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Not Even a Federal Judge Can Make Texas Protect Kids

Patrick Michels

Texas Monthly

Matthew Fraidin

University of the District of Columbia, mfraidin@udc.edu

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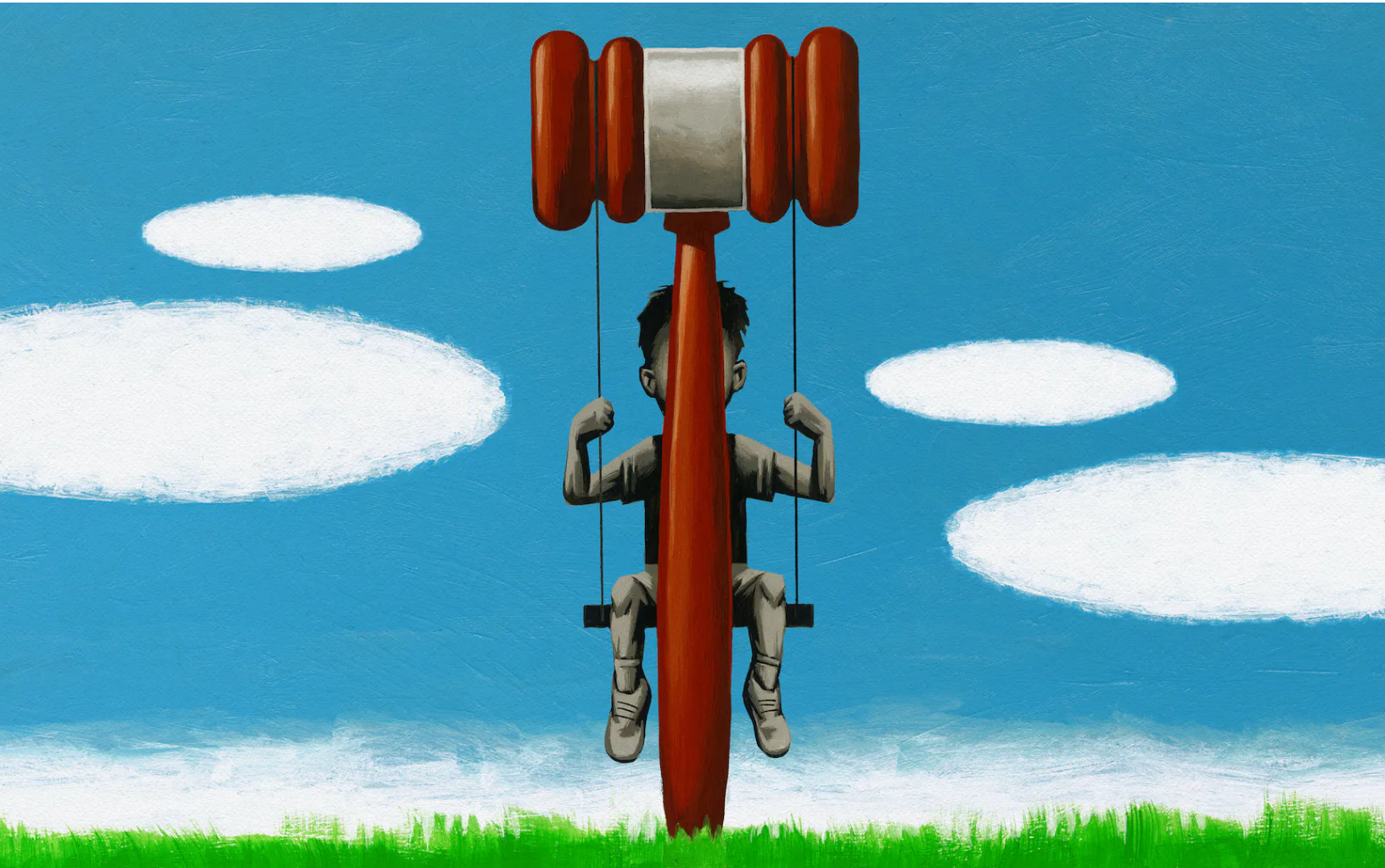


Illustration by Thomas Fuchs

POLITICS & POLICY

Not Even a Federal Judge Can Make Texas Protect Kids

Nine years ago, U.S. district judge Janis Jack ordered the state to end the mistreatment of children in its custody. But state officials have largely ignored her fines and threats.



By Patrick Michels

February 2024

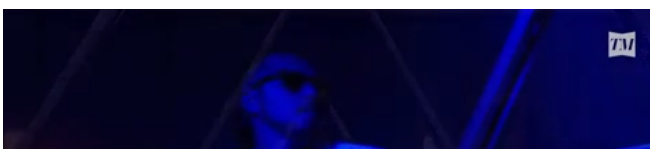
In a thirteenth-floor courtroom in downtown Dallas, Jackie Juarez took the witness stand to testify about years of mistreatment under the system that raised her. Now eighteen years old, she stood a little over four and a half feet tall, with dark curls that fell atop a long, cream-colored cardigan. She pulled

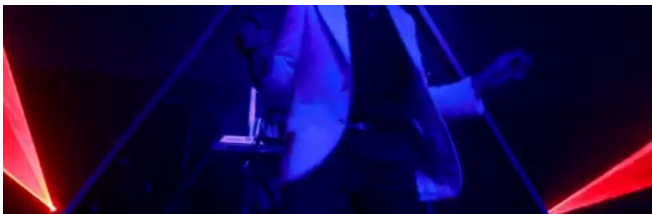
the microphone close as she spoke. At eleven years old, she had been placed in the state’s custody, for reasons that remain confidential. She was removed from a group home after reporting inappropriate text messages from a male staffer—he remained employed at the facility, while Juarez was accused of causing trouble—only to be shuffled among hotels and churches and even forced to sleep in office buildings. She was what the state calls a “child without placement,” or CWOP—a cold acronym used by bureaucrats to refer to the perilous limbo on the margins of the foster care system.

Juarez testified to being so overmedicated with sedatives that she was falling asleep in school. She said that she was beaten so badly by other girls—social workers wouldn’t intervene—that she needed to be taken to the hospital. She ran away to seek safety but later returned to the state’s custody, enrolling in an extended care program at age eighteen when there was nowhere else to go.

All of this had taken place, Juarez noted, in the eight years after U.S. district judge Janis Jack—who now presided over the December hearing at which Juarez testified—handed down a landmark 260-page ruling condemning the Texas foster care system as “broken.” After that 2015 decision, Jack appointed monitors who would have access to case files and could raise the alarm about lapses in care. She has issued dozens of specific orders to reform the system, including measures to protect children from sexual abuse and to keep new social workers from being overwhelmed by too many cases. Governor Greg Abbott, after initial resistance, told state officials to do what the court said. It looked as though a new era were finally beginning, and Jack was lauded for it. *A San Antonio Express-News* headline called the judge “the champion young Texans deserve.” The *Dallas Morning News* named her Texan of the Year.

POPULAR VIDEOS





But what might have been a turning point for foster care in Texas has instead become a shameful demonstration of the state government's cruel indifference toward the most vulnerable of its constituents. In 2017, two years after Jack issued her ruling, Juarez was placed in the foster care system. And here she was, in 2023, appearing as a witness in the still-simmering legal battle, as attorneys for children in the system asked Judge Jack for help enforcing her orders.

This case began in 2011, when the foster kids' attorneys, including some from the national child welfare group Children's Rights, sued Texas's top officials in federal court, claiming that the state's foster care system was so dangerous for children that it violated their constitutional right to due process and to freedom from harm while in state custody. The Texas Department of Family and Protective Services (DFPS) is primarily responsible for this system and for the care of the roughly 20,000 children who were removed from their homes after the agency's investigative arm determined they were at risk of abuse or neglect and referred them to its Child Protective Services (CPS) division. The agency's goal is to return each child to their parents once it's safe to do so or, if that isn't possible, to find another secure home for the child. But around half of these children have been in the system for more than a year and are classified as "permanently" in the state's care; they are the ones covered by the lawsuit. Some 80 percent of them live in a family home, with financial support provided by the state. (The state pays families \$27 a day for children without special needs and as much as \$138 a day for more specialized care.) But the rest of them live in group homes, residential treatment centers, or other arrangements. Lawmakers have repeatedly increased funding for foster care in recent years; in the 2024 budget, they allocated an average of about \$41,000 per child in foster care, up from around \$30,000 in 2018.

But statements in court from foster children and social workers make it clear that those budget increases haven't sufficiently reformed the system—nor

for that matter have the mild disciplinary measures doled out by Judge Jack. Twice already, Jack had held the state in contempt for not following her orders. Once, she levied \$150,000 in sanctions for the state's failure to ensure 24-hour supervision in group homes. Yet reports from court monitors still turned up troubling stories of children being abused in the state's custody or simply walking out of placements and fending for themselves, only to wind up injured, trafficked, or killed. Children in foster care don't fare much better once they leave the system at age eighteen. In recent surveys conducted by the state, around a quarter of nineteen-year-old foster care alumni living on their own reported having been homeless in the past two years. Around a quarter said they'd been incarcerated in the same time period.

While the reported number of children without placements has dropped considerably in recent years—down from a nightly average of 114, in July 2021, to 48, in October 2023—conditions have hardly improved. Attorneys and former caseworkers have testified that the prolonged mismanagement and underfunding of the system has pushed staff to a breaking point and created dire circumstances for kids. Austin attorney Lindsey Dionne, who has represented children without placements, testified that the supervision is minimal, and meals are often informal—perhaps from McDonald's, when a caseworker will buy it. “Whatever the location is, it's the children running it,” she said. “When they go missing, nobody looks. When I roam the streets and sometimes find my client, they bring them right back to CWOP and they walk right back out the door.”

After so many years, the foster children's attorneys hoped to convince Jack in December that breaking the cycle would require a more extreme approach: placing parts of the system under receivership, thereby asserting federal control over it. That would be an extraordinary step with only a few precedents in child welfare cases, but it's warranted here, says Houston attorney Paul Yetter, one of the original representatives for the plaintiffs. Of states that have been subject to child welfare reform lawsuits, Yetter says Texas has been “by far” the most aggressive in defending a status quo that ensures mistreatment of vulnerable children. “What it's going to take is a change in leadership at the top. This is a tough thing to do, to run a safe foster

care system, but there are states around the country”—such as Kentucky and New Jersey—“that have had similarly bad systems, and they fixed them.”

Juarez is doing well now, living in a transitional home with good support, she testified. She had stopped taking the medications she felt had been foisted on her. She was enrolled in a course of study for her high school equivalency diploma, and when she mentioned her high marks on a recent practice test, onlookers in the court applauded. After a pause, Yetter asked why she was testifying. “Because kids need to be heard, and things need to change for everyone,” she said. “Because everybody tells you, ‘Oh, CPS is going to take care of you.’ But just like they let me down, they let a lot of kids down. So I’m here fighting for things to change.” When Juarez’s testimony was finished, Jack invited her up to the bench and gave her a hug.

After three days of hearings in December, Jack made an announcement: She would not place the system under receivership. At least not now. “I interpret that to mean the judge is giving the state one more chance to fix its own house,” Yetter says. “And if it’s simply unable to do it, then the remedy of the receiver really becomes the only choice left.”



U.S. district judge Janis Jack speaking aboard the U.S.S. *Lexington* in 2008.
Todd Yates/Corpus Christi Caller-Times/USA Today Network

Marcia Lowry, another attorney for the children in this case, has spent decades arguing for child welfare reform across the country. In her experience, she says, states almost always eventually settle and work with her. “But in Texas there has been resistance from the first and resistance now,” she says, “and the amount of resistance is unusual.” And Texas has thrown more weight behind that resistance as the years have dragged on.

Although Abbott had once promised cooperation with Judge Jack’s orders, the state is now represented in the case by expensive private attorneys from the prominent firm Gibson, Dunn & Crutcher. As the *Dallas Morning News* reported, the five Gibson Dunn attorneys who signed on included four who had clerked for judges on the U.S. Fifth Circuit Court of Appeals, which hears appeals on the ongoing foster care case. The lead attorney, Allyson Ho, is married to James Ho, a right-wing Texas judge appointed to the Fifth Circuit court by Donald Trump.

The Texas Legislature has reportedly given Abbott at least \$6 million to pay their legal fees. That’s in addition to the nearly \$3 million that the attorney general’s office has spent since 2011, plus around \$46 million paid to court-appointed monitors and \$14 million paid to or requested by attorneys for foster children (who were awarded legal fees after Jack ruled in their favor), according to a tally by the *Dallas Morning News*. Yetter and some other attorneys for the plaintiffs have placed their \$6 million in fees in a trust for the children and offered to give the money back to help fund reforms, but the state has not taken them up on the offer.

In court, Jack alluded to the contentious dynamic in the state’s defense. “I know you are waiting on me to issue some order that you can take up to the Fifth Circuit,” she told Ho and the rest of the Gibson Dunn team. The state’s strategy was apparent in the attorneys’ arguments and through statements from DFPS officials. They argued that—despite the many specific failures mentioned in reports by court monitors—the state was, overall, meeting the court’s standards.

Some officials who hold the power to address the foster system’s failures emphasize incremental improvements they say it has made. “I believe the state has tried in good faith to follow the remedial orders,” says state

representative James Frank, a Wichita Falls Republican who chairs the House committee that oversees child welfare and who has adopted children from foster care. CPS caseloads are down, and the percentage of children who find homes through licensed foster parents, group homes, and treatment centers is up.

He says improvements tend to be overshadowed by headlines plucked from the latest report published by the officials that Judge Jack has appointed to monitor the system. “The judge continues to call up anecdotes,” he says, “as opposed to looking at whether the system is improving or not.”

Yetter disagrees. He says the anecdotes that have surfaced in the court case speak to broader systemic issues. While the state has made major strides in some areas, he says, the system for housing children without placements has harmed not only the children living in hotel rooms but also every caseworker forced to cover extra shifts to care for those children. And it has harmed every other child for whom those workers are responsible.

Judge Jack was raised in Fort Worth and studied nursing before shifting into the legal field. She was married with a young daughter when she enrolled at the South Texas College of Law. On class days, she’d catch the early-morning Southwest Airlines flight to Houston and fly back home late the same night. She began a family-law practice and represented Planned Parenthood of South Texas. She also fund-raised for Democratic candidates, and in May 1993 she was one of 21 Texans recommended for federal posts by Bob Krueger during his five-month stint in the U.S. Senate. The list, he wrote, “represents the new Texas, the Texas of diversity, the Texas of change, the Texas of challenge, the Texas of the future.” Jack was confirmed the next year.

Today, after thirty years as a federal judge, Jack has “senior” status and a reduced caseload. She has poured years of her life into the foster care lawsuit. As much as it resembles a marathon, with months of quiet followed by detailed rulings that run hundreds of pages, it also includes the occasional sprint. A tip to court monitors, in March 2022, involving allegations of abuse

at a shelter for girls prompted an emergency hearing the same day it was received. Her role in the case has made her unpopular with some state officials; in the fallout from that 2022 investigation, Justin Lewis, an official in charge of investigations at DFPS, texted a colleague that Jack “needs to get hit by a bus.”

Less than two hours into the court hearing this past December, Jack had already threatened one of the new private attorneys for the state, Prerak Shah, with a contempt of court citation. During testimony from state officials, Jack repeatedly questioned them to pin down their explanations for institutional failures. It was easy to see how she’s gained a reputation for telegraphing the urgency she sees in the work of reform—and her frustration at anyone who seems to be obstructing it.

And yet despite her palpable exasperation, progress has been slow. Yetter says there’s only so much more Jack can do from the bench. “The only way there’s a long-term resolution here is if the state fixes the system,” Yetter says. “She knows that it’s not the place for a federal judge to run a foster system. But she has the power to make it clear when the system is dangerous to children and is violating their rights.”

That leaves it up to Abbott and other Republican leaders to decide how to take these orders from a federal judge.

“I think politics plays a very real part in this,” says Will Francis, a former CPS caseworker who is now the executive director of the Texas and Louisiana chapters of the National Association of Social Workers. “They’ve been willing to make the politics of fighting the lawsuit more important than the changes necessary to reform foster care in Texas.”

Francis notes that the lawsuit is playing out at a time when Texas is, in general, becoming less supportive of LGBTQ youth. The Legislature enacted a ban, for example, on gender-affirming care for transgender kids, and on diversity, equity, and inclusion programs at public universities. That’s particularly significant given that, according to a 2019 study, nearly a third of children in foster care nationwide identify as LGBTQ. The substantive

reforms that would bring the state into compliance with Jack's orders, Francis says, require leaders to put the needs of kids first.

“Kids need a queer-friendly placement. You need diverse homes in every community,” he says. “But these are hard questions. And the lawsuit itself leads to tough political discussions that the state doesn't want to engage in. And so another reason to fight this is to basically keep the wraps on, saying, ‘Hey, Texas can take care of itself.’”

The lawsuit before Jack still drives most of the headlines about foster care in Texas. But there is also a quieter movement underway to prevent more kids from entering the system in the first place. It's made up of a coalition of Democrats concerned by systemic inequities—that the children removed from their homes tend to be poor, nonwhite, or both—and Republicans wary of government overreach into the home. One House bill passed in 2023—authored by James Frank and coauthored by Democrats Gene Wu and Josey Garcia—requires DFPS workers to inform parents of their legal rights when an investigation begins. Many parents, previously unaware of their rights, were subject to the agency's wide-ranging powers to search their homes and question their children; meanwhile, only around 20 percent of DFPS investigations result in findings of likely abuse or neglect.

Matthew Fraidin, a law professor at the University of the District of Columbia, watched receivership play out in the Washington, D.C., foster care system, following a lawsuit similar to the one in Texas. Six years of federal oversight there produced scandal and mixed results. Many argued that the foster care system was in no better shape after the federal takeover. The case ended in 2021, after more than thirty years. The only real change came, Fraidin argues, once the district focused on removing fewer children from their homes to limit the size of the foster care system. About a decade ago, his law students represented parents whose children were removed to foster care, he says, “and in sixty percent of the cases they were returned home without ever being found abused or neglected.”

In Texas, that hasn't been part of the reforms Jack has ordered, but Fraidin says it may be the only way out of the quagmire. Lawsuits like the one before Jack "are doomed to leave agencies as bureaucracies that are focused on the wrong thing." The protracted court battle has been successful in drawing public attention to the system's shameful failings. Substantive change—the kind that will place fewer kids in harm's way—may come more quietly.

*This article originally appeared in the February 2024 issue of Texas Monthly with the title "Not Even a Federal Judge Can Make the State Protect Kids." **Subscribe today.***

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