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SIDELINED AGAIN: HOW THE GOVERNMENT ABANDONED WORKING WOMEN AMIDST A GLOBAL PANDEMIC

Jessica Fink*

Abstract

Among the weaknesses within American society exposed by the COVID pandemic, almost none has emerged more starkly than the government's failure to provide meaningful and affordable childcare to working families—and, in particular, to working women. As the pandemic unfolded in the spring of 2020, state and local governments shuttered schools and daycare facilities and directed nannies and other babysitters to “stay at home.” Women quickly found themselves filling this domestic void, providing the overwhelming majority of childcare, educational support for their children, and management of household duties, often to the detriment of their careers. As of March 2021, more than 5 million American women had lost their jobs, with 2.3 million women no longer even looking for work. Countless other women continue to struggle with the unsustainable demands of performing their paid jobs while simultaneously providing close to full-time domestic services at home. On all of these metrics, women of color have found themselves even more acutely affected.

Importantly, this need not have been the case: With a reasonable amount of planning and expense, federal, state, and local governmental resources could have been mobilized to create a solution to this crisis. By establishing and providing funding for “learning pods” throughout the country, the government could have served the needs of countless working families (especially working mothers) by filling this childcare void, while also providing employment assistance to a host of other workers who lost their jobs during the pandemic. In fact, the government could have turned to its own experience—providing childcare to working mothers during World War II and continuing to operate high-quality and affordable childcare for military families today—to deliver this type of childcare assistance to all families currently in need. In declining to do so, the government not only has exacerbated the COVID crisis for innumerable working families, but also has further relegated women to the professional

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sidelines—a decision destined to have immeasurable and long-term consequences for millions of working women, for the organizations that employ them, and for society as a whole.

INTRODUCTION

The current pandemic has laid bare a wide range of weaknesses in American society: deficiencies in the American health care system,¹ precarious funding for the nation's public schools,² the extent to which a fractured political climate has impeded agreement on even the most basic public safety issues.³ Yet amidst this chaos, perhaps no shortcoming has emerged more starkly than the government's failure to provide meaningful and affordable support for working families—and, in particular, for working women—when it comes to their childcare obligations.

Women for decades have been demanding equality in the workplace, clawing their way into leadership roles,⁴ fighting for basic workplace protections,⁵ and struggling for mentorship and other opportunities.⁶ While the specific experience of every working woman will differ depending on her race, economic status, marital

¹ See, e.g., David Blumenthal & Shanoor Seervai, *Coronavirus Is Exposing Deficiencies in U.S. Health Care*, HARV. BUS. REV. (Mar. 10, 2020), <https://hbr.org/2020/03/coronavirus-is-exposing-deficiencies-in-u-s-health-care> [<https://perma.cc/4BGL-ZK4Y>].

² See, e.g., Kenzi Abou-Sabe, Christine Romo, Cynthia McFadden & Omar Abdel-Baqi, *A Tale of Two ZIP Codes: COVID-19 Exposes Deep Disparities in U.S. Schools*, NBC NEWS (June 8, 2020, 3:11 PM), <https://www.nbcnews.com/news/us-news/tale-two-zip-codes-covid-19-exposes-deep-disparities-u-n1227646> [<https://perma.cc/X867-BLYD>].

³ See, e.g., Frank Berry, *Masks, Walls and Security in a Divided Country*, BLOOMBERG (Dec. 23, 2020, 4:30 AM), <https://www.bloomberg.com/opinion/articles/2020-12-23/covid-masks-border-walls-and-how-partisanship-imperils-public-safety> [<https://perma.cc/KTX9-DD9B>].

⁴ See Rachel Thomas, Marianne Cooper, Gina Cardazone, Kate Urban, Ali Bohrer, Madison Long, Lareina Yee, Alexis Krivkovich, Jess Huang, Sara Prince et al., *Women in the Workplace 2020*, MCKINSEY & COMPANY 8 (Sept. 30, 2020), https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2020.pdf [<https://perma.cc/Z3RL-WDB8>]; see also Patricia Cohen & Tiffany Hsu, *Pandemic Could Scar a Generation of Working Mothers*, N.Y. TIMES (June 30, 2020), <https://www.nytimes.com/2020/06/03/business/economy/coronavirus-working-women.html> [<https://perma.cc/SK8S-KKKJ>].

⁵ See DEBORA L. SPAR, *WONDER WOMEN: SEX, POWER, AND THE QUEST FOR PERFECTION*, 174–81 (1st ed. 2013) (discussing tangible and intangible barriers to women's progress in the workplace); see also Hanna Rosin, *The End of the End of Men*, N.Y. MAG. (Feb. 1, 2021), <https://www.thecut.com/2021/02/hanna-rosin-end-of-the-end-of-men.html> [<https://perma.cc/677C-USQ8>] (“American work culture has always conspired to keep professional women out and working-class women shackled.”).

⁶ See Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL'Y L. REV. 57, 60, 91–97 (2018); see also Thomas et al., *supra* note 4, at 24–25 (discussing harsher criticism often levied upon female workers, need for women to do more than men to prove competence, and importance of women mentoring other women at work).

status, and countless other factors,⁷ virtually all women have struggled for equal treatment in some form at work. Prior to the COVID pandemic, women finally seemed to be making progress in this area, closing the gap on various metrics with respect to their workplace representation.⁸ Yet as the pandemic unfolded, leading to the closing of schools, the shuttering of daycare facilities, and the unavailability of other childcare resources such as nannies or even family members⁹ (not to mention the elimination of cleaning services and other amenities that traditionally have helped working families to balance their professional and domestic obligations),¹⁰ women have found themselves largely on their own—providing the bulk of the childcare, educational support for their children, and management of various household demands—unsurprisingly at significant cost to their careers.¹¹ In the first year of the pandemic alone, more than 5 million American women lost their jobs,¹² with 2.3 million women leaving the workforce entirely (i.e., no longer even looking for work).¹³ Millions more continue to struggle with the impossible task of performing their (paid) full-time work while simultaneously providing close to full-time childcare and other services on the home front.¹⁴ According to one recent report, as many as two million additional women are considering taking a leave of absence from their jobs or leaving their jobs entirely.¹⁵

⁷ See Thomas et al., *supra* note 4, at 32 (“There is no one experience of women during Covid-19.”); see also Emilie Aries, *The Imperative of Intersectional Feminism*, FORBES (Aug. 30, 2017, 7:47 AM), <https://www.forbes.com/sites/emiliearies/2017/08/30/the-imperative-of-intersectional-feminism/?sh=32c2ce5e1914> [https://perma.cc/4KG2-ZV8J] (discussing Kimberlé Crenshaw’s work on intersectionality); *Stop Generalizing Women as You Try to Advance Women*, NILOFER MERCHANT (Apr. 6, 2019), <https://nilofermerchant.com/2019/04/06/stop-generalizing-women-as-you-try-to-advance-women/> [https://perma.cc/QQ33-H74F].

⁸ See *infra* notes 43–47 and accompanying text.

⁹ See Julia Fanzeres, *As Women Drop Out of Labor Market, Moms Call for More Aid*, BLOOMBERG (Feb. 23, 2021), <https://www.bloomberg.com/news/articles/2021-02-23/as-women-drop-out-of-labor-market-moms-call-for-more-aid> [https://perma.cc/94J2-8T9V] (discussing women who have dropped out of the workforce “because there’s no one to look after their kids”); see also Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *Cares Act Gimmicks: How Not to Give People Money During a Pandemic and What to Do Instead*, NAT’L LAW REV. (Apr. 11, 2020), <https://www.natlawreview.com/article/cares-act-gimmicks-how-not-to-give-people-money-during-pandemic-and-what-to-do> [https://perma.cc/TJL9-MY52] (noting that “[c]hildren’s daycares and schools are closed, and parents have been thrown into new roles as educators and full-time babysitters”); Kathryn A. Edwards, Grace Evans & Daniel Schwan, *Parenting Through the Pandemic: Who’s Working, Who’s Caring for the Kids, and What Policies Might Help*, RAND (Apr. 8, 2020), <https://www.rand.org/blog/2020/04/parenting-through-the-pandemic-whos-working-whos-caring.html> [https://perma.cc/TJL9-MY52].

¹⁰ See Thomas et al., *supra* note 4, at 6.

¹¹ See *infra* Part II.

¹² See *infra* note 57 and accompanying text.

¹³ See *infra* note 58 and accompanying text.

¹⁴ See *infra* Section II.B.

¹⁵ See *infra* note 91 and accompanying text.

Importantly, this need not have been the case: With a reasonable amount of planning and expense, federal, state, and local governmental resources could have been mobilized not only to help fill this childcare void, but also to provide more meaningful employment assistance to many other workers whose jobs have been furloughed or eliminated during the pandemic. Specifically, as described in greater detail below, the various “learning pods” that have been established by many private organizations during this time could have been set up with and/or supplemented by government funding to help them serve a broader population. Yet while the government has in the past provided childcare assistance to some working families, under some circumstances—and while in some limited cases it has continued to do so—the government thus far has declined to provide such aid on a broad scale amidst this pandemic, creating a crisis for countless working families and further relegating women to professional sidelines.

This Article describes the extent to which the childcare needs of working families have been ignored by the government during the COVID pandemic, to the immeasurable detriment of working women—many of whom consequently have found themselves pushed to the “sidelines” within their professions. The Article outlines one possible (and relatively simple) solution through which the government could have provided essential domestic support to working mothers while also directing tremendous financial and other benefits to a host of workers whose jobs have been impacted by COVID.

Part I of this Article discusses the long history in this country of failing to provide adequate childcare and other support for working women and points out the impact that this failure has had on women generally, and women of color more specifically. Part II describes the extent to which the current COVID pandemic has exacerbated these deficiencies, placing countless working women into the impossible predicament of needing simultaneously to perform two full-time jobs—their professional work and substantial domestic responsibilities. Part III of this article argues, based on historical precedent and current circumstances, that the government can and should step up and provide childcare support for working families who are impacted by the pandemic. This Part describes the woefully inadequate protections for working families that traditionally have existed within the United States and details the long battle in this country for government-supported childcare. It highlights the isolated successes that have emerged on this front, most notably during World War II and again presently within the American military. This Part also proposes a viable and fairly straightforward option for the government more broadly to support childcare for working families, while also providing aid to countless others whose livelihoods have been decimated by the pandemic. Finally, Part IV sets forth the consequences of the government’s failure to act amidst this current crisis. Drawing upon previous work that more generally explored the extent to which women may find themselves “sidelined” within the workplace, this Part sets forth the ways in which the government’s failure to support the childcare needs of working families has exacerbated this sidelining, with dire consequences for individual working women, for the organizations that employ(ed) them, and for society as a whole.

I. OLD NEWS: THE LACK OF ADEQUATE CHILDCARE AND SUPPORT FOR WORKING WOMEN

There is nothing new about the absence of adequate childcare and other domestic support for working families in the United States. Scholars have written about the “caregiver conundrum” that impedes workers from achieving a sustainable balance between work and family¹⁶ and about the astronomical cost of childcare in the United States,¹⁷ while agencies such as the Equal Employment Opportunity Commission (“EEOC”) have felt compelled to issue guidance for employers regarding how to treat workers with “caregiving responsibilities.”¹⁸

That women bear the brunt of this lack of support almost seems too obvious to mention: Even before the current pandemic, women held the “*de facto* status as the

¹⁶ Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for “Real” Workers*, 39 STETSON L. REV. 777, 777 (2010); see also Heather S. Dixon, *National Daycare: A Necessary Precursor to Gender Equality with Newfound Promise for Success*, 36 COLUM. HUM. RTS. L. REV. 561, 564–65, 574–76 (2005); Catherine Schur, *Conspicuous by Their Absence: How Childcare Can Help Women Make It to the Top*, 27 GEO. J. LEGAL ETHICS 859, 859 (2014) (“[W]omen already in the workplace often miss out on career opportunities because they either do not have childcare, or the childcare they do have is inadequate to meet the demands of their schedules.”).

¹⁷ See C. Nicole Mason, *Caregiving Should be Treated as a Public Good, Not a Private Obligation*, EVOKE (Jan. 21, 2020), <https://www.evoke.org/articles/2021/january/caregiving-should-be-public-good-not-private-obligation-dr-c-nicole-mason> [<https://perma.cc/A9Y3-GUBN>] (characterizing the United States as “singular among developed nations in terms of how [little] is invested in care and supports for families”); see also Lydia Kiesling, *Paid Child Care for Working Mothers? All It Took Was a World War*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/us/paid-childcare-working-mothers-wwii.html> [<https://perma.cc/99R4-X9L4>] (“Ours is an economy in which wages have stagnated and the cost of child care has soared . . .”); Fanzeres, *supra* note 9 (“The infrastructure of childcare is broken. Nobody can afford it and it’s not seen as something that we simply need in our society.” (quoting Rashama Saujani, founder/CEO of Girls Who Code)).

¹⁸ See U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities> [<https://perma.cc/R5UN-9ALV>] [hereinafter EEOC Caregiver Disparate Treatment]; see also U.S. Equal Emp. Opportunity Comm’n, *Employer Best Practices for Workers with Caregiving Responsibilities* (April 22, 2009), <https://www.eeoc.gov/laws/guidance/employer-best-practices-workers-caregiving-responsibilities> [<https://perma.cc/CXC8-VX2M>] [hereinafter EEOC Best Practices]; cf. NYC COMM’N HUMAN RIGHTS, *FAQ FOR CAREGIVER PROTECTIONS*, https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/Caregiver_FAQ.pdf [<https://perma.cc/4Z9X-B2BJ>] (last visited Oct. 4, 2021) (providing an example of state law guidelines in this area).

caregivers of their families,”¹⁹ spending on average 2.6 hours per day performing childcare duties compared to 2.0 hours by their male partners.²⁰ “Among married couples who work full time, women provide close to 70 percent of the childcare during standard working hours”²¹ Women (somewhat humorously) report their children “literally walk[ing] past their dads to go to their moms to ask for stuff,”²² leading countless women to perform the proverbial “double shift”—putting in a full day of paid work, followed by hours spent caring for children and doing household chores.²³ According to one particularly depressing report, 43% of high-achieving women felt that their husbands created more housework than they contributed.²⁴ In this respect, as argued by former Barnard College President and current Senior Associate Dean of Harvard Business School Online Deborah Spar, modern working women have received a raw deal; they “got the fact-paced job opportunities [they] craved . . . [but] did not lose any responsibilities in the process.”²⁵ So, Spar observes, “women are now routinely juggling hunting and foraging and tending the hearth, caring for children while providing for them.”²⁶

¹⁹ See Dixon, *supra* note 16, at 575; see also RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, *SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT* 204 (2020) (“Women are still more likely than men to be the ones juggling child care responsibilities while working part-time or from home, and they still are more likely than men to handle household chores and administrative tasks like filling out school forms, planning playdates, and navigating doctor’s appointments.”).

²⁰ See Schur, *supra* note 16, at 861 (citing a 2012 study by the Bureau of Labor Statistics). Of course, this statistic assumes the presence of a partner with whom one can share childcare responsibilities. For single parents—the vast majority of whom are female—virtually 100% of all caregiving responsibilities will fall upon their shoulders. See Thomas et al., *supra* note 4, at 18 (“[F]or the 1 in 5 mothers who don’t live with a spouse or partner, the challenges are even greater.”); see also Cohen & Hsu, *supra* note 4.

²¹ Cohen & Hsu, *supra* note 4; see also EEOC Caregiver Disparate Treatment, *supra* note 18, at 3 (noting that even though women’s wages account for over one third of family income where both parents work, women continue to serve as primary caregivers in most families). Interestingly, this phenomenon is not unique to the United States. In India, for example, women spend 30% more time on their families than men. See Anu Madgavkar, Olivia White, Mekala Krishnan, Deepa Mahajan & Xavier Azcue, *COVID-19 and Gender Equality: Countering the Regressive Effects*, MCKINSEY GLOB. INST. (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects> [https://perma.cc/4GN9-6ZK8].

²² Thomas et al., *supra* note 4, at 18.

²³ *Id.* at 6; see also SPAR, *supra* note 5, at 155 (citation omitted) (discussing the now-ubiquitous idea of a “second shift” for working women).

²⁴ See SPAR, *supra* note 5, at 156 (citation omitted).

²⁵ *Id.* at 153; see also Schur, *supra* note 16, at 862 (“[T]he current workplace was designed based on the expectation that the workingman had a wife at home who took responsibility for childcare and chores.”).

²⁶ SPAR, *supra* note 5, at 153; see also Porter, *supra* note 16, at 781 (“Most men could ignore the impact that workplace demands placed on their families because most men had wives who could pick up the slack.”); *Id.* at 782 (“As I have argued previously, [t]he normal

While such concerns impact women across all facets of the workforce, working mothers of color remain particularly vulnerable to discrimination against caregivers and to the lack of support provided for working parents.²⁷ The EEOC reports that “[Black] mothers with young children are more likely to be employed than other women raising young children.”²⁸ Black and Hispanic women also are more likely than others to be raising their children in a single-parent home, thus inevitably leaving them with the vast majority (if not all) of the domestic duties.²⁹ Finally, women of color may have more caregiving responsibilities than their peers, devoting more time to caring for grandchildren and/or elderly relatives.³⁰

This additional childcare burden involves more than just fodder for grumbling conversations among women and their peers. Rather, this additional burden manifests in concrete negative impacts on working women: For example, “women with children” traditionally have been “more likely than men to be worried about their performance reviews at work”³¹—and with good reason, given the persistent “false perception that mothers can’t truly be invested in both family and work and are therefore less committed than fathers and women without children.”³² As Professor Joan Williams, a renowned scholar in this area, has observed, “[t]he bias triggered by motherhood is a magnitude larger than that of the glass ceiling.”³³ Even the EEOC has recognized the presence of a “maternal wall” that can limit the employment opportunities for workers with caregiving responsibilities,³⁴ cautioning employers against acting on stereotypes regarding employees with caregiving duties.³⁵

full-time and overtime work schedule of many jobs makes it difficult for many workers to meet the caregiving needs of their loved ones.” (citation and internal quotation marks omitted)).

²⁷ See Leanne Fuith & Susan Trombley, *COVID-19 and the Caregiving Crisis*, 77-OCT BENCH & B. MINN. 27, 29 (Oct. 2020); see also EEOC Caregiver Disparate Treatment, *supra* note 18, at 4 (noting that “[w]hile caregiving responsibilities disproportionately affect working women generally, their effects may be even more pronounced among some women of color, particularly African American women”).

²⁸ See EEOC Caregiver Disparate Treatment, *supra* note 18, at 4.

²⁹ See *id.*

³⁰ See *id.*

³¹ Cohen & Hsu, *supra* note 4.

³² Thomas et al., *supra* note 4, at 20; See also *id.* at 13 (“[M]others are more likely than fathers to worry that their performance is being negatively judged due to their caregiving responsibilities.”).

³³ Schur, *supra* note 16, at 863 (internal quotation omitted). Even in the legal profession, where one might hope for more egalitarian views of gender roles, evidence indicates that law firms remain “less willing to invest in their female attorneys because of the perception that they will not put in the necessary hours.” *Id.* at 861.

³⁴ EEOC Caregiver Disparate Treatment, *supra* note 18, at 4 (citation and internal quotation marks omitted).

³⁵ See *id.*; see also Fuith & Trombley, *supra* note 27, at 28 (citation omitted) (observing that “caregiver discrimination” was on the rise even before the current pandemic and citing various states that provide protections against such workplace bias).

This disparity is not one that affects just a small segment of the population—a minor problem that can be swept under a rug and ignored. To the contrary, working mothers occupy an increasingly significant portion of American society, with literally millions of women feeling the impact of the government’s decision to provide support (or not) in this context. While over 72% of American women with children under the age of eighteen are in the paid labor force,³⁶ the increase of women in the workforce in recent years has been most pronounced among “mothers of young children, who are almost twice as likely to be employed today as were their counterparts 30 years ago.”³⁷ Sixty-five percent of women with children under the age of six presently work, as do 57% of women with infants.³⁸ In this respect, the American workforce—and American society—is comprised in large part of working mothers. While this group has been stretched thin for decades, always figuring out how to “make it work” when balancing the seemingly impossible-to-satisfy competing needs of home, spouse, child, and profession, the pandemic has pushed many in this group far past their breaking point. Through it all, however, the government has remained largely absent. As sociologist Jessica Calarco has observed: “Other countries have social safety nets. The U.S. has women.”³⁹

II. DISPARITY CONTINUED: HOW COVID HAS EXACERBATED THESE CHILDCARE DEFICIENCIES

While the COVID pandemic has highlighted a broad array of weaknesses throughout modern society, it has shed particular light on the lack of adequate childcare available to working parents—and has rendered particularly obvious the devastating impact that this deficiency has on working women.⁴⁰ Indeed, for working women, COVID has evolved not only into a public health crisis, but also

³⁶ See Dixon, *supra* note 16, at 569.

³⁷ See EEOC Caregiver Disparate Treatment, *supra* note 18, at 3.

³⁸ See Dixon, *supra* note 16, at 569.

³⁹ Sarah Stankorb, *When Something Breaks, Mom Picks Up the Pieces. What Happens When Moms Break?*, GLAMOUR (Feb. 24, 2021), <https://www.glamour.com/story/when-something-breaks-moms-pick-up-the-pieces-what-happens-when-moms-break> [<https://perma.cc/77G5-65YJ>].

⁴⁰ See Simon Workman & Steven Jessen-Howard, *The True Cost of Providing Safe Child Care During the Coronavirus Pandemic*, CTR. AM. PROGRESS (Sept. 3, 2020, 5:00 AM), <https://www.americanprogress.org/issues/early-childhood/reports/2020/09/03/489900/true-cost-providing-safe-child-care-coronavirus-pandemic/> [<https://perma.cc/4P7X-STT8>] (“[T]he pandemic has exacerbated the existing child care crisis and raised significant new challenges.”).

into an employment disaster,⁴¹ as women generally—and women of color specifically—have found themselves “in the bullseye of this pandemic.”⁴²

Ironically, in the weeks and months leading up to COVID landing on American shores, working women achieved a long-pursued milestone: In February 2020, just prior to the pandemic’s outbreak in the United States, women found themselves comprising “more than half of the nation’s civilian nonfarm labor force.”⁴³ Likewise, between 2015 and the start of 2020, the share of women in Senior Vice President roles grew from 23% to 28%,⁴⁴ with female representation in the C-suite growing from 17% to 21% during this period.⁴⁵ While not all women made the same amount of progress in these areas—women of color remained dramatically underrepresented across all of these metrics⁴⁶—researchers applauded the “slow but steady progress” that women had made within corporate America.⁴⁷ The pandemic, however, has been quick to erase these optimism-inducing gains.

As the pandemic unfolded in the spring of 2020, the childcare institutions and other safeguards on which working parents rely rapidly vanished—in some cases overnight. Not only were daycare centers closed down and individual childcare providers (nannies and other babysitters) bound by various “stay at home” orders,⁴⁸ but the public school system likewise shut its doors for any in-person learning.⁴⁹ As of April 2020, forty-six states had system-wide school closures that lasted multiple

⁴¹ Titan Alon, Matthais Doepke, Jane Olmstead-Rumsey & Michèle Tertilt, *The Impact of the Coronavirus on Gender Equality*, VOXEU (Apr. 19, 2020), <https://voxeu.org/article/impact-coronavirus-pandemic-gender-equality> [<https://perma.cc/6MTX-HHQ5>] (noting that while men have greater risk of suffering negative health consequences from COVID, women’s employment opportunities likely stand in greater jeopardy than those of their male peers).

⁴² Courtney Connley, *Coronavirus Job Losses Are Impacting Everyone, But Women Are Taking a Harder Hit than Men*, CNBC (Jan. 12, 2021, 10:22 AM), <https://www.cnbc.com/2020/05/14/coronavirus-job-losses-disproportionately-impact-women.html> [<https://perma.cc/BQ5J-W8GY>] [hereinafter Connley, *Coronavirus Job Loss*]; see also Clara Totenberg Green, *The Latest in School Segregation: Private Pandemic ‘Pods’*, N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/opinion/pandemic-pods-schools.html> [<https://perma.cc/BQ5J-W8GY>] (“Raising children without the in-person schooling so many families rely on can be a nightmare on the most personal level.”).

⁴³ Cohen & Hsu, *supra* note 4; see also Stankorb, *supra* note 39 (attributing this increase in women’s workforce participation to the fact that women were more likely to hold down part-time work and/or multiple jobs).

⁴⁴ See Thomas et al., *supra* note 4, at 8.

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ *Id.* at 8.

⁴⁸ See Fanzeres, *supra* note 9 and accompanying text; see also *COVID-19: Frequently Asked Questions About Childcare*, EDUCATED NANNIES (Mar. 22, 2020), <https://www.educatednannies.com/covid-19-frequently-asked-questions-about-childcare/> [<https://perma.cc/8UWK-X8SK>] (explaining the statewide order that nannies and other private childcare provider could report to work only if employed by an essential worker).

⁴⁹ See Edwards et al., *supra* note 9.

weeks or even months.⁵⁰ Four months later, just prior to the start of the new school year, less than half of the country's elementary and high school students would attend school in person full time,⁵¹ with 52% attending school virtually only and just 25% attending school every day.⁵² Moreover, while children's ability to learn remotely often requires some hands-on help from an adult,⁵³ 80% of parents lacked any assistance in educating their children from home,⁵⁴ with more than half of parents taking on this task while also holding down paid work.⁵⁵

While all parents have felt the impact of these closings, working women have borne the brunt of this new reality across every measure: Women have experienced the greatest degree of involuntary job loss as a result of the pandemic; they have had to take on the greatest burdens in balancing their work with their domestic obligations; and they have most frequently had to make the wrenching decision "voluntarily" to leave their jobs to care for their children.

A. Women as the Targets of Involuntary Job Loss Amidst the Pandemic

Even early on in the pandemic, women felt the brunt of the involuntary job loss attributable to COVID. "In April 2020 alone, women accounted for 55% of the 20.5 million jobs lost."⁵⁶ By January 2021, American women had lost more than 5 million jobs since the start of the pandemic,⁵⁷ with more than 2.3 million women leaving the

⁵⁰ *Id.*

⁵¹ See Steve Liesman, *Half of U.S. Elementary and High School Students Will Study Virtually Only This Fall, Study Shows*, CNBC (Aug. 11, 2020, 9:03 AM), <https://www.cnbc.com/2020/08/11/half-of-us-elementary-and-high-school-students-will-study-virtually-only-this-fall-study-shows.html> [<https://perma.cc/B6XY-QRKW>].

⁵² See *id.*

⁵³ See Claire Cain Miller, *'I'm Only One Human Being': Parents Brace for a Go-It-Alone School Year*, N.Y. TIMES (Sept. 8, 2020), <https://www.nytimes.com/2020/08/19/upshot/coronavirus-home-school-parents.html> [<https://perma.cc/V4JN-5VAG>].

⁵⁴ See *id.*

⁵⁵ See *id.*

⁵⁶ See Connley, *Coronavirus Job Loss*, *supra* note 42.

⁵⁷ See Maggie McGrath, *American Women Lost More than 5 Million Jobs in 2020*, FORBES (Jan. 12, 2021, 11:15 AM), <https://www.forbes.com/sites/maggiemcgrath/2021/01/12/american-women-lost-more-than-5-million-jobs-in-2020/?sh=246e2c242857> [<https://perma.cc/46QP-5V4A>]; see also Angela Garbes, *The Numbers Don't Tell the Whole Story: Unemployment Statistics Can't Capture the Full Extent of What Women Have Lost*, N.Y. MAG. (Feb. 1, 2021), <https://www.thecut.com/article/covid-19-pandemic-women-at-work.html> [<https://perma.cc/CP4J-JQL9>] ("According to the National Women's Law Center, women have lost 5.4 million jobs since the pandemic began."); cf. Eilene Zimmerman, *The Pandemic Has Been an Economic Disaster for Women. Some Took Advantage of It*, WASH. POST (Jan. 21, 2021, 6:00 AM), <https://www.washingtonpost.com/road-to-recovery/2021/01/21/female-entrepreneurs-coronavirus/> [<https://perma.cc/DR4Z-MXAL>] (citing an analysis of Bureau of Labor Statistics data from the National Women's Law Center indicating that women lost nearly 6 million jobs between February 2020 and January 2021).

workforce entirely (meaning that they no longer were even looking for work).⁵⁸ In December 2020 alone, the Bureau of Labor Statistics initially attributed *all* of the 140,000 jobs thought to have been lost that month to female workers, only later revising its figures to show that women accounted for 196,000 of the 227,000 jobs lost that month (or 86.3%).⁵⁹ Such stark statistics placed women's workforce participation rate at its lowest level since 1988—a thirty-three year low.⁶⁰ All of this led one prominent woman, Vice President Kamala Harris, to refer to women's exodus from the workforce as a “national emergency.”⁶¹

For many of these women, this departure from the workforce has been anything but voluntary. As the pandemic and its attendant shutdown of various aspects of the economy predictably led to massive layoffs throughout a variety of industries, women suffered job losses at higher rates than their male peers.⁶² For one thing, the sectors of the economy hit hardest by the pandemic—leisure, hospitality, education, health care, retail—tend to be disproportionately populated by women.⁶³ Moreover, even within particular industries, women suffered job losses at higher rates than their male peers in the same field. For example, while women account for 52% of the leisure and hospitality sector, as of May 2020, they comprised 54% of the jobs lost in that field.⁶⁴ While women account for 48% of the retail workforce, they comprised 61% of those job losses during this period.⁶⁵ Once more, the situation was

⁵⁸ See Courtney Connley, *Women's Labor Force Participation Rate Hit a 33-Year Low in January, According to New Analysis*, CNBC (Feb. 8, 2021, 2:22 PM), <https://www.cnbc.com/2021/02/08/womens-labor-force-participation-rate-hit-33-year-low-in-january-2021.html> [<https://perma.cc/QN22-62LC>] [hereinafter Connley, *Women's Labor Force Participation*]; see also McGrath, *supra* note 57 (“By Ewing-Nelson’s accounting, 2.1 million women left the labor market entirely since the beginning of the pandemic . . .”).

⁵⁹ Connley, *Women's Labor Force Participation*, *supra* note 58.

⁶⁰ *Id.*; see also Eliana Dockterman, *These Mothers Wanted to Care for Their Kids and Keep Their Jobs. Now They're Suing After Being Fired*, TIME (Mar. 3, 2021, 6:11 PM), <https://time.com/5942117/mothers-fired-lawsuit-covid-19/> [<https://perma.cc/LWA2-YRGT>].

⁶¹ Kamala Harris, *Kamala Harris: The Exodus of Women from the Workforce Is a National Emergency*, WASH. POST, (Feb. 12, 2021, 6:57 PM), https://www.washingtonpost.com/opinions/kamala-harris-women-workforce-pandemic/2021/02/12/b8cd1cb6-6d6f-11eb-9f80-3d7646ce1bc0_story.html [<https://perma.cc/KX4H-VJCR>] [hereinafter Harris, *Kamala Harris*]. This pattern of disproportionate job loss among female workers extends outside of the United States as well. According to one report, while women comprise 39% of global employment, they accounted for 54% of overall job loss as of July 2020. See Madgavkar et al., *supra* note 21, at 1.

⁶² See Connley, *Coronavirus Job Loss*, *supra* note 42.

⁶³ See *id.*; see also Fanzeres, *supra* note 9 (citing observations by economics professor, Betsey Stevenson) “Women were hit hard in this economic recession because it was the first led by the service sector If we think of things like education, and health services, 78% of those jobs are held by women.” *Id.*

⁶⁴ See Connley, *Coronavirus Job Loss*, *supra* note 42.

⁶⁵ See *id.* Women likewise accounted for 83% of the job losses in education and health services, despite comprising only 77% of the workforce in that sector. See *id.*

particularly dire for women of color, who experienced involuntarily job loss at an even higher rate than their white female peers.⁶⁶ As of January 2021, more than 1 in 12 Black women ages twenty and older remained unemployed, along with nearly 1 in 11 Latina women and more than 1 in 13 Asian women (as compared to nearly 1 in 16 of all women being unemployed during this period).⁶⁷

From one perspective, this higher rate of job loss among female workers not only is unsurprising, but also fits with logic: Women disproportionately tend to do the lowest-paid jobs in our economy—jobs that, by definition, hold the least value for employers and therefore remain the most expendable.⁶⁸ This is especially true for women of color, who find themselves over-represented in these low-wage roles, particularly within hard-hit economic sectors such as service and hospitality.⁶⁹ Even in higher paid or more “valued” lines of work, women (and again, particularly women of color)⁷⁰ typically earn lower wages than their male counterparts, even when working in comparable positions.⁷¹ Accordingly, employers generally will turn to women in these “expendable” roles first when deciding where to make involuntary cuts.⁷²

⁶⁶ See *id.* (citing observation that “women of color in particular are over-represented in low wage roles”); see also Garbes, *supra* note 57 (citing higher rates of unemployment for women of color); Claire Ewing-Nelson, *Another 275,000 Women Left the Labor Force in January*, NAT’L WOMEN’S L. CTR. (Feb. 2021), <https://nwlc.org/wp-content/uploads/2021/02/January-Jobs-Day-FS.pdf> [<https://perma.cc/VAJ7-YGYX>].

⁶⁷ See Ewing-Nelson, *supra* note 66 (citations omitted).

⁶⁸ See Connley, *Coronavirus Job Loss*, *supra* note 42.

⁶⁹ See *id.*; see also Garbes, *supra* note 57.

⁷⁰ See Connley, *Coronavirus Job Loss*, *supra* note 42.

⁷¹ See *Women Deserve Equal Pay*, NAT’L ORG. FOR WOMEN, <https://now.org/resource/women-deserve-equal-pay-factsheet/> [<https://perma.cc/JA46-XRTV>] (citing report indicating that in 2014, women’s paychecks included only 77 cents for every \$1.00 earned by men); see also *The State of the Gender Pay Gap in 2020*, Payscale, (stating that in 2020, women make 81 cents for every dollar made by a man); but see Karin Agniss Lips, *Don’t Buy into the Gender Pay Gap Myth*, FORBES (Apr. 12, 2016, 11:15 AM), <https://www.forbes.com/sites/karinagniss/2016/04/12/dont-buy-into-the-gender-pay-gap-myth/?sh=70622b8d2596> [<https://perma.cc/H8CS-6H9Y>] (disputing the existence of the gender pay gap). Interestingly, sociologist Jess Calarco links these disparities in earning to a broader devaluing of any labor viewed as “feminine labor,” citing research indicating that “as any profession becomes primarily women, the income relative to other similar professions goes down. That’s happened to a number of different types of jobs in our economy throughout history” Mary Harris, *The COVID Economy Is Probably Even Worse for Women than It Looks*, SLATE (Feb. 4, 2021, 1:41 PM), <https://slate.com/human-interest/2021/02/covid-economy-women-job-loss-unemployment-child-care.html> [<https://perma.cc/8JGD-7PNS>] [hereinafter Harris, *COVID Economy*].

⁷² See Connley, *Coronavirus Job Loss*, *supra* note 42.

B. Women “Leaning Out” and “Dropping Out” Amidst the Pandemic

Perhaps even more perplexing than those women whose jobs have been eliminated due to COVID are the number of women who have felt compelled to “lean out” at their jobs, or “voluntarily” leave the workforce altogether, due to the impossible demands placed upon them because they lacked adequate childcare amidst this crisis. As noted above, women always have shouldered an outsized burden when it comes to balancing the demands of work and family life,⁷³ but COVID has exacerbated that extra burden: According to a recent edition of an annual study on Women in the Workplace conducted by McKinsey & Company, mothers during COVID have been more than three times as likely as fathers to take responsibility for housework and caregiving, and they have been one-and-a-half times more likely than fathers to spend an extra three hours per day (or more) on housework and childcare—adding up to an extra twenty hours per week (i.e., half of an additional full-time job).⁷⁴ Citing survey results that might seem humorous in another context, one commentator reported that 54% of women claimed that they would be responsible for educating their children on weekdays—and while 29% of men claimed that they too would have this responsibility, only 2% of women agreed that their partners would share this task.⁷⁵ It is not that fathers are doing nothing, of course—sitting idly by and watching their partners take on all of the domestic responsibilities. To be sure, many fathers have stepped up to provide more assistance than in the past with childcare and other domestic issues.⁷⁶ But when conflict arises—when both parents are struggling with balancing work obligations against domestic demands—“we see mothers sacrificing their own careers, oftentimes because they make less than their husbands and feel like their job then matters less to the household budget as a whole.”⁷⁷

⁷³ See *supra* Part I.

⁷⁴ Thomas et al., *supra* note 4, at 18; see also Miller, *supra* note 53 (“It’s mothers who are doing most of the planning, and spending the most time caring for and educating the children.”); *Id.* (quoting one working mother’s observation that “[the moms are] the ones who are really bearing the brunt of this, and having to take on this third shift in order to get our children through this distance learning”).

⁷⁵ See Miller, *supra* note 53. Similarly, while 36% of men believed that they would be sharing this job equally with their female partners, only 18% of women agreed with that assertion. *Id.* As with other employment trends discussed herein, see, e.g., Madgavkar et al., *supra* note 21, this pattern of female workers picking up the slack at home also manifests outside of the United States. See, e.g., Pablo Uchoa, *Coronavirus: Will Women Have to Work Harder After the Pandemic?*, BBC (July 14, 2020), <https://www.bbc.com/news/business-53363253> [<https://perma.cc/XGX8-LY3K>] (internal quotation omitted) (quoting the advisor for the Brazilian association of women in the insurance market’s observation that most women she knows “are trying to work the two shifts at the same time”); see also *id.* (citing the female founder and chief executive of the United Kingdom’s largest online parenting network’s concerns about extra childcare and domestic burdens that the pandemic has placed on mothers).

⁷⁶ See Stankorb, *supra* note 39.

⁷⁷ *Id.*

This balancing act creates drastic repercussions for working women—particularly those who wish to hold on to their paid jobs but who reasonably fear the consequences that their divided attention may have on their productivity and performance. The McKinsey study quoted one working mother with two school-aged children (ages seven and eleven) who stated:

I'm doing it all, but at the same time I'm feeling like I'm not doing any of it very well. I also worry that my performance is being judged because I'm caring for my children. If I step away from my virtual desk and I miss a call, are they going to wonder where I am?⁷⁸

Another woman worried that she “need[s] to be available for meetings at core business hours, and it’s very hard to focus when my kids are in the room.”⁷⁹ Still another mother described being told by her employer to “take leave or resign” when she requested two hours per day of flex time to help her 11-year-old son with his schooling after his school shut down as a result of the pandemic.⁸⁰ Even within Congress, where members presumably hold more power and have access to more resources than the average working parent, the impact of the pandemic has wreaked havoc: For example, one working mother—Representative Grace Meng from New York—found herself in the unworkable situation of being restricted by childcare concerns from leaving her child to fly to Washington D.C. to vote, but also being prohibited from bringing her child with her onto the House floor.⁸¹

These women who remain in the workforce while juggling their childcare obligations are “certainly facing setbacks in their careers, in their ability to compete with co-workers who don’t have the same caregiving responsibilities and who may be able to take on that extra work assignment or work the full 40 or 50 or 60 hours a week to get things done and look like the ideal worker.”⁸² With the nation’s entire childcare infrastructure operating at a bare minimum, female workers—those who are picking up the slack in this respect—lack the flexibility to pick up extra shifts or alter their schedule on short notice, therefore lowering their value in the eyes of employers who may need such flexibility right now.⁸³ For women who already battle against the “maternal wall”—who, even under the best of circumstances, constantly struggle against the assumption that they possess less commitment to and flexibility associated with their jobs⁸⁴—this need to perform their work duties while balancing the additional demands of housework and childcare amidst a pandemic places them

⁷⁸ Thomas et al., *supra* note 4, at 17.

⁷⁹ *Id.* at 19.

⁸⁰ Jena McGregor, *As Workplaces Reopen, Coronavirus Could Unleash an ‘Avalanche’ of Lawsuits over Family Leave, Discrimination*, WASH. POST (May 5, 2020), <https://www.washingtonpost.com/business/2020/05/05/mother-discrimination-childcare-lawsuit/> [<https://perma.cc/UJ3M-KJ62>].

⁸¹ See Stankorb, *supra* note 39.

⁸² Harris, *COVID Economy*, *supra* note 71.

⁸³ See Connley, *Coronavirus Job Loss*, *supra* note 42.

⁸⁴ See *supra* note 34 and accompanying text.

in the middle of an unsustainable arrangement.⁸⁵ Moreover, in this context as well, women of color find themselves disproportionately impacted by the struggle to balance both work and family obligations, given that they are more likely than white women to be their family's sole breadwinner and are as much as two times as likely as white women to handle *all* of the childcare and housework duties in the home.⁸⁶

Unsurprisingly, for many working women, the challenge of balancing a full-time job with these increased domestic duties simply has proven too much to bear. Reports abound of “mothers who are effectively being pushed out of the workforce because they now have to combine or find some way to provide full-time care or instruction for their children while also keeping their jobs.”⁸⁷ As one single mother who left her job during the pandemic observed, “[n]ot only did I make the choice, but I *had* to make the choice.”⁸⁸ The wage gap that generally exists between men and women only exacerbates this phenomenon: Couples who decide that one partner needs to pull back from or entirely leave the workforce to assume greater domestic responsibilities often will decide that the female partner should do so since she generally makes less than her male spouse.⁸⁹ As one working mother—a senior manager with two young children—described her experience: “There were times when I said to my husband, ‘One of us is going to have to quit our job.’ And I remember thinking, ‘How come I’m the only one thinking about this, and my husband isn’t?’ I don’t think him leaving was ever in question.”⁹⁰ Thus, the

⁸⁵ See Connley, *Coronavirus Job Loss*, *supra* note 42 (observing that, for such female workers, “their flexibility is going down at the very moment when employers are trying to figure out who they need to let go”).

⁸⁶ See, e.g., Thomas et al., *supra* note 4, at 19 (noting that Latina and Black mothers are “more likely to be their family’s sole breadwinner or to have partners working outside the home”); see *id.* at 19 (observing that Latina mothers and Black mothers are 1.6 times and 2 times more likely, respectively, than white mothers to handle all childcare and housework in home). Notably, the employment-related burdens described in this Section fall in a particularly acute way on single parents in the United States—the vast majority of whom are single mothers. See Alon et al., *supra* note 41, at 3 (noting that 19 million children in the United States live with single parents, 70% of whom are single mothers); see also Thomas et al., *supra* note 4, at 18 (stating that 1 in 5 mothers do not live with a spouse or partner).

⁸⁷ Harris, *COVID Economy*, *supra* note 71.

⁸⁸ Stankorb, *supra* note 39.

⁸⁹ See Dockterman, *supra* note 60 (noting that, particularly in light of the pervasive wage gap between male and female workers, “[i]n heterosexual couples, it often makes financial sense for the woman to be the one to leave her job or risk losing it by taking on childcare duties”); see also Rosin, *supra* note 5.

⁹⁰ Thomas et al., *supra* note 4, at 21; see also SPAR, *supra* note 5, at 181 (“Individually, [when women leave the workplace,] each of these women’s moves may make great sense. Together, though, they have created a landscape where women are still scarce, and where the clashing visions between what is and what was expected to be makes them feel scarcer still.”); Harris, *COVID Economy*, *supra* note 71 (noting that, in the context of COVID, “[w]hen a mom leaves the workforce, that can seem like a very individual decision . . . but you see it from a different perspective, that the whole reason the mom is going to make that decision is because of the incentive structure all around her”).

McKinsey study, published in September 2020 (notably, before the impact of a new year of online schooling may have fully hit parents), asserted that as many as two million women still were considering taking a leave of absence from their jobs or leaving their jobs entirely.⁹¹ According to the study, this represented the first time in the annual report's history that women were leaving the workforce at a higher rate than men (with women and men having left the workforce at comparable rates for the previous six years of reporting),⁹² leading to what some economists have deemed the "first female recession."⁹³ Even the Chairman of the nation's Federal Reserve weighed in on this disparity in recent testimony before the Senate, acknowledging that the burden of trading one's job to care for one's children "has fallen more significantly on women than on men."⁹⁴

Importantly, much of the female job loss cited above may never even show up as part of the country's already-dramatically-high unemployment rate: To be counted as part of that statistic, an unemployed individual must be looking for alternate work.⁹⁵ For many of these women, seeking alternate work remains unrealistic as long as schools and other childcare options continue to be closed.⁹⁶ Indeed, of all of the parents who lost their jobs during the pandemic, "[m]ore than one-third . . . , mostly women, have yet to return to jobs they lost because there's no one to look after their kids."⁹⁷ Thus, women's reluctant departure from the workforce not only represents a disproportionate female burden; it represents a burden that remains largely invisible among the nation's statistical recounting of job loss. Yet despite its invisibility, this gendered alteration of the workplace is likely to have negative ramifications for years or decades to come—ramifications that the government could take steps to mitigate or avoid.

III. THE CASE—THEN AND NOW—FOR GOVERNMENT SUPPORT OF CHILDCARE FOR WORKING FAMILIES

Confronted with the unfathomable damage that COVID has inflicted on countless working women and their families, one would think that some arm of the government—federal, state, local—would jump to the aid of these beleaguered

⁹¹ Thomas et al., *supra* note 4, at 9; *see also id.* at 6 (noting that, as a result of COVID, "1 in 4 women are contemplating what many would have considered unthinkable less than a year ago: downshifting their careers or leaving the workforce"); Fanzeres, *supra* note 9 (confirming that, as of February 2021, "more than 2 million women have dropped out of the workforce").

⁹² *See* Thomas et al., *supra* note 4, at 9.

⁹³ Fanzeres, *supra* note 9; *see also* Rosin, *supra* note 5 (noting that in September 2020 alone—the month in which many children resumed virtual "school" from their homes, thereby adding "teaching assistant" to the job description of many mothers—"865,000 women dropped out of the labor force, compared with 216,000 men").

⁹⁴ Fanzeres, *supra* note 9.

⁹⁵ *See* Connley, *Women's Labor Force Participation*, *supra* note 58.

⁹⁶ *See* Fanzeres, *supra* note 9.

⁹⁷ *Id.*

parents. One would hope that faced with such potential devastation to the professions and livelihoods of so many, someone in charge would step up to provide concrete assistance. Disappointingly, however, that has not happened. Families essentially have been left to their own devices to muddle through the pandemic, stuck with just the piecemeal aid that traditionally has been a part of the existing legal regime, and buttressed only by half-hearted (and largely inadequate) measures intended to provide temporary emergency relief. As one activist in this area recently observed, “[i]nstead of a structural solution and policies, we’ve relied on the unpaid labor of women, who are at a breaking point.”⁹⁸ Yet despite the government’s inaction in this area, at least one potential solution exists that not only could provide needed help to working families, but also could assist countless other individuals who have found their income decimated by the pandemic.

*A. The Woefully Inadequate Existing Support for Working Parents
Under American Laws*

Volumes have been written about the extent to which the American legal regime falls short with respect to its ability to provide support for the caregiving responsibilities of working families.⁹⁹ The United States frequently has been criticized as the only industrialized country in the world that lacks a paid family leave policy.¹⁰⁰ Indeed, in spending less than 1% of its gross domestic product on childcare and early education, the United States finds itself ranked only above Turkey and Ireland in this respect.¹⁰¹ Moreover, those laws that do exist within the United States which potentially could protect working parents from unequal treatment based upon their caregiving responsibilities, such as the Family Medical Leave Act (“FMLA”)¹⁰² or Title VII of the Civil Rights Act of 1964 (“Title VII”),¹⁰³

⁹⁸ Claire Cain Miller, *Working Moms Are Struggling. Here’s What Would Help*, N.Y. TIMES (Feb. 4, 2021), <https://www.nytimes.com/2021/02/04/parenting/government-employer-support-moms.html> [<https://perma.cc/8LVJ-4SJ3>] [hereinafter Miller, *Working Moms*]; see also JEFFERSON & JOHNSON, *supra* note 19, at 204 (citations omitted) (observing that “[s]olutions to ‘help’ women balance the burdens of this ‘second shift,’ especially in the early years of infancy and preschool, are piecemeal at best and remain unavailable for many women, especially in the United States”); David Faris, Opinion, *America’s Parents Are Not Okay*, THE WEEK (Feb. 2, 2021), <https://theweek.com/articles/961199/americas-parents-are-not-okay> [<https://perma.cc/8PLQ-KPGM>] (noting that, even prior to the COVID pandemic, “most functional countries already had parental leave policies that would make Americans weep”).

⁹⁹ See, e.g., Porter, *supra* note 16; see also Dixon, *supra* note 16.

¹⁰⁰ See Connley, *Coronavirus Job Loss*, *supra* note 42; see also Dockterman, *supra* note 60; Miller, *Working Moms*, *supra* note 98 (“The United States is the only rich country without paid family leave, and one of few without subsidized child care.”).

¹⁰¹ See Mason, *supra* note 17.

¹⁰² 29 U.S.C. §§ 2601–54.

¹⁰³ 42 U.S.C. §§ 2000e–2000e-16.

generally have fallen short when applied to this group, providing protection only in very limited circumstances.¹⁰⁴

Like so many other flaws within the American social fabric, this inability of the law to adequately protect caregivers has been highlighted and exacerbated by the COVID crisis. Not only do existing laws like the FMLA continue to provide little help for families in the current environment,¹⁰⁵ but even measures passed for the very purpose of providing relief for families amidst the pandemic have done little to ameliorate working parents' caregiving responsibilities. For example, the Families First Coronavirus Response Act ("FFCRA"),¹⁰⁶ passed on March 18, 2020, purported to bring relief to American workers by providing paid leave and expanded unemployment benefits and food assistance for certain families impacted by the pandemic.¹⁰⁷ However, the FFCRA only applied to employers with fewer than 500 employees¹⁰⁸ and only provided full-time employees with up to eighty hours of paid leave (plus in some cases an additional ten weeks of partially paid leave if a worker was caring for a child whose school or other place of care was closed due to the pandemic).¹⁰⁹ Many schools and daycare facilities, however, remained closed in response to the pandemic for a year or more, long past the time when any relief provided by the FFCRA had run out for many families. Congress also passed the

¹⁰⁴ See Porter, *supra* note 16, at 792 (asserting that the FMLA benefits only a limited group of workers); see also *id.* at 791 ("The only cases that are likely to be successful under Title VII are those in which the mother performs as an ideal worker but is nevertheless discriminated against because of stereotypical beliefs regarding women's traditional roles."); cf. Catherine L. Fisk, *Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 BERKELEY WOMEN'S L.J. 89, 99–103 (1986) (arguing for applicability of the Title VII disparate impact claim to challenge neutral employment practices that have an adverse impact on women due to their role as primary caretakers of children); EEOC Best Practices, *supra* note 18 (providing "best practices" guidance for employers with respect to employees having caregiving responsibilities).

¹⁰⁵ See 29 U.S.C. §§ 2611(11), 2612(a) (providing for unpaid leave in cases of an employee or family member's "serious health condition" but not for caregiving due to school closure or lack of childcare, and providing up to 12 weeks of unpaid leave per year); see also Fuith & Trombly, *supra* note 27, at 28 (indicating the same).

¹⁰⁶ Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020).

¹⁰⁷ See *id.*; see also Fuith & Trombly, *supra* note 27, at 28.

¹⁰⁸ See Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 110, 5110, 134 Stat. 178, 189, 199; see also Fuith & Trombly, *supra* note 27, at 28.

¹⁰⁹ Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020); see also Fuith & Trombly, *supra* note 27, at 28; Faris, *supra* note 98 (criticizing the "meager provisions of [the FFCRA] which did not apply to as many as 106 million private sector workers in the country"); Nina Maja Bergmar, *How to Avoid Getting Sued in a COVID-19 World – Top Claims Facing Employers as Employees Return to Work*, 22 TORTSOURCE 4, 2 (2020) (discussing parameters of FFCRA); Dockterman, *supra* note 60 (discussing limits of FFCRA).

Coronavirus Aid, Relief, and Economic Security (“CARES”) Act in March 2020,¹¹⁰ providing states with \$3.5 billion, through a block grant, to support access to childcare,¹¹¹ but that law too has been criticized as “woefully insufficient” to meet families’ ever-growing need for support in this area.¹¹²

B. The Long Battle for Government-Supported Childcare in the United States

Faced with this long history of the government’s failure to adequately support childcare for working families, countless scholars, academics, and policymakers have argued for the government to play a more active role in this area—financially and otherwise. In their book, *Shortlisted: Women in the Shadows of the Supreme Court*, Professors Renee Knake Jefferson and Hannah Brenner Johnson make a compelling case for the need for government-funded, high-quality early childcare.¹¹³ They note that “[n]o one in our society would expect an individual to pave their own road in order to drive from home to school or work. Instead, taxpayer dollars fund resources that we all benefit from, like roads, police, and K-12 education.”¹¹⁴ Accordingly, they ask, “[w]hy is early child care any different? Everyone benefits

¹¹⁰ Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. 136, 34 Stat 281.

¹¹¹ *See id.* at 34 Stat. 557.

¹¹² *See* Workman & Jessen-Howard, *supra* note 40; *see also* Foohey et al., *supra* note 9 (referring to various aspects of CARES Act funding as “gimmicks”). In July 2020, the House of Representatives passed, on a bipartisan vote, the Child Care is Essential Act, providing (among other things) additional support for childcare amidst the pandemic. *See* Child Care Is Essential Act of 2020, H.R. 7027, 116th Cong. (2d Sess. 2020) (unenacted). The Senate, however, did not approve that legislation. *See H.R. 7027 (116th): Child Care Is Essential Act*, Govtrack (2020), <https://www.govtrack.us/congress/bills/116/hr7027> [<https://perma.cc/NB64-J4B8>]; *see also* Workman & Jessen-Howard, *supra* note 40. On March 6, 2020, however, the Senate approved a \$1.9 trillion COVID relief package which included, among other things, a one-year child tax credit of between \$1000 and \$3000 per child (with additional funds available for children under the age of 6). *See* Alana Abramson, *President Biden Just Signed a \$1.9 Trillion COVID-19 Relief Bill into Law. Here’s What’s in It*, TIME (March 11, 2021), <https://time.com/5944774/whats-in-covid-19-relief-bill-senate/> [<https://perma.cc/6BQ4-H234>]; *see also* Jason DeParle, *In the Stimulus Bill, a Policy Revolution in Aid for Children*, N.Y. TIMES (Jul. 12, 2021), <https://www.nytimes.com/2021/03/07/us/politics/child-tax-credit-stimulus.html> [<https://perma.cc/TM76-DE62>]. While President Biden’s “American Rescue Plan,” signed into law in March 2021, provided \$39 billion in funding to childcare providers, many critics have argued that it still fails to “address the underlying inequities that made us so vulnerable to the pandemic in the first place.” Michelle Fox, *Billions of Covid Relief Dollars Are Going to Child Care. Here’s Why Advocates Say More Needs to Be Done to Fix the Crisis*, CNBC (Mar. 18, 2021), <https://www.cnbc.com/2021/03/18/despite-billions-in-relief-advocates-say-more-needs-to-be-done-to-fix-the-child-care-crisis.html> [<https://perma.cc/5HLL-U4TJ>].

¹¹³ JEFFERSON & JOHNSON, *supra* note 19, at 204.

¹¹⁴ *Id.*

when infants and toddlers have quality care.”¹¹⁵ Dean Deborah Spar echoes this view, arguing that:

[e]ven if women (like me) don’t believe that government can ever fully solve the problems that women face every day in their kitchens and laundry rooms, we need at least to demand that government be part of the solution, that our leaders and legislators consider the small things they can do to alleviate the complicated burden of America’s working families.¹¹⁶

Almost six decades ago, Eleanor Roosevelt extolled the virtues of the government-funded childcare (discussed in greater detail below) that had been provided to mothers during World War II.¹¹⁷ More recently, Vice President Kamala Harris proclaimed that “[w]ithout affordable and accessible child care, working mothers are forced to make an unfair choice,”¹¹⁸ predicting that “[o]ur economy cannot fully recover [from the pandemic] unless women can fully participate.”¹¹⁹

While many have clamored for the government to provide this support—to provide funding and/or other aid for childcare for working families—and while the benefits associated with such support seem obvious, the United States’ record has remained meager at best in this area. However, a few isolated examples exist which demonstrate the government’s potential to step up and provide this assistance.

*1. The (Relatively Unknown) Historical Support for Government-Supported Childcare*¹²⁰

Perhaps the strongest argument in favor of the government stepping in to provide childcare support for working families during these challenging times is the fact that the government has done this before, providing government-supported childcare on a broad scale during World War II.¹²¹ Unlike the COVID pandemic,

¹¹⁵ *Id.*

¹¹⁶ SPAR, *supra* note 5, at 171; *see also* Mason, *supra* note 17 (“We should invest in a national care system where no family spends more than seven percent of their income on care, and high-quality care is widely accessible.”).

¹¹⁷ *See infra* note 157 and accompanying text.

¹¹⁸ Harris, Kamala Harris, *supra* note 61.

¹¹⁹ *Id.*

¹²⁰ For more thorough background information of the history of the debate regarding government funded, universal childcare, *see generally* Deborah Dinner, *The Universal Childcare Debate: Rights Mobilization, Social Policy, and the Dynamics of Feminist Activism 1966–1974*, 28 LAW & HIST. REV. 577 (2010); Meredith Johnson Harbach, *Childcare Market Failure*, 2015 UTAH L. REV. 659 (2015); Dixon, *supra* note 16.

¹²¹ Even prior to World War II, there is some modest evidence of government support for childcare. During the Great Depression, the Works Project Administration (WPA) operated 1,900 preschools through an Emergency Nursery School program. *See* EMILIE STOLTZFUS, CONG. RSCH. SERV., RS20615, CHILD CARE: THE FEDERAL ROLE DURING

which has driven women *out* of the workforce in droves due to childcare obligations at home,¹²² World War II presented a different domestic conundrum for American women, driving them *into* the workforce—many for the first time—as American men went overseas to fight the war.¹²³ Women’s participation in the labor force expanded dramatically during World War II, with the most notable expansion among married women: While approximately 13 million women were part of the American workforce in 1940, that number increased to 19 million in July 1944.¹²⁴ “Married women’s labor force participation grew from 15% in 1940 to 23% in 1944.”¹²⁵ Indeed, “[d]uring the war, for the first time, married women workers outnumbered single women workers.”¹²⁶ (Of course, the bulk of this increase in female workforce participation involved white women; women of color had been working outside of the home long before World War II.)¹²⁷

Faced with the need to bring women into the workforce at a time when many likely had young children (i.e., those not old enough for school) at home, the U.S. government passed a federal law known as the Lanham Act.¹²⁸ The Lanham Act created a series of childcare centers throughout the United States so that women could go to work in factories and other locations while men were away fighting

WORLD WAR II 2 (2000). Notably, however, the goal of this program was not to ensure that working parents had a means of balancing paid and domestic obligations, but rather was to provide jobs for unemployed teachers. *See id*; *see also* Kiesling, *supra* note 17 (“During the Depression, the Works Progress Administration ran a collaborative federal and state program of nursery schools, aimed at creating jobs.”); Sonya Michel, *A Tale of Two States: Race, Gender, and Public/Private Welfare Provision in Postwar America*, 9 YALE J. L. & FEMINISM 123, 126 (1997) (describing the role of childcare during the Depression and WWII).

¹²² *See supra* Section II.B.

¹²³ *See* Schur, *supra* note 16, at 864 (“Congress first provided for comprehensive childcare during World War II for the purpose of encouraging women to join the workforce.”); *see also* STOLTZFUS, *supra* note 121, at 1–2.

¹²⁴ *See* STOLTZFUS, *supra* note 121, at 2.

¹²⁵ *Id.*

¹²⁶ *Id.* While data does not indicate what percentage of these married women also had children, one can presume that a significant number were mothers as well. *See U.S. Households, Families, and Married Couples, 1890–2007*, INFOPLEASE, <https://www.infoplease.com/us/family-statistics/us-households1-families-and-married-couples-1890-2007> [<https://perma.cc/DEX7-ENYS>] (last visited Sept. 28, 2021) (noting average size of 3.67 persons per household in 1940).

¹²⁷ *See* Kiesling, *supra* note 17 (stating that approximately 38% of nonwhite women already worked outside of the home in 1940, compared to just 25% of white women).

¹²⁸ Lanham Act, 15 U.S.C. §§ 1051–72, 1091–96, 1111–27. Passed by Congress in 1940, the Lanham Act was a federal law that provided a number of social services during the war, and among other things childcare services in communities contributing to defense production. *See* Kiesling, *supra* note 17; Rhaina Cohen, *Who Took Care of Rosie the Riveter’s Kids?*, ATLANTIC (Nov. 18, 2015), <https://www.theatlantic.com/business/archive/2015/11/daycare-world-war-rosie-riveter/415650/> [<https://perma.cc/85X8-ZZ3D>].

overseas.¹²⁹ Funded by both the federal and local governments, with parents contributing fees as well,¹³⁰ these childcare centers were “intended to boost war production by freeing mothers to work.”¹³¹ As one commentator put it, “[t]hese programs reorganized one kind of domestic labor—child-rearing—to enable another kind: paid labor in the domestic economy that helped fortify America against its foreign enemies.”¹³²

The childcare program established by the government during this period ultimately was expansive in its scope. At its peak, the program included 3,000 daycare centers operating in every state except New Mexico.¹³³ In 1944, the program reached a peak enrollment of nearly 130,000 children,¹³⁴ and data indicates that by the end of the war, somewhere between 550,000 and 600,000 children received some care from Lanham Act programs.¹³⁵ Between 1943 and 1946, the federal government granted \$52 million toward the program, with communities—mostly through user fees—contributing an additional \$26 million.¹³⁶ Open seven days a week, twelve months a year, these childcare facilities included an infirmary for sick children, lunch along with a morning and afternoon snack, and “even a cafeteria where women could pick up hot meals to take home after work.”¹³⁷ Childcare center staff went so far as to purchase items on a mother’s grocery list so that she could pick up those items with her child at the end of each workday.¹³⁸ Yet importantly, this care remained quite affordable to working mothers of the time, costing between \$3 and \$4 per week (\$50 to \$60 per week in today’s money).¹³⁹ While this fee only covered

¹²⁹ See Harris, *COVID Economy*, *supra* note 71; see also Michel, *supra* note 121, at 126 (“[D]uring World War II, after much debate, [the federal government] finally established childcare centers under the provisions of the Lanham Act.”); Mason, *supra* note 17; STOLTZFUS, *supra* note 121, at 2–3; Daphna Thier, *The U.S. Government Can Provide Universal Childcare – It’s Done So in the Past*, JACOBIN (Dec. 27, 2020), <https://www.jacobinmag.com/2020/12/universal-childcare-lanham-act-us-government> [https://perma.cc/XJ8S-M5MH].

¹³⁰ See Kiesling, *supra* note 17; see also Cohen, *supra* note 128.

¹³¹ STOLTZFUS, *supra* note 121, at 1; see also *id.* at 2 (citing “demands for new workers, especially when issued by aircraft, ship, and bomber manufacturers” as motivating Congress to facilitate the ability of mothers to enter the workforce).

¹³² Cohen, *supra* note 128.

¹³³ See *id.*

¹³⁴ See STOLTZFUS, *supra* note 121, at 1, 4.

¹³⁵ See Cohen, *supra* note 128.

¹³⁶ See STOLTZFUS, *supra* note 121, at 1; see also Cohen, *supra* note 128 (claiming that between 1943 and 1946, spending on this program exceeded \$1 billion in 2015 dollars); Thier, *supra* note 129 (stating the same).

¹³⁷ See Kiesling, *supra* note 17; see also Cohen, *supra* note 128; Thier, *supra* note 129.

¹³⁸ See Thier, *supra* note 129.

¹³⁹ See *id.* (noting that the program cost families \$3 to \$4 per week); see also Cohen, *supra* note 128 (stating that for a child between 2 and 5 years of age, mothers would pay fifty cents per day).

half of the *actual* price of caring for each child, the government covered the rest of the expense through the millions of dollars that it invested.¹⁴⁰

Interestingly, many of the fears that motivated governmental support for childcare during World War II seem to be reflected in headlines surrounding the current pandemic. World War II employers worried about absenteeism among their female workers, as women then—like now—missed work due to childcare obligations.¹⁴¹ Moreover, just as today’s working mothers find themselves struggling to keep up with workplace demands in the face of the “distractions” of childcare and virtual school,¹⁴² World War II era legislators feared that those women who did make it to work would find themselves too preoccupied with concerns regarding their children’s welfare to be productive workers.¹⁴³ As one legislator testifying before the Senate at the time observed, “[y]ou cannot have a contented mother working in a war factory if she is worrying about her children”¹⁴⁴ Finally, World War II era legislators appeared to be motivated by *children’s* well-being in this context: Headlines of today decry a “mother arrested after leaving kids alone while at work,”¹⁴⁵ or lament about another working mother who left her 14-year-old daughter in charge of her infant son, asking the girl to care for the baby in between taking online middle school classes.¹⁴⁶ In a similar vein, World War II legislators worried about “children running wild in the streets,”¹⁴⁷ about “children left in parked cars outside workplaces or fending for themselves at home,”¹⁴⁸ and about “children bringing their younger siblings to school because there was no one at home to care for them.”¹⁴⁹

In this respect, the childcare centers established by the Lanham Act represented a significant—and groundbreaking—shift in the government’s perspective regarding the underlying purposes of government-supported childcare. While in the past, the government “supported childcare primarily to either promote poor children’s early education or to push poor women into the labor force,”¹⁵⁰ these Lanham Act childcare centers were motivated by broader concerns. They

¹⁴⁰ See Thier, *supra* note 129.

¹⁴¹ See Cohen, *supra* note 128; see also STOLTZFUS, *supra* note 121, at 2 (“[E]mployers also cited absenteeism among women workers as proof of the need for child care and other household services.”); cf. *supra* Part II.

¹⁴² Thomas et al., *supra* note 4, at 17; see also *supra* notes 78–81 and accompanying text.

¹⁴³ See Cohen *supra* note 128.

¹⁴⁴ See *id.*

¹⁴⁵ Aris Folley, *GoFundMe Set Up for Mother Arrested After Leaving Kids Alone While at Work*, THE HILL (Feb. 16, 2021), <https://thehill.com/blogs/blog-briefing-room/news/539108-gofundme-mother-arrested-leaving-kids-alone-while-at-work> [<https://perma.cc/YHN8-73RX>].

¹⁴⁶ See Dockterman, *supra* note 60.

¹⁴⁷ Cohen, *supra* note 128.

¹⁴⁸ STOLTZFUS, *supra* note 121, at 2.

¹⁴⁹ See Kiesling, *supra* note 17.

¹⁵⁰ Cohen, *supra* note 128.

represented “the first and, to date, only time in American history when parents could send their children to federally-subsidized childcare, regardless of income.”¹⁵¹ Yet, “it took a bloody global war, and its production demands on the country’s workforce, for the United States to make such meaningful provisions for working parents.”¹⁵²

Unsurprisingly, because this “restructuring of the social safety net”¹⁵³ was prompted by the war and by the corresponding need to draw women into the workplace, support for these childcare centers quickly dissipated once the war ended and men returned home to their jobs.¹⁵⁴ Unlike the United States, Europe needed all of its citizens to stay in the workforce after the war to rebuild an economy and a society that had been destroyed, and European governments therefore created a host of safety net programs, making it possible for women to continue to work—such as paid maternity leave and paid or affordable child care.¹⁵⁵ The United States, however, “opted not to pursue those kinds of policies, and we actively avoided those policies in order to push women *out* of the workforce”¹⁵⁶ Thus, while many people clamored for a continuation of the Lanham Act’s childcare program after the war—including Eleanor Roosevelt, in a nationally-syndicated newspaper column that she penned to recount her public actions¹⁵⁷—virtually every jurisdiction in the

¹⁵¹ *Id.*

¹⁵² Kiesling, *supra* note 17. Despite the many benefits associated with this program, one should not ignore the racial and class divides that went along with this assistance. As one reporter recently observed, “[t]he Times coverage of this period speaks often of working women and mothers, and it is clear that the paper mostly meant white women and mothers. But black and brown women already worked outside of the home Black women’s higher participation in the workforce meant that quality child care was even more crucial, though they ironically had less access to it.” *Id.* Moreover, while the Lanham Act purported to allocate funds without considering race, creed, or color, this egalitarian principle did not always play out in reality. For example, these childcare facilities were “functionally segregated, the services were made inhospitable to black families.” *Id.*; see also Thier, *supra* note 129, at 2 (observing that while some childcare centers in this era were desegregated, other “inexcusably provided for white families only”).

¹⁵³ Harris, *COVID Economy*, *supra* note 71.

¹⁵⁴ See Cohen, *supra* note 128 (“At the end of the war, the Lanham nursery schools closed, helping cast women out of the workforce to open up jobs for returning soldiers.”).

¹⁵⁵ See Harris, *COVID Economy*, *supra* note 71; see also Stankorb, *supra* note 39 (explaining that “in order to populate the workforce as much as possible, countries in Europe created all sorts of policies that facilitated women’s work”) (internal quotation marks omitted).

¹⁵⁶ Stankorb, *supra* note 39 (emphasis added); see also Harris, *COVID Economy*, *supra* note 71; Schur, *supra* note 16, at 864 (“When the war ended, notions that children should be raised in the home and conservative opposition to women in the workforce replaced the imperatives of wartime and the funding [for childcare] was eliminated.”).

¹⁵⁷ Eleanor Roosevelt, *My Day*, UNITED FEATURES SYNDICATE, INC. (Sept. 8, 1945), https://www2.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1945&_f=md000125 [<https://perma.cc/VJH5-CD94>] (“Many thought [the childcare centers] were purely a war emergency measure. A few of us had an inkling that perhaps they were a need which was constantly with us, but one that we had neglected to face in the past.”).

country stopped operating these childcare centers once the federal subsidy for them ended in February 1946.¹⁵⁸

Periodic calls for government support for childcare continued to emerge after World War II, but none achieved significant success. Perhaps most headline-grabbing was the effort, in late 1970 and early 1971, to pass the Comprehensive Child Development Act (“CCDA”),¹⁵⁹ which would have provided twenty-four hour childcare to working families, with a focus on providing services to economically disadvantaged individuals.¹⁶⁰ President Nixon, however, vetoed the CCDA, criticizing the Act for its alleged “fiscal irresponsibility, administrative unworkability, and family-weakening implications of the systems it envisions.”¹⁶¹ While various other efforts to pass legislation providing long-term government support for childcare have emerged in the decades since the vetoing of the CCDA, none have gained serious support or attention either inside or outside the halls of Congress.¹⁶²

2. *Making Childcare Work in the Military*

As it turns out, safe, reliable, government-supported childcare is not simply a relic of the World War II era. To the contrary, the United States military currently provides high-quality, affordable, and universally accessible childcare for all of its employees.¹⁶³ Under this system, all military families have access to a wide range of

¹⁵⁸ See STOLTZFUS, *supra* note 121, at 5. California, New York City, and Philadelphia continued to use public funds to operate their childcare centers, even after the federal program wound down. See *id.* at 5 (“A 1960 CB survey found just 376 child care centers operating nationwide with at least partial public financing. Most of these (324) were located in California, New York and Philadelphia, where public funding has continued since the war.”).

¹⁵⁹ See Schur, *supra* note 16, at 865; see also Dixon, *supra* note 16, at 562.

¹⁶⁰ See Schur, *supra* note 16, at 865.

¹⁶¹ See *id.* at 866 (footnote and internal quotations omitted); see also Mason, *supra* note 17.

¹⁶² See Dixon, *supra* note 16, at 562–63 (“Not since 1990 has the provision of child care as a national goal been seriously considered in the United States—and never has it been considered outside the context of welfare.”) (footnotes omitted). Even the limited federal childcare support provided during the COVID pandemic is only temporary. See *supra* note 112 and accompanying text.

¹⁶³ See Bryce Covert, *The U.S. Already Has a High-Quality, Universal Childcare Program – In the Military*, THINKPROGRESS (June 16, 2017), <https://archive.thinkprogress.org/universal-military-childcare-9bb2b54bd154/> [<https://perma.cc/3V3N-BLVH>]; see also Harbach, *supra* note 120, at 707 (describing the Department of Defense as having “a system in place to ensure universal access to quality childcare for service members”) (citation omitted); LINDA K. SMITH & MOUSUMI SARKAR, MAKING QUALITY CHILD CARE POSSIBLE: LESSONS LEARNED FROM NACCRRRA’S MILITARY PARTNERSHIPS, NAT’L ASS’N OF CHILD CARE RESOURCE & REFERRAL AGENCIES, (Sept. 2008), <https://hubert.hhh.umn.edu/ECEpdf>

sponsored childcare providers, including “center-based care, family childcare, school-age care, and part-day preschool.”¹⁶⁴ The childcare centers appear to be set up with military working parents’ needs in mind, providing breakfast, lunch, and snacks to the children and offering flexible hours to accommodate parents’ busy schedules.¹⁶⁵ Some centers open as early as 6:00 AM and stay open through the early evening (with some centers even offering around-the-clock care).¹⁶⁶

Participants in the military’s childcare system rave about the quality, and the military applies robust checks to the system to ensure that it maintains these high standards.¹⁶⁷ All Department of Defense (“DoD”) childcare centers are accredited through the National Association for the Education of Young Children (“NAEYC”) and are subjected to four unannounced inspections per year.¹⁶⁸ As one professor who has studied these centers has observed, “[t]here’s not a single military childcare dollar that goes to an unlicensed, uninspected childcare facility.”¹⁶⁹ Staff at these centers must have a high school diploma or GED and must pass a background check.¹⁷⁰ This stands in stark contrast to childcare centers in the civilian world, where only 11% of childcare facilities are accredited by the NAEYC and where just sixteen states require that lead childcare providers have credentials comparable to those of military childcare providers.¹⁷¹

/MakingQualityCare2008.pdf [https://perma.cc/B3AR-AQ3J]; Amy Bushatz, *Military Child Care*, MILITARY (2021), <https://www.military.com/spouse/military-life/military-resources/military-child-care.html> [https://perma.cc/L4QN-9KCD].

¹⁶⁴ See Harbach, *supra* note 120, at 707.

¹⁶⁵ See Bushatz, *supra* note 163; see also Covert, *supra* note 163; *Military Child Care Programs*, MILITARY ONESOURCE (May 10, 2021, 5:36 PM), <https://www.militaryonesource.mil/family-relationships/parenting-and-children/childcare/military-child-care-programs/> [https://perma.cc/EQ9J-AB27] [hereinafter MILITARY ONESOURCE].

¹⁶⁶ See MILITARY ONESOURCE, *supra* note 165.

¹⁶⁷ See Covert, *supra* note 163; see also SMITH & SARKAR, *supra* note 163, at iii (“The Military Child Development Program has been recognized by Congress and the Executive Branch . . . as a model for the nation to follow in terms of improving the quality of care for civilian families.”).

¹⁶⁸ See Covert, *supra* note 163; see also Bushatz, *supra* note 163 (noting that the over 800 Department of Defense Child Development Centers on military installations worldwide “offer a safe child care environment and meet professional standards for early childhood education”); Harbach, *supra* note 120, at 707 (explaining that, “[i]n terms of quality oversight, installation programs must be inspected regularly, and all care provided by the military or receiving military funding must meet minimum quality and safety standards”) (citation omitted); SMITH & SARKAR, *supra* note 163, at 19 (articulating the rigorous quality standards for military-run childcare facilities).

¹⁶⁹ See Covert, *supra* note 163, at 8 (internal quotations omitted).

¹⁷⁰ See *id.*; see also SMITH & SARKAR, *supra* note 163, at 19.

¹⁷¹ See Covert, *supra* note 163; see also Thier, *supra* note 129, at 3 (stating that, in the civilian world, “quality of childcare has been so low that children are often in dangerous conditions, sometimes with fatal consequences”); cf. SMITH & SARKAR, *supra* note 163, at 6 (observing that, outside of the military, “[t]here are few, if any, prescreening requirements

Perhaps the starkest difference between private sector childcare and that offered through the military is the price: When an enlisted parent enrolls his or her child in one of the military's child development centers, they will only ever be charged a percentage of their income—usually roughly 10%—with prices set regardless of their child's age.¹⁷² In the civilian world, in contrast, full-time childcare can consume up to 20% or more of a family's income, with younger children being most expensive to place.¹⁷³ The practical difference for families is astronomical: One military parent who had experience in both private sector and military childcare observed that “[for] what we were paying for [our child] weekly, I was able to put my one child in military childcare for months.”¹⁷⁴ Another claimed that the cost of civilian care, when they had used it, had cost at least double that of military care.¹⁷⁵

Importantly, the military keeps the cost of its care so low because of the very thing argued for in this Article: robust government support. The U.S. military spends more than a billion dollars per year to subsidize this childcare.¹⁷⁶ In other words, rather than asking military families to shoulder the cost of the entire “sticker price” of the care, as happens in the civilian world, the military only asks families to pay what is affordable, using government funding to bridge the gap between what parents can pay and what the care actually costs.¹⁷⁷ In 2013, for example, government funding covered approximately two-thirds of the cost of this childcare.¹⁷⁸ Thus, as with so many desired societal changes, much comes down to funding. As one advocate in this area observed about the military's accomplishments

for working with small children” and that “[c]omprehensive background checks are not required, and there are no consistent qualifications or pre-service training requirements . . . [and] providers are not consistently inspected”).

¹⁷² See Covert, *supra* note 163; see also MILITARY ONESOURCE, *supra* note 165 (explaining that the cost for military child development centers is based upon total family income).

¹⁷³ See Covert, *supra* note 163.

¹⁷⁴ *Id.* at 2.

¹⁷⁵ See *id.* at 4 (“[A] military family making \$50,000 will pay approximately \$100 per week, with low-income families paying \$59 and no one paying more than \$206.”). In the civilian world, in contrast, childcare can cost families as much as \$250 per week. See *id.*; see also Thier, *supra* note 129 (noting that civilian childcare can cost “as much as \$30,000 per year in some places”).

¹⁷⁶ See Stankorb, *supra* note 39.

¹⁷⁷ See Covert, *supra* note 163; see also SMITH & SARKAR, *supra* note 163, at 6 (observing that in the military “the cost of quality is built into the way of doing business”); cf. SMITH & SARKAR, *supra* note 163, at 6 (arguing that, in the civilian world, “[b]ecause child care already costs more than most parents can afford to pay, providers have little incentive to undertake quality improvement initiatives because they cannot pass the costs on to parents”).

¹⁷⁸ See Covert, *supra* note 163.

in this realm: “It’s not a miracle. It’s the determination, and you have to fund it. You have to fund it.”¹⁷⁹

C. The COVID Childcare Crisis: A Viable Solution—Ignored by the Government

Despite some isolated examples of the government stepping in to provide affordable, quality childcare for working families—during World War II in the past, for military members now—the government largely has ignored working families’ long-standing and desperate need for support in this area. While many in the government have expressed sympathy for and/or solidarity with working women,¹⁸⁰ the government thus far has done little to provide meaningful and long-term structural help to this group.¹⁸¹ This unmet need, however, has not gone entirely unnoticed, particularly as the COVID pandemic has upended the traditional childcare arrangements for millions of American families.

In the spring and summer of 2020, as it became increasingly clear that schools, daycare centers, and other sources of childcare would not be opening any time soon,¹⁸² various private businesses throughout the United States began presenting working parents with a possible solution for their predicament—with a possible way to balance their professional obligations with the educational and care demands of children stuck at home. Called alternately “learning pods,”¹⁸³ “distance learning

¹⁷⁹ *Id.* Notably, this commitment to providing robust and affordable childcare support for military families represents a fairly recent development within the armed forces, evolving over the past several decades. As recently as the early 1980s, the Government Accountability Office (“GAO”) released a report deeming the military’s childcare services to be “in appalling shape.” *See id.* Some referred to the program as the “ghetto of American child care.” SMITH & SARKAR, *supra* note 163, at iii. It was only after advocates for improvement were able to push through legislation that increased the standards in this area—over the intense opposition amongst many members of Congress—that military childcare services dramatically improved. *See Covert, supra* note 163. Perhaps this history is why some have argued for using the military experience as a model for improving the quality and affordability in the civilian world. *See SMITH & SARKAR, supra* note 163, at 19.

¹⁸⁰ *See Harris, Kamala Harris, supra* note 61; *see also Highlights of Joe Biden’s Plan to Support Women During the COVID-19 Crisis*, <https://joebiden.com/plans-to-support-women-duringcovid19/> [<https://perma.cc/9PC3-SZY6>] (last visited Sept. 23, 2021).

¹⁸¹ *See supra* Section III.A.

¹⁸² *See supra* notes 48–52 and accompanying text.

¹⁸³ Alice Opalka & Ashley Jochim, *It Takes a Village: The Pandemic Learning Pod Movement, One Year In*, CTR. ON REINVENTING PUB. EDUC. (Feb. 11, 2021), <https://www.crpe.org/thelens/it-takes-village-pandemic-learning-pod-movement-one-year-%20> [<https://perma.cc/LGU4-LQMU>].

pods,”¹⁸⁴ “pandemic pods,”¹⁸⁵ “learning hubs,”¹⁸⁶ and the like,¹⁸⁷ these entities provide a staffed, safe, supervised environment for school-aged children who are learning virtually to complete their schoolwork when their parents are not able to monitor this learning due to work or other obligations.¹⁸⁸ They represent a viable solution not only for the staggering childcare dilemma experienced by countless families amidst the pandemic, but also for the broader societal problem of economic devastation and rampant unemployment across many segments of the American workforce.

1. *The Rise of Pandemic Learning Pods*

The learning pods that have developed as a result of the pandemic may take various forms and may involve various degrees of dependence upon a child’s regular school curriculum: Some learning pods follow a traditional “homeschooling” model, which requires a parent to withdraw his or her child from school, find or create a curriculum, and follow all relevant state homeschooling guidelines.¹⁸⁹ Other parents have outsourced this effort, hiring current or former teachers and tutors (or “zutors”) to create and provide this instruction or to assist with the instruction provided (online) by their child’s school.¹⁹⁰ Still others have adopted a different model, in which various community-based businesses and organizations have opened their doors to provide parents with a place to drop off their children to receive the online

¹⁸⁴ See *Distance Learning POD Program*, BAY CLUB, <https://www.bayclubs.com/amenity/distance-learning-pod-program/> [<https://perma.cc/CE5Y-68B9>] [hereinafter BAY CLUB].

¹⁸⁵ Penny Spiller, *Coronavirus: How Pandemic Pods and Zutors Are Changing Home Schooling*, BBC NEWS, (Aug. 4, 2020), <https://www.bbc.com/news/world-us-canada-53622214%20> [<https://perma.cc/2J4D-T85B>].

¹⁸⁶ Opalka & Jochim, *supra* note 183.

¹⁸⁷ See Will Huntsberry, *For Now, New School-Like Camps Won’t Be Allowed in the Fall*, VOICE OF SAN DIEGO (Aug. 17, 2020), <https://www.voiceofsandiego.org/topics/education/for-now-new-school-like-day-camps-wont-be-allowed-in-the-fall/> [<https://perma.cc/97YB-QHV3>] (describing proposed “full-day camp” programs, under which adults would supervise students’ online learning in small groups).

¹⁸⁸ See *id.*; see also Spiller, *supra* note 185; BAY CLUB, *supra* note 184. These “learning pods” are not to be confused with homeschooling pods, where a group of parents might come together to themselves take turns educating their children based on a curriculum that they devise. Rather, in these learning pods, each child’s regular teacher continues to conduct the learning virtually, just at a new location outside of the child’s home. See Huntsberry, *supra* note 187; see also BAY CLUB, *supra* note 184.

¹⁸⁹ See *Pandemic Pods: Families, Educators Create “Microschools” to Avoid Returning to Classrooms*, 66 SCH. LIBR. J. 20 (2020) [hereinafter *Pandemic Pods*].

¹⁹⁰ See *id.* at 20 (citing one New York City public school substitute teacher’s desire to “work with a pod so she can remain a teacher and earn an income.”); see also Spiller, *supra* note 185 (discussing “matchmaking apps” that can pair families with teachers who can give online lessons and defining “zutors” as zoom tutors).

instruction of their children's regular school.¹⁹¹ Many of these organizations—like the YMCA, Boys & Girls Club, or other community centers—have long-standing roles in providing some degree of childcare within a community.¹⁹² Others may be private businesses—martial arts centers, dance studios, health clubs—that have found a way to provide a needed service to working families, while presumably making a profit for themselves.¹⁹³

While the specific format of each learning pod might differ, these “drop off” learning pods commonly provide a host of desirable benefits: They boast “fully-equipped, distraction-free classroom setting[s] with wi-fi.”¹⁹⁴ They advertise compliance with “comprehensive COVID-19 safety standards.”¹⁹⁵ Some programs even offer fitness and extracurricular activities for students to engage in after school or on breaks.¹⁹⁶ Some likewise provide meals or snacks for the children, generally at an additional charge.¹⁹⁷ Perhaps most importantly, the programs claim to provide a staff of “highly-qualified and background checked teachers.”¹⁹⁸ Notably, these “teachers” presumably need not engage in any significant, substantive teaching, given that a student's “real” teacher will be virtually present on their computer screen.¹⁹⁹ Rather, these staff members simply are there to provide assistance and support to students during their virtual school day.²⁰⁰

These benefits, of course, do not come without significant cost. Within one database that was compiled to study these learning pods, 60% of the pods charged fees for participation, with costs ranging from a few dollars per day to thousands of dollars over a period of weeks or months.²⁰¹ One program would cost parents as

¹⁹¹ See Opalka & Jochim, *supra* note 183; see, e.g., BAY CLUB, *supra* note 184; Huntsberry, *supra* note 187.

¹⁹² Opalka & Jochim, *supra* note 183; see also Huntsberry, *supra* note 187.

¹⁹³ See Opalka & Jochim, *supra* note 183; see also BAY CLUB, *supra* note 184. While some school districts and/or local governments may play a role in these enterprises, the majority seem to be operated solely by private entities. See Opalka & Jochim, *supra* note 183 (stating that “[t]he majority of learning pod operators in our database are nonschool organizations”); see also *id.* (noting that 7% of the pods in the database studied were operated directly by school districts, with another 12.5% operated as partnerships between cities, school districts, and community-based organizations).

¹⁹⁴ See BAY CLUB, *supra* note 184.

¹⁹⁵ See *id.*

¹⁹⁶ See *id.* (purporting to offer “after-school extracurricular programs featuring world-class sports and fitness programs”); see also Huntsberry, *supra* note 187 (describing program that would “combine a supervised learning environment with athletics training”).

¹⁹⁷ See, e.g., BAY CLUB, *supra* note 184.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.* (describing its program as “giving students a space with peers to complete online distance learning” and as “supporting the curriculum *provided by your student's school* with a teacher on-site to be available when questions arise” (emphasis added)).

²⁰⁰ See *id.*

²⁰¹ See Opalka & Jochim, *supra* note 183 (observing that while some programs may charge just a few dollars per day for participation, other charge significantly more); see also

much as \$7,200 over the course of an entire school year.²⁰² While many of these organizations also offer scholarships to help defray the cost of these services for families in need, such assistance will not be available to every family.²⁰³ Thus, while these learning pods represent a potentially helpful option for working parents who need assistance with and/or monitoring of their children's virtual schooling, they remain an option that may be well out of financial reach for many working families.

2. *The Practicality of Government Support for Learning Pods*²⁰⁴

So how might the government play a role in this area, to bolster the childcare needs of working families, particularly during times of disruption like the COVID pandemic? How might state, local, or even the federal government step in not only to support the learning pods that already have been established, but also to scale them up in such a way that this service might be available to working families all over the country? As noted above, the COVID pandemic has decimated various segments of the economy, with millions of Americans finding themselves involuntarily out of work.²⁰⁵ Certain industries have found themselves particularly impacted: As of February 2021, the leisure and hospitality sector (restaurants, bars, hotels, convention centers) had shed four million workers—approximately one-quarter of its workforce.²⁰⁶ The event planning industry (with a workforce that happens to be 80% female) went from a \$1.5 trillion industry worldwide just over

Huntsberry, *supra* note 187 (noting that “many families will need to pay a fee of anywhere from \$800 to \$1000 per month” for a YMCA learning pod program).

²⁰² See Opalka & Jochim, *supra* note 183.

²⁰³ See *id.* (explaining that while 60% of the learning pods in the organization's database charged a fee, half of those offered scholarships or need-based fee schedules); see, e.g., Huntsberry, *supra* note 187.

²⁰⁴ Much already has been written about the feasibility—legally, economically, and otherwise—of various forms of government funded childcare. See, e.g., Dinner, *supra* note 120; Dixon, *supra* note 16; Porter, *supra* note 16, at 850–56; Workman & Jessen-Howard, *supra* note 40, at 2, 9–14 (providing data underscoring “the need for immediate federal investment in child care to ensure that providers can meet . . . additional costs, stay open, and provide safe care for the millions of children and families who rely on it”). This article leaves it to those scholars (and to economists) to debate the feasibility of specific aspects of governmental support in this area. The article simply argues that governmental support for these “learning pods” represents one viable solution to the current childcare crisis, and questions why no facet of the government—federal, state, or local—seems to have considered this option on any broad scale or in any serious way. *Id.*

²⁰⁵ See *supra* notes 56–67 and accompanying text.

²⁰⁶ See Kathryn Dill, *Four Million Hotel, Restaurant Workers Have Lost Jobs. Here's How They're Reinventing Themselves*, WALL ST. J. (Feb. 22, 2021, 11:27 AM), <https://www.wsj.com/articles/hospitality-workers-are-pushed-into-new-careers-as-pandemic-begins-second-year-11613999342> [<https://perma.cc/9KSW-26Z9>].

three years ago to one that essentially evaporated in March 2020.²⁰⁷ Many of the workers from these sectors of the economy readily could be offered a position staffing a learning center like those described above. While the specific requirements to work with children in this context might vary somewhat from one state to the next,²⁰⁸ workers generally might need no more than a background check and some rudimentary proficiency with technology (i.e., knowledge sufficient to assist a child in navigating whatever virtual learning platform was being used by the child's school and/or to troubleshoot any minor technological issues that might arise). With the child's "actual" teacher on the child's computer screen, a staff person at a learning pod would need simply to help keep the child on task, answer simple questions, supervise for safety, and monitor lunch and breaks—tasks seemingly well within the grasp of a broad range of (otherwise unemployed) individuals.

One can imagine the government funding learning pods like this throughout the United States—perhaps on its own, or perhaps by providing support for existing learning centers, helping them to dramatically scale up. Of course, providing this type of government support would be costly—not just in terms of the actual dollars and other resources devoted to these centers, but also with respect to the need to regulate and monitor them once they were established. Yet these expenditures could lead to tremendous savings in other areas of the economy. For one thing, these learning pods would provide paid work to countless individuals whose jobs have been furloughed or eliminated as a result of the pandemic, thereby eliminating the need for such individuals to collect unemployment.²⁰⁹ According to one report, state unemployment payments as of November 2020 had reached a record high of \$500 billion, "dwarf[ing]" in less than one year the total unemployment payments (\$293 billion) "paid between 2008 and 2013 during the Great Recession and its aftermath."²¹⁰ In fact, as of November 2020, states had borrowed \$40 billion from the U.S. Treasury in order to keep up with their unemployment payments, after already depleting almost all of the \$75 billion that states held in trust funds for this purpose at the start of the year.²¹¹ California paid out \$114 billion between March

²⁰⁷ See Leena Rao, *How Event Planners Have Pivoted in the Pandemic*, MARIE CLAIRE (Feb. 16, 2021), <https://www.marieclaire.com/career-advice/g35479612/event-planners-covid-19-shutdowns/> [<https://perma.cc/UC2J-HX39>].

²⁰⁸ See, e.g., OFFICE OF CHILDCARE, *Child Care Licensing & Regulations*, ADMIN. CHILD FAM., <https://childcare.gov/consumer-education/child-care-licensing-and-regulations> [<https://perma.cc/4LMM-P5P2>]; see also *National Database of Child Care Licensing Regulations*, U.S. DEPT. HEALTH & HUM. SERV. <https://childcareta.acf.hhs.gov/licensing> [<https://perma.cc/K9HE-MYBE>].

²⁰⁹ See *infra* notes 210–219 and accompanying text.

²¹⁰ Chris Marr & Sam McQuillan, *States Grapple with Cost of Jobless Benefits as Pandemic Worsens*, BLOOMBERG L. (Nov. 16, 2020, 2:46 AM), <https://news.bloomberglaw.com/daily-labor-report/states-grapple-with-cost-of-jobless-benefits-as-pandemic-worsens> [<https://perma.cc/9CB8-X2AR>].

²¹¹ See *id.*

2020 and January 2021.²¹² Georgia's Labor Department confirmed that during the eight-month span between March and November 2020, it paid out more in unemployment benefits than it had in the *previous twenty-eight years combined*.²¹³ The federal government also has substantial financial skin in the game, with a significant portion of its proposed \$1.9 trillion COVID relief package being directed toward expanded unemployment benefits.²¹⁴

As if these massive unemployment payments on their own were not enough to cause great distress, along with these payments has come tremendous fraud and waste. California alone is reported to have paid out more than \$11 billion in *fraudulent* unemployment claims—approximately 10% of all of the payments made for pandemic-era relief.²¹⁵ Experts expect to see this number climb, as another 17% of the unemployment dollars that have been paid out by California (more than \$19 billion) are considered “suspicious” and ultimately could be confirmed to be fraudulent.²¹⁶ As a result of these and similar concerns, local governments and law enforcement officials have had to devote tremendous resources to rooting out and prosecuting this fraud—something not only costly in and of itself, but which also has created a massive backlog that has delayed payments on hundreds of thousands of legitimate unemployment claims.²¹⁷ The federal government itself has committed to getting involved, with the U.S. Labor Department's Inspector General recently advising that federal outreach may be necessary to curb this illegal activity.²¹⁸

²¹² See Patrick McGreevy, *California Officials Say Unemployment Fraud Now Totals More Than \$11 Billion*, L.A. TIMES (Jan. 25, 2021, 3:37 PM), <https://www.latimes.com/california/story/2021-01-25/california-unemployment-fraud-11-billion-investigations> [<https://perma.cc/QGD3-DNU6>].

²¹³ See Marr & McQuillan, *supra* note 210.

²¹⁴ See Abramson, *supra* note 112; see also DeParle, *supra* note 112. As of September 2021, the federal government had spent more than \$656 billion on expanded unemployment benefits since the beginning of the pandemic in March 2020. See Robert Channick, *How Monday's End of Federal Pandemic Unemployment Benefits Will Affect Illinois*, PANTAGRAPH (Sept. 8, 2021), https://pantagraph.com/news/state-and-regional/govt-and-politics/how-mondays-end-of-federal-pandemic-unemployment-benefits-will-affect-illinois/article_d3087a91-36f5-52ab-9775-591120a735c3.html [<https://perma.cc/T3FC-T6EE>]; cf. David A. Lieb, *States Tap Federal Aid to Shore Up Empty Unemployment Funds*, AP NEWS (May 27, 2021), <https://apnews.com/article/donald-trump-coronavirus-pandemic-health-business-government-and-politics-5326b6d23ffcb4d9be851d9b8fc319f2> [<https://perma.cc/2P93-EP22>] (noting that as of May 2021, 18 states owed the federal government \$52 billion for unemployment loans).

²¹⁵ See McGreevy, *supra* note 212; see also Ben Penn, *Jobless Aid Fraud Warrants Greater Federal Action, Watchdog Says*, BLOOMBERG L. (Feb. 24, 2021, 12:01 PM), <https://news.bloomberglaw.com/daily-labor-report/jobless-aid-fraud-warrants-greater-federal-action-watchdog-says> [<https://perma.cc/TV5S-9QPU>] (describing the U.S. Labor Department Inspector General's warning that billions of dollars have been paid to individuals fraudulently filing for unemployment benefits in multiple states).

²¹⁶ See McGreevy, *supra* note 212.

²¹⁷ *Id.*

²¹⁸ See Penn, *supra* note 215.

Perhaps more important than the unemployment savings (from claims both legitimate and not) that could flow from having the government support learning pods in this environment is the extent to which this type of government involvement would free up working parents—primarily working mothers—to return and/or give the proper focus to their jobs. No one can do two (or more) full-time jobs simultaneously for an indefinite period of time. To the extent that parents (mothers) are trying to do so, most are not doing so very successfully.²¹⁹ Having the government provide the necessary support for children to receive care and/or learn outside of the home would allow parents to engage *fully* in their jobs—to show up without worry about who is watching their children; to attend conference calls and meetings undistracted by other demands; to have the flexibility in their schedules to take on extra projects and extra shifts if they so choose.²²⁰ Moreover, eliminating this crushing dual focus on work and family could dramatically improve the mental health of many individuals. One indisputable result of the pandemic is that the mental health of working parents is at an all-time low.²²¹ As one reporter—who is a working parent himself—recently observed, the pandemic has subjected many parents of small children to “a truly horrendous ordeal, a relentless, around-the-clock waking nightmare from which there has hardly been a glimmer of escape.”²²² Thus, just as the childcare centers established during World War II allowed working mothers to contribute to wartime production undistracted by the demands of childcare and without daunting concerns about the health and safety of their children in their absence,²²³ so too would government support of these learning pods allow working parents to cease the impossible, exhausting, and unsustainable juggling act that they have undertaken over the past year.

Finally, providing government funding for these learning pods would be an important step toward closing the inequality gap that the pandemic has exposed in the educational system.²²⁴ As noted above, as privately-run operations, many of the existing learning pods charge parents substantial fees for their services—in some instances, hundreds or even thousands of dollars per month.²²⁵ While some of these centers offer scholarships or sliding scale fees for families in need, not every center does so.²²⁶ Thus, as one commentator has pointed out, “[c]hildren whose parents have the means to participate in learning pods will most likely return to school academically ahead, while many low-income children will struggle at home without

²¹⁹ See *supra* Section II.B.

²²⁰ See *supra* Part II.

²²¹ See Faris *supra* note 98; see also Jessica Grose, *The Pandemic Is a ‘Mental Health Crisis’ for Parents*, N.Y. TIMES (Sept. 9, 2020), <https://www.nytimes.com/2020/09/09/parenting/mental-health-parents-coronavirus.html> [<https://perma.cc/U86C-8BU8>] (“[T]he mental health impact [of the pandemic] on parents remains significant and shows no signs of abating.”).

²²² Faris, *supra* note 98.

²²³ See *supra* notes 141–144 and accompanying text.

²²⁴ See Spiller, *supra* note 185; see also Green, *supra* note 42.

²²⁵ See *supra* notes 201–203 and accompanying text.

²²⁶ See *supra* note 203 and accompanying text.

computers or reliable internet for online learning.”²²⁷ At the end of the day, if these learning pods are left to operate without any government support, those who may have the greatest need for such services—workers like firefighters, police officers, grocery workers, and teachers, who generally *must* leave their homes in order to work—may find themselves priced out of this service.

IV. PUSHED FURTHER TO THE SIDELINES: THE TRUE COSTS ASSOCIATED WITH THE GOVERNMENT LEAVING WORKING WOMEN BEHIND

As maddening as the government’s inaction may be in failing to provide any significant childcare support to working women amidst the pandemic—even in the face of at least one viable and fairly straightforward solution—very little about that result seems likely to surprise the average female worker. Whether the discussion involves women experiencing termination amidst the pandemic at a higher rate than their male peers,²²⁸ or women balancing the bulk of the domestic duties along with their paid work,²²⁹ or women “voluntarily” departing from the workplace more frequently than men in order to manage domestic demands,²³⁰ all of these consequences feed into a broader narrative about the value (or lack thereof) that society places on the work performed by female workers, and on the extent to which women often find themselves pushed to the sidelines in their professions. The government’s failure to account for families’ childcare needs amidst this pandemic, and its corresponding abandonment of the working women who inevitably have had to fill in this massive gap, is both consistent with and an aggravation of the ways in which women historically have found themselves marginalized in the workplace.

A. The Nature and Scope of Women Sidelined in Their Work

Women may find themselves “sidelined” in the workplace in any number of ways. The term “sidelining” (or, more specifically, “gender sidelining”) in this context refers to the various slights, snubs, and disadvantages that women experience in the workplace that—while generally not actionable under any antidiscrimination regime—accumulate to create very real obstacles and barriers to the advancement of women at work.²³¹ Sometimes this involves a woman in a corporate working environment who finds her ideas “bropriated” during workplace meetings.²³² Sometimes it involves the different (generally less respectful) language

²²⁷ Green, *supra* note 42. It also is worth noting that these learning pods, if not generally available, may lead to further stratification across race and class lines, as parents “self-select” into pods with others similar to themselves. *Id.*; see also Spiller, *supra* note 185 (observing that “[l]earning loss is likely to be greater among low-income black and Hispanic students”).

²²⁸ See *supra* Section II.A.

²²⁹ See *supra* Section II.B.

²³⁰ See *supra* Section II.B.

²³¹ See Fink, *supra* note 6, at 60.

²³² *Id.* at 83–85.

that is used to describe women in the professional spotlight.²³³ Sidelining may manifest in female politicians and Supreme Court Justices getting interrupted more frequently than their male colleagues.²³⁴ It may arise when female artists face greater challenges than their male peers in getting their work displayed in prestigious museums.²³⁵

As discussed in greater detail elsewhere,²³⁶ the vast majority of instances of gender sidelining will not form the basis of an actionable sex discrimination claim.²³⁷ Rather, these instances of marginalization “are more likely to be seen as one-off slights that do not reflect the entirety of a woman’s workplace experience.”²³⁸ Nonetheless, these instances collectively can represent real obstacles to a woman’s career—events that can subtly but significantly derail (i.e., sideline) a woman’s professional goals.²³⁹ In the context of the pandemic, the ramifications of this sidelining have only become more pronounced: Women not only have found themselves more frequently marginalized as a result of the government ignoring their childcare needs, but also have felt the impact of this sidelining in a much more pronounced way than in the past.²⁴⁰

B. How the Lack of Childcare Amidst COVID Has Exacerbated the Impact of Gender Sidelining for Working Women

Even under the “best” of circumstances, with a functioning economy and with schools and daycare facilities in session, women have grappled with being shoved to the sidelines at work.²⁴¹ Yet as described in detail above, the rise of the pandemic has exacerbated the challenges that working women face: They have been the ones to bear the brunt of the layoffs and downsizing; they have been the ones to take on the domestic burdens at home, often at the expense of their jobs.²⁴² As a result, not only have individual women experienced significant losses in the workplace during this period, but likewise there have been negative ramifications for the organizations within which these women work(ed), as well as for society as a whole.

²³³ See *id.* at 78–79 (describing the extent to which the media remarks upon appearance and other superficial attributes of female Supreme Court Justices and diplomats); see also *id.* at 67–69 (detailing dismissive coverage of female athletes’ accomplishments).

²³⁴ See *id.* at 77–78.

²³⁵ See *id.* at 70–71.

²³⁶ See generally *id.* (discussing the more subtle and less obvious gender bias in the workplace that has led to adverse treatment of women in modern times).

²³⁷ See *id.* at 97–98.

²³⁸ *Id.*

²³⁹ See *id.* at 86–93.

²⁴⁰ See *infra* Sections IV.B.1–IV.B.3.

²⁴¹ See generally *infra* Sections IV.B.1–IV.B.3.

²⁴² See *supra* Part II.

1. How Keeping Women on the Sidelines During COVID Leads to Losses for Individual Women

Within the context of this pandemic, the government's failure to provide adequate childcare support for women seems likely to have dramatic and long-lasting effects for individual women themselves. First, women will experience immediate and perhaps irreparable financial losses due to their pandemic-related departure from work. Under questioning by the Senate during a recent hearing, Federal Reserve Chairman Jerome Powell was asked about the disproportionate labor market drop-out rate for women due to COVID.²⁴³ While Chairman Powell expressed hope that these absences "will be temporary to the extent people want to return," he acknowledged that "[i]t may be difficult [for women] to get back to where [they] were."²⁴⁴

Chairman Powell's concerns seem to bear out in the actual experiences of female workers. Discussing women's career paths long before COVID, Dean Deborah Spar noted that "most women who pull blithely into a career 'off-ramp' find the road back far more treacherous than they had anticipated. Positions disappear; salaries plummet; professional relationships grow stale."²⁴⁵ Citing a 2005 Harvard Business Review study conducted by Sylvia Ann Hewitt and Carolyn Buck Luce, Spar noted that "at the end of the day, only 40 percent of women who try to return to full-time professional jobs actually manage to do so"²⁴⁶—and this, long before COVID had wreaked havoc on the economy.²⁴⁷ University of Michigan economics and public policy professor Betsey Stevenson more recently echoed this view, opining that "[w]e could have an entire generation of women who are hurt" by the pandemic's impact on employment²⁴⁸ and worrying in particular about women who are pregnant or whose children "are too young to manage on their own" during this period.²⁴⁹

Even those women who do successfully reenter the workforce post-COVID likely will face concrete negative ramifications. For one thing, they are likely to return to lower pay.²⁵⁰ In fact, even a fairly short hiatus from work can lead to a

²⁴³ See Fanzeres, *supra* note 9.

²⁴⁴ *Id.*

²⁴⁵ SPAR, *supra* note 5, at 183–84; see also Rosin, *supra* note 5 (describing the "backward cascade" likely to impact women's professional trajectories after they temporarily leave the workforce).

²⁴⁶ SPAR, *supra* note 5, at 184.

²⁴⁷ See Cohen & Hsu, *supra* note 4 (discussing "offramp" concerns in the context of COVID and observing that "[w]omen who drop out of the workforce to take care of children often have trouble getting back in, and the longer they stay out, the harder it is").

²⁴⁸ *Id.*

²⁴⁹ See *id.* (opining that the impact of women pulling back from and/or leaving the workforce "could last a lifetime").

²⁵⁰ See Connley, *Women's Labor Force Participation*, *supra* note 58 (citing concerns of National Women's Law Center ("NWLC") Vice President for Education and Workplace

salary reduction for returning workers.²⁵¹ For women who simply transition from full-time to part-time work, the financial ramifications may be similarly dire, given that women who work less than full-time can earn significantly less than full-time peers who hold equivalent jobs with equivalent education levels.²⁵² Women returning to work also may lose access to leadership opportunities: Not only will there be fewer women in leadership roles if those female leaders feel forced to leave the workforce,²⁵³ but opportunities for *other* women to move up in the ranks likewise may be stymied due to the absence of the mentoring that often is necessary for such development,²⁵⁴ and due to the decrease in female talent among the lower ranks of an organization—creating what some have called a “broken rung . . . on the talent pipeline.”²⁵⁵ As with so many of the ramifications of the pandemic, here too, women of color may experience these losses to a greater degree, having come into the pandemic already underrepresented in leadership roles and already receiving less of the sponsorship and advocacy that is needed to advance in their careers.²⁵⁶

Women also may suffer from less tangible losses as a result of the government’s failure to provide women with the childcare support that they need during this crisis. For many working women, their self-worth is very much tied up in their jobs.²⁵⁷ In the words of one working mother whose job has taken a backseat to her domestic duties amidst the pandemic, “I worry that it may take me a lifetime to undo the false notion that my work is somehow less valuable.”²⁵⁸ To leave this work behind—whether due to an involuntary layoff or due to a “voluntary” departure to address the

Justice that “[t]hese long periods of unemployment, as well as the increase in women dropping out of the labor force, ‘can really impact wages when an individual does find a [full-time] job again’”); *see also* McGrath, *supra* note 57 (citing NWLC analyst concern that when women leave labor force and look for work again, they may “take the first job they can get,” perhaps a “lower-paying job with worse benefits”).

²⁵¹ *See*, Sylvia Ann Hewlett, *Celebrate Mother’s Day by Erasing the Motherhood Penalty*, HUFFPOST (May 7, 2017), https://www.huffpost.com/entry/celebrate-mothers-day-by-_b_9859250%20 [<https://perma.cc/9EJB-LKZB>] (noting that even a one-to-two-year timeout can reduce a women’s salary by 14%, and at three years the gap rises to 46%); *cf.* Rosin, *supra* note 5 (referring to a study that found that women who took just one year away from work had annual earnings that were 39% lower than those of women who did not take such leave).

²⁵² *See* Porter, *supra* note 16, at 787–88.

²⁵³ *See* Thomas et al., *supra* note 4, at 9.

²⁵⁴ *See* Fink, *supra* note 6, at 93–97.

²⁵⁵ *See* Thomas et al., *supra* note 4, at 9; *see also id.* (expressing concern that “[a]ll the progress we’ve seen over the past five years would be erased”).

²⁵⁶ *See id.* at 28.

²⁵⁷ *See generally* Kate Morgan, *Why We Define Ourselves by Our Jobs*, BBC (Apr. 13, 2021), <https://www.bbc.com/worklife/article/20210409-why-we-define-ourselves-by-our-jobs> [<https://perma.cc/YQ8S-L6FZ>] (noting that a person’s self-worth is often attached to their job); *see also* Jeffrey Davis, *You Are Not Your Work*, PSYCH. TODAY (Mar. 26, 2019), <https://www.psychologytoday.com/us/blog/tracking-wonder/201903/you-are-not-your-work> [<https://perma.cc/SN9F-KXHR>].

²⁵⁸ Garbes, *supra* note 57.

childcare demands that the pandemic has imposed—can be soul-crushing for a female worker.²⁵⁹ One woman, who previously worked in biotech and as a freelance science editor and who quit her well-paying job to shoulder pandemic-related domestic responsibilities, lamented that “so much of my identity is tied up with my professional work that it was hard for me to let that go.”²⁶⁰

Finally, those women who stay in the workforce, straining to balance their professional and domestic demands, often find themselves psychologically no better off.²⁶¹ While working women clearly have been asked to do the impossible—add another set of significant duties on top of their existing full-time jobs—many women still experience profound disappointment when they fail to accomplish this feat.²⁶² As one commentator observed, “many women . . . have internalized the problem of care. We blame ourselves if we can’t do it all or make it work.”²⁶³ While some women ultimately may find a way to balance both sets of obligations (at least temporarily), this endeavor often comes at the expense of their mental health, as they overload (and likely exhaust) themselves by juggling parental, personal, and professional responsibilities.²⁶⁴ In failing to do more—to do *anything* substantial—to address the long-term childcare needs of this group, the government contributes to the dire consequences that these women individually experience.

2. *How the Government Keeping Women on the Sidelines During COVID Detrimentially Alters Workplace Culture and Productivity*

In addition to impacting individual working women, the government’s sidelining of working women amidst the pandemic by failing to address the childcare crisis creates ramifications for the organizations in which these women are (or were) employed. On the most superficial level, when women leave the workplace (or are pushed out) due to childcare obligations, companies lose the skills and expertise of

²⁵⁹ See Jennifer Folsom, *Author Jennifer Folsom: I Nailed a Job Transition amid Covid-19, and You Can Too*, NBC NEWS (Jan. 12, 2021, 10:34 AM), <https://www.nbcnews.com/know-your-value/feature/author-jennifer-folsom-i-nailed-job-transition-amid-covid-19-ncna1253930> [<https://perma.cc/2KYV-CPPA>] (“As if looking for a job weren’t soul-crushing enough, these women were doing so while performing homeschooling and caretaking duties and living through the worst global pandemic of our lifetime.”).

²⁶⁰ Cohen & Hsu, *supra* note 4.

²⁶¹ See, e.g., Mason, *supra* note 17.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Miller, *Working Moms*, *supra* note 98 (“We’ve seen people have been immensely productive at home, but it’s been coming at an enormous cost to their mental health and overall sanity.”); cf. Garbes, *supra* note 57 (discussing loss and grief felt by women who have left careers as a result of the pandemic). Here too, women of color may experience even greater psychological challenges than their peers: Black women in particular are more than twice as likely as women generally to have lost a loved one during the pandemic, and report experiencing a less supportive working environment than their white coworkers. See Thomas et al., *supra* note 4, at 29.

a wide range of talented workers.²⁶⁵ Research also indicates that women who experience sidelining at work ultimately may lose motivation and/or become less productive workers: If female workers see, through their treatment during COVID or otherwise, that employers view their workplace contributions as less valuable and respected, this can mute the drive and ambition of those women who remain in the workforce.²⁶⁶

Sidelining women during this pandemic also impacts the broader culture within an organization. Employing women in the upper echelons of an organization has been shown to impact the policies that the organization embraces.²⁶⁷ For example, the authors of the McKinsey & Company study found that senior-level women within a company are more likely than their male peers to “embrace employee-friendly policies and programs and to champion racial and gender diversity.”²⁶⁸ Having women fill top executive positions also can provide support for other female executives, allowing these leaders to act as mentors or role models for other women within the company.²⁶⁹ Pushing women out of these leadership positions (or standing idly by while they depart as a result of untenable domestic demands) means that instead of fostering a culture that encourages women to succeed, companies may create a climate that makes it even *more* difficult for women to thrive.

3. *How the Government Keeping Women on the Sidelines During COVID Impacts Broader, Societal Notions of Equality*

The government’s failure properly to provide childcare support to women amidst the pandemic not only affects women’s individual circumstances and those of the organizations that employ(ed) them; it also creates broader ramifications for society as a whole. On the most immediate level, this failure may have a dramatic economic impact, both within the United States and abroad. Within the United States, the EEOC estimates that income from women’s employment “accounts for over one-third of the income in families where both parents work.”²⁷⁰ Accordingly, women’s income may be “important to the economic security of many families, particularly among lower-paid workers.”²⁷¹ Vice President Harris, in her Op-ed,

²⁶⁵ See Thomas et al., *supra* note 4, at 25.

²⁶⁶ See Anna Fels, *Do Women Lack Ambition?*, HARV. BUS. REV. (Apr. 2004), <https://hbr.org/2004/04/do-women-lack-ambition> [https://perma.cc/R665-UR3G] (discussing the link between earned affirmation and long-term performance); see also Fink, *supra* note 6, at 92 (citations omitted) (arguing that lack of recognition associated with gender sidelining “has a concrete impact on women’s desire and ability to excel, muting their drive and ambition”).

²⁶⁷ See Thomas et al., *supra* note 4, at 25.

²⁶⁸ *Id.*

²⁶⁹ See Taekin Shin, *The Gender Gap in Executive Compensation: The Role of Female Directors and Chief Executive Officers*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 258, 262 (2012) (citations omitted).

²⁷⁰ See EEOC Caregiver Disparate Treatment, *supra* note 18, at 3.

²⁷¹ *Id.*

pointed to studies that have shown that the United States' gross domestic product "could be 5 percent higher if women participated in the workforce at the same rate as men,"²⁷² a sentiment echoed by researcher and CEO Dr. Nicole Mason, who claims that "[e]xpanding availability and lowering costs of child care . . . could deliver a \$1.6 trillion boost to GDP."²⁷³ Estimates from the Center for American Progress and the Century Foundation predict that if women remained out of the workforce for one year at the same levels as were seen in spring 2020, it would cost the United States \$64.5 billion.²⁷⁴

Continuing to keep women on the sidelines by failing to provide adequate childcare for working families also impacts women's overall equality in society at large. As Professor Catherine Fisk has observed, "[t]he structure of the labor market is built on the foundation of unpaid labor that women have provided in bearing and rearing society's children. For women to achieve economic equality, society must acknowledge and assume the long-ignored economic costs of childcare."²⁷⁵ Analyzing why women flock into college and graduate programs and into entry and midlevel positions, only to "fall out" before reaching the top of their professions, Dean Deborah Spar has opined that "[i]t isn't legalized prejudice anymore. It isn't barriers on the way in."²⁷⁶ Rather, Spar argues, this "falling out" occurs when women—faced with the impossible balance of performing their demanding professional work while simultaneously shouldering the bulk of the duties at home—"decid[e] . . . that they need to stay at home, or work part time, or step away from the fast track."²⁷⁷ Put more bluntly, because women cannot achieve true equality without financial independence, and cannot gain financial independence without performing paid work, their equal rights depend upon some government intervention.²⁷⁸ As one scholar in this area has observed, "[b]ecause most women do not have 'housewives' to care for their children while they are at work and because men usually will not forego their careers to accept the full-time responsibility of child care, women need affordable and reliable daycare in order to attain true

²⁷² Harris, *Kamala Harris*, *supra* note 61.

²⁷³ Mason, *supra* note 17. Similar assertions have been made on a global level: A July 2020 Statement by UN Women and Women 20 to the G20 Finance Ministers and Central Bank Governors pointed out that women contribute 37% of the global GDP, arguing that "[d]eploying women's full potential is critical to economic recovery." U.N. Women & Women 20, *Women as Drivers of Economic Recovery and Resilience During COVID-19 and Beyond*, (July 14, 2020), <https://www.unwomen.org/en/news/stories/2020/7/statement-joint-w20-women-during-covid-19-and-beyond> [<https://perma.cc/2KHG-M6KT>]. A report from McKinsey & Company likewise contains a discussion of the global ramifications of keeping women away from the workforce, estimating that global GDP could decrease by as much as \$1 trillion by 2030 if women's unemployment does not track that of men in each sector of the job market. *See* Madgavkar et al., *supra* note 21, at 1.

²⁷⁴ *See* Dockterman, *supra* note 60.

²⁷⁵ Fisk, *supra* note 104, at 89.

²⁷⁶ SPAR, *supra* note 5, at 181.

²⁷⁷ *Id.*

²⁷⁸ *See* Dixon, *supra* note 16, at 564–65.

equality to men.”²⁷⁹ The government is in a position to help provide such care, and in doing so, might enhance the position of women within society as a whole.

CONCLUSION

Without question, society will grapple with the impact of the COVID pandemic for years (and perhaps decades) to come. For many individuals, positive lessons will emerge from this experience—lessons about the need to support our healthcare workers and the system in which they work;²⁸⁰ lessons about the importance of schooling in children’s educational, social and psychological well-being;²⁸¹ lessons about how to prioritize between personal and professional obligations.²⁸² Perhaps the most significant lesson that can emerge from this crisis, however, is that neither the government nor society can continue to ignore the need for meaningful and affordable childcare support for working families—and, in particular, for working women. The government has stepped up to provide this support in the past when our nation was at war and needed women in the workplace. It has continued to do so in the present, providing necessary and much-deserved support for the children of military families. The time has come—has long since passed—to engage in this effort more broadly, to ameliorate the childcare crisis for countless working families, and to stop pushing working women onto the sidelines.

²⁷⁹ *Id.* at 564 (footnotes omitted).

²⁸⁰ See Sandro Galea, *4 Lessons from the Coronavirus*, FORTUNE (Mar. 14, 2020, 11:30 AM), <https://fortune.com/2020/03/14/four-lessons-from-the-coronavirus/> [<https://perma.cc/LSB5-C5XY>].

²⁸¹ See Kristen Taketa, *Pediatricians: Schools Must Reopen Now to Relieve Children’s Suffering*, SAN DIEGO UNION TRIBUNE (Feb. 7, 2021, 6:06 AM), <https://www.sandiegouniontribune.com/news/education/story/2021-02-07/pediatricians-say-schools-need-to-reopen-now-to-relieve-childrens-suffering?fbclid=IwAR2zn4l5zG1ajEMjMwHvIeA-nkQpb24Hh-uDNjS54Ey9RZR-xbeLsGnp958%20> [<https://perma.cc/J8CE-9LL2>].

²⁸² See Faris, *supra* note 98 (discussing difficulties of parenting during the pandemic but noting that “I wouldn’t trade a minute of this time with my family for anything”); see also George Carey, Opinion, *The 2020 COVID Effect: What Matters to People of All Ages Has Changed Dramatically*, USA TODAY (Dec. 15, 2020, 8:00 AM), <https://www.usatoday.com/story/opinion/2020/12/15/covid-unifies-america-emotional-priorities-shift-2020-column/6540239002/> [<https://perma.cc/LZK2-NNC9>] (citing a “[d]ramatic shift in emotional priorities” for many Americans).