

REFLECTIONS ON “PERSONAL RESPONSIBILITY” AFTER
COVID AND *DOBBS*:
DOUBLING DOWN ON PRIVACY

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ABSTRACT

This essay uses lenses of gender, race, marriage, and work to trace understandings of “personal responsibility” in laws, policies, and conversations about public support in the United States over three time periods: (I) the pre-COVID era, from the beginning of the American “welfare state” through the start of the Trump administration; (II) the pandemic years; and (III) the present post-pandemic period. We sought to explore the possibility that COVID and the assistance programs it inspired might have reshaped the notion of personal responsibility and unsettled assumptions about privacy and dependency. In fact, a mixed picture emerges. On the one hand, the Supreme Court has rejected longstanding constitutional protection for abortion, and campaigns for “parental rights” have gained traction in several states. On the other hand, innovative forms of public support for families have appeared at state and local levels. In developing these conclusions, we highlight familiar challenges to the public/private divide while also exposing new cracks in doctrine that

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INTRODUCTION

This essay uses lenses of gender, race, marriage, and work to trace understandings of “personal responsibility” in laws, policies, and conversations about public support in the United States over three time periods. In doing so, we highlight the longstanding distinction in the U.S. between the “deserving poor” and the “undeserving poor” and the assumptions underlying this distinction.¹ Our analysis leads us to examine other binaries as well: public versus private, intentional discrimination versus disproportionate impact, and negative versus positive rights.

Although the legal literature over the years has included several examinations of the general topic of personal responsibility, the COVID-19 pandemic inspired us to take a fresh look. In particular, we wondered how the extensive government aid programs initiated in response to the pandemic might change the law, politics, and social meaning of “personal responsibility” more broadly.² Then, while the pandemic persisted, the Supreme Court overturned a half century of precedent in *Dobbs v. Jackson Women’s Health Organization*,³ holding that the Constitution does not

1. See LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1985 at 27 (1994) (stating that welfare strategists initially focused on poor widows as epitomizing the “deserving poor”); *id.* at 281 (stating that the subsequent decline in young widowhood and the rise in the number of the divorced and unmarried mothers stigmatized poor single mothers). See also Khiara M. Bridges, *The Deserving Poor, The Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049 (2017) (using the distinction to analyze support for class-based affirmative action); Peter B. Edelman, *Toward a Comprehensive Anti-Poverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1703-09 (1993) (tracing the “deserving poor” through American history); Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 830-31 (1994) (noting that widows receiving Social Security are not expected to work, unlike welfare mothers). See generally MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA’S ENDURING CONFRONTATION WITH POVERTY (2d ed. 2013).

2. “Personal Responsibility” has become a slogan in political debates about public assistance. For example, Congress named its landmark 1996 welfare reform legislation, which imposed time limits on aid and stringent work requirements, “The Personal Responsibility and Work Opportunity Reconciliation Act,” Pub. L. No. 104-193, 110 Stat. 2105 (1996). More recently, the concept has surfaced in efforts to attach work requirements to public assistance programs like Medicaid and food stamps or SNAP (the Supplemental Nutrition Assistance Program). See, e.g., Jack Wenik & Zachary S. Taylor, *Is ‘Work for Medicaid’ Dead?*, 2022 PRINDBRF 0301, July 11, 2022.

3. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

protect even a limited right to abortion, inviting doubts about whether other previously recognized forms of liberty merit the constitutional protection that the Court had previously afforded them.⁴ This development, reshaping the relationship between the individual (or the family) and the state, poses new questions not only about “personal responsibility” but also about “privacy,” both of which have loomed so large in past discussions of abortion access.⁵

We organize our analysis by identifying three time periods or stages. In Part I of this Essay, we review pre-COVID times, from origins of the twentieth-century American “welfare state” to “welfare reform” in 1996 and efforts to attach work requirements to food stamps and Medicaid during the Trump administration. As we highlight, the discourse of “personal responsibility” during this time had distinctly sexual connotations—suggesting that poverty was essentially a result of excessive, nonmarital, and otherwise “irresponsible” procreation. Here, we recall not only the race-based and gendered stereotypes associated with government assistance to poor families; we also expose how racial animus and misogyny have shaped this country’s commitment to keeping dependency private and public support minimal and conditional. Although legal doctrine generally distinguishes between intentional discrimination and disproportionate impact, that distinction is especially elusive in the treatment of gender, race, and marital status in family law and policy, we contend, because of prevailing assumptions about families and the way they should operate.

In Part II, we turn to programs initially prompted by the COVID pandemic in 2020. The U.S. government response—even during the Trump administration—sparked hope for a new, more compassionate, and less gendered and racist concept of public assistance that was not dependent on marriage or work. The pandemic challenged the longstanding ideology of personal responsibility and privatized dependency. Federal COVID relief

4. Justice Thomas’s concurrence in *Dobbs* expressly called for reconsideration of all past rulings grounded in substantive due process, from protection for the use of contraception to marriage equality. *Id.* at 2301-02 (Thomas, J., concurring).

5. *Dobbs* overruled *Roe v. Wade*, in which the majority had explained that the “right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” *Roe v. Wade*, 410 U.S. 113, 153 (1973). For connections between the discourse of “personal responsibility” and purportedly private procreative decisions, see, e.g., Linda C. McClain, “Irresponsible” Reproduction, 47 HASTINGS L.J. 339 (1996).

programs treated everyone as “deserving,” even if equal access to assistance proved elusive and women and minorities felt the pandemic’s consequences more acutely than others. These relief programs were proof that government funds to support families could be made available when lawmakers want to offer such assistance, providing supporters of more generous aid with clear examples of the conditions and criteria likely to foster such action.

In Part III, we consider the present period, when COVID poses continuing but increasingly familiar risks. Here, we find mostly backlash, instead of “lessons learned” from the initial COVID stage. Personal responsibility has returned, revitalized, in laws, policies, and conversations, which have doubled down on privatized dependency. From the expiration of the successful child tax credit program to the rise of “parental bills of rights” in education, the private family is emerging as the locus of responsibility for fulfilling daily needs and even for exercising authority over other issues, such as school curriculum or school health and safety, previously considered in the public domain.

Perhaps counterintuitively, we also discern a doubling down on privatization in the elimination of a constitutional right to abortion in *Dobbs*—despite the Court’s explicit rejection of a right to privacy. The previous constitutional divide between abortion and government-funded abortion, protecting a negative right to terminate a pregnancy but rejecting a positive right to access, has collapsed. With abortion now banned or highly restricted in half the states, many individuals have become further isolated from medical interventions they need for health reasons and to care for their families as best they can. Not only do they lack government assistance; they now cannot take certain steps to help themselves. “Privacy,” “privatization,” and “personal responsibility”—once understood as constructs explaining why families should not receive public support and why the Constitution does not protect positive rights more generally—have acquired new meanings that invite active interference with personal decision-making and pose threats to previously accepted negative rights. Those most directly affected are “undeserving” women and minorities, especially those living outside of marriage. Forced motherhood often means forced poverty, so after *Dobbs* legal doctrine and social policy once again send a message to avoid sex when one is not financially prepared for procreation and self-sufficiency.

Yet, despite these troubling and perverse developments, some encouraging developments stand out. As we show below, these include a significant drop in child poverty, local guaranteed income programs that have surfaced in almost fifty cities, and the continuation of free school meals (which ended nationwide after COVID) throughout the state of Maine and in various communities elsewhere.⁶

Against this mixed picture, in Part IV we explore promising, although not uncontroversial, paths to a reimagined concept of “personal responsibility.” Here, we examine the effectiveness of the existing “patchwork” of safety nets, guaranteed minimum income programs, local child tax credits, child development accounts, and the student loan forgiveness plans recently announced by President Biden.

We conclude with some thoughts on how we might understand these developments alongside the doubling down on privacy that we have noted. We underscore how the story of personal responsibility after COVID and *Dobbs* reinforces familiar challenges to the public/private divide⁷ while also exposing new cracks in doctrine that purports to distinguish intentional discrimination from disproportionate impact and to protect negative but not positive rights.

I. STAGE ONE: FROM MOTHERS’ PENSIONS TO TANF⁸

Welfare historians have chronicled the rise of America’s twentieth-century “welfare state” from its roots in Elizabethan Poor Laws and its emergence during the New Deal.⁹ According to Linda Gordon, modern welfare programs providing assistance to impoverished families evolved

6. See *infra* Part IV.

7. See, e.g., Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835 (1985); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181 (1994).

8. This historical account borrows from earlier publications by one of us. See Susan Frelich Appleton, *When Welfare Reforms Promote Abortion: “Personal Responsibility,” “Family Values,” and the Right to Choose*, 85 GEO. L.J. 155 (1996) (hereinafter Appleton, *Welfare Reforms*); Susan Frelich Appleton, *Standards of Review for Privacy-Invasive Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Standard*, 49 VAND. L. REV. 1 (1996) (hereinafter Appleton, *Standards of Review*).

9. See, e.g., GORDON, *supra* note 1; Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1252-82 (1983); Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257 (1964) (Part I); 16 STAN. L. REV. 900 (1964) (Part II); 17 STAN. L. REV. 614 (1965) (Part III).

from a feminist project centered on gender roles¹⁰ and relied on casework or an in-depth investigation of each client's background and circumstances.¹¹ During the Progressive Era, elite and middle-class women who called themselves "maternalists" advocated for "Mothers' Pensions" to provide support for poor women who conformed to the norms of respectable married women.¹² Although the widow represented the paradigm case of the "deserving poor," such pensions allowed even unmarried mothers to imitate the behavior of their more affluent counterparts, who cared for their children at home and depended upon their husbands for a "family wage."¹³ This approach was animated by a view of women, especially those with children, as unemployable and of children as in need maternal care.¹⁴

From 1935 to 1968, the United States had no program of guaranteed public assistance, but Aid to Families with Dependent Children (AFDC) operated as a federal-state program giving states discretion to provide assistance from federal grants to those who met certain requirements.¹⁵ Like the maternalists, this program focused on children in homes without a breadwinning parent—a gender-neutral term infused with gender stereotypes.¹⁶ Although the target families might be those with widows or incapacitated or deserting husbands, some nonmarital families were eligible for aid, notably those headed by single mothers even though they defied traditional sexual norms.¹⁷ Despite race-neutral language in the relevant provisions, a disproportionate number of the eligible families were not white, as poverty in the United States has long disproportionately affected families of color¹⁸—an unsurprising fact given the legacy of slavery,

10. See, e.g., GORDON, *supra* note 1, at 38.

11. See *id.* at 175 (describing casework methods).

12. See *id.* at 55.

13. See *id.*; Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 879 (1994).

14. See Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1250 (1983).

15. See *id.* at 1261. See also *King v. Smith*, 392 U.S. 309, 316 (1968) ("The AFDC program is based on a scheme of cooperative federalism."). For an in-depth analysis of the evolving relationship between the federal government and the states in meeting the needs of the poor, see KAREN M. TANI, *STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935-1972* (2016).

16. See Law, *supra* note 14, at 1255.

17. See *id.*

18. For example, in 1968, of over 25 million persons living below the poverty level, 31.5% were classified as "Negro and other races"; further, while 12.8% of all persons lived below the poverty level, that figure was composed of 10% of the population classified as "white" and 33.5% of the population classified as "Negro and other races." U.S. Bureau of the Census, *Poverty in the United States: 1959 to*

redlining, and discrimination in employment, to name just a few influential factors.¹⁹

Despite this federal vision that unmarried mothers belonged at home caring for their children,²⁰ local rules imposed both work requirements and “morality” requirements on aid recipients, such as Alabama’s infamous “man in the house” rule that disqualified families if the mother was “cohabiting” with a man, even when he was not providing support and had no obligation to do so. Albeit rationalized as a measure designed to make sure men were not evading their responsibilities, the rule also operated to punish sexually active (“promiscuous”) women. Although the Supreme Court struck down this rule as inconsistent with the purposes of the Social Security Act, which created the program,²¹ the rule exemplified the suspicion, disapproval, and disrespect for privacy that came with receiving public aid.²²

Indeed, many critics, invoking this rule and similar intrusions, have elaborated on the conditional nature of the much-heralded doctrine of family privacy, noting how it applies only to families that appear self-supporting.²³ In other words, privatized dependency is the price of privacy. Given the demographic factors of poverty, those least likely to enjoy the protections of family privacy—namely, to have a shield against state interference in intimate life—are poor, unmarried women of color and their children.

During this same period, in 1964, the Johnson administration launched its War on Poverty,²⁴ and just one year later, the notorious Moynihan Report

1968, P-60 (No. 68) CURRENT POPULATION REPORTS 1, 1 (1969), www2.census.gov/library/publications/1969/demographics/p60-68.pdf [https://perma.cc/KS7K-APG5]. Even “[a]mong families above the poverty level, white men ‘outearned’ Negro men, no matter where they lived.” Carolyn Jackson & Terri Velten, *Residence, Race, and Age of Poor Families in 1966*, 32 SOC. SEC. BULL. 3, 10 (1969). And, while the mean earnings for male workers in 1968 was \$6,811, it was only \$2,921 for female workers. U.S. Bureau of the Census, *Income in 1968 of Families and Persons in the United States*, P-60 (No. 66) CURRENT POPULATION REPORTS 1, 103–04 (1969).

19. Cf. Ta-Nehisi Coates, *The Case for Reparations*, THE ATLANTIC, June 2014, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [https://perma.cc/6M45-6DWU].

20. See Law, *supra* note 14, at 1253.

21. *Id.*

22. See generally KHIARA BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017).

23. See generally *id.*; tenBroek, *supra* note 9.

24. See PRESIDENT LYNDON B. JOHNSON, *STATE OF THE UNION ADDRESS* (Jan. 8, 1964).

President Johnson also signed several executive orders designed to improve employment prospects among the poor, including, for example, one establishing requirements for nondiscriminatory hiring and promotion of employees by government contractors. See Exec. Order No. 11246, 3 C.F.R. 167 (Supp.

was issued by the Department of Labor.²⁵ Although the Moynihan Report actually represented a call to action by the federal government to support Black families, any such affirmative characteristics were eclipsed by its condemnation of the matriarchal structure of the stereotypical African-American family, which the Report attributed to a “tangle of pathology.”²⁶ The Moynihan Report thereby solidified the association of deviance with race (Black), gender (female), and family status (nonmarital).²⁷

According to Sylvia Law, with the Supreme Court’s invalidation of the Alabama’s “man in the house” rule in 1968,²⁸ public assistance became an entitlement in the sense that those who met federal socioeconomic criteria were entitled to receive it.²⁹ Yet, this transformation intensified the pushback. As critics decried, not only did those living “immorally” have a right to taxpayer dollars, but—so their argument went—such support itself encouraged “irresponsible” choices.³⁰ Although the Supreme Court ruled in 1970 that states could cap support for large families,³¹ the caricature of the “welfare queen” took shape. Originally used in a news story but popularized by allusions in Ronald Reagan’s campaign speeches for the presidency in 1976,³² the term “welfare queen” conjured the image of an unmarried Black mother who had no intention of pursuing employment when she could rely on public funds and who, acting on an outsized sexual appetite, produced child after child for purposes of increasing her monthly support.³³ Even more, she was probably practicing fraud against a beneficent government.³⁴ By definition, she was underserving of the assistance she received.

1965).

25. OFFICE OF PLANNING & RESEARCH, U.S. DEP’T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (Mar. 1965), <https://web.stanford.edu/~mrosenfe/Moynihan's%20The%20Negro%20Family.pdf> (hereinafter Moynihan Report after its author, Daniel Patrick Moynihan).

26. *Id.* at 29-45.

27. See JILL S. QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY (1994). See also, e.g., MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 6-7 (1995) (comparing “deviance” and “normalcy” in talk about families).

28. *Smith*, 392 U.S. at 312.

29. Law, *supra* note 14, at 1250, 1267-70.

30. See, e.g., McClain, *supra* note 5, at 335.

31. *Dandridge v. Williams*, 397 U.S. 471 (1970).

32. See generally JOSH LEVIN, THE QUEEN: THE FORGOTTEN LIFE BEHIND AN AMERICAN MYTH (2019).

33. See, e.g., Dorothy Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1563 (1996) (reviewing GORDON, *supra* note 1).

34. See LEVIN, *supra* note 32, at 37-44.

In the ensuing years, the welfare queen trope gained momentum in two contexts, both highly politicized. First, beginning in 1976, Congress passed the Hyde Amendment, prohibiting the use of federal funds, specifically Medicaid, for almost all abortions.³⁵ When the Supreme Court upheld such limits on public funding for abortion, even in cases of medically necessary abortions,³⁶ it made plain that any constitutional right to state financial assistance suggested by past cases, however minimal, would not be realized.³⁷ Because the Hyde Amendment is a rider to Congress's annual appropriations bills, it requires a vote every year. Right away, in 1977, the debate in Congress exposed the assumptions and stereotypes about those who would seek to terminate pregnancies at public expense, with references to "ghetto mothers"³⁸ and generalizations that portrayed abortions sought by poor persons as akin to cosmetic surgery.³⁹ Others claimed to see a more Machiavellian scheme at work, namely an effort by Democrats to keep poor people poor and dependent on support in an effort to maintain their votes.⁴⁰ Even that, however, suggests lazy and complicit voters.

Second, during the Clinton administration, public denigration of the welfare queen escalated in the move to "end welfare as we know it," culminating in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which replaced AFDC with Temporary Assistance for Needy Families (TANF).⁴¹ Hallmarks of PRWORA signal the perceived problems that Congress sought to address in inducing "personal responsibility." For example, the legislation expressly incentivizes states to reduce their "illegitimacy ratios"⁴² and to promote marriage, which conservative policymakers have long touted as an exit ramp from dependency on the state.⁴³ It provided for toughened child

35. Pub. L. 94-439, § 209, 90 Stat. 1434 (Sept. 30, 1976).

36. *Harris v. McRae*, 448 U.S. 297 (1980).

37. See Susan Frelich Appleton, *Obergefell's Liberties: All in the Family*, 77 OHIO STATE L.J. 919, 934-37 (2016).

38. 123 CONG. REC. 19,700 (1977) (statement of Rep. Hyde).

39. *Id.* at 19,703 (statement of Rep. Dornan); *id.* at 19,705 (statement of Rep. Rudd).

40. 123 CONG. REC. 21,484 (1977) (statement of Sen. Hatch) (referring to Democrats as "those who keep this marvelous national poor constituency by making them always come to the Federal Government to solve their problems, and those who make it easier to be on welfare than to give them a job or an opportunity for a job.>").

41. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). See Appleton, *Welfare Reforms*, *supra* note 8, at 156 & n. 8.

42. See Appleton, *Welfare Reforms*, *supra* note 8, at 174-75.

43. See, e.g., Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage*

support enforcement measures,⁴⁴ and—contrary to the older policy preferring that mothers of young children stay home to care for them—it included them in rigid work requirements.⁴⁵ In addition, it imposed time limits on public assistance.⁴⁶ It gave states the option of imposing a “family cap” that limits a recipient’s support even if she has additional children,⁴⁷ and data showed that states with higher percentages of African-American recipients were more likely to adopt such caps than other states.⁴⁸ As Dorothy Roberts has observed, “[r]acial politics has so dominated welfare reform efforts that it is commonplace to observe that ‘welfare’ has become a code word for race.”⁴⁹ All of these features of PRWORA suggest government concern with unmarried and unemployed Black mothers whom lawmakers believed, at best, saw no cost in having more children and perhaps even increased their family’s size as a way to secure additional support. Put differently, the rhetoric of “personal responsibility” served as a shorthand for patriarchy, white supremacy, and privatized dependency.

During the first three years of the Trump administration, federal agencies proposed new efforts to restrict assistance to needy families. These included work requirements for both food stamps (Supplementary Nutrition Assistance Program, or “SNAP”) and Medicaid—requirements that were ultimately successfully challenged in court.⁵⁰ Similarly, a “public charge” rule, also halted by a federal court, would have prevented entry into the

Cure as the Revival of Post-Bellum Control, 93 CALIF. L. REV. 1647 (2005). Cf. ISABEL V. SAWHILL, GENERATION UNBOUND DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE (2014) (consideration by long-time marriage proponent of readiness of parenthood as an alternative to marriage).

44. See, e.g., Irwin Garfinkel et al., *A Brief History of Child Support Policies in the United States*, in FATHERS UNDER FIRE: THE REVOLUTION IN CHILD SUPPORT ENFORCEMENT IN THE USA 22 (Irwin Garfinkel et al. eds., 1998).

45. See Appleton, *Standards of Review*, *supra* note 8, at 5 & n.12.

46. See Appleton, *Welfare Reforms*, *supra* note 8, at 168-69 & n.104.

47. See *id.* at 159-62.

48. See Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J. L. & GENDER 151, 179, 179 n. 210 (2006) (citing one TANF reauthorization bill’s finding that “[s]tates in which African Americans make up a higher proportion of recipients are statistically more likely to adopt family cap policies”).

49. Roberts, *supra* note 33, at 1563.

51. See *Dist. of Columbia v. U.S. Dep’t of Agric.*, 444 F. Supp. 3d 1 (D.D.C. 2020) (granting nationwide preliminary injunction against change in SNAP rules that would eliminate waivers and exemptions from work requirements in areas with insufficient jobs); *Stewart v. Azar*, 366 F. Supp. 3d 125 (D.D.C. 2019) (granting summary judgment to plaintiffs in challenge to “demonstration project” that would have imposed work requirements for Medicaid recipients).

United States or adjustment of status for lawful immigrants who were deemed likely to need assistance of any kind, whether state or federal, even temporarily.⁵¹ These more recent initiatives reinforced the view that the prospect of dependency on government programs makes one “irresponsible” and “undeserving” of not just financial assistance but also access to the immigration system and the eventual possibility of becoming a permanent resident or citizen.

In reviewing this history, it is important to note the ways that race and gender figure in the analysis explicitly in addition to the ways otherwise neutral laws disparately impact women of color. For example, as historian Anders Walker has pointed out, racial animus prompted laws discriminating against nonmarital families and the abolition of common law marriage after *Brown v. Board of Education*⁵² in an effort to stigmatize African Americans as immoral, in turn supplying a new justification to maintain school segregation.⁵³ Similarly, Dorothy Roberts has linked the child welfare system, which she calls the “family policing” system, to racially targeted interventions into the lives of Black mothers.⁵⁴ Along these lines, economists have made a persuasive case that racism explains why the United States—in contrast to other countries—has taken such a miserly approach to family needs, from public support to subsidized childcare and parental leave. In theorizing about Congress’s recent unwillingness to enact the family-related measures in President Biden’s Build Back Better proposal,⁵⁵ one commentator ventured: “More or less, it comes down to our long history of racism and how it’s wormed its way into every debate over government benefits.”⁵⁶ The same can be said regarding gender, given that we commonly use “welfare” to refer to state assistance accorded to families, historically women’s sphere, and eschew that term when referring to state

51. *Cook Cnty., Illinois v. Wolf*, 962 F.3d 208 (7th Cir. 2020) (issuing preliminary injunction).

52. 347 U.S. 483 (1954).

53. ANDERS WALKER, THE GHOST OF JIM CROW: HOW SOUTHERN MODERATES USED BROWN V. BOARD OF EDUCATION TO STALL CIVIL RIGHTS 3-9 (2009).

54. Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021).

55. See *The Build Back Better Framework*, WHITE HOUSE, <https://www.whitehouse.gov/build-back-better/> [<https://perma.cc/Y2K6-QY9Q>] (last visited Feb. 28, 2023).

56. Bryce Covert, *There’s a Reason We Can’t Have Nice Things*, N.Y. TIMES (July 21, 2022), <https://www.nytimes.com/2022/07/21/opinion/racism-paid-leave-child-care.html?searchResultPosition=1> [<https://perma.cc/FS8G-J6X6>].

assistance provided through the tax code to corporations or individuals in the labor market.⁵⁷

From this perspective then, both racism and misogyny undergird the longstanding policy of assigning family dependency to the private sphere and, in turn, stigmatizing those families who need state assistance. Whether this conclusion reflects intentional discrimination or disproportionate impact is beside the point.⁵⁸ The very concept of family is so infused with racialized and gendered assumptions that disproportionate impact is tantamount to intentional discrimination.

II. STAGE TWO: COVID PROGRAMS

Government assistance during the first year of the COVID-19 pandemic did not conform to the historical patterns of personal responsibility and privatized dependency described above. Indeed, as Andrew Hammond, Ariel Jurow Kleiman, and Gabriel Scheffler have written, the pandemic radically reshaped the safety net in the United States with four new government programs implemented during the spring and summer of 2020.⁵⁹ These programs included the Coronavirus Preparedness and Response Supplemental Appropriations Act;⁶⁰ the Families First Coronavirus Response Act;⁶¹ the Coronavirus Aid, Relief, and Economic Security Act, otherwise known as the CARES Act;⁶² and the Paycheck

57. Suzanne Mettler, *The Welfare Boogeyman*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/opinion/trump-social-policies-welfare.html> [<https://perma.cc/LZ6N-3ZC2>].

58. The Supreme Court has long held that only a finding of purposeful race-based discrimination violates the equal protection guarantee; a racially disproportionate impact will not suffice. *E.g.*, *Washington v. Davis*, 426 U.S. 229 (1976). Such reasoning also means, for example, that laws singling out pregnancy do not unconstitutionally discriminate on the basis of sex or gender, despite their impact. *E.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2235 (2022) (reaffirming *Geduldig v. Aiello*, 417 U.S. 484 (1974)).

59. Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *How the COVID-19 Pandemic Has and Should Reshape the American Safety Net*, 105 MINN. L. REV. HEADNOTES 154, 163 (2020).

60. Coronavirus Preparedness and Response Supplemental Appropriations Act, Pub. L. No. 116-123, 134 Stat. 146 (2020).

61. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (codified in scattered sections of the U.S.C.).

62. Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 15 U.S.C. §§ 9001-9080).

Protection Program and Health Care Enhancement Act.⁶³ These programs most importantly provided direct cash payments to a much wider range of individuals than ever before,⁶⁴ while also increasing the amount of unemployment assistance, paid sick leave, food assistance, and medical assistance, including free COVID-19 tests. Notably, Congress passed the programs with bipartisan support, and the Trump Administration championed this state assistance even during an election year, with President Trump personally signing many of the checks sent to families during the last six to nine months of his administration.⁶⁵

The CARES Act also included a nationwide eviction moratorium to enable families to stay in their homes as they faced unemployment or reduced wages because of the pandemic.⁶⁶ When the moratorium expired on July 25, 2020, President Trump directed the Secretary of Health and Human Services and the Director of the Centers for Disease Control and Prevention (CDC) to consider other ways to keep families in their homes.⁶⁷ On September 4, 2020, the CDC issued a temporary nationwide eviction moratorium that did not relieve anyone of the obligation to pay rent but did suspend the execution of eviction orders for nonpayment.⁶⁸ Landlords challenged the CDC's authority to issue the moratorium,⁶⁹ and the Supreme Court ultimately invalidated the moratorium during the first year of the

63. Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620 (2020).

64. In March 2020, the CARES Act provided payments of up to \$1200 per adult and \$500 per child under the age of seventeen. *See* 2020 Recovery Rebates for Individuals, Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified as amended at 26 U.S.C. § 6428). In December 2020, the COVID-related Tax Relief Act of 2020 paid up to an additional \$600 per person. *See* Extension of Federal Pandemic Unemployment Compensation, Pub. L. No. 116-260, § 203, 134 Stat. 1182, 1953 (amending 15 U.S.C. § 9023(e)). In both instances, the payments were reduced for individuals making more than \$75,000 per year and married couples making more than \$150,000 per year.

65. Lisa Rein & Michelle Singletary, *His Name on Stimulus Checks, Trump Sends a Gushing Letter to 90 Million People*, WASH. POST (Apr. 29, 2020), https://www.washingtonpost.com/politics/his-name-on-stimulus-checks-trump-sends-a-gushing-letter-to-90-million-people/2020/04/28/04143a62-8999-11ea-ac8a-fe9b8088e101_story.html [<https://perma.cc/AZ6Y-LRCW>].

66. Temporary Moratorium on Eviction Filings, Pub. L. No. 116-136, 134 Stat. 281 Div. A, Tit. IV, § 4024 (2020) (codified at 15 U.S.C. § 9058 (West 2021)).

67. Fighting the Spread of COVID-19 by Providing Assistance to Renters and Homeowners, Exec. Order No. 13,945, 85 Fed. Reg. 49,935, 49,935-56 (Aug. 8, 2020).

68. Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19, 85 Fed. Reg. 55,292, 55,292-95 (Sept. 4, 2020).

69. Paul J. Larkin, *The Sturm und Drang of the CDC's Home Eviction Moratorium*, 2021 HARV. J.L. & PUB. POL'Y PER CURIAM 1, 7-18.

Biden administration,⁷⁰ but millions of families benefitted from the moratorium's protections while it was in force.

Once in office, President Biden continued to reshape the safety net by proposing a \$1.9 trillion recovery bill, which Congress passed without any Republican votes in the Senate and President Biden signed into law on March 11, 2021. The American Rescue Plan Act (ARPA) offered more direct payments to individuals in the spring of 2021,⁷¹ but otherwise focused on financial redistribution through the tax system.⁷² In fact, many commentators view ARPA's expansion of the Child Tax Credit (CTC) as the most meaningful of all the forms of state assistance during COVID.⁷³ Aaron Tang, for example, described ARPA's CTC as creating "a new, federally funded parenthood benefit that recipient parents could spend however they saw fit."⁷⁴ Another commentator wrote that ARPA "transformed the Child Tax Credit into a program more closely resembling a national child allowance—a core public support long in place across wealthy nations worldwide."⁷⁵

ARPA created this new federal parental benefit by expanding the pre-existing CTC in three fundamental ways. First, ARPA increased the amount of payments available to families, from the previous annual payment of \$2,000 for each qualifying child aged sixteen or younger to \$3,600 for each qualifying child six years or younger and \$3,000 for each qualifying child between the ages of six and seventeen.⁷⁶ Second, ARPA changed the form

70. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2491 (2021).

71. American Rescue Plan Act, Pub. L. No. 117-2, § 9601, 135 Stat. 4, 138, 138 (codified at 26 U.S.C. § 6428B) (authorizing payment of an additional \$1400 per person). Once again, the payments were reduced for individuals making more than \$75,000 per year and married couples making more than \$150,000 per year. *See id.*

72. Garrett Watson & Erica York, *The American Rescue Plan Act Greatly Expands Benefits Through the Tax Code in 2021*, TAX FOUND., Mar. 12, 2021, <https://taxfoundation.org/american-rescue-plan-covid-relief> [<https://perma.cc/B257-6VKY>].

73. Ariel Jurow Kleiman, *Revolutionizing Redistribution: Tax Credits and the American Rescue Plan*, 131 YALE L.J. F. 535 (2021).

74. Aaron Tang, *Who's Afraid of Carson v. Makin*, 132 YALE L.J. F. 504, 515 (2022); *see also* Christopher Pulliam & Richard V. Reeves, *New Child Tax Credit Could Slash Child Poverty Now and Boost Social Mobility Later*, BROOKINGS INST.: UP FRONT, Mar. 11, 2021, <https://www.brookings.edu/blog/up-front/2021/03/11/new-child-tax-credit-could-slash-poverty-now-and-boost-social-mobility-later/> [<https://perma.cc/B2NV-73P4>] (detailing promise of the expanded CTC).

75. Megan A. Curran, *Research Roundup of the Expanded Child Tax Credit: The First 6 Months*, 5 POVERTY & SOC. POL'Y REP. 1, 2 (2021).

76. American Rescue Plan Act, Pub. L. No. 117-2, § 9661, 135 Stat. 4, 144-45.

of the payment, from a single lump sum payment received through annual tax filings to monthly payments from July 2021 to December 2021 of \$250 or \$300 per qualifying child per month, depending on their age, amounting to half of the total amount of a family's available credit. Families could claim the other half as part of their 2021 tax filings in early 2022.⁷⁷ Third, ARPA raised the income floor and cap for the CTC. Households filing joint returns were eligible for the full amount of the 2021 CTC if their combined income was less than \$150,000. Single parents or households filing separate returns were eligible for the full amount of the CTC if their income was less than \$75,000. Families exceeding these thresholds were able to receive partial CTC payments.⁷⁸ Moreover, in previous years, families with less than \$25,000 in income did not qualify for the full credit, but they were able to claim the full credit in 2021.⁷⁹ Overall, ninety percent of children in the United States were eligible for the credit.⁸⁰

All of these COVID-inspired measures—the new government assistance programs, the eviction moratorium, and the expanded CTC—largely treated recipients as “deserving,” envisioning a clear role for government to support families as they attempted to cope with illness and a disrupted economy. The usual disapproval and stigma associated with public support largely evaporated, even when those receiving assistance were not married or working.⁸¹ The accompanying intrusions into the privacy of marginalized families also dissipated, based on evidence from New York City showing decreased home monitoring and removals of children.⁸² Of course, precautions against contagion likely explain the

77. I.R.C. § 7527A 24(i); Press Release, U.S. Dep't of the Treasury, Treasury and IRS Disburse Sixth Monthly Child Tax Credit to Families of 61 Million Children (Dec. 15, 2021), <https://home.treasury.gov/news/press-releases/jy0533> [<https://perma.cc/TV4H-SVJD>].

78. I.R.C. § 24(i)(4).

79. I.R.C. § 24(i)(1); *Tax Credits in Build Back Better Support Millions of Families*, INST. TAX'N & ECON. POL'Y: JUST TAXES BLOG (Dec. 9, 2021), <http://www.itep.org/tax-credits-in-build-back-better-support-millions-of-families> [<https://perma.cc/E3VE-MW35>].

80. *Tax Benefit of the Child Tax Credit, by Expanded Cash Income Percentile 2021*, TAX POLICY CENTER (MAR. 23, 2021), www.taxpolicycenter.org/model-estimates/tax-benefits-provisions-affecting-children-march-2021/t21-0045-tax-benefit-child-tax [<https://perma.cc/3929-25YJ>].

81. See Paul Krugman, Opinion, *2020 Was the Year Reaganism Died*, N.Y. TIMES, Dec. 29, 2020, at A19.

82. Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 11 COLUM. J. RACE & L. 1 (2022). Some conflicting evidence suggests that, while authorities brought fewer families into the child welfare system, families already enmeshed in such proceedings experienced greater and longer-lasting invasions of privacy. See BROOKLYN DEFENDERS SERVICE, THE BRONX DEFENDERS, CENTER FOR FAMILY REPRESENTATION, & NEIGHBORHOOD DEFENDER SERVICE OF

decreased home monitoring and removals of children, even if one might wonder why child protection does not constitute an “essential” service.

Still, the more intriguing question is why elected officials and the public largely embraced the pandemic’s economic measures when many criticized earlier forms of state support. One hypothesis is that more white men than ever suddenly found themselves and their families vulnerable due to circumstances over which they had no control.⁸³ They could not fight the virus by working harder or pulling themselves up by their bootstraps. This vulnerability was not limited to white men, of course,⁸⁴ but many white men—unlike men of color and women of all colors—had never before felt so vulnerable to forces outside of their control. A related hypothesis focuses on the massive disruptions in work that accompanied the pandemic. The pandemic created not just physical vulnerability but also economic vulnerability. The usual preoccupation with “personal responsibility” and work requirements obviously could not address a situation characterized by rapid lay-offs and store and workplace closures.⁸⁵

These apparent attitudinal or even philosophical shifts, likely rooted in what Derrick Bell called “interest convergence,”⁸⁶ nonetheless should not obscure the ways that governmental responses to COVID continued to center the idea of personal responsibility, even as state support became more generous. As Aziza Ahmed and Jason Jackson point out, COVID mitigation recommendations emphasizing individual action—handwashing, social distancing, masking, and special precautions for those with preexisting medical conditions—ignored the structural inequalities that make such measures nigh impossible for those who lack access to clean water, live in crowded multigenerational households, and/or work in jobs deemed

HARLEM, OVERSIGHT HEARING: THE CHILD WELFARE SYSTEM DURING COVID-19 5 (June 14, 2021), <https://cfny.org/wp-content/uploads/2021/08/The-Child-Welfare-System-During-COVID-19-Family-Defense-Joint-Testimony-6.14.2021.pdf> [<https://perma.cc/X8RB-FE3D>].

83. See Cara Buckley, *Newly Needy, And Abashed To Seek Help*, N.Y. TIMES, Apr. 1, 2020, at A1.

84. In fact, poor women of color were more vulnerable than white men given the “the underlying pandemics of inequality, economic insecurity, and injustice.” Catherine Powell, *Color of Covid and Gender of Covid: Essential Workers, Not Disposable People*, 33 YALE J.L. & FEMINISM 1, 1 (2021).

85. See Marianne Bitler, Hilary W. Hoynes & Diane Whitmore Schanzenbach, *The Social Safety Net in the Wake of COVID-19*, (Nat’l Bureau of Econ. Rsch., Working Paper No. 27796), <http://www.nber.org/papers/w27796> [<https://perma.cc/T89H-CY2L>].

86. See generally Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

“essential.”⁸⁷ Such a “personal responsibility approach” to a public health crisis necessarily fails poor persons and members of minority groups,⁸⁸ as Ahmed and Jackson illustrate by juxtaposing the handwashing recommendation with the government-caused water contamination in Flint, Michigan.⁸⁹ Similarly, Melissa Murray and Caitlin Millat, among others, showcase how the pandemic, with its school closures, laid bare the inadequacy of state support for caregiving and the gendered division of labor that persists within most families.⁹⁰

III. STAGE THREE: BEYOND COVID

Given the unprecedented support for public programs during the early days of the pandemic, it was possible to hope that the COVID era ushered in a new understanding of family dependency and the role of government in addressing it. Perhaps this new understanding would even lead to new ways of tackling the structural inequalities that form “the social determinants of health” and the neoliberal policies that keep them in place.⁹¹ Yet such hopes were soon dashed, at least in their purest form. Instead, elected officials and large segments of the public seem to be doubling down on personal responsibility and the privatization of dependency, and not just in economic terms.

A. A Return to Privatization

Support for ongoing financial payments to families has waned as the effects of the pandemic have lessened. Rhetoric from stage one has returned, with a renewed rejection of what Senator Joe Machin and other politicians call the “entitlement society.”⁹² Legislators in some states recently sought

87. Aziza Ahmed & Jason Jackson, *Race, Risk, and Personal Responsibility in the Response to COVID-19*, 121 COLUM. L. REV. F. 47, 49-50 (2021).

88. *Id.* at 51.

89. *Id.* at 47-49.

90. Melissa Murray & Caitlin Millat, *Pandemics, Privatization, and the Family*, 96 N.Y.U. L. REV ONLINE 106 (2021). *See also, e.g.*, Naomi R. Cahn & Linda C. McClain, *Gendered Complications of Covid-19: Towards A Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1 (2020); 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 (2022).

91. *See generally* Murray & Millat, *supra* note 90.

92. *See* Jordain Carney, *Democrats Downplay Deadlines on Biden's Broad Spending Plan*, THE

to impose work requirements on food assistance and Medicaid.⁹³ Resistance to Medicaid expansion reemerged.⁹⁴ The expanded CTC ended at the end of 2021 despite evidence that it substantially reduced child poverty and food insufficiency.⁹⁵

These recent developments indicate a swift return to the privatization of dependency after a relatively brief period of increased state support of families. And, in some states, there is more than a return to pre-pandemic policy. Instead, politicians have increasingly invoked the role of families to justify policy interventions that go well beyond debates about financial assistance to those in need.

Most saliently, elected officials in some states have become increasingly skeptical about local schoolboards and teachers and have positioned expansive conceptions of parental rights as a winning election strategy, as illustrated by the recent governor's race in Virginia.⁹⁶ These new claims to parental rights go well beyond the traditional doctrine that permits parents to choose schools for their children or to exempt their

HILL (Oct. 7, 2021), <https://thehill.com/homenews/senate/575673-democrats-downplay-deadlines-on-bidens-broad-spending-plan/> [<https://perma.cc/8BZU-XF27>] (quoting Sen. Manchin); Philip Rucker, *Romney Sees Choice Between "Entitlement Society" and "Opportunity Society,"* WASH. POST (Dec. 20, 2011), http://www.washingtonpost.com/politics/romney-sees-choice-between-entitlement-society-and-opportunity-society/2011/12/20/glQAJXH57O_story.html [<https://perma.cc/F4QZ-YFEV>] (quoting then-Presidential candidate Mitt Romney). See also Tristin K. Green, *Rethinking Racial Entitlements: From Epithet to Theory*, 93 S. CAL. L. REV. 217 (2020) (analyzing and critiquing rhetoric condemning "racial entitlements").

93. See *Gresham v. Azar*, 950 F.3d 93 (D.C. Cir. 2020), *vacated and remanded for dismissal as moot sub nom. by Arkansas v. Gresham*, 142 S. Ct. 1665 (2022).

94. See, e.g., *Where Do the States Stand on Medicaid Expansion?*, COMMONWEALTH FUND BLOG (Oct. 27, 2022), <https://www.commonwealthfund.org/blog/2022/where-do-states-stand-medicaid-expansion> [<https://perma.cc/M88A-MNPG>].

95. "In the six months of the expanded CTC, the overall rate of child poverty in the United States was slashed by 30 percent; food insufficiency was cut by 26 percent." Jason Linkins, *The Tragedy of the Expanded Child Tax Credit*, NEW REPUBLIC (May 7, 2022), <https://newrepublic.com/article/166389/c-hild-tax-credit-midterms-manchin> [<https://perma.cc/657L-WLXS>]. The reverse proved true as well: "three months after its expiration . . . the child poverty rate was up more than 40 percent." *Id.* Economists estimate that continuing the expanded CTC would cost \$97 billion but provide social benefits of \$982 billion. Irwin Garfinkel et al., *The Benefits and Costs of a U.S. Child Allowance* 30 (Nat'l Bureau Econ. Rsch., Working Paper No. 29854, 2022), https://www.nber.org/system/files/working_papers/w29854/w29854.pdf [<https://perma.cc/23VD-BWXX>].

96. See Shane Goldmacher, *Here Are Five Takeaways from the Election Results*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2021/11/03/us/elections/here-are-five-takeaways-from-the-election-results.html?searchResultPosition=7> [<https://perma.cc/3PRY-BRL3>]; Trip Gabriel, *In Virginia, a Test of Messages and Candidates Ahead of the Midterms*, N.Y. TIMES (Nov. 3, 2021), <https://www.nytimes.com/2021/10/19/us/politics/virginia-governor-race-terry-mcauliffe-glenn-youngkin.html?searchResultPosition=11> [<https://perma.cc/VMD6-SKUR>].

children from certain parts of the curriculum.⁹⁷ Instead, these expanded conceptions of parental rights posit that some parents, in the name of family privacy, should be able to trump teachers and school boards, thereby determining what happens in public schools and libraries for *all* students.

This trend first became apparent with fights against mask mandates in public schools. National public health officials and many local schoolboards—even in Republican-led states—advocated for such mandates, and mask mandates were soon implemented throughout most of the nation.⁹⁸ Yet some parents claimed that these mandates violated their constitutional rights to direct their children’s upbringing, particularly parents’ rights to make healthcare decisions for their children.⁹⁹ Most states rejected such claims, but some found them persuasive. Florida Governor Ron DeSantis, for example, declared that parents, as opposed to teachers or school administrators, should determine when children wear or do not wear masks, and he issued an executive order pulling state funding from public school districts that insisted on maintaining mask mandates.¹⁰⁰

Some parents soon invoked their rights in an attempt to exert control over a much broader range of issues, especially those that make race, gender, sexuality, and marriage salient. Conservative white parents demanded that local school boards eliminate so-called critical race theory from their children’s classrooms.¹⁰¹ Some parents also sought to prohibit

97. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925); Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting Mozart After 20 years*, 38 J.L. & EDUC. 83, 129-30 (2009).

98. Stacey Decker, *Which States Banned Mask Mandates in Schools, and Which Required Masks?*, ED. WEEK (Aug. 20, 2021), <https://www.edweek.org/policy-politics/which-states-ban-mask-mandates-in-schools-and-which-require-masks/2021/08> [<https://perma.cc/UU2R-SLLG>].

99. See, e.g., Melissa Frick, *Moms for America Action Group Calls for Parents to ‘Strike’ Against K-12 Schools that Mandate Masking*, M LIVE (Aug. 19, 2021), <https://www.mlive.com/news/grand-rapids/2021/08/moms-for-america-action-group-calls-for-parents-to-strike-against-k-12-schools-that-mandate-masking.html> [<https://perma.cc/XK5Y-9BBR>]; Adam Roberts, *Bentonville Schools Sued Over COVID-19 Mask Requirements*, 4029 TV NEWS (Aug. 20, 2021), <https://www.4029tv.com/article/bentonville-lawsuit-school-mask-requirement/37348537#> [<https://perma.cc/DR4K-FS2R>].

100. Ensuring Parents’ Freedom to Choose, Fla. Exec. Order No. 21-175 (July 30, 2021), <https://www.flgov.com/wp-content/uploads/2021/07/Executive-Order-21-175.pdf> [<https://perma.cc/CN6S-95KK>]. Florida legislators also threatened to pull funding from school districts that imposed mask mandates. See John Kennedy, *GOP lawmaker aims to strip state funding from school districts that defied Gov. DeSantis on masks*, TALLAHASSEE DEMOCRAT, Feb. 10, 2022.

101. See, e.g., Tyler O’Neil, *Parents Rights Activists Slam ACLU for opposing curriculum transparency laws amid CRT battles*, FOX NEWS (Jan. 27, 2022), <https://www.foxnews.com/politics/parent-rights-activists-slam-aclu-for-opposing-curriculum-transparency-laws-amid-crt-battles> [<https://perma.cc/5LZ3-BK34>]. We say “so-called” because

discussion of gender identity and marriage equality in public schools.¹⁰² Calls to ban books about related topics accompanied each of these claims. All of these parents invoke the belief that their parental rights entitle them to control the ideas to which their children are exposed in school.¹⁰³

Once again, some governors have found these arguments to be persuasive. Back in Florida, Governor DeSantis signed a bill into law that prohibits public school teachers from teaching about sexual orientation and gender identity in early grades or even acknowledging that such concepts exist.¹⁰⁴ The law also limits the teaching of these concepts in other grades if it “it is in a manner that is not age appropriate for students in accordance with state standards.”¹⁰⁵ This vague standard could make it difficult for teachers to know what they can cover and is “highly subjective.”¹⁰⁶ The law has been named the “Don’t Say Gay” law by opponents,¹⁰⁷ but, tellingly, the official name of the law is the Parental Rights in Education law.¹⁰⁸ Personal responsibility now looks like a duty to protect one’s child from challenging topics, even while it ignores the existence of other parents with

theorists and school teachers alike assert that children are not learning critical race theory. See Rashawn Ray & Alexandra Gibbons, *Why Are States Banning Critical Race Theory?*, BROOKINGS (Nov. 2021), <https://www.brookings.edu/blog/fixgov/2021/07/02/why-are-states-banning-critical-race-theory/> [<https://perma.cc/7CYB-AQSJ>]; Phil McCausland, *Teaching Critical Race Theory Isn't Happening in Classrooms, Teachers Say in Survey*, NBC NEWS (July 1, 2021), <https://www.nbcnews.com/news/us-news/teaching-critical-race-theory-isn-t-happening-classrooms-teachers-say-n1272945> [<https://perma.cc/4XJL-L5WS>].

102. See, e.g., Rachel Hatzipanagos, *After Florida Passes Bill, LGBTQ Parents Ask: Which Parental Rights?*, WASH. POST (May 9, 2022), <https://www.washingtonpost.com/nation/2022/05/09/lgbtq-parents-dont-say-gay/> [<https://perma.cc/D88P-K82Q>].

103. See, e.g., Ellen Barry, *In Rural Town, Parents and Students Clash Over Mental Health*, N.Y. TIMES, June 5, 2022, at A-1.

104. Fla. SB 1557 (2022), <https://www.flsenate.gov/Session/Bill/2022/1557/BillText/er/PDF> [<https://perma.cc/9MW5-F6BW>] (codified at Fl. Stat. § 1004.42(8)(c)).

105. *Id.*

106. Amelia Nierenberg, *What Does “Don’t Say Gay” Actually Say?*, NY TIMES (Mar. 23, 2022), <https://www.nytimes.com/2022/03/23/us/what-does-dont-say-gay-actually-say.html> [<https://perma.cc/TTP2-68YT>].

107. Jaclyn Diaz, *Florida’s Governor Signs Controversial Law Opponents Dubbed ‘Don’t Say Gay,’* NPR (Mar. 28, 2022), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis> [<https://perma.cc/9YC2-N9ZS>].

108. Press Release, *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, Mar. 28, 2022, <https://flgov.com/2022/03/28/governor-ron-desantis-signs-historic-bill-to-protect-parental-rights-in-education/> [<https://perma.cc/FLL5-TMGB>]. Following suit, the United States House of Representatives has also passed a “Parents Bill of Rights Act.” Annie Karni, *Divided House Passes G.O.P. Bill on Hot-Button Schools Issues*, N.Y. TIMES (Mar. 24, 2023), <https://www.nytimes.com/2023/03/24/us/politics/parents-bill-of-rights-act.html?searchResultPosition=1> [<https://perma.cc/H4KN-4JJB>].

different views about what their children should learn. This privileging of the rights of some parents over those of others also surfaces in moves in Florida and other states to ban parent-supported gender-affirming care for their transgender children.¹⁰⁹

B. Privatization After *Dobbs*

Counterintuitive as it might appear, the Supreme Court's overruling of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization*,¹¹⁰ also stands out as a doubling down on privatization. This analysis is counterintuitive because, of course, *Dobbs* expressly rejected the constitutional right to privacy that undergirded *Roe*'s protection of individual abortion decisions.¹¹¹ But, as we see it, *Dobbs* invites new barriers that separate individuals and families from the services they deem necessary to address their private responsibilities.¹¹²

Although *Roe* established a floor by making abortion legal, it fell well short of guaranteeing access to abortion, thanks to the Hyde Amendment and the cases upholding its denial of government assistance for abortions.¹¹³ Similarly, *Roe* offered nothing to those who would carry a pregnancy to term if only they had the resources to do so and to care for a child, falling well short of the goals of reproductive justice.¹¹⁴ Accordingly, *Roe*—in centering privacy—exemplified law's preference for keeping family matters cordoned off from the state, assigning to the person or family experiencing a pregnancy the responsibility of managing it in one way or another. In overruling *Roe* and eliminating even the negative right to

109. See Arek Sarkissian, *Groups Sue to Stop Florida's Gender-Affirming Care Ban for Kids*, POLITICO (Mar. 23, 2023), <https://www.politico.com/news/2023/03/23/florida-gender-affirming-care-ban-lawsuit-00088644> [<https://perma.cc/5RWU-C9LT>]; Jack Suntrup, *Will Families Flee Missouri if Health Care for Transgender Adolescents Is Banned?*, ST. LOUIS POST-DISPATCH (Mar. 25, 2023), https://www.stltoday.com/news/local/govt-and-politics/will-families-flee-missouri-if-health-care-for-transgender-adolescents-is-banned/article_b8dc7049-7638-5b03-82ed-9f9d0aa69bc5.html [<https://perma.cc/L53Y-DDAC>].

110. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

111. *Id.* at 2245.

112. Bans on gender-affirming care for transgender minors also create barriers for families seeking to carry out their private responsibilities. See *supra* note 109.

113. See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980). See also *supra* notes 35-40 and accompanying text (discussing the Hyde Amendment).

114. See LORETTA J. ROSS & RICKIE SOLINGER, *REPRODUCTIVE JUSTICE: AN INTRODUCTION* (2017).

abortion,¹¹⁵ *Dobbs* removes options for those managing their health and their families. Privacy morphs into isolation, and “personal responsibility” requires foregoing heterosexual sex,¹¹⁶ carrying a pregnancy to term, or seeking to defy state law, no matter the problems.

Certainly, laws that punish abortion providers take aim at women and their autonomy, even if the *Dobbs* majority refuses to recognize a gender-based classification and declines to apply heightened scrutiny.¹¹⁷ Indeed, much of the pushback against the inclusive term “pregnant person” comes from its tendency to camouflage the specific and obvious targets of abortion restrictions: women.¹¹⁸ Even more explicitly, in the wake of *Dobbs*, some legislators advocate for departing from the traditional immunity accorded to the abortion patient and criminalizing her conduct as well.¹¹⁹

And, despite the challenges of paying for an abortion and undertaking the travel, waiting periods, and red tape that many hostile states imposed even before *Dobbs* authorized outlawing abortion altogether, data show that abortion patients have long been disproportionately poor and Black.¹²⁰ The Brief of Amici Curiae filed by Reproductive Justice Scholars in *Dobbs* catalogues the specific economic, educational, and familial disadvantages that Black women face in Mississippi, providing context for why so many exercise control by turning to abortion.¹²¹

115. The negative right to abortion, protected from active interference from the state, contrasts with a positive right, which entitles one to assistance from the state if necessary to exercise the freedom in question. The constitutionality of the Hyde Amendment makes clear that, even when the Court read the Constitution to protect abortion, it recognized only a negative right. See Appleton, *supra* note 37.

116. This response might well have been the objective of critics of “irresponsible reproduction” decades ago. See McClain, *supra* note 5. In other words, perhaps they were using a euphemism for “irresponsible sex.” See, e.g., Helen M. Alvaré, *No Compelling Interest: The “Birth Control” Mandate and Religious Freedom*, 58 VILL. L. REV. 379, 414, 435 (2013) (contending that sexual freedom harms women).

117. *Dobbs*, 142 S. Ct. at 2245-46.

118. E.g., Helen Lewis, *Why I’ll Keep Saying ‘Pregnant Women,’* THE ATLANTIC (Oct. 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/pregnant-women-people-feminism-language/620468/> [https://perma.cc/HWK2-3JB7]. Because we emphasize gender in our analysis, we use the term “women” here.

119. See, e.g., Rick Rojas & Tariro Mzezewa, *After Tense Debate, Louisiana Scraps Plan to Classify Abortion as Homicide*, N.Y. TIMES (May 12, 2022), <https://www.nytimes.com/2022/05/12/us/louisiana-abortion-bill.html?searchResultPosition=7> [https://perma.cc/9UUU-UGF8] (reporting on withdrawn proposal to prosecute abortion patients for homicide).

120. Seventy-five percent of abortion patients are poor or low income; twenty-eight percent are Black. See Guttmacher Institute, *Induced Abortion in the United States: Fact Sheet* (Sept. 2019) (using 2014 data).

121. Brief of Amici Curiae Reproductive Justice Scholars Supporting Respondents at 12-26,

Indeed, beyond providing data, the Brief makes plain why one should see the Mississippi 15-week abortion ban at issue in *Dobbs* as a measure that went beyond simply affecting poor Black women to targeting them. For all the reasons outlined, Black women are the principal “consumers” of abortion health care there and in some other states as well. Even abortion opponents concede that point, which they then invoke to conflate individually chosen abortions with state mandated eugenics programs and anti-Black genocide.¹²² Black women also face the greatest risk of maternal mortality from continued pregnancy and childbirth in a country whose maternal mortality rate is more than double that of most other high-income countries—so that eliminating abortion as an option poses significant dangers to Black lives and health.¹²³ In this sense, Mississippi’s abortion ban looks like its refusal to expand Medicaid¹²⁴ or its initial reluctance to extend its benefits from two months to one year post-partum in order to combat maternal mortality.¹²⁵

Dobbs v. Jackson Women’s Health, Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 4312136, at *12.*26.

122. See *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782-93 (2019) (Thomas, J., concurring); Melissa Murray, *Race-ing Roe, Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. 2025 (2021).

123. See Donna L. Hoyert, *Maternal Mortality Rates in the United States, 2020* (National Center for Health Statistics, Feb. 2022), <https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf> [<https://perma.cc/BT65-6HFQ>]; Jamila Taylor et al., *The Worsening U.S. Maternal Health Crisis in Three Graphs*, The Century Foundation, Mar. 2, 2022, <https://tcf.org/content/commentary/worsening-u-s-maternal-health-crisis-three-graphs/> [<https://perma.cc/Z38D-U7EE>]. See also Claire Cain Miller et al., *Childbirth Is Deadlier for Black Families Even When They’re Rich, Expansive Study Finds*, N.Y. TIMES (Feb. 12, 2023), <https://www.nytimes.com/interactive/2023/02/12/upshot/child-maternal-mortality-rich-poor.html?searchResultPosition=1> [<https://perma.cc/DZ9Z-TVT3>].

124. See Bill Crawford, *Opposition to Medicaid Expansion Beginning to Look Dumb?*, DAILY JOURNAL (May 24, 2022), https://www.djournal.com/opinion/columnists/opposition-to-medicaid-expansion-beginning-to-look-dumb/article_bc60a6ae-9e34-5502-ab86-66e6ad8f4705.html [<https://perma.cc/MC4S-GR3H>] (opinion).

125. See Emily Wagster Pettus, *Mississippi House Leaders Kill Postpartum Medicaid*, AP NEWS (Mar. 9, 2022), <https://apnews.com/article/health-mississippi-medicaid-c49debd7b356f593485853aee5458c1> [<https://perma.cc/FUQ9-MP9D>]. The Mississippi House and Governor changed course in 2023, indicating readiness to support the postpartum extension. See Geoff Pender, *House Sends Extended Postpartum Medicaid Coverage to Governor*, MISS. TODAY (Mar. 7, 2023), <https://mississippitoday.org/2023/03/07/postpartum-extension-medicaid-coverage-mississippi/> [<https://perma.cc/9HWM-AW4E>].

Critical commentators see this impact as a feature, not a bug, of *Dobbs*. Michele Goodwin develops the idea of “complicit bias” to describe the approach manifested in *Dobbs*.¹²⁶ Angela Garbes observes:

When we force people into motherhood, we are forcing them into poverty. . . . [W]hat’s happening right now is that our system is working exactly as it’s designed to keep people in power and to keep poor people and people of color and marginalized people in lives that are harder than they need to be.¹²⁷

Just as racism and misogyny undergird the longstanding policy of assigning family dependency to the private sphere, as emphasized in Part I, they also undergird the rise of abortion restrictions post-*Dobbs*. Legal doctrine and social policy once again send a message to “undeserving” women of color, especially those living outside of marriage, to avoid sex or become an outlaw when one is not financially prepared for procreation and self-sufficiency.

IV. MOVING FORWARD

Despite these troubling and perverse developments, child poverty rates are finally dropping across the country, indicating that longstanding aid programs have been effective despite criticism of them and their stigmatizing effects. In addition, almost fifty cities, inspired by COVID relief programs, have adopted pilot local guaranteed income programs. Some cities have also begun to provide parents with child development accounts or to institute their own versions of child tax credits. On the federal level, President Biden recently announced a broad student loan forgiveness plan. These are all promising, although not uncontroversial, paths to a reimagined concept of “personal responsibility” that would better support families.

126. Michele Goodwin, *Complicit Bias and the Supreme Court*, 136 HARV. L. REV. 119, 126 (2022) (responding to Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23 (2022)).

127. *Fresh Air: Raising Kids Is “Essential Labor.” It’s Also Lonely, Exhausting and Expensive*, NPR, June 21, 2022. See generally Angela Garbes, *ESSENTIAL LABOR: MOTHERING AS SOCIAL CHANGE* (2022), <https://www.npr.org/sections/health-shots/2022/06/21/1105849291/essential-labor-angela-garbes-child-care-pandemic-mothering> [<https://perma.cc/DSF2-TTP3>].

A. The Safety Net “Patchwork”

The United States has long stood out because of the sharp contrast presented by its great national wealth and its high rate of child poverty. Yet, a detailed 2022 report from Child Trends reveals an impressive fifty-nine percent drop in child poverty in the United States from 1993 to 2019—even before pandemic aid programs had begun.¹²⁸ “Child poverty has fallen in every state, and it has fallen by about the same degree among children who are white, Black, Hispanic and Asian, living with one parent or two, and in native or immigrant households. Deep poverty, a form of especially severe deprivation, has fallen nearly as much.”¹²⁹ Because of unequal starting points, however, gaps remain between white children and Black and Hispanic children as well as between children in immigrant families and those in nonimmigrant families.¹³⁰

Expanded government aid constituted the principal driver of the dramatic drop in child poverty. In particular, the Child Trends report cites major shifts in the safety net¹³¹ that account for the drop in child poverty. First, the overall amount of government assistance to families increased, particularly from the 1990s to the start of the Great Recession. The most notable increases were provided through the Earned Income Tax Credit (EITC), SNAP, and Social Security;¹³² in studies including the pandemic response, the increased spending as a result of ARPA’s expanded Child Tax Credit staved off what would otherwise have been the second largest

128. Dana Thomson et al., *Lessons from a Historic Decline in Child Poverty*, CHILD TRENDS (2022), <https://www.childtrends.org/publications/lessons-from-a-historic-decline-in-child-poverty> [https://perma.cc/YN77-Q679]. *But see* Matthew Desmond, *Why Poverty Persists in America*, N.Y. TIMES (Mar. 9, 2023), <https://www.nytimes.com/2023/03/09/magazine/poverty-by-america-matthew-desmond.html?searchResultPosition=2> [https://perma.cc/QG8P-MGHK].

129. 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?searchResultPosition=2> [https://perma.cc/A4YQ-SCE3].

130. *Id.*

131. For a critique of this term because it hides feminist and communitarian concerns and ignores structural inequalities, see Matthew B. Lawrence, *Against the “Safety Net,”* 72 FLA. L. REV. 49 (2020).

132. In 2019, “the EITC had the potential to reduce child poverty by 3.2 percentage points, or 22 percent,” “Social Security reduced child poverty by 1.9 percentage points in 2019, or 14 percent,” and “SNAP reduced poverty by 1.4 percentage points, or 11 percent.” Because of the underreporting of SNAP benefits, Social Security and SNAP may be interchangeable as the second and third most influential forms of aid. Thomson et al., *supra* note 128.

increase in poverty, instead causing poverty rates to fall.¹³³ Thus, one take-home message from the Child Trends report centers on multiplicity: “The story of the safety net, in other words, is a story of safety nets — multiple programs with multiple aims, sometimes evolving in uncoordinated or accidental ways.”¹³⁴ For example, Social Security plays a larger role now than it did in the past both because of increased benefits and because of the growing number of children living with elderly parents and grandparents.¹³⁵

Second, government aid programs switched their focus from out-of-work assistance to in-work programs, and in-work programs covered a larger number of families than the out-of-work programs did.¹³⁶ Single mothers’ labor force participation also saw a net increase of fifteen percent from 1993 to 2019.¹³⁷ These shifts resulted in the minimal overall change in “deep poverty,” however, because the poorest families received less assistance than they might otherwise have received had assistance not been extended to a larger number of families.¹³⁸

Importantly, the Child Trends report found that demographic factors “did not contribute to the decline in child poverty from 1993 to 2019, but were associated with about forty-three percent of the decline in deep poverty.”¹³⁹ In particular, “[t]he share of Black children—whose parents often face hiring discrimination and wage inequality in the workforce—decreased from 1993 to 2019 and was associated with decreases in child poverty, although this shift’s contribution to the overall decline was small.”¹⁴⁰ By contrast, Hispanic and children in immigrant families produced very different conclusions:

133. Arloc Sherman et al., *What to Know About Next Week’s Poverty, Income, and Health Insurance Figures for 2021*, CTR. BUDGET & POL’Y PRIORITIES (Sept. 8, 2022), <https://www.cbpp.org/sites/default/files/9-8-22pov.pdf> [<https://perma.cc/LRM8-27NW>]; see also Marielle Argueza, *Economics in Brief: How the Pandemic Safety Net Slashed Child Poverty*, NEXT CITY (Sept. 23, 2022), <https://nextcity.org/urbanist-news/economics-in-brief-how-the-pandemic-safety-net-slashed-child-poverty> [<https://perma.cc/274L-2UYA>].

134. DeParle, *supra* note 129.

135. *Id.*

136. The average benefit received among children in participating families fell by 36.6% for unemployment insurance and by 39.0% for Temporary Assistance for Needy Families (TANF) and Aid to Families with Dependent Children (AFDC); meanwhile, the average benefit received grew by 134.2% for the EITC, which is conditioned on employment. Thomson et al., *supra* note 128.

137. Demographic trends, including this one, are the primary focus of Chapter 2 of the Child Trends report. *Id.*

138. See *id.* (Finding 4).

139. *Id.*

140. *Id.*

The share of children who are Hispanic or who live in immigrant families grew from 1993 to 2019. These demographic shifts were associated with increases in child poverty rates; this likely reflects the high incidence of Hispanic and immigrant parents who face discrimination in the labor market and restricted access to the social safety net, both of which limit efforts to reduce child poverty. Increases in the share of children living in immigrant families were also associated with increases in rates of deep poverty among children.¹⁴¹

In addition, the Child Trends study found that changes in the share of children in two-parent families were associated with little of the decline in child poverty from 1993 to 2019.¹⁴²

These findings show that existing financial assistance programs have been effective in reducing poverty even for families of color so long as families have access to the programs. The programs have also benefited female-headed and single-parent households, undercutting the use of marriage incentives as poverty reduction measures.¹⁴³ The policy of prioritizing aid for those already in the labor force rewards a form of “personal responsibility” and compounds the disadvantages of those out-of-work. While race, gender, and marriage have become less salient, employment looms larger than before.¹⁴⁴

B. Guaranteed Income Programs

In addition to existing financial assistance programs, many jurisdictions are experimenting with more robust, and less stigmatizing, forms of family support. Over the years, policymakers and advocates in the U.S. have discussed various ways of offering a guaranteed minimum income to those living in poverty and a universal basic income (UBI) for all citizens. These

141. *Id.*

142. *Id.*

143. *See supra* note 43 and accompanying text.

144. As Clare Huntington explains, although the EITC operates as a cash transfer tied to employment for low-income workers, it enjoys wide bipartisan support. Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1532-33 (2023). Indeed, several “red states” have their own EITC programs. *Id.* at 1534-35; *see also infra* note 175.

conversations trace back at least as far as the War on Poverty era,¹⁴⁵ when even conservative economists and politicians supported the proposals.¹⁴⁶ Sometimes, the programs were framed as a negative income tax.¹⁴⁷

Although these ideas have received attention for decades, Andrew Yang revived talk of UBI during his run for the Democratic nomination for President in the 2020 election.¹⁴⁸ And now, almost fifty cities—including Los Angeles, Atlanta, Minneapolis, Denver, and Chicago—have launched pilot programs experimenting with guaranteed income.¹⁴⁹ Some observers contend that government assistance during the pandemic created openings for such programs, even though most law and policymakers resist direct cash payments even more than they push back against Medicaid and food stamps.¹⁵⁰ According to critics, such “free” benefits undermine personal responsibility, “destroy fundamental elements of the social contract, and create the wrong incentives for people as they make choices about their life’s course,”¹⁵¹ establishing an “entitlement society” that contravenes the American way.¹⁵²

Of course, the existence of such programs in even fifty cities still means that they are absent from countless areas with high poverty concentrations. Yet, that so many families are receiving a guaranteed income, even on an experimental basis, is notable—reflecting a significant shift in the relationship between families and the state and treating dependency as a

145. See, e.g., Richard A. Cloward & Frances Fox Piven, *The Weight of the Poor: A Strategy to End Poverty*, THE NATION, May 2, 1966, at 510.

146. See MILTON FRIEDMAN, WITH THE ASSISTANCE OF ROSE D. FRIEDMAN, CAPITALISM AND FREEDOM 192 (1962).

147. See *id.*

148. See Matt Stevens, *Andrew Yang on Universal Basic Income*, N.Y. TIMES, June 27, 2019, <https://www.nytimes.com/2019/06/27/us/politics/who-is-andrew-yang.html?searchResultPosition=1> [<https://perma.cc/R29B-85BX>] (examining Yang’s proposal to give everyone \$1000 per month).

149. See Kurtis Lee, *Guaranteed Income Programs Spread, City by City*, N.Y. TIMES (Sept. 13, 2022), <https://www.nytimes.com/2022/09/10/business/economy/guaranteed-income.html> [<https://perma.cc/TJ9L-2WLW>]; Jonathan Weisman, *\$500 a Month, No Strings: Chicago Experiments with a Guaranteed Income*, N.Y. TIMES (Feb. 13, 2023), <https://www.nytimes.com/2023/02/13/us/politics/universal-basic-income-chicago.html?searchResultPosition=1> [<https://perma.cc/WL4L-B32P>].

150. See Lee, *supra* note 149.

151. *Id.*

152. See, e.g., Thom Hartmann, *Behind Joe Manchin’s Attack on “Entitlement Society”*: Billionaires Who Hate America, SALON (Oct. 26, 2021, 5:30 AM), https://www.salon.com/2021/10/26/behind-joe-manchins-on-entitlement-society-billionaires-hate-america_partner/ [<https://perma.cc/Y4XQ-J8Z3>]. See also *supra* note 92 (citing criticisms of “entitlements”).

community responsibility. Moreover, recent criticisms of guaranteed income programs seem to have shed the emphasis on gender, race, and marriage that marked earlier condemnations; likewise, the association of public assistance with violations of family privacy seems less pronounced in this context, even while intrusions in the name of child welfare continue to reflect bias.¹⁵³ With COVID relief measures paving the way for new understandings of “welfare” and “personal responsibility,”¹⁵⁴ however preliminary, guaranteed income programs and other innovations have gained more traction than ever before.¹⁵⁵ Even some abortion opponents see such support for families as a necessary response to *Dobbs*.¹⁵⁶

C. Focusing on Children and Promoting Higher Education

Often support programs focused on children receive a more positive reception than those focused on adults. Children are “innocent” and largely free from expectations of personal responsibility, so the argument goes.¹⁵⁷

153. See James Barron, *Some Child Welfare Workers Say the System Is Racist*, N.Y. TIMES (Nov. 28, 2022), <https://www.nytimes.com/2022/11/28/nyregion/some-child-welfare-workers-say-the-system-is-racist.html?searchResultPosition=1> [<https://perma.cc/Z9CB-VTZK>] (“A draft report found that caseworkers [in New York City] overpolice parents during investigations of possible child abuse and neglect.”); Andy Newman, *Is N.Y.’s Child Welfare System Racist? Some of Its Own Workers Say Yes.*, N.Y. TIMES (Nov. 23, 2022), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html?searchResultPosition=2> [<https://perma.cc/JTS4-BGJT>].

154. See Farhad Manjoo, *Biden Has Helped the Quiet Revolution of Giving People Money*, N.Y. TIMES (Sept. 23, 2022), <https://www.nytimes.com/2022/09/23/opinion/columnists/child-tax-credit-basic-income.html?searchResultPosition=1> [<https://perma.cc/Z9Q2-GPE5>] (opinion) (“Among the big changes ushered in by the pandemic was a quiet revolution in American welfare policy.”).

155. For more on the ways universal basic income programs may combat the racial wealth gap, see Lynn D. Lu, *From Stigma to Dignity? Transforming Workfare with Universal Basic Income and a Federal Job Guarantee*, 72 S.C. L. REV. 703 (2021).

156. See Dana Goldstein, *In Post-Roe World, These Conservatives Embrace a New Kind of Welfare*, N.Y. TIMES (Feb. 10, 2023), <https://www.nytimes.com/2023/02/10/us/conservatives-child-care-benefits-roe-wade.html?searchResultPosition=1> [<https://perma.cc/B7YY-SCZV>]. But see Ruth Graham, “Will We Keep Marching?” *On Roe’s 50th Anniversary, Abortion Opponents Reach a Crossroads*, N.Y. TIMES (Jan. 19, 2023), <https://www.nytimes.com/2023/01/19/us/abortion-roe-v-wade-50th-anniversary.html?searchResultPosition=2> [<https://perma.cc/GQ5Z-WZZQ>] (“The anti-abortion movement often emphasizes support for pregnant women and families, but serious efforts have been largely limited to private foundations and nonprofits. Increasing public spending to care for families is often opposed by lawmakers on the right.”).

157. See, e.g., Rachel F. Moran, *Dreamers Interrupted: The Case of the Rescission of the Program of Deferred Action for Childhood Arrivals*, 53 U.C. DAVIS L. REV. 1905, 1942-43 (2020) (discussing *Plyer v. Doe*, 457 U.S. 202 (1982), in terms of personal responsibility and the innocence of migrant children brought to the United States by their parents).

Indeed, the plight of children in need frequently helps make the case against their supposedly irresponsible parents.¹⁵⁸ Reliance on the private family puts children at the mercy of those they happen to get for parents—something over which they have no control.¹⁵⁹ Accordingly, assistance programs like the Child Health Insurance Program (CHIP) have always provoked far less controversy than the more broadly applicable Medicaid program,¹⁶⁰ and universal preschool has been gaining purchase even in states that usually minimize support for families.¹⁶¹

Still, a focus on children does not always provide a critical shield, particularly on the federal level. Most assessments of ARPA's now-expired expanded CTC¹⁶² consider it to have been a success, particularly in the way it improved children's lives by allowing investments in their care and education.¹⁶³ Yet calls to renew the program after the expansion ended at the close of 2021 have failed.¹⁶⁴ Opponents view the monthly checks, in contrast to the traditional format of tax refunds, as a form of unacceptable

158. See, e.g., Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015) (explaining how early cases striking down classifications based on "illegitimacy" emphasized harm to innocent children even while reaffirming disadvantages imposed on adults defying sexual norms).

159. See Anne L. Alstott, *Is the Family at Odds with Equality? The Legal Implications of Equality for Children*, 82 S. CAL. L. REV. 1 (2008).

160. Although CHIP has occasionally encountered political speed bumps, it has enjoyed unusual bipartisan support. See Abby Goodnough & Robert Pear, *The CHIP Program Is Beloved. Why Is Its Funding in Danger?*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/health/children-s-health-insurance-program.html?searchResultPosition=1> [<https://perma.cc/Y356-7WTW>]. Many states now make CHIP benefits available to immigrant children, regardless of their immigration status. Michael Ollove, *More States Offer Health Coverage to Immigrant Children*, PEW STATELINE (Dec. 6, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/12/06/more-states-offer-health-coverage-to-immigrant-children> [<https://perma.cc/ZL6F-9W85>]. By contrast, Medicaid encountered resistance even in some states where voters have approved it. See, e.g., Bram Sable-Smith, *A Tale of Two Medicaid Expansions: Oklahoma Jumps In, While Missouri Lags*, KHN (Dec. 3, 2021), <https://khn.org/news/article/medicaid-expansion-oklahoma-missouri/> [<https://perma.cc/9L5F-3Q38>]; Jayke Simsheuser, *What's Next?: Missouri's Medicaid Expansion After Doyle v. Tidball*, 87 MO. L. REV. 885 (2022).

161. See Huntington, *supra* note 144, at 1526.

162. *Child Tax Credit*, U.S. DEP'T OF THE TREAS., <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/child-tax-credit> [<https://perma.cc/YEC3-ZWUD>]; American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 144.

163. See, e.g., Leah Hamilton et al., *The Impacts of the 2021 Expanded Child Tax Credit on Family Employment, Nutrition, and Financial Well-Being: Findings from the Social Policy Institute's Child Tax Credit Panel (Wave 2)*, BROOKINGS GLOBAL WORKING PAPER #173 at 3-6 (Apr. 2022), https://www.brookings.edu/wp-content/uploads/2022/04/Child-Tax-Credit-Report-Final_Updated.pdf [<https://perma.cc/WT6H-4ABB>] (reporting key findings); Linkins, *supra* note 93.

164. 26 U.S.C. § 7527A(f).

wealth redistribution.¹⁶⁵ In particular, they take issue with the absence of a parental work requirement.¹⁶⁶ Further, many older Americans dislike the CTC because they see it as a threat to existing social safety net programs, like Social Security and Medicare¹⁶⁷—assuming a zero-sum baseline and suggesting that they are more deserving than the potential competition. In a similar vein, support during the pandemic gave schools the flexibility of serving all children free meals.¹⁶⁸ As with the CTC, however, such support expired, and Congress has not heeded calls for renewal.¹⁶⁹

Yet some state and local governments have continued these COVID-era programs when the federal government has not. In 2022, the state of Maine made free school lunches permanent,¹⁷⁰ joining California and cities like New York, Boston, and Chicago¹⁷¹ and suggesting promise for other local and state-wide endeavors. Similarly, lawmakers in New Jersey, New Mexico, and Vermont created new CTCs, and California lawmakers enhanced their existing CTC.¹⁷² Lawmakers in Connecticut and Rhode

165. See, e.g., Joel Mathis, *Understanding the Debate Around Permanent CTC Payments*, THE WEEK (May 12, 2022), <https://theweek.com/pros-and-cons/1013423/understanding-the-debate-around-permanent-ctc-payments> [<https://perma.cc/3QWG-M7F4>].

166. *Id.* There is no evidence that the 2021 structure affected employment rates, however. *Id.* Although government support for childcare would promote out-of-home work, this aspect of President Biden's agenda has stalled. See Binyamin Appelbaum, (Opinion), *And Child Care for All*, N.Y. TIMES (Mar. 1, 2023), <https://www.nytimes.com/2023/03/01/opinion/editorials/and-child-care-for-all.html?searchResultPosition=1> [<https://perma.cc/933V-3UPE>].

167. Ian Prasad Philbrick, *Why Isn't Biden's Expanded Child Tax Credit More Popular?*, N.Y. TIMES (Jan. 5, 2022), <https://www.nytimes.com/2022/01/05/upshot/biden-child-tax-credit.html> [<https://perma.cc/BE2W-VBE6>].

168. United States Dep't of Agriculture, *Food & Nutrition Service, School Meal Changes are Coming in the 2022-23 School Year* (June 29, 2022), <https://www.fns.usda.gov/cn/2022-23-parent-faqs> [<https://perma.cc/YF2F-WLQ5>].

169. Bridget Huber, *Hunger Advocates Want Free School Meals for All Kids. It's Tough Sell in Congress*, NPR (Sept. 7, 2022), <https://www.npr.org/sections/health-shots/2022/09/07/1101550783/free-school-meals-kids-hunger> [<https://perma.cc/2YM5-M7ZF>]; Bryce Covert, *I Can't Imagine Who Would Think It's OK to Take Food Away from Kids*, N.Y. TIMES (Dec. 27, 2022), <https://www.nytimes.com/2022/12/27/opinion/congress-child-tax-credit-universal-school-meals.html?smid=em-share> [<https://perma.cc/FQ9L-9VDN>]; Linda Qiu, *Families Struggle as Pandemic Program Offering Free School Meals Ends*, N.Y. TIMES (Jan. 22, 2023), <https://www.nytimes.com/2023/01/22/us/politics/universal-school-meals-free-lunches.html?searchResultPosition=2> [<https://perma.cc/SKU8-2A5X>].

170. Robbie Feinberg, *Maine makes free school lunches permanent after federal funding ends*, NPR (Aug. 31, 2022), <https://www.npr.org/2022/08/31/1120223479/maine-makes-free-school-lunches-permanent-after-federal-funding-ends> [<https://perma.cc/X97M-9AEX>].

171. *California Will Launch The Nation's Largest Free Student Lunch Program*, NPR (July 20, 2021), <https://www.npr.org/2021/07/20/1018267303/california-free-lunch-public-schools> [<https://perma.cc/3VRX-P95T>].

172. Aidan Davis, *More States are Boosting Economic Security with Child Tax Credits in 2022*,

Island also offered one-time tax rebates to children from low- and middle-income families in their states, and lawmakers in New York enacted a one-year increase to the state's Empire State Child Credit.¹⁷³ In six other states, including Oklahoma and Idaho, lawmakers have enacted less generous measures, yet they all provide additional support to families beyond that provided by the existing federal CTC.¹⁷⁴ Four additional states, including Utah, enhanced the benefits families receive through state earned income tax credits.¹⁷⁵

Even before the pandemic, several jurisdictions instituted pilot child development account programs,¹⁷⁶ which might garner more sustained public support than the CTC or free lunches. These accounts provide parents with money that must be deposited into investment accounts for their children's postsecondary education.¹⁷⁷ Child development accounts therefore provide families with a structure to accumulate assets over time as opposed to supporting families' short-term consumption. Moreover, most jurisdictions that have instituted these accounts have done so on a universal basis, with an account provided to every newborn. At the same time, most programs allocate extra payments and incentives for children from vulnerable families, meaning the accounts are universal yet progressive.¹⁷⁸

Researchers have rigorously studied these pilot programs, revealing many positive impacts of child development accounts. The accounts "substantially increase asset building for postsecondary education,"¹⁷⁹ but they also do more. Of note, young children receiving the accounts

INST. TAX'N & ECON. POL'Y (Sept. 15, 2022), <https://itep.org/more-states-are-boosting-economic-security-with-child-tax-credits-2022/> [<https://perma.cc/6YE8-LV5K>]. These new and expanded credits are all permanent with the exception of New Mexico's credit, which is scheduled to expire in 2027. *Id.*

173. *Id.*

174. *Id.* (discussing Colorado, Oklahoma, Massachusetts, Idaho, Maine, and Maryland).

175. Iris Hinh & Samantha Waxman, *Many States Are Creating or Expanding Tax Credits to Help Families Afford the Basics*, OFF THE CHARTS BLOG (Aug. 10, 2022), <https://www.cbpp.org/blog/many-states-are-creating-or-expanding-tax-credits-to-help-families-afford-the-basics> [<https://perma.cc/8VVF-XBFD>] (discussing Illinois, Utah, Virginia, and Oregon). See also Huntington *supra* note 144 (discussing federal and state EITC programs).

176. Michael Sherraden et al., *Child Development Accounts in the COVID-19 Crisis: Lessons from the Great Recession*, CENTER FOR SOCIAL DEVELOPMENT, CSD RESCH. & POL'Y REP. 20-11 (April 2020), at 1.

177. *Id.*

178. Jin Huang et al., *Asset Building and Child Development: A Policy Model for Inclusive Child Development Accounts*, 7 RSF: RUSSELL SAGE FDN. J. SOC. SCI. 176, 177, 184, 186 (2021).

179. Sherraden et al., *supra* note 176, at 3.

developed at a faster rate than other children.¹⁸⁰ The mothers of those children also exhibited improved mental health, a greater willingness to try new parenting practices, and heightened educational expectations.¹⁸¹ These positive effects were apparent even if the families did not save additional money in the accounts, and the effects were usually greater for low-income and disadvantaged families as compared to other families.

These pilot attempts to generate funds for children's future education have been accompanied by calls to forgive the postsecondary loans students have incurred in the absence of child development accounts or other state payments designed to defray the costs of college. These calls accelerated during the pandemic, and on August 24, 2022, President Biden issued an executive order forgiving up to \$20,000 in loans for each qualifying borrower. The Biden administration claims this order will "[p]rovide relief to up to 43 million borrowers," "[t]arget relief dollars to low- and middle-income borrowers," "[h]elp borrowers of all ages," and "[a]dvance racial equity."¹⁸² Because of court challenges, this relief has not yet gone into effect.¹⁸³

Unlike child development accounts, this loan forgiveness would not be universal. To qualify for forgiveness, borrowers would need to have an individual income of less than \$125,000 or a household income of less than \$250,000.¹⁸⁴ Moreover, these qualifying borrowers would receive the full \$20,000 of forgiveness only if they originally qualified for Pell Grants, which are reserved for the poorest of families, and owe more than \$20,000.¹⁸⁵ Qualifying non-Pell Grant recipients would receive only

180. Huang, *supra* note 178, at 183-84 (emphasizing that child development accounts "have the potential to reduce some child development disparities caused by economic inequality").

181. *Id.*

182. *FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, WHITE HOUSE (Aug 24, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/> [<https://perma.cc/HX3Z-FD2X>].

183. *See infra* text accompanying notes 191-200.

184. *Id.*

185. *Id.* Of note, 72% of Pell Grant recipients are Black. *Indicator 22: Financial Aid*, NAT'L CTR. FOR EDUC. STAT. (Feb. 2019), https://nces.ed.gov/programs/raceindicators/indicator_rec.asp#:~:text=The%20percentage%20of%20students%20who,varied%20by%20racial%20ethnic%20group

[<https://perma.cc/8U3V-2YFK>]. *See also* Erica Bloom, *A More Targeted Approach to Debt Forgiveness*, URBAN WIRE (Apr. 21, 2021), <https://www.urban.org/urban-wire/more-targeted-approach-student-loan-forgiveness> [<https://perma.cc/LQM2-PMMZ>].

\$10,000 in forgiveness or the amount of their outstanding debt if less than \$10,000.

The Biden Administration has also proposed regulations that are even more tied to income. The Revised Pay As You Earn (REPAYE) draft regulations allow borrowers with only undergraduate debt to pay no more than five percent of their discretionary monthly income on loans, those with only graduate debt to pay no more than ten percent of their discretionary monthly income on loans, and those with both undergraduate and graduate debt to pay between five percent and ten percent of their discretionary monthly income based upon the weighted average of the original principal balances of their loans.¹⁸⁶ Additionally, the proposed regulations raise the amount of income that is considered discretionary, ensuring that no person who earns under 225 percent of the federal poverty level (about the annual equivalent of a \$15 minimum wage) will be required to make a monthly payment.¹⁸⁷ The Department of Education emphasizes that, if these regulations are enacted, “Black, Hispanic, American Indian and Alaska Native borrowers would see their lifetime payments per dollar borrowed cut in half.”¹⁸⁸

Other proponents of these loan forgiveness efforts similarly emphasize the ways they will particularly support African-American borrowers, given the role of race and racism in the accumulation of college debt.¹⁸⁹ Indeed, Black women are more likely to have student debt than any other group; in 2017, approximately twenty-five percent of Black women had student debt

186. *Notice of Proposed Rulemaking: Improving Income-Driven Repayment for the William D. Ford Federal Direct Loan Program*, DEP’T EDUC. 1, 23 (2021), <https://www2.ed.gov/policy/highered/regs/hearulemaking/2021/nprmidr.pdf> [<https://perma.cc/C2QQ-4JAQ>].

187. *Id.* at 23-24; *FACT SHEET*, *supra* note 182.

188. Press Release, Dep’t Educ., *New Proposed Regulations Would Transform Income-Driven Repayment by Cutting Undergraduate Loan Payments in Half and Preventing Unpaid Interest Accumulation*, (Jan. 10, 2023), <https://www.ed.gov/news/press-releases/new-proposed-regulations-would-transform-income-driven-repayment-cutting-undergraduate-loan-payments-half-and-preventing-unpaid-interest-accumulation> [<https://perma.cc/H4HL-STDD>].

189. *Analysis of President Biden’s Announced Executive Order to Cancel Student Debt*, STUDENT BORROWER PROT. CTR. (Aug. 24, 2022), <https://protectborrowers.org/analysis-of-president-bidens-announced-executive-order-to-cancel-student-debt/> [<https://perma.cc/U5UX-QHET>]; *National Action Network Responds to Biden Student Debt Cancellation*, NAT’L ACTION NETWORK (Aug. 24, 2022), <https://nationalactionnetwork.net/newnews/national-action-network-responds-to-biden-student-debt-cancellation/> [<https://perma.cc/387E-JFCX>]; *Both/And: Student Loan Forgiveness and Financial Aid for Latinos*, EXCELENCIA IN EDUC. (Mar. 25, 2021), https://excelenciaineducation.medium.com/both-and-student-loan-forgiveness-and-financial-aid-for-latinos-ef8c39ecc2c8#_ftn1 [<https://perma.cc/9GMP-2KDV>].

compared to only twelve percent of White men.¹⁹⁰ Yet, despite these effects, or maybe because of them, these loan forgiveness efforts have encountered various forms of resistance.

Some critics argue that the executive order is invalid, claiming that loan forgiveness requires an act of Congress.¹⁹¹ Then-Speaker of the House Nancy Pelosi even stated in a 2021 press conference that the President did not have the power to forgive student loans.¹⁹² Other critics of loan forgiveness challenge the role of the state in subsidizing higher education, thereby shifting costs from borrowers to other taxpayers. According to the Penn Wharton Budget Model, the executive order will cost the government about \$300 billion in foregone revenue.¹⁹³ The National Taxpayers Union claims that each U.S. taxpayer will pay an average of \$2,503.22 to make up for this loss.¹⁹⁴ Notably, the costs will not be spread evenly across the income spectrum, as the average additional cost per taxpayer will increase as income increases.¹⁹⁵ Some economists also fear that loan forgiveness could negatively counteract the \$275 billion in deficit reduction included in the Inflation Reduction Act (IRA).¹⁹⁶ The Committee for a Responsible

190. Michael King et al., *Student Debt Weighed Heavily on Millions Even Before Pandemic*, U.S. CENSUS BUREAU (Aug. 18, 2021), <https://www.census.gov/library/stories/2021/08/student-debt-weighted-heavily-on-millions-even-before-pandemic.html> [<https://perma.cc/NZ56-9EKY>].

191. Mark Kantrowitz, *Is Student Loan Forgiveness By Executive Order Legal?*, COLLEGE INVESTOR (Aug. 24, 2022), <https://thecollegeinvestor.com/35892/is-student-loan-forgiveness-by-executive-order-legal/> [<https://perma.cc/9SHX-DGAR>].

192. Press Release, Nancy Pelosi, Speaker, House of Representatives, Transcript of Pelosi Weekly Press Conference Today (July 28, 2021), <https://web.archive.org/web/20210728234123/https://www.speaker.gov/newsroom/72821-2> [<https://perma.cc/84F8-C8YV>] (“People think that the president of the United States has the power for debt forgiveness. He does not. He can postpone, he can delay, but he does not have that power. That has to be an act of Congress.”).

193. *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, PENN. WHARTON BUDGET MODEL (Aug. 26, 2022), <https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness#:~:text=We%20estimate%20that%20President%20Biden's,%2488%2C000%20or%20less%20per%20year> [<https://perma.cc/A8MV-BV9M>].

194. Andrew Lautz, *LATEST: Biden Student Debt Cancellation Could Cost Taxpayers Around \$400 Billion* (Aug. 25, 2022), <https://www.ntu.org/foundation/detail/latest-biden-student-debt-cancellation-could-cost-taxpayers-around-400-billion> [<https://perma.cc/T7GF-HEBW>].

195. *Id.* (discussing how low-income taxpayers earning between \$1 to \$50,000 would have an average additional cost per taxpayer of \$190. For those with adjusted gross incomes between \$50,000 and \$75,000, the average additional cost per taxpayer will be \$1,040. Those earning between \$75,000 and \$100,000 will incur an average additional cost per taxpayer of \$1,774, and those earning \$100,000 to \$200,000 will incur an average additional cost per taxpayer of \$3,791).

196. *Cancelling Student Debt Would Undermine Inflation Reduction Act*, COMM. FOR RESPONSIBLE FED. BUDGET (Aug. 16, 2022), <https://www.crfb.org/blogs/cancelling-student-debt-would-undermine-inflation-reduction-act> [<https://perma.cc/MZS6-MURE>].

Federal Budget has even gone so far to say that debt forgiveness would “wipe out the disinflationary benefits” of the IRA and would “boost near-term inflation much greater than the IRA will lower it.”¹⁹⁷ Two appellate courts have now temporarily blocked implementation of President Biden’s executive order based on the potential merit of some of these critiques.¹⁹⁸ The Supreme Court will issue a decision later in 2023.¹⁹⁹

Related criticism of loan forgiveness efforts often invokes concerns about personal responsibility as well. Borrowers could have gone to more affordable colleges, majored in more practical subjects, or worked during college to reduce their debt burden. Because borrowers did not take responsibility in this fashion, the arguments go, they alone should be responsible for their debts. Therefore, even as unprecedented loan forgiveness may go effect, others resist the state’s role in supporting individuals’ achievement of higher education.

CONCLUSION

Despite continued resistance to public aid and calls for personal responsibility, our analysis reveals some new developments that show at least slightly greater openness to government support than we saw pre-pandemic. Guaranteed income programs in almost fifty cities, some free school meal programs, and President Biden’s student loan forgiveness plans are all examples of this trend. These developments, along with the rising dominance of work-related assistance programs in lieu of initiatives promoting marriage, create new intersections of family and state that challenge the traditional public/private divide and the privatization of dependency.

At the same time, privatization is alive and well in new forms. Powerful and outspoken parents have decided that what they want for their children should be imposed on all, seeking a public role for private parental prerogatives. The most prominent of these moves take explicit aim at

197. *Id.*

198. *Brown v. U.S. Dep’t of Educ.*, No. 4:22-CV-0908-P, 2022 WL 16858525 (N.D. Tex. Nov. 10, 2022); *Nebraska v. Biden*, No. 22-3179 (8th Cir. Nov. 14, 2022).

199. Oral argument before the Supreme Court took place on February 28, 2023. Lexi Lonas, *Top takeaways from the student loan forgiveness arguments at the Supreme Court*, THE HILL (Feb. 28, 2023), <https://thehill.com/regulation/court-battles/3878003-top-takeaways-from-student-debt-relief-arguments-at-the-supreme-court/> [https://perma.cc/L5SV-G9R2].

materials and teaching that support historically marginalized students—Black students and LGBTQ students. Thus, although the “welfare queen” has faded from view, her race, gender, and rejection of traditional marriage still play a major role in contemporary discourse regarding the state’s role in family life. Likewise, we find poor women of color squarely in the crosshairs of the post-*Dobbs* limitations on legal abortion. Such reliance on sexist and racist assumptions about intimate life necessarily means that the disproportionate impact of these new developments is rife with discriminatory intent, in turn challenging yet another traditional legal divide.

Allowing some parents to control the curriculum and library contents for all, along with *Dobbs*’s delegation of abortion decision-making to legislators who often openly embrace religious views on sexuality and procreation, also upsets the traditional binary of negative rights and positive rights. Certainly, this legal distinction has received its share of scholarly criticism because the absence of the latter exacerbates inequalities. Scholars have also shown how families relying on public aid lack the privacy—that is, even the negative right—that other families enjoy. None of the current economic aid programs come close to guaranteeing such aid as a positive right, but now once-secure negative rights have become vulnerable for all, with the one-time abortion right as a conspicuous example. The debate is no longer whether we should add positive rights to negative rights but, rather, whether negative rights protecting family matters should persist at all.

In these ways, the pandemic and the responses it sparked reinforced, challenged, curtailed, and extended longstanding approaches to the privatization of dependency in the United States. We see reasons for both optimism and concern. Some state and local governments are supporting families in new ways, yet racist and sexist assumptions about family life persist, and arguments about personal responsibility and work both bolster and threaten state support of families. Amidst this complex landscape, we hope scholars and policymakers will continue to reimagine state support of families.

