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## *Parens Patriae* After the Pandemic

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## PARENS PATRIAE AFTER THE PANDEMIC\*

MEREDITH JOHNSON HARBACH\*\*

*The COVID-19 pandemic prompted extraordinary state action to protect American children. Acting in its longstanding role as parens patriae, the state stepped in to protect children and their families from the ravages of the pandemic as well as from the dramatic upheaval it precipitated. This Article will evaluate the state's pandemic response vis-à-vis children and their families, mining the experience for lessons learned and possible ways forward. Specifically, this project will argue that the state's pandemic response represented a departure from the state's conventional approach to parens patriae. Conventional practice prior to the pandemic was characterized by a state model of parens patriae that was largely reactive and residual, and was exercised in ways that particularly disadvantaged children of color and low-income children. By contrast, the model of parens patriae actualized in response to the pandemic was proactive, preventative, and responsible. Instances of child abuse dropped or held steady, the incidence of youth offending did not increase, and child poverty levels reached historic lows. At the same time, many children and their parents managed to grow closer and spend more time together during the pandemic. Ultimately, this Article argues that this new approach to parens patriae is the best path forward to protect children and their families from harm and promote child well-being.*

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## INTRODUCTION

The arrival of COVID-19 upended American life, causing immense social and economic disruption. Although America's children were, in general, less likely than adults to suffer serious health consequences from the virus itself,<sup>1</sup> the pandemic has impacted children and their families in myriad ways. An estimated three out of four children in the United States have been infected with the coronavirus,<sup>2</sup> and over 1,600 have died as a result of COVID-19.<sup>3</sup> Their parents and caregivers have become ill, worked from home, and lost their jobs. Around 232,500 children lost at least one primary caregiver to COVID-19.<sup>4</sup> The usual settings children inhabited outside the home—schools, childcare, community centers—were disrupted and/or shuttered.<sup>5</sup> And the public institutions created to protect and regulate children—child welfare agencies, state residential settings, juvenile courts, and youth detention and confinement spaces—were forced to dramatically change and reduce day-to-day operations.<sup>6</sup>

1. *COVID-19 and Children*, UNICEF, <https://data.unicef.org/covid-19-and-children/> [https://perma.cc/64AA-BBXQ].

2. Mike Stobbe, *CDC Estimates 3 in 4 Kids Have Had Coronavirus Infections*, AP NEWS (Apr. 26, 2022), <https://apnews.com/article/cdc-covid-infections-kids-baefa22555970245f0ff939e7bbc7c80> [https://perma.cc/9L2F-MNZM]; Kristie E.N. Clarke, Jefferson M. Jones, Yangyang Deng, Elise Nycz, Adam Lee, Ronaldo Iachan, Adi V. Gundapalli, Aron J. Hall & Adam MacNeil, *Seroprevalence of Infection-Induced SARS-Cov-2 Antibodies: United States, September 2021-February 2022*, 71 MORBIDITY & MORTALITY WKLY. REP. 606, 606 (2022).

3. *Provisional COVID-19 Deaths: Focus on Ages 0-18 Years*, NAT'L CTR. FOR HEALTH STATS., <https://data.cdc.gov/NCHS/Provisional-COVID-19-Deaths-Focus-on-Ages-0-18-Yea/nr4s-juj3> [https://perma.cc/5HH2-N4UT] (last updated Feb. 22, 2023).

4. *More than 140,000 U.S. Children Lost a Primary or Secondary Caregiver Due to the COVID-19 Pandemic*, NAT'L INSTS. HEALTH (Oct. 7, 2021), <https://www.nih.gov/news-events/news-releases/more-140000-us-children-lost-primary-or-secondary-caregiver-due-covid-19-pandemic> [https://perma.cc/97L2-X4HW]; Rakesh Kochhar, *Fewer Mothers and Fathers in U.S. Are Working Due to COVID-19 Downturn; Those at Work Have Cut Hours*, PEW RSCH. CTR. (Oct. 22, 2020), <https://www.pewresearch.org/fact-tank/2020/10/22/fewer-mothers-and-fathers-in-u-s-are-working-due-to-covid-19-downturn-those-at-work-have-cut-hours/> [https://perma.cc/7CNU-A46A].

5. See, e.g., *How COVID-19 Is Impacting Child Care Providers*, ZERO TO THREE (Apr. 20, 2020), <https://www.zerotothree.org/resource/how-covid-19-is-impacting-child-care-providers> [https://perma.cc/5CD8-QFAW]; Morgan Welch & Ron Haskins, *What COVID-19 Means for America's Child Welfare System*, BROOKINGS INST. (Apr. 30, 2020), <https://www.brookings.edu/research/what-covid-19-means-for-americas-child-welfare-system/> [https://perma.cc/5YJU-3DU3].

6. See, e.g., Welch & Haskins, *supra* note 5 (describing vital parts of the child welfare system as “at a near standstill”); Press Release, Massachusetts Off. of the Child Advoc., *New Report Highlights*

As in other times of national crisis, the pandemic prompted an extraordinary state response to protect the American public both from the ravages of COVID-19 itself and from the dramatic upheaval it precipitated. In recognition of the imminent harms to children and their families, Congress placed them at the center of much of its COVID-19 response legislation. Lawmakers provided funding to protect children and support the multiple contexts and institutions in which children live by supplying direct economic support for families as well as school funding, rental assistance, nutrition services, childcare, and support for child welfare.<sup>7</sup> For example, in the American Rescue Plan,<sup>8</sup> Congress appropriated unprecedented funds to support children, their families, and communities, including emergency relief funds for elementary and secondary schools, a child tax credit, and childcare assistance.<sup>9</sup>

These state initiatives to protect children and promote their well-being are not new, although the pandemic prompted an unusually robust response.<sup>10</sup> In fact, the United States has a long tradition of recognizing the state's distinctive relationship with, and obligations toward, children: it has long been recognized that the state, as *parens patriae* or "parent of the nation," is responsible for guarding and promoting children's interests, safety, and welfare.<sup>11</sup> Thus, the state has been characterized as "the ultimate parent who looks after all the children in society under the *parens patriae* concept."<sup>12</sup> Certainly, the state interest underlying much of the legislation enacted during the pandemic was an

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Negative Impacts of Pandemic on Youth, Makes Recommendations To Prevent Future Delinquency (Oct. 6, 2021), <https://www.mass.gov/news/new-report-highlights-negative-impacts-of-pandemic-on-youth-makes-recommendations-to-prevent-future-delinquency> [<https://perma.cc/ALSF-CXCP>] (documenting reduction in juvenile justice system utilization).

7. See Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 1182, 1567-77, 2096-2109 (codified in scattered sections of 7 and 42 U.S.C.); Kelly Vyzral, *Congress Passes COVID Relief: A Summary of the Legislation & Where It Falls Short*, CHILD DEF. FUND OHIO (Dec. 22, 2020), <https://www.cdfohio.org/wp-content/uploads/sites/6/2020/12/The-Consolidated-Appropriations-Act-of-2021-12.22.2020.pdf> [<https://perma.cc/5A3R-KR8T>].

8. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified as amended in scattered sections of 5, 7, 12, 15, 19, 20, 26, 29, 31, 38, 41, 42, 45, 49, and 50 U.S.C.).

9. *Id.* §§ 2004-2005, 2202-2301, 9611(a)-(c)(2), 9612(a)-(b), 9631(a)-(d), 9632(a)-(c), 9641(a)-(b), 9641(d), 9642, 9801(a)-(c), 9811(a)(1)-(2), 135 Stat. at 19-27, 31-37, 144-52, 159-71, 207-08 (codified as amended in scattered sections of 20, 26, 31, and 42 U.S.C.).

10. See, e.g., *Coronavirus (COVID-19) Pandemic Transformed the U.S. Federal Food and Nutrition Assistance Landscape*, USDA (Oct. 4, 2021), <https://www.ers.usda.gov/amber-waves/2021/october/coronavirus-covid-19-pandemic-transformed-the-u-s-federal-food-and-nutrition-assistance-landscape/> [<https://perma.cc/ET9R-4J4Q>] (detailing how the COVID-19 response led to the expansion of federal food and nutrition assistance programs); Welch & Haskins, *supra* note 5 (explaining robust federal funding provided to programs directly and indirectly providing assistance to children).

11. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 572 (1st ed. 1968); SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 132-33 (2003); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 262-64 (2011).

12. KATZ, *supra* note 11, at 132.

interest in protecting America's children from the virus and its impact on their lives.

The first priority for the state, as it often is when acting as *parens patriae*, was to protect children. Yet, perhaps surprisingly, these state initiatives to protect children during COVID-19 and its aftermath did not only protect them in an immediate sense; they also yielded some important *gains* for American children. For example, children and their families experienced an unprecedented drop in poverty levels.<sup>13</sup> Child physical abuse did not increase, but appears to have remained constant or even dropped.<sup>14</sup> Youth offense rates did not rise, and fewer youth were detained overnight outside their homes.<sup>15</sup> Many parents and caregivers reported that in spite of the pandemic, they were able to spend more quality time together and in fact grew closer to their children.<sup>16</sup> Child experts across several disciplines have observed that our experience with the pandemic and the state's response offers an opportunity to revisit the ways the state engages to protect children and to reform our law and policy around child well-being.<sup>17</sup>

This Article will evaluate the state's pandemic response vis-à-vis children, mining the experience for lessons learned and possible ways forward. Specifically, this project will argue that the state's pandemic response represented a departure from the state's conventional approach to *parens patriae*. Contemporary practice prior to the pandemic was characterized by a state model of *parens patriae* that was largely reactive and residual, and was exercised in ways that particularly disadvantaged children of color and low-income children. By contrast, the model of *parens patriae* actualized in response to the pandemic was proactive and responsible, and mitigated some of the harsher effects of the reactive model for certain children. Ultimately, this Article argues that a new approach to *parens patriae* is the best path forward to protect children and their families from harm and promote child well-being.

13. See Kalee Burns, Liana Fox & Danielle Wilson, *Expansions to Child Tax Credit Contributed to 46% Decline in Child Poverty Since 2020*, U.S. CENSUS BUREAU (Sept. 13, 2022), <https://www.census.gov/library/stories/2022/09/record-drop-in-child-poverty.html> [<https://perma.cc/L8Z9-73MP>].

14. Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L. F. 1, 3, 5 (2022); see Barbara H. Chaiyachati, Joanne N. Wood, Camille Carter, Daniel M. Lindberg, Thomas H. Chun, Lawrence J. Cook & Elizabeth R. Alpern, *Emergency Department Child Abuse Evaluations During COVID-19: A Multicenter Study*, 150 PEDIATRICS 18, 18, 25–26 (2022).

15. Press Release, Massachusetts Off. of the Child Advoc., *supra* note 6.

16. See *Despite the Pandemic, Many Parents Report Family Closeness*, AM. ACAD. PEDIATRICS (Mar. 24, 2021), <https://www.aap.org/en/patient-care/family-snapshot-during-the-covid-19-pandemic/despite-the-pandemic-many-parents-report-family-closeness/> [<https://perma.cc/4YK5-4DLW>] [hereinafter *Many Parents Report Family Closeness*].

17. Welch & Haskins, *supra* note 5.

The Article proceeds in three parts. Part I briefly introduces the concept of *parens patriae* in the United States and describes some of the key contexts in which the state operates as *parens patriae*. Part II explains how America's default model of *parens patriae* has been reactive and residual, engaging only after harm has occurred and assuming at most a back-up role in supporting children and their families. The Article then analyzes how well the default model of *parens patriae* served American children prior to the pandemic. Finally, Part III assesses the pandemic response. First, this part explores the harms children and their families experienced during the pandemic. Second, it describes the state response, which, contrary to the conventional approach, in many ways prevented harm before it happened and mitigated harm after the fact. Finally, this part considers what lessons we might draw from the state's pandemic response for *parens patriae* more broadly. In the end, this Article argues that the pandemic response provides a new model for a *parens patriae* role that is proactive, preventative, and responsible—one that will better ensure child well-being by preventing harm before it occurs, and by proactively supporting families and the institutions created to foster child well-being.

#### I. PARENS PATRIAE AND PROTECTING CHILDREN

For well over a century, the United States has recognized that the state, as *parens patriae*, has a special interest in child well-being. As the Supreme Court has recognized, “[i]t is [in] the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.”<sup>18</sup> Broadly speaking, this principle recognizes that the state has a right and responsibility to protect those who cannot protect themselves.<sup>19</sup>

The United States inherited the doctrine of *parens patriae* from English common law.<sup>20</sup> During the colonial period and the early years of the Republic, there was little recognition that the state might have an independent interest in, or obligation to, children.<sup>21</sup> Instead, children fell within “the empire of the father,” in which the patriarch—not the state—had absolute power and control over them.<sup>22</sup> Within this patriarchal family, the father had virtually unlimited

18. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

19. 1 WILLIAM BLACKSTONE, COMMENTARIES \*460–63; CLARK, *supra* note 11, at 572.

20. The doctrine had developed in England as a basis for providing English Courts of Chancery jurisdiction over legal guardianships for child wards. See Neil Howard Cogan, *Juvenile Law, Before and After the Entrance of “Parents Patriae,”* 22 S.C. L. REV. 147, 166–77 (1970) (discussing the first cases where *parens patriae* appears).

21. See HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 2–4 (2005).

22. BLACKSTONE, *supra* note 19, at \*453 (using the term “empire of the father”); see MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA 5–7 (1985); MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS xiii, 5 (1994).

discretion to raise and control his children as he chose, and the state did not typically intervene.<sup>23</sup> Older children might be indentured to work for wealthy families, who then had authority over them.<sup>24</sup> The public only assumed responsibility for children when they were orphaned.<sup>25</sup> In general, initiatives to protect children were private and local in nature.<sup>26</sup>

Beginning in the nineteenth century, however, “child savers” and other Progressive-Era reformers recognized the need to protect vulnerable children in a variety of contexts. Child advocates, law and policy reformers, courts, and legislators increasingly relied upon and invoked the state’s role as *parens patriae* in protecting and regulating children.<sup>27</sup> During this time, the state’s role as *parens patriae* expanded significantly.<sup>28</sup> This expansion set the stage for the emergence of three of the primary contexts in which the state contemporarily acts as *parens patriae* for America’s children: youth offending, child maltreatment, and child poverty.

Through the expansion of the state’s *parens patriae* role, the state reformed its approach to children who committed crimes. Prior to the emergence of *parens patriae*, the common law approach to young people who committed crimes was to adjudicate and punish them the same as adults, and confine them with adults.<sup>29</sup> Early penal reformers founded societies for the prevention of delinquency, which led to the creation of separate facilities for the housing, education, and rehabilitation of children who committed crimes.<sup>30</sup> Yet the “houses of refuge,” reform, industrial, and training schools that developed soon confronted challenges with overcrowding, poor conditions, and staff abuse.<sup>31</sup> Continued work and advocacy ultimately led to the creation of the first juvenile court, established by the Illinois legislature, relying on the state’s interest as *parens patriae*.<sup>32</sup> Other states quickly followed suit, with most states having established juvenile courts by 1925.<sup>33</sup>

23. BLACKSTONE, *supra* note 19, at \*453.

24. See Linda Gordon, *Child Welfare: A Brief History*, VCU LIBRS. SOC. WELFARE HIST. PROJECT, <https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/child-welfare-overview/> [https://perma.cc/YA6E-3LC5] (last modified Aug. 16, 2018).

25. *Id.*

26. *Id.*

27. DOUGLAS E. ABRAMS, *A VERY SPECIAL PLACE IN LIFE: THE HISTORY OF JUVENILE JUSTICE IN MISSOURI* 4 (2003).

28. *Id.* at 4–5.

29. *Id.*

30. See MELISSA SICKMUND & CHARLES PUZZANCHERA, U.S. DEP’T OF JUST., *JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT* 84 (2014).

31. See *Juvenile Justice History*, CTR. ON JUV. & CRIM. JUST., <http://www.cjcr.org/education1/juvenile-justice-history.html> [https://perma.cc/QB8W-7Y6U].

32. See SICKMUND & PUZZANCHERA, *supra* note 30, at 84; see also DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* xiii (2004).

33. See DOUGLAS E. ABRAMS, SUSAN V. MANGOLD & SARAH H. RAMSEY, *CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE* 1003–04 (3d ed. 2007).

Juvenile delinquency jurisdiction was fashioned as an alternative to the criminal approach of prosecuting and confining children like adults.<sup>34</sup> Instead, juvenile courts created a special, civil jurisdiction, triggered when children and young people committed offenses that would have been classified as crimes had they been committed by adults. As originally designed, juvenile delinquency jurisdiction was envisioned as an alternative to criminal punishment that would instead be focused on individualized treatment and rehabilitation for the child or youth.<sup>35</sup> Procedures were informal, based on the ideal of a juvenile judge who was considered to be benevolent and parent-like.<sup>36</sup> The procedures were confidential, and a finding of delinquency substituted for a criminal conviction.<sup>37</sup> Children were, for the most part, confined separately from adults.<sup>38</sup> Juvenile courts proliferated, ultimately exercising jurisdiction over cases involving both youth offending and child maltreatment, as well as status offenses.<sup>39</sup>

In the context of child maltreatment, the state had evinced little interest in protecting children from maltreatment prior to the mid-nineteenth century when, as discussed above, paternal rights were virtually absolute. Gradually, however, society came to recognize that some children were at heightened risk of harm related to poverty, neglect, or abuse.<sup>40</sup> Child advocates lobbied for the creation of societies for the prevention of cruelty to children, which multiplied toward the end of the nineteenth century.<sup>41</sup> American courts began invoking the state's *parens patriae* interest as a justification for intervening in family life to protect children from the harms of parental maltreatment.<sup>42</sup> This movement ultimately led to what is now commonly known as the child welfare system.<sup>43</sup> The modern-day child welfare system is a complex system designed to detect child maltreatment, often through mandatory reporting laws, and then investigate the alleged maltreatment.<sup>44</sup> Possible state responses include providing services and support to parents and guardians, temporary child

34. See *Juvenile Justice History*, *supra* note 31.

35. See ABRAMS ET AL., *supra* note 33, at 1005.

36. *Id.* at 1007.

37. *Id.* at 1010.

38. *Id.*

39. Status offenses are actions that are regulated or prohibited when committed by a minor, for example, truancy or running away. See *id.* at 10.

40. See Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1413 (1999).

41. *Id.*

42. *Ex Parte Crouse* was the first case in the United States to explicitly recognize the state's *parens patriae* power. 4 Whart. 9, 11 (Pa. 1839); see LAUREN DUNDES, *Juvenile Law*, in THE OXFORD COMPANION TO AMERICAN LAW (Kermit L. Hall ed., 2002). The Supreme Court first recognized the doctrine in *Fontain v. Ravenel*, 58 U.S. 369, 384 (1854).

43. See ABRAMS ET AL., *supra* note 33, at 302–05 (describing the child welfare court process and including a chart of child welfare system).

44. See *id.*



removal and placement of children in foster care with the ultimate goal of reunification with their families, and sometimes, termination of parental rights.<sup>45</sup>

Reformers also recognized that much of what was interpreted as neglect was actually caused by poverty. Thus, some early state initiatives were aimed at providing public financial support for children in need. During the first two decades of the twentieth century, the state passed “mothers’ pension” laws to protect children from being separated from their mothers because of poverty.<sup>46</sup> Expanding on these advancements, the mid-1900s saw an expansion of the welfare state, which federalized a number of child welfare policies and also provided material support for struggling families through the Aid to Families with Dependent Children (“AFDC”) program.<sup>47</sup> AFDC remained the primary mechanism for state provision of financial support for children until its replacement in 1996 with the Temporary Assistance to Needy Families (“TANF”) program.<sup>48</sup>

Today, the state’s *parens patriae* interest is the basis for a range of laws and institutions that regulate and care for children—the youth legal system, status offenses, the child protection system, foster care and other state residential placements, as well as regulations like compulsory school laws, child labor regulation, and other regulations protecting child health, safety, and welfare.<sup>49</sup> As a matter of constitutional doctrine, *parens patriae* is the state’s independent

45. *Id.*

46. See Gordon, *supra* note 24.

47. Social Security Act of 1935, Pub. L. No. 74-271, §§ 401–06, 49 Stat. 620, 627–29 (repealed), repealed by Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2112–61 (codified as amended in scattered sections of 42 U.S.C. § 601); see Lucy S. McGough, *Families in the 21st Century: Changing Dynamic, Institutions, and Policies, Introduction: The Past as Prologue*, 54 EMORY L.J. 1219, 1222–23 (2005).

48. See Gordon, *supra* note 24; Personal Responsibility and Work Opportunity Act of 1996 § 103.

49. See, e.g., MARK INGRAM & JOHN RYALS, JR., FAMILY ENGAGEMENT AND JUVENILE JUSTICE: THE EVOLUTION OF *PARENS PATRIAE* 2 (2020), <https://rfknrcjj.org/wp-content/uploads/2020/08/Family-Engagement-and-Juvenile-Justice-The-Evolution-of-Parens-Patriae.pdf> [<https://perma.cc/84YU-WL3H>] (“Modern-day evolution of the *parens patriae* doctrine recognizes society’s responsibility to care for children if their parents are unable to do so.”); JILL GOLDMAN, MARSHA K. SALUS, DEBORAH WOLCOTT & KRISTIE Y. KENNEDY, A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 51 (2003) (“The basis for intervention in child maltreatment is grounded in the concept of *parens patriae* . . .”); Fred C. Lunenburg, *Compulsory School Attendance*, 5 FOCUS ON COLLS., UNIVS. & SCHS., no. 1, 2011, <http://www.nationalforum.com/Electronic%20Journal%20Volumes/Lunenburg,%20Fred%20C.%20Compulsory%20School%20Attendance%20FOCUS%20V5%20N1%202011.pdf> [<https://perma.cc/2WAY-87T8>] (“The courts have sustained compulsory attendance laws on the basis of the legal doctrine of *parens patriae*.”); Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System’s Disregard for the Constitutional Rights of Nonoffending Parents*, 82 TEMP. L. REV. 55, 61 (2009) (“In the newly created specialized [juvenile] courts, juvenile court judges became the state’s designee to exercise its *parens patriae* authority . . .”); Andrew Alexander Bruce, *The Beveridge Child Labor Bill and the United States as Parens Patriae*, 5 MICH. L. REV. 627, 636 (1907) (proposing *parens patriae* as a proper doctrinal justification for Congress to pass child labor laws).

interest in protecting children, sometimes justifying intervention in family life, even when it overrides parental prerogatives or preferences.<sup>50</sup>

Thus, the concept of *parens patriae* has animated a number of law reforms and policy projects aimed at ensuring child well-being, and its scope expanded significantly over the twentieth century.<sup>51</sup> Indeed, the Supreme Court has recognized the “*parens patriae* interest in preserving and promoting the welfare of the child” is an urgent one.<sup>52</sup> Yet the original conception has been tested and, in many ways, belied during the twentieth century and spanning into the twenty first. As will be explored below, in application, the state’s implementation of *parens patriae* has yielded, at best, mixed results, and has been particularly harmful for non-White and low-income children.

## II. AMERICA’S CONTEMPORARY *PARENS PATRIAE*

At least in theory, the *parens patriae* doctrine has been understood as both a state prerogative and an affirmative state obligation to protect and promote the well-being of children.<sup>53</sup> Yet despite the rhetoric with which the state’s interest is described and the significance of this interest, in practice *parens patriae* contemporarily is expressed in a reactive, residual manner. What is more, the state engages with families as *parens patriae* with varying levels of surveillance and interference in ways that track race and class.

Much of contemporary American political theory, law, and policy understands the care of children as the private prerogative and responsibility of parents, rather than a state responsibility.<sup>54</sup> The state assumes that, absent family crisis or contingency, family members will have adequate financial and other resources to provide and care for their children, without the need for state assistance.<sup>55</sup> The state does, in limited instances, step in to protect children. But most often the state only engages after harm has occurred. For example, state authorities can investigate incidents of abuse and neglect after receiving a report of suspected child maltreatment.<sup>56</sup> Similarly, delinquency jurisdiction is triggered after a young person is referred to the juvenile court.<sup>57</sup>

50. See *Schall v. Martin*, 467 U.S. 253, 263 (1984); *Santosky v. Kramer*, 455 U.S. 745, 766–67 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“Acting to guard the general interest in youth’s wellbeing, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways.”).

51. See *McGough*, *supra* note 47, at 1222.

52. *Santosky*, 455 U.S. at 766.

53. KATZ, *supra* note 11, at 187–88. For an analysis of how the emerging legal framework governing children and their families has evolved to center child well-being, see Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1397–1411 (2020).

54. See *infra* Section II.A.

55. See *infra* notes 62–71 and accompanying text.

56. See, e.g., *ABRAMS ET AL.*, *supra* note 33, at 288–89.

57. See *id.* at 996, 1040.

As a consequence of this reactive, residual model of *parens patriae*, many American children were living in conditions of precarity and inequality prior to the pandemic. Data from the Federal Interagency Forum on Child and Family Statistics showed that a concerning number of children were experiencing hardship across one or more of the seven indicators of child well-being: family and social environment, economic circumstances, access to healthcare, physical environment and safety, behavior, education, and child health.<sup>58</sup> Although the United States is among the world's most powerful and wealthy nations, in 2019, the United States had higher rates of child poverty than most other member countries of the Organization for Economic Co-operation and Development ("OECD").<sup>59</sup> Additionally, the child protection and youth justice systems have been the targets of intense and sustained critique.

This part will briefly explore the theoretical underpinnings of the state's reactive, residual approach. It will then describe the consequences of this approach for children and their families across the following domains: youth offending, child protection, and child poverty.

#### A. *The Reactive, Residual Parens Patriae*

It is important to understand the headwinds impeding a more proactive, preventative, and responsible model of *parens patriae* in the United States. The state's expression and implementation of its *parens patriae* interests and role has taken place within the broader context of a classical liberal and neoliberal tradition that prioritizes individual liberty and well-functioning markets.<sup>60</sup> As a liberal welfare state, the United States has emphasized individualism rather than communitarianism, personal responsibility rather than collective obligations, and a market orientation.<sup>61</sup>

Classical liberal theory operates on the assumption that parents, as liberal subjects, are capable of providing for their children and pursuing their vision of

58. FED. INTERAGENCY F. ON CHILD & FAM. STAT., AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING 2021 *passim* [hereinafter AMERICA'S CHILDREN].

59. Based on data available in 2018, the OECD ranked the United States thirty-sixth out of a total of forty-five countries in an evaluation of child poverty rates among OECD countries. ORG. FOR ECON. CO-OPERATION & DEV., CHILD POVERTY 1–2 (2021), [https://www.oecd.org/els/CO\\_2\\_2\\_Child\\_Poverty.pdf](https://www.oecd.org/els/CO_2_2_Child_Poverty.pdf) [<https://perma.cc/K6ZJ-R5K8>]; *see also* SAVE THE CHILD., GLOBAL CHILDHOOD REPORT 2019, at 5 (2019), <https://www.savethechildren.org/content/dam/usa/reports/advocacy/global-childhood-report-2019-pdf.pdf> [<https://perma.cc/V6VJ-E2KG>] ("The United States, China and Russia may be the three most powerful countries in the world—in terms of their economic, military and technological strength and global influence—but all three badly trail most of Western Europe in helping children reach their full potential.").

60. *See infra* notes 64–71 and accompanying text.

61. Paul Spicker, *Liberal Welfare States*, in THE ROUTLEDGE HANDBOOK OF THE WELFARE STATE 193, *passim* (1st ed., 2013); Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1746 n.156 (2012).

the good life.<sup>62</sup> Because families are self-sufficient and well-functioning they require only that the state stay out of their way. Children's needs will be fulfilled by the private family, and children generally have no direct claim against the state for affirmative support.<sup>63</sup> Viewed in this way, state engagement with families is an unwanted and unwarranted intrusion.

Like classical liberalism, neoliberalism prioritizes values of individual liberty and state restraint through the prism of market principles, with a particular focus on personal responsibility and autonomy.<sup>64</sup> As applied to the family, neoliberalism seeks to privatize human dependency and the costs of social reproduction; individual families, not the state, are responsible for the support and rearing of children.<sup>65</sup> In the neoliberal view, families, like individuals, will operate best through market engagement, whereas state engagement with families would undermine family autonomy.<sup>66</sup> The neoliberal state's proper role is *laissez-faire* regulation of market allocations, and minimal welfare state provisions are a limited, and exceptional, backstop.<sup>67</sup>

Working in tandem, liberal theory and neoliberalism have narrowly defined the state's *parens patriae* role. The primary values of these theories are individual, family, and market self-determination.<sup>68</sup> All three domains share an interest in being unencumbered by state interference. Families are entitled (or left) to largely operate without state engagement, in the private spheres of family and market. Families are autonomous, rational, and self-sufficient; therefore, they shoulder the responsibility for family and child well-being. In

62. See MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS* 3–5 (2010) [hereinafter EICHNER, *THE SUPPORTIVE STATE*]; Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 10–12 (2008) [hereinafter Fineman, *Anchoring*]; Martha Albertson Fineman, *Equality and Difference—The Restrained State*, 66 ALA. L. REV. 609, 616–17 (2015) [hereinafter Fineman, *Restrained State*]; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 261–63 (2010) [hereinafter Fineman, *Responsive State*]. Doctrinally, these prerogatives are recognized as parents' fundamental rights to the care, custody, and control of their children.

63. See EICHNER, *THE SUPPORTIVE STATE*, *supra* note 62, at 5, 25–26.

64. See Anna Heenan, *Neoliberalism, Family Law, and the Devaluation of Care*, 48 J.L. & SOC'Y 386, 386–87 (2021).

65. See Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1082 (2017); Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 220–24 [hereinafter Eichner, *Privatized*]; Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 25 (2014).

66. Eichner, *Privatized*, *supra* note 65, at 253–55; Alstott, *supra* note 65, at 31.

67. See Alstott, *supra* note 65, at 28, 38; see also Meredith Johnson Harbach, *Childcare, Vulnerability, and Resilience*, 37 YALE L. & POL'Y REV. 459, 475 (2019) [hereinafter Harbach, *Resilience*] (discussing "crisis/contingency" model of childcare).

68. See Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 40–43 (2005); EICHNER, *THE SUPPORTIVE STATE*, *supra* note 62, at 3–5; Fineman, *Anchoring*, *supra* note 62, at 1–2, 10–12; Fineman, *Restrained State*, *supra* note 62, at 609, 616–17; Fineman, *Responsive State*, *supra* note 62, at 251, 261–62.

the ordinary course, there should be little, if any, need for affirmative state engagement or support of families, which would be antithetical to the core values of self-determination and liberty. Any state engagement with families would thus be exceptional—only arising in contexts in which the family was experiencing crisis or rupture, or markets weren't functioning efficiently.

As a result, the default posture of the state vis-à-vis children and families is nonintervention, and the state role is, at best, residual. The state has a right or prerogative to intervene in family life as *parens patriae*, but only when a child or their family is otherwise in jeopardy<sup>69</sup>—typically after suspected child maltreatment or a youth offense, or in the context of means-demonstrated poverty. Neoliberal values have been used to privatize dependency and shift social responsibility for children to their parents exclusively,<sup>70</sup> meaning child development is determined largely by the education and resources of parents.<sup>71</sup> Thus understood, the conventional approach to *parens patriae* has offered little support for a more proactive, preventative, responsible role in which the state would assume significant obligations to assist children and families.

#### B. *Parens Patriae Prior to the Pandemic*

Across the contexts of youth offending, child protection, and child poverty, the reactive, residual *parens patriae* in place prior the pandemic was having concerning consequences for America's children and their families.

The youth legal system has been the subject of extensive and sustained critique.<sup>72</sup> Over time, the system has evolved from a benevolent, rehabilitative model to one more focused on personal responsibility, punishment, and public safety.<sup>73</sup> Thus, even though youth involvement with the justice system is correlated with poverty,<sup>74</sup> the state frequently only becomes involved after a youth offense, rather than taking a preventative approach to address the root

69. OFF. ON CHILD ABUSE AND NEGLECT, CHILD.'S BUREAU, A COORDINATED RESPONSE TO CHILD ABUSE AND NEGLECT: THE FOUNDATION FOR PRACTICE 51–52 (2003).

70. See Heenan, *supra* note 64, at 386–87.

71. Robert H. Bradley & Robert F. Corwyn, *Socioeconomic Status and Child Development*, 53 ANN. REV. PSYCH. 371, 372 (2002).

72. See, e.g., KRISTIN HENNING, *THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH* (2021); Tamar R. Birckhead, *Delinquent by Reason of Poverty*, 38 WASH. U. J.L. & POL'Y 53, 96–101 (2012); Nancy E. Dowd, *Black Lives Matter: Trayvon Martin, the Abolition of Juvenile Justice and #Blackyouthmatter*, 31 U. FLA. J.L. & PUB. POL'Y 43, 52–53 (2020); Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 319–27 (2021). Notably, however, the system had witnessed significant improvements over the first two decades of the twenty-first century, particularly in the context of juvenile dispositions. See Hong, *supra*, at 313.

73. JUVENILE CRIME, JUVENILE JUSTICE 157–62 (Joan McCord, Cathy Spatz Widom & Nancy A. Crowell, eds., 2001).

74. See Birckhead, *supra* note 72, at 70–96.

causes of delinquency, like poverty.<sup>75</sup> Critics have highlighted the ineffectiveness and potential harm done by the reactive system: children in state institutions often suffer harm and are at increased risk for recidivism, involvement in the criminal justice system, and downstream effects on education and employment.<sup>76</sup> Further, youth of color have been more likely to be arrested and to have deeper involvement in the system at every level.<sup>77</sup>

Likewise, scholars and advocates have widely considered America's child protection system to be irreparably broken.<sup>78</sup> Because the vast majority of substantiated child maltreatment claims have been for neglect, these claims in essence punish parents for being poor.<sup>79</sup> Rather than taking a preventative approach that addresses poverty and other root causes of maltreatment, like parents' mental health and substance use disorders, the state typically has become involved only in reaction to a report of suspected maltreatment.<sup>80</sup> Moreover, state engagement with families in the child welfare system has been inequitably raced and classed—Black and Native children have been disproportionately likely to be reported, investigated, removed, and to experience termination of their parents' rights.<sup>81</sup> The foster care system, ostensibly designed as a safer placement for children who are removed from their homes, often leads to abuse and worse overall outcomes than if the children had remained in the home.<sup>82</sup>

75. See generally Charisa Smith, *Nothing About Us Without Us! The Failure of the Modern Juvenile Justice System and a Call for Community-Based Justice*, 4 J. APPLIED RSCH. ON CHILD. no. 1, 2013 (discussing the ineffectiveness of the current juvenile justice system in preventing recidivism and supporting youth development).

76. See, e.g., Dowd, *supra* note 72, at 52–53; Birkhead, *supra* note 72, at 96–101.

77. See OFF. OF JUV. JUST. & DELINQ. PREVENTION, RACIAL AND ETHNIC DISPARITY IN JUVENILE JUSTICE PROCESSING LITERATURE REVIEW: A PRODUCT OF THE MODEL PROGRAMS GUIDE (2022), <https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/racial-and-ethnic-disparity> [<https://perma.cc/HS6J-96BR>].

78. See generally, e.g., Tina Lee, *Response to the Symposium: Strengthened Bonds: Abolishing the Child Welfare System and Reenvisioning Child Well-Being*, 12 COLUM. J. RACE & L. 421 (2022) (summarizing key points from a symposium about abolishing the child welfare system and identifying next steps); Nancy D. Polikoff & Jane M. Spinak, *Strengthened Bonds: Abolishing the Child Welfare System & Reenvisioning Child Well-Being*, 11 COLUM. J. RACE & L. 421 (2021) (highlighting critiques of the child welfare system and calling for its abolition).

79. See Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 536–37 (2019) (“[T]he majority of cases in the child welfare system deal with neglect, not abuse . . . and . . . poverty is often conflated with neglect or creates circumstances that may lead to neglect.”).

80. See CHILD.'S BUREAU, HOW THE CHILD WELFARE SYSTEM WORKS 3 (2020), <https://www.childwelfare.gov/pubpdfs/cpswork.pdf> [<https://perma.cc/9B5L-LS6Z>].

81. CHILD WELFARE INFO. GATEWAY, CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 3 (2021), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf) [<https://perma.cc/HJ3E-X9HB>]; see also Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can be Done To Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253, 254 (2020) (collecting data and research).

82. See Trivedi, *supra* note 79, at 541–52.

More generally, the systems and institutions the state created to provide services for children, promote their well-being, and protect them from harm have been failing many of them. The existing public school system in the United States has been failing many poor children and children of color.<sup>83</sup> Design and funding for public education has led to dramatic disparities in educational opportunities based on race and class.<sup>84</sup> The inequitable distribution of school funding disproportionately impacts school districts serving more low-income students of color.<sup>85</sup> And student learning outcomes and performance have tracked these disparate opportunities.<sup>86</sup> Simultaneously, America's childcare system—a key service for working parents and an important protective factor for disadvantaged children—has been dysfunctional. Demand for quality care far exceeds supply, and many American families have been priced out of the level of quality care they wanted for their children.<sup>87</sup> This childcare crisis leads to suboptimal care for children, economic hardship and stress for their parents, and misses an important opportunity to build child, family, and community resilience.<sup>88</sup>

Prior to the arrival of the pandemic, children's economic circumstances were among the most concerning factors impacting child well-being in the United States. The residual approach that assumed private families had adequate resources to provide for their children yielded a child poverty rate in the United States higher than many other wealthy, peer nations.<sup>89</sup> Before COVID-19, approximately 10.5 million American children—14.4%—were living in poverty.<sup>90</sup> As of 2019, 10.7 million children—about 14.6%—lived in households classified as food insecure.<sup>91</sup> Federal expenditures on children had

83. Linda Darling-Hammon, *Unequal Opportunity: Race and Education*, BROOKINGS INST. (1998), <https://www.brookings.edu/articles/unequal-opportunity-race-and-education/> [https://perma.cc/XJ4V-JV7G].

84. *Id.*

85. *Id.*

86. See Kimberly Jenkins Robinson, *Strengthening the Federal Approach to Educational Equity During the Pandemic*, 59 HARV. J. LEGIS. 35, 57–58 (2022); KIMBERLY JENKINS ROBINSON, LEARNING POL'Y INST., PROTECTING EDUCATION AS A CIVIL RIGHT: REMEDYING RACE DISCRIMINATION AND ENSURING A HIGH-QUALITY EDUCATION 6–7 (2021).

87. See, e.g., Leila Schochet, *The Child Care Crisis Is Keeping Women Out of the Workforce*, CTR. AM. PROGRESS (2019), <https://www.americanprogress.org/article/child-care-crisis-keeping-women-workforce/> [https://perma.cc/P64L-RGXP] (discussing the impact of unaffordable childcare on working women).

88. See Harbach, *Resilience*, *supra* note 67, at 462–63.

89. See *supra* note 59 and accompanying text.

90. AMERICA'S CHILDREN, *supra* note 58, at vii.

91. *Id.* Notably, however, a patchwork of expanded safety net programs for children led to a significant decline in child poverty—including deep poverty—between the 1990s and 2019. See generally DANA THOMSON, RENEE RYBERG, KRISTEN HARPER, JAMES FULLER, KATHERINE PASHCALL, JODY FRANKLIN & LINA GUZMAN, LESSONS FROM A HISTORIC DECLINE IN CHILD POVERTY (2022), <https://www.childtrends.org/publications/lessons-from-a-historic-decline-in-child->

been declining for over a decade.<sup>92</sup> The only program providing cash assistance to families with children living in poverty was the Temporary Assistance to Needy Families (“TANF”) program.<sup>93</sup> But by 2019, just 23% of families with children living in poverty received TANF support, as opposed to 70% when TANF was created in 1996.<sup>94</sup> Additional financial supports via tax policy provided marginal support for struggling families with children.<sup>95</sup> And because of the ways in which these policies were designed, many poor families received little or no benefit at all.<sup>96</sup>

In sum, the reactive, residual state model has not been functioning well or equitably to protect American children and promote their well-being. In the contexts of youth offending and child protection, the state is too often reactive—stepping in only *after* some harm had occurred, rather than addressing underlying causes. For poor children and children of color, the “exceptional” involvement of the state as *parens patriae* is, in actuality, routine. Far too often, they and their families have suffered significant intervention from the state,

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poverty [<https://perma.cc/945X-UCZY>] (discussing the causes and effects of the unprecedented decline in child poverty and deep poverty resulting in part from social safety net programs).

92. See FIRST FOCUS, FACT SHEET: KIDS AND COVID BY THE NUMBERS 2 (2022), [https://firstfocus.org/wp-content/uploads/2022/03/FACT-SHEET\\_Kids-Covid-Numbers.pdf](https://firstfocus.org/wp-content/uploads/2022/03/FACT-SHEET_Kids-Covid-Numbers.pdf) [<https://perma.cc/YCT9-N9YU>].

93. Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2112–61 (codified as amended in scattered sections of 42 U.S.C.).

94. ANNIE E. CASEY FOUND., KIDS, FAMILIES, AND COVID-19: PANDEMIC PAIN POINTS AND THE URGENT NEED TO RESPOND 11 (2020), <https://assets.aecf.org/m/resourcedoc/aecf-kidsfamiliesandcovid19-2020.pdf> [<https://perma.cc/PF4Z-5THN>] [hereinafter KIDS, FAMILIES, AND COVID-19].

95. The Earned Income Tax Credit was designed to encourage work and is available only to working families with low annual incomes. See *Policy Basics: The Earned Income Tax Credit*, CTR. ON BUDGET & POL’Y PRIORITIES (Dec. 10, 2019), <https://www.cbpp.org/research/federal-tax/the-earned-income-tax-credit> [<https://perma.cc/5EV7-BY5G>].

96. See *id.* The Child Tax Credit (“CTC”) was available only to families reporting income and paying federal income tax, and therefore many low-income families received at most partial credit or none at all because their incomes were too low. See Lydia DePillis, *Changes to the Child Tax Credit: What It Means for Families*, CNN (Dec. 16, 2017, 12:50 PM), <http://money.cnn.com/2017/12/16/news/economy/child-tax-credit/index.html> [<https://perma.cc/RUK5-M7Z5>]; see also Chuck Marr, Stephanie Hingtgen, Arloc Sherman, Katie Windham & Kris Cox, *Temporarily Expanding Child Tax Credit and Earned Income Tax Credit Would Deliver Effective Stimulus, Help Avert Poverty Spike*, CTR. ON BUDGET & POL’Y PRIORITIES (July 21, 2020), <https://www.cbpp.org/research/federal-tax/temporarily-expanding-child-tax-credit-and-earned-income-tax-credit-would> [<https://perma.cc/45PQ-S3RA>]; *GOP Bill’s Child Tax Credit Leaves 10 Million Children in Working Families with a CTC Increase of Just \$75 or Less*, CTR. ON BUDGET & POL’Y PRIORITIES (Dec. 15, 2017), <https://www.cbpp.org/research/federal-tax/interactive-gop-bills-child-tax-credit-leaves-10-million-children-in-working> [<https://perma.cc/7KJB-FD9U>]. Likewise, the Child and Dependent Care Tax Credit required parents to be working or attending school and was not refundable, and therefore it did not reach many low- and moderate-income families. See *Key Elements of the U.S. Tax System: How Does the Tax System Subsidize Child Care Expenses?*, TAX POL’Y CTR. (May 2021), <https://www.taxpolicycenter.org/briefing-book/how-does-tax-system-subsidize-child-care-expenses> [<https://perma.cc/WQ58-TYNP>].



only after the initial harm had transpired, and often in ways that created new harms. The private market approach leaves these families vulnerable to the most damaging consequences of the free market economy—meaning that many of these children and their families live in poverty.<sup>97</sup> At the same time, the residual model of *parens patriae* assumes parents and families can adequately provide the necessary financial and other supports for their children and provides strictly circumscribed financial benefits to families. This means that children’s well-being was determined largely by their parents’ income and resources.

It was against this backdrop that American children and families confronted the COVID-19 pandemic.

### III. LESSONS FROM THE PANDEMIC: REIMAGINING *PARENS PATRIAE*

The advent of the COVID-19 pandemic profoundly tested the reactive, residual model of *parens patriae*. American children’s experiences of the pandemic highlighted the many ways in which this model of *parens patriae* was insufficient to adequately protect children and promote their well-being. The pandemic uncovered the ways in which neoliberal assumptions about the ability of parents and markets to adequately provide for children were flatly wrong. Instead, our experience with the pandemic surfaced the ways in which, because of market forces, many families are not financially secure and cannot afford to provide adequate food, housing, healthcare, and childcare for their children.<sup>98</sup>

Further, the arrival of the pandemic tested whether the state was up to the task of protecting children in times of crisis.<sup>99</sup> The data emerging from the pandemic years makes clear that when the pandemic arrived, the state was unprepared and unable to adequately protect and provide for children.<sup>100</sup> The state was unable to ensure that children retained access to services and

97. See MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* 142–55 (2020); see also *supra* notes 72–95 and accompanying text.

98. See, e.g., Dana Braga, *One-in-Four U.S. Parents Say They’ve Struggled To Afford Food or Housing in the Past Year*, PEW RSCH. CTR. (Dec. 7, 2022), <https://www.pewresearch.org/fact-tank/2022/12/07/one-in-four-u-s-parents-say-theyve-struggled-to-afford-food-or-housing-in-the-past-year/> [https://perma.cc/F2K8-6VDH] (discussing parents who cannot afford basic necessities such as food, housing, medical care, and child care).

99. One source described how

the events of 2020 have exposed holes in the safety net of programs and policies designed to catch kids and families in free-fall moments like these. Moreover, the devastating and disproportionate effects of the pandemic on communities of color have made it clear that the national response to this current situation must address . . . racial inequities.

KIDS, FAMILIES, AND COVID-19, *supra* note 94, at 4.

100. Amanda Barroso & Juliana Menasce Horowitz, *The Pandemic Has Highlighted Many Challenges for Mothers, but They Aren’t Exactly New*, PEW RSCH. CTR. (Mar. 17, 2021), <https://www.pewresearch.org/fact-tank/2021/03/17/the-pandemic-has-highlighted-many-challenges-for-mothers-but-they-arent-necessarily-new/> [https://perma.cc/JL7U-HJ7Y].

institutions that were essential to their well-being. Children’s experiences with schooling during the pandemic demonstrated that simply making public schooling available to all children does not come close to ensuring equal educational opportunities, much less equitable ones. And the childcare crisis illuminated the many ways in which the American childcare system was unreliable and unable to function optimally—both before and during the pandemic.<sup>101</sup>

This part will first consider how the reactive, residual *parens patriae* functioned during the pandemic. Next, this part will examine the ways in which the uniquely robust state response protected children and helped prevent future harms. Finally, this part will argue that the state’s child-focused response to the pandemic offers a blueprint for a new model of *parens patriae*—one that is proactive, preventative, and responsible, rather than reactive and residual.

#### A. *Pandemic Effects on Child Well-Being*

America’s experience with the COVID-19 pandemic uncovered the multiple ways in which children and their parents had been struggling to access the basic resources and services they need to survive and flourish. The pandemic made clear that there are many institutions and services for children and their families that are essential—food security, stable housing, education that is adaptable to children’s needs and situations, access to technology and Wi-Fi, and safe, reliable, high-quality childcare.<sup>102</sup> Children were disproportionately affected by the pandemic in multiple ways, across a range of key indicators of their well-being.

First, the COVID-19 virus itself negatively impacted many children and their families. Over 140,000 American children lost a primary or secondary caregiver to COVID-19.<sup>103</sup> Children of color were significantly more likely to lose a caregiver to COVID-19.<sup>104</sup> And, of course, although not generally affected as significantly as older Americans, most children did, in fact, become

101. For a critique of the state’s role in supporting childcare in the United States, arguing that “the state’s role with regard to childcare should be primary, rather than supplemental or contingent,” see generally Harbach, *Resilience*, *supra* note 67. See also Meredith Johnson Harbach, *Childhood Market Failure*, 3 UTAH L. REV. 659, 661 (2015) (arguing that the “childcare crisis is, in part, a market failure” and requires “explicit government intervention in the childcare market to correct existing market imperfections”).

102. See *infra* notes 111–34 and accompanying text.

103. *More than 140,000 U.S. Children Lost a Primary or Secondary Caregiver During the Covid-19 Pandemic*, NAT’L INSTS. HEALTH (Oct. 7, 2021), <https://www.nih.gov/news-events/news-releases/more-140000-us-children-lost-primary-or-secondary-caregiver-due-covid-19-pandemic> [<https://perma.cc/8F8D-FKN5>].

104. *Id.*

infected.<sup>105</sup> Some of them died,<sup>106</sup> and some have suffered significant, negative consequences, with the possibility of longer-term damage to their health.<sup>107</sup>

Second, at the outset of the pandemic, economic circumstances deteriorated dramatically for many children. The economic impact of the pandemic disproportionately affected households with children, especially households of color.<sup>108</sup> During the pandemic, the number of children with an unemployed parent reached levels that had last been recorded over fifty years prior.<sup>109</sup> Households with children were more likely to have at least one adult lose employment income, and unemployment was more likely to be permanent rather than temporary.<sup>110</sup>

Consequently, families with children experienced increased economic hardship, housing instability, and food insecurity.<sup>111</sup> Data from 2020 revealed that approximately thirty percent of households with children anticipated that they would lose access to housing because of eviction or foreclosure.<sup>112</sup> These families were less confident about their ability to afford housing and were more

105. The most recent data on seroprevalence among children by the Centers for Disease Control and Prevention estimate that over ninety-five percent of children in the United States have COVID-19 antibodies. *COVID Data Tracker, Nationwide Commercial Lab Pediatric Antibody Seroprevalence*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://covid.cdc.gov/covid-data-tracker/#pediatric-seroprevalence> [<https://perma.cc/CH39-EQ8Z>]; see also Stobbe, *supra* note 2.

106. The latest data from the Centers for Disease Control and Prevention estimates that more than 1,500 children have died from COVID-19. *Provisional COVID-19 Deaths: Focus on Ages 0-18*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://data.cdc.gov/NCHS/Provisional-COVID-19-Deaths-Focus-on-Ages-0-18-Yea/nr4s-juj3/data> [<https://perma.cc/BC8E-RNQY>] (estimating 611 deaths among children aged zero to four, and 976 deaths among children five to eighteen).

107. AM. ACAD. PEDIATRICS, *Post-COVID Conditions in Children and Teens*, HEALTHYCHILDREN.ORG (Mar. 18, 2022), <https://www.healthychildren.org/English/health-issues/conditions/COVID-19/Pages/Post-COVID-Conditions-in-Children-and-Teens.aspx> [<https://perma.cc/VDV5-56ZP>].

108. See Olivier Armantier, Gizem Kosar, Rachel Pomerantz & Wilbert van der Klaauw, *The Disproportionate Effects of COVID-19 on Households with Children*, FED. RES. BANK N.Y. (Aug. 13, 2020), <https://libertystreeteconomics.newyorkfed.org/2020/08/the-disproportionate-effects-of-covid-19-on-households-with-children/> [<https://perma.cc/S4U3-DLUQ>]; Aubrey Edwards-Luce, Averi Pakulis, Cara Baldari, Carrie Fitzgerald, Christopher Towner, Conor Sasner, Kathy Sacco, Michelle Dallafior, Miriam Abaya & Olivia Gomez, *Key Stats on the Effect of COVID-19 on Kids*, FIRST FOCUS (Nov. 19, 2020), <https://firstfocus.org/resources/key-stats-on-the-effect-of-covid-19-on-kids> [<https://perma.cc/4ZKJ-JP7G>].

109. See Zachary Parolin, *Unemployment and Child Health During COVID-19 in the USA*, LANCET PUB. HEALTH, Oct. 2020, e521, e521.

110. See Lindsay M. Monte, *New Census Household Pulse Survey Shows More Households with Children Lost Income, Experienced Food Shortages During Pandemic*, U.S. CENSUS BUREAU (May 27, 2020), <https://www.census.gov/library/stories/2020/05/adults-in-households-with-children-more-likely-to-report-loss-in-employment-income-during-covid-19.html> [<https://perma.cc/9PGG-AHB9>].

111. Edwards-Luce et al., *supra* note 108.

112. KIDS, FAMILIES, AND COVID-19, *supra* note 94, at 8.

likely to miss housing payments.<sup>113</sup> Food insecurity also increased during the pandemic for children, from roughly ten percent prior to the pandemic, to fourteen percent of households with children reporting that they sometimes or always did not have enough to eat.<sup>114</sup> Households with children were more likely to report food insufficiency during the pandemic.<sup>115</sup>

Children also lost regular, consistent access to K–12 education, as well as early learning opportunities and childcare. In the wake of the pandemic, almost all schools in the United States closed in 2020 for some period of time,<sup>116</sup> with a patchwork of in-person, hybrid, and remote approaches to schooling emerging by the 2020–2021 school year.<sup>117</sup> Among other things, the pandemic led to a school attendance crisis. By October 2020, it was estimated that approximately three million children were at high risk of having minimal or no access to education because of the pandemic.<sup>118</sup> A year later, data indicated that nationwide enrollment in pre-K–12 public schools had dropped significantly, declining 2.7% from enrollment three years earlier.<sup>119</sup>

Children struggled to navigate these changed circumstances successfully, and many of their families lacked adequate resources to support them. Just before the start of the 2020–2021 school year, roughly half of all families with children reported having no adult to help children at home with schoolwork; thirty-six percent did not have a quiet place in the home for children to study; and thirty-two percent lacked broadband internet and tools for online learning.<sup>120</sup> The digital divide<sup>121</sup> frustrated the ability of children to learn effectively from home, as significant numbers of children did not have access to

113. See Monte, *supra* note 110; Lindsay M. Monte & Sharon O’Connell, *Adults in Households with Children Report Higher Rate of Late Housing Payments and Food Shortages Amid COVID-19*, U.S. CENSUS BUREAU (June 30, 2020), <https://www.census.gov/library/stories/2020/06/the-risks-children-face-during-pandemic.html> [<https://perma.cc/3SJ4-53ZD>].

114. KIDS, FAMILIES, AND COVID-19, *supra* note 94, at 8.

115. See Monte & O’Connell, *supra* note 113.

116. *Map: Coronavirus and School Closures in 2019-2020*, EDUC. WEEK (Oct. 13, 2021), <https://www.edweek.org/leadership/map-coronavirus-and-school-closures-in-2019-2020/2020/03> [<https://perma.cc/V6LG-6CRX> (staff-uploaded archive)].

117. See *A Year of COVID-19: What It Looked Like for Schools*, EDUC. WEEK (Mar. 4, 2021), <https://www.edweek.org/leadership/a-year-of-covid-19-what-it-looked-like-for-schools/2021/03> [<https://perma.cc/9J5R-HDTJ> (staff-uploaded archive)] (including “Fall 2020: Back to school, but not really” and “October: Hybrid learning dominates”).

118. Hailly T.N. Korman, Bonnie O’Keefe & Matt Repka, *Missing in the Margins 2020: Estimating the Scale of the COVID-19 Attendance Crisis*, BELLWETHER EDUC. (Oct. 21, 2020), <https://bellwethereducation.org/publication/missing-margins-estimating-scale-covid-19-attendance-crisis#2021> [<https://perma.cc/WF4D-ZQG9>].

119. *Id.*

120. KIDS, FAMILIES, AND COVID-19, *supra* note 94, at 10.

121. The “digital divide” refers to the gap between “those who have adequate broadband internet access and those who do not.” COLBY LEIGH RACHFAL, CONG. RSCH. SERV., R46613, *THE DIGITAL DIVIDE: WHAT IS IT, WHERE IS IT, AND FEDERAL ASSISTANCE PROGRAMS 1* (2021).

a computer and did not have a reliable internet connection at home.<sup>122</sup> Some children had to resort to completing schoolwork on a cell phone.<sup>123</sup> Lower-income children, children of color, and children living in rural environments were disproportionately impacted by the digital divide in ways that made online learning more challenging.<sup>124</sup> When schools did begin to reopen at least partially, school districts with a majority of White students were three times more likely to offer at least some in-person learning than school districts that primarily served students of color.<sup>125</sup>

Data collected after the worst days of the pandemic by the Office for Civil Rights of the Department of Education confirmed that the pandemic exacted a significant toll on K–12 students.<sup>126</sup> Overall, the pandemic negatively affected academic growth and heightened prepandemic disparities in core subjects.<sup>127</sup> Many students experienced increased challenges to access and benefit from educational opportunities, including children of color, students learning English, and LGBTQ+ students.<sup>128</sup> Most students also struggled with mental health and well-being, while also losing access to school-based supports.<sup>129</sup>

As was well-documented during the height of the pandemic, access to childcare was severely disrupted. Childcare providers, like other businesses, experienced financial hardship during the pandemic.<sup>130</sup> Some childcare centers were shuttered because of decreased enrollment and income, and child advocates warned of a collapse in the system.<sup>131</sup> The pandemic's effect exacerbated existing childcare shortages, and combined with the economic hardships experienced by families with children, magnified existing childcare

122. See Robin Lake & Alvin Makori, *The Digital Divide Among Students During COVID-19: Who Has Access? Who Doesn't?*, CTR. ON REINVENTING PUB. EDUC. (June 2020), <https://crpe.org/the-digital-divide-among-students-during-covid-19-who-has-access-who-doesnt/> [<https://perma.cc/9SY4-QXQE>].

123. *Id.*

124. *See id.*

125. Kalya Belsha, Michael Rubinkam, Gabrielle LaMarr LeMee & Larry Fenn, *A Nationwide Divide: Hispanic and Black Students More Likely than White Students To Start the Year Online*, CHALKBEAT (Sept. 11, 2020), <https://www.chalkbeat.org/2020/9/11/21431146/hispanic-and-black-students-more-likely-than-white-students-to-start-the-school-year-online> [<https://perma.cc/X7CJ-XG9U>].

126. See OFF. FOR C.R., U.S. DEP'T OF EDUC., EDUCATION IN A PANDEMIC: THE DISPARATE IMPACTS OF COVID-19 ON AMERICA'S STUDENTS 2–4 (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/20210608-impacts-of-covid19.pdf> [<https://perma.cc/596R-AKDR>].

127. *Id.* at iii–iv.

128. *Id.* at iv.

129. *Id.*

130. See U.S. CHAMBER OF COM. FOUND., CHILD CARE: AN ESSENTIAL INDUSTRY FOR ECONOMIC RECOVERY 5–10 (2020), [https://www.uschamberfoundation.org/sites/default/files/media-uploads/EarlyEd\\_Minis\\_Report3\\_090320.pdf](https://www.uschamberfoundation.org/sites/default/files/media-uploads/EarlyEd_Minis_Report3_090320.pdf) [<https://perma.cc/6426-KHVE>].

131. See *How COVID-19 Is Impacting Child Care Providers*, *supra* note 5.

affordability challenges.<sup>132</sup> Children lost opportunities to develop and grow in early care and education settings, and their parents' (especially mothers') ability to work was compromised because of the dearth of care alternatives for their children, negatively impacting their economic bottom line.<sup>133</sup> By late 2020, thirty-two percent of adults with young children reported they would be less likely to return to work due to lack of childcare.<sup>134</sup>

The pandemic highlighted and exacerbated inequality among children based on resources, race, and class. Children of color were more likely to have parents who were designated as essential workers and who were more likely to die from COVID-19.<sup>135</sup> Families of color with children were more likely to anticipate missing housing payments or losing their homes than were White households.<sup>136</sup> Additionally, families of color experienced food insecurity at levels roughly double that of White and Asian households.<sup>137</sup> Families of color with children also were roughly twice as likely to not have health insurance as were White and Asian families.<sup>138</sup> Low-income workers, many of whom had lived in poverty prior to the pandemic, were more likely than other workers to lose jobs and suffer economic hardship as a result.<sup>139</sup> Furthermore, these families had far fewer resources to support their children during remote learning.<sup>140</sup>

By contrast, children in White, wealthy families were less likely to feel the negative effects of COVID-19, either directly or indirectly. These children were less likely to lose a parent.<sup>141</sup> Their parents were also less likely to lose their jobs and more likely to have the ability to work remotely.<sup>142</sup> Although access to

132. See Edwards-Luce et al., *supra* note 108.

133. See Abha Bhattarai & Alyssa Fowers, *For Low-Income Parents, No Day Care Often Means No Pay*, WASH. POST (Feb. 22, 2022), <https://www.washingtonpost.com/business/2022/02/22/child-care-covid-inequality/> [<https://perma.cc/J8CZ-QJES> (dark archive)].

134. KIDS, FAMILIES, AND COVID-19, *supra* note 94, at 9.

135. As of November 2020, although children of color comprised forty-one percent of children in the United States, they constituted a full seventy-five percent of the children who died from COVID. See Edwards-Luce et al., *supra* note 108.

136. KIDS, FAMILIES, AND COVID-19, *supra* note 94, at 7–8.

137. *Id.* at 8.

138. *Id.* at 5.

139. See Kim Parker, Rachel Minkin & Jesse Bennett, *Economic Fallout from COVID-19 Continues To Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), <https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/#:~:text=Lower%2Dincome%20adults%20continue%20to,%25%20of%20upper%2Dincome%20adults> [<https://perma.cc/4HQA-ADVN>].

140. See Lake & Makori, *supra* note 122.

141. See Dan Treglia, J.J. Cutuli, Kamyar Arasteh & John Bridgeland, *Parental and Other Caregiver Loss Due to COVID-19 in the United States*, 2022 J. COMM. HEALTH 1, 1–2 (Dec. 14, 2022), <https://link.springer.com/content/pdf/10.1007/s10900-022-01160-x.pdf?pdf=button> [<https://perma.cc/9BVG-M6VY>].

142. See, e.g., Joan C. Williams, *Opinion: How the Return to Office Work Is Impoverishing the Middle Class*, POLITICO (Dec. 8, 2021, 11:31 AM),

education and childcare affected all children, children whose parents had financial resources were better able to manage. These children had the resources to more successfully attend school from home and were able to access private learning “pods” with classmates whose parents were similarly situated.<sup>143</sup>

Thus, the reactive, residual model of *parens patriae* functioned about as one would expect during the pandemic. Child well-being decreased as a result, and disproportionately so for poor children and children of color.

#### B. *Parens Patriae During the Pandemic: Inspiration from the State’s Pandemic Response*

COVID-19 was a true crisis for our society, including children. It destroyed lives, while also derailing the country’s economy and wrecking the job market. Yet perhaps surprisingly, our experiences of the pandemic also provide a view of the way forward for the state as *parens patriae*.

As discussed above, when the pandemic arrived, the extant version of *parens patriae* was reactive and residual in nature.<sup>144</sup> The pandemic triggered a more active and forward-looking state response. This more robust state response was necessary to protect children because all families, rather than particular families or children, were thrust into the chaos of pandemic life. The state responded—at the federal, state, and local levels—to mitigate harm and protect children and their families. And it did so in ways that modeled what a more expansive, responsible *parens patriae* might look like. The state’s changed approach was manifest in the contexts of child poverty, child welfare, and youth offending.

##### 1. Child Poverty Measures

Reactions to the pandemic spurred a range of enhanced anti-poverty measures in the United States. The state expended substantial financial resources on a variety of measures to protect children in the form of cash transfers and direct provision of services to children and their families. These investments led to the largest year-to-year increase of the amount of federal funding spent on children in more than fifteen years, at 11.2%.<sup>145</sup> Two of the most impactful child poverty investments came in the form of an enhanced

<https://www.politico.com/news/agenda/2021/12/08/returning-to-office-middle-class-523937> [<https://perma.cc/H67Y-UC26>].

143. See Osamudia James, *The Political Economy of Pandemic Pods*, 96 N.Y.U. L. REV. ONLINE 89, 92–94 (2021); Douglas Belkin, *Wealthy Families Stick with Full-Time Tutors Hired Early in Pandemic*, WALL ST. J. (Sept. 7, 2022, 5:30 AM), <https://www.wsj.com/articles/wealthy-families-stick-with-full-time-tutors-hired-early-in-pandemic-11662543002> [<https://perma.cc/XG9Q-Q8JW> (dark archive)].

144. See *supra* Section II.B.

145. See Michele Kayal, *2021 Children’s Budget Shows Largest Year-to-Year Increase in the Share of Federal Spending on Kids*, FIRST FOCUS (Nov. 3, 2021), <https://firstfocus.org/blog/childrensbudget2021> [<https://perma.cc/MU3X-FY89>].

Child Tax Credit (“CTC”), put in place by the 2021 American Rescue Plan Act,<sup>146</sup> and the Universal Free Lunch Program, codified in the 2020 Families First Coronavirus Response Act.<sup>147</sup>

The American Rescue Plan<sup>148</sup> temporarily modified and enhanced the CTC, making it a “near-universal child benefit available to all but the highest-income families.”<sup>149</sup> Congress increased the amount of the CTC from \$2,000 to \$3,600 for children under age six, and \$3,000 for children under age eighteen.<sup>150</sup> Congress also made the CTC fully refundable, meaning that low-income families received the full benefit as a cash transfer.<sup>151</sup> And families eligible for the refundable CTC received fifty percent of their credits in monthly advance payments from July through December 2021, meaning that families with children received cash assistance on a consistent basis, rather than receiving the CTC payments after filing taxes.<sup>152</sup>

The Census Bureau estimates that the CTC expansion lifted an estimated 2.9 million children out of poverty.<sup>153</sup> Similarly, the number of children living in near poverty also declined.<sup>154</sup> In a survey of parents, 84.4% reported that the CTC checks reduced financial anxiety and 76.83% related that the checks “made a huge difference” for their families.<sup>155</sup> These parents used the CTC funds for

146. American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 9611–12, 135 Stat. 4, 144–52 (codified as amended in scattered sections of 26 and 31 U.S.C.). Prior to the American Rescue Plan Act, Congress enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act. Pub. L. No. 116-136, 134 Stat. 281 (2020) (codified in scattered sections of 2, 5, 6, 7, 8, 10, 11, 12, 15, 17, 18, 20, 21, 22, 23, 25, 26, 27, 28, 29, 31, 34, 35, 38, 39, 40, 41, 42, 44, 45, 47, 49, 50, and 54 U.S.C.). The Act provided one-time stimulus payments to individuals earning less than \$75,000 a year, and an additional \$500 transfer for each child under seventeen, as well as appropriating additional funding for food assistance programs and a variety of health initiatives. *Id.* § 2201(a), 135 Stat. 335 (codified at 26 U.S.C. § 6428).

147. Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 2101–2204, 134 Stat. 178, 184–87 (2020) (codified at 7 U.S.C. § 2011).

148. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified as amended in scattered sections of 5, 7, 12, 15, 19, 20, 26, 29, 31, 38, 41, 42, 45, 49, and 50 U.S.C.).

149. See MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R45124, THE CHILD TAX CREDIT: LEGISLATIVE HISTORY 1 (2021).

150. *Child Tax Credit*, U.S. DEP’T TREASURY, <https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/child-tax-credit> [<https://perma.cc/HVC9-PNN7>].

151. *Id.*

152. See *id.*

153. See Burns et al., *supra* note 13.

154. See *id.*

155. See *Survey Reveals Families in Serious Financial Crisis with Rising Prices and No Monthly Child Tax Credit Payments in Sight*, PARENTSTOGETHER ACTION (May 10, 2022), <https://parentstogetheraction.org/2022/05/10/survey-reveals-families-in-serious-financial-crisis-with-rising-prices-and-no-monthly-child-tax-credit-payments-in-sight/> [<https://perma.cc/WNJ4-FF49>] [hereinafter *Families in Serious Financial Crisis*].



“food (80%), housing (60%), utilities (67%), extracurriculars for their kids (41%), childcare (23%), and buying healthier foods (32%).”<sup>156</sup>

In addition to significantly improving financial security for all eligible families, the CTC led to particularly impactful benefits for children of color and children in lower-income families. Black, Hispanic, and other households of color were more likely to use CTC funds for childcare and education expenses, and were twice as likely to use the funds for increased or enhanced tutoring.<sup>157</sup> Similarly, low- and moderate-income families were more likely to use funds for tutoring, spending time with children, purchasing more and better food, and improving their housing situations.<sup>158</sup> According to researchers at the Brookings Institute, the effect of the expanded CTC on families of color, as well as low- and moderate-income families, suggests that the CTC could be an important tool for addressing racial disproportionality and income inequality.<sup>159</sup> The temporary expansion of the CTC was also linked to an estimated twenty percent decrease in food insufficiency among households with children.<sup>160</sup> Pandemic-related funding increases have also been linked to an increase in health coverage for children.<sup>161</sup>

Early in the pandemic, Congress increased funding for the federal Supplemental Nutritional Assistance Program.<sup>162</sup> Although school closures in the early stages of the pandemic exacerbated food insecurity, food insecurity

156. *See id.*

157. *See* Leah Hamilton, Stephen Roll, Mathieu Despard, Elaine Maag, Yung Chun, Laura Brugger & Michal Grinstein-Weiss, *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 Survey (Wave 2)* 4 (Brookings Glob. Working Paper #173, 2022), [https://www.brookings.edu/wp-content/uploads/2022/04/Child-Tax-Credit-Report-Final\\_Updated.pdf](https://www.brookings.edu/wp-content/uploads/2022/04/Child-Tax-Credit-Report-Final_Updated.pdf) [<https://perma.cc/7MSP-ENBB>].

158. *Id.*

159. *Id.* at 3. Skeptics had worried that the expanded CTC would disincentivize wage work. *See* Teaganne Finn & Phil McCausland, *Romney’s Push To Revive Child Tax Credit Hinges on Work Requirements*, NBC NEWS (Feb. 21, 2022), <https://www.nbcnews.com/politics/congress/romneys-push-revive-child-tax-credit-hinges-work-requirements-rcna16581> [<https://perma.cc/Z8EC-N9QU>]. However, there were no statistically significant changes in employment between CTC-eligible households versus those that were not eligible. *Id.*

160. *See* Paul R. Shafer, Katherine M. Gutiérrez, Stephanie Ettinger de Cuba, Allison Bovell-Ammon & Julia Raifman, *Association of the Implementation of Child Tax Credit Advance Payments with Food Insufficiency in US Households*, JAMA NETWORK OPEN, Jan. 13, 2022, at 4.

161. *See* Laryssa Mykyta, Katherine Keisler-Starkey & Lisa Bunch, *More Children Were Covered by Medicaid and CHIP in 2021*, U.S. CENSUS BUREAU (Sept. 13, 2022), <https://www.census.gov/library/stories/2022/09/uninsured-rate-of-children-declines.html> [<https://perma.cc/2XWD-D57T>].

162. KIDS, FAMILIES, AND COVID-19, *supra* note 94, at 8. The Supplemental Nutrition Assistance Program (“SNAP”) “provides nutrition benefits to supplement the food budget of needy families so they can purchase healthy food and move towards self-sufficiency.” *Supplemental Nutrition Assistance Program*, U.S. DEPT’ AGRIC., FOOD & NUTRITION SERV., <https://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program> [<https://perma.cc/D8CZ-NHSN>].

declined for these children in response to new policies like expanded eligibility for free lunches. In March 2020, as part of the Families First Coronavirus Response Act (“Families First Act”),<sup>163</sup> Congress created more flexibility within the National School Lunch and Breakfast Programs to better meet the needs of at-risk children who received meals via their public schools, reducing bureaucratic hurdles and expanding availability during the summer months.<sup>164</sup> The Families First Act enabled public schools to provide universal free meals to all children.<sup>165</sup>

Free school meals perform an essential function in the United States’ child safety net. They offer higher-nutrient foods than packed lunches and are linked to decreased obesity among children living in poverty.<sup>166</sup> The Free Universal Lunch program increased children’s access to healthy food and helped address food insecurity.<sup>167</sup> Moreover, making school lunches universally free and available to all children mitigated the stigma and shaming associated with an income-based approach to school meals.<sup>168</sup>

In conclusion, recent Census Bureau data demonstrate the significant impact of pandemic anti-poverty programs on children. As measured by the Supplemental Poverty Measure (“SPM”),<sup>169</sup> child poverty fell to its lowest recorded level in 2021, declining almost 50% from 2020 (9.7%) to 2021 (5.2%).<sup>170</sup> SPM rates fell the most for Hispanic and Black children.<sup>171</sup> And while children of color continue to experience poverty disproportionately, the rate of that disproportionality decreased over the same time period.<sup>172</sup>

## 2. Child Welfare

The arrival of COVID-19 necessarily changed the state’s *parens patriae* approach to alleged child maltreatment. Specifically, the pandemic and its

163. Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020) (codified in scattered sections of 1, 5, 7, 10, 25, 26, 29, 38, and 42 U.S.C.).

164. *See id.* §§ 2101–2204, 134 Stat. 184–87 (codified at 42 U.S.C. §§ 1751, 1760 (2020)); *Coronavirus (COVID-19) Response Child Nutrition & School Meals*, NAT’L CONF. STATE LEGISLATURES (May 7, 2020), <https://www.ncsl.org/state-federal/covid-response-child-nutrition-school-meals> [<https://perma.cc/ENV4-HN9N>].

165. *See* Sarah Martinelli, Swapna Reddy, Michael Yudell, Saigaytri Darira & Maureen McCoy, *The Case for Universal Free Meals for All: A Permanent Solution*, HEALTH AFFS. (May 5, 2022), <https://www.healthaffairs.org/doi/10.1377/forefront.20220504.114330/> [<https://perma.cc/F6TK-F8TJ>]; Families First Coronavirus Response Act §§ 2101–2204, 134 Stat. at 184–87 (codified at 42 U.S.C. §§ 1751, 1760 (2020)).

166. *Id.*

167. *Id.*

168. *Id.*

169. The Supplemental Poverty Measure includes net income as well as noncash benefits like SNAP. *See* Burns et al., *supra* note 13.

170. *Id.*

171. *See id.*

172. *See id.*

consequences led to a significant suspension of the reactive *parens patriae* model of the child welfare system.

In the wake of the near-complete shutdown at the beginning of the pandemic, children's contacts with mandatory reporters of child maltreatment decreased dramatically, as schools, childcare and after school care facilities closed, and pediatrics offices were operating on a limited basis and only for sick visits.<sup>173</sup> In part because of this precipitous drop in contact, the total number of child maltreatment reports declined by between twenty to seventy percent.<sup>174</sup> Child welfare advocates warned of a "sharp increase in unreported cases of abuse and neglect."<sup>175</sup> Likewise, in response to the pandemic, state child protection agencies cut back in-home visits and investigations because of concerns around spreading the virus.<sup>176</sup> And courts overseeing child welfare cases were also closed.<sup>177</sup> The number of child removals and foster care placements also plunged.<sup>178</sup> Consequently, child welfare agencies were engaging with far fewer families and children than they had been prior to the pandemic. To the extent that the standard reactive approach was muted by the pandemic, the attendant harms resulting from the reactive approach likely also decreased.<sup>179</sup>

But while harms related to the reactive model may have waned, child advocates worried that child abuse and neglect would increase during the pandemic. Although they anticipated a significant decrease in child maltreatment reports, researchers believed it unlikely that child maltreatment rates would actually decrease.<sup>180</sup> Instead, child maltreatment experts cautioned that increased stress, closed schools, unemployment, and social isolation related

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173. See Welch & Haskins, *supra* note 5. In one small study, however, researchers found that after an initial dip in April 2020, reports rebounded above expected rates by June and July, leading them to conclude that "despite a temporary reduction in reports, the child welfare system continued to detect abuse and neglect, particularly in the more objective maltreatment categories." See Kele Stewart & Robert Latham, *COVID-19 Reflections on Resilience and Reform in the Child Welfare System*, 48 *FORDHAM URB. L.J.* 95, 126 (2020).

174. See Welch & Haskins, *supra* note 5.

175. *Id.*

176. See *id.*

177. For example, New York City Family Courts ceased all in-person operations on March 25, 2020, and held virtual proceedings for emergency cases. See Melissa Friedman & Daniella Rohr, *Reducing Family Separations in New York City: The COVID-19 Experiment and a Call for Change*, 123 *COLUM. L. REV. F.* 52, 67 (2023).

178. For example, in New York City, the number of children removed from their homes based on allegations of maltreatment fell by more than fifty percent. *Id.* at 53.

179. See *supra* Section II.B for a discussion of the harms from the reactive *parens patriae* approach.

180. See Amber Peterman, Alina Potts, Megan O'Donnell, Kelly Thompson, Niyati Shah, Sabine Oertelt-Prigione & Nicole van Gelder, *Pandemics and Violence Against Women and Children* 23–24 (Ctr. Glob. Dev., Working Paper No. 528, 2020).

to the pandemic would increase the risk for child maltreatment.<sup>181</sup> Many worried that incidents of child maltreatment would increase during the pandemic,<sup>182</sup> and some concluded that “child abuse continues to be a significant problem in the USA which has likely worsened during the COVID-19 pandemic.”<sup>183</sup> Yet although findings are preliminary, data suggest that the anticipated spike in child abuse did not materialize.

A variety of data and retrospective studies suggest that child maltreatment rates did not increase.<sup>184</sup> In New York City, for example, the Commissioner of the Administration for Children’s Services concluded that the agency had not seen indications of an increase in undetected child abuse.<sup>185</sup> Despite the dramatic drop in child removals, the rate of maltreatment cases that were substantiated held steady with the substantiation rate in 2019—a year before the pandemic.<sup>186</sup> What is more, the number of child deaths related to suspected maltreatment dropped twenty-five percent in 2020 as compared to 2021.<sup>187</sup> New York child welfare scholars and attorneys concluded that children stayed just as

181. See, e.g., Annette K. Griffith, *Parental Burnout and Child Maltreatment During the COVID-19 Pandemic*, 37 J. FAM. VIOLENCE 725, 727–28 (2022); Elizabeth Swedo, Nimi Idaikkadar, Ruth Leemis, Taylor Dias, Lakshmi Radhakrishnan, Zachary Stein, May Chen, Nickolas Agathis & Kristin Holland, *Trends in U.S. Emergency Department Visits Related to Suspected or Confirmed Child Abuse and Neglect Among Children Aged <18 Years Before and During the COVID-19 Pandemic—United States, January 2019–September 2020*, 69 CTRS. DISEASE CONTROL & PREVENTION MORBIDITY & MORTALITY WKLY. REP. 1841, 1841 (2020).

182. See, e.g., Nikita Stewart, *Child Abuse Cases Drop 51 Percent. The Authorities Are Very Worried*, N.Y. TIMES (Aug. 7, 2020), <https://www.nytimes.com/2020/06/09/nyregion/coronavirus-nyc-child-abuse.html> [<https://perma.cc/5Y5K-23J9>] (dark archive)]; Laura Santhanam, *Why Child Welfare Experts Fear a Spike of Abuse During COVID-19*, PBS NEWSHOUR (Apr. 6, 2020, 5:47 PM), <https://www.pbs.org/newshour/health/why-child-welfare-experts-fear-a-spike-of-abuse-during-covid-19> [<https://perma.cc/V87D-SGB3>]; WORLD HEALTH ORG., *Global Burden of Violence Against Children, in GLOBAL STATUS REPORT ON PREVENTING VIOLENCE AGAINST CHILDREN 11, 14–15* (2020), <https://www.unicef.org/sites/default/files/2020-06/Global-status-report-on-preventing-violence-against-children-2020.pdf> [<https://perma.cc/9J55-LBDE>].

183. See Wesley J. Park & Kristen A. Walsh, *COVID-19 and the Unseen Pandemic of Child Abuse*, BMJ PEDIATRICS OPEN, Sept. 13, 2022, at 1, 2.

184. Take the early concern that, despite the drop in maltreatment reports, child abuse and neglect continued apace, or even increased. To the contrary, researchers observed that in 2019, teachers were responsible for roughly twenty percent of abuse reports; yet reporting declined up to seventy percent. Thus, the absence of school reports could not account for the much larger decline in reporting overall. Brenda Patoine, *Child Abuse Actually Decreased During COVID. Here’s Why*, TUFTS NOW (Feb. 14, 2022), <https://now.tufts.edu/2022/02/14/child-abuse-actually-decreased-during-covid-heres-why> [<https://perma.cc/U2UM-VMRZ>].

185. See Michael Fitzgerald, *No Evidence of Pandemic Child Abuse Surge in New York City, but Some See Other Crises for Child Welfare System*, IMPRINT (June 15, 2021, 7:25 PM), <https://imprintnews.org/top-stories/no-evidence-of-pandemic-child-abuse-surge-in-new-york-city-but-some-see-other-crises-for-child-welfare-system/55991> [<https://perma.cc/5SAN-8NNN>] (staff-uploaded archive)].

186. See Friedman & Rohr, *supra* note 177, at 68–69.

187. See *id.* The substantiation rate remained steady during the pandemic, even as lockdown ended. And data did not uncover any “backlog” of hidden maltreatment. See *id.* at 69–70.

safe during the pandemic as they did prior to the pandemic—perhaps even safer than had they been removed—despite a dramatic shift in the functioning of the child welfare system.<sup>188</sup>

A little over a year into the pandemic, as the number of child maltreatment reports and emergency department visits decreased, a group of pediatricians from Yale Medical School sought to test whether children were being maltreated but not brought to care.<sup>189</sup> These researchers predicted that despite lower reporting rates and emergency department visits generally, caregivers would continue to access medical care for life-threatening injuries like abusive head trauma (“AHT”).<sup>190</sup> They used AHT diagnostics as a proxy to measure the rate of abuse because they would not expect these visits to decrease as a result of lower maltreatment reporting.<sup>191</sup> They analyzed the records of forty-nine children’s hospitals for AHT in children under five from 2017 through September 2020.<sup>192</sup> Contrary to the authors’ expectations, the study showed a “significant decrease” in admissions for AHT in children under five across all forty-nine children’s hospitals.<sup>193</sup> The authors hypothesized that protective factors might explain the decrease. They surmised that pandemic effects on employment meant children were more likely to be cared for by two or more caregivers than prior to the pandemic, which reduced the likelihood of solo caregiving by men, who most commonly inflict AHT.<sup>194</sup>

Another recent retrospective study analyzing the rate of emergency department encounters related to child physical abuse concluded that the encounter rates for child physical abuse were either reduced or unchanged during the pandemic.<sup>195</sup> More specifically, encounters linked to a child physical abuse diagnosis dropped by nineteen percent across all ages, with the greatest drop among preschool and school-aged children.<sup>196</sup> Additionally, encounters among children under two with injuries suggesting a high risk of physical abuse fell by ten percent.<sup>197</sup> Encounter rates involving skeletal x-rays to evaluate potential child abuse did not demonstrate a significant reduction, “impl[ying] that decreases were not due to decreased likelihood of clinicians to evaluate or identify abuse.”<sup>198</sup> Overall, report data demonstrated that lower-severity

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188. See Friedman & Rohr, *supra* note 177, at 60–61; Arons, *supra* note 14, at 3.

189. See Nathan L. Maassel, Andrea G. Asnes, John M. Leventhal & Daniel G. Solomon, *Hospital Admissions for Abusive Head Trauma at Children’s Hospitals During COVID-19*, 148 PEDIATRICS 1, 1 (2021).

190. See *id.*

191. See *id.*

192. See *id.*

193. See *id.* at 2.

194. See *id.* at 3.

195. See Chaiyachati et al., *supra* note 14, at 18.

196. See *id.* at 18, 22.

197. See *id.* at 25.

198. *Id.*

encounter rates decreased during the pandemic and higher-severity rates remained static.<sup>199</sup>

The study authors considered potential explanations for the decrease, cautioning that further critical study would be necessary to fully understand the results in context.<sup>200</sup> One possible explanation for the data was that the rate of child physical abuse may not have changed, because the drop in lower-severity encounters was related to the drop in mandatory reporting, while the higher-severity encounters remained constant.<sup>201</sup> But the other possibility was that the results reflected an actual reduction in the incidence of child abuse.<sup>202</sup> The authors hypothesized that this decrease could have resulted from “novel protective factors within the pandemic,” such as the presence of additional caregivers like older siblings attending school online and parents who had lost their jobs or were working from home.<sup>203</sup>

Other experts who had expressed early concern later concluded that child abuse did not, in fact, increase.<sup>204</sup> Instead, child abuse was a “missing epidemic” during the pandemic.<sup>205</sup>

A central explanation for this seeming paradox? Prevention.<sup>206</sup> Experts on child maltreatment have suggested that the presence of protective factors during the pandemic could explain why, despite risks, child abuse does not appear to have increased during the pandemic. First, the presence of additional caregivers like older siblings attending school online and parents who had lost their jobs may have reduced the risk of physical abuse and promoted attachment.<sup>207</sup> Relatedly, improved work-life balance related to remote work may have

199. *See id.*

200. *See id.* at 25–26.

201. *See id.* at 25. An earlier, rapid review study found increased cases of hospital maltreatment but decreased rate of maltreatment reporting, suggesting that while child abuse reporting declined, actual incidents of child maltreatment did not. *See* Ashley Rapp, Gloria Fall, Abigail C. Radomsky & Sara Santarossa, *Child Maltreatment During the COVID-19 Pandemic: A Systematic Rapid Review*, 68 PEDIATRIC CLINICS N. AM. 991, 991 (2021).

202. Chaiyachati et al., *supra* note 14, at 25.

203. *Id.*

204. *See* Robert Sege & Allison Stephens, *Child Physical Abuse Did Not Increase During the Pandemic*, 176 JAMA PEDIATRICS 339, 339 (2022); *see also* Robert D. Sege, Pediatric Perspective, *Reasons for HOPE*, 147 PEDIATRICS 1, 1 (2021) (reporting positive child and family experiences during the pandemic).

205. Sege & Stephens, *supra* note 204, at 339. Indeed, attorneys at The Legal Aid Society, New York City, concluded, “[t]his once-in-a-century pandemic revealed a striking truth: Keeping children at home with their families provided them with equal, if not greater, safety than removing them for placement in the child welfare system.” Friedman & Rohr, *supra* note 177, at 53.

206. *See* Robert Sege, Allison Stephens & Amy Templeman, *Child Abuse Rates Dropped During Covid—The Reasons Point to Economics*, HILL (June 9, 2022, 3:00 PM), <https://thehill.com/opinion/3517190-child-abuse-rates-dropped-during-covid-the-reasons-point-to-economics/> [<https://perma.cc/V8W6-55AQ>] (“The pandemic demonstrated the positive impacts of addressing family needs rather than removing children from their families after disaster strikes.”).

207. *See* Chaiyachati et al., *supra* note 14, at 25; Sege & Stephens, *supra* note 204, at 339.

promoted more extensive, quality contact with multiple caregivers for children.<sup>208</sup> And finally, government assistance to families in financial distress likely helped to mitigate the stress and harm caused by the financial fallout from the pandemic.<sup>209</sup> In particular, because child neglect rates are closely correlated with poverty,<sup>210</sup> the dramatic reduction of child poverty resulting from increased state investments would suggest that instances of child neglect decreased because of the state's response to the financial consequences of the pandemic.

Moreover, surveys conducted by the American Academy of Pediatrics, in collaboration with Prevent Child Abuse America, the Centers for Disease Control and Prevention, and Tufts Medical Center, suggest that strengthened family support systems may have helped to prevent child maltreatment.<sup>211</sup> Despite the stresses of the pandemic, many families were able to cope and become more engaged and connected: more than half of caregivers surveyed reported that their families had grown closer.<sup>212</sup> Many parents reported using positive parenting practices to discipline their children.<sup>213</sup> And although parents took their children on fewer outings during the pandemic, they shared more weekly meals with their children and some read to their children more frequently.<sup>214</sup>

Finally, in the absence of preventative services provided by state agencies, communities organized “mutual aid” projects to provide a variety of essential goods and services to community members in need.<sup>215</sup> These groups organized around “principles of solidarity, collective care, accountability, and racial justice.”<sup>216</sup> They distributed essential items like groceries and diapers, and some

208. See Danielle Laraque-Arena, *Child Abuse and Neglect: It's About Prevention*, CONTEMP. PEDIATRICS (Apr. 4, 2022), <https://www.contemporarypediatrics.com/view/child-abuse-and-neglect-it-s-about-prevention> [https://perma.cc/432R-LMYH].

209. See Sege & Stephens, *supra* note 204, at 339; Laraque-Arena, *supra* note 208.

210. See, e.g., Trivedi, *supra* note 79, at 536–37 (“[N]eglect cases may also be filed for failure to provide sufficient food or inadequate supervisions due to lack of affordable childcare. These are problems of family poverty, not of parental mistreatment.”).

211. See *Family Snapshots: Life During the Pandemic*, AM. ACAD. PEDIATRICS, <https://www.aap.org/en/patient-care/family-snapshot-during-the-covid-19-pandemic/> [https://perma.cc/FQ2C-Z3TS]; AMBER JOINER-HILL, MAGNOLIA DETROIT CONSULTING, CAREGIVING IN THE CONTEXT OF COVID-19: YEAR ONE SUMMARY REPORT 2–4 (2022), [https://downloads.aap.org/AAP/PDF/COVID\\_Family\\_Snapshot\\_Y1\\_Summary\\_Report\\_FINAL.pdf?\\_ga=2.183508390.18781417.1674959923-29702188.1674959922](https://downloads.aap.org/AAP/PDF/COVID_Family_Snapshot_Y1_Summary_Report_FINAL.pdf?_ga=2.183508390.18781417.1674959923-29702188.1674959922) [https://perma.cc/6XYQ-66LP].

212. See *Many Parents Report Family Closeness*, *supra* note 16.

213. See *Child Discipline During the COVID-19 Pandemic*, AM. ACAD. PEDIATRICS (June 8, 2021), <https://www.aap.org/en/patient-care/family-snapshot-during-the-covid-19-pandemic/child-discipline-during-the-covid-19-pandemic/> [https://perma.cc/YV4T-D7CY].

214. See Yeris Mayol-Garcia, *Pandemic Brought Parents and Children Closer: More Family Dinners, More Reading to Young Children*, U.S. CENSUS BUREAU (Jan. 3, 2022), <https://www.census.gov/library/stories/2022/01/parents-and-children-interacted-more-during-covid-19.html> [https://perma.cc/Y3YA-YVEM].

215. Arons, *supra* note 14, at 22–25.

216. *Id.* at 23.

provided additional preventative and supportive services for families, including childcare, mental health care, and support groups.<sup>217</sup>

In short, the absence of a reactive *parens patriae* response to child maltreatment does not appear to have caused an increase in child maltreatment, and a range of protective factors likely mitigated the risks of maltreatment created by the pandemic, and potentially even lowered rates of child maltreatment.

### 3. Youth Offending

In the youth legal context, the reactive model of *parens patriae*—detaining youth after the commission of an offense and only potentially providing services afterward—diminished during the pandemic. The number of youths confined to secure detention centers fell, driven by a sharp drop in admissions and an increased rate of release.<sup>218</sup>

Similar to concerns about child maltreatment, some worried that youth offending and violence would spike during the pandemic.<sup>219</sup> Yet despite alarms raised over a surge in youth crime during the pandemic, data suggest that youth violence remained static or declined during the pandemic.<sup>220</sup> However, the pandemic did increase psychological distress and antisocial behaviors among justice-involved youth.<sup>221</sup>

What is more, during the pandemic, stakeholders in the youth legal system worked to divert youth and avoid placement in detention facilities as much as possible.<sup>222</sup> Data from the pandemic show that fewer youth were arrested and detained overnight, placed in detention, or held in out-of-home juvenile justice placement systems when compared to prepandemic data—a “silver lining of the pandemic.”<sup>223</sup>

217. *Id.* at 23–25.

218. *At Onset of the Covid-19 Pandemic, Dramatic and Rapid Reductions in Youth Detention*, ANNIE E. CASEY FOUND. (Apr. 23, 2020), <https://www.aecf.org/blog/at-onset-of-the-covid-19-pandemic-dramatic-and-rapid-reductions-in-youth-de> [<https://perma.cc/HP3B-XTZ7>] [hereinafter *Reductions in Youth Detention*].

219. See Richard Mendel, *Data Reveals Violence Among Youth Under 18 Has Not Spiked in the Pandemic*, SENT’G PROJECT (June 14, 2022), <https://www.sentencingproject.org/policy-brief/data-reveals-violence-among-youth-under-18-has-not-spiked-in-the-pandemic/> [<https://perma.cc/8K6W-PKWL>].

220. See *id.* But see Sarah Westwood, *COVID-19 School Closures Give Rise to Juvenile Crime in Certain Cities*, WASH. EXAM’R (Aug. 18, 2022), <https://www.washingtonexaminer.com/restoring-america/fairness-justice/covid-school-closures-rise-juvenile-crime> [<https://perma.cc/58HA-9ZF8>] (“But in some cities, most of which kept schools closed longer than the national average, juvenile crime has increased dramatically.”).

221. See Joan A. Reid, Tiffany Chenneville, Sarah M. Gardy & Michael T. Baglivio, *An Exploratory Study of COVID-19’s Impact on Psychological Distress and Antisocial Behavior Among Justice-Involved Youth*, 68 CRIME & DELINQUENCY 1271, 1284 (2022).

222. See *Reductions in Youth Detention*, *supra* note 218.

223. See Press Release, Massachusetts Off. of the Child Advoc., *supra* note 6.



Moreover, more than half of jurisdictions surveyed about the impact of COVID-19 reported that the reduction in secure detention dropped more for Black youth (who, as explored above, are disproportionately represented in all aspects of the youth legal system), than for White youth.<sup>224</sup> The experiences of state agencies suggest that “challenging old (and often less than effective) practices and implementing structures that better align with best practices in juvenile justice” are key takeaways from the COVID-19 experience.<sup>225</sup> New questions for those working in the youth legal system include considering whether time in secure detention can be reduced while yielding positive outcomes, what additional supports state agencies can provide to support youth success in their communities, and questioning whether youth should be confined in secure facilities if they are “positively engaged and crime-free while in the community.”<sup>226</sup> Youth justice advocates viewed the pandemic as “a seminal event for ongoing reform,” potentially leading to an increase in community-based diversion that provides youth with services and resources within their communities, rather than in state confinement.<sup>227</sup>

In sum, the United States’ experiment with a more responsible state—which takes initiative for not only protecting children in an isolated sense, but also preventing harm, providing for children, supporting their parents, and monitoring institutions—was a success. Neither youth offending nor child maltreatment rates appear to have increased as predicted. Despite the early economic fallout from the pandemic, after significant anti-poverty measures initiated in response to COVID-19, child poverty numbers reached historic lows. And the anti-poverty measures Congress put in place had an especially beneficial impact for children and families of color.<sup>228</sup>

### C. *After the Pandemic: Reimagining Parens Patriae*

Our experience with the default model of *parens patriae*, both prior to the pandemic and as it arrived, makes clear that the reactive, residual approach is an inadequate model to protect children and promote their well-being.<sup>229</sup> Filtered through the neoliberal lens, protecting children from harm has meant primarily protecting them from child maltreatment or the consequences of youth offending, and typically after the fact. What is more, under neoliberal

224. See COUNCIL OF JUV. JUST. ADM’RS, THE IMPACT OF COVID-19 ON JUVENILE JUSTICE SYSTEMS: PRACTICE CHANGES, LESSONS LEARNED, AND FUTURE CONSIDERATIONS 7, 11–12 (2022), [https://mcusercontent.com/10b10aa0562ed09660f97b9a0/files/4a54f006-f02f-08af-37c9-9255f32ffd06/COVID\\_19\\_Impact\\_on\\_JJ\\_Systems.01.pdf](https://mcusercontent.com/10b10aa0562ed09660f97b9a0/files/4a54f006-f02f-08af-37c9-9255f32ffd06/COVID_19_Impact_on_JJ_Systems.01.pdf) [<https://perma.cc/JF74-25LC>].

225. *Id.* at 39.

226. *Id.* at 39–40.

227. Molly Buchanan, Erin D. Castro, Mackenzie Kushner & Marvin D. Krohn, *It’s F\*\*cking Chaos: COVID-19’s Impact on Juvenile Delinquency and Juvenile Justice*, 45 AM. J. CRIM. JUST. 578, 593 (2020).

228. See *supra* Section III.B.

229. See *supra* Sections II.A–B.

assumptions about self-sufficiency, market efficiency, and personal responsibility, state protection generally does not extend to significant financial support, because parents are assumed to have the financial wherewithal to care for their children and advance their well-being.<sup>230</sup> The neoliberal *parens patriae*'s biggest blind spots are poverty and inequality. Assumptions about parental ability to financially support and provide for their children are plainly wrong.<sup>231</sup> And assumptions about market efficiency take the existing distribution of wealth as a given, rather than questioning whether that distribution is fair.

Creating a model of *parens patriae* that actually fulfills the state's responsibility to protect children and promote their well-being requires a more expansive and capacious understanding of what "protection" is. It requires a *parens patriae* role that is proactive, preventative, and responsible. The state's role must evolve from staying out of the way and occasionally providing reactive protection and residual support, to providing affirmative, forward-looking supports for children and their families. Thus understood, protection from harm means far more than engaging to protect children after they have suffered maltreatment or committed an offense, though in some circumstances (hopefully far more rarely), this type of protection will still be necessary. Protection from harm must also entail protection from the ravages of poverty, discrimination, climate change, and more.

A significant component of this more expansive notion of protection includes *prevention*. Rather than simply intervening when children have been hurt, or families or markets are in crisis, the state should provide children and their families with the goods, services, and support that help to prevent harm from happening in the first place. This means the state must assume affirmative responsibility to provide for children with not only quality schooling and childcare, but also universal healthcare, adequate nutrition, and safe housing.

Protection also requires assisting parents and families. As demonstrated by the CTC,<sup>232</sup> cash assistance to parents living in poverty helps to raise children out of poverty, as well as provide their parents with more resources for things like childcare, nutrition, and time with their children.<sup>233</sup> Data from a guaranteed income pilot project has confirmed that direct cash transfers enable parents to better afford childcare and spend more quality time with their children.<sup>234</sup> Research has also established that state investments in anti-poverty measures

230. See *supra* Section II.A.

231. See *supra* Section II.B.

232. See *supra* Section III.B.1.

233. See *supra* notes 146–61 and accompanying text.

234. See STACIA WEST, AMY CASTRO BAKER, SUKHI SAMRA & ERIN COLTRERA, PRELIMINARY ANALYSIS: SEED'S FIRST YEAR 13, 22 [https://static1.squarespace.com/static/6039d612b17d055cac14070f/t/6050294a1212aa40fdaf773a/1615866187890/SEED\\_Preliminary+Analysis-SEEDs+First+Year\\_Final+Report\\_Individual+Pages+.pdf](https://static1.squarespace.com/static/6039d612b17d055cac14070f/t/6050294a1212aa40fdaf773a/1615866187890/SEED_Preliminary+Analysis-SEEDs+First+Year_Final+Report_Individual+Pages+.pdf) [https://perma.cc/Y6T4-VEDD].

reduce rates of child maltreatment.<sup>235</sup> To the extent parents are struggling with mental illness and substance use disorder, supportive counseling and healthcare are required.<sup>236</sup> The state should also provide ground-up, community-based support systems and support for mutual aid projects so that families have others to offer guidance and support them in their critical child development work.

Protection also means adequately supporting and monitoring the institutions in which children's lives are embedded. Schools and childcare should be well resourced and of high quality, regardless of zip code, and they should be available for all children. Foster care and other out-of-home placements for children and youth should be options of last resort, and should always be stable, safe, and developmentally appropriate.

Finally, the state must ensure equitable access to services, equitable opportunities, and equitable engagement with institutions like schools, the child protection system, and the youth legal system. Beyond addressing and eliminating the pronounced disproportionality for children of color and poor children, this means providing supportive, equitable services to these children and their families, and more generally providing supports to children living with disadvantage to help mitigate that disadvantage and develop resilience.<sup>237</sup>

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Unfortunately, as of this writing, the state appears poised to return to the reactive, residual model of *parens patriae* that was dysfunctional prior to the pandemic and made it more difficult for children and their families to be resilient during the pandemic.

Despite the dramatic benefits of the expanded CTC, Congress declined to renew it, and it expired at the end of 2021.<sup>238</sup> Since then, parents have reported

235. See Nicole L. Kovski, Heather D. Hill, Stephen J. Mooney, Frederick P. Rivara & Ali Rowhani-Rahbar, *Short-Term Effects of Tax Credits on Rates of Child Maltreatment Reports in the United States*, 150 PEDIATRICS 1, 2, 5 (2022); Henry T. Puls, Matthew Hall, James D. Anderst, Tami Gurley, James Perrin & Paul J. Chung, *State Spending on Public Benefit Programs and Child Maltreatment*, 148 PEDIATRICS 1, 4 (2021); Dana Weiner, Clare Anderson & Krista Thomas, *System Transformation To Support Child & Family Well-Being: The Central Role of Economic & Concrete Supports*, CHAPIN HALL (July 2021), <https://www.chapinhall.org/research/economic-supports-child-welfare/> [https://perma.cc/EB39-D4ZG].

236. Persistent poverty and temporary economic shocks can lead to substance abuse, mental health challenges, intimate partner violence, and more general stresses on families. See Sege et al., *supra* note 206.

237. See Harbach, *Resilience*, *supra* note 67, at 504–14.

238. See Jeff Greenfield, *Opinion: The Sad, Familiar Demise of the Expanded Child Tax Credit*, POLITICO (Sept. 28, 2022, 4:30 AM), <https://www.politico.com/news/magazine/2022/09/28/poor-kids-just-dont-matter-in-american-politics-00059018> [https://perma.cc/7LH6-HT4K]. Some lawmakers were concerned about the expense involved in the expanded CTC, as well as possible effects on inflation, and concerns about how parents spent the cash transfers. See Deepa Shivaram, *The Expanded Child Tax Credit Expires Friday After Congress Failed To Renew It*, NPR (Dec. 30, 2022; 2:03

that the end of CTC payments, combined with rising prices associated with inflation, is causing financial stress and challenges in affording housing payments, purchasing adequate food, and accessing health insurance or medication.<sup>239</sup> In one study, 27.6% of parents shared that they were no longer able to meet their families' basic needs, and 61.55% said it became more difficult to meet basic needs, while only 10% reported that the end of CTC payments had little impact on their families.<sup>240</sup> Food insufficiency in families with children has also increased. Lawmakers declined to extend the Free Universal Lunch program in the 2022 federal budget, and the program expired on June 30, 2022.<sup>241</sup> As a result, it is estimated that ten million children will no longer have access to free lunches.<sup>242</sup> Child removals may also be on the rise.<sup>243</sup> And the number of youth in secure detention facilities has also increased, coupled with even greater disproportionality for Black youth and longer detention stays.<sup>244</sup>

#### CONCLUSION

COVID-19 changed American life, so much so that we refer to the time period prior to COVID-19 as the "Before Times."<sup>245</sup> As a country, we are still working out what our aftertime will be.<sup>246</sup> We have collectively processed the experience of COVID-19, and wondered when times would get back to "normal."<sup>247</sup> Yet plentiful commentary has queried whether it is even possible

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PM), <https://www.npr.org/2021/12/30/1069143123/expanded-child-tax-credit-expires-friday-congress> [<https://perma.cc/J4J2-KHNF>].

239. See *Families in Serious Financial Crisis*, *supra* note 155.

240. See *id.*

241. See Elizabeth Chuck, *Free School Lunches for All Set To End, Creating "Perfect Storm" Amid High Inflation*, NBC NEWS (June 18, 2022, 4:30 AM), <https://www.nbcnews.com/news/us-news/free-school-lunches-set-end-creating-perfect-storm-high-inflation-rcna33688> [<https://perma.cc/B2JL-RKEL>].

242. See Danielle Campoamor, *Universal Free Lunch Has Ended: 'Students Can't Learn if They're Hungry'*, TODAY, <https://www.today.com/parents/parents/universal-free-lunch-ends-rcna43827> [<https://perma.cc/9W6K-7CW4>] (last updated Sept. 1, 2022, 6:37 PM).

243. See Friedman & Rohr, *supra* note 177, at 71.

244. *The Number of Youth in Secure Detention Returns to Pre-Pandemic Levels: "The New Normal" or "The Old Status Quo?"*, ANNIE E. CASEY FOUND. (Aug. 16, 2022), <https://www.aecf.org/blog/the-number-of-youth-in-secure-detention-returns-to-pre-pandemic-levels> [<https://perma.cc/K997-V34E>].

245. See *Remembering How It Was in the 'Before Times'*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/before-times-covid-history-and-usage> [<https://perma.cc/5F5C-JEGS>].

246. *Aftertime*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/aftertime> [<https://perma.cc/AMQ8-XKVG>].

247. See, e.g., Danny Dorling, *When Will Life Return to Normal After the Pandemic?*, CONVERSATION (Dec. 2, 2021, 8:04 AM), <https://theconversation.com/when-will-life-return-to-normal-after-the-pandemic-172726> [<https://perma.cc/WH7S-V8C6>].

to get back to normal,<sup>248</sup> and some have admonished that we should aspire to something better.<sup>249</sup>

The COVID-19 pandemic has had a devastating effect on children and families in the United States. At the same time, however, it invites a reevaluation and reimagination of the state's role as *parens patriae*. As society has emerged from the pandemic, there have been resolutions—indeed exhortations—to resist passively slipping back into our well-worn habits and patterns. Given the tremendous strides that were made in child well-being, during and despite the pandemic, we cannot imperil that progress by simply returning to the residual, reactive *parens patriae*. We have seen a better, more successful way to protect children and promote their well-being. Our interest in, and responsibility for, child well-being is urgent. We must not pass up this opportunity to reimagine *parens patriae* and recommit ourselves to our children.

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248. See, e.g., Peter C. Baker, *'We Can't Go Back to Normal': How Will Coronavirus Change the World?*, GUARDIAN (Mar. 31, 2020, 1:00 AM), <https://www.theguardian.com/world/2020/mar/31/how-will-the-world-emerge-from-the-coronavirus-crisis> [<https://perma.cc/48G8-ZYZQ>]; James C. Cobb, Opinion, *If the Great Depression Is Any Indication, Things Won't Just Go Back to 'Normal' After the Coronavirus Pandemic Ends*, TIME (Apr. 27, 2020, 2:00 PM), <https://time.com/5827348/great-depression-coronavirus-after/> [<https://perma.cc/MBP5-5WYD>]; Bryan Lufkin, *Is Going 'Back to Normal' Even Possible?*, BBC (July 8, 2021), <https://www.bbc.com/worklife/article/20210707-is-going-back-to-normal-even-possible> [<https://perma.cc/SQ9U-NRTN>].

249. See, e.g., Sigal Samuel, *We Shouldn't Go Back to "Normal." Normal Wasn't Good Enough.*, VOX, <https://www.vox.com/future-perfect/22394635/anxiety-back-to-normal-covid-19-pandemic> [<https://perma.cc/L578-PDL2>] (last updated May 12, 2021, 11:18 AM); Sara Pantuliano, *Covid-19: 'We Won't Get Back to Normal Because Normal Was the Problem.'*, ODI, <https://odi.org/en/insights/covid-19-we-wont-get-back-to-normal-because-normal-was-the-problem/> [<https://perma.cc/8ASB-RZYH>].