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#### Recommended Citation

Aziza Ahmed & Jason Jackson, *The Public/Private Distinction in Public Health: The Case of COVID-19*, in 90 Fordham Law Review 2541 (2022).

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Bluebook 21st ed.

Jason Jackson & Aziza Ahmed, The Public/Private Distinction in Public Health: The Case of COVID-19, 90 FORDHAM L. REV. 2541 (2022).

ALWD 7th ed.

Jason Jackson & Aziza Ahmed, The Public/Private Distinction in Public Health: The Case of COVID-19, 90 Fordham L. Rev. 2541 (2022).

APA 7th ed.

Jackson, J., & Ahmed, A. (2022). The public/private distinction in public health: the case of covid-19. Fordham Law Review, 90(6), 2541-2560.

Chicago 17th ed.

Jason Jackson; Aziza Ahmed, "The Public/Private Distinction in Public Health: The Case of COVID-19," Fordham Law Review 90, no. 6 (May 2022): 2541-2560

McGill Guide 9th ed.

Jason Jackson & Aziza Ahmed, "The Public/Private Distinction in Public Health: The Case of COVID-19" (2022) 90:6 Fordham L Rev 2541.

AGLC 4th ed.

Jason Jackson and Aziza Ahmed, 'The Public/Private Distinction in Public Health: The Case of COVID-19' (2022) 90(6) Fordham Law Review 2541

MLA 9th ed.

Jackson, Jason, and Aziza Ahmed. "The Public/Private Distinction in Public Health: The Case of COVID-19." Fordham Law Review, vol. 90, no. 6, May 2022, pp. 2541-2560. HeinOnline.

OSCOLA 4th ed.

Jason Jackson & Aziza Ahmed, 'The Public/Private Distinction in Public Health: The Case of COVID-19' (2022) 90 Fordham L Rev 2541

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# THE PUBLIC/PRIVATE DISTINCTION IN PUBLIC HEALTH: THE CASE OF COVID-19

Jason Jackson\* & Aziza Ahmed\*\*

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## INTRODUCTION

In August 2021, Dr. Francis Collins, then Director of the National Institute for Health (NIH), appeared on CNN to discuss the public health response to COVID-19. During the conversation, he said the following:

If you are parents who have small children under 12 at home they are susceptible for getting infected. And if the parents are out and about and might themselves be carrying the virus and you don't want to pass that along. . . . So, many parents with that recommendation consider wearing masks for families at home to reduce this risk as long as the kids are unvaccinated, especially if you're in a community that has very high transmission at the present time.<sup>1</sup>

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\*\* Professor of Law, University of California, Irvine School of Law. The authors would like to thank Mariana Arcaya, Andrew Binet, Devin Buntin, I. Bennett Capers, Naomi Cahn, Clare Dalton, Catherine D'Ignazio, Catherine Powell, Sanjay Pinto, Justin Steil, Andres Svstuk, Delia Wendel and Patrice Williams for comments and suggestion on earlier drafts, as well as Julia Hatheway for excellent editorial guidance throughout the publication process. Many thanks to the organizers of *The Law of Parents and Parenting Symposium* for including us.

1. Cammy Pedroja, *Director Says There's 'No Need to Mask at Home,' Earlier Message 'Garbled,'* NEWSWEEK (Aug. 3, 2021, 7:30 PM), <https://www.newsweek.com/nih-director-says-theres-no-need-mask-home-earlier-message-garbled-1615943> [<https://perma.cc/EWP7->

His comments caused a furor. Senator Rand Paul appeared on Fox News criticizing the director for his comments.<sup>2</sup> Rand Paul, speaking on Fox News, called the recommendation “utterly without scientific evidence.”<sup>3</sup>

The strong reaction led to a quick response from Collins. He tweeted on August 3, 2021: “Let me clarify the masking message that I garbled on @NewDay this morning. Vaccinated parents who live in communities with high COVID-19 transmission rates should mask when out in public indoor settings to minimize risks to their unvaccinated kids. No need to mask at home.”<sup>4</sup> He thus apologized for his supposed error.<sup>5</sup>

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BA67]. Collins’s comment was an elaboration of an earlier comment in the interview when he said:

The recommendations are for kids under twelve that they avoid being in places where they might get infected which means recommendations of mask-wearing in schools and at home . . . Parents of unvaccinated kids should be thoughtful about this and the recommendation is to wear masks [at home] as well. I know that’s uncomfortable, I know that seems weird, but that’s the best way to protect your kids.

*Id.*

2. See *Rand Paul Hits NIH Director for Mask-at-Home Comments: How Can People Who Are So Smart Say Such Stupid Things?*, FOX NEWS (Aug. 3, 2021, 10:20 PM), <https://www.foxnews.com/media/rand-paul-nih-director-mask-comments> [https://perma.cc/8DVY-DYNQ].

3. *Id.* Somewhat ironically, the outcry from conservatives over Collins’s comments was preceded by another controversial incident a few days earlier, when Surgeon General Vivek Murthy was (wrongly) accused via the Republican National Committee Twitter account of saying that “vaccinated parents should wear masks at home with their kids and outside,” prompting Murthy’s communications director to clarify to CNN that “[w]hat the Surgeon General said is that parents of unvaccinated kids can wear masks in public places to avoid bringing infection home to their kids . . . so they don’t have to wear masks at home with their kids.” Pedroja, *supra* note 1. These incidents highlight the deeply politicized nature of the COVID-19 public health response.

4. Lawrence A. Tabak (@NIHDirector), TWITTER (Aug. 3, 2021, 4:45 PM), <https://twitter.com/NIHDirector/status/1422654529087189000> [https://perma.cc/839G-N7DL].

5. See *Francis Collins to Step Down as Director of the National Institutes of Health*, NAT’L INST. HEALTH (Oct. 5, 2021), <https://www.nih.gov/news-events/news-releases/francis-collins-step-down-director-national-institutes-health> [https://perma.cc/W8KN-9G39]. Dr Collins announced his retirement from the NIH just two months later on October 5, 2021, ending his tenure as the longest serving presidentially appointed NIH Director. *Id.* In a later interview with *Science*, Collins responded to a question on what he would not miss about being NIH Director:

I won’t miss the nasty politics that unfortunately seem to surround a lot of what’s happening right now as a reflection of the divisiveness in our country. I won’t miss the slings and arrows being pitched at NIH, on the basis of political perspectives. I won’t miss getting really horrible, hateful emails every time I show up on Fox News. And the things that they’re quite comfortable saying about me and my family.

Jocelyn Kaiser, *I Won’t Miss the Nasty Politics: Francis Collins Reflects on His Tenure at NIH*, SCIENCE (Dec. 20, 2021, 5:40 PM), <https://www.science.org/content/article/i-won-t-miss-nasty-politics-francis-collins-reflects-his-tenure-nih> [https://perma.cc/62G9-4PAV]. Collins has since been named Scientific Advisor to President Joe Biden and Cochair of the President’s Council of Advisors on Science and Technology as part of a move that the White House described as “doub[ling] down on science.” *President Biden Announces OSTP Leadership*, THE WHITE HOUSE (Feb. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/16/president-biden-announces-ostp-leadership/> [https://perma.cc/AXK7-6VXB].

While Collins's initial remarks were based on the possibility of adults getting infected while in public and then potentially transmitting the virus to their children at home, his correction presented the household as a COVID-19 risk-free zone. Yet, from the start of the pandemic, public health data have increasingly shown that essential workers, employed in contexts from nursing homes to meatpacking plants, faced high risk of exposure.<sup>6</sup> If infected, these workers, who are disproportionately racial minorities, would unwittingly take COVID-19 home to their families and children.<sup>7</sup> Thus, the home *is* a potential site of COVID-19 exposure and transmission. So why has there been resistance to developing public health interventions that would protect children and other adults in the domain of the home?

In this Essay, we argue that the paradigm of the public/private distinction is implicitly operating as a primary frame in the public health response to the pandemic. The public/private distinction is particularly evident in the guidance around masking and other risk-mitigation policies and advice issued by public health agencies. This public health approach reifies the notion of the home as an exceptional private space that exists outside of the possibility of COVID-19 transmission, obscuring the reality of the high risk of transmission in some households.<sup>8</sup> We argue that the manifestation of the public/private distinction in the COVID-19 response is deeply raced and classed as it ignores the high risks borne by essential workers, who are disproportionately lower-income workers of color, *and their families*. The reality is that many essential workers could not follow the primary advice offered over the course of the pandemic to stay at home and thus bore disproportionate risk of contracting COVID-19 in the workplace and exposing family members at home.

The rest of this Essay is organized as follows. Part I describes how the primary public health response of stay-at-home orders was organized around a sharp differentiation between risk of transmission in the public sphere versus risk of transmission in the private domain of the home. Part II

6. See Charles A. Taylor et al., *Livestock Plants and COVID-19 Transmission*, 117 PROC. NAT'L ACAD. SCI. 31,706, 31,706 (2020) ("[This] study suggests that, among essential industries, livestock processing poses a particular public health risk extending far beyond meatpacking companies and their employees.").

7. One study suggested that 87 percent of the people infected with COVID-19 in meatpacking plants were racial minorities. See Michelle A. Waltenburg et al., *Update: COVID-19 Among Workers in Meat and Poultry Processing Facilities—United States, April–May 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 887, 887 (2020); see also Jocelyn Frye, *On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color*, CTR. FOR AM. PROGRESS (Apr. 23, 2020), <https://www.americanprogress.org/issues/women/reports/2020/04/23/483846/frontlines-work-home> [<https://perma.cc/2CK3-ZABB>]; Celine McNicholas & Margaret Poydock, *Who Are Essential Workers?: A Comprehensive Look at Their Wages, Demographics, and Unionization Rates*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 19, 2020, 11:25 AM), <https://www.epi.org/blog/who-are-essential-workers-a-comprehensive-look-at-their-wages-demographics-and-unionization-rates/> [<https://perma.cc/HX7C-JZ55>].

8. There is an important parallel with what feminist philosopher Nancy Fraser has termed the "crisis of care." Nancy Fraser, *Contradictions of Capital and Care*, 100 NEW LEFT REV. 99, 99 (2016). This Essay returns to this topic in Part II.

elaborates the logic and history of the public/private distinction and the role it has played in structuring the governance of modern society. Part III shows how the public/private distinction has shaped the approach to understanding the household in neoclassical political economy and traces the way those ideas have had an imprint on public health law and policy. In Part IV, we move beyond the public/private distinction by turning our attention to commonsense public health policy measures that would contribute to decreased risk of COVID-19 transmission in the home, such as Dr. Collins's masking advice. Highlighting the simplicity of these responses not only offers pragmatic tips, but also serves to highlight how entrenched the public/private distinction has been in the response. Without this divide, these responses could have—and should have—been prioritized. This Essay then concludes with a brief discussion of the theoretical and policy implications of the preceding analysis.

### I. COVID-19 RISK: THE PRIVATE HOME VERSUS THE PUBLIC DOMAIN

Stay-at-home orders were one of the earliest actions taken by states as the threat of COVID-19 became clear. Between March 1 and May 31, 2020, forty-two states and territories announced mandatory orders to remain at home.<sup>9</sup> These stay-at-home orders ranged in terms of target population and area, with some being issued at the city or county level, while others were issued at the state level.<sup>10</sup> For example, the California stay-at-home order, one of the first in the country, stated that “all individuals living in the State of California” should “stay home or at their place of residence except as needed to maintain continuity of operations of the federal critical infrastructure sectors.”<sup>11</sup> Most states implemented a list of essential services that could continue to operate during this time.<sup>12</sup> As the Morbidity and Mortality Weekly Report (MMWR) from the Centers for Disease Control and Prevention (CDC) described, the idea was to reduce population movement in order to prevent close contact “among persons outside the household, potentially limiting exposure to persons infected with

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9. See Amanda Moreland et al., *Timing of State and Territorial COVID-19 Stay-at-Home Orders and Changes in Population Movement—United States, March 1–May 31, 2020*, 69 MORBIDITY & MORTALITY WKLY. REP. 1198, 1198 (2020). For a discussion of the efficacy and impact of stay-at-home orders, see generally James H. Fowler et al., *Stay-at-Home Orders Associate with Subsequent Decreases in COVID-19 Cases and Fatalities in the United States*, PLOS ONE, June 10, 2021, at 1; Dhaval M. Dave et al., *When Do Shelter-in-Place Orders Fight COVID-19 Best?: Policy Heterogeneity Across States and Adoption Time* (Nat'l Bureau Econ. Rsch., Working Paper No. 27,901, 2020); Andrew I. Friedson et al., *Did California's Shelter in Place Order Work?: Early Coronavirus-Related Public Health Effects* (Nat'l Bureau Econ. Rsch., Working Paper No. 26,992, 2020).

10. For an example of a stay-at-home order at the city level, see N.Y.C. Exec. Order No. 103 (Mar. 25, 2020). For an example of a stay-at-home order at the state level, see Cal. Exec. Order No. N-33-20 (Mar. 19, 2020).

11. Cal. Exec. Order No. N-33-20 (Mar. 19, 2020).

12. See, e.g., *id.* For example, the California executive order listed the essential services that would remain open: gas stations, pharmacies, food (grocery stores, farmers markets, food banks, convenience stores, takeout and delivery restaurants), banks, laundromats, and essential state and local government services. *Id.*

SARS-CoV-2.”<sup>13</sup> The MMWR went on to say that “stay-at-home orders can help protect the public’s health by limiting potential exposure to SARS-CoV-2 and reducing community transmission of COVID-19.”<sup>14</sup> The message was clear: while the public domain is a zone of risk, the home is a site of safety.

The logic of the stay-at-home orders was centered on an imagined family: a family that was at least middle-class, one in which remote work options were possible, in which childcare was available in the home during working hours, in which there was food security, and which was free from abuse or violence. Yet the effectiveness of the stay-at-home orders was challenged by the reality that many people could not stay at home. This was particularly true for essential workers, which included a range of people from those working in health-care facilities, like hospitals, to those working at meatpacking facilities, grocery stores, and doing “gig economy”-based food delivery.<sup>15</sup> While physicians and nurses were rightly celebrated for bravely facing the risks of contracting COVID-19 while caring for the ill, in the shadows were the many (often people of color) who were also working in high-risk health-care settings as nursing aides, medical assistants, and janitorial staff.<sup>16</sup> Similarly, the explosive growth of online delivery services during the pandemic was enabled by the growing class of precarious gig economy workers who took on this risky work, many having little choice to do so as a result of employment losses in other areas of work as the economy shut down.<sup>17</sup> Further, as the pandemic unfolded, Americans learned of the thousands of workers who were occupying high-risk occupations in oft-overlooked nodes of essential supply chains—such as meatpacking plants—and who were contracting COVID-19 at alarming rates.<sup>18</sup> Many of

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13. Julie O'Donnell et al., *Vital Signs: Characteristics of Drug Overdose Deaths Involving Opioids and Stimulants—24 States and the District of Columbia, January–June 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 1190, 1199 (2020).

14. Moreland et al., *supra* note 9, at 1199.

15. See Cal. Exec. Order No. N-33-20 (Mar. 19, 2020) (noting that government facilities were deemed essential and hence, requiring workers to provide the services in question); Taylor et al., *supra* note 6, at 31,713 (discussing “aspects of large meat processing plants [that] render them especially susceptible to spreading respiratory viruses”).

16. See Molly Kinder, *Essential But Undervalued: Millions of Health Care Workers Aren't Getting the Pay or Respect They Deserve in the COVID-19 Pandemic*, BROOKINGS INST. (May 28, 2020), <https://www.brookings.edu/research/essential-but-undervalued-millions-of-health-care-workers-arent-getting-the-pay-or-respect-they-deserve-in-the-covid-19-pandemic/> [<https://perma.cc/M7U4-6YPA>].

17. See Rebecca Henderson, *How COVID-19 Has Transformed the Gig Economy*, FORBES (Dec. 10, 2020, 10:18 AM), <https://www.forbes.com/sites/rebeccahenderson/2020/12/10/how-covid-19-has-transformed-the-gig-economy/> [<https://perma.cc/Z7FV-TRQ2>].

18. The spread of COVID-19 in the meatpacking industry was an important topic within the U.S. House Select Subcommittee on the Coronavirus Crisis “amid evidence the plants were major spreaders of COVID-19 and that workers suffered unusually severe outbreaks.” Leah Douglas, *Nearly 90% of Big US Meat Plants Had COVID-19 Cases in Pandemic's First Year—Data*, REUTERS (Jan. 14, 2022, 1:50 PM), <https://www.reuters.com/business/nearly-90-big-us-meat-plants-had-covid-19-cases-pandemics-first-year-data-2022-01-14/> [<https://perma.cc/2FDM-PNF4>]. A Reuters report found that “[d]ata from meatpackers Tyson Foods . . . JBS, Cargill, Smithfield Foods and National Beef made public in October showed

these lower-income workers were undocumented immigrants of color who disproportionately lived in overcrowded households.<sup>19</sup> As studies showed, these workplace exposures led to exposures in the home, placing the children and extended family members of those who worked in those settings at high risk of contracting COVID-19 at home.<sup>20</sup>

A paradox emerged, one which many of us witnessed in real time: while some families were able to abide by the stay-at-home orders and enjoy the zone of safety that it provided, for others the home increasingly became a site of COVID-19 transmission as some household members were forced to face the risks of working in the public domain to survive the precarious economic environment created by the pandemic.<sup>21</sup>

## II. GOVERNING COVID-19 RISK THROUGH THE PUBLIC/PRIVATE DISTINCTION

The high visibility of the racialized underclass that continued to face the risk of contracting COVID-19 in the public domain due to financial need, while others stayed home, has led to theorizing about why the public health response failed to take into account the needs of so many individuals and families.<sup>22</sup> Scholars have offered a number of explanations for this paradox, ranging from structural racism and gender inequality to a public health infrastructure that does not adequately address the social determinants of health in the context of a fundamentally flawed social safety net.<sup>23</sup> We have

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59,000 cases of COVID-19 and 269 deaths among their workers between March 2020 and Feb. 1 2021. Both figures were around *three times* higher than previous estimates.” *Id.*

19. Mariana C. Arcaya et al., *Rising Home Values and COVID-19 Case Rates in Massachusetts*, SOC. SCI. & MED., Nov. 2020, at 1, 4–5 (“Crowding, doubling up, homelessness, and taking on part-time work in jobs that carry COVID-19 exposure risk may help explain how rapidly increasing home values and unaffordable housing create geographic and social disparities in COVID-19 outcomes.”).

20. See generally Taylor et al., *supra* note 6 (discussing risks in meatpacking).

21. See generally RAUL HINOJOSA-OJEDA ET AL., UCLA N. AM. INTEGRATION & DEV. CTR. & THE MEXICAN INSTITUTO NACIONAL DE ESTADÍSTICA Y GEOGRAFÍA, *ESSENTIAL BUT DISPOSABLE: UNDOCUMENTED WORKERS AND THEIR MIXED-STATUS FAMILIES* (2020), <https://irle.ucla.edu/wp-content/uploads/2020/08/Essential-Undocumented-Workers-Final-w-Cover.pdf> [<https://perma.cc/MWJ8-DJA8>]; Maeve Higgins, *The Essential Workers America Treats as Disposable*, N.Y. REV. (Apr. 27, 2020), <https://www.nybooks.com/daily/2020/04/27/the-essential-workers-america-treats-as-disposable/> [<https://perma.cc/6HSL-7RDBJ>]; Catherine Powell, *The Color and Gender of COVID: Essential Workers Not Disposable People*, THINK GLOBAL HEALTH (June 4, 2020), <https://www.thinkglobalhealth.org/article/color-and-gender-covid-essential-workers-not-disposable-people> [<https://perma.cc/KB5A-XBJF>].

22. The most recent U.S. Supreme Court decision striking down the Biden administration’s Occupational Safety and Health Administration (OSHA) workplace vaccination mandate is yet another example of legal barriers to protecting the public health that are likely to exacerbate the disproportionate effects by race and class. *Nat’l Fed’n of Indep. Bus. v. Dep’t of Labor, Occupational Safety & Health Admin.*, No. 21A244 (U.S. Jan. 13, 2022) (per curiam).

23. See generally Catherine Albiston & Catherine Fisk, *Precarious Work and Precarious Welfare: How the Pandemic Reveals Fundamental Flaws of the U.S. Social Safety Net*, 42 BERKELEY J. EMP. & LAB. L. 257 (2021) (highlighting the catastrophic effects of the employment-based social insurance system in the United States on inequality by race, class,



also contributed to this growing literature, arguing in a recent article that the centrality of individual risk and personal responsibility in the American response to the COVID-19 pandemic privileges individual behaviors over the structural vulnerabilities that produce racially inequitable health outcomes.<sup>24</sup>

This Essay builds on our earlier work by identifying an additional subterranean logic that guides the flawed public health response and obscures necessary interventions. We argue that public health is guided by the logic of the public/private distinction. Following family law scholar Frances Olsen, we describe how the public/private distinction operates in public health governance as a “structure of consciousness”:<sup>25</sup> “a shared vision of the social universe that underlies a society’s culture and also shapes the society’s view of what social relationships are ‘natural’ and, therefore, what social reforms are possible.”<sup>26</sup> Olsen posits that the core of this distinction is the imagined dichotomy between the sphere of the market and the sphere of the family.<sup>27</sup> We likewise argue that this market-family dichotomy is at

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gender, and immigration status); Lindsay F. Wiley & Samuel R. Bagentos, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, 52 ARIZ. ST. L.J. 1235 (2020) (arguing for a solidarity-based approach to the pandemic public health response); Ruqijah Yearby & Seema Mahopatra, *Law, Structural Racism, and the COVID-19 Pandemic*, J.L. & BIOSCIENCES, Jan.–June 2020, at 1 (highlighting the role of structural racism in the disparate impact of COVID-19).

24. See generally Aziza Ahmed & Jason Jackson, *Race, Risk and Personal Responsibility in the Response to COVID-19*, 121 COLUM. L. REV. F. 47 (2021). We argued that the ideology of personal responsibility that is characteristic of neoliberalism places the onus for risk mitigation on individual action rather than on the social and legal determinants of health. We describe the conceptual frameworks on which the personal responsibility approach to public health rests. *Id.* By emphasizing individual actions over structural responses, we describe how public health agencies such as the CDC have failed to take in to account the circumstances of the millions who live in multigenerational or overcrowded households, who are housing insecure or actually homeless, who do not have access to alternatives to public transportation, and who cannot influence their working conditions. *Id.* at 52. We showed how this individual responsibility public health approach is not idiosyncratic; it is a fundamental dimension of the wider move toward neoliberal techniques of societal governance. *Id.* at 49. Crucially, we argued that “[t]he idea that individuals made the decisions that controlled their health and destiny dovetailed with the market-oriented political and economic ideology of neoliberal governmentality that, through the 1980s and 1990s, was slashing public services funding across the board while promoting progress through individual entrepreneurship, hard work, and personal responsibility.” *Id.* at 59. This ties in with key aspects of the public/private distinction that we are elaborating in this Essay. See also Cecília Tomori et al., Comment, *Where Is the “Public” in American Public Health?: Moving from Individual Responsibility to Collective Action*, 45 eCLINICALMEDICINE 1, 1–2 (2022).

25. Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1498 (1983). Duncan Kennedy specifically describes legal consciousness:

The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind. Yet everyone, including actors who think they disagree profoundly about the substantive issues that matter, would dismiss without a second thought (perhaps as “not a legal argument” or as “simply missing the point”) an approach appearing to deny them.

DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 11 (1998).

26. Olsen, *supra* note 25, at 1498.

27. *Id.* at 1560–61.

the heart of the public/private distinction that we observe in public health. Operating as a commonly shared assumption among those responsible for crafting the response to the public health crisis, the private sphere of the home was never understood to be a site for risk of transmission. It was only the public sphere (the market) that was a site of risk. Yet the risk-free home of the public health policymakers' imagination did not match the reality of many people's lives. The imagined home was one where household members were able to work from home. This conception became a stand-in for all "homes" but ignored those who had to exit the home due to financial need.

This Essay argues that understanding the vast mismatch between assumption and reality requires understanding the power of the public/private distinction in structuring societal governance. It draws on literatures in family law, feminist legal theory, critical legal theory, and feminist political economy and philosophy in elaborating this claim in the context of the deep structural inequalities of the COVID-19 public health response. It identifies the roots of the public/private distinction in the tripartite state-market-family distinction familiar from classical and neoclassical political economy and traces the way it has been imported into legal discourse and policy action through the subfield of law and economics.

Professor Robert Mnookin describes the public/private distinction as an ideological dichotomy that sharply distinguishes the "legitimate bounds of government coercion and regulation (the private sphere) from those where government has a legitimate role (the public sphere)."<sup>28</sup> Mnookin suggests that

the dichotomy between public and private can bring into focus two questions central to political theory and moral philosophy: (1) Should certain activities be considered "private" and thus at least presumptively beyond the legitimate sphere of regulatory, paternalistic governmental power? (2) If so, what activities should be considered "private" and why?<sup>29</sup>

These certainly are crucial questions. Yet, as Olsen argues, what is considered "public" and "private" is politically constructed and highly contested. Following the observation that this logic structures legal regimes, key questions remain: what are the distributional implications of designating some things as public and others as private, and "why [does] the legitimization or delegitimation work[]." <sup>30</sup> Olsen argues that ultimately the critical issue is about "hierarchy," "domination," and "maintaining the status quo."<sup>31</sup>

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28. Robert Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429, 1429 (1982).

29. *Id.*

30. Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 325, 327 (1993).

31. *Id.* at 325. Professor Karl Klare's argument that the public/private divide (in labor regulation) ultimately serves to entrench class hierarchy is an important corollary. See generally Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

The public/private distinction in law thus “refers to notions that legitimize or delegitimize legal regulative ‘intervention’ in different spheres of human activity.”<sup>32</sup> For feminists, the dichotomy played an important role in structuring a gendered world in which women existed in the private sphere and men in the public sphere.<sup>33</sup> The private sphere is associated with affective life in the home, family and culture, care, and child-rearing, all of which are deeply intertwined with notions of gender.<sup>34</sup> The public sphere was associated with employment and the market.<sup>35</sup>

Scholars in both social and legal theory have traced the lineage of the public/private distinction through a threefold periodization, beginning in the nineteenth century.<sup>36</sup> Feminist political philosopher Nancy Fraser argues that there are “three regimes of social reproduction-cum-economic production in capitalism’s history.”<sup>37</sup> The first began during the early industrial era, when capitalist societies distinguished “the work of social reproduction from that of economic production,” relegating it “to a newly institutionalized ‘domestic sphere’ where its social importance was obscured.”<sup>38</sup> Capitalist societies thus followed a Victorian logic that “separate[d] social reproduction from economic production, associating the first with women, and obscuring its importance and value” while associating the second with men and elevating its importance in social life.<sup>39</sup> This was the moment when the elaboration of separate spheres of market and family began. The second period was of early to mid-twentieth century state-managed capitalism. This regime of large-scale industrial production “internalized social reproduction through state and corporate provision of social welfare,” along with “the seemingly more modern ideal of ‘the family wage,’ even though [as in the first period] relatively few families were [actually] permitted to achieve it.”<sup>40</sup> The third, contemporary regime is characteristic of the neoliberal era, where the state has gradually shed its social welfare responsibilities and “externaliz[ed] carework onto families and communities while diminishing their capacity to perform it.”<sup>41</sup> Fraser argues that the result “amid rising inequality, is a dualized organization of social reproduction, commodified for those who can pay for it, privatized for those

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32. Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1, 4 (2014).

33. See generally Naomi R. Cahn, *Models of Family Privacy*, 67 GEO. WASH. L. REV. 1225 (1999) (discussing separate spheres and the public/private distinction); Martha Albertson Fineman, *Contract and Care*, 76 CHI-KENT L. REV. 1403 (2001) (discussing separate spheres).

34. See Cahn, *supra* note 33, at 1227; Fineman, *supra* note 33, at 1416; Martha Albertson Fineman, *What Place for Family Privacy*, 67 GEO. WASH. L. REV. 1207, 1218 (1999). See generally Gary S. Becker, *Altruism in the Family and Selfishness in the Market Place*, 48 ECONOMICA 1 (1981).

35. See Fineman, *supra* note 33, at 1207.

36. See generally Fraser, *supra* note 8; Shamir, *supra* note 32.

37. Fraser, *supra* note 8, at 104.

38. *Id.* at 102.

39. *Id.*

40. *Id.* at 104.

41. *Id.* at 112.

who cannot—all glossed by the even more modern ideal of the ‘two-earner family.’”<sup>42</sup>

Critical legal theory scholars offer a concurring analytic approach, showing how the idea of separate spheres emerged and became institutionalized in legal thinking through a complementary threefold periodization offered by Professor Duncan Kennedy.<sup>43</sup> From this perspective, the development of legal thinking was predicated on changing ideas of the relationship between the public and the private.<sup>44</sup> Liberal legal ideals emerged in the nineteenth century when “markets became central legitimating institutions.”<sup>45</sup> These liberal ideas held that “legal intervention in the private sphere (namely, the family and the economic market) is unjustified and should be limited (in the market) or nonexistent (in the family), while in the public sphere (state) legal intervention is welcome and necessary.”<sup>46</sup> The idea that the state should not intervene in the private sphere—for example, that the state should not attempt to regulate or even provide guidance on behavior in the home, such as masking during a pandemic—was later challenged by scholars “seeking first to reveal the social-interventionist nature of law, and then to employ it for their own ideological ends—such as the legal realists, and later critical legal scholars, feminists and others.”<sup>47</sup>

These scholarly efforts influenced social legislation that “aimed to make ‘the market more like the family’—less individualistic and more altruistic, solidaristic and infused with relation-based responsibilities.”<sup>48</sup> That is, it led to the rise of the welfare state (or the nanny-state by its detractors) that not only internalized social reproduction through social welfare provided by the

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42. *Id.* at 104. Fraser concludes by noting that in each regime, therefore, the social-reproductive conditions for capitalist production have assumed a different institutional form and embodied a different normative order: first “separate spheres” [the Victorian (gendered) ideal], then the “family wage” [social protection through legislation and a welfare state] and now the (imaginary of) “two-earner family” [under the neoliberal, withered welfare state].

*Id.*

43. This model is based on Duncan Kennedy’s *Three Globalizations of Law and Legal Thought: 1850–2000*, where Kennedy traces the evolution of legal consciousness in the United States. Kennedy identifies three (somewhat overlapping) periods that reflect a distinct mode of legal thinking: liberal legal consciousness under Classical Legal Thought (CLT) (1850–1914), regulatory legal consciousness during the era he refers to as socially-oriented legal reforms (1900–1968), and the third period of neoformalism and policy analysis (1945–2000). See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 19 (David M. Trubek & Alvaro Santos eds., 2006). Professor Hila Shamir offers a very valuable historicization of the public/private distinction that rests on Kennedy’s threefold typology. See generally Shamir, *supra* note 32.

44. See Shamir, *supra* note 32, at 4–5.

45. *Id.* at 4 (quoting Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982)).

46. *Id.* at 4–5.

47. *Id.* at 5–6.

48. *Id.* at 6 (quoting Olsen, *supra* note 25, at 1529).

business sector and the state (as Fraser argued),<sup>49</sup> but also designed and enforced regulations that more directly regulated social life within the “private sphere” of the home. The evolution of the public/private distinction in the contemporary period of neoliberalism in which the state has shifted risk and responsibility onto individuals and households might well be understood in these terms. However, to be clear, we would suggest that the way that the public/private distinction shapes contemporary state approaches to policy and regulation—such as public health guidance during COVID-19—should not be interpreted as a weakening or withdrawal of the role of the state in social life relative to that of the market, but rather as the way that the state works *through* the market to achieve its goals.<sup>50</sup>

Thus, we can identify a parallel set of ideas in conceptualizing the public/private distinction in social theory and legal theory. These ideas rest on a historicized understanding of the evolution of the public/private distinction. These ideas have not only been important in shaping scholarly thinking, but crucially they have also informed law, legislation, policy, and ultimately, societal governance.

### III. LAW, ECONOMICS, AND PUBLIC HEALTH

Legal scholars and political philosophers were not alone in working with these ideas. A similar distinction between the public and the private is made in economic theory, most famously by Professor Gary Becker.<sup>51</sup> In the market, economic man is assumed to be rational, selfish, and disciplined.<sup>52</sup>

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49. See Fraser, *supra* note 8, at 104.

50. We define neoliberalism not as the displacement of the state by the market but rather as the way that the state uses market logics and mechanisms as a mode of governance. See Philip Mirowski, *Postface: Defining Neoliberalism*, in *THE ROAD FROM MONT PÉLERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 417, 421 (Philip Mirowski & Dieter Plehwe eds., 2009). Philip Mirowski notes that some legal scholars mistakenly see neoliberalism “as an ideological movement that disempowers the state.” *Id.* This common understanding is deeply misleading and the definition of neoliberalism as a mode of governance that privileges market-based logics and policies presents a more theoretically compelling and empirically accurate approach.

51. See generally Becker, *supra* note 34. However, it is worth noting that Becker sees himself as following directly on Adam Smith. Becker begins the article with Smith’s oft-cited passage from *The Wealth of Nations*, positing “that people are selfish in their market transactions: ‘It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest.’” *Id.* at 1 (quoting ADAM SMITH, *THE WEALTH OF NATIONS* 14 (Edwin Cannan ed., Mod. Libr. 1937) (1776)). But Becker continues, this time quoting from Smith’s *Theory of Moral Sentiments*:

Yet altruism is generally recognized to be important within a family. Again, Adam Smith said: “Every man feels his own pleasures and his own pains more sensibly than those of other people. . . . After himself, the members of his own family, those who usually live in the same house with him, his parents, his children, his brothers and sisters, are naturally the objects of his warmest affections.”

*Id.* at 1 (quoting ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 321 (Henry G. Bohn 1853) (1759)).

52. See Olsen, *supra* note 25, at 1500.

Yet in the family, economic man is considered to be nurturing, caring, affective, and altruistic.<sup>53</sup>

Becker posits this distinction based on the logic of efficiency and market competition, arguing, “I believe that altruism is less common in market transactions and more common in families because altruism is less ‘efficient’ in the market place and more ‘efficient’ in families.”<sup>54</sup> Altruistic behavior thus gets competed out of the market but altruistic behavior in familial settings generates greater utility, and indeed, Becker’s theory predicts that the relative number of altruistic families expands in society by generating greater utility from higher investment returns.<sup>55</sup> Becker thus offers a model of human behavior in the private sphere of the household that stands in sharp contrast to the public sphere of the market.<sup>56</sup>

These insights from Becker were picked up and translated into public health by law and economics scholars, including Judge Richard Posner and Professor Tomas Philipson. In their book, *Private Choices, Public Health*, Posner and Philipson describe how some people are altruists while others are egoists.<sup>57</sup> These two groups of people respond differently to legal interventions that aim to foster behavior change.<sup>58</sup> In writing about AIDS, a topic on which law and economics scholars have been prolific, they posit that all sexually active people are either altruists or egoists.<sup>59</sup> It then follows that

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53. See Becker, *supra* note 34, at 1. Becker begins by assuming that only one actor in the family is altruistic while all others are “selfish beneficiaries” of his altruistic preferences. Becker’s model of the altruistic household assumes a male head of the household, and then operationalizes this assumption to account for coordinated behavior in the family that maximizes a single household utility curve (rather than a set of individual and heterogenous utility curves as would be expected in the public sphere of the market). See *id.*

54. *Id.* at 10.

55. See *id.* at 12.

56. See generally *id.* It is worth noting that, within the structure of Fraser’s threefold model of the rise of the regimes of “separate spheres” presented in the previous section, Becker’s household economics emerged precisely during the transition from state-managed welfare capitalism to neoliberalism. See Fraser, *supra* note 8, at 104. See generally GARY S. BECKER, A TREATISE ON THE FAMILY (2009). For an excellent analysis of the reception of Becker’s ideas in feminist legal theory and family law, see generally Philomila Tsoukala, *Gary Becker, Legal Feminism, and the Cost of Moralizing Care*, 16 COLUM. J.L. & GENDER 357 (2007).

57. See generally TOMAS J. PHILIPSON & RICHARD A. POSNER, PRIVATE CHOICES, PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE (1993).

58. See generally *id.* Chapter six is entirely devoted to policy interventions for behavioral change. See *id.* at ch. 6.

59. See Richard A. Posner & Tomas J. Philipson, *Optimal Regulation of AIDS* 3 (Coase-Sandor Inst. L. & Econ. Working Paper No. 6, 1992) (“All sexually active persons are assumed to fall into one of two groups. In the first, persons are altruistic toward their sexual partners, meaning that a disease or other cost to a person’s sexual partner or partners is also a cost (though not necessarily, or ordinarily, as great a cost) to the person. This implies that if he knows he’s infected this knowledge becomes for him a reason to refrain from unsafe sex. In the second group, there is no altruism toward one’s sexual partners, implying that knowing oneself to be infected does not operate as a reason against one’s engaging in unsafe sex. We call persons in the first group altruists, and persons in the second group egoists.”).

understanding this behavioral distinction is crucial to designing successful public health interventions.<sup>60</sup>

The historical role of the public/private distinction in law coupled with Becker's work in economics provides valuable insights to the logic of state regulation and the COVID-19 public health response. The state emphasis on regulating the public sphere may root in the assumption that people act *selfishly*—i.e., people will not mask, social distance, or practice the other individual-level behaviors that are deemed important for limiting the spread of COVID-19. These forms of selfish behavior are believed to generate overall negative societal outcomes in terms of increased COVID-19 prevalence, based on the logic of economics that sees societal-level outcomes as a product of aggregate individual-level behavior.

In sharp contrast to state regulation in the public sphere, we suggest that insights from Becker hold that the state will *not* regulate in the private sphere because it assumes that people act *altruistically*, which in turn generates positive household level outcomes. In general, these forms of altruistic behavior enable social reproduction in the family. In the context of the pandemic, they may include ensuring health safety, as well as various forms of emotional and material support, such as caring for children who are home from school and ensuring the continuation of their education.

The logic of the public/private divide underpins the unevenness and inconsistency of state action and inaction in what has ultimately resulted in a grossly inequitable pandemic response. More broadly, the public/private distinction is a fundamental part of the relationship between state, market, and society that has increasingly shifted costs to households as an outcome of the rise of neoliberalism and the decline of the welfare state.<sup>61</sup> This approach to public health ignores the structural imperatives that force essential workers—disproportionately lower-income people of color—to face risk of COVID-19 exposure in the public domain without offering guidance that might allow them to mitigate risk of COVID-19 transmission at home. We suggest that the implicit assumption of state actors is that people are choosing to go out into the public sphere and take on risk, but when they return to the private sphere of the home they are in a risk-free zone. Much like feminist legal scholars have long argued is the case with domestic violence where the police just stop at the door, public health regulation refuses to enter the supposed private sphere of the home. However, this approach to public health ignores the structural imperatives that force

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60. While Posner and Philipson do not focus on the family in *Optimal Regulation of AIDS*, they do note that altruism is enhanced by monogamy. And like Becker, they also draw on the authority of classical political economy, citing Adam Smith's argument in *The Theory of Moral Sentiments* that "people are not 'global' altruists, but instead are selfish toward strangers and altruistic toward relatives and close friends." *Id.* at 9.

61. See generally Margaret R. Somers & Fred Block, *From Poverty to Perversity: Ideas, Markets and Institutions over 200 Years of Welfare Debate*, 70 AM. SOCIO. REV. 260 (2005). Note that the rise of neoliberalism itself is linked with ideas from Chicago School economics, of which Gary Becker is a central figure. For a historical perspective on the rise of neoliberalism more generally, see QUINN SLOBODIAN, *GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM* (2018), and Mirowski, *supra* note 50, at 421.

essential workers to face risk in the public domain without offering guidance that might allow them to mitigate the risk of household transmission. These assumptions illustrate the power of the public/private distinction in the COVID-19 public health response.

Law and economics have had large impacts on public health. Through the birth of economic epidemiology and its offshoots, it has become common to both study and advocate for the role of policy and legal incentives to foster behavior change.<sup>62</sup> While this is a relatively recent and distinct development in public health policymaking, the idea of otherwise selfish individuals behaving altruistically toward those at home is rooted in a well-established line of theorizing that can be traced backward from Posner to Becker and ultimately to Adam Smith. The public/private distinction is similarly so deeply ingrained in the history of legal thought<sup>63</sup> that Kennedy argues that it is embedded in legal consciousness.<sup>64</sup> The public/private distinction has thus underpinned the public health response to many diseases in the late twentieth century, from malaria to HIV/AIDS, and is very much a structuring force in the context of COVID-19.

#### IV. BEYOND THE PUBLIC/PRIVATE DISTINCTION: ALTERNATIVE APPROACHES TO HOUSEHOLD RISK REDUCTION

Perhaps the most vivid evidence of the public/private divide in the public health response to COVID-19 comes not in what the government did do—issue stay-at-home orders discussed above—but also in what most state governments did *not* do. Certain preventative steps should have been pursued more aggressively if the home was figured as a site of intervention. These include providing High Efficiency Particulate Air (HEPA) filters for individuals in their homes, making it possible for family members—especially those in crowded living spaces—to quarantine outside of the home, and providing rapid tests. We address these measures in order.

As it was established that the transmission of COVID-19 was through aerosolized and respiratory transmission, air filters became a key intervention recommended by the CDC.<sup>65</sup> In public guidance about HEPA filters, school classrooms featured heavily.<sup>66</sup> As the idea circulated that the virus was

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62. See, e.g., RICHARD THALER & CASS SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* (2009).

63. See generally Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982).

64. See generally Kennedy, *supra* note 25.

65. See William G. Lindsley et al., *Efficacy of Portable Air Cleaners and Masking for Reducing Indoor Exposure to Simulated Exhaled SARS-CoV-2 Aerosols—United States, 2021*, 70 MORBIDITY & MORTALITY WKLY. REP. 972, 972–76 (2021).

66. See *Improving Ventilation in Schools, Colleges, and Universities to Prevent COVID-19*, U.S. DEP'T OF EDUC., <https://www.ed.gov/improving-ventilation-schools-colleges-and-universities-prevent-covid-19> [<https://perma.cc/64KP-PVGS>] (last visited Apr. 2, 2022). Students have also protested for better investment in air quality and masks. See Laura Meckler & Hannah Natanson, *Students, Seeing Lax Coronavirus Protocols, Walk Out and Call in Sick to Protest In-Person Classes*, WASH. POST (Jan. 14, 2022, 4:09 PM),



aerosolized, rather than solely transmitted through respiratory particles,<sup>67</sup> it became clear that buildings would need to be properly ventilated in order for the air to be cleared of the virus.<sup>68</sup> People who could afford air filters were able to access them for their homes and sales of air filters went up dramatically.<sup>69</sup> Even as air filters became central to an effective COVID-19 response, and although transmission of COVID-19 often took place in homes, especially where individuals were essential workers, the home was ignored in the public disbursement of resources around air filters. A commonsense approach to decreasing transmission of COVID-19 in the home would have been to distribute HEPA filters, especially to the homes of essential workers who were unable to mitigate through social distancing.

In addition to HEPA filters, isolation at home was key to stopping intra-home transmission of COVID-19. The logic is clear: by isolating individuals while they are infectious, the person who is positive is unable to then spread the virus to others.<sup>70</sup> Many, however, would have found it difficult to follow the CDC guidelines on quarantining at home, which suggested that the person with COVID-19 should try to have their own bathroom and to stay in a separate room.<sup>71</sup> These guidelines were premised on the idea that people have additional space in their home in which to isolate. If these were the standards for isolation, it is obvious that many people in the United States would not have the space to isolate at home if necessary. Thus, providing individuals who cannot effectively isolate at home—those people who live in smaller dwellings—a place to go to isolate would assure that others in the household are not infected by that individual. This would be especially important for households in which there is an elderly or immunocompromised person.

A plan to offer people from the household a place to isolate has been implemented in some jurisdictions, though inconsistently. Most notably, New York City had the COVID-19 Hotel Program which was specifically

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<https://www.washingtonpost.com/education/2022/01/14/students-walkout-covid-safety/> [<https://perma.cc/UQS5-ZA3K>].

67. This was a controversial idea at the start of the pandemic as the Trump administration attempted to downplay the aerosolized virus as a route of transmission in order to push a “reopen the economy” agenda. See Laurel Wamsley, *CDC Publishes—Then Withdraws—Guidance on Aerosol Spread of Coronavirus*, NPR (Sept. 21, 2020, 4:08 PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/09/21/915351325/cdc-publishes-then-withdraws-guidance-on-aerosol-spread-of-coronavirus> [<https://perma.cc/L8E6-DVVA>].

68. See *Isolation Hotel Program for Those with COVID-19*, NYC, <https://www1.nyc.gov/site/helpnownyc/get-help/covid-19-hotel-program.page> [<https://perma.cc/F9WT-V8YL>] (last visited Apr. 2, 2022).

69. See Daniela Sirtori-Cortina, *Covid-19 and Wildfires Spell Big Business for the Air Purifier Industry*, BLOOMBERG GREEN (Aug. 5, 2021, 6:00 AM), <https://www.bloomberg.com/news/articles/2021-08-05/covid-19-and-wildfires-are-driving-a-big-increase-in-u-s-air-purifier-sales> [<https://perma.cc/H8JL-UVVF>].

70. See *Quarantine and Isolation*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 27, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/quarantine-isolation.html#quarantine> [<https://perma.cc/6MSY-FY3Q>].

71. See *id.*

designed for those who needed to isolate and did not have space to effectively do so.<sup>72</sup> The city offered free hotel rooms to individuals for up to ten days.<sup>73</sup> During pandemic surges, however, these hotel rooms were in short supply. At the time of writing this Essay, there were no rooms available.<sup>74</sup> Other cities, including Los Angeles, offered medical sheltering programs for the homeless and those in need of rooms in which to isolate.<sup>75</sup> At least one study has shown that these programs are effective in containing the spread of COVID-19.<sup>76</sup>

Self-testing via rapid test provided another opportunity to make an intervention into the home. To respond to a positive COVID-19 case in the home, it is necessary to know that someone is positive. From the beginning of testing rollout, individuals faced challenges to accessing COVID-19 tests. Rapid tests began receiving Emergency Use Authorization from the U.S. Food and Drug Administration in late 2021. Rapid tests provide information on whether a person is infectious at the time of taking the test.<sup>77</sup> Readily available rapid tests in a home would allow an individual to test frequently and ensure that they are not infectious to other members of their family even if they did have an exposure at work. Upon a positive test, an individual would be able to isolate, if possible, at home.

Home tests could have been used to help limit potential exposure at home. After an exposure, for example, home tests could allow people to utilize the “test to stay” method recommended for schools.<sup>78</sup> In the school setting, to minimize school disruption, rather than isolate at home after an exposure, a child would test at least twice in a seven-day period until the test turned positive or until the person could no longer test positive from that exposure.<sup>79</sup> Used at home, a rapid test could have a similar effect: to provide people the opportunity to act with minimal disruption to their time at home.<sup>80</sup>

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72. See *Isolation Hotel Program for Those with COVID-19*, *supra* note 68.

73. See *Take Care*, NYC HEALTH & HOSPS., <https://www.nychealthandhospitals.org/test-and-trace/take-care/> [<https://perma.cc/AZB6-DMVH>] (last visited Apr. 2, 2022).

74. See Mary Steffenhagen, *Long Waits for NYC’s COVID-19 Isolation Hotel Rooms, as Omicron Cases Spike*, CITY LIMITS (Dec. 28, 2021), <https://citylimits.org/2021/12/28/long-waits-for-nycs-covid-19-isolation-hotel-rooms-as-omicron-cases-spike/> [<https://perma.cc/X44J-7YG9>].

75. See *COVID-19: Medical Sheltering*, CNTY. OF L.A., <https://covid19.lacounty.gov/medical-sheltering/> [<https://perma.cc/W43G-F9B9>] (last visited Apr. 2, 2022).

76. See generally Jonathan D. Fuchs et al., *Assessment of a Hotel-Based COVID-19 Isolation and Quarantine Strategy for Persons Experiencing Homelessness*, JAMA NETWORK, Mar. 2, 2021, at 1.

77. See *Self-Testing at Home or Anywhere*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 16, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/testing/self-testing.html> [<https://perma.cc/UP7D-PTE6>].

78. Press Release, Ctrs. for Disease Control & Prevention, *Test-To-Stay Options Can Help Keep Students in School During COVID-19* (Dec. 17, 2021), <https://www.cdc.gov/media/releases/2021/s1217-Test-To-Stay.html> [<https://perma.cc/CVT8-2VAB>].

79. U.S. DEP’T OF EDUC., *TEST TO STAY IMPLEMENTATION CHECKLIST FOR SCHOOLS*, <https://www2.ed.gov/documents/coronavirus/test-to-stay-checklist.pdf> [<https://perma.cc/TEK8-33TA>].

80. See generally Natsumi Nemoto et al., *Evaluation of Test to Stay Strategy on Secondary and Tertiary Transmission of SARS-CoV-2 in K–12 Schools—Lake County, Illinois, August*

But rapid tests have been hard to come by and they have been expensive. Calls for the government to distribute tests finally resulted in the Biden administration providing them for free. As this Essay is being drafted, at the start of the third year of the pandemic and nine months after the development of the first rapid test, rapid tests are being mailed out for the first time (each person receives eight tests total).<sup>81</sup> In a pandemic in which timely notification of your COVID-19 status can prevent further transmission, the White House suggested that U.S. government rapid “tests will typically ship within 7–12 days of ordering,” and the U.S. Postal Service estimates a further one to three days for delivery.<sup>82</sup> The only other way to access rapid antigen tests for individuals who want to get tested is to pay out-of-pocket or have insurance reimburse them for the antigen test. Further, up until January 15, 2022, following Biden administration guidance, many insurers were requiring a health-care practitioner to suggest the rapid antigen test in order to qualify for reimbursement, thereby undermining the ability of people to get access to quick results and potentially disincentivizing testing.<sup>83</sup>

Finally, masking at home would be a sensible precaution if members of that household work in high-risk settings or are frequently exposed to COVID-19. The CDC guidance has changed several times on masking, from first denying masks were necessary,<sup>84</sup> to suggesting any face covering, to most recently, on January 14, 2022, suggesting that Americans wear “the

9–October 29, 2021, 70 MORBIDITY & MORTALITY WKLY. REP. 1778 (2021). A very important caveat to this is that tests may not work to effectively detect new variants. See *Do At-Home COVID-19 Tests Detect the Omicron Variant?*, PBS (Dec. 31, 2021, 6:18 PM), <https://www.pbs.org/newshour/health/do-at-home-covid-19-tests-detect-the-omicron-variant> [https://perma.cc/9ZUK-6RMJ]. The use of rapid tests in the Nemoto study was accompanied by mask-wearing and physical distancing and applied when the person was asymptomatic. See Nemoto et al., *supra*, at 1778. This policy where tests are sent to homes at low or no cost had been adopted in other countries, such as the United Kingdom, relatively early in the pandemic, but not in the United States until January 2022 amid the Omicron wave. Mia de Graaf, *The UK Lets Citizens Order 7 At-Home COVID-19 Tests a Day. Here's How it Works*, YAHOO! NEWS (Jan. 13, 2022), <https://news.yahoo.com/us-start-covering-cost-covid-220136288.html> [https://perma.cc/E4FF-3BEW].

81. See *Get Free At-Home COVID-19 Tests*, COVID.GOV, <https://www.covid.gov/tests> [https://perma.cc/S4HF-KAHX] (last visited Apr. 2, 2022).

82. *USPS Free COVID Tests: How to Order, When to Expect Shipments and More*, MSN (Jan. 30, 2022), <https://www.msn.com/en-us/news/us/usps-free-covid-tests-how-to-order-when-to-expect-shipments-and-more/ar-AATj5ZW> [https://perma.cc/9QSP-C6YE].

83. See *Biden-Harris Administration Requires Insurance Companies and Group Health Plans to Cover the Cost of At-Home COVID-19 Tests, Increasing Access to Free Tests*, U.S. DEP'T OF HEALTH & HUM. SERVS. (Jan. 10, 2022), <https://www.hhs.gov/about/news/2022/01/10/biden-harris-administration-requires-insurance-companies-group-health-plans-to-cover-cost-at-home-covid-19-tests-increasing-access-free-tests.html> [https://perma.cc/H2CD-LQF8]. Testing is also very expensive and, while some municipalities do offer free or reduced priced testing, the costs in many locales must be borne by individuals with little government support. At the time of writing this Essay, one of the most popular rapid tests costs approximately \$24 dollars, and a PCR test can cost up to \$250 or more.

84. See Jamie Ducharme, *An N95 Is the Best Mask for Omicron. Here's Why*, TIME (Jan. 18, 2022, 9:42 AM), <https://time.com/6139169/n95-best-mask-omicron-covid-19/> [https://perma.cc/C6S6-JXFB].

most protective masks [they] can.”<sup>85</sup> What is clear is that masking works and high-quality masks are effective in preventing transmission in the home, at work, and among the general public.<sup>86</sup> Distributing masks directly to people’s homes would help address the issue of in-home transmission of COVID-19.<sup>87</sup> This is particularly important as increasing numbers of Americans contract the virus and will likely be cared for by other members of their family.

Each of these proposed interventions, supported by public health scholars and advocates, could help to decrease in-home transmission of COVID-19. The powerful public/private divide, however, has cordoned off the home from public health intervention by the state.

### CONCLUSION

This Essay has argued that the public/private distinction has led to the home being considered an exceptional space in the context of COVID-19. We have sought to highlight the way the public/private distinction has shaped public health policies that deepen some of the core structural inequalities that have characterized the COVID-19 pandemic. We have followed Frances Olsen in suggesting that the most valuable outcome of analyzing the COVID-19 response through the lens of the public/private divide is “to achieve . . . a rethinking of how the categories ‘public’ and ‘private’ are structured, [and] a deeper analysis of how the status quo is maintained [as a means of identifying] new approaches to theorizing social change.”<sup>88</sup> Indeed, while we have argued that the public/private divide operates as a deep “structure of consciousness,” we also wish to emphasize that the categorization of public and private—and the separate spheres of family and market that it currently engenders—is nevertheless unstable, as we showed with the threefold historicization of the public/private distinction.<sup>89</sup> Professor Hila Shamir suggests that an alternative approach would be to “depart from the dichotomous architecture of the public/private distinction, and instead reveal the dynamic and unstable nature of each of the spheres and the division of labor between them.”<sup>90</sup> Such an approach to the public/private

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85. David Shepardson & Lisa Baertlein, *U.S. CDC Urges Americans to Wear “Most Protective Masks You Can,”* REUTERS (Jan. 14, 2022, 5:33 PM), <https://www.reuters.com/world/us/us-cdc-recommends-americans-wear-most-protective-mask-you-can-2022-01-14/> [<https://perma.cc/CBG7-YPWF>].

86. See David Beier, *The Time Has Come for a Major National Effort on Mask Innovation*, MEDIUM (July 20, 2020), <https://davidbeier.medium.com/the-time-has-come-for-a-major-national-effort-on-mask-innovation-8baf75b7617c> [<https://perma.cc/Z5UK-SK6M>]; Abraar Karan et al., *Along with Vaccine Rollouts, the U.S. Needs a National Hi-Fi Mask Initiative*, STAT (Jan. 7, 2021), <https://www.statnews.com/2021/01/07/national-hi-fi-mask-initiative-needed-with-vaccine-rollouts/> [<https://perma.cc/UT57-W36E>].

87. One day before the CDC’s latest mask guidance, President Joe Biden announced that the federal government would make high-quality masks available for free. See Shepardson & Baertlein, *supra* note 85.

88. Olsen, *supra* note 30, at 327.

89. This is a central claim of critical legal scholars and others. See generally Kennedy, *supra* note 43.

90. Shamir, *supra* note 32, at 9.

distinction as a governance frame could open new possibilities that could guide policymakers toward the design and implementation of more equitable policy and legislative responses to the ongoing pandemic.

