm recognizes the reality of parental vulnerability, it disrupts (neo)liberal assumptions that parents are always capable of autonomously providing for their children, or will always act in their children's best interests, although most will be motivated to act in their children's interests most of the time.<sup>150</sup> The corollary to this is that parents, too, have

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147. See Fineman & Shepherd, *Homeschooling*, *supra* note 63, at 60.

148. Fineman, *LGBT Youth*, *supra* note 63, at 313.

149. *Id.* at 314.

150. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 126; Hendricks, *supra* note 35, at 1099.

a legitimate claim to state support to shore up the resilience of their children and families.<sup>151</sup> Because both children and parents are embedded within families that can manifest vulnerability, a responsive state would recognize that parents' and children's interest often will coincide, and both will sometimes require assistance from the state in order to be resilient.<sup>152</sup>

Vulnerability theory understands the state's obligations to include ensuring the availability of assets that will cultivate resilience in children and families, and to ensure the fair and equitable distribution of those assets. Thus, an appreciation of the vulnerable subject in childhood requires that the state must be more responsive to and responsible for vulnerability. Broadly, a state that responds to our universal vulnerability will understand that liberal theory's reliance on clear distinctions between public and private are misplaced, and it will recognize that the responsive state has a far more robust and supportive role to play. Fundamentally, the state must change its orientation toward children and families from hands-off to hands-on.

How might we articulate this new role for the state vis-à-vis the vulnerable subject in childhood? First, the state must continue to recognize that, because of their vulnerability – their inability (legally and practically) to care for or protect themselves – children require the special care and assistance of the state to shore up resilience. Thus, the state would continue to have a primary obligation to *protect* the vulnerable subject in childhood. However, in a departure from current understandings, this protective role would not exist simply as a state prerogative, but also as a state obligation, because it is the state's responsibility to support vulnerable subjects in managing their vulnerability and developing resilience.

Second, in order to ensure the equitable distribution of the assets required for resilience, the responsive state should provide resources and social goods to children and their families to promote resilience. Third, consistent with Vulnerability Theory's recognition that children are embedded within families that may, themselves, be vulnerable, the responsive state would embrace obligations to *assist parents and families*

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151. Fineman & Shepherd, *Homeschooling*, *supra* note 63, at 96; *see also* EICHNER, *SUPPORTIVE STATE*, *supra* note 19, at 64-65.

152. Naomi Cahn, *Placing Children in Context: Parents, Foster Care, and Poverty*, in *WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS* 145–55 (Martha Albertson Fineman & Karen Worthington eds., 2009).

in their child development work. Fourth, recognizing the critical role that larger societal institutions play in either perpetuating or offsetting childhood and family vulnerabilities, the responsive state would also have an obligation to *support and monitor* these institutions so as to promote asset accumulation and resilience. Finally, in recognition of the role the state plays in creating and sustaining social institutions affecting children, the responsive state would also embrace a state obligation to *ensure equality of access and opportunity* to the social institutions critical to supporting children and families.

These positive, forward-looking assumptions of responsibility reflect the understanding that managing individual and collective vulnerabilities isn't simply a matter of person or family responsibility, but also a central state concern.<sup>153</sup>

### C. Childcare and Vulnerability

Equipped with a more realistic model of legal subjectivity and an updated understanding of the state's role, I now return to the realities of American childcare. In the discussion below, I consider what we can learn by studying childcare through the Vulnerability lens as a predicate to my proposal for a public childcare system. Turning the Vulnerability lens to

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153. Fineman, *Beyond Identities*, *supra* note 31, at 1719. The Convention on the Rights of the Child (CRC), recognized as the most comprehensive of human rights treaties, gives voice to this more expansive understanding of the state role. See G.A. Res. 44/25, United Nations Convention on the Rights of the Child (Nov. 20, 1989), <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx> [<https://perma.cc/9SPB-3RLA>] [hereinafter CRC]; Jaap E. Doek, *What Does the Children's Convention Require?*, 20 EMORY INT'L L. REV. 199 (2006). The CRC recognizes that children are entitled to special care and assistance. See CRC, *supra* at p.mbl. That special care and assistance includes a duty of protection. See *id.* at art. 3, para. 2.; *id.* at art. 19, para. 1; Bartholet, *supra* note 38, at 93. Beyond protection, the CRC includes a duty of providing for children, including access to social insurance and an adequate standard of living. See *id.* at 91-93; CRC, *supra* at art. 26 para. 1; *id.* at art. 27, para. 1. The CRC also obliges states parties to assist parents in childrearing, including material support. See *id.* at art. 18, para. 2; *id.* at art. 27, para. 3. Beyond children and families, the CRC requires states parties to develop, maintain, and regulate services and institutions to care for and protect children. *Id.* at art. 3, para 3; *id.* at art. 18, para 2; *id.* at art. 19, para 2. Finally, the CRC guarantees that all children have equal access to its protections, provisions, and to social institutions. *Id.* at art. 2, para. 1.

our childcare system reveals that vulnerability is expressed in multiple aspects of the system. All major stakeholder categories – children, families, childcare providers – manifest vulnerability. And the assets that assist children, families, and providers in developing resilience are distributed inequitably, leading to marked disparities in resilience within the childcare domain. Moreover, as I have explored before, the childcare market itself is vulnerable to both classic and behavioral market failure and is not regulated by the state in ways that help to promote market resilience.

What is more, high-quality childcare is an impactful *asset* that helps children, families, and communities develop resilience and offset vulnerability in other areas. Understanding the dysfunctions of our childcare system through a Vulnerability analysis helps us appreciate the importance of state engagement in childcare so as to ensure equality of access and opportunity, and to promote resilience in the various stakeholders to moderate their vulnerability. I consider these realities of vulnerability and resilience below.

### 1. Children and Vulnerability

For much of the early lifecourse, vulnerability is manifest and apparent because of children’s physical and psychosocial embodiment. At various development stages, children are literally unable to provide for their physical and material needs. They also are at risk of harm because of the ways they think, process, and make decisions. Psychologically, children and youth are immature, and this immaturity has a biological basis.<sup>154</sup> Neuroscience research shows that the prefrontal cortex – the region of the brain responsible for self-control, judgment, and rational decisionmaking, doesn’t fully mature until well into the mid-20s.<sup>155</sup> Young children and adolescents are generally less cognitively developed than adults.<sup>156</sup>

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154. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 811-18 (2005); see also *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (recognizing children as less mature and responsible, more reckless and impulsive, subject to peer pressure, and with traits less fixed than adults).

155. See Adrianna Galván, *Insights About Adolescent Behavior, Plasticity, and Policy from Neuroscience Research*, 83 NEURON 262, 262 (2014).

156. Older teens’ cognitive function begins to approach that of adults. Scott & Grisso, *supra* note 154, at 813-14.

Children and youth also evidence less impulse control than do adults.<sup>157</sup> And finally, children are far less mature, psychosocially. As compared to adults, they tend to be less risk averse, more focused on short-term rather than long-term consequences, and more easily influenced by peers and authority figures.<sup>158</sup>

It is at least in part because of these physical and psychosocial vulnerabilities that children are legally disabled. They generally lack standing to sue or be sued in court, cannot work or contract, and except in exceptional circumstances, cannot usually override parental decisions about their care, custody, education, or health. And yet developmentally, when they have the proper structural and institutional support, children are also in a position to develop a robust resilience. Because of neuroplasticity, adolescence can be “an ideal time to positively influence or redirect problem behaviors.”<sup>159</sup>

Children of color also manifest vulnerability because of racial stereotyping and implicit bias. Children of color, especially black children, are disproportionately disciplined and more likely to be suspended or expelled as compared to their white classmates, potentially creating a “preschool-to-prison pipeline.”<sup>160</sup> Boys of color, in particular, lack access to quality early education opportunities.<sup>161</sup> And teachers rate black children’s persistence, learning approaches, and social skills less favorably than those of white children.<sup>162</sup>

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157. *Id.* at 814.

158. *Id.* at 815.

159. Galván, *supra* note 155, at 263. Plasticity refers to the brain’s malleability, such that in response to new experiences, interactions, and opportunities, the brain can “reshape[] and redefine[] itself adaptively to fit the needs of the individual.” *Id.*

160. Christine Johnson-Staub, *Equity Starts Early: Addressing Racial Inequalities in Child Care and Early Education Policy*, CTR. FOR L. & SOC. POL’Y 13-14 (2017), [https://www.clasp.org/sites/default/files/publications/2017/12/2017\\_EquityStartsEarly\\_0.pdf](https://www.clasp.org/sites/default/files/publications/2017/12/2017_EquityStartsEarly_0.pdf) [<https://perma.cc/3D27-G7KQ>].

161. Dobbins, *Unequal Access*, *supra* note 12, at 2.

162. García & Weiss, *supra* note 11, at 8.

## 2. Families and Vulnerability

Vulnerability theory foregrounds the interconnected network of families, communities, and institutions that impact the vulnerable subject in childhood. Children are vulnerable not only because they are *embodied*, but also because they are *embedded* within particular families, childcare providers, and communities.

Rising economic inequality has led to pronounced inequities in resilience for children and their families. Statistics bear this out. As measured by key national indicators of wellbeing, many of America's children lack sufficient material resources to navigate their vulnerability. As of 2015, among the 73.6 million children under age 18 in America, 20% were living in poverty. Among children living in poverty, the nation's youngest, ages zero to five (roughly 25 million total),<sup>163</sup> were more likely to be living below the poverty line than were older children.<sup>164</sup> As recognized by the Federal Interagency Forum on Child and Family Statistics, "[c]hildren living in poverty are vulnerable to environmental, educational, health, and safety risks. Compared with their peers, children living in poverty, especially young children, are more likely to have cognitive, behavioral, and socioemotional difficulties. Throughout their lifetimes, they are more likely to complete fewer years of school and experience more years of unemployment."<sup>165</sup> Importantly, race and ethnicity intersect with childhood poverty. Racial inequality increasingly affects economic equality and people of color represent a larger share of the population.<sup>166</sup> Children of color thus experience higher rates of poverty

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163. FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, *AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2017* 93 tbl.POP1 (2017) [hereinafter *AMERICA'S CHILDREN*], [https://www.childstats.gov/pdf/ac2017/ac\\_17.pdf](https://www.childstats.gov/pdf/ac2017/ac_17.pdf) [<https://perma.cc/TZ2F-MPN6>].

164. *Id.* at 14. Among that 20%, the poverty rate was much higher for Black, non-Hispanic children (34%) and Hispanic children (29%). *Id.*

165. *Id.*

166. Valerie Wilson & Jessica Schieder, *The Rise in Child Poverty Reveals Racial Inequality More Than a Failed War on Poverty*, ECON. POL'Y INST. (June 8, 2018), <https://www.epi.org/publication/the-rise-in-child-poverty-reveals-racial-inequality-more-than-a-failed-war-on-poverty> [<https://perma.cc/ML9R-FWXD>].

than do white children, and represent an increasing share of children living in poverty overall.<sup>167</sup>

What is more, recent data indicate that in 2016, 34 million children (almost half of the childhood population) experienced at least one “Adverse Childhood Experience” (ACE), and another 20% experienced two or more.<sup>168</sup> And in 2015, 18% of children lived in households classified by the USDA as “food insecure.”<sup>169</sup> Each of these factors pose an increased risk of harm to the children affected.

Many parents and families lack sufficient assets to exercise resilience in the face of adversity and change. As recognized by early-childhood experts, “[a] sensitive, responsible adult caregiver can reduce the impact of significant stress on a child, but parents themselves are often undermined by the same events and stresses that affect their children.”<sup>170</sup> A sizeable number of American families today are experiencing transition or crisis in ways that make it difficult for them to thrive.<sup>171</sup> Many of these changes are associated with lack of resources and family income.<sup>172</sup> As I discussed above, high quality care is expensive, and many families don’t have the financial resources to afford quality childcare.<sup>173</sup>

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167. *Id.*

168. See CD Bethell, et al., *Issue Brief: A National and Across State Profile on Adverse Childhood Experiences and Possibilities to Heal and Thrive*, JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH (2017), <http://www.cahmi.org/projects/adverse-childhood-experiences-aces> [<https://perma.cc/U4WN-257Z>]. ACEs “include a range of experiences that can lead to trauma and toxic stress and impact children’s brain development and physical, social, mental, emotional, and behavioral health and well-being.” *Id.* at 1. Examples include: family poverty, parental divorce or separation, death of a parent or guardian, parent or guardian incarceration, witnessing violence, living with a mentally ill, suicidal, or depressed person, living with person who has alcohol or drug problems, experiencing bias based on race or ethnicity. See *id.* at tbl.1.

169. AMERICA’S CHILDREN, *supra* note 163, at 18.

170. Jane Waldfogel & Robert D. Putnam, *Promoting Opportunity in Early Childhood*, in *Closing the Opportunity Gap*, *supra* note 1, at 25.

171. See HUNTINGTON, *FAILURE TO FLOURISH*, *supra* note 19, at 27-54.

172. See CARBONE & CAHN, *supra* note 19, at 83.

173. *High Cost 2014*, *supra* note 96, at 20-25; *Parents’ Perceptions of Child Care in the United States*, NAT’L ASS’N OF CHILD CARE RES. & REFERRAL AGENCIES 2 (2008), [https://usa.childcareaware.org/wp-content/uploads/2015/10/2009\\_parents\\_perception\\_report-r3.pdf](https://usa.childcareaware.org/wp-content/uploads/2015/10/2009_parents_perception_report-r3.pdf) [<https://perma.cc/W5WC-2T92>]

#### CHILDCARE, VULNERABILITY, AND RESILIENCE

There are racial and class-based disparities among families' ability to access quality care that meets their needs and allows adults to work.<sup>174</sup> Although all low-income families confront barriers to accessing quality childcare, families of color, limited English proficient families, and immigrant families face systemic barriers because of affordability, access, supply, and level of quality.<sup>175</sup> The majority of children of color living in low-income families have working parents. And parents of color are more likely to work in low-wage jobs, with unpredictable hours and few workplace benefits, making it more difficult to access quality care.<sup>176</sup> These families are less likely to locate care that provides adequate hours to cover sometimes-unpredictable work schedules.<sup>177</sup> Immigrant families frequently confront challenges in locating quality options that are culturally or linguistically appropriate, leading them instead to rely on informal care that is not subject to licensing and oversight.<sup>178</sup>

And parents' lack of resilience vis-à-vis childcare isn't limited to material resources and structural barriers. As my earlier research has uncovered, gaps in information frustrate their efforts to make authentic childcare decisions. Data confirm that parents lack adequate information about childcare, including the advantages and characteristics of high-quality care, indicators of quality, the location and availability of quality care, the relative costs of care, and the range of childcare alternatives. Nor are they readily able to monitor and supervise the care they purchase for their children. These information problems lead adverse selection in the childcare market, lowering the overall demand for quality care, and lowering the quality purchased by individual families.<sup>179</sup> Even when parents are armed with adequate information, the operation of heuristics

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(staying at home to care for children not an option because of financial concerns); *What do Parents Think About Child Care?: Findings from a Series of Focus Groups*, NAT'L ASS'N OF CHILD CARE RES. & REFERRAL AGENCIES 14 (2008) (parents had difficulty finding level of quality desired that they could afford and was available during needed hours); *id.* at 18-19 (high price is main driver of parental compromise on childcare choices).

174. JOHNSON-STAU, *supra* note 160, at 2.

175. *Id.* at 8.

176. *Id.* at 3.

177. *Id.* at 9-11.

178. JOHNSON-STAU, *supra* note 160, at 10-13.

179. Harbach, *Market Failure*, *supra* note 14, at 684-85.



and biases can cloud the judgments they form about childcare quality and negatively affect their decisions about which services to pursue for their children.<sup>180</sup> This imperfect rationality leads to distorted market behavior and a dysfunctional childcare market.

### 3. Childcare Workers and Vulnerability

Many childcare workers, who are disproportionately female and women of color, live in poverty.<sup>181</sup> Most have some college education, but only about 1/5 of them have a college degree, as opposed to 1/3 of other workers.<sup>182</sup> Childcare providers suffer a wage penalty for performing childcare.<sup>183</sup> Their hourly wages are roughly 23% lower than comparable workers in other jobs,<sup>184</sup> and recent estimates suggest that pay in the childcare sector falls among the bottom 10% of all occupations.<sup>185</sup> They also are less likely than others to receive workplace benefits like healthcare and pensions.<sup>186</sup> Many cannot afford childcare for their own children.<sup>187</sup> According to Child Care Aware, a project of the Department of Health and Human Services Office of Child Care, childcare providers in all states would spend more than half their annual salary to send two children to center-based care.<sup>188</sup>

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180. Harbach, *Nudging*, *supra* note 3, at 94-106.

181. Elise Gould, *Child Care Workers Aren't Paid Enough To Make Ends Meet*, ECON. POLICY INST. 1-2 (2015), <http://www.epi.org/files/2015/child-care-workers-final.pdf> [<https://perma.cc/55EN-BZVR>].

182. *Id.* at 2.

183. *Id.* at 6.

184. *Id.* at 2.

185. See Ajay Chaudry & Katie Hamm, *The Child Care for Working Families Act Will Boost Employment and Create Jobs*, CENTER FOR AMERICAN PROGRESS 5 (Dec. 7, 2017), <https://www.americanprogress.org/issues/early-childhood/reports/2017/12/07/443783/child-care-working-families-act-will-boost-employment-create-jobs> [<https://perma.cc/Y6B9-873B>].

186. *Id.*

187. *Id.*

188. *High Cost 2017*, *supra* note 22, at 21.

#### 4. The Childcare Market and Vulnerability

Finally, Vulnerability Theory recognizes that, like individuals, social institutions also may be vulnerable.<sup>189</sup> They may be rendered thus by market conditions, external policy changes, political compromises, agency capture, or human bias.<sup>190</sup> As discussed above, America’s childcare system exhibits multiple vulnerabilities: childcare spillovers and information problems lead to classic market failure, while heuristics and biases lead to behavioral market failure. The shortcomings of the childcare market lead to a suboptimal demand and supply of quality childcare. Moreover, disparities between supply and demand of childcare have led to childcare “deserts,” with limited or no access to quality care in some regions, especially care for infants, children of color, low-income and rural families, as well as a limited supply of culturally-diverse care, care during nontraditional hours, and care for children with special needs.<sup>191</sup>

##### *D. Quality Childcare and Resilience*

While the childcare system as it exists today unquestionably manifests and exacerbates vulnerability, it is also an asset that holds great promise for promoting resilience.<sup>192</sup> Childcare constitutes part of the “geology”<sup>193</sup> or “ecology”<sup>194</sup> of childhood – sites that present the perils of vulnerability but also the promise of resilience.<sup>195</sup> It is an important site of social reproduction that can provide children with assets and resilience with

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189. Fineman, *Anchoring*, *supra* note 18, at 12-13.

190. *Id.*; Fineman, *Responsive State*, *supra* note 34, at 273.

191. *See* Dobbins, *Deserts*, *supra* note 4, at 3-6.

192. *See also id.* at 15-16.

193. Fineman, *LGBT Youth*, *supra* note 63, at 309; Rasheed Malik & Katie Hamm, *Mapping America’s Child Care Deserts*, CENTER FOR AMERICAN PROGRESS (2017), <https://www.americanprogress.org/issues/early-childhood/reports/2017/08/30/437988/mapping-americas-child-care-deserts> [<https://perma.cc/TMT4-WBJQ>].

194. Woodhouse, *Ecogenerism*, *supra* note 62, at 823; *see also* Laura Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007).

195. Fineman & Shepherd, *Homeschooling*, *supra* note 63, at 62-63; Fineman, *Restrained State*, *supra* note 34, at 614-15; Rosenbury, *supra* note 194, at 840-46.

which to face future opportunities and challenges, preparing them to be productive members of society.<sup>196</sup> Below, I consider the potential of quality childcare as an important asset for multiple stakeholders.

### 1. Quality Childcare and Resilient Children

Quality care is an important component of building childhood resilience in the face of adversity and limited resources. Behavioral and social science experts find that children become resilient when they have access to supportive relationships, adaptive skill-building like executive function and self-regulation, and positive experiences.<sup>197</sup> The greatest predictor of childhood resilience is the existence of at least one stable, committed relationship with a supportive adult – parent, caregiver, or other.<sup>198</sup> Responsive interactions with these supportive adults promote healthy brain architecture and can protect children from disruption and assist them in developing coping skills in the face of adversity.<sup>199</sup>

As recognized by the National Academy of Sciences, “[y]oung children experience many important influences, . . . including the adults who work with them to provide for their care and education, health, and security. These professionals represent one of the most important channels available for improving the quality of early care and education.”<sup>200</sup> Quality care from early childhood educators can help buffer children from adversity and develop resilience.<sup>201</sup> First, care providers can assist in the development of stable relationships with supportive adults by providing consistent, supportive care. In some cases, the care provider herself may be the only secure relationship.<sup>202</sup> Second, quality childcare helps children develop adaptive skills like self-regulation, expressing emotions, and self-

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196. Fineman & Shepherd, *Homeschooling*, *supra* note 63, at 72; Fineman, *LGBT Youth*, *supra* note 63, at 322.

197. *See Resilience*, *supra* note 128, at 4, 5.

198. *Id.* at 1.

199. *Id.* at 2.

200. *See Transforming*, *supra* note 2, at 2.

201. *See* Mary A. Sciaraffa et al., *Understanding and Promoting Resilience in the Context of Adverse Childhood Experiences*, 46 EARLY CHILDHOOD ED. J. 346-49 (2017), <https://doi.org/10.1007/s10643-017-0869-3> [<https://perma.cc/6GWX-R46F>].

202. *Id.* at 347-48.

assertion.<sup>203</sup> Finally, quality care can provide children positive experiences with nurturing teacher-child relationships and the foundation of a safe, stable, and stimulating learning environment.<sup>204</sup>

## 2. Quality Childcare and Resilient Families

Childcare also helps parents and can strengthen families, both financially and otherwise. Of course, parents need safe, affordable, accessible care so that they can work, go to school, earn additional income, and experience higher, more stable earnings in the long run.<sup>205</sup> Childcare offers parents the space to provide for their children and families, financially, as well as to pursue meaningful work outside the home. But childcare also supports parents and families in their child development work, thereby promoting resilience and providing additional protection to children facing adversity. Care providers support families by reinforcing the importance of family connections, serving as role models for child development, encouraging collaboration among families, teaching parents about healthy parenting and child-development skills, connecting families to support services and opportunities, and interfacing with families about particular concerns for their children.<sup>206</sup> High quality care is especially important for low-income families and families of color, as these children are more likely to feel the effects of vulnerability, and childcare has been shown to be especially impactful for these communities.<sup>207</sup>

## 3. Quality Childcare and Resilient Communities

Early childhood providers can also promote resilience and support in their broader communities. Child development programs can work in combination with health, education, funding, and other policy initiatives to support the comprehensive needs of children and families as a unit.<sup>208</sup> Care providers can work collaboratively across disciplines to support children and families facing adversity and help to educate the public about

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203. *Id.* at 346-47; *Resilience*, *supra* note 128, at 9.

204. Sciaraffa, *supra* note 201, at 350.

205. *High Cost 2017*, *supra* note 22, at 7.

206. Sciaraffa, *supra* note 201, at 348.

207. *High Cost 2017*, *supra* note 22, at 7; *High Cost 2015*, *supra* note 2, at 15-17.

208. *See* Beckmann, *supra* note 24, at S29.

the science and consequences of ACEs.<sup>209</sup> And preliminary research suggests that higher-quality childcare can increase social capital in more diffuse ways, leading to more resilient communities.<sup>210</sup>

Affordable, quality childcare also supports broader economic development. The undersupply of affordable, accessible childcare negatively impacts our collective economic bottom line. Families lose financial resources because of lack of access to affordable childcare and family leave, parents regularly miss work because of childcare breakdowns, businesses lose revenue because of parental absenteeism, and businesses lose workers when parents must provide care rather than work outside the home.<sup>211</sup> Conversely, accessible childcare enables parents (especially mothers) to work more and remain employed longer, has a positive impact on absenteeism, and significantly reduces employee turnover.<sup>212</sup> Higher-quality childcare would also benefit a particular segment of the childcare market: childcare providers. High-quality early childhood education requires more staff, with better professional preparation, more benefits, and higher wages to train and retain that staff. Implementing these improvements would not only increase the quality of care provided, but also improve wages and working conditions for those providing that care.<sup>213</sup>

In sum, high-quality childcare not only promotes children's resilience, but can also be instrumental to promoting stronger families, more resilient communities, and increased economic development overall.<sup>214</sup>

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209. Sciaraffa, *supra* note 201, at 348.

210. See Stefania Maggi et al., *Community Resilience, Quality Childcare, and Preschoolers' Mental Health: A Three-City Comparison*, 73 SOC. SCI. & MED. 1080, 1087 (2011).

211. *High Cost 2017*, *supra* note 22, at 7-8.

212. *Id.* at 8.

213. *High Cost 2015*, *supra* note 2, at 22-23; Gould, *supra* note 181, at 14.

214. See generally Josh Bivens et al., *It's Time for An Ambitious National Investment in America's Children*, ECON. POL'Y INST., (Apr. 6, 2016), <http://www.epi.org/publication/its-time-for-an-ambitious-national-investment-in-americas-children> [<https://perma.cc/XNX6-2945> ]; see also *High Cost 2015*, *supra* note 2, at 15.

This understanding of childcare through Vulnerability Theory demonstrates why a private, hands-off childcare system is inappropriate and inequitable. Given our universal and particularized vulnerabilities, the state cannot countenance the private childcare model that exists today. High quality childcare is a human asset that promotes resilience and enhances the material wellbeing of children, families, and society. Indeed, high quality care not only promotes resilience, generally, but can also help to mitigate other challenges and inequalities experienced by children in early childhood. The childcare market, however, does not operate to distribute quality care equitably and inclusively. Instead, children from well-off families have a range of options and opportunities, while the children of working and poor families, disproportionately families of color, struggle with low-quality, inconsistent, and inadequate care. In the face of this inequality, the responsive state should develop affirmative law and policy initiatives to remedy inequality and equalize access and opportunity, so that all children and families have equal opportunities to develop resilience through quality care.

This obligation requires us to shift our theoretical focus from private childcare models to public ones and to similarly alter the state's orientation toward children and families. The responsive state must protect children from the harm of low-quality care. It must provide adequate care for children, either directly or through subsidies. It must assist parents in providing quality care for their children, both personally and through third parties. It must support and monitor a childcare system that provides high-quality care.<sup>215</sup> And it must ensure that all children have equal access to high-quality childcare. In short, to fulfill its obligations to ensure the equitable distribution of assets and the

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215. The Convention on the Rights of the Child recognizes these more specific duties *vis-à-vis* caring for children. In the words of the Convention, the state should: “ensure the child such protection and care as is necessary for his or her well-being,” CRC, *supra* note 153, at art. 3, para. 2; “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and... ensure the development of institutions, facilities and services for the care of children[.]” *id.* at art. 18, para. 2; “take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible[.]” *id.* at art. 18, para. 3; and “ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities...,” *id.* at art. 3, para. 3.

development of resilience, the state must develop a robust, comprehensive public childcare system for the United States.

### III. TOWARD A PUBLIC CHILDCARE SYSTEM

This new understanding of the state's role vis-à-vis children and families, one that recognizes and responds to the realities of human vulnerability, provides the foundation for a new, public childcare model. In contrast to the private childcare models I explored in Part I, the public childcare model sees the state role as central to care provision in the United States. In order to fulfill its obligations toward children – to deploy quality care to safeguard their wellbeing and ensure that it is distributed equitably – the state has a responsibility to ensure comprehensive access to high-quality care for all of America's children. Having theorized a new, public childcare model, this Part will consider how we might translate this model into practical law and policy initiatives. I begin by mapping out how the principles of my new public childcare model should be put into practice. I then anticipate and respond to potential objections to a public childcare system. I conclude by evaluating how this new model for childcare is manifest in newly-proposed federal legislation – the Child Care for Working Families Act – and considering how effective this proposal would be in developing a comprehensive, public childcare system that fulfills the state's obligations to vulnerable children, families, and communities.

#### *A. Designing a Public Childcare System*

Revising our understanding of the state's orientation toward childcare with insights from the "childcare and vulnerability frame" enable us to distill a set of overarching principles and goals that should guide the institutional design of a comprehensive, public childcare system in the United States. Consistent with my analysis above, the state must protect children, provide for them, assist parents and families, support and monitor childcare institutions, and ensure equality of access and opportunity to childcare for all. Below, I consider the possibilities for each of these directives.

Before getting to the particulars, I offer an overarching imperative: Quality is essential. Quality childcare benefits both children and their families. High-quality care enhances future academic and social success for children, and generates social spillovers for parents, families, communities, and the nation. Without quality, childcare cannot act as an

asset to help children and families navigate vulnerability and develop resilience. On the other hand, low-quality childcare can exacerbate experiences of vulnerability, and do so in ways that are more difficult to overcome later in the life course. What is more, suboptimal demand for quality care is at the root of childcare's market failure.<sup>216</sup> And quality childcare is what parents desire for their children, although their decisions are complicated by heuristics and biases that lead to behavioral market failure.<sup>217</sup> A critical touchstone for all state interventions and innovations in a public childcare system must therefore be quality.<sup>218</sup> And childcare quality should be measure not only along structural and process matrices,<sup>219</sup> but also in terms of cultural competence, and a recognition of the importance of diverse early care providers for presenting children with early opportunities to engage with children and adults from a variety of backgrounds.<sup>220</sup>

### 1. Protecting Children

Turning now to the principles animating a public childcare system, the state should protect children from harm. The state can accomplish this most directly via significantly increased quality regulation of the childcare market.<sup>221</sup> Unfortunately, our existing system of childcare regulation is limited and uneven, exposing children to the potential harms of unregulated care. Existing regulations often fall short of the quality benchmarks experts look to, establishing a floor beyond which providers

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216. See Harbach, *Market Failure*, *supra* note 14, at 693-94.

217. See Harbach, *Nudging*, *supra* note 3, at 74-75, 94-106.

218. For a more in-depth description of how childcare quality is measured, see Harbach, *Nudging*, *supra* note 3, at 78-81. See also Marjorie Wechsler, et al., *The Road to High-Quality Early Learning: Lessons from the States*, LEARNING POL'Y INST 6-9 (2016), [https://learningpolicyinstitute.org/sites/default/files/product-files/Road\\_to\\_High\\_Quality\\_Early\\_Learning\\_REPORT.pdf](https://learningpolicyinstitute.org/sites/default/files/product-files/Road_to_High_Quality_Early_Learning_REPORT.pdf) [<https://perma.cc/5EFM-VCDG>].

219. See *supra* note 3.

220. JOHNSON-STAUER, *supra* note 160, at 15-16.

221. Regulations also can offset market failure problems with spillovers and information in the childcare market. See Harbach, *Market Failure*, *supra* note 14, at 694-696.



cannot fall, as opposed to a more developmentally-rich ceiling.<sup>222</sup> And many states allow informal, unlicensed care to operate legally. Unlicensed care is not subject to basic health and safety requirements, minimum training requirements, or background checks. It is not inspected.<sup>223</sup> Although recent reauthorization of the Child Care Development Fund (CCDF) made improvements by mandating that all states have a licensing scheme in place and requiring states to engage in more robust oversight of CCDF providers, its effects are limited.<sup>224</sup> Unlicensed care remains a problem, and there are no universal, federal standards regulating the licensing or oversight of childcare.<sup>225</sup>

By contrast, a comprehensive public childcare system must be one in which all non-family providers are licensed and monitored, and have access to training and continuing education. Congress should set a national floor of quality – developmentally informed – below which no state’s childcare licensing system would permit care to fall. Beyond that, Congress could offer a variety of incentives for care providers to “race to the top” in terms of offering higher quality care.

## 2. Providing for Children

The state also has an obligation to make material provision for children in the childcare context. Given the number of children living in poverty and the number of families who are priced-out of high-quality care, the state will need to make significant investments to ensure equal access to quality childcare. Importantly, in this context, as in others, the state’s obligations to children cannot be fulfilled without aiding parents.<sup>226</sup> The state can provide for quality childcare for children via direct provision

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222. See Harbach, *Market Failure*, *supra* note 14, at 700-703.

223. See *High Cost 2015*, *supra* note 2, at 29.

224. See Harbach, *Market Failure*, *supra* note 14, at 714-16.

225. See *id.* at 700-703.

226. Although enhancing quality can exist in tension with enhancing access, providing quality childcare need not be zero-sum. See *Closing the Opportunity Gap*, *supra* note 1, at 29-30. It is, of course, possible to both support working families and assist them in their vital child development/social reproduction work. But such support will only promote resilience if we ensure that quality is a primary focus. This will require significant financial investments in developing a comprehensive system of care.

of care and via subsidies to their parents to enable them to purchase high-quality care.

Direct state provision could be enhanced by increased funding for the Head Start and Early Head Start Programs, which currently serve only a fraction of eligible children. The state – at the federal or state level – might also duplicate the efforts of the Department of Defense which, as part of its comprehensive Child Care Fee Assistance Programs, provides care directly via more than 800 child development centers on military installations worldwide.<sup>227</sup> More states might also follow the examples of Oklahoma, New Jersey, Boston, and New York City, all of which have universal pre-K (UPK) programs, which are available to all children meeting the age requirement, regardless of income or other factors.<sup>228</sup> Newer research suggests that high-quality UPK programs not only significantly increase access to early learning and quality care, but also may help to eliminate the achievement gap.<sup>229</sup>

The state should also provide for children via a system of subsidies to enable families to afford higher-quality care. This policy change would move from a view of state support as limited to times of crisis or contingency, and recognize that childcare is unaffordable for many families because of the changing structures of home and work. As discussed above, however, existing federal subsidies are serving only 15% of eligible children.<sup>230</sup> According to data analyzed by the Government Accountability Office, in 2011-12, approximately 8.6 million children were eligible for subsidies under the CCDF, but only 1.5 million received them, leaving a dramatic gap in services.<sup>231</sup> Congressional funding had remained relatively static for over a decade and, by 2015, the number of children

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227. See *High Cost 2017*, *supra* note 22, at 25. All installation programs must be inspected regularly, and third-party providers receiving military subsidies must meet quality and safety standards. See Harbach, *Market Failure*, *supra* note 14, at 707.

228. See Allison Freidman-Krauss et al., *How Much Can High-Quality Universal Pre-K Reduce Achievement Gaps?*, CTR. FOR AM. PROGRESS 7 (Apr. 2016), <http://nieer.org/wp-content/uploads/2017/01/NIEER-AchievementGaps-report.pdf> [<https://perma.cc/K6K3-W28Y>].

229. See *id.* at 7-15.

230. See *supra* note 103 and accompanying text; *High Cost 2015*, *supra* note 2, at 38.

231. See U. S. GOV'T ACCOUNTABILITY OFF., GAO-17-60, CHILD CARE: ACCESS TO SUBSIDIES AND STRATEGIES TO MANAGE DEMAND VARY ACROSS STATES (2016).

served reached an all-time low over the Fund's 17 years.<sup>232</sup> In order to truly provide for children, state investment in childcare subsidies must be increased at every level – federal, state, and local – and must be tied to the provision of quality care. The recent, two-year budget deal allotted an additional \$5.8 billion in discretionary funding to the CCDF over two years, which will fully fund the earlier, 2014 reauthorization.<sup>233</sup> According to the Center for Law and Social Policy (CLASP), approximately 230,000 children will gain childcare assistance through this increase over two years.<sup>234</sup> While the increase is laudable, it does not come close to serving the millions of children who are eligible but not receiving subsidized care. And more broadly, the state should address income inequality head-on. Research establishes that when parents receive income support – even

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232. In 2017, a study found that the number of children supported by the Child Care Development Fund had dropped to a 17-year low. See Christina Walker & Hannah Matthews, *CCDBG Participation Drops to Historic Low*, CTR. FOR LAW & SOC. POL'Y (Jan. 2017), <https://www.clasp.org/sites/default/files/public-resources-and-publications/publication-1/CCDBG-Participation-2015.pdf> [<https://perma.cc/AS54-HVUV>]. States also provide some subsidies to parents, but have experienced increased demand for subsidies without increased federal funding, leading them to implement cost-savings strategies that lessens accessibility and affordability. See *High Cost 2015*, *supra* note 2, at 38-39.

233. See *Budget Deal Includes Unprecedented Investment in Child Care*, CTR. FOR LAW & SOC. POL'Y 16 (Feb. 2018), <https://www.clasp.org/sites/default/files/publications/2018/02/Budget%20Deal%20Includes%20Child%20Care%20Investment%20.pdf> [<https://perma.cc/VVS6-ERT8>].

234. *Id.* For FY 2018, the Omnibus spending bill increased discretionary spending for the CCDBG by \$2.4 billion. CLASP estimated that an approximate total of 151,370 children would receive CCDBG-funded childcare. *Child Care in the FY 2018 Omnibus Spending Bill*, CTR. FOR LAW & SOC. POL'Y 2 (Mar. 2018), <https://www.clasp.org/sites/default/files/publications/2018/03/Child%20Care%20in%20the%20FY%202018%20Omnibus.pdf> [<https://perma.cc/XQ7K-RP75>]. Combined funding for the CCDF program for 2018 was approximately \$8.143 billion. Office of Childcare, *Fiscal Year 2018 Federal Child Care and Related Appropriations*, ADMIN. FOR CHILD. & FAMILIES (May 30, 2018), [https://www.acf.hhs.gov/occ/resource/fiscal-year-2018-federal-child-care-and-related-appropriations#\\_ftn1](https://www.acf.hhs.gov/occ/resource/fiscal-year-2018-federal-child-care-and-related-appropriations#_ftn1) [<https://perma.cc/K9VE-6CQX>].

outside the context of childcare – children’s wellbeing and development are enhanced.<sup>235</sup>

In terms of tax benefits, Congress recently passed the Tax Cuts and Jobs Act, large-scale tax overhaul legislation that has enhanced some tax relief for some families with children. Under the new law, the Child Tax Credit doubles from \$1000 to \$2000 per child, and allows parents to receive \$1400 as a refund if their credit is larger than their federal income tax liability. The child tax credit also is available to high earners for the first time, as it raises the maximum income threshold from \$75,000 to \$200,000 for single parents, and from \$110,000 to \$400,000 for married couples.<sup>236</sup> Despite these benefits, the new increase will have a negligible benefit for those who need it most.<sup>237</sup>

The Act also retained the Child and Dependent Care Tax Credit (CDCTC), worth up to \$1,050 for one child under 13 and \$2,100 for two children under 13 in a family with an adjusted gross income of \$15,000 or less.<sup>238</sup> Childcare advocates have been underwhelmed. They note that the CDCTC offers only a modest benefit. First, to qualify for the credit, a single parent must be working or in school, and for married couples both adults must do so.<sup>239</sup> Second, the credit isn’t refundable, and thus does not reach

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235. Arloc Sherman & Tazra Mitchell, *Economic Security Programs Help Low-Income Children Succeed Over Long Term, Many Studies Find*, CTR. ON BUDGET & POL’Y PRIORITIES (July 17, 2017), <https://www.cbpp.org/research/poverty-and-inequality/economic-security-programs-help-low-income-children-succeed-over> [<https://perma.cc/8YF7-2HUU>].

236. See Lydia DePillis, *Changes to the Child Tax Credit: What it Means for Families*, CNN (Dec. 16, 2017, 12:50 PM), <http://money.cnn.com/2017/12/16/news/economy/child-tax-credit/index.html?iid=EL> [<https://perma.cc/EJ82-WJ87>].

237. Estimates suggest that 10 million children from working, low-income families would net \$75 or less. See *GOP Bill’s Child Tax Credit Leaves 10 Million Children in Working Families with a CTC Increase of Just \$75 or Less*, CTR. ON BUDGET & POL’Y PRIORITIES (Dec. 15, 2017), <https://www.cbpp.org/research/federal-tax/interactive-gop-bills-child-tax-credit-leaves-10-million-children-in-working> [<https://perma.cc/UPE9-BSRT>].

238. See *Key Elements of the U.S. Tax System: How Does the Tax System Subsidize Child Care Expenses?*, TAX POL’Y CTR. (2018), <https://www.taxpolicycenter.org/briefing-book/how-does-tax-system-subsidize-child-care-expenses> [<https://perma.cc/RBD3-7UKA>].

239. *Id.*

many low- and moderate-income families.<sup>240</sup> Most families able to take advantage of the credit earn between \$100,000 and \$200,000. And the amount of the credit is far lower than the average amount most families spend on care.<sup>241</sup> Experts calculated that in 2018, a mere 11.8% of families with children benefitted from the credit, and among those who did, their taxes were reduced by an average of \$593.<sup>242</sup>

Finally, the Act also kept the dependent care flexible spending account (FSA) program allowing workers to save up to \$5,000 in pre-tax dollars in a flexible spending account to offset costs for qualifying dependents.<sup>243</sup> Because FSAs are employer-provided, at least one parent in a married couple, or the single parent, must actually be working, and working for an employer that offers an FSA program.<sup>244</sup> FSAs benefit higher-income households because the value of the exclusion rises with a household's marginal tax rate.<sup>245</sup> FSAs are practically unavailable to nearly two-thirds

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240. *Id.*

241. See Leila Schochet et al., *Trump's Plan for the Child Tax Credit Does Not Meet Working Families' Needs*, CTR. FOR AM. PROGRESS (Oct. 25, 2017, 11:45 AM), <https://www.americanprogress.org/issues/early-childhood/news/2017/10/25/441368/trumps-plan-for-the-child-tax-credit-does-not-meet-working-families-needs> [<https://perma.cc/GGK4-ETBR>]. President Trump's campaign childcare proposals anticipated a more robust – and complex – system of tax benefits to assist families with childcare expenses. See Lily L. Batchelder et al., *Assessing President Trump's Child Care Proposals*, 70 NAT'L TAX J. 759, 763-64 (2017). Tax policy scholars, however, concluded that those proposals were “unduly complicated, arbitrarily exclude certain low-income families, deliver support well after child care payments are due, and provide the smallest benefits to low- and middle-income families for whom child care expenses tend to represent the largest financial burden.” *Id.* at 759. These proposals did not make it into the Tax Cuts and Jobs Act of 2017.

242. TAX POL'Y CTR., BRIEFING BOOK, *How Does the Tax System Subsidize Child Care Expenses?* 197-200, <https://www.taxpolicycenter.org/briefing-book> [<https://perma.cc/3WUY-Q8N2>] (citing URBAN-BROOKINGS TAX POLICY CENTER, TPC Microsimulation Model, version 0718-1).

243. See Darla Mercado, *Tax Bill Provisions May Help Parents Defray this Massive Cost*, CNBC (Dec. 2, 2017, 12:00 PM), <https://www.cnbc.com/2017/12/22/tax-reform-breaks-may-help-parents-defray-child-care-cost.html> [<https://perma.cc/832J-ZVAL>].

244. Stoltzfus, *supra* note 104, at 2-4.

245. Batchelder, *supra* note 241, at 5.

of workers.<sup>246</sup> More broadly, low- and middle-income families participate less often in tax-preferred savings programs, and also tend to contribute less to them than wealthier families.<sup>247</sup>

Tax scholars advocate for a childcare tax policy that would reduce costs to a reasonable percentage of family income.<sup>248</sup> They recommend that to improve affordability to childcare through the tax code, policymakers should restructure and simplify existing policy, perhaps by replacing the CDCTC and FSAs with an expanded, refundable credit that would limit childcare expenses to a percentage of income.<sup>249</sup> But tax scholars also acknowledge the limitations of *post hoc* tax policy to address concerns about childcare affordability. Direct spending programs would help parents pay for childcare each month, rather than receiving benefits after the fact. They can adjust over the term of a year based on changed circumstances, rather than remaining static. And, as discussed above, they often include quality requirements for subsidized childcare. These scholars instead suggest that a better approach might be to expand and fully fund the CCDF so that all eligible families would receive subsidies, and childcare expenses overall would be lowered to a manageable amount. Coupling a fully-funded CCDF with CDCTC reforms would also ensure that middle-class families with high costs would also benefit.<sup>250</sup>

### 3. Assisting Parents and Families

Moving beyond protecting and providing care for children, a public childcare system should assist parents in their child development work. In the context of childcare, this responsibility takes multiple forms. Of course, the direct provision of care, subsidies, and tax credits assists parents in affording higher-quality care. But beyond outsourced care, the state must recognize the significance of parents and guardian care in early childhood. Because secure attachment to a stable and consistent caregiver is the

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246. Stoltzfus, *supra* note 104, at 1, 2.

247. Chuck Marr, Nathaniel Frenz & Chye-Ching Huang, *Retirement Tax Incentives are Ripe for Reform*, CTR. ON BUDGET & POL'Y PRIORITIES fig. 1 (Dec.13, 2013), <https://www.cbpp.org/sites/default/files/atoms/files/12-13-13tax.pdf> [<https://perma.cc/VP9L-USTZ>].

248. *See* Batchelder, *supra* note 241, at 3.

249. *Id.* at 18.

250. *Id.*

biggest determinant of resilience and healthy child development, the state should engage in direct efforts to shore up the quality and quantity of parental and guardian care for young children. As experts at the Saguaro Seminar have recognized, “to properly address the problems of early childhood . . . we have to attend to not just children but their parents.”<sup>251</sup>

Experts recognize that all parents need support, and recommend the implementation of rigorously-evaluated parenting programs designed to improve parents’ cognitive and behavioral skills around parenting so as to increase parenting quality.<sup>252</sup> To increase the quantity of parental care, they recommend paid parental leave, paid sick leave, and workplace flexibility.<sup>253</sup> Currently, the United States is the only advanced, industrialized country that does not provide paid parental leave.<sup>254</sup> A recent budget proposal from President Trump’s would have offered six weeks off for new parents at fractional percentage of their earnings. This proposal called for funding through state unemployment insurance, which could put financial pressure on states and result in an increased payroll tax. Moreover, unemployment insurance generally provides only about one-third of weekly wages.<sup>255</sup>

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251. See Waldfogel & Putnam, *supra* note 170, at 25.

252. *Id.* at 26-28. For example, the Nurse-Family Partnership Program has been found to reduce harsh parenting and improve home environments, parents’ literacy activities, and children’s early vocabulary. *Id.* at 27. In February 2018, the Congressional budget bill included \$400 million each year for five years to expand the NPP and other evidenced-based home visit programs. See Press Release, Nurse-Family Partnership, States Set to Continue Providing Nurse-Family Partnership to Vulnerable Families, (Feb. 9, 2018), <https://www.nursefamilypartnership.org/in-the-news/congress-passes-funding-federal-home-visiting-program> [<https://perma.cc/U9ZX-LWT6>]. State intervention, of course, raises concerns about state overreach and policing of family decisionmaking. State supports and education will require careful balancing of family pluralism and children’s best interests.

253. See Waldfogel & Putnam, *supra* note 170, at 31-32.

254. See *id.* at 31.

255. See Lorie Konish, *Trump’s Budget Calls for Six Weeks’ Paid Family Leave. What it Will Cost You*, CNBC (Feb. 12, 2018, 5:08 PM), <https://www.cnbc.com/2018/02/12/trumps-budget-calls-for-six-weeks-paid-family-leave.html> [<https://perma.cc/S2VZ-7ZBZ>]. Unlike the Family and Medical Leave Act, the Trump proposal does not extend to those providing care for other family members or who are themselves ill. See *id.*

An alternative strategy proposes funding twelve weeks of paid family leave by allowing new parents the opportunity to collect early Social Security benefits after birth, and then defer collection of their benefits at retirement.<sup>256</sup> The maximum monthly benefit would be \$2,877, with the average waged worker receiving approximately \$1,175 a month.<sup>257</sup> Both parents could take leave any time during the first year, meaning that two-parent families could stagger their leave periods for a total of twenty-four weeks of time to provide parental care. According to proponents, the average income replacement would be comparable to or higher than parental leave benefits in the United Kingdom and Canada.<sup>258</sup>

#### 4. Supporting and Monitoring Childcare Institutions

In addition to protection, provision, and assistance for parents, the state must support and monitor the overall childcare system. More robust and universal regulation is an important step. The state must also step in to address the spillovers, information problems, heuristics, and biases that cause the market to perform suboptimally. As I have discussed in-depth elsewhere, the state can best address conventional market failure by providing subsidies linked to quality, regulating childcare, and providing more transparent and accessible information to parents about childcare.<sup>259</sup> Congress took a number of important steps in this direction with the Child Care and Development Fund Block Grant Act of 2014.<sup>260</sup> To offset parents' behavioral market failures, the state can develop a suite of strategic childcare interventions to nudge parents toward higher-quality care.<sup>261</sup>

Moreover, the state should work to enhance the supply of quality childcare by investing in the early care and education workforce. Research

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256. See Kristin A. Shapiro, *Policy Focus: A Budget-Neutral Approach to Parental Leave*, INDEP. WOMEN'S F. 1 (Jan. 2018), [http://pdf.iwf.org/budget-neutral\\_approach\\_parental\\_leave\\_PF18.pdf](http://pdf.iwf.org/budget-neutral_approach_parental_leave_PF18.pdf) [<https://perma.cc/BH8M-QG4A>].

257. See *id.* at 2.

258. See *id.* at 4-5.

259. See Harbach, *Market Failure*, *supra* note 14, at 694-96.

260. See *id.*, at 712-18.

261. See Harbach, *Nudging*, *supra* note 3, at 113-20. In my project on behavioral market failure, I suggest strategic information disclosures, information campaigns and leveraging social norms, required warnings, and procedural nudges when parents access childcare subsidies See *id.*



on the most successful early childhood education and care efforts makes clear that well-trained childcare providers and staff are critical to the establishment and maintenance of quality. Important characteristics include the expected credentials, schooling, and experience, but also interpersonal skills like energy, enthusiasm, and motivation.<sup>262</sup>

Recognizing the significance of high-quality, consistent care for young children, and the need for a well-trained, professionalized childcare workforce, the National Academies of Science recently convened a Committee on the Science of Children Birth to Age 8, and issued a call to action on transforming the childcare workforce.<sup>263</sup> “[T]he science of child development and early learning makes clear the importance and complexity of working with young children . . . . Yet just when children would benefit most from high-quality experiences that build on each other consistently over time, the systems with which they interact are fragmented.”<sup>264</sup> Because of the significant impact childcare professionals have on children during this critical developmental phase, the Committee recommends a range of initiatives and supports across a number of domains to enhance the necessary competencies and responsibilities of childcare professionals to support quality, professional childcare.<sup>265</sup> Ultimately, they conclude that “[i]mplementing [their] recommendations will produce substantive changes that elevate the perception of the professionals who work with children from birth through age eight and improve the quality of professional practice, the quality of the practice environment, and the status and well-being of the workforce – and ultimately, outcomes for children.”<sup>266</sup>

The Committee recognizes that such a transformation in the childcare workforce cannot happen without coherent funding, oversight, and policies.<sup>267</sup> Thus, supporting childcare professionals must necessarily include financial support. The remarkably low pay for childcare work presents a significant barrier to developing and retaining a more skilled childcare workforce. Higher compensation, on the other hand, would help to attract a more skilled workforce and provide incentives for childcare

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262. See Bivens, *supra* note 214, at 20-22.

263. See *Transforming*, *supra* note 2.

264. *Id.* at 1.

265. *Id.* at 4-15.

266. *Id.* at 15.

267. See *id.* at 13-14.

providers to invest in staff development, which would also enhance quality.<sup>268</sup> Enhancing provider wages and training would not only fulfill the state's obligation to children, but would also help to offset the hardships of care providers, who are themselves manifesting significant vulnerability.

### 5. Ensuring Equality of Access and Opportunity

Finally, in order to ensure the equitable distribution of childcare and the development of resilience, a public childcare system must ensure equality of access to high-quality care for all children. The implementation of increased provision, subsidies, and supports to parents must be sufficient to ensure that all children receive quality care, regardless of the circumstances of their birth or their socio-economic status. While this obligation need not be fulfilled via a universal childcare program, the program must be comprehensive; there must be adequate targeted, means-tested childcare for all children and families who cannot otherwise afford it, or require other special services.<sup>269</sup> Ensuring equal access will require recognition of and engagement with the particular barriers confronted by families of color, and their children's disproportionately low access to quality care.<sup>270</sup> Equal access must also include expanded childcare hours to support parents working in jobs with non-traditional or unpredictable hours, as well as access to culturally and linguistically appropriate care.<sup>271</sup>

To reiterate the sentiment with which I began this Article: "If we are to achieve true equality of opportunity, each and every child deserves to have a decent early childhood so they can acquire the skills and competencies to compete and contribute effectively."<sup>272</sup>

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268. One way to increase childcare wages would be to set higher reimbursement rates for quality providers via the CCDF. *See* Bivens, *supra* note 214, at 22.

269. *See* Freidman-Krauss *supra* note 228, at 7.

270. *See supra* notes 159-61, 165-66 and accompanying text.

271. *See supra* notes 173-77 and accompanying text.

272. *Closing the Opportunity Gap, supra* note 1, at 32.

*B. Objections*

The move to a comprehensive, public childcare system would be a significant departure from the private childcare models the United States has long embraced.

To begin, skeptics are sure to be wary of a more robust state presence in the American childcare system. The state has long been viewed suspiciously, not only by (neo)liberalism, but also by critical theory, which views the state as an entity that inherently exercises what is often arbitrary and coercive power.<sup>273</sup> Drawing on this perspective, family law scholarship has offered numerous critiques of the ways in which state interactions with families can be biased, coercive, punitive, and harmful to families and children. Indeed, the family privacy and parental rights doctrines are understood, at least in part, as a counterbalance to the state's *parens patriae*<sup>274</sup> and police powers – as a way to protect against state authoritarianism and overreach.<sup>275</sup> Yet this resistance depends heavily on a version of *parens patriae* that tends to be reactive and adversarial, and implemented through a liberal theoretical frame that has dramatically limited its scope and reach.<sup>276</sup> But this limited, negative family-law orientation need not be the default posture of the state vis-à-vis families. Instead, the state should be more preoccupied with providing affirmative, forward-looking supports for families and children rather than intervening

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273. See Hendricks, *supra* note 35, at 1095.

274. The notion that the state is empowered and indeed required to step in to protect children in certain circumstances has a long history in our legal tradition. Broadly speaking, the *parens patriae* principle recognizes that the state has a right and responsibility to protect those who cannot protect themselves. See 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 463 (J.B. Lippincott Co. 1893); HOMER H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 786-87 (2d ed. 1988).

275. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 64. The foundational family liberty cases concerned the state role in educating and caring for children. The primary concern was state incursions into family decisionmaking as a form of totalitarianism. The family, by fostering pluralism, came to be seen as a check against state attempts to standardize its citizenry. See Harbach, *Market Failure*, *supra* note 14, at 662-64 & n.20.

276. See *supra* notes 57-61 and accompanying text. This orientation is what scholar Clare Huntington calls “negative family law.” See HUNTINGTON, FAILURE TO FLOURISH, *supra* note 19, at 81-108.

to override parents.<sup>277</sup> Thus, despite the state's sometimes-problematic history as *parens patriae*, we must expand our imagination of the state's role to include the possibility of a state that is supportive rather than adversarial, collaborative rather than autocratic.<sup>278</sup>

A second concern relating to family autonomy is the potential for the public childcare model to override parental choice, standardize childcare options, and undercut family pluralism values that are a hallmark of our family law tradition.<sup>279</sup> But it is possible (and indeed, *desirable*) to significantly reimagine the state's role without giving up important values of family autonomy and pluralism.<sup>280</sup> As I have argued elsewhere, the state should recognize that individual families will have diverse motivations and interests in selecting their particular childcare arrangements, and should also recognize the normative value in this diverse and varied approach to childcare decisions.<sup>281</sup> An enhanced state role in ensuring comprehensive access to quality care need not imply a state takeover of the childcare system, nor a compulsory childcare system (the latter approach evoking the specter of children living in barracks in ancient Sparta, to channel Justice McReynolds in *Meyer v. Nebraska*<sup>282</sup>). The state can remain neutral

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277. To continue with Huntington's thesis, the state might instead adopt a "flourishing" approach to family law, which would focus on supporting families and children to head off rupture, and to repair the ruptures that do occur. See HUNTINGTON, *FAILURE TO FLOURISH*, *supra* note 19, at 109-11.

278. Fineman, *Anchoring*, *supra* note 18, at 19; Fineman, *Responsive State*, *supra* note 34, at 274. As Jennifer Hendricks expresses it, we must "trust in the capacity of the state to be a force for good under the terms of the new, more intimate social contract." Hendricks, *supra* note 35, at 1095; see also *id.* at 1099. Although a more fulsome analysis of the tensions between state authority and parental prerogatives is beyond the scope of this article, it is important to note continued risks of state involvement. A Vulnerability approach might suggest greater state engagement and less emphasis on parental preferences in some contexts, but concerns about family pluralism will require a careful balancing of these interests. See Fineman & Shepherd, *Homeschooling*, *supra* note 63, at 88-97.

279. See Harbach, *Nudging*, *supra* note 3, at 124-25; Harbach, *Outsourcing*, *supra* note 13, at 284.

280. See EICHNER, *SUPPORTIVE STATE*, *supra* note 19, at 58-62.

281. Harbach, *Outsourcing*, *supra* note 13, at 282-84.

282. In *Meyer v. Nebraska*, the Court recounted Plato's ideal of common childrearing and Sparta's barracks for training and education of children, but

with regard to the form of childcare selected while still taking a normative position on the importance of *quality* across a variety of settings.<sup>283</sup> Consequently, the state orientation toward family childcare decisions should be one that respects individual choices and provides support across the multiple childcare settings that may be selected.<sup>284</sup> Regardless of childcare arrangements, parents and family members will remain the most significant influence on their children's development.<sup>285</sup>

At least two more practical concerns about the public childcare model exist. One concern is focused on the ability (or not) of the state(s) to provide a high-quality product in an efficient and effective manner. To be sure, as market theory recognizes, government failure can occur just as surely as market failure does. Some types of government intervention can impede market performance, and government services don't always end up promoting social welfare.<sup>286</sup> The primary response here is the recognition that a state versus market system of comprehensive care need not be zero-sum. Instead, public-private partnerships would offer opportunities for innovation by the state as well as by private market actors. This approach would enhance the diversity of options from which parents could choose. Beyond these collaborations, well-trained technocrats at the agency level, combined with judicial review of agency action, can act to protect against government bias and failure.<sup>287</sup>

Finally, any sort of comprehensive childcare system will be expensive.<sup>288</sup> Unlike some other market sectors, it is impossible to

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then rejected the "desire of the legislature to foster a homogenous people." 262 U.S. 390, 401-02 (1923).

283. See Harbach, *Market Failure*, *supra* note 14, at 693-94; Harbach, *Outsourcing*, *supra* note 13, at 282-84; Cf. EICHNER, SUPPORTIVE STATE, *supra* note 19, at 51-53; Harbach, *Nudging*, *supra* note 3, at 78-81. This "neutrality" as to parents' individual choices about childcare is consistent with liberal theory's more overarching priorities. See EICHNER, SUPPORTIVE STATE, *supra* note 19, at 22.

284. Research suggests parents prefer a range of providers across public and private settings. WECHSLER, *supra* note 218, at 9.

285. Cf. Fineman & Shepherd, *Homeschooling*, *supra* note 63, at 97.

286. See Harbach, *Market Failure*, *supra* note 14, at 686-87 & n.171; Harbach, *Nudging*, *supra* note 3, at 124-25.

287. See Harbach, *Nudging*, *supra* note 3, at 125.

288. See JILL S. CANNON ET AL., INVESTING EARLY: TAKING STOCK OF OUTCOMES AND ECONOMIC RETURNS FROM EARLY CHILDHOOD PROGRAMS 101-107 (2017),

simultaneously improve productivity and lower costs in the childcare sector without lowering quality.<sup>289</sup> The cost of a comprehensive system would far exceed our existing model of targeted subsidies and credits. And a transition to a public childcare model would doubtless involve significant financial commitments from all levels of government. But increased spending to enhance quality childcare is a sound investment, generating significant social spillovers in the form of cost savings in education, crime prevention, public assistance, social services, and an increased tax base. Indeed, Nobel Laureate economist James Heckman persuasively argues that childcare investments generate significant financial returns, estimating a rate of return at above 10%. Ultimately, our failure to adequately invest in and ensure quality care for all of America's children is both a moral failing and a type of behavioral market failure. As a country, we are shortsighted, far too focused on initial outlays and costs for childcare, and thus make decisions that don't reflect our longer-term goals for children, families, and society. By investing too little in the short term, we collectively fall prey to present bias in ways that have significant consequences for our future.

My responses to the objections above offer refinements to the public childcare model. First, the state's orientation toward children and families in the childcare context should be proactive, supportive, and focused on mitigating vulnerability and promoting resilience. This can be accomplished if the state acts as a collaborative supporter of parents and guardians, rather than stepping in to override or punish parental choices. Second, the state should respect the diversity of childcare choices and work to ensure that families can exercise authentic choice to the greatest extent possible. To this end, any public childcare system would be

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[https://www.rand.org/pubs/research\\_reports/RR1993.html](https://www.rand.org/pubs/research_reports/RR1993.html)  
 [https://perma.cc/Z5BC-CG2K]; Grover J. (Russ) Whitehurst, *Why the Federal Government Should Subsidize Childcare and How to Pay for It*, BROOKINGS INST. 1 (Mar. 9, 2017), [https://www.brookings.edu/wp-content/uploads/2017/03/es\\_20170309\\_whitehurst\\_evidence\\_speaks3.pdf](https://www.brookings.edu/wp-content/uploads/2017/03/es_20170309_whitehurst_evidence_speaks3.pdf)  
 [https://perma.cc/7WMB-37X9]; Harbach, *Market Failure*, *supra* note 14, at 707; Bivens, *supra* note 214, at 31-32; Katie Hamm & Carmel Martin, *A New Vision for Child Care in the United States: A Proposed New Tax Credit to Expand High-Quality Care*, CTR. FOR AM. PROGRESS 17-18 (Sept. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/08/31111043/Hamm-Childcare-report.pdf> [https://perma.cc/U3FY-ZC53].

289. Gould, *supra* note 181, at 13-14.

voluntary rather than compulsory.<sup>290</sup> To ensure a variety of options and to leverage innovation in multiple settings, the public model should be one that ensures comprehensive access to quality care, including state-provided care, but does not create a system of exclusive state provision of that care. Instead, this new model would recognize the role of parents, families, and market actors in providing a multitude of high-quality care environments. Third, increased state involvement must be accompanied by enhanced transparency around policymaking and clear protections in the case of government failure or oversight. Finally, we must overcome our collective present bias and invest in our children today so as to ensure their futures, as well as our own.

Having sketched out some possibilities for how the state might protect and provide for children, assist parents, support institutions, and ensure equality of access and opportunity, I turn now to consider the potential of newly-proposed legislation – The Child Care for Working Families Act<sup>291</sup> – to vindicate the full panoply of the state’s responsibilities to children and their families.

### *C. Case Study: The Child Care for Working Families Act*

In September 2017, Senator Patty Murphy and Congressman Bobby Scott first introduced the Child Care for Working Families Act: an ambitious new blueprint for childcare reform and the creation of a federal-state partnership via state grants “to promote child care and early learning.”<sup>292</sup> Although the 2017 bill did not become law, it was reintroduced in February 2019.<sup>293</sup> Widely lauded by more than 100

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290. The voluntary nature of childcare would not, however, eliminate the state’s *parens patriae* interest in children. So, for example, if parents or guardians were providing care that fell below minimum expectations, the state would have authority to intervene on behalf of the child.

291. See H.R. 1364, 116th Cong. (2019); S. 568, 116th Cong. (2019); see also S.1806, 115th Cong. (2017); H.R.3773, 115th Cong. (2017).

292. S. 1806, 115th Cong., at 1 (2017).

293. See H.R. 1364, 116th Cong. (2019); S. 568, 116th Cong. (2019). The legislation is nearly identical to the 2017 Act. See Jay Nichols, *Child Care Advocates Applaud Reintroduction of Child Care for Working Families Act*, CHILD CARE AWARE OF AMERICA (Feb. 26, 2019), <http://usa.childcareaware.org/2019/02/child-care-advocates-applaud-reintroduction-of-child-care-for-working-families-act> [<https://perma.cc/2BW6-DCZ9>].

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organizations advocating for children, women, parents, families, individuals with disabilities, education reform, and economic opportunity,<sup>294</sup> the Act would invest at least \$90 billion in childcare reform in its first three years.<sup>295</sup> The bill represents a significant step toward fulfilling the state's obligations of protection, provision, assistance, support, and equality of access to childcare, and would also address the needs and vulnerabilities of multiple stakeholders in our childcare system.

First, to help fulfill the state's obligation to protect children from harm, the Act incentivizes the development and use of high-quality care across a variety of care settings. Participating states must develop tiered and transparent systems for measuring the quality of providers who participate in the program. These systems must include a set of standards that consider the extent to which providers adhere to rigorous, evidence-based standards tied to child outcomes and are particularized to the type of care and children served, while maintaining a high level of quality across all types of care.<sup>296</sup> The Act also provides funds for states to improve the quality of care, with extensive directives on the forms those improvements should take.<sup>297</sup>

Second, the Act enhances the provision of quality care for children in a number of ways. First, it allocates funds for Head Start programs to expand

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294. See News Release, Senator Patty Murray, *Sen. Murray Introduces Bold, Comprehensive Child Care and Early Learning Bill to Bring Down Costs of Child Care in Washington State and Across the Country* (Sept. 14, 2017) [hereinafter News Release, Murray], <https://www.murray.senate.gov/public/index.cfm/2017/9/sen-murray-introduces-bold-comprehensive-child-care-and-early-learning-bill-to-bring-down-costs-of-child-care-in-washington-state-and-across-the-country> [https://perma.cc/EJR8-3CC4].

295. S. 568, *supra* note 293, at § 1; see Jay Nichols, *New Bill Would Make Affordable Child Care a Reality for All Families*, CHILD CARE AWARE AM. (Sept. 14, 2017), <https://usa.childcareaware.org/2017/09/new-bill-would-make-affordable-child-care-a-reality-for-all-families> [https://perma.cc/8S6X-CP3K]. This would result in an increase of funding for the Child Care Development Fund to roughly 3.5 times the total, annual federal spending for childcare in Fiscal Year. See CTR. FOR L. & SOC. POL'Y & NAT'L WOMEN'S L. CTR., *Child Care in the Bipartisan Budget Act of 2018: Frequently Asked Questions* (Feb. 13, 2018), <https://www.clasp.org/sites/default/files/publications/2018/02/FAQ%20CCDBG%20Increase.pdf> [https://perma.cc/4F75-K2Y7].

296. This requirement contemplates that the standards at the "entry" tier of quality to increase in rigor over time. See S. 568, *supra* note 293, at 14-17.

297. *Id.* at 30-48.



to provide full-day, full-year programming.<sup>298</sup> Second, the Act provides both incentives and funding for states to develop voluntary, universal, high-quality preschool programs with equitable access for low- and moderate-income three- and four-year-olds.<sup>299</sup> Finally, the Act would dramatically increase the number of children eligible for childcare subsidies, providing childcare assistance for low- and middle-income families, and capping the amount of childcare expenses eligible families would pay based on their percentage of the median state income. Families would pay for childcare services on a sliding scale, ranging from those with the lowest incomes having no co-pay, to families at 150% of their state's median income having co-pays capped at 7%.<sup>300</sup>

Third, the Act also includes provisions to assist parents in providing quality care to their children. While it does not include a paid family leave proposal (which, as discussed above, is now the subject of several alternative plans), the Act expresses support for the Maternal, Infant, and Early Childhood Home Visiting Program, urging Congress to increase financial support for the Program to promote family health, improve school readiness and achievement, prevent child maltreatment, support family economic self-sufficiency, reduce crime, and improve community coordination.<sup>301</sup>

Fourth, the Act also would support and monitor the broader childcare market in a variety of ways. As explained above, the Act would incentivize the provision of quality care by requiring that states implement research-

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298. *Id.* at 87-95.

299. *Id.* at 66-87.

300. For those families with income at 25% or lower than the state's median income, childcare services would be available without a required co-pay. For families between 75-100% of the state's median, states would require between 0-2% of the families' income. For those at 100-125%, the co-pay would be between 2-4%. Finally, for families making up to 50% above the state's median income, out-of-pocket childcare expenses would be capped at 7%. *Id.* at 25-26. The U.S. Department of Health and Human Services has determined that childcare expenses in excess of 7% of family income is unaffordable. See Allison May, *How Much Does Child Care Cost?*, NAT'L CONF. ST. LEGISLATURES (Jan. 3, 2018), <http://www.ncsl.org/blog/2017/01/03/how-much-does-child-care-cost.aspx> [<https://perma.cc/BR6L-8Q58>].

301. S. 568, *supra* note 293, at 96-99; see also *supra* note 252 (describing Home Visiting Program).

based standards to measure the quality of participating providers.<sup>302</sup> The Act also expressly addresses the supply of quality care by focusing on the childcare workforce. It requires states to use quality allotments to support comprehensive training and professional development activities of childcare professionals, and ensure that childcare workers receive a living wage.<sup>303</sup>

Finally, the Act makes significant advancements in assuring equality of access to quality care for all children. Broadly, the Act aspires to more expansive access for childcare, defining “high-quality and inclusive care” as care provided by an eligible childcare provider; that is at the highest tier of the state’s quality system; that serves a percentage of infants, toddlers, and children with disabilities that reflects the prevalence of such children in the state; and that provides care for children with disabilities alongside children without disabilities.<sup>304</sup> Thus, the Act focuses on building a more inclusive, high-quality childcare system with access for those underserved children and families most frequently confronting childcare deserts: children with disabilities, infants and toddlers, and families requiring care during non-traditional hours. Also, as discussed above, it more than doubles the number of children eligible for financial assistance, thus reaching many more families who cannot, on their own, afford quality care.<sup>305</sup> The Act also prohibits discrimination based on race, color, religion, national origin, sex, sexual orientation, gender identity, or disability against any person participating in or receiving benefits from the program.<sup>306</sup>

By working to protect, provide, assist, support, and ensure equality of access, the Act would enable stakeholders in our childcare system to better manage responsibility and cultivate resilience. For children, of course, the provision of high-quality care promotes cognitive and social development, school readiness, and better long-term outcomes. Further, as discussed above, efforts to channel high-quality care to low-income families will be especially effective in cultivating resilience. For parents, the proposal to make high-quality care accessible for low- and middle-income families would likely lead to many more parents working outside the home.

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302. *Id.* at 14, 35-38.

303. *Id.* at 35-38; *id.* at 22-23

304. *Id.* at 62-63.

305. News Release, Murray, *supra* note 294.

306. S. 568, *supra* note 293, at 55.

Experts estimate that once fully phased in, the legislation would result in an additional 1.6 million parents, primarily mothers, joining the workforce as a result of increased subsidies and reduced costs.<sup>307</sup> And they project that this increase in employment and earnings will lift 1 million or more families out of poverty.<sup>308</sup> As we saw above, promoting economic resilience within families also directly benefits children: decreasing rates of child poverty are correlated with improved child outcomes.<sup>309</sup>

Moving beyond children and families, the Act would also promote the growth of the childcare workforce, leading to an estimated 700,000 new childcare positions.<sup>310</sup> The employment growth would be accompanied by increased training for teachers and caregivers, and higher compensation for providers, incentivizing them to augment their qualifications. By ensuring all childcare workers receive a living wage, the Act would help to ensure these workers and their families have sufficient earnings to meet their basic needs.<sup>311</sup> More broadly, the Act would promote economic development by creating an estimated total of 2.3 million new jobs overall, and also build the longer-term human capital of millions of children who will later support the economy and society as a whole.<sup>312</sup>

None of this is to say, however, that the Act provides a comprehensive fix for childcare access and quality or the demands of balancing market work and family work. Perhaps the biggest shortcoming of the Act is that, despite mandating important metrics for assessing childcare quality, it does not require universal licensing for childcare providers, nor set any national baselines or minimums for levels of quality. This concern is especially manifest in the context of some faith-based childcare and family childcare provided in providers' homes. These providers represent a prominent sector of the childcare market, but are frequently unregulated, leading to concerns about both safety and quality for children. Thus, while federalism and efficiency concerns might caution against monolithic federal control over state childcare efforts, the failure to require universal licensing raises important concerns around quality. The Act also does not address childcare supports via the tax system which, as discussed above,

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307. See Chaudry & Hamm, *supra* note 185, at 2-3.

308. *Id.* at 3.

309. *Id.*

310. *Id.* at 4-5.

311. *Id.*

312. *Id.* at 2, 6.

could support direct subsidies and assist middle-class families with high childcare expenses.<sup>313</sup> Finally, the Act does not address paid family leave, which is an essential policy tool to ensure that parents have ample time to spend with infants and children who are ill or disabled.<sup>314</sup>

Nevertheless, the Child Care for Working Families Act would move childcare in the United States from a fractured private system to a more integrated, comprehensive public childcare partnership between states and the federal government. While not guaranteeing a right to universal access or deploying every potential method to protect, provide, assist, support, and ensure access,<sup>315</sup> the Act goes very far indeed in implementing the state's obligations to children and families in the childcare context. As summed up in a recent report on the Act's economic effects:

An investment in child care as proposed in the . . . Act will put America on a path to meeting crucial economic and societal goals now and into the future by putting more people in the workforce, raising wages, and helping families make ends meet, all while making sure that children – right from the start – get the safe, stable, and high-quality care and learning experiences they will need to thrive and succeed.<sup>316</sup>

With childcare increasingly hailed as a moral and economic issue across the political spectrum,<sup>317</sup> the Act presents a meaningful opportunity for the state to make good on its obligations to our youngest children.

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313. *See supra* notes 236-50.

314. For recent scholarship proposing a more comprehensive remedy for inequality in early childhood, combining paid parental leave, affordable, high-quality childcare, universal preschool, and an enhanced Head Start, *see generally* AJAY CHAUDRY ET AL., *CRADLE TO KINDERGARTEN: A NEW PLAN TO COMBAT INEQUALITY* (2017).

315. In particular, the Act does not address childcare subsidies via the tax system, although they were partially reformed in the recent budget deal. The Act also does not require regulation across childcare settings, and does not broach paid family leave, which is the subject of other recent legislative proposals.

316. Chaudry & Hamm, *supra* note 185, at 7.

317. *See* Michelle Chen, *How to Fix America's Childcare Crisis*, *NATION* (Sept. 19, 2017), <https://www.thenation.com/article/how-to-fix-americas-childcare-crisis> [<https://perma.cc/RH7F-SQBZ>]; Katharine B. Stevens, *Federal Early Childhood Care & Education: Advancing Opportunity through Early*

## CONCLUSION

A new understanding of state obligation – informed and enhanced by Vulnerability Theory – suggests a transformative approach to our chronic childcare problems. This approach flips the defaults in childcare law and policy. Just as childcare itself has crossed the private-public divide, the responsive state understands childcare as a public – rather than exclusively private – responsibility and concern.

More broadly, this project's critique of the state's existing orientation toward children and families, and its call for a more responsible state, invites us to revisit the state's orientation across a broader set of legal domains. We need not start from scratch. It has long been recognized that the state, as *parens patriae*, is responsible for guarding and promoting children's interests, safety, and welfare.<sup>318</sup> And yet, as I alluded to briefly above, *parens patriae* frequently is implemented in negative ways, and fails to live up to its aspirations or potential.<sup>319</sup> Updating *parens patriae* with a more solid and realistic theoretical basis would require significant reforms in a variety of law and policy contexts, including child welfare, juvenile justice, family law, and broader social welfare policy.

Acknowledging the universality of vulnerability among families and children, the state can support families to ensure all children have access to quality childcare and consequently, increased resilience with greater opportunities to develop and thrive. In contrast to private child models' focus on "my kids," "your kids," and "their kids" the responsive state recognizes all children as "our kids,"<sup>320</sup> helping make way for more equitable access to our aspirations for future generations.

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*Learning*, AM. ENTERPRISE INST., 9 (2017), <http://www.aei.org/spotlight/federal-early-childhood-care-and-education-programs-advancing-opportunity-through-early-learning> [<https://perma.cc/4PEC-UKVH>]. Recent polling found that 77% of voters support federal action to augment childcare assistance and expand early care and education. Julie Kashen, *A Year of Momentum for Child Care and Early Education*, CENTURY FOUND. (Sept. 14, 2018), <https://tcf.org/content/commentary/year-momentum-child-care-early-education> [<https://perma.cc/63WT-FMUH>].

318. CLARK, *supra* note 274, at 132; GROSSMAN & FRIEDMAN, *supra* note 62, at 262-63.

319. *See supra* notes 274-78 and accompanying text.

320. *See generally* PUTNAM, *supra* note 5.