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The New Orleans Transformation: Foster Care as a Rare, Time-Limited Intervention

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ARTICLES

THE NEW ORLEANS TRANSFORMATION: FOSTER CARE AS A RARE, TIME-LIMITED INTERVENTION

by

Josh Gupta-Kagan,* Christopher Church,** Melissa Carter,***
Vivek Sankaran**** & Andrew Barclay*****

This Article offers an initial evaluation of one reformed child protection system—New Orleans, Louisiana—and describes how a system that dramatically reduces the number of children in foster care might look. This system shows how a major metropolitan area can shrink its daily population of children in foster care to the low double digits, which would correspond to a reduction of the national daily foster care population by about 360,000. This reduction was mostly due to sending children home—usually to the homes from which they were removed—within days or weeks of removal, raising questions about the necessity of the original removal. This reduction occurred without harming children’s safety, suggesting that keeping children in state custody is not necessary to keep them safe. Moreover, New Orleans data reveal a particularly large reduction in the time Black children are separated from

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their families, an increase in the number of children living with kinship caregivers compared to strangers, and a near elimination of congregate care placements and termination of parental rights. All of these are positive outcomes, which demand widespread attention in the field.

Several features of the reformed New Orleans system stand out. First, in the period before any adjudications (when most foster care exits occurred), the family court took on a dispute resolution role, focused on ensuring cases were prepared for trial or moving toward settlement. This contrasts with the family court's historically more common and more interventionist problem-solving role. Second, the court insisted on compliance with pretrial procedures. Third, legal representation, especially of parents and the agency, was vigorous and adversarial.

Some notes of caution are warranted. A significant minority of children leave foster care in New Orleans via a quick permanent change of custody to a relative, which ends the court's involvement in the family's life but sacrifices some potential benefits of a longer case, especially a parent's opportunity to engage in rehabilitative services and more easily seek reunification.

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INTRODUCTION

The now-conventional critique of the present child protection system is that it is dramatically overbroad, intervening with far too many families through agencies and courts that are ill-suited to provide effective assistance. For the overwhelming

number of poor and disproportionately Black and Indigenous families subject to state intervention, the present system imposes surveillance, policing, and separation, but little effective assistance, and intervenes more than necessary to keep children safe. Sharp criticism also applies to the present foster care system's frequent use of terminations of parental rights (TPRs), and especially pursuing TPRs on the timeline set by the Adoption and Safe Families Act (ASFA). Calls for dramatic reform—to “narrow[] the front door”;¹ to repeal ASFA and reduce the use of TPRs;² to “end[] the need for group placements”;³ to promote racial justice;⁴ and to broadly “transform,”⁵ “redesign,” “fundamentally rethink,”⁶ and even “abolish child welfare as we know it”⁷—now abound.

¹ *About*, NARROWING THE FRONT DOOR TO NYC'S CHILD WELFARE SYS., <https://www.narrowingthefrontdoor.org/about> (last visited May 15, 2023).

² For instance, *Family Integrity & Justice Quarterly* devoted its Winter 2022 issue to “The Harm of the Adoption and Safe Families Act.” See *The Harm of the Adoption and Safe Families Act*, 1 FAM. INTEGRITY & JUST. Q. 6 (2022); see also Dorothy Roberts, *The Clinton-Era Adoption Law That Still Devastates Black Families Today*, SLATE (Nov. 21, 2022, 5:50 AM), <https://slate.com/news-and-politics/2022/11/racial-justice-bad-clinton-adoption-law.html>; Sarah Katz, Opinion, *A Federal Law Has Been Destroying Families for 25 Years. Let's Get Rid of It*, PHILA. INQUIRER, <https://www.inquirer.com/opinion/commentary/adoption-safe-families-act-repeal-20221117.html> (Nov. 17, 2022); Diane Redleaf, *The Adoption and Safe Families Act Takes Kids Away From Loving Parents*, REASON (Nov. 17, 2022, 8:00 AM), <https://reason.com/2022/11/17/adoption-and-safe-families-act-25th-anniversary/>.

³ *Ending the Need for Group Placements*, CASEY FAM. PROGRAMS (May 20, 2022), <https://www.casey.org/ending-need-for-group-placements/>; *Keeping Children Out of Group Placements: Strategies and Alternatives*, ANNIE E. CASEY FOUND. (Jan. 18, 2022), <https://www.aecf.org/blog/keeping-children-out-of-group-placements-strategies-and-alternatives>.

⁴ E.g., DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022); Alan J. Dettlaff, Kristen Weber, Maya Pendleton, Reiko Boyd, Bill Bettencourt & Leonard Burton, *It Is Not a Broken System, It Is a System that Needs to Be Broken: The UpEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 513 (2020).

⁵ E.g., Krista Thomas & Charlotte Halbert, *Transforming Child Welfare: Prioritizing Prevention, Racial Equity, and Advancing Child and Family Well-Being*, 6 NAT'L COUNCIL FAM. RELS. POL'Y BRIEF, Apr. 2021, at 1, 3; Katie Albright, *Time to Transform Child Welfare into a Child and Family Well-Being System*, ASCEND ASPEN INST. (Apr. 30, 2021), <https://ascend.aspeninstitute.org/time-to-transform-child-welfare-into-a-child-and-family-well-being-system/>; *Why Is Child Welfare System Transformation Necessary?*, CASEY FAM. PROGRAMS (Apr. 10, 2020), <https://www.casey.org/child-welfare-transformation-videos/>.

⁶ *First-of-its-Kind Partnership Aims to Redesign Child Welfare into Child and Family Well-Being Systems*, ANNIE E. CASEY FOUND. (Sept. 9, 2020), <https://www.aecf.org/blog/first-of-its-kind-partnership-aims-to-redesign-child-welfare-into-child-and-family-well-being-systems/>; see also *First-of-its-Kind Partnership Aims to Redesign Child Welfare into Child- and Family Well-Being Systems*, CASEY FAM. PROGRAMS (Sept. 9, 2020), <https://www.casey.org/thriving-families-safer-children/>.

⁷ Alan Dettlaff, Kristen Weber, Maya Pendleton, Bill Bettencourt & Leonard Burton, *What It Means to Abolish Child Welfare as We Know It*, IMPRINT (Oct. 14, 2020, 11:45 PM), <https://www.imprint.org/what-it-means-to-abolish-child-welfare-as-we-know-it/>.

That critique is by no means universally held,⁸ but its basic tenets—that the legal system should focus only on the most severe (and relatively rare) cases of child maltreatment, that doing so will not jeopardize child safety, and that racial and class disparities demand urgent action—have attracted bipartisan support across both the Trump and Biden administrations.⁹ Even critics of the abolitionists acknowledge that Child Protective Services (CPS) “may not be the appropriate agency to address the risks faced” by many of the families currently impacted by CPS agencies.¹⁰ Efforts to improve the system thus seek to narrow its scope, or at least more effectively triage cases, so family court action and family separations are limited to cases where they are truly necessary to keep children safe from severe threats to their health or safety.

This Article describes and offers some initial evaluation of one version of what such a reformed system could look like by examining a jurisdiction that dramatically reduced its use of foster care. Relying on a mixed-methods study of the New Orleans foster care system, it quantitatively explores how the New Orleans system changed over time and how it contrasts with national norms. It qualitatively evaluates a subset of New Orleans Juvenile Court removal hearings that occurred between April 2016 and December 2019¹¹—after the decline in foster care utilization occurred—

imprintnews.org/race/what-means-abolish-child-welfare. The *Columbia Journal of Race & Law* also held a symposium in 2021 focused on “Abolishing the Child Welfare System and Re-Envisioning Child Well-Being,” publishing articles on the topic from a group of over 20 scholars, practitioners, and advocates impacted by the system. Symposium, *Strengthening Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well Being*, 11 COLUM. J. RACE & L. 421 (2021).

⁸ E.g., Richard P. Barth, Melissa Jonson-Reid, Johanna K.P. Greeson, Brett Drake, Jill Duerr Berrick, Antonio R. Garcia, Terry V. Shaw & John R. Gyourko, *Outcomes Following Child Welfare Services: What Are They and Do They Differ for Black Children?*, 14 J. PUB. CHILD WELFARE 477 (2020); Sarah A. Font & Kathryn Maguire-Jack, *It’s Not “Just Poverty”: Educational, Social, and Economic Functioning Among Young Adults Exposed to Childhood Neglect, Abuse, and Poverty*, 101 CHILD ABUSE & NEGLECT, Jan. 2020, at 10.

⁹ See Jerry Milner & David Kelly, *It’s Time to Stop Confusing Poverty with Neglect*, IMPRINT (Jan. 17, 2020, 5:12 AM), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect> (Trump administration criticizing the breadth of the current system, urging state and local authorities to “stop confusing poverty with neglect”); Proclamation No. 10192 of April 30, 2021, 86 Fed. Reg. 23,849 (May 5, 2021) (President Joe Biden similarly criticizing how “[t]oo many children are removed from loving homes because poverty is often conflated with neglect, and the enduring effects of systemic racism”); Erica Green, *Can ‘Kinship Care’ Help the Child Welfare System? The White House Wants to Try*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/us/politics/foster-children-biden-welfare.html> (a White House official stating the “child welfare system is broken.”).

¹⁰ Font & Maguire-Jack, *supra* note 8, at 10; Proclamation 10192, 86 Fed. Reg. at 23,849.

¹¹ The Orleans Parish Juvenile Court provided the Authors with a random sample of over 100 hearings between these dates for evaluation.

to offer additional insight to the role of the court and those hearings in the reformed system.¹²

As described previously, the utilization of foster care in New Orleans, Louisiana, plummeted by 90% between 2011 and 2017, the decline coinciding with Judge Ernestine Gray's tenure presiding over the Orleans Parish Juvenile Court's civil child neglect and abuse docket.¹³ If such a decline were applied nationwide, the foster care population on a given day could reduce by about 360,000 children.¹⁴ In New Orleans, this decline resulted from actions taken after the local CPS agency separated children from their families—after a child protection hotline call alleged a parent abused or neglected their child, after (or while) CPS investigated that allegation, and after CPS physically and legally removed the child from their caretakers, triggering court oversight of the agency's actions. Once the case landed on Judge Gray's docket, children left foster care remarkably quickly—measured in days, not months or years, for the overwhelming majority of children.¹⁵ Crucially, these quick exits from foster care did not generally jeopardize children's safety.¹⁶

This change makes New Orleans both a unique case study of a jurisdiction with a dramatically lower foster care population than both the national norm and other major cities, and an illustration of what a reformed foster care system might look like. In New Orleans, foster care was used far less frequently as a protective intervention, yet the safety of children was not jeopardized.¹⁷ The overall number of days children were separated from their families for the purpose of foster care placement was considerably lower than anywhere else in the country.¹⁸ Notably, the dramatic reduction in days Black children spent in foster care resonates with calls

¹² See Melissa Carter, Christopher Church & Vivek Sankaran, *A Quiet Revolution: How Judicial Discipline Essentially Eliminated Foster Care and Nearly Went Unnoticed*, 12 COLUM. J. RACE & L. 496, 503–05 (2022) (providing an overview of the Louisiana statutory removal scheme and a description of the hearings the research team reviewed).

¹³ *Id.* at 497, 516.

¹⁴ The number of children in foster care nationally has remained in the low-to-mid 400,000s for several years, falling during the pandemic to 391,098 by September 30, 2021. CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT 1 (2022).

¹⁵ Carter et al., *supra* note 12, at 510; *infra* Section I.C.

¹⁶ Carter et al., *supra* note 12, at 512.

¹⁷ *Id.*

¹⁸ *Infra* Part III. Claiming confidentiality concerns, the federal government only releases county identifiers for jurisdictions with at least 1,000 records in annual submissions. CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS): 6-MONTH FOSTER CARE FILE USER'S GUIDE 4 (2022). This policy choice by the federal government limits verification of this claim to counties with at least 1,000 records annually and also limits the public's ability to study and understand prevention efforts that successfully reduce the number of children and families impacted by the child welfare system. For instance, historically, New Orleans was commonly excluded from public reporting due to its low (per capita) foster care utilization.

for racial equity and justice.¹⁹ And the New Orleans legal system features far less frequent use of TPRs.²⁰ The small subset of cases that did end in terminations on ASFA timelines—those of very young children found to have suffered serious abuse—evidence the legal system’s narrow focus on the most severe cases of maltreatment. For most New Orleans children impacted by the system, quick exits from foster care mooted ASFA’s controversial timeline. All these changes occurred in New Orleans without significant modification to the laws defining abuse or neglect, governing court procedures, or imposing termination timelines. And these changes resulted from court practices that avoided family courts’ historic “problem-solving” role and instead reflected an understanding that the court’s first task is to resolve factual and legal disputes about whether abuse or neglect occurred and whether foster care is necessary.²¹

The system we describe here is not the only possible vision of what a reformed foster care system might look like. Where the New Orleans story highlights impacts post-removal, the early phases of the COVID-19 pandemic highlight impacts further upstream, namely on mandatory reporting.²² As others have explained, child protection hotline calls plummeted, which in turn reduced CPS agency investigations of families and removals of children.²³ Similar to our findings in New Orleans, these changes led to a smaller system without any detectable degradation of children’s safety.²⁴ The post-removal changes that occurred in New Orleans and the front-end changes that occurred in the early months of COVID-19 are instructive for those seeking to alter the foster care system in ways that comport with more just and equitable outcomes and a more limited role for state intervention in the privacy of families.

In describing the system in New Orleans, this Article avoids wading into other, less descriptive, territory. It does not make an argument about how the legal system ought to define family situations not sufficiently severe to warrant CPS agency involvement. Nor does it argue the relative merits of front-end or back-end reforms,

¹⁹ *Infra* Section I.B.

²⁰ *Infra* Section I.D.

²¹ *Infra* Part III.

²² Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 COLUM. J. RACE & L.F. 1, 1 (2022).

²³ *Id.*

²⁴ *Id.*; see also Robert Sege & Allison Stephens, *Child Physical Abuse Did Not Increase During the Pandemic*, 176 JAMA PEDIATRICS 338, 339 (2022); cf. Barbara Chaiyachati, Joanne N. Wood, Camille Carter, Daniel M. Lindberg, Thomas H. Chun, Lawrence J. Cook & Elizabeth R. Alpern, *Emergency Department Child Abuse Evaluations During COVID-19: A Multicenter Study*, 150 PEDIATRICS 25, 26 (2022) (acknowledging a significant decrease in reports of suspected maltreatment, but questioning whether pandemic changes led to true reductions in maltreatment versus decreased detection).

or whether substantive legal changes should occur. And it does not seek to identify precise causes of the foster care decline in New Orleans.

Part I describes the dramatic decline in the utilization of foster care in New Orleans, and the corresponding impacts of that decline, including a particularly large reduction in the time Black children are separated from their families for foster care placement, an increase in the number of children living with kin, and a near elimination of congregate care placements and TPRs. Part I includes some notes of caution as well, recognizing that the frequency of children leaving foster care quickly raises questions about whether many of those children needed to be removed in the first place. It also explores a subset of cases in which the court approved a permanent change of custody, ending the court's involvement in a family but at the cost of sacrificing some potential benefits of continued court involvement in certain cases. Part II contextualizes the magnitude of New Orleans's foster care decline by comparing its dynamics to other jurisdictions. Part III discusses what the legal system looked like during this period, offering guidance to courts as to their pivotal role in limiting the state's unnecessary interference into a family's affairs.

I. IMPACTS OF THE DECLINE OF FOSTER CARE UTILIZATION IN NEW ORLEANS

Building off prior work,²⁵ this Part describes the dramatic decline in foster care utilization in New Orleans and examines its impact across a variety of indicators. Although the number of children that the agency removed did not change significantly, those children left foster care so quickly that the number of children separated from their families for foster care placement in New Orleans declined by 90%, from more than 200 children in 2011 to just 20 in 2017.²⁶ By the end of that period, New Orleans's rate of foster care utilization was one-tenth the national rate.²⁷ This tremendous decline affected the New Orleans system across a range of measures, including those related to race, how long children remain separated from their caretakers, where they are placed and how often those placements change, and the rate

²⁵ Carter et al., *supra* note 12, at 498.

²⁶ *National Data Archive on Child Abuse and Neglect Datasets: Adoption and Foster Care Analysis and Reporting System (AFCARS) Foster Care Files, Federal Fiscal Years 2010–2020*, CHILD'S BUREAU, <https://www.ndacan.acf.hhs.gov/datasets/datasets-list-afcars-foster-care.cfm> (last visited Apr. 7, 2023) [hereinafter AFCARS 20XX FFY] (data and analysis on file with corresponding author). Unless otherwise noted, AFCARS datasets utilized in this Article 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, nor its agents or employees bear any responsibility for the analyses or interpretations presented here.

²⁷ AFCARS 2017 FFY, *supra* note 26.

at which the system terminates parents and children's legal relationships (commonly known as terminations of parental rights, or TPRs).

This Part also explores how the scope of the change in New Orleans rendered meaningless many of the frequently used metrics of a foster care system. A system with so few children spending so little time in foster care requires somewhat different explanatory metrics.

A. *The Core Metrics of the Foster Care System*

There are a handful of measures that serve as foundational, explanatory metrics of any foster care system. These generally include how many children are removed and discharged from foster care—including reasons for both—the length of time children are in foster care, and basic demographic data about the children, such as age and race. These data are routinely reported by state and federal agencies,²⁸ and drive headlines about trends in the foster system.²⁹ Examining these core metrics in New Orleans allows a description of the decision points where New Orleans differs from norms, and how significant those differences are.

The most straightforward summary of what happened in New Orleans is that foster care utilization decreased by 90% as a result of the court discharging most children very quickly after the CPS agency removed them. While many of these children arguably should have never been removed, the significant limitation on the time children spent in care in New Orleans highlights the legal system's important role in minimizing the state's unnecessary interference in a family's affairs. One result of the fast discharges of children from foster care is that few children remained in care long enough for permanency options common elsewhere—like adoption—to even be considered. However, many of these children were discharged to the custody of their relatives, resulting in permanent changes to the custodial relationship. New Orleans's heavy reliance on relatives has many benefits, but also raises concerns about the steady encroachment of *parens patriae* on the fundamental right

²⁸ *Data and Statistics: AFCARS*, CHILD.'S BUREAU (Nov. 1, 2022), <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/afcars>; see also *Foster Care Services Dashboard*, S.C. DEP'T SOC. SERVS., <https://reports.dss.sc.gov/ReportServer/Pages/ReportViewer.aspx?/Foster+Care> (Apr. 7, 2023, 4:25 AM).

²⁹ E.g., John Kelly, *Number of Youth in Foster Care Dropped Again in 2021*, IMPRINT (Nov. 1, 2022, 8:38 AM), <https://imprintnews.org/youth-services-insider/number-youth-in-foster-care-dropped-again-2021/235363>; Jaclyn Cosgrove, *Why Are Black Children Removed from Homes at High Rate? L.A. County Plans 'Blind Removal' Pilot*, L.A. TIMES (July 14, 2021, 5:00 AM), <https://www.latimes.com/california/story/2021-07-14/why-are-black-children-removed-from-homes-at-high-rate-l-a-county-plans-blind-removal-pilot>.

to family integrity,³⁰ especially since the quick discharges in New Orleans almost certainly take place before any adjudication of the allegations in the petition.³¹

1. Describing the New Orleans Transformation and Comparing It to National Norms

Separating children from their parents and placing them in foster care is the most invasive measure used by the child protection system with the intention of protecting children from parental maltreatment. The logic of separation is plain: if a parent poses a danger to the child, the state can protect the child by removing him or her from the source of danger, the parent. Such separations, of course, are major invasions of parents' and children's right to family integrity and can traumatize both parents and children.

Critics of the present legal system charge that it separates families too often, when removal is not necessary to ensure children's safety.³² Examinations of the legal system during the early months of the COVID-19 pandemic—when child neglect and abuse allegations, investigations, and removals all declined significantly—demonstrated that children remained safe even when family separations were used less frequently.³³

The Orleans Parish removal rate has long been low compared to national norms, and it remained relatively stable at those low levels between 2010 and 2020,³⁴ the only Orleans Parish foster care metric that can be described as such.³⁵

³⁰ Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

³¹ A parent or caretaker's constitutional right to family integrity includes the right "to a hearing on their fitness before their children are removed from their custody." Stanley v. Illinois, 405 U.S. 645, 658 (1972). That hearing is most commonly referred to as the adjudication hearing, and in Louisiana must be held within 45 days of the filing of the petition. LA. CHILD. CODE ANN. art. 659(A) (1999). Of course, children are commonly removed from their caretakers before any such hearing under *Stanley's* implied and accepted exception of exigency. Thus, in New Orleans, most children are not in care long enough for the allegations against their parents, memorialized in the agency's petition, to be the subject of any such hearing.

³² Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 523 (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, 1163 (2019); Dettlaff et al., *supra* note 4, at 506; ROBERTS, *supra* note 4, at 22–23.

³³ Arons, *supra* note 22, at 18.

³⁴ AFCARS 2010–19 FFY, *supra* note 26 (unless otherwise noted, the data reported for the 2019 FFY are considered to be time invariant in the Orleans Parish).

³⁵ See *infra* fig.3.

The Orleans Parish removal rate hovered between 1 and 2 average monthly removals for every 10,000 children in the population during this time frame, consistently below state and national rates.³⁶

The Orleans Parish's stable removal rate is especially surprising in the context of the overall 90% reduction in foster care utilization in New Orleans: How does a jurisdiction cut foster care use by 90% from an already relatively low starting point without significantly reducing the number of children that are removed and placed in foster care? The quantitative answer rests primarily with length of stay in foster care. Most of the children removed and placed in foster care in New Orleans are discharged very quickly, often within a week or two of their removal.

Quick exits from foster care are not uncommon nationally. During the 2019 Federal Fiscal Year (FFY), authorities discharged more than 21,000 children from foster care within one month of their removal (8.6% of all children removed).³⁷ These percentages and absolute numbers have reduced slightly over the years.³⁸ Significant variation exists across states in the proportion of children discharged within a month of their removal, with New Mexico discharging the most (42.3%) children within a month of their removal and 13 states discharging less than 5% of children within a month of their removal.³⁹ Scholars have suggested that this state-by-state variation may result in part from how CPS agencies, law enforcement, and other state actors divide authority over child removals, while *intrastate* variation suggests that different local practices and practitioners may play as large a role as the law itself.⁴⁰

The most common metric to describe the prevalence of children who spend very brief periods of time in care, often referred to as “short stayers,”⁴¹ is to calculate

³⁶ AFCARS 2010–19 FFY, *supra* note 26. The Louisiana average monthly removal rate hovered between 2 and 4 per 10,000 and the national average monthly removal rate averaged between 2.5 and 3.5 per 10,000, both consistently higher than the Orleans Parish rate. *Id.*

³⁷ AFCARS 2019 FFY, *supra* note 26.

³⁸ AFCARS 2014–19 FFY, *supra* note 26. Nationally, the percentage of short stayers reduced from 10.3% in 2014 FFY to 8.6% in 2019 FFY and the total number reduced from 27,730 in 2014 FFY to 21,736 in 2019 FFY. *Id.*

³⁹ AFCARS 2019 FFY, *supra* note 26.

⁴⁰ Vivek S. Sankaran & Christopher 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, 219–23 (2017).

⁴¹ *Id.* at 216; see Zoe Getz, Cassandra Simmel, Liwei Zhang & Brett Greenfield, “Short-Stayers” in *Child Welfare: Characteristics and System Experiences*, 138 CHILD. & YOUTH SERVS. REV., May 2022, at 1; Brett Greenfield, Liwei Zhang & Cassandra Simmel, *Exploring State Level Factors Associated with Short-Stays in Child Welfare: The Role of Systemic Risk and Surveillance*, 28 CHILD MALTREATMENT, 345, 345 (2023); Eli Hager, *The Hidden Trauma of “Short Stays” in Foster Care*, MARSHALL PROJECT (Feb. 11, 2020), <https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care>; STEPHANIE NELSON-DUSEK & MONICA

the percentage of children who are discharged from foster care within 30 days of their removal.⁴² However, a significant proportion of these children are discharged from foster care much more quickly, within a week or two of their removal.⁴³ For example, a majority of short stayers nationally were discharged within six days of their removal.⁴⁴ Brief stays in foster care typically result in one of two discharges: a return to the custody of the parent or caregiver from whom the child was removed, or a discharge from foster care to the custody of a different parent or other family member or kinship caregiver.⁴⁵ The first path is most common: of the children who left foster care within 30 days, authorities returned most—75%—“to the very caretakers from whom they were removed.”⁴⁶ Authorities discharged an additional 16% of these children to relative custody.⁴⁷

The New Orleans system contrasts with national statistics in three crucial ways. First, far more children left foster care very quickly in New Orleans than nationally. As mentioned previously, the 90% reduction in foster care utilization in New Orleans was a result of processes that took place after the physical and legal separation of a child from their caretaker, and can be best described as a significant reduction in the length of time children spend in foster care separated from family. The most recent data available covering Judge Gray’s tenure show that the median length of stay for all children exiting the New Orleans foster care system was less than a month (0.4 months),⁴⁸ compared to 13.7 months statewide and 15.5 months nationally.⁴⁹ The measure of central tendency of New Orleans’s foster care length of stay is a matter of days, compared to over a year elsewhere.

The majority (51%) of children discharged from foster care in New Orleans do so within 30 days. That is more than double the state of Louisiana’s rate (20%) and six times the national rate (8.6%).⁵⁰ Nationally, short stayers are a common feature of the system, but not typical. In New Orleans, they are the norm.

Second, when children left foster care in New Orleans quickly, they most commonly returned to the parents from whom the agency removed them but were still more likely to be discharged to the custody of a relative than in other parts of the

IDZELIS ROTHE, WILDER RSCH., MINNESOTA’S SHORT-STAYERS: A STUDY OF CHILDREN WHO HAVE EXPERIENCED SHORT OUT-OF-HOME PLACEMENT STAYS I (2016).

⁴² NELSON-DUSEK & ROTHE, *supra* note 41, at 1.

⁴³ Sankaran & Church, *supra* note 40, at 209, 217, 226.

⁴⁴ AFCARS 2019 FFY, *supra* note 26.

⁴⁵ *Id.* Other common exits from foster care—adoption, guardianship, or emancipation—generally take much longer, and thus combined, account for approximately five percent of short-stayer discharges nationally.

⁴⁶ *Id.*; Sankaran & Church, *supra* note 40, at 218.

⁴⁷ Sankaran & Church, *supra* note 40, at 219; AFCARS 2019 FFY, *supra* note 26.

⁴⁸ AFCARS 2019 FFY, *supra* note 26.

⁴⁹ *Id.*

⁵⁰ *Id.*

country. In FFY 2019, 22% of short stayers in New Orleans were discharged to the custody of a relative, compared to 16% nationally.⁵¹ However, short-stayer discharges to relative custody have recently been as high as 39%, more than double the national rate.⁵² A corollary to this higher rate of discharges to relative custody is that a lower percentage of New Orleans short stayers were reunited with their parents—56% in New Orleans compared with 74% nationally.⁵³ But with the much higher rate of short stayers overall, and with a majority of those discharges still being reunifications, the New Orleans system featured significantly more quick discharges to reunification than the national norm *and* significantly more quick discharges to relative custody.

Third, adoptions in New Orleans were rare during Judge Gray's tenure—they occurred at about six percent of the national rate.⁵⁴ Among the 97 child removals in New Orleans during the 2017 FFY, only 9 children were discharged to adoption.⁵⁵ Because so few children stay in care past adjudication and disposition, most children were not even the subject of a legal permanency plan, let alone one that called for the permanent termination of a parent and child's legal relationship and creation of a new parent-child relationship through adoption. Of the few children who were adopted from the New Orleans foster care system, the adoptions were finalized more quickly than comparable state and national timelines.⁵⁶ The median time from removal to adoption for these children was 13 months, with a maximum time from removal to adoption of 22 months and a minimum time of 9 months.⁵⁷

2. *Questions Raised by Short Stayers in New Orleans*

The dynamics of short stayers raise a number of concerns. While the prompt reunification of parent and child may be viewed as a positive—a family is quickly reunited, and a child returns to their family, escaping the uncertainty and risks of foster care—it raises questions about the underlying removal. If the family could be reunified so quickly, was a removal truly necessary? Multiple commentators have argued that many of these family separations “should have been prevented by the

⁵¹ *Id.*

⁵² AFCARS 2018 FFY, *supra* note 26 (national rate was 17.5% short-stayer discharges to relative custody).

⁵³ *Id.*

⁵⁴ AFCARS 2019 FFY, *supra* note 26. The rate of children discharged to adoption in New Orleans was 0.5 per 10,000 children, compared to 8.5 per 10,000 children nationally. *Id.*

⁵⁵ *Id.*; AFCARS 2017 FFY, *supra* note 26. Two children out of this cohort remain in care as of March 31, 2020. *Id.* Nationally, 25% of all children who leave foster care are adopted. CHILD'S BUREAU, *supra* note 14, at 3.

⁵⁶ As a point of reference, the national median months from removal to adoption among children adopted (an exit cohort) was 28.4 months, with the quickest state (Utah) reporting a median of 18.2 months. AFCARS 2019 FFY, *supra* note 26.

⁵⁷ *Id.*

legal system,”⁵⁸ and at least one state agency has made a similar point.⁵⁹ These questions are particularly serious in light of research documenting the harm to children from removing them from their families, even temporarily.⁶⁰ The much greater rate of quick discharges to reunification in New Orleans raises profound questions about whether those children needed to be separated from their caretakers at all. Whatever marginal benefit could be argued to result from a brief stay in foster care is outweighed by the trauma inflicted on the families subject to those family separations.

This question is particularly weighty in the context of New Orleans, where removal rates have long been below the national norm. If large portions of removals in New Orleans did not need to happen, then one may reasonably question whether even larger portions of removals nationally do not need to happen.

The short-stayers phenomenon is more complicated when the family court orders a child quickly released from foster care to a parent or family member *other than* the parent/custodian from whom the child was removed, and then closes its case. Rather than reversing the initial removal, the court’s actions implicitly ratify the judgment that the initial removal was legally justified and necessary to protect the child. Moreover, the court makes that parent–child separation more permanent by shifting custody to the other parent or kinship caregiver; the new custody arrangement is subject to future custody litigation just like any child’s custody is, but there are no further family court hearings in the child maltreatment case which can change custody.

This scenario has significant positive attributes. The placement with the parent or kinship caregiver has all the benefits of parental and other kinship placements—more placement stability, better mental and behavioral health, greater safety from institutional abuse, and fewer permanent terminations of the parent–child relationships.⁶¹ The case closure takes the juvenile court and, eventually, the child protection agency out of the family’s affairs and thus limits the state’s ability to regulate the new family arrangement.

⁵⁸ Sankaran & Church, *supra* note 40, at 210; *see also, e.g.*, Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 916 (2014) (“It is reasonable to infer that many, if not most, children who could return to their families so quickly were never at such a high risk as to justify a removal in the first instance.”).

⁵⁹ The state of Arkansas so acknowledged in a federal filing. TITLE IV-E WAIVER DEMONSTRATION PROJECT PROPOSAL, ARK. DIV. CHILD. & FAM. SERVS. 14 (2012).

⁶⁰ *See, e.g.*, Trivedi, *supra* note 32, at 525–26; ERIN SUGRUE, ALIA INNOVATIONS, EVIDENCE BASE FOR AVOIDING FAMILY SEPARATION IN CHILD WELFARE PRACTICE (2019); Sankaran et al., *supra* note 32, at 1165–67; CHILD WELFARE LAW AND PRACTICE (Donald N. Duquette, Ann M. Haralambie & Vivek S. Sankaran eds., 3d ed. 2016) [hereinafter NACC RED BOOK].

⁶¹ *E.g.*, MARC WINOKUR, AMY HOLTAN & KERI E. BATCHELDER, CAMPBELL SYSTEMATIC REVIEWS KINSHIP CARE FOR THE SAFETY, PERMANENCY AND WELL-BEING OF CHILDREN REMOVED FROM THE HOME FOR MALTREATMENT: A SYSTEMATIC REVIEW 40 (2014).

Possible negative attributes, however, exist as well. First, due process questions are raised when a child exits foster care to a new legal custodian before the court has determined whether the parent has actually neglected or abused the child, as would occur during an adjudication hearing.⁶² Closing the case before such findings can deny that parent the opportunity to challenge the allegations against them. Relatedly, even if the court would have determined that the parent maltreated their child, the parent would be legally entitled to services to help them reunify with their child.⁶³ That legal obligation of the state disappears when the family court case is closed.⁶⁴ These impacts may not only harm the parent who loses custody. The child may lose out on the opportunity to reunify with the parent who has been their primary caretaker. It is likely that living with the other parent or kinship caregivers is preferable to living with strangers in foster care,⁶⁵ but that does not mean it is always preferable to returning to live with that primary caretaker.

Also, a quick exit from foster care and closure of the juvenile court case can trigger a loss of potential benefits to the child and kinship caregiver. One loss is financial. Kinship caregivers (other than parents) could become licensed foster parents entitled to a monthly foster care board payment.⁶⁶ If this arrangement continued and the court eventually ordered a guardianship with that caregiver, the kinship caregiver could obtain a guardianship subsidy⁶⁷ in states offering such subsidies, including Louisiana.⁶⁸ Terminating the court's jurisdiction and sending the child out of foster care forecloses the opportunity of caregivers to obtain these subsidies to help offset the costs of caring for the child. This loss of financial support is important because foster care and guardianship subsidies are typically significantly larger than public benefits like Temporary Assistance for Needy Families (TANF), and kinship caregivers of children involved with the foster care system are, in the aggregate, more impoverished than non-kinship foster parents.⁶⁹

Other case-specific details may also apply to other losses when a family court terminates its jurisdiction. Consider, for instance, the following fact pattern, based

⁶² Josh Gupta-Kagan, *Due Process of Law and Child Protection*, in NACC RED BOOK, *supra* note 60, at 387, 388–91.

⁶³ 42 U.S.C. § 671(a)(15)(B-C).

⁶⁴ Josh Gupta-Kagan, *The Strange Life of Stanley v. Illinois: A Case Study in Parent Representation and Law Reform*, 41 N.Y.U. REV. L. & SOC. CHANGE 569, 590–91 (2017).

⁶⁵ *Infra* Section I.E.

⁶⁶ 42 U.S.C. § 671(28).

⁶⁷ Federally supported guardianship subsidies are available only when a child has lived in licensed kinship foster care for at least six months. 42 U.S.C. § 673(d)(3)(A)(i)(II).

⁶⁸ *Kinship Navigator—Children in Need of Care/Guardianship*, LA. DEP'T CHILD. & FAM. SERVS., <http://www.dcf.louisiana.gov/page/687> (last visited May 15, 2023).

⁶⁹ Christina McClurg Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 CHILD.'S. LEGAL RTS. J. 101, 109, 111 (2019).

on one of the cases reviewed in this study: A child of impoverished parents living in Central America left those parents behind and entered the United States without documentation. Found homeless in New Orleans, the agency took the child briefly into foster care before the court ordered the child released to the custody of a kinship caregiver.⁷⁰ The child may be eligible to regularize their immigration status if the family court issued an order detailing the legal predicates for immigration authorities to grant the child special immigrant juvenile status.⁷¹ But the family court did not do so before closing the case, and it is unclear if the child was able to access the court to obtain such a ruling.

a. Safety

Protecting children from neglect and abuse is, of course, the primary purpose of the child protective system, so data concerning children's safety from maltreatment form crucial measures. Unfortunately, no precise measure of actual maltreatment exists.⁷² Instead, commonly used statistics measure the number of cases reported to CPS agencies and how often such agencies take particular actions, such as formally investigating an allegation to determine whether maltreatment occurred.⁷³

These data are especially useful for children who have already been the subject of an allegation of neglect or abuse, especially one that led to a substantiation (the administrative action demonstrating the CPS agency's investigation produced sufficient evidence that a parent did neglect or abuse their child) or foster care placement. In these cases, CPS agency involvement should ideally prevent future neglect or abuse. Accordingly, measuring the frequency of repeat incidents—re-reports, re-substantiations, and reentries to foster care—of these children provides a useful measure of children's safety after an initial CPS intervention. These statistics can be both underinclusive (by omitting cases never reported to agencies or incorrectly unsubstantiated by agencies) and overinclusive (by including cases incorrectly substantiated by agencies). Nonetheless, these data are among the best measures of safety

⁷⁰ Video Recording: 1027-SS, held by Orleans Parish Juvenile Court (June 8, 2017) (on file with corresponding author). The Casey Family Programs research team secured and utilized 72 video recordings of hearings occurring before adjudication in the Orleans Parish Juvenile Court between September 2016 and March 2019. 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.

⁷¹ 8 U.S.C. § 1101(a)(27)(J).

⁷² A.J SELDAK, J. METTENBURG, M. BASENA, I. PETTA, K. MCPHERSON & S. LI, U.S. DEP'T OF HEALTH & HUM. SERVS., *FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 2* (2010).

⁷³ Such data make up the core of regularly reported government data about the scope of child neglect and abuse. *See, e.g.*, CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., *CHILD MALTREATMENT 2020*, at 6, 17 (2022).

outcomes available, and both academic studies⁷⁴ and the federal government⁷⁵ use these recurrence statistics to measure child safety.

As previously discussed,⁷⁶ there appears to be little connection between the 90% reduction in New Orleans foster care utilization and the system's CPS dynamics. Between 2011 and 2015, there was a steady and significant increase in the number of children reported for suspected maltreatment, and a corresponding increase in CPS investigations of those allegations.⁷⁷ "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."⁷⁸ Between 2014 and 2019, there was a slight reduction in rates of both reports and investigations of suspected maltreatment; however, both of these reductions were consistent with statewide trends in Louisiana.⁷⁹ In this landscape, recurrence rates are all the more important.

When the agency receives an allegation of maltreatment concerning a child with whom it has previously investigated and taken some protective action, it forms the cohort of children by which the safety of the system is examined. The reasoning follows that if the system has awareness of a child that has been subject to maltreatment, it should be able to use its authority to make sure the child is not subject to future or ongoing maltreatment. Although there is some variation in constructing safety measures,⁸⁰ most define recurrence as the number of children subject of a

⁷⁴ *E.g.*, Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42, 44, 46 (2019); Richard P. Barth, Claire Gibbons & Shenyang Guo, *Substance Abuse Treatment and the Recurrence of Maltreatment Among Caregivers with Children Living at Home: A Propensity Score Analysis*, 30 J. SUBSTANCE ABUSE TREATMENT 93, 94, 97 (2006).

⁷⁵ The federal government conducts Child and Family Service Reviews (CFSRs) of each state to measure how well their systems function. "CFSR Safety Outcome 1" is the "Recurrence of Maltreatment," measured by the number of children deemed victims once who are deemed victims again within 12 months. CAPACITY BLDG. CTR. FOR STATES, U.S. DEP'T OF HEALTH & HUM. SERVS., RECURRENCE OF MALTREATMENT 1 (2022). CFSRs also measure reentry to foster care rates. CAPACITY BLDG. CTR. FOR STATES, U.S. DEP'T OF HEALTH & HUM. SERVS., REENTRY TO FOSTER CARE 1 (2022).

⁷⁶ Carter et al., *supra* note 12, at 513.

⁷⁷ *National Data Archive on Child Abuse and Neglect Datasets: National Child Abuse and Neglect Data System ("NCANDS") Child File, Federal Fiscal Years 2010–2019*, CHILD'S BUREAU, <https://www.ndacan.acf.hhs.gov/datasets/datasets-list-ncands-child-file.cfm> (last visited Apr. 7, 2023) [hereinafter NCANDS] (data and analysis on file with corresponding author).

⁷⁸ Carter et al., *supra* note 12, at 512.

⁷⁹ NCANDS, *supra* note 77.

⁸⁰ See KRISTEN LWIN, THE RECURRENCE OF CHILD MALTREATMENT IN CHILD WELFARE 3, 4 (2016), <https://www.oacas.org/wp-content/uploads/2016/08/PARTicle-Recurrence-of-Maltreatment-FINAL.pdf> (arguing that the agency's decision to substantiate should not be

subsequent report of substantiated maltreatment within six or twelve months of a previous substantiated report.⁸¹ If a jurisdiction's underlying rates of investigations or substantiated maltreatment are very low, recurrence of maltreatment may not be the most stable or reliable indicator.

Consider an agency that investigates very few reports of maltreatment in general, say Virginia (5.3 per 10,000 children) whose child investigation rate is the second lowest across all states, and is a fourth of the national rate of 29.4 child investigations per 10,000 children.⁸² Virginia's recurrence of maltreatment rate—not even half the national rate and the ninth lowest across all states—may indicate little more other than a child living in Virginia, a state relatively unlikely to investigate and substantiate an allegation of maltreatment, is also relatively unlikely to be the subject of two substantiated investigations of child maltreatment.

There are other methodological issues with comparing recurrence rates across jurisdictions. Recurrence is dependent on the child protection agency's decision to substantiate an allegation of maltreatment, a decision that requires differing levels of evidence across jurisdictions.⁸³ Nicholas Kahn and colleagues describe a range of regulatory standards governing the standard of proof required to substantiate an allegation of maltreatment, including jurisdictions requiring as little as a "reasonable basis" for substantiation to one requiring a more stringent clear and convincing evidence.⁸⁴ They found that "a higher standard of proof at substantiation of child abuse and neglect actually reduces the likelihood that a report is substantiated."⁸⁵ Thus, if a higher standard of proof reduces the likelihood that one allegation of maltreatment is substantiated, it would similarly reduce the likelihood that a subsequent allegation of maltreatment is substantiated.

Despite these and other methodological issues, recurrence rates remain an important safety indicator. Because of these methodological issues, the most relevant maltreatment rates to compare New Orleans against are its historical rates and comparable statewide rates. The Orleans Parish recurrence of maltreatment rate between 2014 and 2017 hovered around six percent, comparable to statewide rates in Louisiana.⁸⁶ Between 2017 and 2019, the Orleans Parish and statewide recurrence rate

used to assess the validity of an allegation of maltreatment); see also Brett Drake, *Unraveling "Unsubstantiated,"* 1 CHILD MALTREATMENT 261 (1996).

⁸¹ See, e.g., CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CFSR ROUND 3 STATEWIDE DATA INDICATORS WORKBOOK 9 (2022) (defining, for the purposes of the CFSR, the indicator for "recurrence of maltreatment" by reference to another "substantiated or indicated maltreatment report").

⁸² NCANDS, *supra* note 77.

⁸³ Nicholas E. Kahn, Josh Gupta-Kagan & Mary Eschelbach Hansen, *The Standard of Proof in the Substantiation of Child Abuse & Neglect*, 14 J. EMPIRICAL LEGAL STUDIES 333, 336 (2017).

⁸⁴ *Id.* at 336–37.

⁸⁵ *Id.* at 357.

⁸⁶ NCANDS, *supra* note 77 (using a lagging 12-month average).

dropped to five percent.⁸⁷ At no point did the Orleans Parish recurrence rate diverge from the statewide average, despite the dramatic reduction in foster care usage occurring only in Orleans. Thus, the significant reduction in foster care utilization in New Orleans did not result in increases in the recurrence of maltreatment, the primary basis for claiming the reduction in New Orleans did not compromise child safety.

Reentry to care is another safety measure. When children are discharged from foster care, ideally, they should not reenter the system.⁸⁸ Examining reentry rates highlights similar methodological issues as recurrence. For example, low reentry rates in Delaware and Texas (3% and 3.6% respectively) may say more about their underlying removal rates (the third and seventh lowest removal rates across all states, respectively) than anything about the effectiveness of their permanency efforts.⁸⁹ Again, if a jurisdiction is very unlikely to remove a child in the first instance, it would follow that they would be just as unlikely to remove the same child twice in a 12-month period. New Orleans is similarly situated, as the average monthly removal rate between 2010 and 2019 FFY is 1.3 removals per 10,000 children, not even half the national rate.⁹⁰ However, the removal rate in Orleans Parish was not impacted by the 90% reduction in foster care utilization.⁹¹ Therefore, the Orleans Parish reentry rate is a useful safety measure. The Orleans Parish reentry rate peaked in the 2011 FFY, when 23.9% of children removed were reentering within 12 months of a previous discharge.⁹² During the period of significant reduction in foster care utilization, the reentry rate peaked at 15% during the 2012 and 2013 FFYs, dropping to 5.7% during the 2016 FFY, and returning to 15% by 2018 FFY.⁹³ Despite all the methodological issues with comparing recurrence rates in isolation across jurisdictions, it seems worth mentioning that the Orleans Parish reentry rate was below or comparable to the national reentry rate between 2012 and 2018 FFY.⁹⁴

It is beyond the scope of this Article to wade into the debate of what may be an appropriate or tolerable recurrence of maltreatment or reentry to care rate. However, the conventional child welfare critique implicitly invites a balancing of competing priorities: What increase in reentry to care or recurrence of maltreatment

⁸⁷ *Id.*

⁸⁸ *See generally Preventing Placement Re-Entry*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/permanency/reunification/prev-reentry> (last visited May 15, 2023); Sarah Carnochan, Daniel Rizik-Baer & Michael J. Austin, *Preventing Re-Entry to Foster Care*, 10 J. EVIDENCE-BASED SOC. WORK 196, 196 (2013).

⁸⁹ AFCARS 2019 FFY, *supra* note 26.

⁹⁰ AFCARS 2010–19 FFY, *supra* note 26.

⁹¹ *See supra* notes 34–36 and accompanying text.

⁹² AFCARS 2011 FFY, *supra* note 26.

⁹³ AFCARS 2012–18 FFY, *supra* note 26.

⁹⁴ *Id.*

would be worth abolition or transformation (assuming the transformation sought would involve less child separations)? Nonetheless, the Orleans Parish's 90% reduction in foster care utilization did not correspond to an increase in the reentry rate or an increase in the recurrence of maltreatment rate. The reduction in New Orleans, then, was achieved safely by all objective, available measures.⁹⁵

b. Race

This Section examines the impact of changes in the New Orleans system in light of widespread racial justice concerns regarding the child protection system. Race remains central to nearly every conversation concerning the future of foster care.⁹⁶ Vague legal standards effectively delegate wide discretion to CPS agencies and family court judges over an expansive range of crucial decisions, such as whether to substantiate an allegation after investigation, whether to separate a family after a substantiation, and whether to reunify a family after a separation. Critics argue that this discretion permits biases (whether implicit or explicit) held by agency and family court decision-makers to infect decisions, and results in a legal system with a wide scope that disproportionately separates Black and Indigenous families and places them in state custody.⁹⁷ While rates of such interventions are high for white families as well, the system disproportionately investigates and separates Black families. More than ten percent of all Black children and Indigenous children are separated from their parents and placed in foster care by CPS agencies during the course of their childhood, double the rate of white children.⁹⁸

The changes during Judge Gray's tenure which led to such a large decline in the foster care population were not made as part of any explicit effort to reduce either the scope of the system's impact on Black families or racial disparities in New Orleans's system. But the impact of the decline of the foster care population nonetheless has significant implications for racial justice.

New Orleans's reduction in the utilization of foster care dramatically reduced the impact of that system on Black families in New Orleans. As the chart below

⁹⁵ See also Carter et al., *supra* note 12, at 512–13 (examining other safety metrics such as child fatalities).

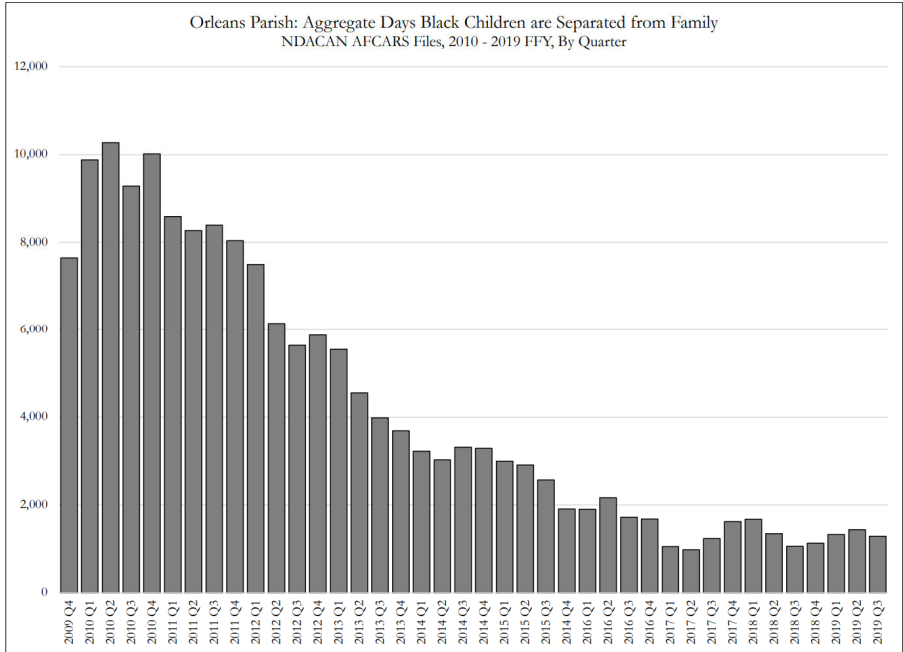
⁹⁶ For leading criticisms of the system and disparities in it, see, for example, ROBERTS, *supra* note 4; Dettlaff et al., *supra* note 4, at 500–01. For criticisms of those and similar arguments, see, for example, Barth et al., *supra* note 8; Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009).

⁹⁷ See, e.g., Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. J.L. & POL'Y 217, 260–63 (2022) (summarizing concerns and collecting sources).

⁹⁸ Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Placement by Age 18 for U.S. Children, 2000–2011*, 9 PLOS ONE, Mar. 26, 2014, at 1, 5. Nationally, Black children account for a portion of the foster care population 1.65 times greater than their portion of the general population. C. Puzanchera, M. Taylor, W. Kang & J. Smith, *Disproportionality Rates for Children of Color in Foster Care Dashboard (2010–2020)*, NAT'L CTR. FOR JUV. JUST. (Feb. 28, 2022), https://ncjj.org/AFCARS/Disproportionality_Dashboard.aspx.

reflects, there was an 88% reduction in aggregate amount of time Black children were separated from their families between 2010 and 2017, a reduction that was sustained through the end of 2019, the end of our study period.⁹⁹

FIGURE 1. Orleans Parish Days Separated from Family



This remarkable impact does not fully address all racial justice concerns. The numbers of New Orleans families the state subjected to CPS investigations and the number of children separated from their caretakers were relatively stable, as the foster care reduction resulted from remarkably quick discharges from foster care. Throughout the period of our study, including the 2011 to 2017 FFY window of significant reduction, Black children were the most likely racial subgroup to be the subject of a CPS investigation and removed from their parents' custody, and Black families were disproportionately subject to those interventions.¹⁰⁰ Albeit not a race-informed strategy, to our knowledge, the significant reduction in foster care utilization in New Orleans on Black families is unprecedented.

c. Termination of Parental Rights

Legal action to terminate the legal relationship between parents and children—often referred to as terminations of parental rights (TPRs)—are common features of the U.S. legal response to child neglect and abuse. The number of TPRs ordered

⁹⁹ AFCARS 2010–19 FFY, *supra* note 26.

¹⁰⁰ AFCARS 2011–17 FFY, *supra* note 26.

by family courts is consistently high, with recent data suggesting more than 60,000 children each year are permanently and legally disconnected from their parents.¹⁰¹ Current legal standards impose a threat of a TPR whenever parents cannot reunify quickly, requiring states (with certain exceptions) to file TPR petitions whenever a child has been in foster care for 15 of the previous 22 months.¹⁰² However, TPR remains a controversial practice. At least one scholar categorically challenged the child protection system's use of TPR as early as 1983,¹⁰³ with more nuanced criticism emerging that questions the role of TPR in certain contexts such as when children are placed with relatives.¹⁰⁴ Common criticisms are that they create legal orphans by terminating parent-child relationships without always leading to new adoptive families,¹⁰⁵ and they unnecessarily harm parent-child relationships.¹⁰⁶ Recent federal guidance, for instance, has urged state authorities "to expand family relationships, not sever or replace them"¹⁰⁷ and focus on children's safety and the value of parent-child relationships "rather than the number of months spent in foster care."¹⁰⁸ Many scholars and advocates have called for repeal of the law creating the 15-of-22-month rule.¹⁰⁹ Generally speaking, criticism concerning TPRs in child welfare is unified in seeking far fewer of them.

Given that New Orleans's 90% reduction in foster care utilization was primarily driven by a significant reduction in the amount of time children are separated from their caretakers, it should not be surprising that very few children are subject to TPR in New Orleans. Consider all children removed in New Orleans during the

¹⁰¹ AFCARS 2016–19 FFY, *supra* note 26 (2016 FFY n = 64,724; 2017 FFY n = 65,396; 2018 FFY n = 67,548; 2019 FFY n = 65,139).

¹⁰² 42 U.S.C. § 675(5)(E).

¹⁰³ Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983); *see also* Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 558 (2022).

¹⁰⁴ *See, e.g.,* Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405 (2005); Vivek Sankaran & Christopher Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 247–49 (2023); *see also* Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715 (2015).

¹⁰⁵ *E.g.,* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L. Q. 121, 132–34 (1995).

¹⁰⁶ *See generally* Sankaran & Church, *supra* note 104.

¹⁰⁷ CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH 10 (2021), <https://www.acf.hhs.gov/cb/policy-guidance/im-21-01>.

¹⁰⁸ *Id.* at 11.

¹⁰⁹ *E.g.,* Mical Raz, *Our Adoption Policies Have Harmed Families and Children*, WASH. POST (Nov. 18, 2022), <https://www.washingtonpost.com/made-by-history/2022/11/18/adoption-parental-rights/>; Roberts, *supra* note 2; REPEAL ASFA, www.repealasma.org (last visited May 15, 2023).

2017 FFY.¹¹⁰ Of the 97 children removed during the 2017 FFY, only 9 children were the subject of a TPR and each of those children were adopted.¹¹¹

Two features are notable regarding the small number of children who were subject to TPRs. First, once they became one of the few cases in which children stayed in foster care for any significant period of time, the New Orleans system wasted little time in moving to TPR and adoption. The time from removal to adoption for those nine children ranged from 9 to 22 months.¹¹² Although the debate over ASFA's TPR timelines in the vast majority of cases in New Orleans is moot (because most children leave foster care well before those timelines are triggered), these timelines to adoption are consistent with what one would expect for a jurisdiction performing well under the spirit of ASFA. For children who remain in foster care for an extended period of time, New Orleans follows ASFA's push for prompt action towards adoption.

Second, TPRs and adoptions were concentrated entirely among younger children. Since 2009 FFY, not a single child over the age of four has been the subject of a TPR in New Orleans.¹¹³ Since the 2017 FFY, not a single child over the age of three has been the subject of a TPR in New Orleans.¹¹⁴

The Orleans Parish's significant reduction in the length of time children were separated from their caretakers resulted in TPRs being an exceedingly rare event, and one that ultimately turned out to be relevant only for children under the age of four. New Orleans is probably best characterized not as a system following or resisting ASFA, but as one that rendered debates about ASFA's impact mostly moot.

d. Placement Type and Stability

When CPS agencies and family courts separate children from their parents, there is some consensus about the general benefits and risks of certain categories of placements. Kinship placements are generally understood to lead to a host of better outcomes for children,¹¹⁵ and kinship foster homes now account for 35% of all foster placements nationally, up from 24% in the early 2000s.¹¹⁶ Congregate care

¹¹⁰ Fostering Court Improvement links the AFCARS files longitudinally, so the 2019 FFY AFCARS file would provide 24 months of follow-up for the children included in the 2017 FFY removal cohort.

¹¹¹ AFCARS 2017 FFY, *supra* note 26 (of the 97 children removed, as of September 30, 2019, only 2 remain in care and neither experienced a TPR since their 2017 removal).

¹¹² *Id.*

¹¹³ AFCARS 2010–19 FFY, *supra* note 26.

¹¹⁴ *Id.*

¹¹⁵ See, e.g., Riehl & Shuman, *supra* note 69, at 104–08 (collecting studies).

¹¹⁶ Compare CHILD'S BUREAU, *supra* note 14, with CHILD'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006 (2006), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport13.pdf>.

facilities are generally understood to create significant risks, with research showing that, in the aggregate, they are more harmful to children than family-like placements.¹¹⁷ That research led Congress to limit financial support of state agency placements in such facilities.¹¹⁸ In addition, there is general consensus that placement stability in foster care is important and that unanticipated placement changes can traumatize children.¹¹⁹

There is a suite of metrics that examine how often children change placements and how much a system utilizes particular types of placements.¹²⁰ The rate of foster children placed in kinship foster homes, non-kinship foster homes, and congregate care facilities on a particular day of the year are commonly reported data, as are the frequency of placement changes.¹²¹ In New Orleans, the rate at which children are placed in congregate facilities provides a useful way of determining whether such a system keeps more children out of that disfavored category of placements. Because New Orleans separates so few children from their caretakers, and those children typically spend very little time in care, one can expect reliance on congregate placements for children to be quite low. That is the case and has been for the past decade. As Figure 2 reflects, New Orleans's reliance on congregate placements has consistently been well below the national rate, and since the 2016 FFY, less than 1 child has lived in a congregate facility per 10,000 children in the population.¹²²

¹¹⁷ See, e.g., *What Are the Outcomes for Youth Placed in Group and Institutional Settings?*, CASEY FAM. PROGRAMS (June 29, 2022), <https://www.casey.org/group-placement-impacts/collecting-studies>).

¹¹⁸ 42 U.S.C. § 672(k)(2)–(4).

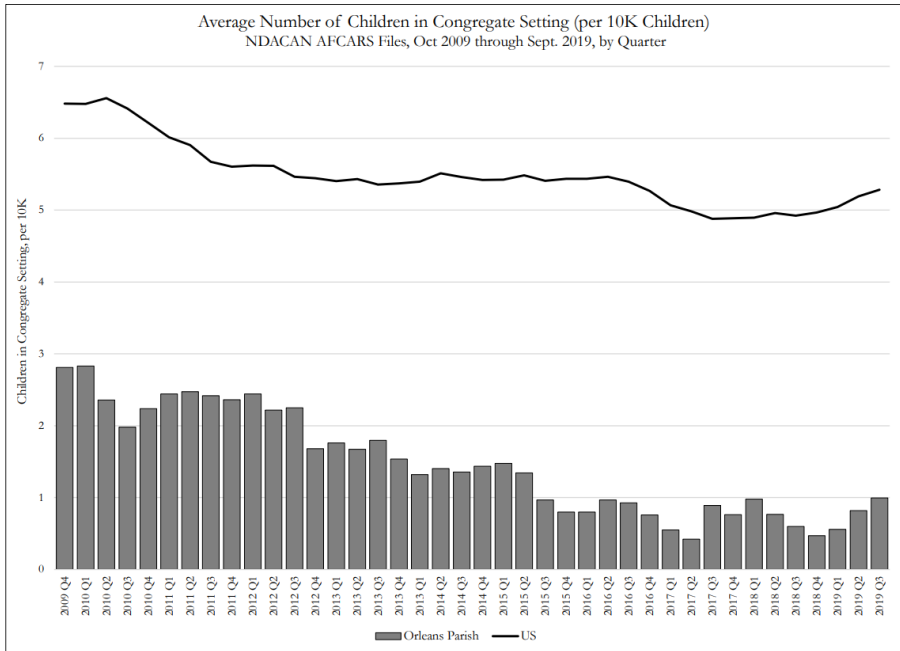
¹¹⁹ See, e.g., *What Impacts Placement Stability?*, CASEY FAM. PROGRAMS (Oct. 3, 2018), <https://www.casey.org/placement-stability-impacts/> (collecting studies); Shelby L. Clark, Ashely N. Palmer, Becci A. Akin, Stacy Dunkerley & Jody Brook, *Investigating the Relationship Between Trauma Symptoms and Placement Instability*, 108 CHILD ABUSE & NEGLECT, Aug. 2020, at 1 (summarizing research on impact of placement instability on children's well-being).

¹²⁰ CAPACITY BLDG. CTR. FOR STATES, U.S. DEP'T OF HEALTH & HUM. SERVS., CFSR ROUND 3 STATEWIDE DATA INDICATOR SERIES: PLACEMENT STABILITY (2019) (overview of current federal placement stability measure, based on a rate of placement moves per 1,000 days in foster care); Sarah Font, Kierra M.P. Sattler & Elizabeth T. Gershoff, *Measurement and Correlates of Foster Care Placement Moves*, 91 CHILD YOUTH SERV. REV. 248, 248, 250 (2018) (creating metrics that distinguish moves that further case goals); Sarah Carnochan, Megan Moore & Michael J. Austin, *Achieving Placement Stability*, 10 J. EVIDENCE-BASED SOC. WORK 235, 236 (2013) (using metrics based on a child's length of stay).

¹²¹ E.g., AFCARS 2021 FFY, *supra* note 26.

¹²² AFCARS 2010–19 FFY, *supra* note 26.

FIGURE 2. Congregate Care Rate, National vs. Orleans Parish



In contrast, formal kinship foster care placements may undercount the frequency with which New Orleans relies on kinship care providers, because so many children are discharged to relative custody (and by closing the case, those families are excluded from counts of formal kinship foster care placements).¹²³ In New Orleans, the most recent data reflect this. As of March 31, 2020, only 12% of children in foster care in New Orleans were placed with a relative, about one-third of the national rate of 35%.¹²⁴ However, just six months earlier, on September 30, 2019, there were 43% of children in care placed with a relative, compared to 32% nationally. The small number of children that are separated from their caretakers for purposes of foster care placement, coupled with the likely short length of stay for such children in New Orleans, results in some instability in foster care metrics that are calculated based on the number of children in care. Nonetheless, New Orleans has some reliance on using relatives as formal foster care placements, but the clearer takeaway is New Orleans's reliance on relatives for legal permanency previously discussed in Section I.A.

¹²³ Similarly, low formal kinship foster care rates may reflect low use of kinship care, or may reflect use of informal kinship care, also known as hidden foster care. Cf. Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 843–44 (2020).

¹²⁴ AFCARS 2020 FFY, *supra* note 26.

The established placement stability metrics are largely incongruent with the New Orleans foster care system. The federal placement stability measure examines the number of moves relative to the child's length of stay, expressed as a rate per 1,000 days in care,¹²⁵ a metric that makes sense when the norm is for children to spend months or years in foster care. But if a child only spends a couple of weeks in foster care and has a placement change (as often occurs, especially if there is an emergency placement immediately following removal, then a second placement a few days later) before leaving, children's placements will appear very unstable when the metric extrapolates those moves to a thousand-day period.¹²⁶ Short stayers, in general, will appear unstable. Nationally, 15.1% of short stayers experienced more than one placement during their brief separation from their caretakers.¹²⁷ The rate is similar in New Orleans, with 15.2% of short stayers experiencing more than one placement during their foster care episode.¹²⁸ Using the length of stay and the total number of placement moves to calculate the federal placement stability measure, New Orleans's stability for short stayers would be 25.3 moves per 1,000 child days, more than six times the national rate for all children in care.¹²⁹ But having more than one placement during a two-week stay in foster care does not mean a child would have more than 26 placements if they stayed in foster care for one year. As important as placement stability is for children, New Orleans's foster care system does not have a sufficient length of stay to meaningfully measure instability.

II. WHY NEW ORLEANS IS SO REMARKABLE: COMPARISONS TO OTHER JURISDICTIONS

This Part contextualizes the magnitude of New Orleans's foster care decline by comparing its outcomes to other jurisdictions. For example, as already stated, if the United States's foster care utilization rate was comparable to the New Orleans rate, there might be 360,000 fewer children in foster care today. Figure 3 contrasts time trends across ten years for four commonly used metrics: maltreatment reports; removals to foster care; children in foster care on September 30; and days separated

¹²⁵ CAPACITY BLDG. CTR. FOR STATES, *supra* note 120 at 1.

¹²⁶ Of the approximately 20,000 children that spent fewer than 30 days in care nationally, 15% had more than one placement. The same is true in New Orleans, with 15% of short stayers having more than one placement.

¹²⁷ AFCARS 2019 FFY, *supra* note 26.

¹²⁸ *Id.*

¹²⁹ *Id.* (the sum of days all short stayers were separated from their caretakers in New Orleans during the 2019 FFY was 316 days, with a total of eight placement changes; the national rate was 4.4 moves per 1,000 days).

from family.¹³⁰ To put everything on a comparable scale, counts per FFY were divided by census child populations, and then the data were scaled to 100% of the maximum national rate over the 10-year period for each metric.

There is little or no connection between maltreatment reports in New Orleans and the reduction in foster care utilization. As previously discussed, the standout explanatory metric for what happened in New Orleans starting in 2011 is a significant reduction in the length of time children spend in foster care separated from their families in non-relative, group, institutional, and runaway placement settings. The rate at which children were reported to and investigated by the CPS agency began increasing in 2011, as reflected in Figure 3 and discussed above. Even though New Orleans received fewer reports of maltreatment than comparable national rates, this and any other CPS comparison metric—outside of recurrence metrics discussed above¹³¹—is unlikely to yield much insight regarding the impact of the decline of foster care utilization in New Orleans. New Orleans's removal rate declined throughout the period of foster care decline, albeit at a far lower rate than days separated from family. However, the New Orleans removal rate relative to the national rate did consistently decrease, and not insignificantly, between 2010 and 2019.¹³² This is likely a result of two factors. First, the New Orleans removal rate, already well below national rates, reduced slightly between 2014 and 2016. Second, there was an increase in the national removal rate between 2014 and 2016. The confluence of these two dynamics resulted in the significant decline of New Orleans's relative removal rate from 59% to 30% of the national rate. Despite the removal rate being a weak explanatory metric of our study's focus,¹³³ New Orleans's already low baseline removal rate may affect comparisons to the aggregate time children are separated from their families in other jurisdictions, particularly those with higher baseline removal rates.

The stronger explanatory metrics of our study focus on rates concerning children in foster care. For example, the rates of children in care—among the more commonly reported foster care metrics—declined from 47% to 9% of the national rate, reflecting the significant reduction in New Orleans's foster care utilization. But as previously discussed, beginning in 2011, the predominant cohort of New Orleans's foster care population became one of short stayers, a cohort that influences cross-sectional or point-in-time measures like the number of children in care on the last day of the fiscal year.¹³⁴ A more stable and useful metric of the size of a foster

¹³⁰ AFCARS 2010–19 FFY, *supra* note 26; NCANDS, *supra* note 77.

¹³¹ *Supra* Section I.B.

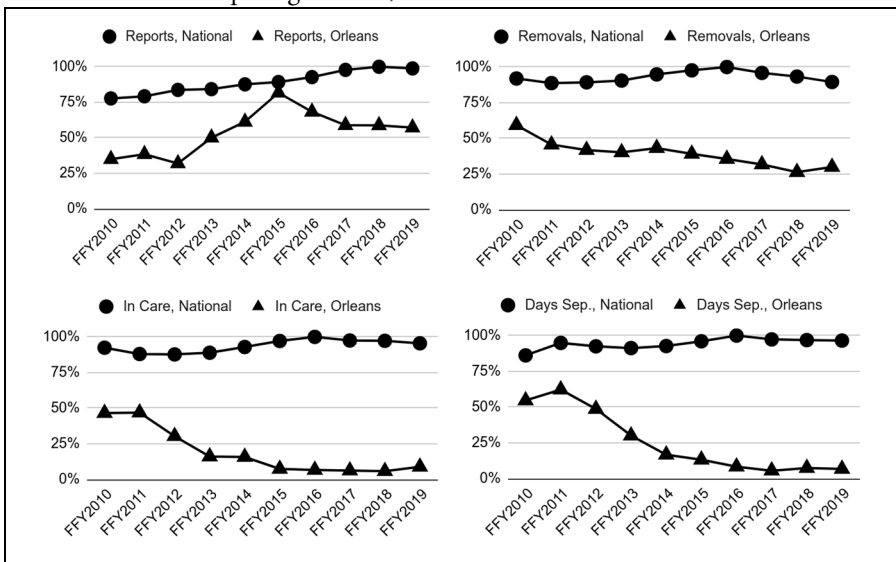
¹³² *See infra* fig.3.

¹³³ *Supra* Section I.A.1.

¹³⁴ Mark E. Courtney, Barbara Needell & Fred Wulczyn, *Unintended Consequences and the Push for Accountability: The Case of National Child Welfare Performance Standards*, 26 CHILD. & YOUTH SERVS. REV. 1141, 1146 (2004).

care system is the aggregate sum of the number of days children are separated from their family for the purpose of foster care placement.¹³⁵ That metric accounts for removals, length of stay, foster placements with relatives and other family, and discharges in a single metric, and is far more stable in handling outliers like New Orleans, where the foster care population is overwhelmingly defined as a small number of kids in placement for just a few weeks.¹³⁶ More relevant to our study, the aggregate days separated from family is the most relevant metric for comparisons because it directly measures the central intervention at issue, the length of time children are separated from their family for placement in stranger foster care. As Figure 3 reflects, the rates of days separated from family in New Orleans declined from a peak of 62% to 7% of the national rate.

FIGURE 3. Comparing Metrics, National vs. Orleans Parish



While the national comparisons in Figure 3 provide general context, there are important questions of specific environmental, systemic, and family factors to factor into comparisons across geographies. For example, Orleans Parish deviates from national norms on environmental factors that are thought to influence family separation rates like poverty, income inequality, and housing stock.¹³⁷ Comparisons to

¹³⁵ Carter, et al., *supra* note 12, at 510–11; see also Andy Barclay & Melissa Carter, *We Want Kids to Grow Up in Safe Families. So Let's Measure That*, IMPRINT (Nov. 6, 2018, 8:00 AM), <https://imprintnews.org/opinion/op-ed-we-want-kids-to-grow-up-in-safe-families-so-lets-measure-that/32667>.

¹³⁶ Barclay & Carter, *supra* note 135.

¹³⁷ See Dettlaff et al., *supra* note 4 (describing housing insecurity, poverty, and other environmental factors as determinants of family separations).

urban counties with similar environmental challenges to New Orleans add more specific, and even more remarkable, contrasts. This Part will discuss the rationale for selecting certain jurisdictions while detailing the methodology used to identify meaningful comparisons.

To identify meaningful comparison jurisdictions, census data¹³⁸ that contain an extensive amount of demographic and environmental data were used to select a group of comparison jurisdictions that were most comparable to the Orleans Parish. The comparison counties were identified using a ranked selection method, based on all-race family poverty to yield a diverse range of racial mixes, and a clear logical connection to neglect, the predominant reason for removal in the Orleans Parish.¹³⁹ Table 1 contains the ten comparison jurisdictions, as well as the Orleans Parish.

TABLE 1. Comparison Jurisdictions

Jurisdiction	Child Population		Families Below Poverty Line		Gini (Income Inequality Coefficient)	30%+ Income on Rent	Density (Children/Square Km)
	All Race	Black/AA	All Race	Black/AA			
Baltimore City, Maryland	125,823	69%	25%	30%	0.51	48%	600
Clayton County, Georgia	79,522	68%	22%	22%	0.41	49%	250
Milwaukee County, Wisconsin	229,349	34%	22%	36%	0.48	47%	395
Norfolk City, Virginia	48,204	48%	23%	34%	0.49	50%	344
Orleans Parish, Louisiana	78,505	70%	26%	38%	0.57	55%	384
Philadelphia County, Pennsylvania	345,561	48%	29%	33%	0.52	50%	995
Richmond City, Virginia	39,956	58%	28%	41%	0.54	52%	258
Shelby County, Tennessee	235,181	58%	23%	32%	0.51	49%	235
St. Louis City, Missouri	59,819	60%	28%	38%	0.50	47%	374
Wayne County, Michigan	417,723	42%	28%	39%	0.50	49%	295
Wyandotte County, Kansas	45,940	21%	24%	36%	0.42	44%	223

¹³⁸ *American Community Survey 5-Year Data (2009–2021)*, U.S. CENSUS BUREAU (Dec. 8, 2022), <https://www.census.gov/data/developers/data-sets/acs-5year.2019.html#list-tab-4I4VY5RRIJ7ZB1MPPH>.

¹³⁹ AFCARS 2010–2019 FFY, *supra* note 26 (showing that, of all the removals that took place between 2010 and 2019 FFY in the Orleans Parish, 89% implicated neglect as at least one of the reasons for removal).

The ten comparison jurisdictions are urban (greater than 80% urban land area)¹⁴⁰ and have a child population of more than half of the Orleans Parish 2017 child population. These counties, including Orleans Parish, have among the highest family poverty rates. Within these ten comparison counties, we seek to answer the counterfactual research question: How many days would children in the ten comparison jurisdictions spend separated from family due to a removal to foster care in the Orleans Parish child welfare system?

To isolate the effects of the changes in Orleans Parish processes, we chose each child's earliest foster care removal episode during FFY 2017 in the 11 counties in Table 1 as our unit of analysis. We chose our period of analysis as the 24 months following each child's earliest FFY 2017 removal date, and our (potentially right-censored)¹⁴¹ outcome variable as the number of days separated from family by one or more foster care episodes during the analysis period. We defined each child's county of jurisdiction as the 11-level exposure variable in a quasi-experimental design.¹⁴² To determine the estimated reduction in foster care utilization the ten comparison counties might expect if the cohort of children removed there were instead removed in New Orleans, we applied a statistical methodology to estimate the counterfactual outcome with a binary (child is in Orleans Parish or child is not) exposure variable. The statistical methodology utilized applies the causal survival forest¹⁴³

¹⁴⁰ NCANDS, *supra* note 77. NCANDS contains a county Federal Information Processing System (FIPS) code for a majority of the larger counties, but censors those with fewer than 1,000 records. See CHILD.'S BUREAU, *supra* note 18, at 4. Those FIPS codes were then linked to the Rural-Urban Continuum Codes (RUCC), which is the federal government's classification scheme that identifies counties as one of nine categories related to the size of the county. See *Rural-Urban Continuum Codes*, U.S. DEP'T AGRIC., <https://www.ers.usda.gov/data-products/rural-urban-continuum-codes.aspx> (Dec. 10, 2020).

¹⁴¹ See, e.g., *Censoring (Statistics)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Censoring_\(statistics\)](https://en.wikipedia.org/wiki/Censoring_(statistics)) (last visited May 15, 2023). Right censoring occurs in our study when a child has been separated from their family from the date of their removal through the end of the 2019 FFY, at most 24 months. Because our period of analysis ends on September 30, 2019, and some children in our study will still be separated from their family on that date, they are right censored.

¹⁴² This is a commonly accepted methodology to estimate the impact of an intervention when random assignment is not feasible. See Margaret A. Handley, Courtney R. Lyles, Charles McCulloch & Adithya Cattamanchi, *Selecting and Improving Quasi-Experimental Designs in Effectiveness and Implementation Research*, 39 ANN. REV. PUB. HEALTH 1 (2018). Quasi-experimental design is appropriate here because it would be impossible and improper to randomly assign children across the nation to either the New Orleans Juvenile Court or some other (control group) court.

¹⁴³ See Yifan Cui, Michael R. Kosorok, Erik Sverdrup, Stefan Wager & Ruoqing Zhu, *Estimating Heterogeneous Treatment Effects with Right-Censored Data via Causal Survival Forests*, ARXIV, Sept. 7, 2022, at 1, <https://doi.org/10.48550/arXiv.2001.09887>.

function of R's generalized random¹⁴⁴ forest package (GRF)¹⁴⁵ This methodology is appropriate for analyzing data where the outcome of interest is time based, as it is here where the counterfactual research question is based on the time children are separated from their families, and the methodology is also appropriate for data that are right censored.¹⁴⁶ Random forest is a commonly used statistical methodology where an algorithm builds multiple decision trees¹⁴⁷ to produce an outcome estimate, typically some average of all the independent decision trees.¹⁴⁸

Finally, estimates of rank-weighted¹⁴⁹ conditional average treatment effects were computed using augmented (commonly known as doubly robust) inverse probability weighting.¹⁵⁰ The average treatment effect is the outcome used to convey the effect of our intervention¹⁵¹—that is, would children in the ten comparison jurisdictions spend less time separated from their family if they were instead removed in New Orleans? The average treatment effect in our study is conditional, as our outcome of interest changes across subgroups (age of child at removal, poverty status of family, for example).¹⁵² Finally, we used a doubly robust method to minimize the effect of confounders. A confounder is a variable (unmeasured or hidden) that can suggest a relationship between two variables where one may not exist.¹⁵³ Confounders can bias the interpretation of the outcome by influencing either the exposure (child from one of the comparison counties removed in New Orleans) or

¹⁴⁴ Susan Athey, Julie Tibshirani & Stefan Wager, *Generalized Random Forests*, 47 ANNALS STAT. 1148, 1148 (2019).

¹⁴⁵ Julie Tibshirani, Susan Athey, Rina Friedberg, Vitor Hadad, David Hirshberg, Luke Miner, Erik Sverdrup, Stefan Wager & Marvin Wright, *GRF: Generalized Random Forests*, COMPREHENSIVE R ARCHIVE NETWORK, <https://cran.r-project.org/package=grf> (last visited May 15, 2023).

¹⁴⁶ Kaci L. Pickett, Krithika Suresh, Kristen R. Campbell, Scott Davis & Elizabeth Juarez-Colunga, *Random Survival Forests for Dynamic Predictions of a Time-to-Event Outcome Using a Longitudinal Biomarker*, 21 BMC MED. RSCH., Oct. 17, 2021, at 1.

¹⁴⁷ Matthias Schonlau & Rosie Yuyan Zou, *The Random Forest Algorithm for Statistical Learning*, 20 STATA J. 3, 4 (2020).

¹⁴⁸ *Id.* at 5.

¹⁴⁹ Julie Tibshirani, Susan Athey, Erik Sverdrup & Stefan Wagner, *Estimate a Rank-Weighted Average Treatment Effect (RATE)*, GITHUB, https://grf-labs.github.io/grf/reference/rank_average_treatment_effect.html (last visited May 15, 2023).

¹⁵⁰ Christoph F. Kurz, *Augmented Inverse Probability Weighting and the Double Robustness Property*, 42 MED. DECISION MAKING 156, 157 (2022).

¹⁵¹ *Average Treatment Effect*, WIKIPEDIA, https://en.wikipedia.org/wiki/Average_treatment_effect (last visited May 15, 2023).

¹⁵² *Id.*

¹⁵³ *Confounding*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Confounding> (last visited May 15, 2023); see also Tyler Vingen, *Spurious Correlations*, <https://www.tylervingen.com/spurious-correlations> (last visited May 15, 2023) (containing a number of entertaining statistical correlations that highlight the concept of a confounding variable).

the outcome (reduction in days separated from family); doubly robust methodologies account for confounders in both. The model and methodology described above resulted in the estimated average and total reductions in time separated from family per child in foster care shown in Table 2.

TABLE 2. Estimated Reduction in Days Separated Under an Orleans Parish Counterfactual

Jurisdiction	N	Average Days Separated per Child Removal			Total Years Separated FFY 2017		
		Observed	Estimate Under Orleans Counterfactual		Observed	Estimate Under Orleans Counterfactual	
Baltimore City, Maryland	1,057	146	52	-64%	423	150	-272
Clayton County, Georgia	225	250	59	-76%	154	36	-118
Milwaukee County, Wisconsin	1,144	254	62	-76%	796	194	-601
Norfolk City, Virginia	75	416	63	-85%	85	13	-72
Orleans Parish, Louisiana	97	54	54	0%	14	14	0
Philadelphia County, Pennsylvania	3,082	221	69	-69%	1,865	582	-1,283
Richmond City, Virginia	151	354	47	-87%	146	19	-127
Shelby County, Tennessee	725	273	36	-87%	542	71	-470
St. Louis City, Missouri	249	204	60	-71%	139	41	-98
Wayne County, Michigan	1,556	219	53	-76%	933	226	-707
Wyandotte County, Kansas	340	268	63	-76%	249	59	-191
Total	8,701				5,346	1,407	-74%

Every comparison jurisdiction would have had a significant ($p < 0.001$) reduction in foster care utilization under the counterfactual. The reduction in foster care utilization ranged from a high of 85% in Norfolk to 64% in Baltimore. Of note, none of the estimates reached the 90% reduction that New Orleans saw from 2011 to 2017. The heterogeneity of the observed average days separated from family versus the relatively uniform estimates under the counterfactual demonstrates that the random forest model found some characteristics that differentiate these jurisdictions from New Orleans and adjusted to balance them. Based on variable importance estimates and linear approximations, the ages of children at removal and the removal

family structures, alone and in combination, most strongly confound and differentiate the jurisdictions' removal cohorts.

For example, 19% of the aggregate burden of family separation in New Orleans is borne by children aged 1 to 11. That compares to 40% to 60% in the ten comparison jurisdictions. New Orleans children removed at age 1 to 11 can expect to spend 24 days separated from family, compared to 120 to 386 days in the ten comparison jurisdictions. However, New Orleans adopts a much higher proportion of infants removed from married couples than the comparison jurisdictions (19% versus 3%). Those adoptions require nearly as much time separated from family (247 days) in New Orleans as in the other jurisdictions. The Orleans Parish CPS agency removes few infants, relatively speaking, so the small number of infants that are removed in New Orleans and are ultimately adopted is not sufficiently numerous to strongly influence the New Orleans family separation metric. Thus, as the model works through the comparison of county removal cohorts, jurisdictions that (as a baseline) remove more infants will likely fall short of the 90% reduction in foster care utilization experienced in New Orleans. Still, the low number of adoptions in New Orleans, coupled with the fact that those adoptions concern almost exclusively very young children, may signal a choice to limit the costs of family separation in New Orleans to only the highest-risk cases. Findings like these that highlight narrow sets of characteristics could be valuable to decision makers seeking to avoid family separation.

III. THE COURT'S ROLE IN SUCH A SYSTEM

A. *Dispute Resolution, Not Problem-Solving Judge*

From its origins, the family court has featured a model of the judicial role that differs from an impartial arbiter of disputes between parties. As one of the courts' early founders and advocates explained it in 1909:

[A family court judge] must . . . be more than [a good lawyer]. He must be a student of and deeply interested in the problems of philanthropy and child life, as well as a lover of children. . . . [H]e must be willing and patient enough to search out the underlying causes of the trouble and to formulate the plan by which, through the cooperation, oftentimes, of many agencies, the cure may be affected.¹⁵⁴

More than a century later, the National Council of Juvenile and Family Court Judges asserted the same idea:

Judging in juvenile court is specialized and complex, going beyond the traditional role of the judge. Juvenile court judges, as the gatekeepers to the foster care system and guardians of the original problem-solving court, must engage

¹⁵⁴ Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 118–19 (1909).

families, professionals, organizations and communities to effectively support child safety, permanency, and well-being.¹⁵⁵

One leading family court judge has similarly described his tasks as including “conven[ing] the community around issues relating to at-risk children and families” and otherwise serving as “an administrator, a collaborator, a convener, and an advocate.”¹⁵⁶ In a “problem-solving” family court, “the role of the judge was to be a leader of a team that included other helping professionals, especially social workers.”¹⁵⁷ This vision of a problem-solving court coincides with therapeutic goals—seeking “to maximize the positive effects of legal interventions on the social, emotional, and psychological functioning of individuals and families.”¹⁵⁸ Such a role presumes there is a problem to solve—typically the problem of the parent’s alleged maltreatment and whatever pathology is assumed to underlie it. With that framework, a problem-solving judge needs to keep cases open for enough time to diagnose a family’s therapeutic needs, order services to address them, and evaluate how well that intervention has worked. As a result, a problem-solving judge is relatively less focused on whether an agency has met its burden to prove that the court should take jurisdiction; taking jurisdiction is expected so that the court can solve the problem posed (presumably) by the parents’ assumed faults. Problem-solving judges are thus associated with relatively less hesitation to authorize agencies to intervene in families.

Such a role “stands in sharp contrast to the image of the blindfolded balancer of scales.”¹⁵⁹ Such a judge decides factual and legal disputes between parties and resists any impulse to go beyond that role to solve problems the judge might perceive. A judge focused on dispute resolution can reasonably be expected to show relatively more restraint before authorizing an intervention in families. A dispute-resolution judge is laser-focused on whether the party with the burden of proof can meet that burden, and harder questions about what to do about any legal problem only arise if the judge answers that question affirmatively.

The reformed foster care system in New Orleans featured a family court decidedly different from the reigning problem-solving vision for the court, at least in its

¹⁵⁵ NAT’L COUNCIL JUV. & FAM. CT. JUDGES, KEY PRINCIPLES FOR PERMANENCY PLANNING FOR CHILDREN 1 (2011), <https://www.ncjfcj.org/wp-content/uploads/2013/02/Key-Principles-2011.pdf>.

¹⁵⁶ Judge Leonard P. Edwards, *Remarks of Judge Leonard P. Edwards at the Presentation of the William H. Rehnquist Award for Judicial Excellence, U.S. Supreme Court, Washington, D.C., November 18, 2004*, 5 J. CTR. FOR FAMS., CHILD. & CTS. 169, 170 (2004).

¹⁵⁷ Jane M. Spinak, *Family Defense and the Disappearing Problem-Solving Court*, 20 CUNY L. REV. 171, 171 (2016); *see also id.* at 174–76 (summarizing problem-solving courts).

¹⁵⁸ Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 95 (2006).

¹⁵⁹ *Id.*

predisposition stages. Instead, the family court followed a dispute resolution model: parties brought matters of disagreement and the court provided a structure for resolving that disagreement. Cases stayed open no longer than necessary to achieve that goal. And because that mostly led to quick case closure, there simply was not time to apply a problem-solving model.

The two types of New Orleans hearings observed in this study were all about the dispute resolution process. Continued custody hearings, the statutorily required 72-hour hearing to review an emergency removal,¹⁶⁰ focused on legal grounds for family separations. The second shelter hearing, a judicially created hearing in New Orleans to promote efficiency and expediency,¹⁶¹ focused on whether parties, especially the agency, were prepared to move forward with trials (and chastising parties when they had not filed necessary documents to move forward), or whether parties had reached a settlement. Judge Gray appeared focused on ensuring all parties followed proper procedures and avoided unnecessary delays, once admonishing parties “I will not continue the cases again. So don’t even ask.”¹⁶² When Judge Gray raised topics the parties did not present, it was to seek to fill in details in settlements (with the stated goal of ensuring that settlements did not lead to future disputes), or to nudge parties, usually the agency, to take steps necessary to properly adjudicate the case, such as identifying non-resident fathers. The court in these hearings paid negligible attention to therapeutic or broader problem-solving goals—there was no discussion of the children’s adjustment to foster care, placement needs, whether parents had service needs, or services provided to parents or children, or any other well-being issue. The only exceptions to this conclusion apply to hearings presided over by judges other than Judge Gray, such as when one judge asked during a removal hearing whether there was a Christmas event a child could attend.¹⁶³

This model of the judicial role is far more consistent with the role of traditional civil judges than with the role of family court judges. Descriptively, it is difficult to overstate how dramatically different those roles are.¹⁶⁴ Normatively, the dispute-resolution role followed in the New Orleans hearings we observed is consistent with criticisms of the problem-solving role—that “judges are not best suited to be leaders of problem-solving teams.”¹⁶⁵

¹⁶⁰ LA. CHILD. CODE ANN. art. 624(A), (E) (2022).

¹⁶¹ Carter et al., *supra* note 12, at 505–06.

¹⁶² Video Recording: 1020-SS, held by Orleans Parish Juvenile Court (Sept. 26, 2017) (on file with corresponding author).

¹⁶³ Video Recording: 1007-CC, held by Orleans Parish Juvenile Court (Dec. 11, 2019) (on file with corresponding author).

¹⁶⁴ See, e.g., JANE M. SPINAK, THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES 226 (forthcoming 2023) (contrasting the two models).

¹⁶⁵ *Id.*

This dispute resolution judicial role dominated this study because we reviewed only hearings occurring during the predisposition stage. Judge Gray shared with the research team her view that unless and until the court finds a parent unfit, it should avoid engaging in problem-solving efforts; the focus in these early stages is on whether a legal basis exists for court intervention.¹⁶⁶ For the minority of cases in which the court did adjudicate a parent unfit, Judge Gray indicated she would apply a more traditional (for family court) problem-solving model.¹⁶⁷ However, because relatively few cases reached that stage, the dispute resolution role predominated in New Orleans.

B. Inquisitor of Evidence and Strict Compliance with Process

The court's focus on dispute resolution versus collaborative problem solving was most evident in the manner in which Judge Gray conducted hearings. As has been observed often, "the atmospherics in Family Court prize collaboration and cooperation."¹⁶⁸ The sharp edges of the adversarial approach expected in traditional litigation have been blunted by the expectation, developed over time, that family court judges should act with the maximal power of their authority to positively influence and alter the life course of the children, youth, and families who appear before them. That self-image is consistent with the child-saving "master narrative" of the child welfare system and origin story of the juvenile court.¹⁶⁹

Judge Gray did not resemble that archetype. She presided over cases in the role of arbiter, performing the traditional judicial tasks of finding facts and interpreting law. When witnesses testified, Judge Gray actively participated in their examination. Her approach reflected more in the style of an inquisitor than the passive recipient of information presented through the adversarial contest of the parties. Of the hearings reviewed, Judge Gray averaged 20 questions per witness during witness testimony, as contrasted with an average of six questions per witness from other judges.¹⁷⁰ And she asked three times more questions when witnesses were not giving testimony than the other judges combined.¹⁷¹

¹⁶⁶ Telephonic Interview with Ernestine Gray, Judge, Orleans Parish Juvenile Court (June 5, 2020) (notes on file with corresponding author).

¹⁶⁷ *Id.*

¹⁶⁸ Matthew I. Fraidin, *Decision-Making in Dependency Court: Heuristics, Cognitive Biases, and Accountability*, 60 CLEV. ST. L. REV. 913, 937 (2013).

¹⁶⁹ *Id.* at 939.

¹⁷⁰ Analysis of the Hearing Review Collection Data (raw data & analysis on file with corresponding author). Each hearing was reviewed by two members of the research team, with high inter-rater reliability measured by Cohen's Kappa of 0.90, $p < 0.001$.

¹⁷¹ *Id.*

Judge Gray's questions were probative, not pro forma. She asked questions to clarify information in the record and the sequence of events to which witnesses testified. Her questions did not appear to be motivated by a best practice checklist or superficial compliance with legal mandates as she did not always address the same legal requirements consistently across cases. In some matters, her priority concern was placement, in others it was visitation, identification and engagement of putative fathers, diligent searches for relatives, or application of the Indian Child Welfare Act (ICWA). Each individual case being presented was the focus of Judge Gray's attention and matters of custody and family connection were her central concern.

Judge Gray interrogated the bases for decisions made and actions taken and tested the veracity of testimony. Her disciplined inquiry did not wander into the broad territory of child well-being or array of services for parents but instead, remained focused on the legal sufficiency of pleadings and evidence and whether case processing goals were met. Often, Judge Gray interrupted proceedings during attorney examination of witnesses to make these points. In one such instance, she interrupted a caseworker's explanation of a proposed visitation schedule, insisting, "That's not how it works. We are intruding into their lives. And we need to establish [if] our intrusion makes sense. That's why it's the safety/risk analysis."¹⁷²

Rather than scolding parents, Judge Gray scolded counsel in an effort to ensure they satisfied the evidentiary burdens and legal standards that govern the decision to remove children from parental custody and retain them in foster care. She instructed the state's attorney in one case that "[t]he argument that you need to make is one that supports the children either staying in care or not . . . the standard is imminent risk."¹⁷³ And later, "The question becomes, is there a reason to maintain the children separate and apart from the mother today? . . . You know this is a question that comes automatically at the end of the hearing. Every time."¹⁷⁴ In another case, she lectured a child's attorney after the attorney had informed the court that her client did not want to return home. Judge Gray, revealing a bit about her judicial philosophy, stated:

I'm sure you'll tell your client that, at least in this court, the court doesn't believe that is her choice as a minor . . . She doesn't get to choose where she lives. Foster care is not a choice that we have children make. We don't believe foster care is the best thing for them. We only do that when we have to. And when we can do something different, that's what we do . . .¹⁷⁵

¹⁷² Video Recording: 1047-CC, held by Orleans Parish Juvenile Court (May 22, 2018) (on file with corresponding author).

¹⁷³ Video Recording: 1012-CC, held by Orleans Parish Juvenile Court (Sept. 23, 2018) (on file with corresponding author).

¹⁷⁴ *Id.*

¹⁷⁵ Video Recording: 1010-SS, held by Orleans Parish Juvenile Court (May 10, 2016) (on file with corresponding author).

Like a civil court judge open to parties settling disputes, the court repeatedly expressed openness to negotiated settlements including a joint recommendation for discharge from foster care. The court's willingness to accept these negotiated settlements extended even to cases when it expressed concern about the timing and manner in which one was reached. One example from the set of observed hearings was a case in which the parties presented an agreement to transfer physical and legal custody of the child to the grandmother with visitation to the mother, supervised by the grandmother.¹⁷⁶ Judge Gray opened by expressing concern that the case would return to court "because we haven't done all [that we need to do]."¹⁷⁷ She interrupted the state's presentation to inquire about whether services would be provided to the grandmother, then questioned whether the mother's live-in boyfriend was in agreement.¹⁷⁸ She admonished the lawyers to "have conversations with both people" then excused everyone but the lawyers, who were summoned for an extended sidebar conversation.¹⁷⁹ Dubious about the lack of forethought, Judge Gray questioned how the arrangement would work when the mother and her boyfriend no longer wanted the grandmother in the home and admonished "you can't plan these cases 15 minutes before you walk into my courtroom."¹⁸⁰ The court took a brief recess, then returned once the parties had agreed that a neighbor would supervise the visits when the grandmother was not available.¹⁸¹ Judge Gray issued the order. In this more minimalist exercise of judicial power, the court acted with restraint. Where private ordering resulted in termination of the court's jurisdiction, Judge Gray respected the parties' self-determination and supported arrangements that allowed a child to live with family free from continued agency involvement and court supervision.

Because of the structure of the family court, Judge Gray enjoyed an outsized role. That role resisted the maximalist view of judicial power. Instead, the court conducted itself more modestly, and Judge Gray presided over cases more in the way of a manager of a dispute resolution process than the leader of a problem-solving process.

C. Parent, Child, and Agency Representation

At the early stages of proceedings our study examined—where the basis and need for state intervention had not yet been established—Judge Gray did not aim

¹⁷⁶ Video Recording: 1002-CC.1, held by Orleans Parish Juvenile Court (May 28, 2019) (on file with corresponding author).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Video Recording: 1002-CC.2, held by Orleans Parish Juvenile Court (May 28, 2019) (on file with corresponding author).

to create a collaborative approach, in which adverse parties were on the same team trying to help families. Instead, the courtroom resembled more of a battleground in which advocates fiercely argued over the need for judicial intervention.

In the observed hearings, lawyers representing the agency and parents vigorously litigated the legality of family separation. Notably, parents' attorneys routinely challenged agency recommendations to place children in foster care, which resulted in many contested evidentiary hearings. At these hearings, the agency typically called the caseworker as their witness. Attorneys from the agency and parents actively questioned witnesses about the basis for separating children from their parents, the need for such separation, and the efforts made to prevent the separation.

In addition to actively questioning witnesses, parents' attorneys also regularly objected to purportedly inadmissible evidence or inappropriate questions and presented extensive arguments to the court challenging the need for removal and the adequacy of reasonable efforts. They felt comfortable asking for a directed verdict where they felt that the agency's case was inadequate, and they were unafraid to assert their client's statutory and constitutional rights when appropriate.

In contrast to the lawyers representing the agency and the parent, the child's attorney played a much more subdued role in the proceedings we observed. They asked far fewer questions, delivered much shorter arguments, and made very few requests of the court.¹⁸² It was also unclear from the hearings what role—if any—they played in out-of-court negotiations.

What was clear was that the court created a welcoming climate for parents' lawyers to challenge the separation of families. Judge Gray welcomed contested hearings, and never pressured parents' lawyers to persuade their clients to waive statutory and constitutional rights. In turn, lawyers embraced this contentious climate and used their traditional lawyer skills to ensure that their clients' positions were presented to the court and that the question of family separation was thoroughly examined.

CONCLUSION

As the field wrestles with the most effective way to slow the steady encroachment of *parens patriae* on family integrity, New Orleans exemplifies one such way a system could work. Most intriguing, it does so absent any substantive legal changes

¹⁸² See, e.g., Video Recording: 1013-CC, held by Orleans Parish Juvenile Court (Aug. 10, 2016) (on file with corresponding author) (Reviewer 1 reported that parent attorney asked 62 questions of witness with Reviewer 2 reporting the parent attorney asked 58; both reviewers reported the child's attorney asked zero questions of the witness); Video Recording: 1022-CC, held by Orleans Parish Juvenile Court (Jan. 28, 2019) (on file with corresponding author) (Reviewer 1 reported that parent attorney asked 49 questions of the witness and child attorney asked 12 questions of the witness with Reviewer 2 reporting the parent attorney asked 40 questions of the witness and the child attorney asking 11 questions of the witness).

mandating or catalyzing transformation; the same changes could happen tomorrow in other jurisdictions through concerted efforts of judges, lawyers, and agencies. The reformed system in New Orleans features the court serving as a gatekeeper to children's placement by the state in foster care, adjudicating and facilitating settlement of the central disputes in civil child neglect and abuse cases—whether children need to be separated from their families. The short stayers, which make up the overwhelming majority of children in foster care, created a system that looks remarkably different from other comparable jurisdictions or national norms. The time children are separated from their families, particularly children of color, is astonishingly lower in New Orleans than anywhere else. This reduction was achieved without leading to negative safety outcomes. Issues that dominate other jurisdictions' foster systems are largely moot. Congregate care is barely used. Terminations of the parent-child relationship are rare events, applied only to cases involving young children who remained in foster care longer than the norm.

We do not present the New Orleans experience as a model of perfection. Questions remain—for instance, in the frequent decisions to change custody permanently without proceeding to any trial or working to reunify children with the parent who had been their primary caretaker. Nor do we evaluate how New Orleans created its much-reduced foster system. Rather, this description of New Orleans provides a view of one possible future for a field in flux.