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AN UNINTENDED ABOLITION: FAMILY REGULATION DURING THE COVID-19 CRISIS

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In a typical year, New York City's vast family regulation system, fueled by an army of mandated reporters, investigates tens of thousands of reports of child neglect and abuse, policing almost exclusively poor Black and Latinx families even as the government provides those families extremely limited support. When the City shut down in the wake of the COVID-19 pandemic, this system shrunk in almost every conceivable way as mandated reporters retreated, caseworkers adopted less intrusive investigatory tactics, and family courts constrained their operations. The number of reports fell, the number of cases filed in court fell, and the number of children separated from their parents fell.

At the same time, families found support elsewhere, through suddenly burgeoning mutual aid networks and infusions of new government entitlements. This large-scale reconfiguration of the family regulation system represents a short-term experiment in abolition: in this period, New Yorkers moved away from a system that oppressed poor Black and Latinx people and not only envisioned but built a more democratic and humane model to protect families.

As this Piece demonstrates, under this new model, families remained just as safe. Data from the courts and from the city's Administration for Children's Services reveal that there was no rise in child neglect or abuse during the shutdown period. Furthermore, once the City began to re-open, there was no perceivable "rebound effect," that is, no delayed, compensatory rise in reports. This Piece positions the COVID-19 shutdown period as a successful case study, demonstrating one possible future absent the massive, oppressive apparatus of the family regulation system.

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I. INTRODUCTION

Abolition of the family regulation system is too often dismissed as a fantasy, an impracticable ideal that cannot be tested in reality. Yet the COVID-19 crisis provided exactly such a test: for several months, in much of the country, the family regulation system ceased to function as usual and was reduced to its bare bones. New York City, the initial epicenter of the crisis, shut down in mid-March 2020 and remained under near-total lock-down until mid-June. During that time, mandated reporters and agency caseworkers were sidelined and courts limited their operations. The number of reports of child neglect and abuse fell, the number of cases filed in family court fell, and the number of families separated by the government fell. Meanwhile, in the absence of government assistance—and government intrusion—communities developed robust mutual aid projects to meet their needs for food, provisions, childcare, and therapeutic services.

As the first wave of the COVID-19 crisis receded in New York City, family regulation system operations began to normalize. But while the predominant media narrative predicted that the pandemic and accompanying social isolation would increase child neglect and abuse, the numbers did not bear that out: during New York's shutdown, child fatalities fell, as did reports of child neglect and abuse. Taken in isolation, a drop in reporting during an immediate period of crisis might mean little. But moving into fall 2020, there was no surge in reports even as mandated reporters began to re-enter the field, nor was there any increase in the rate at which investigations found reports of neglect or abuse to be valid. The drop in reporting did not obscure a "boom" in child neglect and abuse. Rather, with fewer government-sanctioned separations of families, children stayed just as safe.

Abolition, writ large, is a decentralized, collectivist project. This grounding gives abolitionist movements strength, vitality, and flexibility, but can also make the meaning of "abolition" feel opaque or ephemeral.[1] Yet over the last several decades, activists, organizers, and scholars have set forth a robust abolitionist philosophy.[2] Reviewing this body of

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[1] *Compare* Andrew Ferguson, *What Does Defund the Police Really Mean?*, ATLANTIC (June 14, 2020), https://www.theatlantic.com/ideas/archive/2020/06/what-does-defund-police-really-mean/612904/ [https://perma.cc/5XXY-AKNP], *with* Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/KD4G-JUWG].

[2] *See, e.g.*, ABOLITION COLLECTIVE, ABOLISHING CARCERAL SOCIETY 4 (2018); Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (June 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/DS8C-L3MJ]; *see generally* RUTH WILSON GILMORE, GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA (2007); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 15–21 (2003); *Who We Are*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/about-us/#:~:text=The%20Movement%20for%20Black%20Lives,policy%2C%20cultural%20and%20political%20wins%2C [https://perma.cc/S56E-4G7S]; *Who We Are*, UPEND MOVEMENT, https://upendmovement.org/about/ [https://perma.cc/9DVD-NR8P]; Lisa Sangoi, Co-Founder & Co-Director, Movement for Family Power, Keynote Address at upENDing the Child Welfare System: The Road to Abolition Conference (Oct. 29, 2020), https://upendmovement.org/2020/10/29/keynote-address-upend-convening/ [https://perma.cc/224P-KDS9]; *see also* Micah Herskind, *Prison Abolition Resource Guide*, https://micahherskind.com/abolition-resource-guide/ [https://perma.cc/8NG3-SBCP] (collecting articles and books on abolitionist history, theory and movements).

abolitionist philosophy, Professor Dorothy Roberts identified three core tenets.[3] While Roberts explored these tenets in the context of carceral abolition, they are reflected in the abolitionist movements that are working to dismantle a wide range of interconnected systems of oppression, from the wage system, to environmental exploitation, to the military industrial complex, to the family regulation system.[4]

First, abolition demands that we acknowledge the history of the system in question and grapple with its roots in racial capitalism[5]—the economic structure endemic to this country under which capital accumulation and the exploitation of labor are facilitated by racial hierarchy and the deep inequalities produced by that hierarchy.[6] Second, and closely related, abolition requires that we follow that history forward to the present to consider how the expansion and maintenance of the system "functions to oppress black people and other politically marginalized groups in order to maintain a racial capitalist regime."[7]

Finally, Roberts highlights a third tenet, so often forgotten or deliberately ignored by those who dismiss abolition. She positions abolition as a hopeful and generative project, one that asks that we "imagine and build a more humane, free, and democratic society" that no longer relies on systematic violence to meet human need and solve social problems.[8] Accordingly, while abolitionists may accept that systems of oppression cannot be dismantled overnight, they emphasize chipping away at oppressive institutions and shrinking the state's capacity for violence rather than legitimizing or entrenching existing systems.[9]

This Piece examines the COVID-19-induced period of temporary abolition of the family regulation system in New York City. Part I describes the dramatic limitations placed on New York City's family regulation system—a system that targets, almost exclusively, poor Black and Latinx

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[3] Dorothy E. Roberts, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 7 (2019) [hereinafter Roberts, *Abolition Constitutionalism*].

[4] *See* Roberts, *Abolition Constitutionalism, supra* note 3, at 7 (recognizing that "all of these oppressive systems and the movements for their eradication are interconnected"); Dorothy E. Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455, 457 (2021) [hereinafter Roberts, *How I Became a Family Policing Abolitionist*].

[5] *See* Roberts, *Abolition Constitutionalism*, *supra* note 3, at 7.

[6] *See* Roberts, *Abolition Constitutionalism*, *supra* note 3, at 14 n.60 (citing CEDRIC J. ROBINSON, BLACK MARXISM: THE MAKING OF THE BLACK RADICAL TRADITION 2 (2000)).

[7] Roberts, *Abolition Constitutionalism*, *supra* note 3, at 7–8.

[8] Roberts, *Abolition Constitutionalism*, *supra* note 3, at 7–8.

[9] Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 COLUM. J. RACE & L. 767, 807 (2021) [hereinafter Mack, *The White Supremacy Hydra*] ("[T]he family regulation system was neither erected in a day, nor will it be dismantled in a day. While progress toward abolition may at times be incremental, abolitionist steps are about gaining ground in the constant effort to radically transform society and chipping away at oppressive institutions rather than helping them live longer.") (quoting Critical Resistance, *Abolitionist Steps*, *in* THE ABOLITIONIST TOOLKIT 48, 48 (2004), http://criticalresistance.org/wp-content/uploads/2012/06/Ab-Toolkit-Part-6.pdf [https://perma.cc/TGB6-KUTS]). Abolitionists often frame this practice as pursuing "non-reformist reforms," as opposed to reformist reforms. *Id.*; *see also* Roberts, *How I Became a Family Policing Abolitionist*, *supra* note 4, at 465 (citing Dan Berger, Mariame Kaba & David Stein, *What Abolitionists Do*, JACOBIN (June 24, 2017), https://www.jacobinmag.com/2017/08/prison-abolition-reform-mass-incarceration [https://perma.cc/C55S-5GEL]).

families—during the COVID-19 shutdown. This Part concludes, based on data from New York City's Administration for Children's Services ("ACS") and family courts, that the shrinking of the family regulation system had no adverse effect on the safety of children. Part II then describes the mutual aid groups that grew as the family regulation system shrank. Together with increased government cash aid, these mutual aid groups' work met families' vital needs through a model of collective action and self-determination, rather than policing and state violence.

Though unintentional, this brief experiment shows that the outsized and reactionary family regulation system that New York built up prior to the pandemic is not necessary to protect children. That system purported to address the problem of child maltreatment, but "child maltreatment" often means nothing more than child poverty.[10] Thus, it should not be surprising that the system's draconian tools of surveillance and separation were ill-fit to that problem. Indeed, the data from the shutdown period makes this clear: with less surveillance and fewer separations, children stayed just as safe, demonstrating that in "normal" times, we needlessly separate children from their families even when children would have been as safe at home. Instead of reverting to an oppressive system of family policing, we can address child poverty by insisting on a radically reduced and re-envisioned system that relies on principles of mutual aid rather than government-led oppression. Abolition need not be a fantasy; New York City already made it, for a moment, a reality.

II. PUTTING THE FAMILY REGULATION SYSTEM ON PAUSE

Through early 2020, New York City operated a vast family regulation system, surveilling and policing thousands of families annually. This system did not focus evenly on all of New York's families; rather, it focused on poor Black and Latinx families almost exclusively.

Over the last five years, one in five New York City children—but one in three Black and Latinx children—had contact with the system.[11] At every stage of the family regulation system, Black and Latinx children are overrepresented: while only sixty percent of the city's children are Black or Latinx, ninety percent of children named in investigations, ninety percent of children placed in foster care, and ninety percent of children in open preventive service cases are Black or Latinx.[12] While poverty drives reports of neglect generally, the system especially targets poor Black and Latinx families. Neighborhoods with the highest rates of child poverty had rates of investigation four times higher than neighborhoods with the lowest rates of child poverty, but even among neighborhoods with similar poverty rates,

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[10] *See infra* Part II.

[11] Lisa Sangoi, "*Whatever They Do, I'm Her Comfort, I'm Her Protector." How the Foster System Has Become Ground Zero for the U.S. Drug War*, MOVEMENT FOR FAM. POWER, https://drugpolicy.org/resource/MFPreport [https://perma.cc/ZJK5-LR2C].

[12] *Hearing Before the Comm. on the General Welfare*, N.Y. City Council 9 (Oct. 31, 2019) (written testimony of David Hansell, Comm'r of the Admin. for Child. Servs.), https://legistar.council.nyc.gov/View.ashx?M=F&ID=7848724&GUID=1FCB59BF-3609-4090-8ADC-17FA992BB742 [https://perma.cc/ZAY5-YS86]; *see also infra* Part II.A.3, (describing preventive service model).

those with higher concentrations of Black and Latinx residents had higher rates of investigation.[13]

This disproportionality is neither a coincidence nor a recent phenomenon. The project of policing poor Black and Native families and immigrant families is older than the country itself. Black enslaved families were forcibly separated, in a pattern of state-sanctioned violence that tore apart families and pathologized and punished Black parents.[14] The government enacted the same sort of violence on Native families, removing Native children from their families to forcefully assimilate them.[15] In urban areas, white middle class reformers, aided explicitly and implicitly by the state, cast poor immigrant mothers as "degraded, immoral, and sexually promiscuous," and sought to take their children, too.[16] Even as the language of family regulation became more refined and its tactics more subtle, its underlying purpose of controlling and pathologizing marginalized families persisted. Indeed, it was only when Black children began receiving welfare benefits in large numbers that family regulation agencies "pivoted sharply from providing services to children in their homes to taking children from their parents," a pivot that marked the birth of the modern family regulation system.[17]

The very meaning of "child maltreatment" contributes to the overrepresentation of poor children in the family regulation system. In New York, fewer than fifteen percent of reports received allege physical or sexual abuse, whereas sixty-five percent allege "neglect," a category capturing everything from malnutrition to inadequate clothing or shelter, to lack of appropriate supervision.[18] Not only may conditions of poverty—a lack of material resources and a lack of access to childcare, healthcare, mental health services, and substance use treatment—be conflated with child neglect, but residential segregation along racial and class lines, together with poorer families' increased reliance on government services,

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[13] Angela Butel, *Data Brief: Child Welfare Investigations and New York City Neighborhoods*, THE NEW SCH. CTR. FOR N.Y.C. AFFS. (2019), http://www.centernyc.org/data-brief-child-welfare-investigations [https://perma.cc/93UN-DY9R] (comparing investigations among New York City's 59 community districts).

[14] DOROTHY E. ROBERTS, SHATTERED BONDS 233–236, 248–250 (2003) [hereinafter ROBERTS, SHATTERED BONDS]; *see also* Miriam Mack, *The White Supremacy Hydra*, *supra* note 9 at 781 (citing Peggy C. Davis & Richard G. Dudley, Jr., *The Black Family in Modern Slavery*, 4 HARV. BLACKLETTER J. 9 (1987)).

[15] Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 538 (2021).

[16] Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 55, 57 (2016) (describing the role of reformers in the regulation of immigrant families and noting that reformers served as "virtually a judge's private advisor" and "judges usually accepted the [private] agency's advice").

[17] Roberts, *How I Became A Family Policing Abolitionist*, *supra* note 4, at 464.

[18] *Compare* N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: JULY 2020, at 29 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flash Reports/2020/07.pdf [https://perma.cc/M4GV-LS3H] [hereinafter JULY 2020 FLASH REPORT], *with* N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: JULY 2019, at 27 (2019) [hereinafter JULY 2019 FLASH REPORT].

places marginalized families under heavier surveillance by mandated reporters.[19]

The family regulation system, then, has long played a key role in maintaining racial and class hierarchies by policing poor Black, Native, and immigrant families.[20] This project has long been entrenched in New York, as the government, aided by an army of mandated reporters, investigated and punished poor Black and Latinx families for conditions of poverty, coerced families into ongoing services, and broke apart families.

In March 2020, this machinery met an obstacle it could not churn through: the emergence of COVID-19 in New York City. As city and state officials ordered shutdowns and limited every aspect of New Yorkers' lives, the family regulation system shrunk too: schools closed for in-person learning, caseworkers limited home visits, and family courts restricted the kinds of cases they would hear. This Part describes these key changes to the operations of the family regulation system during the "COVID-19 Pause" and the effect of those changes on the families and communities usually surveilled by ACS.

A. New Limits on the Family Regulation System

1. The Closure of Schools

On March 11, 2020, Mayor Bill De Blasio told New Yorkers, "If you're not sick, you should be going about your life."[21] Just four days later, on March 15, 2020, he announced the closure of New York City's public schools.[22] This closure, affecting 1.1 million schoolchildren, signaled a new phase in the city's COVID-19 response, presaging the broader New York State on Pause executive order that closed all non-essential businesses and banned all non-essential gatherings a week later.[23]

For the family regulation system, the closure of public schools meant the loss of its primary source of surveillance. In the period leading up to the Pause, school personnel were responsible for more than a quarter of all calls to the State Central Register ("SCR"), New York's child protection hotline.[24] This was not unique to New York: nationwide, education personnel make more child maltreatment allegations than any

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[19] *See generally* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 192–193 (2005) (citing DUNCAN LINDSEY, THE WELFARE OF CHILDREN 65–66 (1994)) (describing poverty as the number one predictor of reports of neglect); TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM (2016) (describing family regulation system as a punitive system that punishes parents for poverty and removes children from their parents' care, rather than providing parents the necessary financial support).

[20] *See generally* ROBERTS, SHATTERED BONDS, *supra* note 14.

[21] Serena Dai, *Mayor Says That Healthy People Should Still Be Dining Out*, EATER (Mar. 11, 2020), https://ny.eater.com/2020/3/11/21175497/coronavirus-nyc-restaurants-safe-dine-out [https://perma.cc/AM93-RAV3].

[22] Eliza Shapiro, *New York Schools to Close to Slow the Spread of Coronavirus*, N.Y. TIMES (Mar. 15, 2020), https://www.nytimes.com/2020/03/15/nyregion/nyc-schools-closed.html [https://perma.cc/HUL5-UT7V].

[23] *New York State on Pause: 10 Point Plan*, N.Y. STATE (Mar. 22, 2020), https://web.archive.org/web/20200401234802/https://coronavirus.health.ny.gov/new-york-state-pause.

[24] N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: MARCH 2020, at 28 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/03.pdf [https://perma.cc/3DM6-QCHV] [hereinafter MAR. 2020 FLASH REPORT].

other group, though decades of data show that these same reports are the least likely to be substantiated by an investigation.[25] Decades of research show, too, that reporters are more likely to suspect and report neglect or abuse of poor Black and Latinx children than of white higher-income children.[26] Often, rather than ensuring the safety of students, educators' reporting habits create distrust between parents and schools, and contribute to the regulation and penalization of the city's Black and Latinx families.[27] By moving schools to remote operations, the city began to close this spigot.

2. Guidance to Child Protective Specialists

Just as surveillance of children at school decreased, so, too, did surveillance of families in their homes. On March 15, 2020, the State Office of Children and Family Services ("OCFS") issued a guidance to family regulation workers regarding safety measures for investigations (the "Investigation Guidance").[28] It encouraged caseworkers, "when appropriate, to remotely assess the safety and risk posed to a child," and to conduct a health screening of families before arriving at their homes.[29]

This marked a stark departure from usual investigatory protocol. ACS typically commences its investigations by going to a family's home unannounced for an initial visit where workers enter every room, open cabinets and refrigerators, question parents and children separately, and demand to perform "body checks" examining children's near-nude bodies.[30] These intrusive investigations can spiral quickly, especially because

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[25] DANA WEINER ET AL., CHAPIN HALL AT THE UNIV. OF CHICAGO, COVID-19 AND CHILD WELFARE: USING DATA TO UNDERSTAND TRENDS IN MALTREATMENT AND RESPONSE 2 (2020), https://www.chapinhall.org/wp-content/uploads/Covid-and-Child-Welfare-brief.pdf [https://perma.cc/TW5N-Q4GR]; Brianna Harvey, Josh Gupta-Kagan & Christopher Church, *Reimagining Schools' Role Outside the Family Regulation System*, 11 COLUM. J. RACE & LAW 575, 585 (2021) (describing schools as largest source of reports and noting that "[a]t every stage of the process, allegations from schools are *less* likely to protect children" than reports from other sources).

[26] Jessica Dixon Weaver, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM L. & POL'Y 109, 117 (2008); Jina Lee et al., *Implicit Bias in the Child Welfare, Education, and Mental Health Systems,* NAT'L CTR. FOR YOUTH LAW 3 (2015), https://youthlaw.org/wp-content/uploads/2015/07/Implicit-Bias-in-Child-Welfare-Education-and-Mental-Health-Systems-Literature-Review_061915.pdf [https://perma.cc/6CQ7-K8SR].

[27] Rebecca Klein & Caroline Preston, *When Schools Use Child Protective Services as a Weapon Against Parents*, HECHINGER REP. (Nov. 17, 2018), https://hechingerreport.org/when-schools-use-child-protective-services-as-a-weapon-against-parents/ [https://perma.cc/LPA3-KYLX]; *see also* Harvey, Gupta-Kagan & Church, *supra* note 25, at 14.

[28] Lisa Ghartey, Deputy Comm'r, N.Y. Off. of Child. & Fam. Servs. Div. of Child Welfare & Cmty. Servs., Novel Coronavirus of 2019 Disease (COVID-19) Guidance for Children Protective Services Staff (Mar. 15, 2020) [hereinafter OCFS Investigation Guidance for CPS Staff], https://ocfs.ny.gov/main/news/2020/COVID-2020Mar15-Guidance-for-CPS.pdf [https://perma.cc/K4C9-36QC].

[29] OCFS Guidance for CPS Staff, *supra* note 28.

[30] *A Parent's Guide to a Child Abuse Investigation*, N.Y.C. ADMIN. FOR CHILD. SERVS., https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page [https://perma.cc/VT3Q-LA7E]; THE CHILD WELFARE ORGANIZING PROJECT ET AL., THE SURVIVAL GUIDE TO THE NYC CHILD WELFARE SYSTEM: A WORKBOOK FOR PARENTS BY PARENTS 24 (2007), http://www.brooklynacslawyer.com/acssurvivalguide.pdf [https://perma.cc/HGH8-MLBY]; Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 131 (2019).

parents are rarely, if ever, informed that they have a right to counsel, and instead are encouraged to be "forthcoming," without receiving warning that their statements may be used against them.[31] Thus, an investigation into a child's lateness to school might, once a worker enters a home and interviews a parent, become an investigation into the family's "dirty home" or into the parent's marijuana use, if revealed to a worker who presented themself as a helper. The Investigation Guidance limited the sprawling and invasive nature of investigations, requiring that families receive advance notice and encouraging ACS workers to stay out of families' homes if possible.

3. Guidance to Contracted Agencies

Beyond the surveillance typically carried out by its own employees, ACS contracts with private agencies, which place and monitor children in foster homes and administer "preventive services."[32] As part of an investigation, ACS may refer a family to in-home preventive services—which might include ongoing home visits from a caseworker, accompanied by referrals for services like therapy or substance use treatment—and to limited material provisions, like diapers, furniture, and clothing for children.[33] ACS touts preventive services as voluntary.[34] But families often feel that they have no real choice; if parents do not accept the referral, ACS may file a case against them and even try to remove their children from their care.[35]

Preventive in-home services are cast as a more progressive alternative to foster care, allowing families to stay safely together while providing them needed assistance.[36] But preventive services are not a panacea, nor should they be treated as a gentler version of family regulation. They are unequally offered, with Black families least likely to

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[31] Burrell, *supra* note 30, at 144–145; Eileen Grench, *City, Union Push Back on Informing Parents of Rights in Child-Welfare Probes*, THE CITY (Oct. 19, 2021), https://www.thecity.nyc/2021/10/19/22735575/nyc-child-welfare-probes-parents-not-told-their-rights [https://perma.cc/GV2G-7KEW].

[32] *About ACS*, N.Y.C. ADMIN. FOR CHILD. SERVS., https://www1.nyc.gov/site/acs/about/about.page [https://perma.cc/57TJ-L9ZZ].

[33] *A Parent's Guide to a Child Abuse Investigation*, *supra* note 30; *Prevention Services*, N.Y.C. ADMIN. FOR CHILD. SERVS., https://www1.nyc.gov/site/acs/child-welfare/prevention-services.page [https://perma.cc/KF4C-YAG2].

[34] *A Parent's Guide to a Child Abuse Investigation*, *supra* note 30.

[35] *See, e.g.*, Kathryn Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), https://newrepublic.com/article/153062/crime-parenting-poor-new-york-city-child-welfare-agency-reform [https://perma.cc/9YLQ-264J] (quoting a social worker who describes preventive service model as, "supposedly voluntary, but there's a lot of undertone that, 'If you don't, we'll be watching'"); *see also* Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 671 (2012).

[36] *See, e.g.*, Jim Purcell, Opinion, *Prevention Services Can Help NYC Avoid a Feared Foster-Care Surge*, CITY LIMITS (June 10, 2020), https://citylimits.org/2020/06/10/opinion-prevention-services-can-help-nyc-avoid-a-feared-foster-care-surge/ [https://perma.cc/6ZXV-5R74]; Fernando Clara et al., Nat'l Implementation Rsch. Network & Casey Fam. Programs, *Implementing Evidence-Based Child Welfare: The New York City Experience*, CASEY FAM. PROGRAMS 10 (2017), https://caseyfamilypro-wpengine.netdna-ssl.com/media/evidence-based-child-welfare-nyc.pdf [https://perma.cc/XLQ9-R5V6].

receive a referral.[37] If they are offered at all, they serve as another means of surveillance, as preventive service caseworkers, who are mandated reporters, must see families approximately twice each month.[38] The threat of a new report hangs heavy, diminishing trust between families and caseworkers, and leading to family separations for concerns that likely never would have risen to the level of an SCR report.[39]

In spite of families' reservations, ACS's preventive program has ballooned over the last two decades. As of March 2020, there were 21,200 children and 9,100 families enrolled in preventive services.[40] But on March 20, 2020, OCFS issued a guidance (the "Preventive Guidance") urging the private agencies with which it contracts to reduce in-person contact.[41] It encouraged preventive agencies to carry out "casework contacts" remotely when possible and to pre-screen families for COVID-19 before any home visits.[42] Thus, OCFS reduced the surveillance of families engaged in "voluntary" services just as it reduced the surveillance of families by ACS staff during investigations.

4. Limitations on the Reach of Family Court

The family regulation system's surveillance and investigation apparatus feeds into the city's family court system. In order to obtain final orders removing children from their parents' care or requiring that parents participate in certain services, the government must file a petition in court and ultimately prove that a child was abused or neglected. The Constitution demands as much, as the integrity of the family unit is protected under the Due Process Clause of the Fourteenth Amendment, and the government may only impinge upon it after proving a parent's

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[37] CHILD. BUREAU, DEP'T OF HEALTH AND HUMAN SERVS., CHILDREN OF COLOR IN THE CHILD WELFARE SYSTEM: PERSPECTIVES FROM THE CHILD WELFARE COMMUNITY 7 (2003), https://www.childwelfare.gov/pubPDFs/children.pdf [https://perma.cc/H632-VWRL].

[38] N.Y. OFF. OF CHILD. & FAM. SERVS., PREVENTIVE SERVICES PRACTICE GUIDANCE MANUAL ch. 4, at 4-7 (2015), https://ocfs.ny.gov/main/publications/Preventive%20Services%20Guide%202015.pdf [https://perma.cc/GHR6-XKK2] [hereinafter OCFS PREVENTIVE SERVICES GUIDANCE MANUAL] ("Caseworkers are mandated reporters under state law, and may be prosecuted or fined if they fail to report."); *id*. app. C-1 (requiring minimum of twelve casework contacts every six months).

[39] OCFS PREVENTIVE SERVICES GUIDANCE MANUAL, *supra* note 38, ch. 6, at 6-6 (instructing caseworkers to pay special attention to matters like the family's "hygiene and cleanliness" and the family's level of enthusiasm for preventive services); *see also* Joyce, *supra* note 35 ("ACS's successes have been tempered by the fact that, because many poor parents view ACS as inherently dangerous, they routinely walk away from the programs that are designed to support them, rather than invite child welfare into their lives."); Interview with Attorney A, Parent Defense Attorney, N.Y.C. Public Defender Office (July 15, 2020) (on file with author) [hereinafter Interview with Parent Att'y A] (recounting case in which caseworker reported a family because a young child had a "patch of dirt" on her skin, there was "very little food" in the home, and the mother regularly contacted the preventive service agency requesting assistance buying food),

[40] N.Y.C. ADMIN. FOR CHILD. SERVS., QUARTERLY REPORT ON PREVENTION SERVICES UTILIZATION, JANUARY–MARCH 2020 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/2020/ll11preventionservicesq12020.pdf [https://perma.cc/22VK-E9S9].

[41] Lisa Ghartey Ogundimu, Deputy Commir's, N.Y. Off. of Child. & Fam. Servs. Div. of Child Welfare & Cmty. Servs., Novel Coronavirus of 2019 Disease (COVID-19) Guidance for Foster Care and Preventive Staff (Mar. 20, 2020), https://ocfs.ny.gov/main/news/2020/COVID-2020Mar20-Guidance-for-Foster-Care-and-Preventive-Staff.pdf [https://perma.cc/N9CU-F793] [hereinafter OCFS Guidance for Preventive Staff].

[42] OCFS Guidance for Preventive Staff, *supra* note 41, at 3–4.

unfitness.[43] In theory, then, parents' participation in services and cooperation with agency supervision prior to the entry of a finding of neglect or abuse is strictly voluntary. But in reality, parents often have no choice but to accede to "service plans" before a finding is made against them, as ACS may ask a judge to condition a child's release home to their parents on the parents' "cooperation" with services and ongoing home supervision.[44] If a parent does not agree to these orders, ACS may instead seek orders removing a child from their home.[45]

On March 23, 2020, Hon. Jeanette Ruiz, the Administrative Judge of the New York City Family Court, issued the New York City Family Court Coronavirus Plan, effective March 26, 2020 (the "Court Plan").[46] Under that directive, the family courts in the city's five boroughs shifted to virtual operations and limited the types of cases they would hear.[47] On existing cases, all non-emergency matters—including trials, status conferences, and pending visitation applications—were adjourned.[48] As for new cases, courts accepted only those involving applications for remands,[49] the telling term carried over from the carceral state to refer to the city's applications to remove children from their parents' care.

For those families already deeply embroiled in the family regulation system, this order had tragic and traumatic consequences. Parents awaiting trial were left in legal limbo and parents seeking to expand their visitation with their children in foster care had to prevail upon the discretion of ACS and foster care agencies, without the ability to challenge those agencies' decisions in court.[50] Beyond this immediate

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[43] Stanley v. Illinois, 405 U.S. 645 (1972) (holding that the Due Process Clause constitutionally requires the state to accord parents with a hearing on their fitness and to provide unfitness in fact, before separating children); *see also* N.Y. FAM. CT. ACT §§ 1011; 1012; 1027.

[44] *See* Amy Sinden, *"Why Won't Mom Cooperate?": A Critique of Informality in Child Welfare Proceedings,* 11 YALE J. L. & FEMINISM 339, 354–55 (1999) [hereinafter Sinden, "*Why Won't Mom Cooperate?*"] (situating the pressure on mothers to "cooperate" within the "social work discourse" that is often used to frame the family regulation system); *see also* N.Y. FAM. CT. ACT § 1015-a (empowering family courts to order services); *id.* §§ 1027, 1028 (directing family court judges to consider whether the provision of services to a child or child's family could prevent or eliminate the need to remove the child from the home).

[45] *See* Sinden, *Why Won't Mom Cooperate?*", *supra* note 44, at 345–50 (describing various situations involving children being removed from their homes).

[46] Hon. Jeanette Ruiz, Administrative Judge, N.Y.C. Fam. Ct., Updated Family Court Coronavirus Plan (Mar. 23, 2020) [hereinafter Mar. 23, 2020 Family Court Coronavirus Plan].

[47] *Id.* at 2.

[48] *Id.* at 1. Courts continued to hear emergency orders to show cause in these cases; these "emergencies" typically involved requests to change the placement of a child. Interview with Attorney B, Parent Defense Attorney, N.Y.C. Public Defender Office (May 4, 2020) (on file with author) [hereinafter Interview with Parent Att'y B]; Interview with Attorney C, Parent Defense Attorney, N.Y.C. Public Defender Office (May 27, 2020) (on file with author) [hereinafter Interview with Parent Att'y C].

[49] Mar. 23, 2020 Family Court Coronavirus Plan, *supra* note 46., at 1

[50] Ese Olumhense, *Parents Seeking Return of Children Must Forge Connections on Screens*, THE CITY (May 21, 2020), https://www.thecity.nyc/government/2020/5/21/21270820/parents-seeking-return-of-children-first-must-forge-connections-on-screens [https://perma.cc/8VL6-VYKK].

trauma, the Pause imperiled parents' ability to meet statutory timelines to maintain their parental rights to their children.[51]

But for hundreds of other parents, the Court Plan effectively prevented ACS from hauling them into court at all, as it limited ACS's ability to file new cases to only those that sought to separate children from their parents.[52] In 2019, sixty-six percent of the 12,300 children named in proceedings in the city's family courts were released under court-ordered supervision on the date of filing.[53] While some court-ordered supervision cases resulted from judges' denials of ACS's applications to separate families, far more reflected ACS's own initial applications for court-ordered supervision[54]—applications that at times reflected concerns for children's safety but at times arose instead out of frustration with parents' lack of "cooperation."[55]

Under the March 23, 2020 directive, no matter how frustrated a caseworker might be, ACS could not bring parents to court unless it was prepared to show that their children would be at imminent risk of physical or emotional harm if the children stayed home. As discussed in Part I.B, with this heightened barrier to filing, the number of families brought to court dropped precipitously, and so too did the court-ordered separation and surveillance of families.

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[51] *See, e.g.*, Julia Lurie, *"Mommy, How Come I Only See You on the Phone?"*, MOTHER JONES (Mar. 22, 2021), motherjones.com/crime-justice/2021/03/mommy-how-come-i-only-see-you-on-the-phone/ [https://perma.cc/G879-ULAZ] (describing families' prolonged separations and limited visits, as well as concerns from officials at the Children's Bureau of the U.S. Department of Health and Human Services that the clock toward termination of parental rights has "kept ticking in some places")

[52] Mar. 23, 2020 Family Court Coronavirus Plan, *supra* note 46, at 1.

[53] N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: JANUARY 2020, at 9 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/01.pdf [https://perma.cc/FP3D-KWMS].

[54] Because ACS does not release data reflecting how often parents challenged their children's removal, it is difficult to discern the number of cases in which ACS initially sought court-ordered supervision, as opposed to the number of cases where ACS initially sought, and was denied, an order for a child's removal, thus converting the case into a court-ordered supervision case. N.Y.C Admin. for Child. Servs., Response to Author's Freedom of Information Law Request (Aug. 6, 2020) (on file with author) (request made under the Freedom of Information Law, N.Y.PUB. OFF. LAW § 84 et seq.). However, in those cases where ACS conducted emergency removals, then filed for approval in court *ex post facto*, twenty to twenty-five percent of children were immediately returned home by judges, thus converting those cases into court-ordered supervision cases. Michael Fitzgerald, *New York City Council Confronts Child Welfare Agency Over Parent-Child Separations*, IMPRINT (Nov. 29, 2018), https://imprintnews.org/news-2/new-york-city-levin-lancman-hansell/32921 [https://perma.cc/KY4V-RP4Y]. Emergency removals should reflect the direst of circumstances—those cases where ACS assessed a child to be in such immediate danger that ACS could not seek a court order prior to removal—and thus should reflect, among the cases ACS files in court, the strongest cases for removal. We may assume conservatively, then, that judges approve ex ante in-court applications for removal at the same rate they approve ex post applications to approve an out-of-court emergency removal: that is, in seventy-five to eighty percent of cases. Under that assumption, in 2019, ACS sought court-ordered supervision in about sixty percent of cases.

[55] *See* Burrell, *supra* note 30, at 144 ("In many cases, the caseworker may mark the case as indicated but not pursue formal charges in court if the parents are cooperative with services."); *see also* Sinden, "*Why Won't Mom Cooperate?*", *supra* note 44, at 345.

B. Effect of March Directives

The combined effect of these directives—school closures, decreased in-home surveillance, and limits on court operations—was immediate and dramatic. The numbers of reports, investigations, and new family court petitions plummeted. At the same time, on the cases they did hear, family court judges evinced an increased reluctance to separate families amid an unprecedented crisis. Though media outlets predicted increases in child abuse, with children "trapped" at home with parents under increased stress and away from the watchful eyes of mandated reporters, ACS's own data show that there was a drop in child abuse in the initial COVID-19 shutdown and that rates of child neglect, at worst, remained unchanged.

1. Decrease in Reports and Investigations

Comparing the three full months following the implementation of the shutdown directives with the same period the prior year, the number of reports to the State Central Register regarding children in New York City fell by more than 40%, to 9,848 from 17,347.[56]

Reports from families and community members fell by 21% but reports from mandated reporters plummeted by 53%.[57] Before the shutdown, mandated reporters made two-thirds of all reports but that rate fell to just 55%.[58] As might be expected given the parameters of the shutdown, this drop-off was not distributed evenly among mandated reporter groups. While reports by school personnel fell by 83%, reports by medical providers and social service personnel dropped by around 40%, and reports by law enforcement fell by only 33%.[59] It should not be surprising that non-educators continued to make reports at relatively high rates; even with schools closed, poor families could not escape all surveillance, as they continued to live in heavily policed neighborhoods and to rely on social service programs that also monitor families.[60]

Despite a spate of articles arguing that parents, under increased financial and emotional stress, might abuse their children at higher rates,[61] the content of the reports received did not vary from the year prior.

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[56] JULY 2020 FLASH REPORT, *supra* note 18; N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: JUNE 2020, at 3 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/06.pdf [https://perma.cc/FE24-NCXP]; N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: MAY 2020, at 3 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/05.pdf [https://perma.cc/CE2U-DNDR]. These figures refer to reports received by the State Central Register and include reports that were screened out, i.e. reports that did not trigger an investigation. *Id*.

[57] JULY 2020 FLASH REPORT, *supra* note 18, at 28.

[58] *Id.*

[59] *Id.*

[60] Mulzer & Urs, *supra* note 16, at 28 Nor did teachers curb all of their reporting. As children moved to remote schooling, some teachers began to report children for failing to log on for class. *See* Eileen Grench, *Parents Expecting iPad Deliveries Got Knock on Door From Child Welfare Workers*, THE CITY (Apr. 22, 2020), https://www.thecity.nyc/education/2020/4/28/21247059/parents-expecting-ipad-deliveries-got-knock-on-door-from-child-welfare-workers [https://perma.cc/8TEF-B5NC].

[61] *See, e.g.*, Nina Agrawal, *The Coronavirus Could Cause a Child Abuse Epidemic*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/opinion/coronavirus-child-abuse.html [https://perma.cc/8FWM-HU8H]; Angela Uhfeil, *Calls to Colorado's Child Abuse*

In spring 2020, in the three months following the shutdown, only 13% of reports concerned physical, sexual, or psychological abuse, a dip from 15% in the same period in 2019. Meanwhile, reports coded as neglect, together with reports regarding maltreatment concerns such as parental substance use, school absences, and lack of medical attention, made up approximately 85% of reports in both years.[62]

Likewise, the shutdown did not change the rate at which reports were substantiated. In New York, a report is considered "substantiated" if, after investigation, ACS determines that it is supported by "some credible evidence."[63] This is a low burden, satisfied by any "evidence that is worthy and capable of being believed."[64] Illustrating the prevalence of overreporting, less than 40% of investigations uncovered evidence that met even this low standard: among reports that resulted in investigations, in spring 2019, the rate of substantiation hovered between 35% and 38%.[65] As the number of investigations shrunk, this rate remained steady, staying between 37% and 39% in spring 2020.[66] This steady rate of substantiation is particularly noteworthy precisely because it came at a time when fewer reports were received. Past studies have shown that when family regulation agencies receive fewer reports, their investigations for each report tend to be more thorough and more accurate, as workers are less bogged down with frivolous reports.[67] If anything, then, the rate of substantiation would be expected to *rise* as the number of reports dropped. Instead, it remained unchanged.

The decrease in reports and investigations brought with it a decrease in in-home preventive services. Compared with the same period in 2019, the number of referrals to preventive services fell by 27% and the number of new cases opened fell even more dramatically, by 45%.[68] Of all of the services administered by ACS, preventive services—which can provide childcare vouchers, access to food pantries, and clothing and diapers for children—might seem the most likely to swell during a recession. But preventive services are tightly linked to ACS's policing arm. In spring 2019, 80% of referrals to these so-called voluntary services

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Hotline Have Dropped—And That's Not a Good Thing, 5280 MAG. (May 18, 2020), https://www.5280.com/2020/05/calls-to-colorados-child-abuse-hotline-have-dropped-and-thats-not-a-good-thing/ [https://perma.cc/A29X-Z953].

[62] *Compare* JULY 2020 FLASH REPORT, *supra* note 18, at 29, *with* JULY 2019 FLASH REPORT, *supra* note 18, at 27.

[63] N.Y. SOC. SERV. LAW § 412(7). Effective January 1, 2022, this standard will be raised to a "fair preponderance of the evidence." *Id*.

[64] N.Y. COMP. CODES R. & REGS. tit. 18, § 432.1(g).

[65] N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: SEPTEMBER 2020, at 6 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/09.pdf [https://perma.cc/U8JV-C6HE] (comparing June 2019 and June 2020); N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: AUGUST 2020, at 6 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/08.pdf [https://perma.cc/3XZR-JT4T] (comparing May 2019 and May 2020); JULY 2020 FLASH REPORT, *supra* note 18, at 6 (comparing April 2019 and April 2020).

[66] JULY 2020 FLASH REPORT, *supra* note 18, at 6.

[67] *See, e.g.*, Mical Raz, *Unintended Consequences of Expanded Mandatory Reporting Laws*, 139 PEDIATRICS PERSPS. 1 (2017); Jane Spinak, *Child Welfare and COVID-19: An Unexpected Opportunity for Systemic Change*, *in* LAW IN THE TIME OF COVID-19 74 (Katherina Pistor ed., 2020).

[68] JULY 2020 FLASH REPORT, *supra* note 18, at 32–33.

stemmed from ACS investigations, while less than 4% stemmed from self-referrals.[69] Families, who have never been accustomed to turning to ACS for truly voluntary services (as the self-referral numbers indicate),[70] continued to find support elsewhere, as discussed in Part III.

2. Decrease in Family Separations

As the stream of reports and investigations slowed, so too did the number of new filings in family court and the number of families separated by the government. In the first three full months following the City's shutdown, the number of new neglect and abuse cases filed by ACS in court fell by more than fifty percent, to 1,482, from 3,205.[71] This decrease flowed from the decrease in investigations and from the Court Directive that limited ACS to filing new cases only where it sought to separate families.[72]

It is not surprising that ACS filed fewer cases overall. After all, the Court Directive forbade ACS from filing any cases where it sought only court-ordered supervision over intact families, a type of case that previously made up more than half of all filings.[73] More surprising is the equally dramatic drop in the number of children placed in foster care. Conceivably, the number of children placed in foster care could have stayed nearly steady, if ACS had ceased filing court-ordered supervision cases and continued to exercise its power to request removals in the same manner that it had pre-pandemic. Instead, compared with the same period the year prior, only half as many children were placed in foster care as a result of ACS's applications for a removal at the time of filing: 375 children in spring 2020, down from 700 in that period in 2019.[74]

This dramatic drop suggests that during the shutdown, two institutional actors—ACS itself and family court judges—began paying greater heed to New York's legal standard for removal of children from their parents. Under that standard, articulated by the New York Court of Appeals in *Nicholson v. Scoppetta*,[75] ACS must show that a child would be placed at imminent risk of physical or emotional harm if they stayed in their parents' care and that no orders short of removal could mitigate that harm.[76] Moreover, in recognition of the trauma that even a brief family separation exacts on any child, ACS must show that the risk associated

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[69] JULY 2020 FLASH REPORT, *supra* note 18, at 33.

[70] *See A Parent's Guide to a Child Abuse Investigation*, *supra* note 30 (discussing lack of parental trust in ACS).

[71] *Compare* JULY 2019 FLASH REPORT, *supra* note 18, at 8 (reporting new filings for April, May, and June 2020), *with* JULY 2020 FLASH REPORT, *supra* note 18, at 9 (reporting new filings for same months in 2019).

[72] *See* Mar. 23, 2020 Family Court Coronavirus Plan, *supra* note 46. Note that ACS classifies cases as "Court Ordered Supervision"; "Remand" (kinship or non-kinship foster placement); or "Other/Unspecified." *See, e.g.*, JULY 2019 FLASH REPORT, *supra* note 18, at 8. The "Court Ordered Supervision" category includes: 1) cases where children stay home with their parents under court-ordered ACS monitoring; 2) cases where children are released home to one parent under court-ordered ACS monitoring but the other parent is excluded from the home; and 3) cases where children are released to a non-parent friend or relative as an alternative to formal foster care.

[73] *See supra* notes 53–54 and accompanying text.

[74] *Compare* JULY 2019 FLASH REPORT, *supra* note 18, at 9, *with* JULY 2020 FLASH REPORT, *supra* note 18, at 9. This refers *only* to "remand" applications. *See supra* note 72.

[75] 820 N.E.2d 840 (N.Y. 2004).

[76] *Nicholson*, 820 N.E. 2d at 850–52.

with the child remaining in their parents' care outweighs the harm to them caused by a removal from their care.[77]

With the Court Directive forbidding the filing of monitoring-only cases, ACS should have filed only those cases that it determined met the *Nicholson* standard for removal. Indeed, the steep decrease in the number of children placed in foster care demonstrates that ACS did in fact request far fewer family separations during the shutdown.[78] In a time where families were under increasing pressure, ACS requested remands in approximately *half* as many cases.[79] This decrease outpaced the decrease in reports received,[80] showing that the drop in requests for remands cannot be attributed solely to a "pipeline problem" from a lack of reports. Instead, in addition to holding off on filing monitoring-only cases, ACS seems to have begun assessing rigorously the cases in which it might seek a removal and declining to file some cases where it typically would have sought a removal.[81] This gives credence to an argument long made by parents and their advocates: that in normal times, ACS does not limit itself to seeking removals only in cases that meet the *Nicholson* standard and that it instead seeks removals even where there is no imminent risk or where alternate services could be put in place, out of a sense of frustration with "uncooperative" parents or in an attempt to punish them.[82]

During the shutdown, even among the smaller set of cases where ACS did seek a removal in court, judges, too, appeared to apply *Nicholson*

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[77] *Id.*; *see also, e.g.*, William Wan, *What Separation from Parents Does to Children: 'The Effect is Catastrophic'*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html [https://perma.cc/YJW4-EW3U] (summarizing research showing that separations stunt the neurological development of young children); Vivek Sankaran, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care*, 19 U. PA. J. L. & SOC. CHANGE 207, 207–37 (2016) (reviewing studies showing that even short-term removals harm children emotionally, developmentally, and socially).

[78] The number of children placed in foster care serves as a proxy for the number of family separations requested by ACS, as family court judges grant the vast majority of ACS's applications for removal. *See supra* note 54 and accompanying text (concluding that courts approve seventy-five to eighty percent of removal applications).

[79] *Compare supra* note 56 and accompanying text (describing drop in reports) *with supra* note 71 and accompanying text (describing drop in foster care placements).

[80] *Compare supra* note 56 and accompanying text (describing drop in reports) *with supra* note 71 and accompanying text (describing drop in foster care placements).

[81] ACS's decision to exercise its discretion more judiciously in this arena is of a piece with its actions in other arenas during the shutdown. For instance, during the shutdown, ACS and foster care providers began to "proactively review[] the cases of 4,000 children and work[] with parents' and children's attorneys to determine if cases could move forward with increased and/or unsupervised visiting, pre-disposition release, trial discharge or final discharge" and "found these proactive reviews to be beneficial in expediting the reunification process." *The Child Welfare System During COVID-19: Oversight Hearing Before the Comm. on the General Welfare*, N.Y. City Council 14 (June 14, 2021) (written testimony of David Hansell, Comm'r of the Admin. for Child. Servs.), https://www1.nyc.gov/assets/acs/pdf/testimony/2021/ChildWelfareSystem.pdf [https://perma.cc/K47H-TG5X]. ACS had always had the power to conduct such "proactive" reviews and speed families' reunifications; it just had not exercised it.

[82] *See supra* note 55 and accompanying text; *see also* Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html [https://perma.cc/4TCA-ZJLS].

more rigorously, paying special attention to the harm of a removal. Whereas judges previously denied twenty to twenty-five percent of ACS requests to separate families, in the two weeks immediately following the transition to virtual court, judges denied approximately thirty percent.[83] In those cases where parents immediately challenged their children's removal, judges determined that children should remain with their families in slightly more than fifty percent of cases.[84]

Tasked with determining whether to separate families in the middle of an unprecedented global public health crisis, judges displayed more skepticism of ACS's applications. Public defenders who litigated hearings contesting removals during the initial shutdown reported that judges increasingly fixated on the harm of removal to the child, as the pandemic disrupted families' visits.[85] Whereas judges typically expect that children in foster care will have at least two visits each week with their parents, that expectation was suddenly disrupted.[86] A remand order might now mean that a child would not see their parents in person for months. Per observers in court, this uncertainty caused some judges, at least, to weigh the harm of removal more heavily in their analysis and thus grant fewer applications for removals. [87]

Judges' increased reluctance to separate families is especially striking considering the context of the applications they were hearing. With ACS itself appearing to exercise greater discretion and screening cases more rigorously before requesting separations, the cases that were in fact filed should have represented the direst situations—cases where ACS was confident that a court would agree that the children would be at risk at home, where services could not mitigate the risk, and where the harm of removal, even compounded by the lack of meaningful family visitation, did not outweigh the risk of the child staying home. It would follow that judges would grant a higher rate of applications in this context, given ACS's own intensified screening. But instead, judges disagreed with ACS with greater frequency, leaving more families together.

For more than a decade, ACS officials have pointed to the city's falling foster care population and insisted that they view the removal of children from their families as a "last resort," a path taken only when

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[83] *Compare* Abigail Kramer, *Child Welfare Limbo: Covid-19 Puts Family Reunifications On 'Indefinite' Hold*, THE NEW SCH. CTR. FOR N.Y.C. AFFS. (Mar. 30, 2020), http://www.centernyc.org/reports-briefs/2020/3/30/child-welfare-limbo-covid-19-puts-family-reunifications-on-indefinite-hold [https://perma.cc/B32L-HM4Q] (discussing outcomes of applications for removals in 2020), *with supra* note 54 and accompanying text (discussing same for 2019).

[84] Kramer, *supra* note 83; Fitzgerald, *supra* note 54.

[85] Olumhense, *supra* note 50; Interview with Parent Att'y B, *supra* note 48; Interview with Parent Att'y C, *supra* note 48. Even when judges did enter orders removing children from their parents' care, parent defense attorneys reported that judges were more inclined to grant liberal visitation to parents, allowing visits outside the offices of ACS or foster care agencies, in order to ensure visits could actually take place in this period. Interview with Attorney D, Parent Defense Attorney, N.Y.C. Public Defender Office (Feb. 24, 2021) (on file with author).

[86] Olumhense, *supra* note 50; Interview with Parent Att'y B, *supra* note 48; Interview with Parent Att'y C, *supra* note 48.

[87] Interview with Parent Att'y B, *supra* note 48; Interview with Parent Att'y C, *supra* note 48.

absolutely necessary to protect children from serious harm.[88] If this were the case, the extreme reduction in removals during the shutdown would mean that by placing only half as many children in foster care, ACS and family court judges left hundreds of New York City children to suffer grave harm at home with unsafe caregivers. But as Part I.C shows, the children who stayed home in this period remained safe with their families and within their communities. This precipitous drop in removals, and the absence of any negative consequences for child safety, suggests that in normal times, ACS needlessly requests—and courts needlessly approve—hundreds of foster care placements where families never needed that intervention after all.

C. Sustained Safety

The pandemic brought a torrent of sensationalist news articles, positing that children were at increased risk from their families during stay-at-home orders.[89] These articles, backed by horrifying anecdotes rather than data, were wrong. Through the initial Pause period, severe child abuse in New York City fell, and there was no compensatory increase in reports as the city began re-opening and as mandated reporters and caseworkers resumed their surveillance. Per ACS's own data, even as only half as many children were taken from their families, children stayed just as safe.

1. Fall in Child Abuse

Measured by reports of child fatalities and physical or sexual abuse, child abuse dropped during the shutdown. While such reports always make up a tiny sliver of child maltreatment concerns, they offer a valuable and much-cited measure.[90] All mandated reporters are affected by implicit biases, but child injuries and fatalities serve as a more objective measure than nebulous suspicions of neglect.[91] Further, concerns that rise to the level of injury or death to a child are more likely to result in medical

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[88] *See, e.g.*, *Racial Disparities in the Child Welfare System: Oversight Hearing Before the Comm. on the General Welfare*, N.Y. City Council 16 (Oct. 31, 2019) (written testimony of David Hansell, Comm'r of the Admin. for Child. Servs.), https://www1.nyc.gov/assets/acs/pdf/testimony/2020/GWCommitteeHearing.pdf [https://perma.cc/9VJF-8WBC] (describing foster care as a "necessary but last resort"); N.Y.C. ADMIN. FOR CHILD. SERVS., FOSTER CARE STRATEGIC BLUEPRINT: THREE-YEAR PROGRESS REPORT 7 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/2020/FosterCareBluePrintFY2020.pdf [https://perma.cc/M3EL-TBKH] (highlighting the drop in the number of children in foster care).

[89] *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/L4D3-36RS]; Candy Woodall, *As Hospitals See More Severe Child Abuse Injuries During Coronavirus, 'The Worst Is Yet To Come'*, USA TODAY (May 13, 2020), https://www.usatoday.com/story/news/nation/2020/05/13/hospitals-seeing-more-severe-child-abuse-injuries-during-coronavirus/3116395001/ [https://perma.cc/Y87U-8C4L].

[90] *Cf.* Martin Guggenheim, *The History and Influence of the National Association of Counsel for Children – An Alternate Perspective*, 39 CHILD. LEGAL RTS. J. 12, 14 (2020) (describing the emergence of "battered child syndrome"—findings by medical professionals that explained injuries to children as consequences of child abuse—as driving the creation of the modern family regulation system); Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L. J. 1, 55–60 (2001) (tracing same history).

[91] *See supra* notes 18–19 (discussing coding of poverty as neglect); *see also supra* note 26 (discussing bias among mandated reporters).

attention and less likely to evade the purview of a mandated reporter, even during a shutdown.[92]

In spring 2019, the SCR received nearly 5,000 reports of physical abuse, a category including "burn, fatality, fracture, choking, twisting, shaking, excessive corporal punishment, internal injuries, lacerations, bruises, welts, poisoning, noxious substances."[93] In that period, 70% of reports alleging any form of abuse were unfounded, i.e. not supported by any credible evidence.[94] In the same months of 2020, during the Pause, the SCR received approximately 2,000 reports of physical abuse, a decrease of 60%.[95] Just over 75% of reports alleging any form of abuse were unfounded.[96]

This dramatic decrease in reports may reflect that some incidents of physical injuries to children went unnoticed and unreported once children were confined to their homes. However, the number of investigations related to child fatalities—the type of tragedy least likely to avoid public review, irrespective of stay-at-home orders—also dropped by 25% between February 2019 and June 2019 and the same period in 2020.[97] Further, the commissioner of ACS reported that there had not been any significant changes in emergency room usage, one possible indicator of unreported incidents of child abuse.[98] More broadly, he testified that there had not been any indicators of "a larger bolus of undetected charges" of child abuse.[99]

Taken together, this data indicates that child abuse did not increase during the COVID-19 Pause. Fewer reports were received, and among the reports that were received, fewer were substantiated, even as workers had more time to devote to each individual investigation.

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[92] Reports by medical professionals and law enforcement—the mandatory reporters often best positioned to report physical abuse—fell by only 40%, compared to the 77% drop in educators' reports. JULY 2020 FLASH REPORT, *supra* note 18, at 28.

[93] JULY 2019 FLASH REPORT, *supra* note 18, at 27; JULY 2020 FLASH REPORT, *supra* note 18, at 29.

[94] N.Y.C. ADMIN. FOR CHILD. SERVS., CHILD WELFARE INDICATORS QUARTERLY REPORT 2ND QUARTER 2019 (APR–JUN 2019) 5–6 (2019), https://www1.nyc.gov/assets/acs/pdf/dataanalysis/2020/CWIndicatorsCityCouncilReportQ22019.pdf [https://perma.cc/5WT4-CJKY].

[95] JULY 2020 FLASH REPORT, *supra* note 18, at 29.

[96] N.Y.C. ADMIN. FOR CHILD. SERVS., CHILD WELFARE INDICATORS QUARTERLY REPORT 2ND QUARTER 2020 (APR–JUN 2020) 6–7 (2020), https://www1.nyc.gov/assets/acs/pdf/dataanalysis/2020/ChildWelfareIndicatorsReportQ2.pdf [https://perma.cc/4MVL-R5D7].

[97] N.Y.C Admin. for Child. Servs., Response to Author's Freedom of Information Law Request (Aug. 20, 2020) (on file with author) (reporting that from February 2019 to June 2019, there were sixty-three "[c]hildren with fatality SCR allegations (unique children)," including "children with roles in initial and subsequent investigation stages," compared to forty-seven children in the same period in 2020; these numbers reflect the total number of *reports* received regarding child fatalities and include fatalities later determined not to be the result of parental neglect or abuse).

[98] *The Child Welfare System During COVID-19: Oversight Hearing Before the Comm. on the General Welfare*, N.Y. City Council 51:00 (June 14, 2021) (testimony of David Hansell, Comm'r of the Admin. for Child. Servs.), https://legistar.council.nyc.gov/View.ashx?M=F&ID=9578156&GUID=AB24EBFD-8C7D-4A08-9186-923C749CD85B [https://perma.cc/B4LV-TLRY] [hereinafter Hansell Testimony].

[99] *Id.*

Measured by incidences of physical abuse, the shutdown coincided with decreased child maltreatment.

2. Absence of a Rebound Effect

In fall 2020, in a respite between waves of COVID-19, New York City crawled back toward normalcy: children began returning to schools, workers began returning to the field, and family court operations began normalizing.[100] While the number of reports and investigations began to rise again, there was not any rebound effect, i.e. any increase in reports or investigations to compensate for a sustained period of underreporting, by any of three measures.

First, even as mandated reporters returned to the field, the total number of reports remained lower than the previous year. In the final three months of 2020, the SCR received 17% fewer reports than it had received in the year prior.[101] By the time the city's schools completed their staged re-opening for in-person education on September 30, 2020, a quarter of the city's schoolchildren were attending class in person.[102] Following school re-openings, SCR reports did creep upward but at a rate in line with the typical increase in a non-pandemic fall, rather than a more dramatic leap.[103] Far from showing a rebound effect from schools calling in a backlog of reports, school personnel still made 35% fewer reports than they had during the same period the previous year.[104]

Second, the types of concerns reported did not shift from the year prior. In both 2019 and 2020, approximately 75% of reports received in the

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[100] N.Y.C. Fam. Ct., COVID-19 Phase 4 Operations Summary (July 31, 2020) (on file with author); Eliza Shapiro & Mihir Zaveri, *New York City Becomes First Big City in U.S. to Reopen All Its Schools*, N.Y. TIMES (Nov. 18, 2020), https://www.nytimes.com/2020/10/01/nyregion/nyc-coronavirus-schools-reopen.html [https://perma.cc/8QXD-KQUR].

[101] N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: JANUARY 2021, at 28 (2021), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2021/01.pdf [https://perma.cc/4U9C-M6UQ].

[102] Eliza Shapiro, *Only 26% of N.Y.C. Students Attend In-Person Classes, Far From Goal*, N.Y. TIMES (Oct. 26, 2020), https://www.nytimes.com/2020/10/26/nyregion/nyc-schools-attendance.html [https://perma.cc/Q3RN-69M4].

[103] *Compare* a 20% increase in reports between September 2020 and December 2020, N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: OCTOBER 2020, at 3 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/10.pdf [https://perma.cc/FA3A-F4F3]; N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: DECEMBER 2020, at 3 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/12.pdf [https://perma.cc/MT82-YNLE] [hereinafter DEC. 2020 FLASH REPORT], *with* a 15% increase in reports between September 2019 and November 2019, N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: OCTOBER 2019, at 3 (2019), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2019/10.pdf [https://perma.cc/2ETE-F3SD]; N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: DECEMBER 2019, at 3 (2019), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2019/12.pdf [https://perma.cc/MB7V-KYAR], *and* a 27% increase in reports between September 2018 and December 2018. N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: OCTOBER 2018, at 3 (2018), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2018/10.pdf [https://perma.cc/MU4P-YQZJ]; N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: DECEMBER 2018, at 3 (2018), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2018/12.pdf [https://perma.cc/RW7M-VH9E].

[104] DEC. 2020 FLASH REPORT, *supra* note 103, at 28.

city solely relayed concerns of neglect.[105] While reflective of the ongoing issue of families being reported for poverty, this is consistent with prior patterns. The Pause did not, as doomsayers predicted, lead to an increase in physical abuse of children by overstressed parents.

Finally, the rate of substantiation of reports also remained steady through the fall. Through 2019 and 2020, the rate of substantiation hovered between 35% and 37%.[106] Had mandated reporters returned to their surveillance positions and reported an influx of valid concerns from a backlog that had previously gone unreported, the rate of substantiation would have been higher. But that was not the case. This is in line with prior findings. Every summer, when schools go on break, the number of reports to family regulation hotlines drops, but "teacher reports that do result in substantiation remain steady."[107] Put differently, the reports that teachers *do not* make over summer months but that they might make during the school year are unlikely to constitute child maltreatment even if investigated.[108]

Indeed, the commissioner of ACS cited the steady rate of substantiation as yet another sign that cases of child neglect or abuse had not gone underreported during the shutdown.[109] ACS's data from the fall reveals that children stayed as safe with less surveillance, less government intrusion, and less family separation. They stayed safe not because of the family regulation system's presence but, rather, in its absence. This can be attributed in part to the radical re-imagining of society that was taking place at the same time, described in Part II.

III. SUPPORTING FAMILIES WITHOUT REGULATING FAMILIES

Abolition requires that we look back and reckon with the racist history of systems like the family regulation system and that we acknowledge the ongoing purposes of such systems in the present. But by the same token, it demands that we look forward to imagine and build a more humane and democratic society, one no longer reliant on those systems to meet human needs and solve social problems.[110]

In the initial shutdown period, thousands of New Yorkers engaged in just such a transformative project. Even before the pandemic, the government failed to meet New Yorkers' material needs, and the sudden shuttering of schools, workplaces, and government offices only amplified

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[105] *Compare* N.Y.C. ADMIN. FOR CHILD. SERVS., CHILD WELFARE INDICATORS ANNUAL REPORT 2020, at 9 (2020), https://www1.nyc.gov/assets/acs/pdf/data-analysis/2020/CityCouncilReportCY2020.pdf [https://perma.cc/5AQM-2TGS], *with* N.Y.C. ADMIN. FOR CHILD. SERVS., CHILD WELFARE INDICATORS ANNUAL REPORT 2019, at 9 (2019), https://www1.nyc.gov/assets/acs/pdf/child_welfare/2020/CWIndicatorsAnnualCityCouncilReportCY2019.pdf [https://perma.cc/88WL-HY9H].

[106] MAR. 2020 FLASH REPORT, *supra*, note 24, at 6; N.Y.C. ADMIN. FOR CHILD. SERVS., FLASH MONTHLY INDICATOR REPORT: MARCH 2021, at 6 (2021), https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2021/03.pdf [https://perma.cc/S5LP-M74J].

[107] WEINER, *supra* note 25, at 2.

[108] *Id*.

[109] Hansell Testimony, *supra* note 98, at 51:00.

[110] *See* Roberts, *Abolition Constitutionalism*, *supra* note 3, at 7–8.

problems ranging from food insecurity, to housing instability, to lack of access to childcare and physical and mental health care.[111] Against this backdrop, mutual aid networks—built on models of solidarity, collective action, and transformative change, rather than charity, saviorism, and control—grew in every borough. Meanwhile, more New Yorkers received financial assistance from the government, with fewer strings attached, itself a re-envisioning of the role of government.

This Part describes the massive growth and work of mutual aid groups during the Pause, including the tensions raised by these projects, and then concludes by briefly describing the role of government entitlements.

A. Mobilization of Mutual Aid

Dean Spade, an organizer and legal scholar, describes mutual aid as "collective coordination to meet each other's needs," growing out of "an awareness that the systems we have in place are not going to meet them."[112] In fact, Spade writes, those very systems "have often created the crisis or are making things worse."[113] Mutual aid projects meet people's immediate survival needs. Beyond that, they build a shared understanding of the structural causes of deprivation and mobilize movements to dismantle the systems causing the harm.[114] These projects stand in stark contrast to charity and government social services, programs that position rich people in and out of government as morally superior to poor people and empower the former to judge the moral worth of charity recipients and attach conditions to aid accordingly.[115] Rather than aiming to root out the violence of the capitalist system, charity and social services legitimize that very system, providing political cover to elites while controlling and surveilling recipients and affording minimal assistance.[116]

When, in the face of the COVID-19 pandemic, existing charity and government systems failed to meet the basic needs of New Yorkers, mutual aid projects stepped into the breach, just as they have in the face of countless past disasters worldwide.[117]

During the shutdown, New Yorkers' needs swelled; by mid-April 2020, one in four New Yorkers was food insecure, and nearly forty percent of parents reported skipping or cutting meals for themselves to ensure they

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[111] Michael Karpman, Dulce Gonzalez & Genevieve M. Kenney, *Parents Are Struggling to Provide for Their Families during the Pandemic*, URBAN INST., https://www.urban.org/sites/default/files/publication/102254/parents-are-struggling-to-provide-for-their-families-during-the-pandemic_1.pdf [https://perma.cc/VPM4-4KLN].

[112] DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) 9, 12 (2020).

[113] *Id*.

[114] *Id*. at 9, 13.

[115] *Id*. at 22.

[116] *Id*. at 24.

[117] *See, e.g.*, Lucas Blaise Burdick, *After the Flood: Lessons from Occupy Sandy*, WORLD AT 1°C (Sept. 13, 2017), https://worldat1c.org/after-the-flood-lessons-from-occupy-sandy-904c81a21c2f [https://perma.cc/TKU2-YRCY]; Isa Rodríguez Soto, *Mutual Aid and Survival as Resistance in Puerto Rico*, 52 NACLA REP. AMERICAS 303 (2020); SPADE, *supra* note 113, at 3–5 (describing mutual aid projects efforts in Hong Kong).

had food for their children.[118] Parents could not work, not only because their workplaces were closed but because in the absence of schools, they lacked childcare.[119] As stressors piled up, families were even less likely to have access to mental health services.[120] The family regulation system, like so many arms of the government, failed to meet New Yorkers' needs. Indeed, though preventive services had been touted as a way to help poor families in need of support, the pandemic laid bare the entrenchment of these services within the larger model of family policing. As the number of reports and investigations plummeted, so too did the provision of preventive services, even as families' needs for material support grew.[121]

With the government failing them, New Yorkers themselves undertook the project of ensuring that all community members' needs were met. By the end of July, there were nearly sixty mutual aid networks operating throughout the city.[122] Some of these groups organized through social media after the city shut down.[123] But others grew out of pre-existing projects; for instance, a group in Brooklyn's Flatbush neighborhood that previously fought for police accountability and against gentrification turned its attention to food distribution.[124] Regardless of their histories, projects espoused principles of solidarity, collective care, accountability, and racial justice.[125]

Mutual aid projects mobilized to provide an extraordinary array of services to community members who requested aid. Nearly every group organized grocery deliveries and provision of essential items like diapers, but some focused on more specialized services, like childcare for workers or mental health care and support groups.[126] Rather than recreating the

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[118] Sharon Lerner, *"We Need Protein"—Coronavirus Pandemic Deepens New York's Hunger Crisis*, INTERCEPT (June 16, 2020), https://theintercept.com/2020/06/16/coronavirus-hunger-crisis-nyc/ [https://perma.cc/P46Z-8TWZ].

[119] *See, e.g.*, Eliza Shapiro & Patrick McGeehan, *Big New Obstacle for Economic Recovery: Child Care Crisis*, N.Y. TIMES (July 10, 2020), https://www.nytimes.com/2020/07/10/nyregion/nyc-school-daycare-reopening.html [https://perma.cc/NKM5-ZJ9C].

[120] Azza Altiraifi & Nicole Rapfogel, *Mental Health Care was Severely Inequitable, Then Came the Coronavirus Crisis*, CTR. AM. PROGRESS (Sept. 10, 2020), https://www.americanprogress.org/article/mental-health-care-severely-inequitable-came-coronavirus-crisis/ [https://perma.cc/N895-AXM7].

[121] *See supra* Part I.B.

[122] Elizabeth Lawrence, *'Love and Solidarity': Amid Coronavirus, Mutual Aid Groups Resurge in New York City*, NPR (July 26, 2020), https://www.npr.org/sections/health-shots/2020/07/26/895115149/love-and-solidarity-amid-coronavirus-mutual-aid-groups-resurge-in-new-york-city [https://perma.cc/5RTC-D4C2].

[123] *See, e.g.*, *Overview*, BED-STUY STRONG'S MUTUAL AID COMMUNITY FUND, https://ioby.org/project/bed-stuy-strong%E2%80%99s-mutual-aid-community-fund [https://perma.cc/JQ64-FWQ7] (describing group's mid-March founding through Slack, a messaging program).

[124] *#BrooklynShowsLove Mutual Aid Project*, EQUALITY FOR FLATBUSH, https://web.archive.org/web/20211125183319/http://www.equalityforflatbush.org/%20brooklyn-shows-love-mutual-aid-project/ [https://perma.cc/C892-Z7SZ].

[125] *See, e.g.*, *id.*; *Mission and Guiding Principles*, CROWN HEIGHTS MUTUAL AID, https://crownheightsmutualaid.com/mission-and-guiding-principles/ [https://perma.cc/W3FL-TJGT]; Lakshmi Gandi, *South Asian American Activism Must Go Beyond Viral Stories, Advocates Say*, NBC NEWS (June 12, 2020), https://www.nbcnews.com/news/asian-america/south-asian-american-activism-must-go-beyond-viral-stories-advocates-n1230596 [https://perma.cc/PSJ2-YCYJ] (quoting founder of Bronx Mutual Aid Network).

[126] WORKERS NEED CHILDCARE, https://web.archive.org/web/20200524070452/https://www.workersneedchildcare.org/; *About the Network*, NYC COVID CARE NETWORK,

exacting intake procedures required by charities and government social services, groups kept their barriers for entry low, requiring only that community members complete online request forms or call intake lines, and removing eligibility requirements that judged moral worthiness.[127]

While mutual aid was by no means a novel concept in the city, the rapid expansion of mutual aid projects was breathtaking. Bed Stuy Strong, for instance, began in Brooklyn in March 2020, and had built a network of 2,700 volunteers by the end of its first month. [128] In neighboring Crown Heights, Crown Heights Mutual Aid made 1,300 grocery deliveries between March 2020 and May 2020 alone.[129] Across the city, mutual aid groups pooled and redistributed hundreds of thousands of dollars through the work of thousands of volunteers.[130]

This rapid growth brought with it some stumbles, particularly for newly formed groups. While groups like #BrooklynShowLove in Flatbush built on decades of community organizing, newer groups—many populated by the same white, affluent people who are displacing poorer Black and brown New Yorkers from their homes through gentrification—at times displayed the same attitudes of saviorism and the same hierarchical, exclusionary decision-making that plague charity and government services.[131] For instance, controversy erupted in the Crown Heights Mutual Aid group, when it unveiled a community fridge at an apartment building on the very day that building tenants were memorializing a neighbor who had recently been gunned down.[132] Residents had not been consulted about the placement of the fridge. And they were not comforted by organizers' assurances that the building's landlord approved of the fridge because residents had been engaged in a years-long dispute with that same landlord over deplorable housing conditions.[133] This tension reflected a common reality: mutual aid projects can easily "slip into some of the well-worn grooves" of the charity model if organizers do not deeply examine their principles.[134]

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https://nyccovidcare.org/about [https://perma.cc/GY6X-H8B2]; Rachel Holliday Smith & Claudia Irizarry Aponte, *Evolving in COVID Crisis, NYC Mutual Aid Groups Head Into 2021 With Tablets, Toys — and Diapers*, THE CITY (Jan. 4, 2021), https://www.thecity.nyc/life/2021/1/4/22202979/nyc-mutual-aid-groups-covid-head-into-2021-with-expanded-mission [https://perma.cc/D4DW-N2AD].

[127] *See, e.g.*, *Request a Delivery,* INVISIBLE HANDS, https://invisiblehandsdeliver.org/request [https://perma.cc/DJ7M-PXZY].

[128] Jessica McKenzie, *Bed-Stuy Strong: Scaling Mutual Aid During COVID-19*, CIVIC HALL (Apr. 16, 2020), https://web.archive.org/web/20210710190031/https://civichall.org/civicist/bed-stuy-strong-mutual-aid/.

[129] *CMHA Updates: May 21, 2020*, CROWN HEIGHTS MUTUAL AID, https://us18.campaign-archive.com/?u=4fe6ce4b9bcc1bbfbe2904356&id=551556dda7 [https://perma.cc/75J5-42XM].

[130] *See, e.g.*, Smith & Aponte, *supra* note 126; *Bed-Stuy Strong's Mutual Aid Community Fund*, IOBY, https://ioby.org/project/bed-stuy-strong%E2%80%99s-mutual-aid-community-fund [https://perma.cc/D4KC-PVLC].

[131] SPADE, *supra* note 112, at 45.

[132] Crown Heights Mutual Aid, FACEBOOK (May 12, 2020) (relevant posts on file with author).

[133] *Id*.

[134] SPADE, *supra* note 112, at 45.

These missteps should not be ignored. But nor should they distract from the radical project under way. Mutual aid networks undertook the project of creating a more democratic and humane society. They rejected the dominant model, under which families must "earn" support by proving their worthiness and face the loss of their children if they do not adhere to outsiders' visions of what they "should" be doing. Instead, under the mutual aid model, community members mobilized to provide support for families—food, diapers, mental health services, and childcare—premised on the basic understanding that all humans deserve support.

B. Government Support Without Government Control

Together with the increase in mutual aid came a rare influx of government aid with few strings attached. The CARES Act, passed in early April 2020, provided a one-time stimulus payment of $1,200 per adult for individuals earning less than $75,000 annually, with an additional $500 payment for each child under the age of seventeen, and an extra $600 per week in unemployment benefits, through the end of July 2020.[135] Together, these measures were projected to transfer $500 billion from the government to the people in 2020, more than the total amount of all income transfers outside retirement programs in 2019.[136]

In some ways, the CARES Act precisely exemplified the aid model against which mutual aid stands. It established a hierarchy of deservingness, excluding undocumented immigrants and their family members; it required that anyone who had not filed taxes the previous year jump through additional hoops to claim their stimulus checks; and it served to prop up the legitimacy and stability of the capitalist system, by providing minimal payments designed to "stimulate" the economy rather than enacting broader, longer-lasting changes that would have allowed people to meet their needs on an ongoing basis and stay safe for the duration of the pandemic.[137]

But in other ways, these new entitlements showed the possibility of a world in which the government acts to meet people's survival needs without requiring that recipients prove their worthiness, complete programs or undergo drug tests, endure stigmatization, or use funds only on limited, approved expenses. Empowered to spend their funds as they saw fit, people receiving stimulus funds increased their spending on food,

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[135] Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No. 116–136, 134 Stat. 281 (2020).

[136] Zachary Parolin, Megan A. Curran & Christopher Wimer, *The CARES Act and Poverty in the COVID-19 Crisis*, CTR. ON POVERTY & SOCIAL POL'Y (June 21, 2020), https://static1.squarespace.com/static/5743308460b5e922a25a6dc7/t/5eefa3463153d0544b7f08b4/1592763209062/Forecasting-Poverty-Estimates-COVID19-CARES-Act-CPSP-2020.pdf [https://perma.cc/7H79-BMV6].

[137] *See, e.g.*, Cyierra Roldan, *1.2 Million New Yorkers Excluded from the CARES Act*, FISCAL POLICY INST. (May 19, 2020), https://fiscalpolicy.org/1-2-million-new-yorkers-excluded-from-the-cares-act [https://perma.cc/5ZWP-S3BT]; Stephen Roll & Michal Grinstein-Weiss, *Did CARES Act Benefits Reach Vulnerable Americans? Evidence From a National Survey*, BROOKINGS INST. (Aug. 25, 2020), https://www.brookings.edu/research/did-cares-act-benefits-reach-vulnerable-americans-evidence-from-a-national-survey/ [https://perma.cc/MRT8-32CJ] (finding that Black and Hispanic households, part-time workers, those without bank accounts, and those with very low income were more likely to experience delays in receiving stimulus payments).

household items, and bill payments, including rent—that is, survival needs.[138] With the first stimulus payment, 87% of adults in households with incomes of $25,000 or less reported that they used their stimulus funds to meet their expenses.[139] Among adults who spent their stimulus payments, 80% used at least a portion on food, 78% used it on rent, mortgage, and/or utilities, and 58% spent it on household supplies and personal care products.[140] Meanwhile, a much smaller share, 8%, reported spending on TVs, electronics, furniture, appliances, or recreational items.[141]

This usage defies the decades-long narrative that elites need to direct the spending of poor people, to protect them, and society, from irresponsible, frivolous spending. As people began receiving checks, mutual aid projects mobilized, encouraging those who could afford it to turn their stimulus checks over to more vulnerable community members, and thousands answered the call.[142] Meanwhile, the higher unemployment payments did not discourage people from re-entering the labor market and instead allowed workers to find jobs that suited their expertise and skills.[143] Overall, rates of poverty fell in the three months following the passage of the CARES Act.[144]

Like the deconstruction of the family regulation system, this large-scale government entitlement program proved temporary and inadequate.[145] But it also proved the possibility of a version of government

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[138] Scott R. Baker et al., *Here's How Americans Are Spending Their Stimulus Checks,* KELLOGG INSIGHT (May 5, 2020) https://insight.kellogg.northwestern.edu/article/stimulus-checks-spending-data-2020-coronavirus-covid [https://perma.cc/542T-8V9X].

[139] Daniel Perez Lopez & Charles Adam Bee, *How Are Americans Using Their Stimulus Payments?*, U.S. CENSUS BUREAU (June 24, 2020), https://www.census.gov/library/stories/2020/06/how-are-americans-using-their-stimulus-payments.html [https://perma.cc/APF7-L8UF].

[140] *Id*.

[141] *Id*.

[142] Christine Chung, *Community Groups Ask New Yorkers to Pledge Fed Stimulus Checks to Vulnerable*, THE CITY (Apr. 14, 2020), https://www.thecity.nyc/economy/2020/4/14/21247102/community-groups-ask-new-yorkers-to-pledge-fed-stimulus-checks-to-vulnerable [https://perma.cc/48RS-DGBX]; *see also #sharemycheck*, RESOURCE GENERATION, https://web.archive.org/web/20210118014427/https://www.sharemycheck.org/#page.

[143] *See generally* Lucas Finamor & Dana Scott, *Labor Market Trends and Unemployment Insurance Generosity During the Pandemic*, 199 ECON. LETTERS 5 (2021).

[144] Jeehoon Han, Bruce D. Meyer & James X. Sullivan, *Income and Poverty in the COVID-19 Pandemic* 10–11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27729, 2020), https://www.nber.org/system/files/working_papers/w27729/w27729.pdf [https://perma.cc/YGH7-DRTQ].

[145] By September 2021, increased federal unemployment benefits had expired, as had the national moratorium on evictions. Matthew Haag & Nicole Hong, *800,000 New Yorkers Just Lost Federal Unemployment Benefits*, N.Y. TIMES (Sept. 7, 2021), https://www.nytimes.com/2021/09/07/nyregion/nyc-federal-unemployment-benefits.html [https://perma.cc/5Q49-AASF]; Rachel Siegal, *Eviction Moratorium Expires as Renters Face Rising Covid Cases and Lack of Aid*, WASH. POST (July 31, 2021), https://www.washingtonpost.com/business/2021/07/31/eviction-moratorium-expire-cdc/ [https://perma.cc/T8FQ-BTTK]. Further, half a year had elapsed since the government began issuing the last round of stimulus payments. *Third Economic Impact Payment*, IRS, https://www.irs.gov/coronavirus/third-economic-impact-payment [https://perma.cc/X2VY-9RZS]. Even as these benefits expired, the pandemic raged on; indeed, the expiration of these benefits coincided with the surge of the Delta variant of COVID. Apoorva Mandavilli, Benjamin Mueller & Shalini Venugopal Bhagat, *When Will the Delta Surge End?*, N.Y. TIMES (Oct. 1, 2021),

too often dismissed as fantasy. Society is accustomed, Spade writes, to a binary choice between a government that "denies the disaster's significance and abandons people to its devastation," or a government that "responds with inadequate aid that comes with enhanced policing, surveillance, militarization, and wealth transfers to the top."[146] So inured are we to this binary that it can feel impossible to imagine any choices beyond it.[147] But during the shutdown, as woefully inadequate systems that provide aid at the cost of human dignity receded, New Yorkers envisioned and enacted a radical new society, in which government funds represented freedom rather than further oppression and community members collectively coordinated to meet their own survival needs and to mobilize for change.

IV. CONCLUSION

As the COVID-19 pandemic has stretched on, it can feel impossible to find signs of hope within it. It has killed, as of this writing, nearly 800,000 Americans, with Black, Native, and Latinx communities disproportionately bearing the brunt of those tragic and needless deaths even as they are disproportionately called to the frontlines as "essential workers." It has spurred the largest economic crisis since the Great Depression, leaving millions of families without sufficient food and on the brink of homelessness; and it has kept thousands of children nationwide from seeing their parents as they wait out the pandemic in foster care. Were that not enough, police have continued to murder Black Americans with impunity, those protesting murders by police have themselves been beaten and prosecuted, and the former president cheered on police while denying the validity of a democratic election and inciting an insurrection.

But this death and destruction—the rupturing of the interlocking systems of oppression that power this country—have, too, created a window into a different world, one in which people are not controlled, regulated, and destroyed by the government in the service of the capitalist system, but instead in which people collectively aid each other to ensure not just that community members have what they need to survive but to survive safely and to thrive.

New York's shutdown forced a temporary but radical reduction of the family regulation system, nearly halving the number of reports, investigations, and family separations, reducing surveillance of families in their schools and in their homes, and removing not only the intrusion but also the limited support of voluntary preventive services. Rather than endangering children, this shutdown protected them: rates of substantiated abuse dipped, rates of substantiated neglect remained unchanged, and children stayed sheltered with their families and in their communities rather than enduring the trauma of a separation, much less a separation with no family visitation. These families stayed safely together not because of the family regulation system but because of its absence. In the midst of the nonstop trauma of 2020, community members worked for and with each other, providing their neighbors food, diapers,

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https://www.nytimes.com/2021/09/01/health/covid-delta-us-britain.html [https://perma.cc/ET8J-KUAP].

[146] SPADE, *supra* note 112, at 39.

[147] *Id.*

childcare, and mental health services, and redistributing government wealth.

Under the drudgery and daily struggle of the capitalist system, it can be difficult to find the space or the energy to imagine, let alone build, a more humane and democratic society. The COVID-19 crisis, though, made that easier. We need not imagine, from whole cloth, how we might keep children safe in the absence of the family regulation system. Nor need we continue to speculate as to how we might address the child poverty that drives neglect reports without resorting to the violence of family separations. We have the answers. We can envision a world in which we address child poverty and child safety by providing families the monetary support they need, without strings attached, and by building robust community support networks, governed by principles of solidarity and collective caretaking rather than punishment and moral judgment.

We can envision this world because, for a short time in 2020, we lived it.