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### A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed.

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## A QUIET REVOLUTION: HOW JUDICIAL DISCIPLINE ESSENTIALLY ELIMINATED FOSTER CARE AND NEARLY WENT UNNOTICED

Melissa Carter, Cristopher Church, & Vivek Sankaran

*“Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron’s cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.”*

–C. S. Lewis<sup>1</sup>

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<sup>1</sup> C.S. LEWIS, GOD IN THE DOCK: ESSAYS ON THEOLOGY AND ETHICS 292 (1970).

## I. INTRODUCTION

This Piece proposes a rather unremarkable concept: that juvenile court judges can safely reduce the number of children entering foster care by faithfully and rigorously applying the law. What is remarkable, however, is that judges often fail to perform this core function when a state child welfare agency separates a child from their family. Despite evidence that removal decisions are not carefully scrutinized by courts,<sup>2</sup> the child welfare community continues to de-emphasize the role of the judge as an impartial gatekeeper—as the law requires—and instead encourages a different sort of jurist: one with distracting leadership responsibilities on and off the bench; one with responsibility to oversee individual cases but also advocate for broad systemic reform; one who is actively involved with families, making clinical decisions regarding their personal affairs. In this Piece, we invite judges to explore whether such extraneous responsibilities advance justice for families, or instead create an inviting space for “omnipotent moral busybodies” to emerge.<sup>3</sup> This Piece argues that the emphasis on that *different sort of jurist* is misplaced, and that judges must prioritize their role as gatekeeper above all else, particularly during the preadjudication phase of civil child abuse and neglect proceedings.<sup>4</sup>

The Piece makes its argument by focusing on the work of Judge Ernestine Gray, who sat on the Orleans Parish Juvenile Court for nearly forty years. Judge Gray’s disciplined approach to rigorously applying the law during the preadjudication phase transformed New Orleans Parish’s intervention in families into what such intervention is meant to be: a rare, time-limited event. Judge Gray’s disciplined approach led New Orleans to become the first major city in the United States to essentially eliminate foster care. In 2011, there were over two hundred children in foster care.<sup>5</sup>

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<sup>2</sup> See, e.g., CUTLER INST. FOR CHILD & FAM. POL’Y, MUSKIE SCH. PUB. SERV., & CTR. CHILD. & THE LAW, AM. BAR ASSOC., MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 102–103, 105 (2005) (reporting from a state-wide judges’ survey that 85.1% of judges surveyed never or rarely made an affirmative finding that the agency failed to make reasonable efforts to reunify even when they believed the agency did not make such efforts); J. Mary Tabor, *Transformation in Child Welfare: Iowa Courts’ Pilot Project on Juvenile Justice Shows Reduction in Termination of Parental Rights Cases*, in 80 IOWA LAW. 10–12 (Iowa State Bar Assoc., 2020) (discussing positive changes from a pilot initiative setting forth four questions for juvenile court judges to ask child welfare agency staff prior to approving an *ex parte* removal request, for the purpose of preventing the unnecessary removal of children from their parents). For legal scholarship considering courts’ role in family separation, see Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540 (2004); Vivek S. Sankaran & Christopher E. Church, *Easy Come, Easy Go: The Plight of Children who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207 (2016); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 552–62 (2019); Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1163, 1177–89 (2019).

<sup>3</sup> LEWIS, *supra* note 1.

<sup>4</sup> We use the term “preadjudication phase” to refer to all hearings that precede the formal hearing on the merits when the court finds as a matter of law that a child is an abused, neglected, or dependent child.

<sup>5</sup> Child. Bureau, U.S. Dep’t of Health & Hum. Servs., Adoption and Foster Care Analysis and Reporting System (AFCARS) Foster Care Files, Federal Fiscal Years 2010–2020, NAT’L DATA ARCHIVE ON CHILD ABUSE & NEGLECT [hereinafter AFCARS Dataset], <https://www.ndacan.acf.hhs.gov/datasets/datasets-list-afcars-foster-care.cfm> [<https://perma.cc/JSV7-VS64>] (data on file with corresponding author). Unless otherwise noted, AFCARS

By March of 2017, just twenty children were in foster care, in a city with more than 75,000 children.<sup>6</sup>

The significance of this reduction cannot be overstated. With 285 children in foster care, New Orleans would have a foster care utilization rate comparable to statewide rates in Louisiana.<sup>7</sup> With 481 children in care, its foster care utilization rate would be comparable to the national rate.<sup>8</sup> Instead, on March 31, 2020, the city had just forty-nine children in care, one-tenth of the national rate.<sup>9</sup> Even more notably, children who do enter foster care in the Orleans Parish typically spend a matter of weeks separated from family, in contrast to the years-long stays typical for children in care in other jurisdictions.<sup>10</sup> What exists today in New Orleans is not a foster care system by any familiar standards.

Thus, this Piece offers an opportunity to better understand Judge Gray’s approach and its impact on children and families in her community. Her approach provides lessons for juvenile court judges across the country. The first Part highlights the current pressures juvenile court judges face to take on a broader role than their judicial oath or child welfare’s legal framework requires. It assesses how those pressures have resulted in a juvenile court that risks becoming a “tyranny sincerely exercised for the good of its victims.”<sup>11</sup> The second Part closely examines Judge Gray’s approach and details its impact on the New Orleans foster care system. It includes an overview of administrative data and a discussion of the practices, policies, and values Judge Gray brought to the bench. It also outlines the argument that these practices led to significantly less reliance on foster care in Orleans Parish—to the point of its near-elimination—without jeopardizing children’s safety. The Piece concludes with a plea for judges to embrace their role as gatekeeper, rigorously and dispassionately enforcing the law to ensure that children enter and remain in foster care only when the state produces evidence that meets the high burden required to justify family separation.

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datasets utilized in this Piece were made available by the National Data Archive on Child Abuse and Neglect (“NDACAN”), Cornell University, Ithaca, New York. Data from the AFCARS Foster Care Files are originally collected by state child welfare agencies pursuant to federal reporting requirements. Authors and collaborators at Fostering Court Improvement have analyzed the data, and analyses are on file with them. Neither the collection of the original data, the Archive, Cornell University, or its agents or employees bear any responsibility for the analyses or interpretations presented here.

<sup>6</sup> *Id.* at FFY 2017.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> The figure of forty-nine children in care in the Orleans Parish represents a rate of 4.8 children in care for every 10,000 children in the population, compared to the national rate of 57.6 children in care for every 10,000 in the population. AFCARS Dataset, *supra* note 5, at FFY 2020.

<sup>10</sup> Among the eighty-five children discharged in the Orleans Parish during the most recent twelve months, the median length of stay was 0.4 months, compared to 15.5 months nationally. *Id.*

<sup>11</sup> See LEWIS, *supra* note 1, at 292.

## II. THE JUVENILE COURT JUDGE: GATEKEEPER OR COLLABORATOR

The role of the judge occupies a place of central concern for lawyers and their clients. A lawyer's knowledge of the tendencies, preferences, and philosophy of the judge constitutes an essential component of legal strategy and informs the tactical presentation of a case. A casual inquiry into the common wisdom about the role of a judge often elicits metaphors like "umpire" or "referee."<sup>12</sup> Generally speaking, the traditional judicial role is understood as one of presiding impartially over a case in order to ensure the integrity of the process, protecting the rights of the parties, interpreting and applying the law, and making individualized legal determinations to resolve a conflict.<sup>13</sup>

The origins and evolution of the juvenile court have nurtured an alternative model and different expectation for the judicial role. Progressive reformers lauded the juvenile court as an innovation, distinguished as the "first attempt to provide diagnosis and training to delinquents."<sup>14</sup> This is the origin story of the juvenile court as a problem-solving court. Exercising its *parens patriae* authority, the court intervened in the lives of wayward youth to provide protective supervision and rehabilitation.<sup>15</sup> It advanced these goals as both necessary and socially desirable. As observed by Judge Julian Mack, one of the nation's first juvenile court judges, "[t]he problem of the delinquent child, though juristically comparatively simple, is, in its social significance, of the greatest importance, for upon its wise solution depends the future of many of the rising generation."<sup>16</sup> From its very beginning, the purpose of the juvenile court was defined as much by an ambition to address a social problem as by the discipline of the law. The court "provided a setting in which the routine practices of child-saving established in the nineteenth century could be continued in a more legitimate form."<sup>17</sup> Put directly, the jurisdictional authority of the juvenile court inherently allows it to act as an "omnipotent moral busybody."<sup>18</sup>

The juvenile court judge carries out their role guided by a sense of legal and moral obligation to satisfy the dual societal and institutional aims of child protection. The judge's task is to serve as an arbiter of conflict, but as many practitioners and scholars have observed, that is not the full measure of the juvenile court judge's role.<sup>19</sup> Overtime, the juvenile court judge's role has blossomed into an expansive responsibility, combining the

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<sup>12</sup> See, e.g., Theodore A. McKee, *Judges as Umpires*, 35 HOFSTRA L. REV. 1709 (2007).

<sup>13</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1286 (1976) (discussing the traditional role of the appellate court judge as a passive arbiter of established law).

<sup>14</sup> John R. Sutton, *The Juvenile Court and Social Welfare: Dynamics of Progressive Reform*, 19 LAW & SOC'Y REV. 107, 108 (1985).

<sup>15</sup> See Esther K. Hong, *A Reexamination of the Parens Patriae Power*, 88 TENN. L. REV. 277, 278 (2021).

<sup>16</sup> Julian W. Mack, *The Juvenile Court*, 23 HARV L. REV. 104, 104 (1909).

<sup>17</sup> Sutton, *supra* note 14, at 108.

<sup>18</sup> LEWIS, *supra* note 1.

<sup>19</sup> See, e.g., Jane M. Spinak, *Judicial Leadership in Family Court: A Cautionary Tale*, 10 TENN. J.L. & POL'Y 47, 49 (2014).

traditional judicial roles of process manager, adjudicator, and enforcer of rights, with a responsibility to co-create solutions for families and lead system improvement efforts. Juvenile court judges are expected to act as proactive problem-solvers and to fulfill additional administrative, collaborative, and advocacy duties.<sup>20</sup> As Judge Anthony Sciolino, a retired family court judge, writes colloquially, “[A]t various times . . . a judge is called upon to act in the role of salesperson, substitute parent, cheerleader, arm twister, evangelist, planner, fundraiser (within the constraints of the Canons of Judicial Ethics) and consensus builder.”<sup>21</sup> These multiple roles invite, and perhaps command, the juvenile court judge to depart from the “impartial, restrained and objective judge in the common law tradition and shift judicial responsibility from individualized legal determinations to a broader conception of judicial leadership.”<sup>22</sup>

Rationalized by the therapeutic orientation of the juvenile court, the contemporary conception of judicial leadership in the family separation system has been organized around the principle of “collaboration.” In its influential 2004 recommendations for strengthening court oversight of child welfare cases, the Pew Commission on Children in Foster Care called for “incentives and requirements for collaboration between courts and child welfare agencies on behalf of children in foster care.”<sup>23</sup> The recommendations gained traction with policymakers, resulting in a federal requirement for courts and child welfare agencies to “demonstrat[e] meaningful and ongoing collaboration.”<sup>24</sup> Guidance expounding on the requirement defines “meaningful, ongoing collaboration” to mean that courts and agencies “identify and work toward shared goals and activities to increase the safety, permanency, and well-being of children in the child welfare system.”<sup>25</sup> Moreover, the explicit expectation of such collaboration consists of “institutional and infrastructural changes that lead to measurably improved outcomes for the children and families that the state is serving.”<sup>26</sup> This dynamic has forged an enduring link between the role of the juvenile court judge and the advancement of individual and systemic outcomes. And collaboration between the judicial and executive branches is the predetermined manner for the fulfillment of this role and achievement of these outcomes.

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<sup>20</sup> See SOPHIA I. GATOWSKI ET AL., NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 8 (2016) [hereinafter NCJFCJ, COURT PRACTICE GUIDELINES]; see also Remarks of Judge Leonard P. Edwards at the Presentation of the William H. Rehnquist Award for Judicial Excellence (Nov. 18, 2004), reprinted in 5 J. CTR. FAMS. CHILD. & THE CTS. 169 (2004).

<sup>21</sup> Anthony J. Sciolino, *The Changing Role of the Family Court Judge: New Ways of Stemming the Tide*, CARDOZO PUB. L. POL’Y & ETHICS J. 395, 403 (2005).

<sup>22</sup> Spinak, *supra* note 19, at 49.

<sup>23</sup> PEW COMM’N ON CHILD. IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN 36 (2004), [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content\\_level\\_pages/reports/0012pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf) [https://perma.cc/S8E6-C47X].

<sup>24</sup> 42 U.S.C. § 629h(b)(3).

<sup>25</sup> ADMIN. FOR CHILD. & FAMS., U.S. DEP’T OF HEALTH & HUM. SERVS., ACYF-CB-PI-16-05, INSTRUCTIONS FOR STATE COURTS APPLYING FOR COURT IMPROVEMENT PROGRAM (CIP) FUNDS FOR FISCAL YEARS (FYs) 2017–2021, at 6 (Oct. 27, 2016).

<sup>26</sup> *Id.* at 7.

An expansive body of practice guidance has developed as a complement to formal policy, exalting collaboration as the hallmark of judicial leadership. The National Council of Juvenile and Family Court Judges (“NCJFCJ”) reinforces the emphasis on collaboration time and again.<sup>27</sup> It is revered as a best practice, endorsed as the method by which juvenile court judges hold parties and other stakeholders responsible for achieving individual and systemic outcomes related to child safety, permanency, and well-being.<sup>28</sup> The NCJFCJ’s Enhanced Resource Guidelines instruct that juvenile court judges, in order to effectively fulfill their roles “as gatekeepers to the foster care system and guardians of the original problem-solving court,” must collaboratively “engage families, professionals, organizations, and communities to effectively support child safety, permanency, and well-being.”<sup>29</sup> It is clear that this view of the judge as lead collaborator goes beyond an aspiration: judges, advocates, and stakeholders widely accept collaboration as the gold standard for achieving not only results that are legally mandated for children and families but also those that are desired by the broader child welfare community.

Though rarely questioned, collaboration may not always prove to be beneficial for the goals to which it is keyed. The success of any collaboration results in part from situational factors, including the timing, the capacity and competence of participants, the frequency and quality of communication, and the shared focus on clear, common goals.<sup>30</sup> These factors are neither consistently present nor sufficiently controllable in the context of a child welfare case.<sup>31</sup> The incongruity between the features of a successful model of collaboration and the nonlinear, complex nature of a dependency proceeding can cause inconsistent rulings, unnecessary delay, and an erosion of confidence in the juvenile court. All of these consequences threaten the integrity of the process and the quality and timeliness of outcomes for children and families.

Most significantly, a collaborative model can compromise and distort the aims of the proceedings.<sup>32</sup> A perception, by the parties, of the judge as a collaborative partner lends itself to a false presumption that the court can solve the complex social problems that brought the family before it.<sup>33</sup> Yet, as Judge Mack recognized from the outset, “[m]ost of the children

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<sup>27</sup> See NCJFCJ, COURT PRACTICE GUIDELINES, *supra* note 20, at 11 (recommending collaboration “among all aspects of the court and child welfare system”).

<sup>28</sup> *Id.* at 17; see also SOPHIA I. GATOWSKI ET AL., NAT’L COUNCIL OF JUV. & FAM. CT. JUDGES, ENHANCED RESOURCE GUIDELINES: CHILD WELFARE CASEWORKERS’ COMPANION GUIDE 21 (2020) (“The role of the juvenile and family court judge is a unique one and it combines judicial, administrative, collaborative, and systemic advocacy roles. By taking on these roles, the juvenile and family court judge holds all stakeholders, including the court, responsible to ensure safe, timely permanency and well-being for children.”).

<sup>29</sup> NCJFCJ, COURT PRACTICE GUIDELINES, *supra* note 20, at 14.

<sup>30</sup> See Dorothy Norris-Tirrell, *Assessing Multiple Dimensions of Collaboration*, 35 J. HEALTH & HUM. SERVS. ADMIN. 4, 4–5, 7 (2012).

<sup>31</sup> See generally Suparna Malempati, *The Illusion of Due Process for Children in Dependency Proceedings*, 44 CUMB. L. REV. 181 (2014) (describing the complexity of dependency proceedings by reference to the realities of being governed by multiple federal and state laws, unfolding through an elaborate procedural scheme with adversarial positions emerging at any time and changing over the course of an extended case time frame, and involving multiple decision points).

<sup>32</sup> See Spinak, *supra* note 19, at 70–75.

<sup>33</sup> For a fuller discussion of these social problems, see *id.*

who come before the court are, naturally, the children of the poor,”<sup>34</sup> and even the modern-day juvenile court lacks the resources and tools to address issues of poverty or to remediate chronic family and community adversity. This results in a misalignment of expectation that is exacerbated by an inherent power imbalance. A collaborative orientation can obscure the court’s coercive authority and deceive the parties and their legal representatives into believing that everyone in the courtroom is a co-equal when, in fact, the judge commands the awesome power to separate and reconfigure the child’s family.

The overemphasis on collaboration can also distort the judge’s own sense of responsibility for legal decisions, lessening or even undermining the legal rigor needed to ensure a disciplined adherence to the law and to reach decisions based on properly presented evidence. The traditional judicial role is one characterized by a passive judge, with limited involvement in fact-finding, who decides issues identified by the parties in accordance with formal rules and statutes.<sup>35</sup> As commonly conceived, the role of the judge is that of a “neutral umpire, charged with little or no responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial.”<sup>36</sup> In contrast, a problem-solving orientation to the role is necessarily outcome-determinative. The belief that the judge can and should play a role in trying to solve the problems reflected on the court docket may habituate decision-making based on therapeutic impulse. Humanitarian motives may displace more proper inquiry into whether a clear legal basis for intervention in a family exists or scrutiny as to the sufficiency of the child welfare agency’s efforts to keep families together. In this way, “collaborations blur the adversarial opposition of the parties and complicate the judge’s neutrality.”<sup>37</sup> The imbalance increases the risk of greater and unnecessary intrusion into family privacy, unwarranted family separation, and infliction of trauma.

These risks are highest at the preadjudication phase when the “friendly interest of the State”<sup>38</sup> is incongruous with the constitutional rights of parents and children. During the preadjudication phase, the state has not yet proven a parent to be unfit and bears the burden of doing so. Courts cannot presume that such unfitness warranting the need for judicial intervention exists. Thus, at this stage, the court’s primary role must be to examine whether the state has met the legal standard justifying such intervention. The next Part explores the dramatic outcomes that can occur when a judge—in this case Judge Gray—brings a disciplined approach to the preadjudication phase that forces the state to meet the evidentiary burden required to justify family separation. Judge Gray’s

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<sup>34</sup> Mack, *supra* note 16, at 116.

<sup>35</sup> See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1286 (1976).

<sup>36</sup> *Id.*

<sup>37</sup> Misty Johnson Grayer, *Street-Level Judgments: How the Role of Judges Influences the Decision to Collaborate in Juvenile Court* 48 (Aug. 31, 2019) (Ph.D. dissertation, University of Kansas), [https://kuscholarworks.ku.edu/bitstream/handle/1808/31364/Grayer\\_ku\\_0099D\\_16767\\_DATA\\_1.pdf?sequence=1&isAllowed=y](https://kuscholarworks.ku.edu/bitstream/handle/1808/31364/Grayer_ku_0099D_16767_DATA_1.pdf?sequence=1&isAllowed=y) [<https://perma.cc/LDM9-AB7S>].

<sup>38</sup> *E.g.*, Mack, *supra* note 16, at 117.



approach delivers a blueprint for judges across the country to embrace their role as sentinels during the preadjudication phase.

### III. JUDGE GRAY'S IMPACT ON THE ORLEANS PARISH FOSTER CARE SYSTEM

#### A. An Overview of Louisiana's Statutory Preadjudication Scheme

This Piece uses the term preadjudication phase to refer to all legal proceedings that occur between the initial court order authorizing removal of a child from the custody of their parent(s), up until the adjudication when a court holds a full evidentiary hearing to determine whether the allegations in the petition are true. In Louisiana, there are two statutory pathways to remove a child on an emergency basis.<sup>39</sup> First, a police officer or probation officer of the court may take a child into custody without a court order when they “have reasonable grounds to believe that the child’s surroundings are such as to endanger his welfare and immediate removal appears to be necessary for his protection.”<sup>40</sup> Second, the other pathway begins when a police officer, district attorney, or Child Protective Services (“CPS”) employee files a complaint with the court that contains facts demonstrating there are “reasonable grounds to believe that the child is in need of care and that emergency removal . . . is necessary to ensure the child’s protection.”<sup>41</sup> The court is required to determine whether the CPS agency has made reasonable efforts to prevent or eliminate the need for removal.<sup>42</sup> If the court determines that the child’s welfare cannot be safeguarded without removal, the court will issue an instant order directing that child to be placed in the home of a relative or in foster care.<sup>43</sup> Regardless of which pathway is utilized, the parents must be notified of the time and place of the Continued Custody hearing.<sup>44</sup> The Continued Custody hearing must be held within three days of the child’s removal.<sup>45</sup>

During the Continued Custody hearing, the court is required to undertake a number of inquiries.<sup>46</sup> The State has the “burden of proving the existence of a ground for continued custody.”<sup>47</sup> The court evaluates grounds for continued custody on a “necessity of care” standard: the State must meet this standard by showing “reasonable grounds to believe that the child is in need of care and that continued custody is necessary for his safety and protection.”<sup>48</sup> During this hearing, the child and their parent(s) may “introduce evidence, call witnesses, be heard on their own behalf, and

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<sup>39</sup> Most, if not all, children are removed on an emergency basis. However, a non-emergency removal would involve a hearing with all parties where the Child Protective Services agency has the burden of producing sufficient evidence to remove the child from the custody of their parent(s).

<sup>40</sup> LA. CHILD. CODE ANN. art. 621 (2006).

<sup>41</sup> *Id.* art. 619 (2014).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (removal pursuant to an Instant Custody order); *id.* art. 621 (removal without a court order).

<sup>45</sup> *Id.* art. 624 (2018).

<sup>46</sup> First, the court must ask each person before it whether they “know or have reason to know that the child is an Indian child,” and thus subject to the protections in the federal Indian Child Welfare Act. *Id.* art. 624(D).

<sup>47</sup> *Id.* art. 624 (2018).

<sup>48</sup> *Id.* art. 626 (2014).

cross-examine witnesses called by the State.”<sup>49</sup> Finally, the court is required to advise the parents, and potentially the child, of a number of rights and responsibilities related to the proceedings.<sup>50</sup>

Louisiana law prioritizes placement of the child into the home of a relative over placement in foster care, pending the Continued Custody hearing.<sup>51</sup> Relatives who are willing to take custody of a child also seem to have standing to intervene in a Continued Custody hearing to provide “evidence of a willingness and ability to provide a wholesome and stable environment for the child and to protect the health and safety of the child.”<sup>52</sup> This preference for relative placement or custody continues after the Continued Custody hearing.<sup>53</sup>

The statutory preference for relatives is not reflected in the placement data. Of the sixty-four children removed during 2017 who spent less than a month in foster care in Orleans Parish,<sup>54</sup> seventy percent were placed in non-relative foster care during their brief stays.<sup>55</sup> However, Orleans Parish Juvenile Court does often award custody to relatives during the preadjudication phase. Among the sixty-seven children removed during 2017 who spent less than a month in foster care, fifty-nine percent were returned to their parent(s), while thirty-two percent were discharged to the custody of a relative.<sup>56</sup> This is double the statewide rate of discharges to relatives during the same time frame, and well above national rates.<sup>57</sup>

This statutory scheme provides the framework in which Judge Gray operated throughout her career. Although there are certainly differences across jurisdictions, many of which are significant, Louisiana’s statutory scheme generally reflects how children are removed across this nation. Some professionals are afforded the power to remove children without a court order, while others are required to seek court approval during an *ex parte* proceeding.<sup>58</sup> Once a child is removed, the court will typically hold a hearing with all parties present within a few days of that removal to determine whether removal was warranted and whether continued custody is necessary.<sup>59</sup> CPS is tasked with notifying relatives that a child has been removed,<sup>60</sup> and the court is often tasked with ensuring such notification has taken place.

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<sup>49</sup> *Id.* art. 624 (2014).

<sup>50</sup> *Id.* art. 625 (2015).

<sup>51</sup> *Id.* art. 622(B) (2015); *see also id.* art. 622(A) (2015) (going so far as to allow a relative “or other suitable individual” to seek an *ex parte* court order to take provisional custody of the child pending the Continued Custody hearing).

<sup>52</sup> *Id.* art. 624(H) (2015).

<sup>53</sup> *Id.* art. 627(B)(2014).

<sup>54</sup> A petition must be filed within thirty days of the Continued Custody hearing. *Id.* art. 632(A) (2014). Thus, children that are discharged within thirty days of their removal would be discharged during the preadjudication phase.

<sup>55</sup> AFCARS Dataset, *supra* note 5, at FFY 2017.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See* Sankaran & Church, *supra* note 2, at 214.

<sup>59</sup> *Id.*

<sup>60</sup> 42 U.S.C. § 671(a)(29).

Without any change to this statutory scheme, Judge Gray transformed the Orleans Parish foster care system. The next Section provides an overview of her approach.

#### B. The Disciplined Legal Process Judge Gray Instituted

Ernestine Gray was first elected to the Orleans Parish Juvenile Court in 1984. Throughout her thirty-five year tenure with the court, Judge Gray has enjoyed national recognition by way of numerous awards from, and leadership positions with, prominent child welfare organizations.<sup>61</sup> By her own account, however, her first decade on the bench was not worthy of recognition.<sup>62</sup> Judge Gray is quick to reference a 1997 New York Times article that levied an unwavering critique of the Orleans Parish Juvenile Court, dubbing it the “worst juvenile court system in the country.”<sup>63</sup> Although embarrassed by it at the time, Judge Gray now points to this article as one of the early events that triggered her interest in redesigning how the Orleans Parish Juvenile Court managed civil child abuse and neglect proceedings.<sup>64</sup> Her interest was initially focused on the preadjudication phase of such proceedings.<sup>65</sup>

Judge Gray’s first step was to establish the Child Protection Division of the court, which began operating in 2011.<sup>66</sup> The judges within that Division of the Orleans Parish Juvenile Court follow a monthly rotation to handle child welfare agency requests for *ex parte* removals, which as discussed in the previous Section, are granted through the issuance of a written or oral instanter order.<sup>67</sup> That same judge would then preside over a Continued Custody hearing within three days of the child’s removal. During the hearing, the State has the burden of proving “reasonable grounds to believe the child was in need of care and that continued custody was necessary for the child’s safety and protection.”<sup>68</sup>

Initially, for the sake of efficiency and expediency, Judge Gray scheduled what she called a “Second Shelter” hearing to occur roughly

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<sup>61</sup> See, e.g., J. Richard Alan Ginkowski, *ABA Criminal Justice Section Honors Judge Ernestine S. Gray’s Lifetime of Service*, AM. BAR ASSOC. (Jan. 8, 2021), [https://www.americanbar.org/groups/judicial/publications/judicial\\_division\\_record\\_home/2021/vol24-2/cjs-honors-e-gray/](https://www.americanbar.org/groups/judicial/publications/judicial_division_record_home/2021/vol24-2/cjs-honors-e-gray/) [<https://perma.cc/ZAR4-73C4>] (Charles English Award); *The Honorable Ernestine Gray Honored With the ABA’s Charles R. English Award*, NAT’L ASSOC. WOMEN JUDGES (Jan. 6, 2021), <https://www.nawj.org/blog/newsroom/news/the-honorable-ernestine-gray-honored-with-the-abas-charles-r-english-award> [<https://perma.cc/2QKC-GBWY>] (further noting Judge Gray’s prior awards such as Casey Excellence for Children Leadership Award).

<sup>62</sup> Author Notes from Interview with Judge Ernestine Gray (Apr. 30, 2020) (on file with corresponding author) [hereinafter Author’s Notes from Interview with Judge Gray].

<sup>63</sup> Fox Butterfield, *Few Options or Safeguards in a City’s Juvenile Courts*, N.Y. TIMES (July 22, 1997), <https://www.nytimes.com/1997/07/22/us/few-options-or-safeguards-in-a-city-s-juvenile-courts.html> [<https://perma.cc/J3JY-82TC>].

<sup>64</sup> Author’s Notes from Interview with Judge Gray, *supra* note 62.

<sup>65</sup> Although Judge Gray credits the New York Times article as a sort of turning point to her approach in civil child abuse and neglect proceedings, it took over a decade for her to have the seniority and autonomy to institute major changes.

<sup>66</sup> Author’s Notes from Interview with Judge Gray, *supra* note 62.

<sup>67</sup> LA. CHILD. CODE ANN. arts. 619–20. An oral instanter order can be issued only in “exceptional circumstances,” and an affidavit confirming the facts presented orally must be filed within twenty-four hours of the *ex parte* removal order.

<sup>68</sup> *Id.* art. 624(A) (time frame for hearing); *Id.* art. 624(E) (burden of proof); *Id.* art. 626 (A) (grounds for continued custody).

fourteen days after the Continued Custody hearing.<sup>69</sup> Judge Gray presided over all Second Shelter hearings, and every subsequent foster care proceeding, for all children that remained in foster care beyond the Continued Custody hearing in the Orleans Parish, regardless of the initial judge assignment on the case.<sup>70</sup> As the data discussed below show, very few children remained in foster care after this Second Shelter hearing. Judge Gray described the purpose of the hearing much like the purpose of a pre-trial conference, with the primary goal of determining whether CPS was prepared to file a timely petition. Its effect, however, is more aptly described as part of the ongoing vigorous preadjudication gatekeeping function inherent in Judge Gray's approach, an approach that commonly resulted in children being returned to their families within weeks of their removal.<sup>71</sup>

As part of an ongoing Casey Family Programs study,<sup>72</sup> a team consisting mostly of lawyers—including this Piece's co-authors—reviewed and coded approximately thirty Orleans Parish Continued Custody and Second Shelter hearings. What emerged from court observations and other evidence was a clear judicial philosophy: Judge Gray approached every hearing over which she presided with a laser focus on ensuring that children were only placed in foster care when the State proved its burden of the necessity of care. She articulated this in a formal interview with Casey Family Programs:

When it comes down to it, I apply the law rigidly and do what I believe the law requires, which means not removing children from their families unless absolutely necessary. Sometimes there is tension between what I consider to be the appropriate thing in a case and what someone else might consider appropriate: *If the child protection agency can't offer evidence that a child's safety is imminently at risk, I send the child home to their family, consistently.*<sup>73</sup>

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<sup>69</sup> Author's Notes from Interview with Judge Gray, *supra* note 62.

<sup>70</sup> *Id.*

<sup>71</sup> A carefully calibrated foster care system would not remove children from their parents for a few weeks, only to return them home, particularly in light of the well-documented harm of removal. *See* Sankaran & Church, *supra* note 2, at 210–213; Trivedi, *supra* note 2, at 527–51; Sankaran, Church, & Mitchell, *supra* note 2, at 1165–70. The authors suspect that if Judge Gray had presided over every hearing from the very outset of the case, including the *ex parte* request for removal, the number of children placed in foster care would have been reduced significantly.

<sup>72</sup> In 2020, Casey Family Programs funded a team of researchers to document Judge Gray's processes for presiding over civil child abuse and neglect proceedings in the Orleans Parish, and to determine whether a causal relationship existed between those processes and the significant reduction in the number of days children were separated from their family due to foster care placement. The lead researchers were Vivek Sankaran, Melissa Carter, and Andrew Barclay. Josh Gupta-Kagan and the Honorable (ret.) Karen Baynes also provided research support. Christopher Church, Shemeka Sorrells, Ann Stanley, the Honorable (ret.) Robin Sage, Alli Schisler, and Selena Childs served as Casey Family Programs staff support. The study is ongoing as of the time of this publication.

<sup>73</sup> *How Can the Judiciary Help Narrow the Front Door to Child Protection? Q&A with Judge Ernestine S. Gray, Orleans Parish, Louisiana*, CASEY FAM. PROGRAMS (Dec. 4, 2020) [hereinafter *Q&A with Judge Gray*] (emphasis added), <https://www.casey.org/judge-gray-interview> [<https://perma.cc/LA37-VRHB>].

Central to her judicial philosophy is the belief that “[e]ach family has the right to care for and protect their children without unreasonable governmental interference.”<sup>74</sup> Thus, during the preadjudication phase, she considered it to be her paramount—and perhaps only—obligation to enforce constitutional and statutory standards governing family separation, and where separation was necessary, to ensure that children were placed with kin as quickly and safely as possible.<sup>75</sup> In her view, “[f]amilies deserve not to be in court if they don’t have to be there.”<sup>76</sup>

Based on the initial set of hearings the team reviewed, some consistent findings emerged. First, Judge Gray strictly enforced the State’s statutory burdens. A number of exchanges between Judge Gray and the parties stood out to the reviewers. During one hearing, for example, she chastised the agency for producing stale evidence by relying solely on a family’s prior history with CPS to justify family separation.<sup>77</sup> She remarked, “You’re not entitled to rely on those,” and told the agency that they “can’t come here unless you’re certain” of the circumstances that exist at the time of the current matter.<sup>78</sup> In another hearing, she found that the agency had not made reasonable efforts to prevent a child’s removal because the agency had failed to “rule out” other options.<sup>79</sup> Judge Gray noted on the record: “You don’t go the measure of getting a hold order unless you absolutely have to. And you have to rule out all of those other things in order to get to that point.”<sup>80</sup> In a third case in which a caseworker failed to remember details about what a doctor had told him regarding a child’s injuries, the attorney for the agency asked the court to give the agency the benefit of the doubt.<sup>81</sup> Judge Gray responded by forcefully reminding everyone that the agency bore the burden of proof.<sup>82</sup> Regardless of what she might have believed was best for a child, she saw her primary role as one of a foster care sentinel, standing guard over foster care’s front door.

Second, Judge Gray faithfully enforced evidentiary rules. For example, during the same Continued Custody hearing, the testifying case manager was clearly struggling to remember certain details that the department attorney wanted in the record.<sup>83</sup> What immediately followed seemed routine: the case manager opened a binder and began reviewing

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<sup>74</sup> *Id.*

<sup>75</sup> This is, of course, consistent with the Louisiana Children’s Code, which directs the Court to place the child in the “provisional custody of a suitable relative” as early as the issuance of the instant order if the Court determines the child’s welfare cannot be safeguarded without removal. LA. CHILD. CODE ANN. art. 619(B)(2).

<sup>76</sup> Author’s Notes from Interview with Judge Gray, *supra* note 62.

<sup>77</sup> Video Recording: 1004-CC, held by Orleans Parish Juvenile Court (May 30, 2019) (on file with corresponding author). The Casey Family Programs researchers secured video recordings of hundreds of hearings held in the Orleans Parish Juvenile Court between 2011 and 2020. The name of the recording is based on the assignment of a random number to each hearing, followed by -CC for Continued Custody hearings and -SS for Second Shelter hearings.

<sup>78</sup> *Id.*

<sup>79</sup> State *ex rel.* C.W., 2002-2419, p. 4 (La. App. 4 Cir. 05/14/03); 848 So.2d 70, 73.

<sup>80</sup> *Id.*

<sup>81</sup> Video Recording: 1000-CC, held by Orleans Parish Juvenile Court (Feb. 21, 2017) (on file with corresponding author).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

his notes, presumably to refresh his memory.<sup>84</sup> Judge Gray immediately interrupted the case manager, both admonishing him and reminding everyone that a witness is not allowed to reference notes or other materials without the court's express permission.<sup>85</sup> In Judge Gray's courtroom, the rules of evidence were neither aspirational nor optional; they were strictly enforced.

Third, Judge Gray openly shared the value she placed on ensuring that children should only be removed from their parents when the State meets its evidentiary burden justifying family separation. Even when the agency was able to meet its burden, she routinely pushed the parties to identify and place children with suitable relatives, consistent with Louisiana's preadjudication statutory scheme.<sup>86</sup> For example, during one Continued Custody hearing, Judge Gray asked a testifying case manager whether she was able to identify any relatives.<sup>87</sup> The case manager testified that she was able to identify a number of relatives, at least one of whom lived in the New Orleans area.<sup>88</sup> The following exchange is illustrative:

Judge Gray: Did you notify the relatives that live in New Orleans of this hearing?

Case manager: Yes, I sent them a letter.

Judge Gray: Wait, you just removed the child... When did you send them a letter?

Case manager: When I got back to the office.

Judge Gray: And you thought they would get the letter in time to come to this hearing?

Case manager: Department policy is to notify all—  
[interrupted]

Judge Gray: I'm not asking you about department policy. I'm asking you whether you thought by mailing a letter to relatives here in New Orleans just a few days ago, you thought they would show up to this hearing.

[pause]

No, you don't mail them a letter. When they live in New Orleans, you drive over and talk to them, tell them about the hearing, check the home out, see if they can care for this child.<sup>89</sup>

Judge Gray also incentivized the parties to negotiate agreements outside of court to keep children with their families. On numerous occasions, the parties finalized placements with kin—even kin living out of state—during the time between the Continued Custody hearing and Second Shelter hearing. For example, in one Continued Custody hearing,

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *See supra* text accompanying notes 54–58.

<sup>87</sup> Video Recording: 1000-CC (Feb. 21, 2017), *supra* note 81.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

Judge Gray ratified an arrangement on which the parties had reached agreement outside of court, allowing for a child to live with a grandmother in Texas.<sup>90</sup> In most jurisdictions, this would have taken months, if not years.<sup>91</sup> In Judge Gray's courtroom, it happened in days.

Finally, Judge Gray set high expectations by insisting that parties show up to court prepared and by conducting thorough hearings. The first Continued Custody hearing that the research team reviewed lasted more than forty-five minutes, with Judge Gray asking numerous questions of the witnesses,<sup>92</sup> demanding that they present admissible evidence to satisfy statutory burdens.<sup>93</sup> During one exchange, she challenged the parent attorney on her theory of the case with a curiosity and openness that invited zealous legal advocacy.<sup>94</sup> Judge Gray's questioning also suggested that she believed that the parent attorney might be trying to do an end-run to overcome an objection of hers that Judge Gray had previously overruled.<sup>95</sup> After a few minutes of back-and-forth with the parent attorney, Judge Gray smiled and said, "Oh, I see where you are going. . . . Go ahead and proceed."<sup>96</sup> When attorneys showed up to court unprepared, she paused her hearings and directed them to negotiate immediately in the hallways of the courthouse. Her displeasure rarely went unnoticed; during one hearing when the parties had agreed to place a child with a grandmother but failed to work out important details related to parent visitation, Judge Gray remarked:

This is why cases fall apart. I keep telling y'all you can't plan these cases fifteen minutes before you walk into my courtroom. I keep saying that. I guess nobody believes me.<sup>97</sup>

In this way, she created an expectation that parties would actively work together outside of court to pursue all options to prevent children from living with strangers. Judge Gray did not exercise her judicial role in the manner of a collaborative problem-solver, but rather, of the commander of the problem-solving process.

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<sup>90</sup> Video Recording: 1000-SS, held by Orleans Parish Juvenile Court (Mar. 7, 2017) (on file with corresponding author).

<sup>91</sup> See AFCARS Dataset, *supra* note 5, at FFY 2020. The median length of stay among all children discharged to a relative (excluding relative guardianships and relative adoptions) during this timeframe was 5.7 months nationally, compared to 0.2 months in the Orleans Parish. Nine jurisdictions (RI, MI, CT, MD, IN, GA, MO, IA, NC) had a median length of stay for children discharged to a relative (excluding relative guardianships and relative adoptions) that exceeded a year.

<sup>92</sup> Video Recording: 1000-CC (Feb. 21, 2017), *supra* note 81. The researchers developed a tool to code the hearings, capturing the number of questions the judge and attorneys ask during each hearing. The analyses are on file with the corresponding author.

<sup>93</sup> *Id.*

<sup>94</sup> Video Recording: 1000-SS (Mar. 7, 2017), *supra* note 90.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Video Recording: 1002-CC, held by Orleans Parish Juvenile Court (May 28, 2019) (on file with corresponding author).

C. The Outcomes that Followed Judge Gray’s Reorganization of the Orleans Parish Juvenile Court Process for Civil Child Abuse and Neglect Proceedings

Reorganized at Judge Gray’s direction, the Orleans Parish Juvenile Court dramatically reduced the number of children in foster care. Importantly, there is no evidence that this transformed approach jeopardized the safety of children.<sup>98</sup> As stated in the Introduction, there were over two hundred children in care in 2011 when Judge Gray undertook her efforts to reorganize the court process.<sup>99</sup> By March of 2017, just twenty children were in foster care.<sup>100</sup> At that time, Orleans Parish had the lowest rate of children in care in the state,<sup>101</sup> with 2.5 children in foster care for every 10,000 in the population (“per 10K”), compared to a statewide rate of 40.6 per 10K.<sup>102</sup> During this same period, the national rate of children in foster care was 58.5 per 10K.<sup>103</sup> If the Orleans Parish children in care rate of 2.5 per 10K children were applied across the country as of March 31, 2020, there would be just over 18,000 children in foster care rather than the 415,170 that were actually in care on that date.<sup>104</sup>

Children in New Orleans also moved through the system—from removal of custody and placement in foster care, to exit and case closure—at a much faster rate. Of the children who entered foster care in Orleans Parish during the first six months of 2017, 64% were discharged from foster care within thirty days of their removal, compared to 18% of children statewide.<sup>105</sup> The dynamics of that reduction, however, are complex. Removals to and discharges from foster care in the Orleans Parish were relatively stable during this time frame, closely mirroring each other.<sup>106</sup> This is likely because Judge Gray’s court processes had a significant impact on children only after the Continued Custody hearing. Under her scheme, the five or so (depending on the time frame) juvenile court judges in the Orleans Parish handled *ex parte* requests for removal on a rotating monthly basis. When a particular judge granted an *ex parte* removal request, that same judge presided over the Continued Custody hearing. It was only after that hearing that Judge Gray assumed presiding duties over all the civil child abuse and neglect cases, with her Second Shelter hearing automatically scheduled for all children in care after the Continued Custody hearing.<sup>107</sup> As discussed above, 64% of children in foster care were discharged from foster care within thirty days of their removal.<sup>108</sup> Of those

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<sup>98</sup> See *supra* Section III.C.

<sup>99</sup> AFCARS Dataset, *supra* note 5, at FFY 2011.

<sup>100</sup> *Id.* at FFY 2017.

<sup>101</sup> This is excluding Cameron Parish, the second smallest parish (population-wise) in Louisiana, which only has an estimated 1,500 children living in the Parish and had none in foster care at that time.

<sup>102</sup> AFCARS Dataset, *supra* note 5, at FFY 2017.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at FFY 2020. Applying the Orleans Parish 2.5 per 10K rate to the estimated national child population of 72,847,400 children living in the United States suggests a total foster care population of 18,211.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

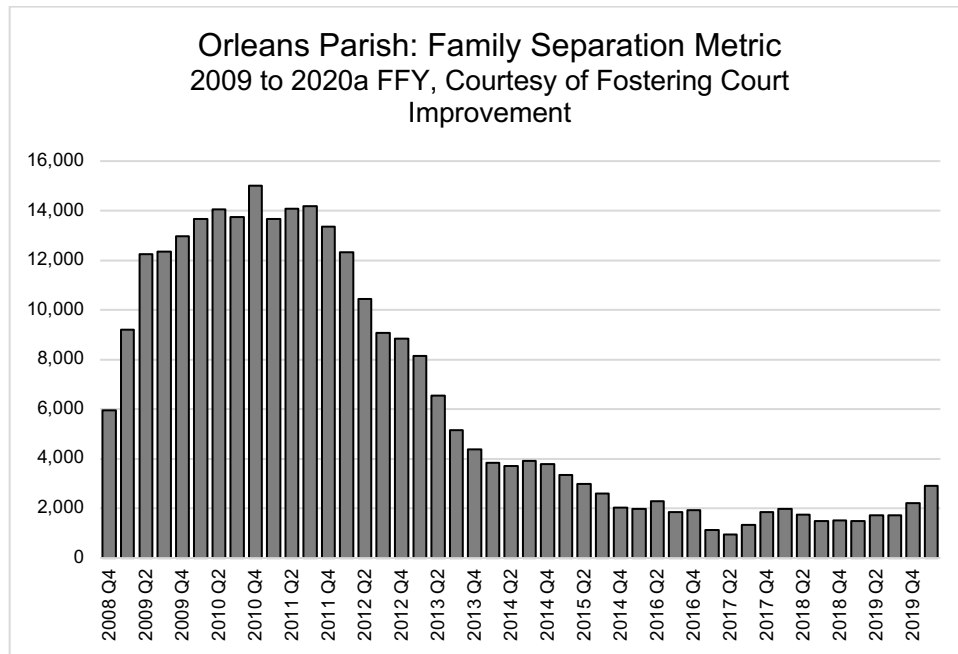
<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at FFY 2017.



children, 84% exited within two weeks of their removal, highlighting Judge Gray’s impact during the preadjudication phase.<sup>109</sup>

It can be seen that an explanatory metric of Judge Gray’s impact on the Orleans Parish dynamics would consist of not only how often, but also how long, children are separated from their family. Fostering Court Improvement’s Family Separation Metric, which is a simple count of the aggregate days all children spend separated from their family due to foster care placement, measures precisely that.<sup>110</sup> The number accounts for entries, exits, and length-of-stay. Figure 1 highlights the 90% reduction in the aggregate number of days all children were separated from their family for purposes of foster care placement between 2011 and 2017 in Orleans Parish.<sup>111</sup> The scale of this reduction is unprecedented.



**Figure 1:** Orleans Parish Family Separation Metric

<sup>109</sup> *Id.* at FFY 2009–2020.

<sup>110</sup> The Family Separation Metric represents a sum of all days that children spend separated from their family for purposes of foster care placement during a particular time frame, most commonly a year. *Days separated from family* include all days that children are in foster care except days spent in relative placements, pre-trial home visits, and pre-adoptive home placements. The non-profit organization and data collaboration effort Fostering Court Improvement reports this both as a single number and as a rate (per 10K children). For state-by-state data and county-by-county data, see *State Websites*, FOSTERING CT. IMPROVEMENT, [https://www.fosteringcourtimprovement.org/state\\_websites.php](https://www.fosteringcourtimprovement.org/state_websites.php) [<https://perma.cc/6VF2-8RUR>]. See also, e.g., Project from The Imprint, *Data on Family Separation*, WHO CARES: A NATIONAL COUNT OF FOSTER HOMES AND FAMILIES, <https://www.fosterarecapacity.com/data/family-separation> [<https://perma.cc/9UPA-YWCZ>] (annual state-by-state data from 2011 through 2020 on average days that a child spends separated from family per year); Melissa Carter & Andrew Barclay, *We Want Kids to Grow Up in Safe Families. So Let’s Measure That.*, IMPRINT (Nov. 6, 2018), <https://imprintnews.org/opinion/op-ed-we-want-kids-to-grow-up-in-safe-families-so-lets-measure-that/32667> [<https://perma.cc/D2CA-5Y7H>] (summarizing some state-by-state conclusions from a “person-time metric” measuring the “time kids spend with non-family”).

<sup>111</sup> The analysis uses AFCARS Datasets, *supra* note 5, at FFY 2009–2020.

Moreover, a wealth of administrative data suggests that the reduction in family separation occurred without compromising safety for children. While family separation significantly decreased in the Orleans Parish between 2011 and 2017, the number of children and families subject to CPS investigations did not.<sup>112</sup> On March 31, 2011, Orleans Parish investigated children at a rate of 14.6 per 10K, compared to 23.4 per 10K statewide.<sup>113</sup> On March 31, 2017, Orleans Parish investigated children at a rate of 28.3 per 10K, compared to 26.1 per 10K statewide.<sup>114</sup> During the period in which the Orleans Parish Juvenile Court was significantly decreasing its foster care footprint, the Orleans Parish CPS agency was increasing its child protection footprint.

Thus, it is reasonable to assume that if children were more at risk as a result of the unprecedented reduction in family separation by the Orleans Parish Juvenile Court, the CPS agency would have captured this via subsequent investigated reports of alleged maltreatment, since investigations were not curbed alongside the reduction in family separation. Subsequent reports of substantiated maltreatment are commonly referred to as a recurrence of maltreatment, and are typically measured at six- or twelve-month intervals.<sup>115</sup> In other words, a recurrence of maltreatment has occurred when a child is the subject of two separate substantiated reports of maltreatment during a six-month period. Since the median length of stay for a child in the Orleans Parish foster care system was so brief during this period of unprecedented reduction, recurrence of maltreatment metrics should capture whether child safety was being compromised by Judge Gray's approach. However, recurrence of maltreatment in the Orleans Parish hovered around six percent during the reduction in family separation, dropping closer to five percent in 2017.<sup>116</sup> Despite the near elimination of foster care, Orleans Parish rates of recurrence of maltreatment remained comparable to statewide rates.<sup>117</sup>

Another useful, yet imperfect, assessment of the safety of the reduction in family separation in the Orleans Parish is the child fatality rate in the jurisdiction. Child fatality rates in the Orleans Parish were comparable to statewide rates between 2011 and 2017, and Orleans Parish rates declined in all but one year during this time frame. Even more notably, Orleans Parish rates were below child fatality rates in two other

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<sup>112</sup> Child. Bureau, U.S. Dep't of Health & Hum. Servs., National Child Abuse and Neglect Data System ("NCANDS") Child File, Federal Fiscal Years 2010–2019, NAT'L DATA ARCHIVE ON CHILD ABUSE & NEGLECT [hereinafter NCANDS Child File Dataset], <https://www.ndacan.acf.hhs.gov/datasets/datasets-list-ncands-child-file.cfm> [<https://perma.cc/4LTF-B84V>] (data on file with corresponding author).

<sup>113</sup> *Id.* at FFY 2017.

<sup>114</sup> *Id.*

<sup>115</sup> *See, e.g.*, CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CFSR ROUND 3 STATEWIDE DATA INDICATOR SERIES 1 (2019) (defining, for the purposes of the Children's Bureau's Child and Family Services Review ("CFSR"), the indicator for "recurrence of maltreatment" by reference to "another substantiated or indicated maltreatment report").

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Using a lagging twelve-month average, recurrence of maltreatment statewide consistently hovered between five percent and six percent during the referenced period.

large Louisiana jurisdictions that consistently have higher rates of family separation than those of Orleans Parish.<sup>118</sup>

In sum, Judge Gray's approach did not influence the actions of mandatory reporters, who continued to refer an increasing number of allegations that the CPS agency screened in and investigated. Judge Gray's approach also did not significantly influence the frequency with which children were removed on an emergency basis.<sup>119</sup> Rather, Judge Gray's influence seemed to impact only the length of time a child was under court supervision, and more critically, separated from their family. So, contrary to what critics of Judge Gray feared, although significantly fewer children were separated from their families, the CPS agency was not flooded with calls of children "being endangered by returning . . . to families in chaos."<sup>120</sup> Less social control shook the confidence of some child welfare system stakeholders, but it did not jeopardize child safety. Rather, it improved the system's ability to protect the integrity of families.

#### IV. LESSONS FOR THE FIELD

As suggested at the outset, what is remarkable about Judge Gray's approach is how unremarkable it was. During the preadjudication stage, she strictly enforced the constitutional presumptions and legal standards that govern foster care proceedings. She held parties to evidentiary rules to ensure she only considered proper evidence. Through her questioning of witnesses and lawyers, she satisfied herself that all of the relevant evidence was presented at the hearings. She maintained high standards for counsel, expecting them to work extensively to resolve matters outside of the courtroom and to be disciplined legal advocates inside the courtroom. These are the core functions of a judge: enforce the law; abide by evidentiary rules; encourage out of court settlements.

However, as detailed in Part I, the import of these essential core functions to a particular juvenile court judge is not always apparent. Calls to collaborate and problem-solve induce judges to defer to the judgment of others and relax procedure at critical decision-making points. Yet a disciplined fidelity to those core gatekeeping functions seems to directly serve the outcomes at the intersection of child protection and family preservation. Defining judicial leadership in a way that aligns with the value of the traditional judicial role seems to have significantly reduced reliance on family separation without compromising child safety. Judge Gray's work in New Orleans demonstrates the powerful impact juvenile court judges can have when they embrace their gatekeeper role. That is, judges must consider it their paramount obligation to enforce the State's

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<sup>118</sup> Nat'l Ctr. for Health Stats., *Underlying Cause of Death 1999–2020*, CTRS. FOR DISEASE CONTROL & PREVENTION: WONDER DATABASE, <https://wonder.cdc.gov> [<https://perma.cc/9N5T-SWM3>] (analysis of data for children on file with Fostering Court Improvement).

<sup>119</sup> As discussed above, removal rates did decrease in the Orleans Parish, but only slightly.

<sup>120</sup> Richard A. Webster, *One Judge's Tough Approach to Foster Care: It's Only for the Really Extreme Cases*, WASH. POST (Nov. 25, 2019), [https://www.washingtonpost.com/national/one-judges-tough-approach-to-foster-care-its-only-for-the-really-extreme-cases/2019/11/24/bd2dd322-0a4c-11ea-97ac-a7ccc8dd1ebc\\_story.html](https://www.washingtonpost.com/national/one-judges-tough-approach-to-foster-care-its-only-for-the-really-extreme-cases/2019/11/24/bd2dd322-0a4c-11ea-97ac-a7ccc8dd1ebc_story.html) [<https://perma.cc/J3JY-82TC>].

statutory and constitutional burdens to prove that a child has been harmed or is at imminent risk of harm before placing that child in foster care.

Implementing this approach might require changes in how courts structure removal hearings, along with changes in how an individual judge handles removal hearings. Judges presiding over removal hearings—both *ex parte* and contested hearings—must be trained in constitutional and statutory removal standards and the corollary for the judicial role. Judges must exercise their power and authority in the preadjudication phase not to achieve a particular end result but to ensure that family separation is used only when foster care is the least restrictive intervention. This value must be shared amongst all those handling removal hearings and must be espoused publicly—as it was by Judge Gray—to influence the broader culture of the court in ways that support meaningful and lasting change. Considerations of how to persuade judges to embrace these values, especially in the preadjudication stage, must be a focal point for future conversations in the child welfare community.

Courts must not only ensure that every judge is properly trained and shares these core values, but also create a structure to ensure that initial removal decisions are reviewed in an expedited manner. Key to the success in New Orleans was Judge Gray's two-week review of initial removal decisions. At these hearings, she assessed whether the initial removal decision was warranted, whether continued removal was warranted, and whether any of the risks that might have existed had since abated. She also used these hearings to ensure that children were placed with kin whenever possible. Immediately after the Continued Custody hearing, the looming Second Shelter hearing served as an ominous reminder to all parties that they would soon have to answer to Judge Gray as to why the child was still in care, why the child was not placed with kin, and what efforts were underway to file a timely petition. Systemic players knew that excuses for not having answers to any of these questions would be met with judicial hostility. Ideally, jurists should evaluate these factors *before* ever separating a family. But they must also build in processes to revisit the initial removal decision frequently and expeditiously.

During the preadjudication phase, judges must rigorously enforce substantive legal standards and evidentiary rules. They must use statutes and court rules as their checklists. They must be willing to hold parties to their burdens, regardless of judicial hunch or personal feelings about the outcome. They must encourage a culture of advocacy, inviting lawyers before them to actively litigate all relevant matters. At a minimum, the advocate's task involves calling witnesses, questioning them extensively, and making thorough arguments before the judge. When attorneys fail to develop the record, judges must be prepared to ask questions from the bench, as Judge Gray regularly did. By taking these steps, judges can convey to families and stakeholders the seriousness of the decision to separate families.

Finally, judges must create an expectation that parties work together outside the courtroom, collaborating to eliminate the need for foster care. This collaboration might include conversations about conditions that would allow children to safely remain with their parents. It

might entail taking steps to overcome barriers for a kinship placement. Regardless of the specific topic of the out-of-court conversation, it requires a shift in the mindset of the parties towards an ethos of *continuous* effort to get children out of foster care, requiring work and advocacy inside and outside of court. Judicial leadership is not about co-creating solutions but rather about setting an expectation and overseeing a process for problems to be solved.

These are the essential steps that Judge Gray took in New Orleans that are immediately replicable nationwide without any statutory modifications or influx of resources. However, one outstanding question remains, related to the role that judicial collaboration plays in this approach, especially given its prevalence as an enduring and prominent theme in juvenile court practice and policy. How does collaboration fit into the approach outlined above, which prioritizes the judge's role as a neutral arbiter of the dispute and enforcer of the law, one who is dispassionate about outcomes?

While a judge must perform their role as gatekeeper until a parent has been proven to be unfit, there are opportunities for meaningful collaboration at other stages of a case. For example, judges can, and should, work with community providers and the child welfare agency to ensure that appropriate services are available for families. Judges should convene collaborative meetings with stakeholders to identify systemic barriers that might be interfering with how cases are handled. Judges can inspire community members to serve as foster parents or respite caregivers. In fact, Judge Gray played many of these collaborative roles in her community. But none of these collaborative roles can come at the expense of judges' roles as foster care sentinels. This is the lesson of Judge Gray's approach in the Orleans Parish: strict adherence to the traditional judicial role at the preadjudication stage of a dependency case can drive an unprecedented reduction in family separation and the near-elimination of foster care.

## V. CONCLUSION

In hindsight, Judge Gray's impact on the Orleans Parish Juvenile Court is nothing short of revolutionary. Yet the revolution was quiet. That is not to suggest that Judge Gray's leadership was without criticism, although that is a topic by which this Piece has refused to be distracted. However, a local CASA director's comments capture how polarizing Judge Gray can be in the Orleans Parish: "There are people who absolutely see her as a model for change, somebody who should be held up as an example and followed . . . and you will definitely find people who intensely dislike her and feel very strongly that what she has done is wrong."<sup>121</sup> Yet for the unprecedented change she brought about in the Orleans Parish, there

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<sup>121</sup> Webster, *supra* note 120 (quoting the executive director of CASA New Orleans). A CASA is a "court appointed special advocate," a citizen volunteer appointed by judges to advocate for the children's best interests. CASA volunteers are trained and managed by programmatic offices in local jurisdictions. *Our Work*, NAT'L CASA/GAL ASS'N FOR CHILD., <https://nationalcasagal.org/our-work/> [<https://perma.cc/4HUL-FNAH>].

seemed to be little awareness, and virtually no evidence, of efforts to document or disseminate her approach.

Judge Gray's approach in New Orleans is a blueprint for the court's role in safely reducing the number of children in foster care, a fully attainable goal in our current system. The phenomenon of the Orleans Parish's near elimination of foster care is explained in large part by interrogating the role of the juvenile court judge. By amplifying Judge Gray's values and disciplined approach to the law during the preadjudication phase, we hope other judges will follow suit.

Judge Gray retired at the end of 2020. While she remains a frequent contributor to national conversations about foster care, few focus on how she safely reduced the number of days that children are separated from their families by ninety percent. The process Judge Gray created in the Orleans Parish Juvenile Court remains in place; all juvenile court judges will continue to handle *ex parte* removals on a rotating monthly basis, and the juvenile court judge now assigned to Judge Gray's former section will continue to preside over all civil child abuse and neglect proceedings following the Continued Custody hearing. Left in Judge Gray's wake is the deepest of curiosities we hope to answer upon the conclusion of our study: Is it the process, or the processor, that matters? We trust, and perhaps fear, it is the latter.