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## Who Needs the State? We Do (Maybe)

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## WHO NEEDS THE STATE?: WE DO (MAYBE)\*

DEBORAH M. WEISSMAN\*\*

*The interdependency between private needs and public support is nowhere set in as sharp relief than in the relationship between the family and the State. Families, perhaps the most intimate of all social arrangements, depend upon government “safety net” guarantees to families in need. But the norm of State support to families is a condition that exists principally in the breach. Indeed, the State operates within a settled political economic context that grants families “negative liberty” but denies households the positive right to assistance in order to subsist. The State has largely signaled an economic and moral indifference to the care and well-being of households.*

*These circumstances have summoned mutual aid activists to fill the void created by the failure of the State to function in behalf of the commonwealth. Acting on principles of prefigurative politics, these entities have sought to establish protocols of cooperation and reciprocity to support communities in need. The importance of mutual aid extends beyond elevating norms of altruism and practices of generosity and implies the need to develop self-sustaining systems of support to assist families without releasing the State from its obligations to citizens.*

*This Article considers ways to organize social responses to support families in need. It critically examines State institutions and mutual aid entities to assesses their comparative strengths and weaknesses in the context of a neoliberal political economy. It does so in the context of pandemic-related support. It concludes by identifying the challenges of relying on State or mutual aid and suggests that adequate support for families in crisis requires multiple strategies and collective efforts.*

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## INTRODUCTION

The interdependency between private needs and public support is nowhere as apparent than in the relationship between the family and the State.<sup>1</sup> Families, perhaps the most intimate of all social arrangements, depend upon government “safety net” guarantees to those in need. But the norm of State support to families is a condition that exists principally in the breach. State agencies have largely abdicated responsibility for the well-being of families whose socioeconomic circumstances render them vulnerable to adversities.<sup>2</sup> Indeed, the State operates within a settled political-economic context that grants families “negative liberty,” but denies households a positive right to assistance in order to subsist.<sup>3</sup> The State has largely signaled an economic and moral indifference to the care and well-being of households.<sup>4</sup>

These circumstances have summoned mutual aid activists to fill the void created by the failure of the State to function on behalf of the commonwealth. Acting on principles of prefigurative politics, these entities have sought to establish protocols of cooperation and reciprocity to support communities in need.<sup>5</sup> The importance of mutual aid extends beyond elevating norms of altruism and practices of generosity and implies the need to develop self-

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1. There are few concise definitions of “the State” in domestic or international law. Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, in *STATE/SPACE: A READER* 53–54 (Neil Brenner, Bob Jessop, Martin Jones & Gordon MacLeod eds., 2003) (noting the “messy” definition of the State). In this Article, I refer to the State as institutionalized public power. I borrow from Mann’s definition to identify the State as “a differentiated set of institutions and personnel” with authoritative rule-making powers and obligations. *Id.* at 53. Martha Fineman’s reflections on the meaning of the State are also instructive: “Whatever else it may be, the state is not a monolithic entity; nor is there only one state with which to be concerned.” Martha Albertson Fineman, *States of Being: Response Piece*, 59 *EMORY L.J.* 1171, 1172 (2010). Our federalist system includes national and state entities, legislatures, courts, and executives, all of which function within and as “the State.” *Id.* at 1173; see also Abhimanyu George Jain, *The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory*, 50 *STAN. J. INT’L L.* 1, 51–52 (2014) (noting that arriving at a definition of the State would be difficult and controversial).

2. ROBERT E. GOODIN, BRUCE HEADY, RUUD MUFFELS & HENK-JAN DIRVEN, *THE REAL WORLDS OF WELFARE CAPITALISM* 44–45, 240–41 (1999) (noting that transfer payments have been so low that the “undeserv[ing]” poor receive amounts considered punitive).

3. Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez Faire Markets in the Minimal State*, 77 *LAW & CONTEMP. PROBS.* 25, 25–26 (2014) (defining negative liberty as “freedom from state intervention”).

4. See EMMA DOWLING, *THE CARE CRISIS: WHAT CAUSED IT AND HOW CAN WE END IT?* 21 (2021) (defining care as “all the supporting activities that take place to make, remake, maintain, contain and repair the world we live in and the physical, emotional and intellectual capacities required to do so”).

5. Prefigurative politics refers to the ways in which social movements engage in political strategies to shape and inform social norms to enhance citizen well-being, democratic participation, and progressive social change. Guilherme Fians, *Prefigurative Politics*, in *THE CAMBRIDGE ENCYCLOPEDIA OF ANTHROPOLOGY* 1, 1 (Felix Stein ed., 2022); see also Anton Törnberg, *Prefigurative Politics and Social Change: A Typology Drawing on Transition Studies*, 22 *DISTINKTION* 83, 85 (2021).

sustaining systems of support to assist families without releasing the State from its obligations to citizens.

This Article considers ways to organize social responses to support families in need. It examines State institutions and mutual aid entities to assess their comparative strengths and weaknesses in the context of a neoliberal political economy.<sup>6</sup> Part I briefly describes the ways in which the State has discharged its obligations to families in need with a focus on pandemic-related supportive measures. It pays particular attention to those families imperiled due to household violence and whose circumstances were exacerbated by the pandemic, shutdowns, and imposed isolation.<sup>7</sup> Part II revisits these measures through a critical lens to examine the ways that current political arrangements have acted to undermine support for poor and racial-minority families. The failure of the State to support families in crisis is addressed in Part III, which examines the role of mutual aid networks and forms of collective community efforts. Part III also calls attention to State efforts to preempt, punish, and otherwise neutralize mutual aid activities. Part IV identifies the challenges of relying on State or mutual aid and suggests that adequate support for families in crisis requires multiple strategies and collective efforts.

## I. FAMILIES AND THE STATE

This part provides a brief overview of the ways the State discharges its obligations to support families. It focuses on salutary measures, particularly the State's efforts to provide relief during the COVID-19 pandemic. Notably, the State's actions are often deployed in response to, and in defense of, a neoliberal political system in varying degrees of crisis: political measures adopted to provide ad hoc social measures in defense of an economic-political system.

### A. *The State in Discharge of Its Obligations to Families*

The State discharges its obligations to support families through legislative, judicial, and executive means. It provides public education, welfare programs,

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6. Definitions of neoliberalism vary, but there is a consensus in describing its essence and structure: an ideology that "is based around a belief in so-called 'free markets.'" See OWEN JONES, *THE ESTABLISHMENT: AND HOW THEY GET AWAY WITH IT* 8 (2014). Neoliberalism is understood as a predilection for "a state supervised by the market, rather than a market controlled by the state." Michael Hardt, *Militant Life*, 64 *NEW LEFT REV.* 151, 154 (2010); Stuart Hall, *The Neo-liberal Revolution*, 25 *CULTURAL STUD.* 705, 706 (2011) (noting that the term neoliberalism generally refers to the "shaping influence of capitalism on modern life").

7. This Article uses the term "intimate partner violence" ("IPV"), also referred to as "domestic violence," "gender violence," and "family violence." For a review of the benefits and weaknesses of these terms and the importance of avoiding the imposition of a gendered frame on violence that occurs in intimate relationships, see Julie Goldscheid, *Gender Neutrality and the "Violence Against Women" Frame*, 5 *U. MIA. RACE & SOC. JUST. L. REV.* 307, 323 (2015). See *infra* notes 114–22 and accompanying text regarding the effects of the pandemic on IPV.

food stamps, housing subsidies, and health care.<sup>8</sup> In times of crisis, the State steps into the breach to remedy the failure of market capitalism to sustain minimum salutary conditions of daily life. The New Deal legislation is one example of State efforts to establish rights to subsistence, particularly in moments of economic crisis.<sup>9</sup>

More recent policies enacted during the pandemic provide another occasion to review State support for families. The primary relief measures of the 2020 Coronavirus Aid, Relief, and Economic Security (“CARES”) Act and the 2021 American Rescue Plan (“ARP”) are now well known.<sup>10</sup> The CARES Act included tax relief, economic impact payments (“EIPs” or stimulus checks), and expanded unemployment benefits.<sup>11</sup> The Act also provided some short-term protection from housing foreclosures for households with federally backed mortgages, as well as a temporary moratorium on evictions for certain renters.<sup>12</sup> The ARP extended parts of CARES-funded nutrition assistance to families, utility assistance subsidies, health care, unemployment benefits, funds to support small restaurants, housing vouchers, and other forms of rental assistance.<sup>13</sup> It included a temporary child tax provision, which decreased childhood poverty.<sup>14</sup> Federal ARP stimulus funds to families were used for child

8. For an overview of the history of U.S. welfare programs, see Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457, 479–87 (1987–88). See also Clare Huntington, *The Institutions of Family Law*, 102 B.U. L. REV. 393, 419–20 (2022); Jason DeParle, *Expanded Safety Net Drives Sharp Drop in Child Poverty*, N.Y. TIMES (Sept. 11, 2022), <https://www.nytimes.com/2022/09/11/us/politics/child-poverty-analysis-safety-net.html> [<https://perma.cc/ZQG3-R8RA> (dark archive)] (finding that government programs have reduced child poverty, although racial gaps remain).

9. For an overview of the features of the New Deal, see David M. Kennedy, *What the New Deal Did*, 124 POL. SCI. Q. 251, 265–68 (2009) (recognizing benefits and failures of New Deal politics and policies).

10. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C. § 9001 (2020)); American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified as amended at 15 U.S.C. § 9001 (2021)); see also *About the CARES Act and the Consolidated Appropriations Act*, U.S. DEP’T TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/about-the-cares-act> [<https://perma.cc/Nd9K-W3VZ>]; Christopher J. Armstrong, Joel E. Roberson, Nicole M. Elliot, Miranda A. Franco, Leslie I. Pollner, Eve Maldonado O’Toole, Lauri A. Hettinger, Lisa Ann Barkovic, Kayla Gebeck Carroll, Ethan Jorgensen-Earp & Hannah M. Coulter, *American Rescue Plan Act of 2021: Summary*, HOLLAND & KNIGHT (Mar. 10, 2021), <https://www.hklaw.com/en/insights/publications/2021/03/american-rescue-plan-act-of-2021-summary> [<https://perma.cc/D95S-BGFV>].

11. CARES Act, Pub. L. No. 116-136, 134 Stat. 281.

12. Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *The Folly of Credit as Pandemic Relief*, 68 UCLA L. REV. DISCOURSE 126, 130 (2020) [hereinafter Foohey et al., *Folly of Credit*].

13. See Armstrong et al., *supra* note 10.

14. *The Child Tax Credit*, WHITE HOUSE, <https://www.whitehouse.gov/child-tax-credit/> [<https://perma.cc/8JGA-QFYD>]; see also Zachary Parolin, Sophie Collyer, Megan A. Curran & Christopher Wimer, *Monthly Poverty Rates Among Children After the Expansion of the Child Tax Credit*, CTR. ON POVERTY & SOC. POL’Y COLUM. U., Aug. 20, 2021, at 1, 5,

care and assisted with employment opportunities.<sup>15</sup> The Paycheck Protection Program (“PPP”) provided certain forms of loan forgiveness and grants intended for small businesses.<sup>16</sup> These stop-gap initiatives to cushion the impact of the COVID-induced economic crisis reduced the number of families in poverty.<sup>17</sup>

### B. *The State and the Crisis of Intimate Partner Violence*

The State measures to support families described above are also relevant to families that suffer intimate partner violence (“IPV”). Domestic violence is an egregious social problem with consequences that affect the national economy as well as individual families—and often for generations.<sup>18</sup> Over the years, the federal government has enacted several funding and policy initiatives to address the harms caused by IPV.<sup>19</sup> Perhaps most notably, in 1994 Congress passed the Violence Against Women Act (“VAWA”), ratifying a federal recognition of the

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<https://www.povertycenter.columbia.edu/s/Monthly-Poverty-with-CTC-July-CPSP-2021.pdf> [<https://perma.cc/D63S-LBAY>].

15. Michael Casey, *Affordable Housing, Long Overlooked, Getting Federal Boost*, ALBUQUERQUE J., <https://www.abqjournal.com/2482612/affordable-housing-long-overlooked-getting-federal-boost.html> [<https://perma.cc/P2YR-4GMK>] (last updated Mar. 25, 2022, 12:22 PM).

16. The program, which was administered through the U.S. Small Business Administration, ended in May 2021. *Paycheck Protection Program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program> [<https://perma.cc/VS6W-8L86>]. For an overview of the benefits offered by COVID-related relief measures, see Maxine Eichner, *COVID-19 and the Perils of Free-Market Parenting: Why It Is Past Time for the United States To Install Government Supports for Families*, 90 FORDHAM L. REV. 2509, 2512–15 (2022).

17. JOHN CREAMER, EMILY A. SCHRIDER, KALEE BURNS & FRANCES CHEN, U.S. CENSUS BUREAU, *POVERTY IN THE UNITED STATES: 2021*, at 3–9 (2022), <https://www.census.gov/content/dam/Census/library/publications/2022/demo/p60-277.pdf> [<https://perma.cc/BLC8-H2LQ> (staff-uploaded archive)] (noting improved supplemental poverty rates although no improvement in official poverty rates); Heather Long & Amy Goldstein, *Poverty Fell Overall in 2020 as Result of Massive Stimulus Checks and Unemployment Aid, Census Bureau Says*, WASH. POST (Sept. 14, 2021, 5:40 PM), <https://www.washingtonpost.com/business/2021/09/14/us-census-poverty-health-insurance-2020/> [<https://perma.cc/R733-BRUZ> (dark archive)].

18. Congressional hearings held for the Violence Against Women Act of 1994 demonstrated the economic consequences of IPV. Violence Against Women Act of 1994, Pub. L. No. 103-322, § 40001, 108 Stat. 1796, 1902 (codified as amended in scattered sections of 8, 16, 18, 28, and 42 U.S.C.). See generally Deborah M. Weissman, *Gender Based Violence as Judicial Anomaly: Between “The Truly National and The Truly Local,”* 42 B.C. L. REV. 1081, 1081–82 n.3 (2001) [hereinafter Weissman, *Gender Based Violence*] (citing to Senate and House committee hearings); Debra Pogrud Stark, Jessica M. Choplin & Sarah Elizabeth Wellard, *Properly Accounting for Domestic Violence in Child Custody Cases: An Evidence-Based Analysis and Reform Proposal*, 26 MICH. J. GENDER & L. 1, 22, 26 (2019) (explaining intergenerational transmission of domestic violence).

19. See Deborah M. Weissman, *In Pursuit of Economic Justice: The Political Economy of Domestic Violence Laws and Policies*, 2020 UTAH L. REV. 1, 23–25 [hereinafter Weissman, *In Pursuit of Economic Justice*] (reviewing federal tax code amendments to protect IPV survivors from tax injustice resulting from abuse).

relationship between gender-based violence and women's equality and economic mobility.<sup>20</sup>

Social and economic calamities associated with the pandemic have exacerbated IPV.<sup>21</sup> In response, the ARP apportioned nearly five million dollars to address IPV via the Family Violence Prevention and Services Act ("FVPSA").<sup>22</sup> This included funding for local public housing authorities to provide vouchers to families experiencing various forms of gender violence.<sup>23</sup> Additionally, President Biden issued an executive order creating the White House Gender Policy Council, which was tasked with addressing the impact of COVID-19 on women and girls.<sup>24</sup> The order paid special attention to gender-based violence and required the council to coordinate with the Ensuring an Equitable Pandemic Response and Recovery Task Force.<sup>25</sup>

\* \* \*

Circumstances and occasions have often obliged the State to act in a robust fashion in defense of families, and never with greater dispatch than during times of national crisis that threaten households with dislocation and disruption.<sup>26</sup> These responses give expression to the premise that the State has obligations to families that must be fulfilled to realize "a version of social democracy."<sup>27</sup> As the next part demonstrates, however, the State discharges its obligations selectively and largely in pursuit of its own interests.<sup>28</sup> Not all families enjoy the largess of the State.

20. § 40001, 108 Stat. at 1902. VAWA has been reauthorized, most recently in March 2022. *Justice Department Applauds Reauthorization of the Violence Against Women Act*, U.S. DEP'T JUST. (Mar. 16, 2022), <https://www.justice.gov/opa/pr/justice-department-applauds-reauthorization-violence-against-women-act> [<https://perma.cc/DZ8M-USDJ>]. For an excellent overview of VAWA, see Leigh Goodmark, *Assessing the Impact of the Violence Against Women Act*, 5 ANN. REV. CRIMINOLOGY 115, 118–20 (2022) [hereinafter Goodmark, *Assessing the Impact*].

21. See Candace Forbes Bright, Christopher Burton & Madison Kosky, *Considerations of the Impacts of COVID-19 on Domestic Violence in the United States*, SOC. SCIS. & HUMANS. OPEN, 2020, at 1, 1–2 (noting that social isolation exacerbates domestic violence).

22. FAM. & YOUTH SERVS. BUREAU, SUPPORT FOR SURVIVORS OF DOMESTIC VIOLENCE AND SEXUAL ASSAULT FROM CULTURALLY SPECIFIC POPULATIONS GRANT PROGRAM 1–2 (2021), [https://www.acf.hhs.gov/sites/default/files/documents/fysb/5\\_fy2021-fvpsa-49-million-arp-culturally-specific-supplemental-funding-program-instruction-memo-10-29-21\\_0.pdf](https://www.acf.hhs.gov/sites/default/files/documents/fysb/5_fy2021-fvpsa-49-million-arp-culturally-specific-supplemental-funding-program-instruction-memo-10-29-21_0.pdf) [<https://perma.cc/ETH5-QQBT>].

23. *Fact Sheet: Reauthorization of the Violence Against Women Act (VAWA)*, WHITE HOUSE (Mar. 16, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/16/fact-sheet-reauthorization-of-the-violence-against-women-act-va-wa/> [<https://perma.cc/ZTA5-YBVY>].

24. Exec. Order No. 14020, 86 Fed. Reg. 13797, 13797–98 (Mar. 11, 2021).

25. *Id.* at 13799.

26. See *supra* Part I.

27. See GARY GERSTLE, *THE RISE AND THE FALL OF THE NEOLIBERAL ORDER: AMERICA AND THE WORLD IN THE FREE MARKET ERA* 6 (2022).

28. Martijn Konings, *The Asset Economy Strikes Again*, BOS. REV. (Aug. 24, 2022), <https://bostonreview.net/articles/the-asset-economy-strikes-again/> [<https://perma.cc/E3CH-UYAV>] (“[B]ailouts are not exceptions to the core logic of neoliberalism; they are its *modus operandi*.”).



## II. ASSESSING THE STATE: THE CONSTRAINTS OF POLITICAL ECONOMY

The State functions within multiple normative systems that often act to mitigate the political will to sustain households in need.<sup>29</sup> Notwithstanding ad hoc measures, the State has failed to establish as a fixed feature a social welfare system to provide families with guarantees of economic security.<sup>30</sup> That the government addressed the needs of families during the pandemic, often through measures previously thought unimaginable, may be viewed as a series of improvised responses to forestall a looming crisis of calamitous national dimensions.<sup>31</sup> The much needed, but seemingly short-lived, pandemic-related measures provided essential benefits and alleviated poverty for some, perhaps many, but not all.<sup>32</sup>

The decades-old shift to neoliberal policies requires a critical assessment of State efforts to support families beyond short-lived crises. In fact, the State has neither supported nor sustained all families consistently and meaningfully.<sup>33</sup> U.S. welfare policies act within a dominant political-economic ideology that has provided minimalist benefits distributed to the fewest eligible recipients.<sup>34</sup> A review of pandemic relief efforts illustrates the ways that the current political order puts the intended relief beyond the reach of many vulnerable families.

29. See Robert Kuttner, *Free Markets, Besieged Citizens*, N.Y. REV. BOOKS (July 21, 2022) [hereinafter Kuttner, *Free Markets*], <https://www.nybooks.com/articles/2022/07/21/free-markets-besieged-citizens-gerstle-kuttner/> [<https://perma.cc/Z4KD-9VMP> (staff-uploaded, dark archive)] (noting the failure of neoliberalism as an economic policy).

30. Households have suffered deep economic decline: the federal minimum wage is worth thirty-one percent less than in the late 1960s. See David Cooper, *Congress Has Never Let the Federal Minimum Wage Erode for This Long*, ECON. POL'Y INST. (June 17, 2019), <https://www.epi.org/publication/congress-has-never-let-the-federal-minimum-wage-erode-for-this-long/> [<https://perma.cc/6AJX-3XZT>] (noting figures as of June 2019).

31. For the list of measures identified with pandemic-related relief, see Armstrong et al., *supra* note 10. See also Jim Tankersley, *Economic Aid, Once Plentiful, Falls Off at a Painful Moment*, N.Y. TIMES (Aug. 23, 2022), <https://www.nytimes.com/2022/08/23/us/politics/food-insecurity-biden-stimulus.html> [<https://perma.cc/SE6Q-UJ7D> (staff-uploaded, dark archive)] (noting an increase in poverty and economic insecurity since government supports ended). It is worth noting that prepandemic childhood poverty rates dropped; however, the poverty line is so low as to make the progress questionable. Moreover, Black and Latino children are much more likely to be poor than white children. See DeParle, *supra* note 8.

32. See *infra* Sections II.A–B.

33. See *infra* Sections II.A–B.

34. See GOODIN ET AL., *supra* note 2, at 41, 44–45, 240–41 (describing punitive attitudes toward the poor justifying minimal state support for families).

A. *Neoliberal Capture of Pandemic Policies and Programs*

## 1. The CARES Act: Legislative Breaches

The CARES Act of 2020 sought to provide economic relief measures for households.<sup>35</sup> The Act was intended to help families survive the economic adversity from the pandemic. But as scholars have observed, the “[p]roblems [with the CARES Act] lie in the subtleties.”<sup>36</sup>

a. *Mortgage and Rent Obligations: Forbearance for Some—But Not for All*

The CARES Act allowed homeowners to seek a forbearance from their mortgage obligations—a provision that promised immediate relief from the risk of foreclosure.<sup>37</sup> The Act also gave mortgage companies unfettered discretion to grant or deny relief.<sup>38</sup> If forbearance was granted, the Act further authorized the mortgage company to determine the terms of deferment.<sup>39</sup>

Testimony at congressional hearings revealed that the mortgage loan service industry undermined the efforts of many homeowners to obtain any forbearance relief.<sup>40</sup> Bureaucratic maneuvers and “discretionary” decisions to deny forbearance, particularly for those families who may have had economic difficulties in the past, diminished the scope of protections of the Act.<sup>41</sup> Indeed, “some economic actors get to defer their payments indefinitely into the future, while others soon find the bailiff at their door.”<sup>42</sup> The resulting inequality in negotiating temporary relief from mortgage payments is expected to create even greater wealth disparities postpandemic.<sup>43</sup>

The CARES Act created similar dilemmas for renters who sought deferment from rental payments.<sup>44</sup> Less than thirty percent of all renters were eligible to apply for temporary forbearance.<sup>45</sup> Moreover, the bureaucratic

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35. See *supra* notes 10–12 and accompanying text.

36. Foohey et al., *Folly of Credit*, *supra* note 12, at 130.

37. *Id.*

38. *Id.* at 130–31.

39. *Id.* (noting “varying” levels of federal guidance and the likelihood that homeowners would have to make balloon payments at the end of the deferment).

40. Andrew D. Cotlar, *Relief Foreclosed: Defending Residential Foreclosures in a Post-CARES Act COVID-19 World*, 92 PA. BAR ASS’N Q. 25, 28 (2021).

41. See *id.* at 26 (noting that the CARES Act mandates that forbearance should be granted notwithstanding previous delinquency of payment before the COVID-19 pandemic).

42. WILLIAM DAVIES, SAHIL JAI DUTTA, NICK TAYLOR & MARTINA TAZZIOLI, UNPRECEDENTED xvii (2022).

43. Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 872 (2022).

44. Foohey et al., *Folly of Credit*, *supra* note 12, at 132.

45. Meredith Bradshaw, Note, *Going, Going, Gone: Takings Clause Challenges to the CDC’s Eviction Moratorium*, 56 GA. L. REV. 457, 467 (2021) (noting that tenants were eligible for relief only if they rented from certain categories of landlords).

hurdles required of tenants—usually without legal counsel—rendered many of the CARES Act relief provisions useless.<sup>46</sup>

*b. Cash Transfers for Some—But Not for All*

Similarly, the CARES Act expanded unemployment payments, but not all workers were eligible for these benefits.<sup>47</sup> Black workers—who were disproportionately categorized as front-line workers and thus deemed “essential workers”—were required to work during the pandemic and faced a greater risk of exposure to COVID-19.<sup>48</sup> Black unemployed workers were the least likely to receive payments and often received the smallest amounts due to wage structures that have historically disadvantaged minority workers.<sup>49</sup> In fact, during the pandemic, the states with the highest numbers of Black residents made it more difficult to access unemployment payments.<sup>50</sup>

When employment benefits were due, delays in issuing expanded unemployment benefits further disproportionately affected low-income families, and particularly Black wage earners who, other than essential workers, were more likely to have lost their jobs.<sup>51</sup> The Brookings Institute found that the State failed to deliver these essential payments in a timely manner such that families “with low incomes or low savings, or those with children, for example—

46. See Kathryn A. Sabbeth, *Eviction Courts*, 18 U. ST. THOMAS L.J. 359, 391–92 (2022).

47. See Shauhin A. Taleh, *Racial Inequality, COVID-19, and Health and Unemployment Insurance: Lessons Learned and Pathways Forward*, 71 DEPAUL L. REV. 635, 658–59 (2022) (describing various eligibility categories and limitations for unemployment assistance); *Fixing Unemployment Insurance and the Coronavirus Response*, ECON. POL’Y INST.: WORKING ECON. BLOG (Mar. 23, 2020, 2:15 PM), <https://www.epi.org/blog/fixing-unemployment-insurance-and-the-coronavirus-response/> [<https://perma.cc/QY7M-56MS>].

48. ELISE GOULD & VALERIE WILSON, ECON. POL’Y INST., *BLACK WORKERS FACE TWO OF THE MOST LETHAL PREEXISTING CONDITIONS FOR CORONAVIRUS—RACISM AND ECONOMIC INEQUALITY 4* (2020), <https://files.epi.org/pdf/193246.pdf> [<https://perma.cc/VWH5-Z9DK>].

49. *Id.*; Ava Kofman & Hannah Fresques, *The Pandemic Economy: Black Workers Are More Likely To Be Unemployed but Less Likely To Get Unemployment Benefits*, PROPUBLICA (Aug. 24, 2020, 5:00 AM), <https://www.propublica.org/article/black-workers-are-more-likely-to-be-unemployed-but-less-likely-to-get-unemployment-benefits> [<https://perma.cc/LV7J-HBHS>] (noting historic racial disparities with regard to work and unemployment infrastructures).

50. Taleh, *supra* note 47, at 659; *see also* Kofman & Fresques, *supra* note 49 (noting that “10% of jobless residents in North Carolina got benefits in 2018, compared with 50% in New Jersey,” and “[a]mong those who received unemployment benefits in 2018, the program replaced 36% of lost wages in Louisiana, compared with 53% in Iowa”).

51. Talmon Joseph Smith & Ben Casselman, *What Will Happen to Black Workers’ Gains if There’s a Recession?*, N.Y. TIMES (Aug. 24, 2022), <https://www.nytimes.com/2022/08/24/business/economy/black-workers-recession.html> [<https://perma.cc/YB9D-4VUE> (staff-uploaded, dark archive)]; Stephen Roll & Michal Grinstein-Weiss, *Did CARES Act Benefits Reach Vulnerable Americans? Evidence from a National Survey*, BROOKINGS INST. (Aug. 25, 2020), <https://www.brookings.edu/research/did-cares-act-benefits-reach-vulnerable-americans-evidence-from-a-national-survey/> [<https://perma.cc/7UCZ-M6TE>] (“Black households were 8 percentage points more likely to experience a delay, and Hispanic households were 11 percentage points more likely to experience a delay.”).

were stuck in a very precarious situation.”<sup>52</sup> “App-deployed” workers (for example, Lyft drivers) were often misclassified as independent contractors and frequently denied unemployment.<sup>53</sup> Although these workers were eligible for CARES Act pandemic unemployment relief, many experienced denials of such benefits because they could not prove they could not drive.<sup>54</sup> Additionally, delays in issuing stimulus payments disproportionately impacted the unbanked.<sup>55</sup> Families who had not filed income taxes in previous years, but especially Black and Latino families, were more likely to experience devastating delays in receipt of CARES Act funds, if they received them at all.<sup>56</sup> Certainly, the temporary relief measures mitigated the effects of the pandemic on Black and Latino families, yet racial and ethnic disparities in household incomes continued, with Black poverty rates at the highest.<sup>57</sup>

c. “Credit As Relief”<sup>58</sup>

The Act failed to provide sufficient direct relief to families, and instead offered relief primarily by extending debt rather than sufficient and consistent cash transfers.<sup>59</sup> The CARES Act’s principal moratoria provisions—“a foreclosure moratorium for homeowners, an eviction moratorium for renters, and a student loan payment moratorium”—functioned as extensions of credit.<sup>60</sup> This strategy “saddle[d] [households] with continuing credit obligations that will prove to be more expensive than when the crisis began.”<sup>61</sup> In one instance,

52. Roll & Grinstein-Weiss, *supra* note 51.

53. Veena Dubal, *Essentially Dispossessed*, 121 S. ATL. Q. 285, 288, 293 (2022).

54. *Id.*

55. Roll & Grinstein-Weiss, *supra* note 51.

56. *Id.*

57. See Valerie Wilson & Adewale A. Maye, *The Labor Market Recovery and Pandemic Relief Measures Lifted Black and Brown Workers and Families in 2021*, ECON. POL’Y INST. (Sept. 15, 2022, 9:41 AM), <https://www.epi.org/blog/the-labor-market-recovery-and-pandemic-relief-measures-lifted-black-and-brown-workers-and-families-in-2021/> [<https://perma.cc/V455-T9W5>]; Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *Steering Loan Modifications Post-Pandemic*, 85 LAW & CONTEMP. PROBS. 201, 202–03 (2022) [hereinafter Foohey et al., *Steering Loan Modifications*] (noting that Black and Latino workers “were sixty-five and fifty-two percent more likely than white workers to be unemployed, respectively” at the end of the third quarter of 2021).

58. Foohey et al., *Folly of Credit*, *supra* note 12, at 133.

59. *Id.* at 129; DAVIES ET AL., *supra* note 42, at 68 (describing debt and credit as the “defining feature” related to relief).

60. Foohey et al., *Steering Loan Modifications*, *supra* note 57, at 201. President Biden announced the cancellation of some student debt, but the order is now under threat of litigation by Republican attorneys general. Michael D. Shear, *Republican-Led States Sue To Block Biden’s Plan To Erase Student Loan Debt*, N.Y. TIMES (Sept. 29, 2022), <https://www.nytimes.com/2022/09/29/us/politics/suit-biden-student-loan-debt.html> [<https://perma.cc/P6DR-NA9C> (staff-uploaded, dark archive)].

61. Foohey et al., *Folly of Credit*, *supra* note 12, at 144–45. For additional critique of the CARES Act, see Pamela Foohey, Dalié Jiménez & Christopher K. Odinet, *CARES Act Gimmicks: How Not To Give People Money During a Pandemic and What To Do Instead*, 2020 U. ILL. L. REV. ONLINE 81, 82 (“Ultimately, this financial support will prove to be shockingly minimal.”).

at the end of the term of forbearance, a homeowner faced a new monthly mortgage obligation three times higher than his original payment.<sup>62</sup> Moreover, mortgage lenders charged improper fees to homeowners in forbearance.<sup>63</sup> The PPP relied on profit-seeking market actors to transact the loans—transactions that proved to be onerous for small business borrowers.<sup>64</sup>

Debt and credit issues have been the principal features of economic crises for many families.<sup>65</sup> The civil docket is crowded with debt collection cases, most resolved by default judgments against debtors lacking legal assistance.<sup>66</sup> Families impacted by the pandemic economy turned to credit to sustain basic necessities, often relying on new predatory “buy now, pay later” applications.<sup>67</sup> The CARES Act offered no protections from debt collection actions, despite the fact that unlawful practices were common.<sup>68</sup> Indeed, pandemic-related debtor-creditor disputes significantly increased, with minimal enforcement efforts by regulatory bodies.<sup>69</sup>

Families would have been better served by unconditional cash transfers.<sup>70</sup> Notwithstanding the sociocultural repugnance of supporting families through

62. Chris Ingalls, *Washington Homeowners Experiencing ‘Sticker Shock’ When Pandemic-Related ‘Mortgage Forbearance’ Ends*, KING 5, <https://www.king5.com/article/news/investigations/washington-state-homeowners-sticker-shock-mortgage-forbearance-program-pandemic/281-52f115c6-2926-4fdc-90ca-9dbc9c91d65c> [<https://perma.cc/GH6X-FDJV>] (last updated Aug. 7, 2021, 5:54 PM).

63. Eric Mogilnicki & Uttara Dukkupati, *CFPB Releases Supervisory Highlights Report*, BUS. L. TODAY (Dec. 2021), <https://businesslawtoday.org/month-in-brief/december-in-brief-business-regulation-and-regulated-industries-2021/> [<https://perma.cc/87CB-AGD2>] (scroll to Mogilnicki & Dukkupati section).

64. See Ron Leiber, *Why Aren’t Student Loans Simple? Because This Is America*, N.Y. TIMES, <https://www.nytimes.com/2022/09/03/your-money/student-loans-personal-finance.html> [<https://perma.cc/PMD4-UMNX> (staff-uploaded, dark archive)] (last updated Sept. 15, 2022).

65. Pamela Foohey, Dalié Jiménez & Christopher K. Odet, *The Debt Collection Pandemic*, 11 CALIF. L. REV. ONLINE 222, 228 (2020) [hereinafter Foohey et al., *Debt Collection*].

66. See THE PEW CHARITABLE TRS., HOW DEBT COLLECTORS ARE TRANSFORMING THE BUSINESS OF STATE COURTS 2 (May 6, 2020), <https://www.pewtrusts.org/-/media/assets/2020/06/debt-collectors-to-consumers.pdf> [<https://perma.cc/3F2M-6C7H>].

67. Priya Krishna, *Eat Now, Pay Later: Going into Debt for Food*, N.Y. TIMES, <https://www.nytimes.com/2022/08/29/dining/buy-now-pay-later-loans-groceries.html> [<https://perma.cc/WEY3-TYNM> (staff-uploaded, dark archive)] (last updated Sept. 7, 2022) (providing testimonials from several families who began relying on “pay later” services to buy groceries during the pandemic).

68. Foohey et al., *Debt Collection*, *supra* note 65, at 229.

69. Craig Cowie, *Is the CFPB Still on the Beat? The CFPB’s (Non)Response to the COVID-19 Pandemic*, 82 MONT. L. REV. 41, 55–57 (2021).

70. DAVIES ET AL., *supra* note 42, at 216; see also Lisa A. Gennetian, Sarah Halpern-Meekin, Lauren Meyer, Nathan Fox, Katherine Magnuson, Kimberly G. Noble & Hirokazu Yoshikawa, *Implementing Cash Transfers to U.S. Families: Insights from the Baby’s First Years Study*, in USING CASH TRANSFERS TO BUILD AN INCLUSIVE SOCIETY: A BEHAVIORALLY INFORMED APPROACH (forthcoming) (manuscript at 3–6, 12–13) (on file with the North Carolina Law Review) (comparing the administrative inefficiencies of government social services programs with the benefits of direct cash disbursement programs to families); Megan Greenwell, *Universal Basic Income Has Been Tested Repeatedly. It Works. Will America Ever Embrace It?*, WASH. POST (Oct. 24, 2022, 9:50 AM), <https://www.washingtonpost.com/magazine/2022/10/24/universal-basic-income/>

direct cash transfers, little evidence suggests that direct economic relief has impaired a ready workforce or otherwise been used for purposes inimical to family well-being.<sup>71</sup> Indeed, cash transfers are more likely to be used to pay for day-to-day expenses and savings for retirement.<sup>72</sup>

d. *CARES Act: “A Hierarchy of Deservingness”*<sup>73</sup>

A review of the distribution of CARES Act funding suggests that the Act established “a hierarchy of deservingness.”<sup>74</sup> The majority of PPP forgivable loans were allocated to business owners and shareholders, that is, to “high-income households.”<sup>75</sup> Billions of PPP dollars went to private schools, while public schools were unable to afford COVID-related safety measures and equipment.<sup>76</sup> Undocumented immigrants, including agricultural workers, were excluded from eligibility for stimulus payments.<sup>77</sup> Homecare workers, predominantly women of color, were also disqualified from provisions of the Act because of their designation as essential workers.<sup>78</sup>

Law enforcement agencies received disproportionately large allocations, particularly when compared to sums provided to families.<sup>79</sup> In addition to the

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[<https://perma.cc/9T7X-GD2U> (dark archive)] (noting the success of universal basic income programs, particularly in comparison with the reluctance of the federal government to extend child tax credits).

71. Stephen Roll, Sara M. Constantino, Leah Hamilton, Selina Miller, Dylan Bellisle & Mathieu Despard, *How Would Americans Respond to Direct Cash Transfers? Results from Two Survey Experiments 5–8* (Aug. 4, 2022) (unpublished manuscript) (on file with the North Carolina Law Review).

72. *Id.* at 34, 37–38 (describing studies that dispel notions of “irresponsible consumption” and demonstrate the benefits of direct cash transfers); Kurtis Lee, *Guaranteed Income Programs Spread, City by City*, N.Y. TIMES, <https://www.nytimes.com/2022/09/10/business/economy/guaranteed-income.html> [<https://perma.cc/Y24J-RWH7> (staff-uploaded, dark archive)] (last updated Sept. 13, 2022) (noting the benefits of and need for government authorized cash transfer benefits).

73. Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1, 25 (2022).

74. *Id.*

75. David Autor, David Cho, Leland D. Crane, Mita Goldar, Bryon Lutz, Joshua Montes, William B. Peterman, David Ratner, Daniel Villar & Ahu Yildirmaz, *The \$800 Billion Paycheck Protection Program: Where Did the Money Go and Why Did It Go There?*, 36 J. ECON. PERSPS. 55, 56 (2022) (describing the program as “highly regressive”).

76. Diane Ravitch, *The Dark History of School Choice*, N.Y. REV. BOOKS (Jan. 14, 2021), <https://www.nybooks.com/articles/2021/01/14/the-dark-history-of-school-choice/> [<https://perma.cc/ZXZ6-UV3L> (staff-uploaded, dark archive)].

77. Arons, *supra* note 73, at 25; Ruqaiyah Yearby & Seema Mohapatra, *Law, Structural Racism, and the COVID-19 Pandemic*, 7 J.L. & BIOSCIENCES 1, 7 (2020) (noting that these workers were required to work, thus ineligible for unemployment benefits).

78. Yearby & Mohapatra, *supra* note 77, at 7.

79. See CONG. RSCH. SERV., DEPARTMENT OF JUSTICE’S CORONAVIRUS EMERGENCY SUPPLEMENTAL FUNDING PROGRAM (Apr. 16, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF11508> [<https://perma.cc/YBL7-ASB8> (staff-uploaded archive)] (discussing how the CARES Act provided \$850 million to local and state governments); TIMOTHY COLMAN, PASCAL EMMER, DERECKA PURNELL, ANDREA J. RITCHIE, HIRAM RIVERA & TIFFANY WANG, *DIVESTING FROM PANDEMIC POLICING AND INVESTING IN A*

amounts allocated directly to carceral institutions, the Act provided states and municipalities significant discretion in distributing other funds with the result that some CARES Act funding intended for housing and health protection went instead to police and prisons.<sup>80</sup>

Wendy Brown offers a critical view of the CARES Act, describing it as the largest upward redistribution of wealth in the history of capitalism. It slashed taxes for the wealthy, funneled billions to corporations, and threw paper towels to the masses. Stimulus checks, unemployment insurance relief, and so forth, comprised less than a third of the CARES Act budget. Indeed, it was the final hurrah for the GOP long game of corporate welfare and tax cuts on wealth under Trump . . . and is one reason the rich got so much richer during the pandemic.<sup>81</sup>

## 2. The American Rescue Plan Act (“ARP”) and the Pandemic As Racism

The ARP (2021) follow up to the CARES Act was intended to limit pandemic-related financial losses and assist families and businesses with economic recovery. Seemingly evidencing a new “COVID duty of care,” the ARP provided much needed economic support to some families through a variety of initiatives.<sup>82</sup> Critiques of the ARP are fixed less on the subtleties of the legislation itself than on the judicial interventions that acted to undo essential provisions designed to support “socially disadvantaged” groups.<sup>83</sup>

Racial minority groups have been disproportionately impacted by health crises.<sup>84</sup> The history of medical abuses of persons of color created reasonable concerns about whether to make use of government-supported treatments.<sup>85</sup> An

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JUST RECOVERY 6 (May 2021), [https://communityresourcehub.org/wp-content/uploads/2021/05/Unmasked\\_Update.pdf](https://communityresourcehub.org/wp-content/uploads/2021/05/Unmasked_Update.pdf) [<https://perma.cc/KDS9-8CUT>].

80. COLMAN ET AL., *supra* note 79, at 6; Adam Mahoney, *Across the Midwest, Counties Are Building New Jails on Toxic Land*, CAP. B NEWS (Sept. 15, 2022, 12:48 PM), <https://capitalbnews.org/toxic-midwest-jail-boom/> [<https://perma.cc/6YP3-4JVW>] (describing jail boom constructions funded by pandemic funds).

81. Wendy Brown & Amy Kapczynski, *A Conversation Between Wendy Brown and Amy Kapczynski*, 121 S. ATL. Q. 239, 256 (2022).

82. Richard J. Evans, *Prescribing a Better Future*, TIMES LITERARY SUPP. (Mar. 4, 2022), <https://www.the-tls.co.uk/articles/a-duty-of-care-peter-hennessy-book-review-richard-j-evans/> [<https://perma.cc/SER8-8CMG> (dark archive)] [hereinafter Evans, *Prescribing a Better Future*] (describing the pandemic as having “revived the principle of the duty of care as Boris Johnson’s government triggered ‘a great surge of state intervention’ to mitigate its effects on the economy and society”).

83. See American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1005, 135 Stat. 4, 12–13 (repealed); see *infra* notes 90, 108, 110.

84. Yearby & Mohaptra, *supra* note 77, at 103 (reviewing data regarding the past and the current pandemic); see Benjamin Mueller, *In Rural America, Covid Hits Black and Hispanic People Hardest*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/health/covid-deaths-black-hispanic-rural.html> [<https://perma.cc/2G6B-T5AD> (staff-uploaded, dark archive)].

85. Michael Conklin, *Legality of Explicit Racial Discrimination in the Distribution of Lifesaving COVID-19 Treatments*, 19 IND. HEALTH L. REV. 315, 315 (2022).

entrenched “pandemic of racism” exacerbated outcomes for people of color during the COVID-19 pandemic.<sup>86</sup> Dorothy Roberts has described this phenomenon as

a pandemic that revealed the structural racism present in virtually every area of our lives: who could work from home; who was an essential worker; who had access to the Paycheck Protection Program; who had to depend on public transportation; who was subject to stricter enforcement of mask restrictions; and more recently, which Americans were getting access to the vaccine.<sup>87</sup>

These circumstances are embedded in a history that acts to shape and deform State pandemic policies and practices that continue to harm racial minority families.

*a. ARP’s Loan Forgiveness Program and Socially Disadvantaged Family Farmers*

Section 1005 of the ARP attempted to address race discrimination through U.S. Department of Agriculture (“USDA”) loan forgiveness programs by offering debt relief to family farmers determined to be socially disadvantaged, including “those belonging to groups that have been subject to racial or ethnic prejudice.”<sup>88</sup> These provisions were intended to ameliorate the effects of discrimination against Black and racial-minority family farmers whose land legacies continue to be in danger as a result of decades of exclusion from USDA loan benefits used for the costs of farming, including livestock, equipment, and family living expenses.<sup>89</sup>

86. See generally Catherine Powell, *Introduction: Interlocking Pandemics*, 114 AM. SOC’Y INT’L L. PROC. 371 (2020) (discussing the impact of the COVID-19 pandemic, police brutality, and poverty).

87. Dorothy A. Brown, *Introduction*, 70 EMORY L.J. 1413, 1413–14 (2021).

88. The USDA defined this group as “farmers who are Black or African American, American Indian or Alaska Native, Hispanic or Latino, and Asian or Pacific Islander” and included women in some USDA programs. *Socially Disadvantaged, Beginning, Limited Resource, and Female Farmers and Ranchers*, U.S. DEP’T AGRIC., <https://www.ers.usda.gov/topics/farm-economy/socially-disadvantaged-beginning-limited-resource-and-female-farmers-and-ranchers/> [<https://perma.cc/J6TQ-4JDW>]. USDA relief programs were intended to provide financial assistance to family-sized farms unable to access credit from commercial banks or other lenders. Memorandum of Law in Support of the Federation of Southern Cooperatives/Land Assistance Fund’s Motion to Intervene as a Defendant at 8, *Miller v. Vilsack*, No. 4:21-cv-00595-O, 2021 WL 6294171 (N.D. Tex. Dec. 8, 2021), *rev’d*, No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022) [hereinafter FSC Memorandum].

89. See Nadra Nittle, *Black-Owned Farms Are Holding On by a Thread*, EATER (Feb. 23, 2021, 10:30 AM), <https://www.eater.com/22291510/black-farmers-fighting-for-farmland-discrimination-in-agriculture> [<https://perma.cc/C327-V7SG>] (quoting former state director of USDA rural development in Georgia enjoining government officials “to pay more attention to family farmers, and especially African-American farmers”); *Representing Black Farmers and Families Across the United States*, NAT’L BLACK FARMERS ASS’N, <https://www.blackfarmers.org/> [<https://perma.cc/4GXY-2Z64>]; Darryl Fears, *A Harvest for the World: A Black Family Farm Is Fighting Racism in Agriculture and Climate Change*, WASH. POST (June 28, 2021), <https://www.washingtonpost.com/climate-environment/climate->



A series of lawsuits were filed to enjoin the government from implementing Section 1005, resulting in several federal court injunctions halting loan relief.<sup>90</sup> The premises in each case were similar. In *Miller v. Vilsack*,<sup>91</sup> a class action case representative of the nationwide claims, plaintiffs objected to the ARP's provision that denied white farmers priority benefits of the loan forgiveness program.<sup>92</sup> Arguing that "[r]acial classifications are antithetical to the Constitution" and citing a string of U.S. Supreme Court decisions to support their claims, the white plaintiffs protested that they were "encountering racial discrimination at the hands of government officials."<sup>93</sup> The USDA defended the Act's provisions, all the while continuing to discriminate against Black farmers who were denied microloans on questionable grounds and otherwise not helped by government programs intended to ameliorate the effects of the COVID-19 pandemic.<sup>94</sup> As a result, several organizations intervened in the case to ensure that Black family farmers enjoyed the fullest representation.<sup>95</sup>

Along with at least four other courts, the *Miller* court entered a nationwide injunction enjoining the distribution of Section 1005 funds to Black farmers.<sup>96</sup> The court found that "the use of race- and ethnicity-based preferences in the

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solutions/interactive/2021/harvest-world-black-family-farm-is-fighting-racism-agriculture-climate-change/ [https://perma.cc/D8YJ-QFTS (dark archive)].

90. *Miller*, 2021 WL 6294171, at \*23 (No. 4:21-cv-00595-O) (granting a preliminary injunction); see *Holman v. Vilsack*, No. 21-1085-STA, 2021 WL 2877915, at \*14 (W.D. Tenn. July 8, 2021) (granting a preliminary injunction); *Wynn v. Vilsack*, 545 F. Supp. 3d 1271, 1294 (M.D. Fla. 2021) (granting preliminary injunction); *Faust v. Vilsack*, 519 F. Supp. 3d 470, 474 (E.D. Wis. 2021) (noting that as of June 2021, farmers challenging the provision came from at least nine states).

91. No. 4:21-CV-00595-O (N.D. Tex. Dec. 8, 2021), *rev'd*, No. 21-11271, 2022 WL 851782 (5th Cir. Mar. 22, 2022).

92. Brief in Support of Plaintiffs' Motion for Preliminary Injunction at 3, *Miller*, 2021 WL 6294171 (No. 4:21-cv-00595-O). Other lawsuits filed across the country have been stayed because the plaintiffs in those cases were *Miller* class members who benefited from the nationwide injunction. *Dunlap v. Vilsack*, No. 2:21-cv-00942, 2021 WL 4955037, at \*3 (D. Or. Sept. 21, 2021); *Wynn*, 545 F. Supp. 3d at 1295; *Faust*, 519 F. Supp. 3d at 478; *Joyner v. Vilsack*, No. 21-1089-STA-jay, 2021 WL 3699869 (W.D. Tenn. Aug. 19, 2021); *Carpenter v. Vilsack*, No. 21-CV-0103 (D. Wyo. Aug. 16, 2021); *McKinney v. Vilsack*, No. 2:21-00212-RWS (E.D. Tex. Aug. 30, 2021); cf. *Holman v. Vilsack*, No. 1:21-cv-01085-STA, 2021 WL 3354169 (W.D. Tenn. Aug. 2, 2021).

93. Brief in Support of Plaintiffs' Motion for Preliminary Injunction, *supra* note 92, at 5.

94. Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction at 13–33, *Miller*, 2021 WL 6294171 (No. 4:21-cv-00595-O). Upon the repeal of Section 1005 of the ARP, the parties stipulated to a dismissal of the case as moot. Joint Stipulation of Dismissal at 1, *Miller*, 2021 WL 6294171 (No. 4:21-cv-00595-O).

95. See FSC Memorandum, *supra* note 88; Dwayne Fatherree, *Fighting To Grow: Black Farmers Continue To Battle Systemic Discrimination*, S. POVERTY L. CTR. (Feb. 18, 2022), <https://www.splcenter.org/news/2022/02/18/fighting-grow-black-farmers-continue-battle-systemic-discrimination> [https://perma.cc/YKL7-CYQZ].

96. *Kent v. Vilsack*, No. 3:21-cv-540-NJR, 2021 WL 6139523, at \*4 (S.D. Ill. Nov. 10, 2021) (first citing *Wynn*, 545 F. Supp. 3d 1271 (preliminary injunction); then citing *Faust*, 519 F. Supp. 3d 470 (temporary restraining order); then citing *Holman*, 2021 WL 2877915; and then citing *Miller*, 2021 WL 6294171 (No. 4:21-cv-00595-O) (preliminary injunction)).

administration of the loan-forgiveness program violates equal protection under the Constitution.”<sup>97</sup> The provision, which “advantaged” minority family farmers, was interpreted through a lens of structural racism that refuses to admit that so-called colorblindness fails to promote equality.<sup>98</sup> Norrinda Hayat accurately assesses the court’s reasoning as “based on an interpretation of the Fourteenth Amendment’s equal protection clause.”<sup>99</sup> She observes how that reasoning acts “as a ‘guarantee of rationality,’ which holds that distinctions based on race can never be ‘rational’ and which gives no leeway to reverse patterns of subordination.”<sup>100</sup>

Racial minority family farmers have long suffered USDA discriminatory loan practices resulting in farm and home foreclosures.<sup>101</sup> The impact of loss of land has contributed to the wealth gap between white and Black families that exists today.<sup>102</sup> As Nikole Hannah-Jones has written, “[T]he lack of wealth . . . has been a defining feature of Black life since the end of slavery” and undermines the ability of families to achieve housing security and educational opportunities.<sup>103</sup> The demise of Section 1005 perpetuates profound inequality.

97. *Miller*, 2021 WL 6294171, at \*15 (No. 4:21-cv-00595-O).

98. Norrinda Hayat, *A Critique of the Black Commons as Reparations*, 45 N.Y.U. REV. L. & SOC. CHANGE 370, 383 n.81 (2021).

99. *Id.* Professor Hayat observes the

iron[y] of this opposition, is the fact that in July 2018, the Trump administration issued aid through the Market Facilitation Program (“MFP”), in the amount of \$12 billion, to largely white farmers who it said were suffering as a result of the trade war with China and was met with little to no resistance.

*Id.*; see also Ian F. Haney López, *Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1057 (2010) (“Racial stratification organizes virtually every aspect of quotidian existence, vertically from the family to the state and the market, and horizontally across seemingly distinct arenas like employment, housing, education, agriculture, public safety, and so on.”).

100. Hayat, *supra* note 98, at 383 n.81 (quoting Robin West, *Towards an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 111 (1991)).

101. Fatherree, *supra* note 95. For a review of the historic discriminatory circumstances that Black farmers have faced, see Maia Foster & P.J. Austin, *Rattlesnakes, Debt, and ARPA § 1005: The Existential Crisis of American Black Farmers*, 71 DUKE L.J. ONLINE 159, 162–64 (2022); Jared Hayes, *Timeline: Black Farmers and the USDA, 1920 to Present*, ENV’T WORKING GRP. (Feb. 1, 2021), <https://www.ewg.org/research/timeline-black-farmers-and-usda-1920-present> [<https://perma.cc/YZ9J-JRKJ>]; *One Million Black Families in the South Have Lost Their Farms*, EQUAL JUST. INITIATIVE (Oct. 11, 2019), <https://eji.org/news/one-million-black-families-have-lost-their-farms/> [<https://perma.cc/36NY-4GQ3>].

102. *One Million Black Families in the South Have Lost Their Farms*, *supra* note 101.

103. Nikole Hannah-Jones, *Justice*, in THE 1619 PROJECT: A NEW ORIGIN STORY 451, 456 (2021).

*b. The Restaurant Revitalization Fund and Priority Aid and Minority Businesses*

The ARP's Restaurant Revitalization Fund ("RRF") was intended to help small, privately owned restaurants meet payroll and operating expenses.<sup>104</sup> The RRF extended priority to restaurants often referred to as "mom and pop" restaurants that were at least fifty-one percent owned and controlled by women, veterans, or the "socially and economically disadvantaged," according to the definitions of the Small Business Act.<sup>105</sup> The rationale for the provisions included expert testimony that demonstrated that

minority-owned businesses were more vulnerable to economic distress than businesses owned by white entrepreneurs—they were more likely to operate in retail, accommodation, food services, and personal care services industries, which were hardest hit by government shut-down orders and a decrease in foot traffic. Moreover, minority-owned businesses were more likely to be in areas with higher rates of COVID-19 infections.<sup>106</sup>

Evidence provided during congressional studies demonstrated that the pandemic disproportionately impacted female- and minority-owned businesses with dire effects.<sup>107</sup>

Referring to the priority scheme as "racial gerrymandering" and faulting the government for "fail[ing] to show that prioritizing women-owned

104. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 5003(b), (c)(3), 135 Stat. 85, 85–90 (codified at 15 U.S.C. § 9009(c) (2021)).

105. See 15 U.S.C. § 637(a)(4); Matthew Korfhage, *Restaurant Relief Fund Ends in Uncertainty, Amid Lawsuits by White Restaurant Owners*, ASBURY PARK PRESS (July 9, 2021, 5:00 AM), <https://www.app.com/story/news/2021/07/09/sba-restaurant-revitalization-fund-discrimination-lawsuits/7885073002/> [<https://perma.cc/3NRN-8WV5> (dark archive)]; see also Eriketa Cost, *'We Still Have Debt': Local Owners Filing Lawsuit Over Restaurant Revitalization Fund*, ROCHESTERFIRST.COM, <https://www.rochesterfirst.com/news/business/we-still-have-debt-locals-filing-lawsuit-over-restaurant-revitalization-fund/> [<https://perma.cc/KB7S-5B54>] (last updated Mar. 30, 2022, 5:40 AM). A person is considered "socially disadvantaged" upon a showing of having been "subjected to racial or ethnic prejudice" or "cultural bias" based solely on his immutable characteristics. 15 U.S.C. § 637(a)(5); 13 C.F.R. § 124.103(a) (2016). According to the Small Business Administration, the term "economically disadvantaged" applies to a person who (1) is socially disadvantaged; and (2) faces "diminished capital and credit opportunities" compared to non-socially disadvantaged people who operate in the same industry. 15 U.S.C. § 637(a)(6)(A).

106. Vitolo v. Guzman, 999 F.3d 353, 371 (6th Cir. 2021) (Donald, J., dissenting) (internal citations omitted).

107. See SELECT SUBCOMM. ON THE CORONAVIRUS CRISIS, UNDERSERVED AND UNPROTECTED: HOW THE TRUMP ADMINISTRATION NEGLECTED THE NEEDIEST SMALL BUSINESSES IN THE PPP 1 (2020), <https://coronavirus.house.gov/sites/democrats.coronavirus.house.gov/files/PPP%20Report%20Final%20%283%29.pdf> [<https://perma.cc/5XYB-XFZF>]; Corrine Blalock, *Introduction: Law and the Critique of Capitalism*, 121 S. ATL. Q. 222, 224–25 (2022) (noting that women had to leave the workforce to provide family care).

restaurants serves an important governmental interest,” the Sixth Circuit Court of Appeals entered a nationwide injunction against the RRF.<sup>108</sup> In doing so, the court cited a number of Supreme Court cases, writing that “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>109</sup> The Northern District of Texas issued a similar injunction, seeming to give no weight to the expert testimony in support of the ARP’s priority schemes based on congressional hearings that identified the disproportionate effect of the pandemic on “[w]omen—especially mothers and women of color” and further, that “eight out of ten minority-owned businesses are on the brink of closure.”<sup>110</sup>

Notwithstanding the evidence produced during the congressional hearings on the racial impact of the pandemic, courts have relied on the premise of a pseudoegalitarian meritocracy as the rationale to enjoin the ARP’s preference and priority schemes.<sup>111</sup> Lawrence Tribe described these judicial viewpoints as “a Kafkaesque distortion of the Reconstruction Amendments if ever there was one.”<sup>112</sup> The decisions warrant a heightened sense of concern about the judiciary’s interest—or lack thereof—in protecting racially and socially disadvantaged families.<sup>113</sup>

108. *Vitolo*, 999 F.3d at 364–65.

109. *Id.* at 365–66 (quoting *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007)).

110. *Greer’s Ranch Café v. Guzman*, 540 F. Supp. 3d 638, 649 (N.D. Tex. 2021) (quoting H.R. REP. NO. 117-7, at 2 (2021)).

111. See generally PUB. HEALTH L. WATCH, COVID-19 POLICY PLAYBOOK: LEGAL RECOMMENDATIONS FOR A SAFER, MORE EQUITABLE FUTURE (Scott Burris, Sarah de Guia, Lance Gable, Donna E. Levin, Wendy E. Parmet & Nicolas P. Terry eds., 2021), <https://scholarshare.temple.edu/bitstream/handle/20.500.12613/6254/PublicHealthLawWatch-Report-2021-03.pdf?sequence=1&isAllowed=y> [<https://perma.cc/5U54-QWU2>] (discussing how legal responses to the pandemic failed to prevent both racial and economic disparities in the wake of the pandemic).

112. See Lawrence H. Tribe & Daniel Drake, *‘Ever Freer To Speak My Mind’: Lawrence H. Tribe, Interviewed by Daniel Drake*, N.Y. REV. BOOKS (Sept. 24, 2022), <https://email.nybooks.com/t/ViewEmail/y/51248D7BFCDEAC442540EF23F30FEDED/7DC057AEEA6BB39046778398EADC2510?alternativeLink=False> [<https://perma.cc/4HLK-CXSE>].

113. See, e.g., Erwin Chemerinsky & Jeffrey Abramson, Opinion, *What Do We Teach Law Students when We Have No Faith in the Supreme Court?*, L.A. TIMES (Jan. 16, 2022, 3:15 AM), <https://www.latimes.com/opinion/story/2022-01-16/supreme-court-conservatives-ideology-precedent-law-schools> [<https://perma.cc/NK87-XFYV> (staff-uploaded, dark archive)] (describing concerns of “a court about to overrule or gut *Roe vs. Wade*, a half-century-old precedent, for no reason other than that the conservatives have the votes to do so”).

B. *Neoliberal Capture of Pandemic Policies and Programs: Intimate Partner Violence*

The relationship between IPV and the pandemic has received national and global attention.<sup>114</sup> IPV has been exacerbated by all of the social and economic disruptions attending the pandemic.<sup>115</sup> Indeed, the conditions of the pandemic set in sharp relief the very conditions of IPV.<sup>116</sup> IPV victims have been the canaries in the pandemic coal mine, many of whom have suffered disproportionate economic losses.<sup>117</sup> Shelter-in-home regimes and social isolation also contributed to rising rates of domestic violence during the pandemic.<sup>118</sup>

Since the late 1970s, the State has privileged carceral approaches to IPV in a fashion consistent with a neoliberal political order that is itself a source of economic insecurity and household strain—both significant contributing factors to IPV.<sup>119</sup> It then relies on carceral practices to govern the consequences.<sup>120</sup> These policies and practices have influenced the ways in which the State has endeavored to address the issue of IPV through pandemic-related measures and raised two concerns addressed here. First, the State’s act of omission: the failure to address the relationship between economic hardship and IPV during COVID, leading to worsening economic circumstances for victims of IPV.<sup>121</sup> Second, the State’s act of commission: the allocation of ARP funds to enhance carceral strategies instead of support for IPV victims, notwithstanding concerns that law enforcement has not only failed to ameliorate IPV but has exacerbated the problem.<sup>122</sup>

114. See Amalesh Sharma & Sourav Bikash Borah, *COVID-19 and Domestic Violence: An Indirect Path to Social and Economic Crisis*, 37 J. FAM. VIOLENCE 759, 760 (2022).

115. See Bright et al., *supra* note 21, at 1; Elliot Ross & Amelia Nierenberg, *It’s Hard when You Can’t Go Anywhere: Life Inside an Assisted Living Facility*, N.Y. TIMES (May 9, 2020), <https://www.nytimes.com/interactive/2020/05/09/style/assisted-living-coronavirus.html> [<https://perma.cc/7T9A-UXJS> (dark archive)].

116. Ross & Nierenberg, *supra* note 115; see Bright et al., *supra* note 21, at 1.

117. See DAVIES ET AL., *supra* note 42, at 112 (describing the pandemic’s “particularly destructive impacts on women”); CTR. FOR SURVIVOR AGENCY & JUST., ANNUAL REPORT 2021, at 2, <https://csaj.org/wp-content/uploads/2022/07/2021-Report.pdf> [<https://perma.cc/R68X-BJYX>] (noting a bleak and worsening economic outlook for IPV survivors).

118. Bright et al., *supra* note 21, at 1–2; Julie Bosman, *Domestic Violence Calls Mount as Restrictions Linger: ‘No One Can Leave,’* N.Y. TIMES, <https://www.nytimes.com/2020/05/15/us/domestic-violence-coronavirus.html> [<https://perma.cc/2T22-7GBC> (dark archive)] (last updated Aug. 7, 2020); *No Where To Go: Intimate Partner Abuse in the COVID-19 Pandemic*, LAW PROFESSOR BLOGS NETWORK (Apr. 8, 2020), [https://lawprofessors.typepad.com/human\\_rights/2020/04/intimate-partner-abuse-in-the-covid-19-pandemic.html](https://lawprofessors.typepad.com/human_rights/2020/04/intimate-partner-abuse-in-the-covid-19-pandemic.html) [<https://perma.cc/ZF5G-CZCS>].

119. Genevieve LeBaron & Adrienne Roberts, *Toward a Feminist Political Economy of Capitalism and Carcerality*, 36 SIGNS 19, 38 (2010).

120. *Id.*

121. See *infra* notes 131–32, 136–38 and accompanying text.

122. Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J.L. & GENDER 53, 87–88 (2017); Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-incarceration Should Be Central*

### 1. A Brief Overview: IPV, the Political Economy, and the State's Response

IPV has long been categorized as a particularly egregious form of violence that disrupts and destabilizes families and communities.<sup>123</sup> During the 1970s and 1980s, the paradigmatic explanations for IPV relied on models of patriarchy as the principal source of this type of violence—a proposition since deemed to be incomplete and undertheorized.<sup>124</sup> Commencing in the early 1980s, the dynamic of domestic violence has been expressed through the ubiquitous use of the Power and Control Wheel, which attempts to decode IPV through an iconic image meant to illustrate the various manifestations of such violence disembodied from structural causes.<sup>125</sup>

More recently, IPV has been identified as an issue embedded in economic structures and systems, an analysis that properly extends beyond personal relationships, personality types, and idiosyncratic explanations.<sup>126</sup> For many individuals, the current political economy contributes to socioeconomic inequality, exploitative working conditions, unaffordable health care, a dearth of affordable housing, and more—all of which contribute to community strain often associated with harmful behaviors, family instability, and increased violence.<sup>127</sup> IPV survivors identify the lack of access to basic needs as the

to the *Work of the Anti-domestic Violence Movement*, 5 U. MIA. RACE & SOC. JUST. L. REV. 585, 591–92 (2015). For a helpful review of the history of carceral responses to IPV, see Mimi E. Kim, *VAWA @ 20: The Mainstreaming of the Criminalization Critique: Reflections on VAWA 20 Years Later*, 18 CUNY L. REV. 52, 53 (2014).

123. See Rebecca Miles-Doan, *Violence Between Spouses and Intimates: Does Neighborhood Context Matter?*, 77 SOC. FORCES 623, 623–26 (1998); see also Michael L. Benson, Greer Litton Fox, Alfred DeMaris & Judy Van Wyk, *Violence in Families: The Intersection of Race, Poverty, and Community Context*, in 2 FAMILIES, CRIME, AND CRIMINAL JUSTICE 91, 91–92 (Greer Litton Fox & Michael L. Benson eds., 2000); Judy A. Van Wyk, Michael L. Benson, Greer Litton Fox & Alfred DeMaris, *Detangling Individual-, Partner-, and Community-Level Correlates of Partner Violence*, 49 CRIME & DELINQ. 412, 413–14 (2003). A National Institute of Justice study demonstrated the role that different neighborhood conditions (particularly those conditions that relate to poverty and economic stress) play in producing domestic violence. GREER LITTON FOX & MICHAEL BENSON, U.S. DEP'T OF JUST., *WHEN VIOLENCE HITS HOME: HOW ECONOMICS AND NEIGHBORHOOD PLAY A ROLE* 1–6 (2004), <https://www.ncjrs.gov/pdffiles1/nij/205004.pdf> [<https://perma.cc/W9KW-DNPZ>]; see also Greer Litton Fox & Michael L. Benson, *Household and Neighborhood Contexts of Intimate Partner Violence*, 121 PUB. HEALTH REPS. 419, 426 (2006) (concluding that IPV behavior is linked to location and stems from the larger political economy).

124. Gwen Hunnicutt, *Varieties of Patriarchy and Violence Against Women: Resurrecting “Patriarchy” as a Theoretical Tool*, 15 VIOLENCE AGAINST WOMEN 553, 553–54 (2009).

125. Tamara Kuennen, *Reclaiming Structural Causes of Battering in the Power and Control Wheel*, 55 ARIZ. ST. L.J. (forthcoming 2023) (on file with the North Carolina Law Review).

126. See sources cited *supra* note 123.

127. Shelley D. Golden, Krista M. Perreira & Christine Piette Durrance, *Troubled Times, Troubled Relationships: How Economic Resources, Gender Beliefs, and Neighborhood Disadvantage Influence Intimate Partner Violence*, 28 J. INTERPERSONAL VIOLENCE 2134, 2142 (2013); Michael L. Benson, John Wooldredge, Amy B. Thistlewaite & Greer Litton Fox, *The Correlation Between Race and Domestic Violence Is Confounded with Community Context*, 51 SOC. PROBS. 326, 334–36 (2004); Lisa A. Goodman, Katya Fels Smyth, Angela M. Borges & Rachel Singer, *When Crises Collide: How Intimate Partner*

principal barrier to safety.<sup>128</sup> Persons who have harmed often face overwhelming obstacles when seeking housing and employment and encounter other economic difficulties related to their legal status—factors that undermine desistance efforts and the goals to mitigate domestic violence.<sup>129</sup> Nonetheless, the State’s approaches to gender violence have long favored criminal legal system strategies while undermining economic support for survivors and denying funding to programs that work with persons who have harmed.<sup>130</sup> These circumstances help to provide the context for the failure of the government to effectively respond to IPV during the pandemic.

## 2. IPV, the Pandemic, and Economic Relief: Acts of Omission

Despite the circumstances of the pandemic that exacerbated IPV, no pandemic-related provisions were enacted to strengthen welfare as a safety net for IPV victims.<sup>131</sup> On the contrary, during the pandemic, fewer families obtained Temporary Assistance for Needy Families (“TANF”) benefits.<sup>132</sup>

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*Violence and Poverty Intersect To Shape Women’s Mental Health and Coping?*, 10 TRAUMA VIOLENCE & ABUSE 306, 308–09 (2009); BRIAN PHILLIPS, GLOBAL PRODUCTION AND DOMESTIC DECAY xxii, 43, 45 (1998) (describing economic conditions including unemployment, reduction in wages, family disruption, and an increase in crime).

128. CTR. FOR SURVIVOR AGENCY & JUST., A VIRTUAL SUMMIT: THE ECONOMIC IMPACT OF COVID-19 ON SURVIVORS OF DOMESTIC/SEXUAL VIOLENCE 11, 45 (2020) [hereinafter VIRTUAL SUMMIT], <https://csaj.org/wp-content/uploads/2021/10/Covid-Summit-FINAL-20-12-17.pdf> [https://perma.cc/3TR7-XEC5] (noting a failure of all systems for survivors).

129. For an overview of desistance theories as applied to IPV, see generally Deborah M. Weissman, *Social Justice as Desistance: Rethinking Approaches to Gender Violence*, 72 AM. U. L. REV. 215 (2022).

130. See generally Weissman, *In Pursuit of Economic Justice*, *supra* note 19 (analyzing legal remedies that address economic abuse).

131. Tara Golshan, *America’s Cash Assistance Program Appears Dead when People Need It Most*, HUFFINGTON POST (May 5, 2020, 12:05 PM), [https://www.huffpost.com/entry/coronavirus-cash-assistance-tanf-welfare-relief\\_n\\_5eb15b58c5b60a92778218cd?guccounter=1](https://www.huffpost.com/entry/coronavirus-cash-assistance-tanf-welfare-relief_n_5eb15b58c5b60a92778218cd?guccounter=1) [https://perma.cc/S934-QUKJ] (noting that TANF was absent from the government’s economic relief efforts); Justin Schweitzer, *TANF Is a Key Part of the Mix of Aid Programs Supporting Families During COVID-19 Crisis*, CTR. FOR AM. PROGRESS (Oct. 7, 2020), <https://www.americanprogress.org/article/tanf-key-part-mix-aid-programs-supporting-families-covid-19-crisis/> [https://perma.cc/5XZN-HT2X] (noting that TANF was missing from pandemic efforts). Temporary Assistance for Needy Families (“TANF”) has been the principal federally funded program that provides economic support for victims of IPV. Jody Raphael, *Welfare Reform: Prescription for Abuse? A Report on New Research Studies Documenting the Relationship of Domestic Violence and Welfare*, 19 LAW & POL’Y 123, 125 (1997); see also *TANF and Domestic Violence: Cash Assistance Matters to Survivors*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 26, 2021), <https://www.cbpp.org/research/family-income-support/tanf-and-domestic-violence-cash-assistance-matters-to-survivors> [https://perma.cc/2NFQ-3WMD] (describing the importance of TANF cash assistance for survivors of IPV).

132. *Policy Basics: Temporary Assistance for Needy Families*, CTR. ON BUDGET & POL’Y PRIORITIES (Mar. 1, 2022), <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families> [https://perma.cc/7UDM-PJZ4] (noting that “TANF’s reach hit a historic low”); Sara Wee, *CSAJ - Economic Impact of COVID on DVSA Survivors Survey (Time 1 & Time 2)*, TABLEAU PUB., <https://public.tableau.com/app/profile/sara.wee/viz/CSAJ-EconomicImpactofCOVIDonDVSASurvi>

Sixty percent of welfare recipients have experienced domestic violence and often rely on welfare subsidies to facilitate escape from abusive relationships.<sup>133</sup> However, TANF has never been readily available to those who need the benefits. TANF regulations impose stringent qualifications and require recipients to engage in low-wage work activities (“workfare” mandates) without the benefit of labor or antidiscrimination protections.<sup>134</sup> Black families are less likely to be approved for TANF due to the racism that shaped the formative stages of U.S. welfare programs.<sup>135</sup>

The ARP included the Pandemic Emergency Assistance Fund for state agencies that administered TANF benefits.<sup>136</sup> However, regulations restricted the use of these funds to nonrecurrent, short-term benefits through September 2022.<sup>137</sup> Funds were limited to “specific crisis situation[s] or episode[s] of need,” were “not . . . intended to meet on-going needs,” and were restricted to four months in duration.<sup>138</sup> Making matters worse, TANF funds were allocated to purposes unrelated to families’ subsistence needs and were unavailable to assist recipients with employment opportunities.<sup>139</sup>

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vorsSurvey\_16184388485340/Story1 [https://perma.cc/WL9F-L8TV] (last updated Dec. 5, 2022) (noting increasing difficulty accessing TANF).

133. See Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN’S L.J. 201, 205 (1996); Haley Hawkins, *Addressing Justice System Barriers for Sexually Victimized Single Mothers*, 37 WOMEN’S RTS. L. REP. 155, 165 n.72 (2016).

134. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 7, 8, 21, 25, 34, and 42 U.S.C.); Rachael A. Spencer, Emily D. Lemon, Kelli A Komro, Melvin D. Livingston & Briana Woods-Jaeger, *Women’s Lived Experiences with Temporary Assistance for Needy Families (TANF): How TANF Can Better Support Women’s Wellbeing and Reduce Intimate Partner Violence*, 19 INT’L J. ENV’T RSCH. & PUB. HEALTH 1, 3 (2022); Kathryn Evans, *Making Workfare More Fair: Protecting Workers in Welfare Programs from Sexual Harassment*, 36 BERKELEY J. GENDER L. & JUST. 150, 158–60 (2021); Jamie Haar, *Women’s Work: Economic Security in the Domestic Violence Context*, 31 HOFSTRA LAB. & EMP. L.J. 471, 487–88 (2014).

135. Ife Floyd, LaDonna Pavetti, Laura Meyer, Ali Safawi, Liz Schott, Evelyn Bellew & Abigail Magnus, *TANF Policies Reflect Racist Legacy of Cash Assistance*, CTR. ON BUDGET & POL’Y PRIORITIES (Aug. 4, 2021), <https://www.cbpp.org/research/family-income-support/tanf-policies-reflect-racist-legacy-of-cash-assistance> [https://perma.cc/4588-5LUM]. A thorough critique of the TANF program is beyond the scope of this Article.

136. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9201, 135 Stat. 4, 124–26 (codified at 42 U.S.C. § 603(c) (2021)). Funds were limited to provide certain nonrecurrent, short-term (“NRST”) benefits. *Id.*

137. OFF. OF FAMILY ASSISTANCE, U.S. DEP’T OF HEALTH & HUM. SERVS., NO. TANF-ACF-PI-2021-02, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES PROGRAM INSTRUCTION 3 (2022), <https://www.acf.hhs.gov/sites/default/files/documents/ofa/TANF-ACF-PI-2021-02-with-table.pdf> [https://perma.cc/T4L9-MCCU].

138. *Id.*

139. Neil MacFarquhar, *Mississippi Welfare Scandal Spreads Well Beyond Favre*, N.Y. TIMES, <https://www.nytimes.com/2022/09/22/us/brett-favre-welfare-mississippi.html> [https://perma.cc/58Y M-SFRY (dark archive)] (last updated Sept. 27, 2022) (describing recent allocations of TANF funds in Mississippi as “a slush fund for pet projects and personal gain”); Aditi Shrivastava & Gina Azito Thompson, *TANF Cash Assistance Should Reach Millions More Families To Lessen Hardship*, CTR. ON



IPV survivors who depend on TANF as their principal source of cash assistance obtained little relief from pandemic measures that failed to address a neoliberal ideology that rejects anything more than minimal welfare support for families.<sup>140</sup> Despite the State's stated attention to issues related to IPV, its efforts to address the economic travails faced by survivors has been perhaps the weakest of pandemic responses.<sup>141</sup>

### 3. IPV, the Pandemic, and the Carceral State: Acts of Commission

In contrast to its indifference to the precarious economic circumstances of IPV survivors during the pandemic, the State increased funds to expand criminalization mechanisms, purportedly to address concerns about rising crime. Since 2020, at least \$850 million have been distributed to law enforcement agencies through the CARES Act at the same time that access to welfare benefits to provide means of exiting an abusive relationship diminished.<sup>142</sup> As of June 2021, at least \$350 billion of ARP funds were distributed for augmenting numbers of police.<sup>143</sup> Indeed, in the midst of deepening economic insecurity for victims of IPV, "ARP investments made [in] 2021 [were] among the largest single-year commitments of federal resources for state and local law enforcement and public safety on record."<sup>144</sup> Moreover, in a recent July 2022 statement promoting the Safer American Plan, President Biden boasted that "[o]ver \$10 billion in ARP funds have already been committed to policing and other public safety efforts."<sup>145</sup> The President recently enjoined states and localities to allocate unspent money from last year's \$1.9 trillion of COVID funds to law enforcement purposes.<sup>146</sup>

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BUDGET & POL'Y PRIORITIES (Feb. 18, 2022), <https://www.cbpp.org/research/family-income-support/tanf-cash-assistance-should-reach-millions-more-families-to-lessen> [<https://perma.cc/3T2K-VH9H>].

140. MARIE GOTTSCHALK, *THE SHADOW WELFARE STATE* 1 (2000) (referring to the United States as a "welfare laggard").

141. Amy Goldstein, *Welfare Rolls Decline During the Pandemic Despite Economic Upheaval*, WASH. POST (Aug. 1, 2021, 10:30 AM), <https://www.washingtonpost.com/health/2021/08/01/welfare-roles-during-the-pandemic/> [<https://perma.cc/CHF2-585T> (dark archive)].

142. See *supra* note 131 and accompanying text; COLMAN ET AL., *supra* note 79, at 6.

143. Noam Biale, Elizabeth Hinton & Elizabeth Ross, *The Discriminatory Purpose of the 1994 Crime Bill*, 16 HARV. L. & POL'Y REV. 115, 156 (2021) (discussing remarks by President Biden and Attorney General Garland on Gun Crime Prevention Strategy).

144. *Fact Sheet: President Biden's Safer America Plan*, WHITE HOUSE (July 21, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/21/fact-sheet-president-biden-safer-america-plan/> [<https://perma.cc/5RVK-AE6A>].

145. *Id.*

146. Shannon Pettypiece, *Biden Urges Cities To Spend Covid Relief Money on Police, Crime Prevention*, <https://www.nbcnews.com/politics/white-house/biden-urge-cities-spend-covid-relief-money-police-crime-prevention-rcna28656> [<https://perma.cc/2324-TSK7>] (last updated May 13, 2022, 4:02 PM).

Local police departments are poised to receive the greatest amount of ARP funds allocated to cities and states.<sup>147</sup> Even greater allocations for criminal justice responses to protect families are on the horizon in 2023.<sup>148</sup> Informed observers have noted the ways that carcerality has dominated responses to the pandemic.<sup>149</sup> These budgetary allocations continue a decades-long trend of ignoring the voices of survivors who seek supportive services outside of the criminal legal system.<sup>150</sup> Moreover, these funding choices may foreclose the possibility of advancing socioeconomic rights.<sup>151</sup>

The expansion of subsidies to law enforcement runs counter to the counsel of antiviolence advocates who have identified “the carceral state as the primary institution perpetuating violence.”<sup>152</sup> Anticarceral feminists have asked: “[W]ho protects us from the police?”<sup>153</sup> Despite the fact that law enforcement systems often deprive victims of autonomy in determining how best to obtain safety, some sheriffs’ departments are using ARP funds for body cameras, a device most frequently used to allow police and prosecutors to proceed with criminal charges independent of survivors’ wishes.<sup>154</sup>

Pandemic funds for carceral responses to IPV perpetuate a practice long rejected by many survivors, antiviolence advocates, and scholars.<sup>155</sup> Arrests and punishment have been the State’s preferred means of addressing IPV, notwithstanding that many survivors and advocates have rejected the criminal

147. COLMAN ET AL., *supra* note 79, at 9.

148. See *Fact Sheet: President Biden’s Safer America Plan*, *supra* note 144.

149. See Alexes Harris, *Monetary Sanctions as a Pound of Flesh*, BRENNAN CTR. FOR JUST. (July 26, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/monetary-sanctions-pound-flesh> [<https://perma.cc/9239-82NM>].

150. See generally AM. CIV. LIBERTIES UNION, CUNY SCH. OF L. & UNIV. OF MIA. SCH. OF L., *RESPONSES FROM THE FIELD: SEXUAL ASSAULT, DOMESTIC VIOLENCE, AND POLICING* (2015), [https://www.aclu.org/sites/default/files/field\\_document/2015.10.20\\_report\\_-\\_responses\\_from\\_the\\_field.pdf](https://www.aclu.org/sites/default/files/field_document/2015.10.20_report_-_responses_from_the_field.pdf) [<https://perma.cc/DA7L-JY7E>] (presenting survey results concerning “how police respond to domestic violence and sexual assault and additional reasons that some survivors do not contact the police”).

151. See Jeremy Waldron, *Socioeconomic Rights and Theories of Justice*, 48 SAN DIEGO L. REV. 773, 775 (2011) (noting that some theories of justice appear to be hostile to socioeconomic rights).

152. Mimi E. Kim, *Anti-carceral Feminism: The Contradictions of Progress and the Possibilities of Counter-Hegemonic Struggle*, 35 AFFILIA 309, 313 (2020) [hereinafter Kim, *Anti-carceral Feminism*].

153. Luci Cavallero & Verónica Gago, *The Political Invention of the Feminist Strike*, VIEWPOINT MAG. (Mar. 23, 2021), <https://viewpointmag.com/2021/03/23/the-political-invention-of-the-feminist-strike/> [<https://perma.cc/T4ZM-749J>].

154. See, e.g., Shelby Harris, *Jackson County Puts Federal Pandemic Funds Toward Body Cams, Tasers*, CAROLINA PUB. PRESS (Feb. 21, 2022), <https://carolinapublicpress.org/51680/jackson-county-puts-federal-pandemic-funds-toward-body-cams-tasers/> [<https://perma.cc/T3JH-LBVM>]; Deborah M. Weissman, *Gender Violence, the Carceral State, and the Politics of Solidarity*, 55 U.C. DAVIS L. REV. 801, 816–17 (2021).

155. The literature on the critique of carceral responses to IPV is expansive and beyond the confines of this Article. See *supra* note 122; *infra* notes 156–57.

legal system as a means of mitigating harms related to gender violence.<sup>156</sup> Racism is one explanation for the failure of the criminal legal system to provide a measure of safety for victims of color while bringing about the demise of communities.<sup>157</sup> Minority communities are subjected to unnecessary and threatening surveillance and overincarceration with long-lasting consequences that separate families; interfere with employment opportunities; and exacerbate trauma, health-related problems, and poverty.<sup>158</sup>

Survivors identify the lack of access to basic needs, including economic resources, health care supports, housing, and child care, as the principal barrier to safety.<sup>159</sup> While funding has increased for law enforcement agencies, organizations that provide direct services to survivors have struggled to survive.<sup>160</sup> Furthermore, ARP funds allocated to states to address IPV are off-limits to those entities that intervene with offenders, notwithstanding the benefits of working with individuals who have harmed and who have most often been harmed themselves.<sup>161</sup> Offender treatment programs are undervalued and often disparaged and deemed undeserving of public funding.<sup>162</sup>

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156. See Goodmark, *Assessing the Impact*, *supra* note 20, at 124–25; AM. CIV. LIBERTIES UNION ET AL., *supra* note 150, at 29; DANIELLE SERED, VERA INST. OF JUST., ACCOUNTING FOR VIOLENCE: HOW TO INCREASE SAFETY AND BREAK OUR FAILED RELIANCE ON MASS INCARCERATION 9, 12, 17, 22 (2017), <https://www.vera.org/downloads/publications/accounting-for-violence.pdf> [<https://perma.cc/JRB2-C7VC>].

157. See Coker & Macquoid, *supra* note 122, at 591–92; Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991) (noting that women of color choose not to call the police fearing the reaction of a hostile police force). Law enforcement response is particularly problematic for immigrant women. See Alexandra Grant, *Intersectional Discrimination in U Visa Certification Denials: An Irremediable Violation of Equal Protection?*, 3 COLUM. J. RACE & L. 253, 262 (2013); Radha Vishnuvajjala, Note, *Insecure Communities: How an Immigration Enforcement Program Encourages Battered Women To Stay Silent*, 32 B.C. J.L. & SOC. JUST. 185, 208–09 (2012).

158. Coker & Macquoid, *supra* note 122, at 598.

159. Caroline Bettinger-Lopez, R. Denisse Córdova Montes & Max Zoberman, *The Duty To Protect Survivors of Gender-Based Violence in the Age of COVID-19: An Expanded Human Rights Framework*, 29 U. MIA. INT'L & COMP. L. REV. 235, 249–51 (2022); see also VIRTUAL SUMMIT, *supra* note 128, at 45 (noting a failure of all systems for survivors).

160. Bettinger-Lopez et al., *supra* note 159, at 243–44 (describing services provided by domestic violence programs, for example, housing, rental assistance, and food).

161. Family Violence Prevention and Services Act, 42 U.S.C. § 10407(a)(2)(B)(iii); Amaia Iratzoqui, *Domestic Violence and the Victim/Offender Overlap Across the Life Course*, 62 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 2801, 2803 (2018).

162. See Brittney R. Chesworth, *Exploring State Policies and Program Practices for Offenders of Intimate Partner Violence* 66 (2020) (Ph.D. dissertation, University of North Carolina at Chapel Hill) (on file with the North Carolina Law Review); EDWARD W. GONDOLF, GENDER-BASED PERSPECTIVES ON BATTERER PROGRAMS 8, 87–88 (2015); 34 U.S.C. § 10441 (setting out the purpose of federal grants focused exclusively on criminal legal strategies and victim services).

The pandemic has exposed the unrealized potential of the State to support all families, particularly poor households. The critiques of the CARES Act and the ARP do not suggest that these measures were insignificant. Indeed, these measures assisted families. *But not all.* Pandemic-related economic recovery strategies often reproduce the biases of the normative system from which they emerge.<sup>163</sup> It could hardly be otherwise, of course. The value systems through which the culture transacts the experiences of daily life are inevitably replicated in the policies through which the State regulates the social order. Entrenched market practices prejudicial to poor and minority homeowners and renters persisted, unaltered by relief measures.<sup>164</sup> Courts rejected the ARP's efforts to address historic systemic discrimination.<sup>165</sup> Neither CARES nor the ARP addressed the structural origins of racial inequality, poverty, or the punitive ideology of welfare programs.<sup>166</sup> The disproportionate allocation of funding to carceral institutions causes concern not only as to whether families received their due but whether it will be police and prosecutors who dominate the response to the consequences of economic crises.

### III. THE TURN TO MUTUAL AID NETWORKS

The failure of the State to provide adequate support for families during the pandemic summoned community groups to develop new mutual aid networks to address pressing needs. Activists rediscovered mutual aid as a phenomenon that has “revived the principle of duty of care.”<sup>167</sup> This part describes the nature of mutual aid, the ways mutual aid networks facilitated support for families and communities, and the challenges that reliance on these entities pose.

#### A. *The Nature of Mutual Aid*

As early as the nineteenth century, Peter Kropotkin (1842–1921) suggested that mutual aid networks of solidarity materialize as an evolutionary factor, founded in the form of “[a] conscience of . . . human solidarity.”<sup>168</sup> More

163. See Lorena Roque, Rose Khattar & Arohi Pathak, *Black Men and the U.S. Economy: How the Economic Recovery Is Perpetuating Systemic Racism*, CTR. FOR AM. PROGRESS (Mar. 28, 2022), <https://www.americanprogress.org/article/black-men-and-the-u-s-economy-how-the-economic-recovery-is-perpetuating-systemic-racism/> [<https://perma.cc/9DR8-Z527>] (noting that systemic racism, ageism, and ableism were unaffected by recovery efforts).

164. See *supra* notes 44–46 and accompanying text.

165. See *supra* Section II.A.1.d.

166. See Conklin, *supra* note 85, at 316.

167. Dan Swain, *Prefigurative Biology: Mutual Aid, Social Reproduction and Plasticity*, in UNCHAINING SOLIDARITY: ON MUTUAL AID AND ANARCHISM 239, 243 (Dan Swain, Petr Urban, Catherina, Malabou & Petr Kouba eds., 2022); Evans, *Prescribing a Better Future*, *supra* note 82.

168. PETER KROPOTKIN, *MUTUAL AID: A FACTOR OF EVOLUTION* ix, xiii (1902). Kropotkin is credited with articulating the concept of mutual aid. See *id.*

recently, Dean Spade has described mutual aid as “survival work” to “share resources and support vulnerable neighbors.”<sup>169</sup> Mutual aid serves as the premise for practices and policies by which citizens act principally outside State structures to respond to crises.<sup>170</sup> Networks engage in supportive activities when the State fails to act to serve as a substitute for State aid when such assistance is offered under a demeaning and punishing bureaucracy.<sup>171</sup>

Mutual aid practices are historic arrangements, particularly among indigenous and racial communities.<sup>172</sup> Immigrant communities settling in the United States established mutual aid associations based on the traditions of their countries of origin, many of which considered community fundraising as “a mandate from the people” to meet collective needs.<sup>173</sup> Networks have long served to provide assistance to communities devastated by natural disasters.<sup>174</sup> During the 1960s and 1970s, free health clinics, food and child care cooperatives, and law collectives were formed in a political moment of contestation with the State on a range of social matters.<sup>175</sup>

Mutual aid is not charity.<sup>176</sup> Network members reject the culture of philanthropy that deems poverty a personal pathology that focuses on

169. DEAN SPADE, *MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT)* 1 (2020) [hereinafter SPADE, *BUILDING SOLIDARITY*]; see also Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, & Mutual Aid*, 12 COLUM. J. RACE & L. 601, 602–03 (2022) (“[M]utual aid is both a practice and a theory.”).

170. See Angela P. Harris, *Decolonizing Legal Subjects in Climate Chaos*, 121 S. ATL. Q. 359, 366–67 (2022) [hereinafter Harris, *Decolonizing Legal Subjects*].

171. See Gregory E. Louis, *Bridging the Two Cultures: Toward Transactional Poverty Lawyering*, 28 CLINICAL L. REV. 411, 427 (2022) (“Mutual aid exists because public services are ‘exclusive, insufficient, punitive, and criminalizing.’” (quoting SPADE, *BUILDING SOLIDARITY*, *supra* note 169, at 53)).

172. SPADE, *BUILDING SOLIDARITY*, *supra* note 169, at 11–15.

173. LILA CORWIN BERMAN, *THE AMERICAN JEWISH PHILANTHROPIC COMPLEX* 35 (2020). See generally Gary R. Mormino & George E. Pozzeta, *The Cradle of Mutual Aid: Immigrant Cooperative Societies in Ybor City*, TAMPA BAY HIST., Dec. 1, 1985, at 1, <https://digitalcommons.usf.edu/cgi/viewcontent.cgi?article=1180&context=tampabayhistory> [<https://perma.cc/3Z7V-MGN3>] (discussing the use of mutual aid amongst immigrants in Ybor City).

174. See Dean Spade, *Solidarity Not Charity: Mutual Aid for Mobilization and Survival*, 38 SOC. TEXT 131, 139 (2020) [hereinafter Spade, *Solidarity Not Charity*].

175. Carrie Feibel, *A 1960s ‘Hippie Clinic’ in San Francisco Inspired a Medical Philosophy*, NPR (Dec. 30, 2017, 6:00 AM), <https://www.npr.org/sections/health-shots/2017/12/30/571979573/a-1960s-hippie-clinic-in-san-francisco-inspired-a-medical-philosophy> [<https://perma.cc/DHT5-Y83W>] (health clinics); ANNE MEIS KNUPFER, *FOOD CO-OPS IN AMERICA: COMMUNITIES, CONSUMPTION, AND ECONOMIC DEMOCRACY* 134–35 (2013) (food co-ops); Rosalyn Baxandall, *Hidden from History* 4–6 (Mar. 27–29, 2014) (unpublished manuscript) (on file with the North Carolina Law Review) (childcare co-ops); Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting To Challenge the Power*, 96 W. VA. L. REV. 293, 298 (1994) (law collectives); see JEFF SHANTZ, *COMMONIST TENDENCIES: MUTUAL AID BEYOND COMMUNISM* 17 (2013).

176. Spade, *Solidarity Not Charity*, *supra* note 174, at 140.

individual relief rather than structural reform.<sup>177</sup> Instead, mutual aid groups act cooperatively, often imbued with political purpose and an informed understanding of the power of collective action.<sup>178</sup>

### B. *Mutual Aid and the Pandemic*

Mutual aid networks have expanded in response to the crisis of the pandemic, largely as a result of the failure of the CARES Act and the ARP to provide sufficient support.<sup>179</sup> Amy Kapczynski and Jacob Hacker posit that the problem lies with the institutions of the State that “are aligned against the expression of popular will.”<sup>180</sup> Community members established collaboratives to assist with the distribution of food, the delivery of essential household needs, and services, such as child care and mental health support groups.<sup>181</sup> Members organized to distribute masks and hand sanitizer and established GoFundMe operations to support economically vulnerable households who often were ineligible for pandemic-related relief.<sup>182</sup> Midwives collaborated to strengthen community birth networks in response to the failure of state-regulated maternal care systems to respond to the needs of pregnant women.<sup>183</sup> Labor coalitions operated through networks built across cities to support unions and improve poor working conditions exacerbated during the pandemic.<sup>184</sup> Groups of mothers organized nationally to assist the unhoused and developed new

177. See Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 805–07 (2002) [hereinafter Weissman, *Shifting Paradigms*].

178. Catherine Malabou, *Politics of Plasticity: Cooperation Without Claims*, in UNCHAINING SOLIDARITY: ON MUTUAL AID AND ANARCHISM 15 (Dan Swain, Petr Urban, Catherine Malabou & Petr Kouba eds., 2021); Deborah Stone, Commentary, *Health Equity in a Trump Administration*, 42 J. HEALTH POLS., POL’Y & L. 995, 997 (2017).

179. Dan Swain, Petr Urban, Catherine Malabou & Petr Kouba, *Unchaining Solidarity, Mutual Aid and Anarchism*, in UNCHAINING SOLIDARITY: ON MUTUAL AID AND ANARCHISM, *supra* note 178, at 4; Arons, *supra* note 73, at 22–27; Kimiko de Freytas-Tamura, *How Neighborhood Groups Are Stepping in where the Government Didn’t*, N.Y. TIMES, <https://www.nytimes.com/2021/03/03/nyregion/covid-19-mutual-aid-nyc.html> [<https://perma.cc/W58P-CF86> (staff-uploaded, dark archive)] (last updated Mar. 6, 2021); Christine Fernando, *Mutual Aid Networks Find Roots in Communities of Color*, AP NEWS (Jan. 21, 2021), <https://apnews.com/article/immigration-coronavirus-pandemic-7b1d14f25ab717c2a29ceafd40364b6e> [<https://perma.cc/5XNS-8MNT>].

180. Amy Kapczynski & Jacob Hacker, *Why Are Americans So Unhappy About the Economy*, LAW & POL. ECON. PROJECT (Mar. 28, 2022), <https://lpeproject.org/blog/why-are-americans-so-unhappy-about-the-economy/> [<https://perma.cc/SH34-5HBE>].

181. Arons, *supra* note 73, at 23.

182. Dean Spade, *Mutual Aid Is Essential to Our Survival Regardless of Who Is in the White House*, TRUTHOUT (Oct. 27, 2020), <https://truthout.org/articles/mutual-aid-is-essential-to-our-survival-regardless-of-who-is-in-the-white-house/> [<https://perma.cc/4VWN-FW2U>].

183. Rachel Anderson-Seller, Comment, *The Coronavirus as a Changemaker: Opportunities To Advance American Maternal Care in the Wake of the Pandemic*, 42 COLUM. J. GENDER & L. 1, 53–57 (2021).

184. See Andrew Elmore, *Labor’s New Localism*, 95 S. CAL. L. REV. 253, 270 (2021).

approaches to housing justice.<sup>185</sup> Other networks provided Wi-Fi routers to enable poor families virtual access to schools and health care.<sup>186</sup> Mutual aid groups provided opportunities for creativity, solidarity, and coordination in many communities.<sup>187</sup> The collaborative work of mutual aid networks not only met new needs resulting from the pandemic, but exposed long-existing gaps in State supports.<sup>188</sup>

### C. *Mutual Aid, the Pandemic, and Gender Violence*

Mutual aid networks have historically supported victims of IPV. During the 1960s and 1970s, an antiviolence movement emerged within second-wave feminism, outside of mainstream arrangements, and with a “structural critique of society.”<sup>189</sup> These antiviolence advocates worked within the realm of grassroots culture, organizing antisubordination strategies to support concepts of agency and dignity.<sup>190</sup> They developed a system of community-run safe houses for women fleeing abusive relationships.<sup>191</sup> Over time, advocates turned to community-based models premised on an understanding of the structural forces that contribute to gender violence, including “racialized political, economic, militarist, and environmental roots and manifestations of violence.”<sup>192</sup> In practice, mutual aid advocates rejected the State’s reliance on purely carceral responses and instead developed restorative and transformative justice models to address the structural sources of IPV, center victims’ voices, and engage in a process of defining accountability that involves community members.<sup>193</sup>

The State has failed to adequately address the consequences of the pandemic on families experiencing violence. Families lacking adequate technology were unable to seek legal protection from the courts that operated

185. Sheila Foster, *From Vacancy to Decommodification: Co-cities and the Enabling State*, LAW & POL. ECON. PROJECT (May 25, 2022), <https://lpeproject.org/blog/from-vacancy-to-decommodification-co-cities-and-the-enabling-state/> [<https://perma.cc/D48Q-RD3N>].

186. de Freytas-Tamura, *supra* note 179.

187. Rebecca Bratspies, *This Great Catastrophe: Bungling Pandemics from 1918 to Today*, 30 MICH. ST. INT’L L. REV. 189, 247–48 (2022).

188. Harris, *Decolonizing Legal Subjects*, *supra* note 170, at 366–67; de Freytas-Tamura, *supra* note 179 (finding that the stimulus bills were insufficient to support families who lost jobs and could not access food or other social services).

189. Nancy Fraser, *Feminism, Capitalism and the Cunning of History*, 56 NEW LEFT REV. 97, 97, 101 (2009).

190. Margaret E. Johnson, *Changing Course in the Anti-domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 155 (2015).

191. *Id.*

192. See Allegra McLeod, *An Abolitionist Critique of Violence*, 89 U. CHI. L. REV. 525, 527 (2022).

193. Kim, *Anti-carceral Feminism*, *supra* note 152, at 316. Organizations such as Creative Interventions and generationFIVE are examples of efforts to develop transformative justice practices founded on principles of community accountability and noncarceral means to address harm. *Id.* at 320.

virtually.<sup>194</sup> Survivors expressed deepening reluctance to turn to the police and to trigger the incarceration of persons who harmed them during a time when COVID-19 was rampant and deaths among persons held in jails and prisons were on the rise.<sup>195</sup>

To meet urgent needs, advocates created toolkits and blueprints to provide instructions for survivors to map out neighborhood resources and identify allies to call upon with safety-related issues.<sup>196</sup> Antiviolence advocates also focused on the worsening economic circumstances of survivors.<sup>197</sup> One organization created a “Safety Fund” in order to make direct and unconditional cash transfers to IPV survivors.<sup>198</sup> Some groups helped IPV survivors with housing needs; others provided a mobile unit to deliver basic needs to survivors.<sup>199</sup>

These efforts were effective. In New York, mutual aid networks contributed to a reduction in family violence without the State’s protection and surveillance mechanisms.<sup>200</sup> Direct cash transfers provided by mutual aid groups alleviated the financial impacts of IPV, including expenses related to health and housing.<sup>201</sup> These “culture of care strategies”<sup>202</sup> incorporated survivor-centered

194. Bettinger-Lopez et al., *supra* note 159, at 240, 264.

195. *Id.* at 264; Weihua Li & Beth Schwartzapfel, *Is Domestic Violence Rising During the Coronavirus Shutdown? Here’s What the Data Shows*, MARSHALL PROJECT (Apr. 22, 2020, 6:00 AM), <https://www.themarshallproject.org/2020/04/22/is-domestic-violence-rising-during-the-coronavirus-shutdown-here-s-what-the-data-shows> [<https://perma.cc/Q937-7SVC>].

196. *See, e.g.*, ALEXANDRIA OCASIO-CORTEZ WITH MARIAME KABA, MUTUAL AID 101 (2020), [https://docs.google.com/document/d/e/2PACX-1vRMxV09kdojzMdyOfapJUOB6Ko2\\_1iAflm8ELeIgma21wIt5HoTqP1QXadF01eZc0ySrPW6VtU\\_veyyp/pub?](https://docs.google.com/document/d/e/2PACX-1vRMxV09kdojzMdyOfapJUOB6Ko2_1iAflm8ELeIgma21wIt5HoTqP1QXadF01eZc0ySrPW6VtU_veyyp/pub?) [<https://perma.cc/GS5E-3W89>]; *see also* Mia Mingus, *Pods and Pod Mapping Worksheet*, BAY AREA TRANSFORMATIVE JUST. COLLECTIVE (June 2016), <https://batjc.wordpress.com/pods-and-pod-mapping-worksheet> [<https://perma.cc/T8Z3-57YE>].

197. *See generally* KIRKLEY DOYLE, AMY DURRENCE & SONYA PASSI, FREEFROM, SURVIVORS KNOW BEST HOW TO DISRUPT INTIMATE PARTNER VIOLENCE DURING COVID-19 AND BEYOND (2020), <https://www.freefrom.org/wp-content/uploads/2021/06/Survivors-Know-Best.pdf> [<https://perma.cc/5BXS-DDLL>] (detailing how survivors of IPV were supported through direct cash assistance).

198. *Id.* at 9.

199. NAT’L ALL. FOR SAFE HOUS., INC. & CARAVAN STUDIOS, COVID-19 AND FLEXIBLE FUNDING: REDEFINING RESILIENCE FOR SURVIVORS 1–2 (2020), [https://safehousingpartnerships.org/sites/default/files/2021-01/COVID\\_and\\_Flex\\_Funding\\_RIRT\\_Project.pdf](https://safehousingpartnerships.org/sites/default/files/2021-01/COVID_and_Flex_Funding_RIRT_Project.pdf) [<https://perma.cc/A44E-BA8N>]; Louie Marven, *How Are Pandemic-Era Lessons Impacting the Ways We Prevent Sexual Violence?*, VAWNET (July 27, 2021), <https://vawnet.org/news/how-are-pandemic-era-lessons-impacting-ways-we-prevent-sexual-violence> [<https://perma.cc/P4RZ-5JXL>].

200. Arons, *supra* note 73, at 27. Professor Arons described a sixty percent drop in the number of reported child abuse cases during the pandemic, which she attributed to mutual aid networks’ support for families as an alternative to family regulation systems that separate and punish. *Id.* at 19–23, 26–28.

201. *See* AMY DURRENCE, KIRKLEY DOYLE & SONYA PASSI, FREEFROM, TRUST SURVIVORS: BUILDING AN EFFECTIVE AND INCLUSIVE CASH TRANSFER PROGRAM 50 (2021), <https://www.freefrom.org/wp-content/uploads/2021/06/TrustSurvivorsReport.pdf> [<https://perma.cc/6RR6-HTJQ>].

202. *See What Makes a “Culture of Care”?*, CULTURES CARE, <https://culturesofcare.com/> [<https://perma.cc/HHX8-NEBH>].



practices and addressed the economic determinants that contribute to IPV and the obstacles to exiting abusive relationships.

D. *Mutual Aid: Possibilities and Challenges of Transformative Networks*

The turn toward mutual aid networks provides opportunities to examine the strengths of these entities as well as the challenges they face and to determine the extent to which they might supplement or supplant the obligations of the State. Community collaborations are often intended to address immediate needs and ameliorate quotidian suffering while addressing the larger systemic issues that contribute to social ills.<sup>203</sup> At the same time, these entities face significant obstacles, particularly because of their efforts to transform the political economy in ways that undermine the interests of existing power structures.<sup>204</sup>

1. Transformative Possibilities

Mutual aid collaborations are often designed to build a “solidarity economy.”<sup>205</sup> They seek to extend beyond material assistance to families and communities to develop a form of social solidarity with the intent to create durable relationships and structural change.<sup>206</sup> As Amna Akbar has written, “[T]hese movements are attempting to rebuild the social, to promulgate alternative arrangements rooted in tending to collective needs rather than the capitalist class, and, perhaps, to test the possibilities and limits of democracy and the state.”<sup>207</sup> Dean Spade, writing on mutual aid, observes that “[b]y participating in groups in new ways and practicing new ways of being together, we are both building the world we want and becoming the kind of people who could live in such a world together.”<sup>208</sup> Mutual aid networks provide opportunities to expand shared beliefs among network members and to exercise power to achieve their goals. That is, mutual aid groups create the space for “genuine contestation over the structural premises that have led to the

203. Daniel E. Walters, *Taking Democracy Seriously in the Administrative State*, LAW & POL. ECON. PROJECT (May 16, 2022), <https://lpeproject.org/blog/taking-democracy-seriously-in-the-administrative-state/> [<https://perma.cc/5G7Z-XE7X>].

204. SPADE, BUILDING SOLIDARITY, *supra* note 169, at 144–48 (describing, for example, challenging the role of the military and the police).

205. *See, e.g.*, Ella Fassler, *Activists Are Sharing Land in Vermont with People Escaping Climate Disaster*, VICE (June 29, 2021, 9:00 AM), <https://www.vice.com/en/article/wx5zb9/activists-are-buying-land-in-vermont-to-help-people-escape-climate-disaster> [<https://perma.cc/53H3-FMDW>] (describing networks operating as “commons’ through land trusts”).

206. Garcia & Godsoe, *supra* note 169, at 609; SPADE, BUILDING SOLIDARITY, *supra* note 169, at 12, 16–17; Brown & Kapczynski, *supra* note 81, at 249.

207. Amna A. Akbar, *This Could Be Housing; Or, What Is a Demand Anyway?*, 121 S. ATL. Q. 261, 262 (2022).

208. SPADE, BUILDING SOLIDARITY, *supra* note 169, at 17.

accumulation of power and the exclusion of the perspectives of marginalized people.”<sup>209</sup>

## 2. The Challenges of Capacity

But there are challenges: Can mutual aid networks be sustained without the resources and support of the State or market? Some networks function on an ad hoc basis and thus struggle to retain volunteers.<sup>210</sup> Many members have full-time jobs and family obligations that preclude long-term commitment.<sup>211</sup> The antistate and informal characteristics of mutual aid networks, dependent largely upon unpaid labor, often restrict members’ ability to scale up or persevere.

Community members experience “burnout” resulting from chronic conflicts and eventual exhaustion.<sup>212</sup> They may suffer trauma through exposure to the very harms that networks seek to remedy.<sup>213</sup> Some members fear state surveillance, especially if they have been previously implicated in the criminal legal system.<sup>214</sup> Mutual aid networks may also face the challenges that arise when more affluent individuals with greater flexibility assume positions of power and destabilize efforts of equality within the groups.

## 3. Criminalizing Mutual Aid

Mutual aid networks often face punitive responses when they seek to engage in transformative work to achieve “nonreformist reform[s]”<sup>215</sup> that do not “advance ‘capitalist needs, criteria, and rationales’”—work that is intended to result in “a modification of the relations of power.”<sup>216</sup> The State does not readily tolerate threats to the status quo. Recently unleashed antidemocratic forces may further endanger progressive mutual aid groups.<sup>217</sup>

Recent scholarship on the Black Panther Party (“BPP”) and the Young Lords (“YLs”) has emphasized a shared commitment to mutual aid programs meant to supplement woefully inadequate State support.<sup>218</sup> The BPP

209. Walters, *supra* note 203.

210. de Freytas-Tamura, *supra* note 179.

211. *Id.*

212. SPADE, BUILDING SOLIDARITY, *supra* note 169, at 70.

213. *Id.* at 68–74.

214. Kate Andrias & Benjamin I. Sachs, *Constructing Countervailing Power: Law and Organizing in an Era of Political Inequality*, 130 YALE L.J. 546, 620 (2021) (noting fear of reprisals as a chief barrier to organizing).

215. Blalock, *supra* note 107, at 231.

216. *Id.* (quoting Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 101 (2020)).

217. Miriam Seifter, *State Institutions and Democratic Opportunity*, 72 DUKE L.J. 275, 278–79 (2022).

218. See Lucie E. White, *Black Panthers: Building Power Through Prefiguration*, LAW & POL. ECON. PROJECT (May 9, 2022), <https://lpeproject.org/blog/black-panthers-building-power-through-prefiguration/> [<https://perma.cc/FW7C-DLAG>]; Johanna Fernández, *The Young Lords: Building Power*

established its organization around a ten-point program for “Land, Bread, Housing, Education, Clothing, Justice and Peace.”<sup>219</sup> It offered a well-publicized breakfast program in working-class communities, organized health clinics and transportation of relatives of incarcerated persons, and taught basic skills to students who attended substandard schools.<sup>220</sup> Lucie White identifies the ways in which the BPP programs functioned as prefigurative politics.<sup>221</sup> She notes that the party endeavored to dismantle commodified ways of delivering health care, expanded the categories of health care providers to include family caregivers, and engaged community members to “bec[o]me more theoretically astute, strategically savvy, and politically ‘empowered’ to engage in deep transformation.”<sup>222</sup> Thus, writes White, “[P]refiguration allowed participants both to envision and pragmatically move toward new political and institutional horizons.”<sup>223</sup>

Johanna Fernández describes the YLs as the Puerto Rican counterpart of the BPP.<sup>224</sup> She explains their purposes: “[E]levat[ing] basic human needs—food, clothing, housing, health, work, and community—over the pursuit of profit”—and all fitting within a mutual aid model.<sup>225</sup> Fernández describes their prefigurative policies and programs: obtaining “community control of local institutions in poor urban neighborhoods.”<sup>226</sup> The YLs filled the gap left by city

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*Through Direct Action*, LAW & POL. ECON. PROJECT (May 12, 2022), <https://lpeproject.org/blog/the-young-lords-building-power-through-direct-action/> [<https://perma.cc/Y7J7-NR63>] [hereinafter Fernández, *Building Power*]; García & Godsoe, *supra* note 169, at 612–14; Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 219 (2022); SPADE, BUILDING SOLIDARITY, *supra* note 169, at 10–11; Martha McCluskey, *Free Meals, “Free Markets”, and Infrastructure for Democracy*, LAW & POL. ECON. PROJECT (May 26, 2021), <https://lpeproject.org/blog/free-meals-free-markets-and-infrastructure-for-democracy/> [<https://perma.cc/2WDC-R5QT>]; Nebil Husayn, *Juneteenth and Black Liberation*, INQUEST (July 15, 2022), <https://inquest.org/juneteenth-and-black-liberation/> [<https://perma.cc/T2WY-X4TP>]; Marika Dias, *Paradox and Possibility: Movement Lawyering During the COVID-19 Housing Crisis*, 24 CUNY L. REV. 173, 180 (2021); Aziza Ahmed & Jason Jackson, *Race, Risk, and Personal Responsibility in the Response to COVID-19*, 121 COLUM. L. REV. F. 47, 59 (2021); Michael Haber, *COVID-19 Mutual Aid, Anti-authoritarian Activism, and the Law*, 67 LOY. L. REV. 61, 72–73 (2021).

219. SEAN L. MALLOY, *OUT OF OAKLAND: BLACK PANTHER PARTY INTERNATIONALISM DURING THE COLD WAR 1* (2017).

220. See White, *supra* note 218; Aaron Morrison, *Decades Later, a New Look at Black Panthers and Their Legacy*, PRESS DEMOCRAT (Oct. 31, 2021), <https://www.pressdemocrat.com/article/news/decades-later-a-new-look-at-black-panthers-and-their-legacy/> [<https://perma.cc/A3SW-MZUD>]; McCluskey, *supra* note 218; Destiny Joilene Benjamin, *Writing Instruction at the Black Panther Party’s Oakland Community School*, 25 J. AFR. AM. STUDS. 576, 577 (2021).

221. See White, *supra* note 218.

222. *Id.*

223. *Id.*

224. Fernández, *Building Power*, *supra* note 218.

225. JOHANNA FERNÁNDEZ, *THE YOUNG LORDS: A RADICAL HISTORY 1* (2020) [hereinafter FERNÁNDEZ, *THE YOUNG LORDS*].

226. *Id.*

schools that provided inadequate language access for non-English speaking parents by sponsoring educational programs for community members.<sup>227</sup> Fernández notes,

[T]he Young Lords identified and targeted the embodiments of power at the local level—institutions of influence and authority in the everyday lives of urban dwellers. . . . [The Young Lords] built a highly disciplined organization with an analysis of the root causes of structural problems, a theory of change, and a vision for a new society, one organized around human need rather than profit.<sup>228</sup>

The BPP and the YLs offered mutual aid within a larger programmatic framework that also challenged the larger legitimacy of the State, including, but not limited to, its neglect of the needs of poor people, which also served to incur the wrath of the State.<sup>229</sup> Lucie White puts it starkly: “Through infiltration, intimidation, assassination, bombings, imprisonment and more, the state sought to destroy the Party and disperse its network of allies. To undermine public support for the Panthers, the state portrayed them using false, viciously racist, stereotypes: a gang of aggressive Black youth . . . .”<sup>230</sup> Similarly, the YLs were characterized as violent thugs and dangerous gang members, and were subjected to police repression designed to destroy the organization.<sup>231</sup>

A tsunami of violent acts of repression followed, led by the police and the FBI’s counterintelligence program, generally referred to as COINTELPRO. . . . Its self-professed aim was to destroy movements by frustrating movement goals and encouraging violence internequine struggles within its organizations.<sup>232</sup>

Occupy Movement protesters also possessed many characteristics of a mutual aid phenomenon because they sought radical economic changes and were regularly “kettled, clubbed, and pepper-sprayed by the New York police.”<sup>233</sup> These experiences serve as a cautionary tale about the State’s refusal to tolerate

227. *Id.* at 2.

228. Fernández, *Building Power*, *supra* note 218.

229. See Joanna Wuest, *Mutual Aid Can’t Do It Alone*, NATION (Dec. 16, 2020), <https://www.thenation.com/article/society/mutual-aid-pandemic-covid/> [<https://perma.cc/94DB-ELS3> (dark archive)]; Fernández, *Building Power*, *supra* note 218.

230. White, *supra* note 218.

231. FERNÁNDEZ, THE YOUNG LORDS, *supra* note 225, at 157. Fernández notes that the BPP decided to legally bear arms to protect the community from police violence, but that such right has been understood to apply to “Europeans and their descendants.” *Id.* at 125.

232. *Id.* at 125.

233. Molly Crabapple, *Occupy Memory*, N.Y. REV. BOOKS (Sept. 16, 2021), <https://www.nybooks.com/daily/2021/09/16/occupy-memory/> [<https://perma.cc/W5EJ-43YW> (staff-uploaded, dark archive)] (describing the center of the Occupy protest in Zuccotti Park in Manhattan, where a clinic had been established along with food stations, a library, and a communications center).

attempts at radical and transformative mutual aid within a politics that challenges the structural sources of the market economy.

#### 4. Co-optation of Mutual Aid Networks

Mutual aid networks may fall victim to co-optation in accordance with the precepts of the current political order.<sup>234</sup> Neoliberalism functions as a totalizing premise extending beyond an economic system.<sup>235</sup> It assumes the appearance of the natural order of things.<sup>236</sup> Principles of individual volunteerism threaten to pervade solidarity networks.<sup>237</sup> The regimen of neoliberal transactions considers market entities, kinship systems, community ties, and private charities as optimal mechanisms for the distribution of goods and services to families.<sup>238</sup> Through the efforts of mutual aid networks to provide for the needs of families, they may thus facilitate the neglect of the State to fulfill its obligations.<sup>239</sup> Joanna Wuest offers an instructive observation with regard to the unintended consequences of mutual aid:

[L]ibertarians and conservatives from organizations like the Heritage Foundation and writers for *National Review* have commended care provided by those other than the state. Like their counterparts on the left, these groups have advanced an understanding of mutual aid not as a tactic alone but as a vision for remaking society.<sup>240</sup>

The phenomenon of co-optation of mutual aid networks is not new and aptly describes much of the history of advocacy against gender violence and the movement's turn to carceral strategies.<sup>241</sup> Shelters and other domestic violence programs that relied on private funds were obligated to professionalize their staff and function according to conventional systems and strategies that failed to embrace efforts to innovate and address structural concerns.<sup>242</sup> Restorative justice approaches developed by anticarceral feminists as a means to intervene

234. See Spade, *Solidarity Not Charity*, *supra* note 174, at 140 (noting the dangers of a shift to strategies of charity and social services that result in faulty moral judgments as to who is deserving of assistance and create "stigmatizing" eligibility requirements).

235. See Deborah M. Weissman, *Countering Neoliberalism and Aligning Solidarities: Rethinking Domestic Violence Advocacy*, 45 SW. L. REV. 915, 919 (2016).

236. See Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 37, 40 (2005).

237. Spade, *Solidarity Not Charity*, *supra* note 174, at 142; see Benjamin, *supra* note 220, at 597.

238. See Weissman, *In Pursuit of Economic Justice*, *supra* note 19, at 21.

239. See Holly R. Barcus & Dan Trudeau, *Introduction to Focus Section: Out in the World: Geography's Complex Relationship with Civic Engagement*, 70 PRO. GEOGRAPHER 270, 272–73 (2018).

240. Wuest, *supra* note 229.

241. Spade, *Solidarity Not Charity*, *supra* note 174, at 144.

242. Andrea J. Nichols, *Meaning-Making and Domestic Violence Victim Advocacy: An Examination of Feminist Identities, Ideologies, and Practices*, 8 FEMINIST CRIMINOLOGY 177, 182 (2013); see Elizabeth L. MacDowell, *Reimagining Access to Justice in the Poor People's Courts*, 22 GEO. J. ON POVERTY L. & POL'Y 473, 519 (2015).

in IPV outside of the criminal legal system have evolved into “professionalized, law-enforcement involved programs.”<sup>243</sup>

#### CONCLUSION: THE NORMATIVE CONCERNS ABOUT CHOOSING

This Article seeks to examine ways available to support families. Neither the U.S. Constitution nor the laws promulgated thereunder articulate affirmative socioeconomic rights for families.<sup>244</sup> Nonetheless, citizens routinely make claims upon the State to remedy a host of basic needs, often as a matter of right.<sup>245</sup> Martha McCluskey has cautioned against renouncing the use of the courts and has proposed instead to engage principles of structural power to obtain constitutionally based economic justice and to “challenge [neoliberalism’s] strategic cynicism about law.”<sup>246</sup> Joseph Fishkin and William Forbath have argued that the right to a political economy that supports families should be advanced by making constitutional claims against the State in a variety of ways.<sup>247</sup> They suggest that a failure of arguments that insist upon constitutional obligations to support a robust welfare state is more a consequence of politics than constitutional text.<sup>248</sup> The Red, Black, and Green New Deal (“RBGND”) National Black Climate Agenda is “framed in the language of conventional civil, political, and human-rights talk” and “constitutionally recognized human right[s].”<sup>249</sup> Although the law has exacerbated a neoliberal order, John Whitlow argues that there is a role for advocates to use the law to reconfigure the State.<sup>250</sup> That is, using the law to

243. Kim, *Anti-carceral Feminism*, *supra* note 152, at 316–18 (noting evidence of co-optation in the proposals to develop a federally sponsored center on restorative justice).

244. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 4 (2005) (“The constitutions of most nations create social and economic rights, whether or not they are enforceable, but the American Constitution does nothing of the kind.”).

245. See Amy Kapczynski & Gregg Gonsalves, *Alone Against the Virus*, BOS. REV. (Mar. 13, 2020), <https://bostonreview.net/articles/amy-kapczynski-corona-time/> [<https://perma.cc/273U-3XEY>] (observing that a majority of Americans believe health care is a “core responsibility” of the state).

246. Martha T. McCluskey, *Constitutional Economic Justice: Structural Power for “We the People,”* 35 YALE L. & POL’Y REV. 271, 296 (2016).

247. JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY 18–21 (2022) [hereinafter FISHKIN & FORBATH, ANTI-OLIGARCHY CONSTITUTION]; Joseph Fishkin & William E. Forbath, *Make Progressive Politics Constitutional Again*, BOS. REV. (June 23, 2022), <https://bostonreview.net/forum/make-progressive-politics-constitutional-again/> [<https://perma.cc/D4HP-X9B3>] [hereinafter Fishkin & Forbath, *Make Progressive*] (arguing for “widening the constitutional lens” in order to claim rights related to racial justice and socio-economic well-being).

248. FISHKIN & FORBATH, ANTI-OLIGARCHY CONSTITUTION, *supra* note 247, at 22; see also Katharine Jackson, *Democracy, Bureaucracy, and Rights*, LAW & POL. ECON. PROJECT (Apr. 25, 2022), <https://lpeproject.org/blog/democracy-bureaucracy-and-rights/> [<https://perma.cc/V5VD-C4E5>] (explaining the failure to claim a constitutional right to a welfare state is a result of political strategies).

249. Harris, *Decolonizing Legal Subjects*, *supra* note 170, at 361.

250. John Whitlow, *If You Can Unmake It Here: Crisis, Contingency, and Law in the Making and Unmaking of Neoliberal New York*, 121 S. ATL. Q. 339, 349 (2022).

make demands on the State may indeed advance social justice initiatives and structural changes.<sup>251</sup> Tressie McMillan Cottom notes that limitations of the executive branch's order to cancel student debt notwithstanding, the measure nevertheless "will help a lot of people. And the people it will help most are those who got the rawest deal," in particular, "Black borrowers [who] take on a lot of debt to be competitive in the labor market, from associate's degrees to graduate programs."<sup>252</sup>

These perspectives are critical for advocates seeking to achieve rights-based support of families.<sup>253</sup> Conditions "essential to enabling human success and well-being," including food, education, housing, and health care, are "matter[s] of public concern and public obligation" that properly belong in the realm of the obligations of the State.<sup>254</sup> It is the State that can accomplish redistribution through tax structures. Moreover, as a consequence of acknowledging the State's obligations to support families, advocates can more readily appreciate the need to "forge more tenacious, inclusive, and egalitarian visions of what the Constitution now demands."<sup>255</sup>

In practice, these obligations are honored in the breach. The United States, John Lanchester has written, "is a capitalist society with a denuded to non-existent safety net for the poor, but multiple quasi-socialist exemptions and subsidies for corporations and the rich."<sup>256</sup> New Deal legislation, for example, enacted in the face of a national economic collapse, has been criticized for the ways in which Blacks and domestic and agricultural workers were excluded from the protections of labor, health, and other social-security-related programs benefits.<sup>257</sup> Indeed, New Deal legislation was founded upon the proposition that

251. See generally Andrias & Sachs, *supra* note 214 (proposing use of the law to remedy political inequality).

252. Tressie McMillan Cottom, Opinion, *Biden's Student Debt Plan Isn't Ideal. It's Still a Win*, N.Y. TIMES, Aug. 27, 2022, at A20.

253. See, e.g., David Cole, *When Rights Went Right*, N.Y. REV. BOOKS (Apr. 21, 2022), <https://www.nybooks.com/articles/2022/04/21/how-rights-went-wrong-jamal-greene-cole/> [<https://perma.cc/CZ2S-N549> (staff-uploaded, dark archive)] ("The Constitution reflects a commitment to insulate certain rights from the momentary impulses of the majority, and to provide reliable protection.").

254. K. Sabeel Rahman, *Losing and Gaining Public Goods*, BOS. REV., Summer 2017, at 16, 19.

255. Amanda Shanor, *Dobbs, Anti-oligarchy, and the Problem of History*, LAW & POL. ECON. PROJECT (July 6, 2022), <https://lpeproject.org/blog/dobbs-anti-oligarchy-and-the-problem-of-history/> [<https://perma.cc/AL3M-2FVF>].

256. John Lanchester, *Fraudpocalypse*, LONDON REV. BOOKS (Aug. 4, 2022), <https://www.lrb.co.uk/the-paper/v44/n15/john-lanchester/fraudpocalypse> [<https://perma.cc/R2ZH-ZRPC>].

257. See *supra* note 9 and accompanying text; Robert Kuttner, *Dividends of a Just Economy, What Is Keeping the Government from Acting on Behalf of Its Citizens?*, N.Y. REV. BOOKS (Apr. 29, 2021) [hereinafter Kuttner, *Dividends*], <https://www.nybooks.com/articles/2021/04/29/dividends-of-a-just-economy/> [<https://perma.cc/HZ64-QYX7> (staff-uploaded, dark archive)] (describing New Deal legislation as "hobbled by racism").

“capitalism left to its own devices spelled economic disaster”—and sought to implement measures that served to preserve capitalism.<sup>258</sup>

These concerns have been heightened in recent decades, years that Robert Kuttner has described as a period when “[r]apacious capitalism has resurged, and with it inequality and insecurity,” having “turned away from the social compact that characterized the postwar boom.”<sup>259</sup> The State currently operates within an environment radically different from the Depression.<sup>260</sup> Gary Gerstle dates a critical political-economic shift beginning in 1970, “when the breakup of the New Deal order allowed long-scorned neoliberal ideas for reorganizing the economy to take root.”<sup>261</sup> This political regimen has since taken hold, and although it is subject to contention and occasional deviation, it has settled into U.S. mainstream political parties in the form of “self-reinforcing power.”<sup>262</sup> Democratic processes have been corrupted by a system that allows those who can afford to pay to assume seats of power.<sup>263</sup>

These circumstances invite a brooding skepticism about the advisability of relying on the State for support for all families. There are few signs of sustaining the COVID “culture of care.” The Build Back Better Act (“BBB”), described by some as a “guarantor of social wellbeing,”<sup>264</sup> proposed “the most transformative investment in children and caregiving in generations,”<sup>265</sup> but was

258. GERSTLE, *supra* note 27, at 2. Gerstle defines “political order” as “a constellation of ideologies, policies, and constituencies that shape American politics in ways that endure beyond the two-, four-, and six-year election cycles.” *Id.*; see Michael Patrick Allen, *Capitalist Response to State Intervention: Theories of the State and Political Finance in the New Deal*, 56 AM. SOCIO. REV. 679, 680 (1991).

259. Kuttner, *Dividends*, *supra* note 257. The United States ranks last of high-income Organization for Economic Cooperation and Development (“OECD”) member countries with regard to providing economic and social rights. Susan Randolph, Michelle Prairie & John Stewart, *Monitoring State Fulfillment of Economic and Social Rights Obligations in the United States*, 13 HUM. RTS. REV. 139, 140 (2012).

260. Amanda Shanor, *The Tragedy of Democratic Constitutionalism*, 68 UCLA L. REV. 1302, 1307–08 (2022) (describing the unraveling of New Deal settlement).

261. GERSTLE, *supra* note 27, at 3. Given the developing Supreme Court jurisprudence on religious rights, Kate Redburn notes that conservatives hope to replace “the New Deal settlement not with a libertarian vision of market freedom, but rather an arrangement in which the market is embedded in a conservative Christian social vision.” Kate Redburn, *The Law and Political Economy of Religious Freedom*, LAW & POL. ECON. PROJECT (Sept. 8, 2022), <https://lpeproject.org/blog/the-law-and-political-economy-of-religious-freedom/> [<https://perma.cc/VL9J-R3BV>].

262. GERSTLE, *supra* note 27, at 3; Kuttner, *Free Markets*, *supra* note 29.

263. Randy Alfonso Falcón, *The Decadent Empire*, RESUMEN (July 4, 2022), <https://www.resumen-english.org/2022/07/the-decadent-empire/> [<https://perma.cc/5STV-HYX7>].

264. DAVIES ET AL., *supra* note 42, at 230.

265. Press Release, The White House, President Biden Announces the Build Back Better Framework (Oct. 28, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/28/president-biden-announces-the-build-back-better-framework/> [<https://perma.cc/WYP2-NA4X>]; see Tony Romm, *A Guide to All the Ways the House Spending Bill Would Affect America*, WASH. POST, <https://www.washingtonpost.com/business/2021/10/28/biden-spending-plan-what-is-in-it/> [<https://perma.cc/7WHB-RPBA> (dark archive)] (last updated Nov. 19, 2021, 9:48 AM); *Fact Sheet: How the Build Back Better Framework Will Support Women’s Employment and Strengthen Family*



replaced by the Inflation Reduction Act (“IRA”).<sup>266</sup> Notwithstanding its salutary provisions, the IRA survived as a diluted version of the BBB, stripped down by both parties.<sup>267</sup> No provisions of the IRA include the proposed BBB measures to support families.<sup>268</sup> Indeed, most of the benefits will inure to those who can afford homes and purchase high-ticket items in order to obtain rebates.<sup>269</sup>

Other bills addressing the IPV-related needs of families in crisis have fallen short.<sup>270</sup> The Healthy Families Act, acknowledging the need for victims of gender violence to receive paid leave, came to a standstill.<sup>271</sup> Likewise, the Fair Housing for Domestic Violence and Sexual Violence Survivors Act of 2021 designating survivors of gender violence as a protected class under the Fair Housing Act failed to advance.<sup>272</sup>

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*Economic Security*, WHITE HOUSE (July 15, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/15/fact-sheet-how-the-build-back-better-framework-will-support-womens-employment-and-strengthen-family-economic-security/> [<https://perma.cc/RU6K-KRR4>].

266. Inflation Reduction Act, Pub. L. No. 117-169, 136 Stat. 1818 (2022) (to be codified in scattered sections of 26 and 42 U.S.C.); see Tony Romm, *House Passes Inflation Reduction Act, Sending Climate and Health Bill to Biden*, WASH. POST, <https://www.washingtonpost.com/us-policy/2022/08/12/inflation-reduction-act-house-vote/> [<https://perma.cc/L257-B99H> (dark archive)] (last updated Aug. 12, 2022, 5:55 PM); Emily Cochrane, *Here’s How Democrats’ Big Domestic Agenda Bill Has Shrunk*, N.Y. TIMES, <https://www.nytimes.com/2022/08/07/us/politics/democrats-climate-health-tax-package.html> [<https://perma.cc/8ZGN-XFUM> (dark archive)] (last updated Aug. 8, 2022) (reviewing the shrinking, if not demise, of these proposed initiatives).

267. See Jonathan Weisman, *With a Center-Leaning Budget, Biden Bows to a Political Reality*, N.Y. TIMES (Mar. 28, 2022), <https://www.nytimes.com/2022/03/28/us/politics/budget-biden-politics.html> [<https://perma.cc/G5ME-NJ5C> (dark archive)]. Notwithstanding climate change provisions, the Act was passed only after concessions were made to allow new oil and gas drilling leases. Cochrane, *supra* note 266.

268. Ai-jen Poo, *How Long Will the U.S. Continue To Disrespect Its Caregivers*, N.Y. TIMES (Aug. 17, 2022), <https://www.nytimes.com/2022/08/17/opinion/home-family-child-care.html> [<https://perma.cc/T9RQ-LXE5> (dark archive)] (criticizing the Act and its failure to include support for caregiver services and paid family and medical leave).

269. See Abha Bhattarai, *5 Ways the Inflation Reduction Act Could Save You Money*, WASH. POST, <https://www.washingtonpost.com/business/2022/08/16/inflation-reduction-act-save-money/> [<https://perma.cc/9MDE-YFED> (dark archive)] (last updated Aug. 16, 2022, 8:27 PM).

270. Although VAWA was reauthorized, it augmented criminal responses to IPV that fail to alleviate IPV and adversely affect particular social groups. See Leigh Goodmark, *Something on Women*, INQUEST (May 20, 2022), <https://inquest.org/something-on-women-vawa/> [<https://perma.cc/XP2R-N55Z>] (“[W]hat VAWA primarily does is promote and fund the criminal legal system.”).

271. Healthy Families Act, S. 1195, 117th Cong. §§ (2)(12)–(15), (3)(3) (2021) (as introduced in Senate, Apr. 15, 2021); *S.1195 - Healthy Families Act*, CONGRESS.GOV (Apr. 15, 2021), <https://www.congress.gov/bill/117th-congress/senate-bill/1195/actions> [<https://perma.cc/DLZ2-9MDG> (staff-uploaded archive)] (showing no progress after introduction).

272. Fair Housing for Domestic Violence and Sexual Violence Survivors Act of 2021, H.R. 2542, 117th Cong. § 3 (2021) (as introduced in House, Apr. 14, 2021); *H.R.2542 - Fair Housing for Domestic Violence and Sexual Violence Survivors Act of 2021*, CONGRESS.GOV (Apr. 14, 2021), <https://www.congress.gov/bill/117th-congress/house-bill/2542?q=%7B%22search%22%3A%5B%22Fair+Housing+for+Domestic+Violence+and+Sexual+Violence+Survivors+Act+of+2021%22%5D%7D&rs=1&r=2> [<https://perma.cc/2KXE-NXZV> (staff-uploaded archive)] (referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties on Oct. 19, 2021).

The courts—including the Supreme Court—further circumscribe the capacities of the State. The Court adjudicates within prevailing ideological parameters tending to obstruct progress toward socioeconomic equality.<sup>273</sup> Laurence Tribe describes a consensus among constitutional law experts who served on the President’s Commission on the Supreme Court of the United States: “[A] majority of the justices had become dangerously wedded to a political perspective inherently hostile to the premises of a flourishing, inclusive democracy representing all persons equally, and that three members of that majority had been added to the Court by political processes that lacked democratic legitimacy.”<sup>274</sup>

The lack of political will to provide support for households in need during the recent economic crisis attending the pandemic serves as a reminder of the structural obstacles to the remedy of family needs. A confirmation too that neoliberalism is a “politically hegemonic” phenomenon that has wholly captured the State.<sup>275</sup>

Mutual aid work promises to develop a “solidarity economy” through expanded political participation.<sup>276</sup> It can be critiqued as a form of withdrawal. And it is not certain that mutual aid can reverse the circumstances that sustain poverty, nor can it perform in a capacity other than a principled, but palliative function.<sup>277</sup>

The challenge is how and whether to embrace both approaches—in sum, to engage in State-focused, rights-based demands and to divest from the State to deploy principles of solidarity and equitable distribution of resources. These are complex issues, fraught with theoretical tensions and practical challenges: to envision strategies that draw on State support and mutual aid in the service of family as ends. Advocates surely agree that needed structural economic and social changes require multiple allies and a multiplicity of strategies.<sup>278</sup> Moreover, it is worth considering advocacy framed in a historical and global

273. See Goldburn P. Maynard, Jr., *Biden’s Gambit: Advancing Racial Equity While Relying on a Race-Neutral Tax Code*, 131 YALE L.J. F. 656, 675–77 (2021–2022) (noting that “[o]rganized conservative efforts, similar to those that have chipped away at affirmative action, immediately sprang into action after the passage of the ARPA”).

274. Laurence H. Tribe, *Politicians in Robes*, N.Y. REV. BOOKS (Mar. 10, 2022), <https://www.nybooks.com/articles/2022/03/10/politicians-in-robles-justice-breyer-tribe/> [<https://perma.cc/7KCM-YH6M>] (reviewing STEPHEN BREYER, *THE AUTHORITY OF THE COURT AND THE PERILS OF POLITICS* (2021); and LINDA GREENHOUSE, *JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT* (2022)).

275. Kuttner, *Free Markets*, *supra* note 29.

276. See Fassler, *supra* note 205; Spade, *Solidarity Not Charity*, *supra* note 174, at 137.

277. See *supra* notes 210–14 and accompanying text.

278. See, e.g., Barcus & Trudeau, *supra* note 239, at 272 (describing how civic engagement and structural change made by students in higher education requires participation of many parties at the local, national, and global level).

lens that contextualizes demands upon State and market actors as a form of reparations by which to reduce inequality.<sup>279</sup>

In the context of collective efforts to achieve transformative justice outside of the State, Mimi Kim observes:

The dilemma of the local in the context of capitalism is not unique to transformative justice. On the one hand, emergent social movement formations have been recognized as a characteristic defining a promising future, or our very survival. Nimble organizational forms, porous containers, networks built upon relationships rather than formal structures feel more resonant with the postmodern social, political, economic, and cultural climate. But on the other side of the beauty of starfish, spores, and viruses, biological forms evoked in current treatises on social movement innovation, lies precarity.<sup>280</sup>

This Article recognizes Professor Kim's precarity. It holds to the proposition that "democracy always lives elsewhere from the state, even in democracies."<sup>281</sup> As Angela Davis has stated: "I don't think we can rely on governments, regardless of who is in power, to do the work that only mass movements can do."<sup>282</sup> Attention to the possibilities of mutual aid as a means of addressing injustices should be sustained.<sup>283</sup>

The pandemic posed an unprecedented health crisis, resulting in the disruption of the market, stay-at-home orders, and shutdowns.<sup>284</sup> That the CARES Act and the ARP did not mitigate the crisis for all families, and moreover, disproportionately benefitted the wealthy, was predictable.<sup>285</sup> Relief measures were intended to "build a bridge over the hiatus that would allow businesses, investors, households and employees a safe passage to a future moment, whereupon the economy could be happily switched back on again."<sup>286</sup> But the "switch back" threatens many families with the prospect of a persistent state of inequality and economic uncertainty. Perhaps the State's "COVID duty of care," discharged through the CARES Act and the ARP, will endure as a standard from which to raise public expectations and demands. Citizens might

279. This topic is the focus of this author's forthcoming essay on the obligations of the State and market to support restorative/transformative justice as reparations for years of exploitation that has contributed to social harm.

280. Kim, *Anti-carceral Feminism*, *supra* note 152, at 323.

281. WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM* 25 (2019).

282. ANGELA Y. DAVIS, *FREEDOM IS A CONSTANT STRUGGLE* 35 (Frank Barat ed., 2016).

283. DAVIES ET AL., *supra* note 42, at 221.

284. See Derrick Bryson Taylor, *A Timeline of the Coronavirus Pandemic*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/article/coronavirus-timeline.html> [<https://perma.cc/C2YM-VVWF> (dark archive)].

285. DAVIES ET AL., *supra* note 42, at 3 (noting that economic inequality and structural racism shaped pandemic experiences).

286. *Id.* at 3, 45–46.

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engage in more effective advocacy to require the State to redistribute wealth through tax structures, for example. The way forward is an unfinished story that requires both State-focused advocacy and mutual aid movements to remedy the tattered safety net of capitalism.

