

The Race Theory That Keeps Imperiled Black Kids Right Where They Are

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Five-year-old old Brandajah Smith grabbed the loaded .38-caliber revolver after her mother left her alone in their New Orleans apartment. It's still not clear why she pulled the trigger, whether it was an accident or related to the suicidal thoughts the child had expressed. But when her mother returned from the store, Brandajah was dead from a single gunshot to the head.

Brandajah's death in 2013 was shocking, but few people who knew her were surprised.

For almost a year, her teachers had repeatedly reported suspicions that she was being sexually abused. They also told authorities that she talked about her own death, what it would be like in heaven and about the gun in her home.

Following Brandajah's death, officials from Louisiana's Department of Children & Family Services told the Times Picayune newspaper that the agency "thoroughly investigated each of the complaints received." But they also said that Brandajah's mother, Laderika Smith, was not complying with the "safety plan" that the agency had set up. In November 2012 – after months of leaving the child in a home with her mother and the mother's boyfriend, who owned the gun (both are felons) – DCFS asked the local court to either order compliance or give the agency the authority to take the child away. By the time of the kindergartner's death, the court had done neither.

Child welfare case files are not public, so it is not clear why the court did not act in Brandajah's case. But that inaction came amid a growing push by liberal advocacy groups, child welfare agencies, and some judges to leave children in troubled homes instead of placing them in foster care.

No one argues that foster care cannot be improved. But this movement, which boasts strong financial and political support, is drawing attention for two reasons. First are concerns that it puts children at risk. The second is that it is based on racial ideology that ignores the evidence about child maltreatment.

A prime mover of this effort is Judge Ernestine Steward Gray, who has served in the Orleans Parish Juvenile Court since 1984. Because the case files are sealed, it is not publicly known whether she was directly involved in Brandajah's case. But she is currently the judge primarily responsible for the vast majority of "child in need of care" cases. She has long argued that the child welfare system unfairly targets minority children for removal from their homes and is widely acknowledged to have almost singlehandedly shifted the parish's policies on foster care.

She also has a powerful ally in the effort – Casey Family Programs. The organization, which has a \$2.2 billion endowment, recently gave Judge Gray a leadership award honoring those who have "had a significant impact in improving outcomes for children and families and building Communities of Hope."

JooYeun Chang, the managing director of public policy at Casey Family Programs, argued last year that the foster care system "traumatize[s] kids by removing them from the only communities they have known" only to place them in living situations that "are no better than jails." The reason so many kids, particularly minority kids, are removed from the home, she said, is that "our system has been built on centuries of racism, classism and xenophobia."

Across the country, advocates influenced and sometimes even trained by Casey Family Programs espouse the view that the child welfare system is racially biased and structured to break up minority families rather than protect children. In response, they say, the system should try to keep kids in their homes, reunify them more quickly if they have been removed, or keep them with extended family because they share the same racial background.

James Dwyer, a law professor at the College of William & Mary, has argued that minority parents – black parents especially – are often seen as the victims of racism and poverty, so there is a growing push to give them as many chances as possible.

Richard Gelles, former dean of the University of Pennsylvania's School of Social Work, believes that leaving children in unsafe environments in the name of family preservation and racial justice is dangerous. "It's almost immoral to hold a child's development hostage while you wait for parents to turn their lives around – if in fact they are going to be able to turn their lives around," he told the PBS program "Frontline." "What if it takes a parent five or six or eight years to turn their life around ... and the only way you know that you've failed is the child is injured or harmed" in the meantime?

Dwyer said that is often the result. “We know that a substantial portion of parents reported once for maltreatment will be reported again if the child remains in their custody,” he told RCI. By contrast, “we know rates of abuse and neglect in foster care are miniscule by comparison — one quarter of 1% annually.”

In that light, it appears that Judge Gray and likeminded people across the country are conducting a high-stakes experiment – applying a new standard for what constitutes abuse and neglect for minority children and where at-risk children should be placed if they are removed. She is doing it with the full knowledge of state officials, but without any public announcement or scrutiny. She may also be in violation of federal equal-protection law. Gray says that she decides cases on an individual basis, but the people in her courtroom say that the issue of race is regularly invoked there and state officials say it is absolutely impacting her decisions.

In a phone interview on Sept. 12, Gray told RealClearInvestigations that “there is not a lot of clarity about the standards” for when to remove children from their homes. She says she will only remove a child “when it is absolutely necessary to ensure the health, safety, and well-being of that child.” But she also knows that her standard differs significantly from that of other judges. “I do believe I have a higher standard in terms of proof. I believe it is the appropriate one.”

Gray even notes that when she is the duty judge – the one who gets called if a DCFS worker wants to remove a child during the night – “the calls are substantially down.” In other words, some caseworkers who have determined a child is in an emergency situation evidently presume Gray will likely turn down the request, so they don’t ask.

Gray’s views are taking hold in New Orleans. Between 2010 and 2018, the number of children in foster care in Orleans Parish fell almost 75%, from 126 to 36. During the same period, neighboring parishes have seen significant increases. East Baton Rouge, for instance, has gone from 126 to 208 during the same period. A map of Louisiana suggests that Orleans is a startling outlier with a rate of 1.7 children in foster care per 1,000 compared with neighboring St. Tammany and St. Bernard with rates of 4.9 and 6.8, respectively. The national average is 6 per 1,000 children.

Nationwide there has been an increase in the number of children entering foster care, from 397,000 in 2012 to 443,000 in 2018. Estimates vary, but for every five incidents in which a child is removed from his or her home, two to four of them have to do with a family member’s substance abuse. And Louisiana’s drug problem has certainly been getting worse. Its rate of overdose deaths has increased to 24.5 per 1,000, compared to the national average of 21.7.

In the past eight years, reports of child abuse and neglect in Orleans Parish have almost doubled from 2,556 to 5,589, and the number that merit an investigation has risen from 1,044 to 1,777. All of which suggests that, if anything, Orleans should be seeing a rise in the number of kids needing to be removed from their homes. But the parish is moving in the opposite direction.

In the past six months, RealClearInvestigations spoke with a local pediatrician specializing in abuse cases, a lawyer who has appeared in Gray's court, foster families, and others who have worked in local foster care and child welfare. None of them were willing to speak on the record because they continue to appear in the judge's courtroom.

But they all said they are deeply concerned about efforts to leave children in troubled homes. And they all report that Gray's reputation for denying state's petitions for removal matters for both investigations and prosecutions. One foster parent said she has talked to children who have begged Gray not to make them go back to neglectful situations with their biological parents. Another person told RCI that the judge berated a lawyer for bringing a case against black parents that she says he never would have brought against white ones.

Both on and off the bench, Gray has suggested that racism is a major problem in the child welfare system. She has repeatedly invoked disparate impact theory, the idea that race-neutral policies can be racist if they impact one group more than others. In a 2018 article for the Louisiana Bar Journal titled "The Color of Justice for Children," Gray wrote, "Nationally, youth of color are disproportionately represented at every decision point in the child welfare system. Their families are disproportionately referred to the system by institutions such as hospitals, schools and law enforcement."

During the interview with RCI, Gray said she tries to make decisions on a case-by-case basis but she said she knows that "African Americans don't make up 100% of the poor people in New Orleans. I have to wonder why poor white parents and poor Vietnamese parents aren't being brought in."

According to a 2016 report from the Children's Information Gateway, black children made up 13.8% of the child population in the United States and 22.6% of those identified as victims by child protective services. Black children make up 24.3% of kids in foster care.

In her article, Gray rests her claim of racial bias on "research [that] shows that rates of child abuse and neglect are not higher in families of color. ... [Factors contributing to this phenomenon] include poverty, a lack of community resources, as well as institutional biases from the police, the child welfare agency and the courts."

But national statistics report that black children are more likely to suffer maltreatment and black women are more likely to be the victims of abuse than whites. Although various factors contribute to this, single parenthood, and especially living with a man who is not the biological father, is a common theme in a notable percentage of abuse cases. According to data from the U.S. Department of Health and Human Services, the incidence of physical abuse for a child living with a single parent and a "partner" is 19.5 per 1,000. That's almost twice as high as for children living with unmarried biological parents or a parent married to a nonbiological parent, and almost 10 times as high as for married biological parents. The data are similar for sexual abuse.

According to data from Child Trends, 70% of all births to black women in 2014 occurred outside of marriage, compared with only 29% of all births to white women. Family structure is a deeply important factor in determining the likelihood of interaction with child welfare officials – one that disproportionately hurts black children.

A 2009 [article](#) in the newsletter for the National Court Appointed Special Advocates Association, featuring the views of Gray and others, quoted another judge on the issue of disparate racial impact on domestic violence: “Women of color experience higher rates of intimate partner violence than white women. Evidence also suggests a great disproportionality in the arrest, prosecution and lengths of sentence for domestic violence crimes.”

If women of color are more likely to be victims of domestic violence, then it would seem logical that men of color (most likely to be married to or partnered with women of color) would experience a higher than average rate of arrest and prosecution. Similarly, if black children are disproportionately likely to be abused or neglected, then it follows that black parents are going to be disproportionately the subject of investigations by our child welfare agencies.

Rhenda Hodnett, Louisiana’s assistant secretary of child welfare, said there’s another way of interpreting the relatively low number of Orleans Parish children in foster care, though she admitted that it is “hard to wrap your head around.” She said that “different communities have different ideas and thoughts around what is abuse and what isn’t.” Though she says the state “does a lot of training on how to recognize abuse and neglect,” she adds that “community norms are a little different.”

This seems an odd explanation, because the number of reports of abuse and neglect in Orleans Parish doubled between 2010 and 2018. Most abuse and neglect calls are not made by bureaucrats who swoop in from the outside but by doctors, teachers, and social workers, many of whom are from the same racial background as the children being reported. So the “community” doesn’t seem to have lowered its standards for reporting abuse and neglect.

Hodnett seems to argue that Gray, who is African American, is better able to determine these “community norms” than the community she is ostensibly serving. Gray “is truly an eminent judge and respected across nation on issue of disproportionality,” Hodnett said. “Her antenna is high. She watches that closely. Race is absolutely something that impacts her decision making. She makes no bones about that.”

And it’s not just that race seems to play a role in Gray’s decisions about removals, but also about where children should be placed if they do have to be removed. In the interview, she said she is committed to ensuring that those children can be placed with their extended family (who likely share their skin color). She worries that “restrictions on placing kids with relatives who have criminal records” has created a problem for these families because “who are the people who have more relatives in the criminal justice system? It’s minorities.” In other words, Gray is suggesting that the standards for which homes may legally take in minority children should be lowered.

Gray has also recommended that judges should “consider race as a factor when placing children for adoption (e.g., by applying provisions similar to those in the Indian Child Welfare Act to African American children) ... vigorously recruit families whose background reflects that of children waiting to be adopted and who will adopt older children.”

Gray’s encouragement of her fellow jurists to consider race as a factor in placing children in foster homes may be illegal (she did not respond to a follow-up email seeking comment on this point). Walter Olson, a legal analyst and senior fellow at the Cato Institute, told RCI that “since 1996 ... federal law has made it explicitly unlawful for a state that receives federal adoption or foster care funding to delay or deny any placement because of the parent's or child's race, ethnicity, or national origin, except for kids that fall under the Indian Child Welfare Act.

“Without a change in federal law, it's not at all clear how Judge Gray would expect states to move toward restricting transracial placements for black kids. And even if federal law did change, denying children placement because a family is of the ‘wrong’ race could still run afoul of the U.S. Constitution.”

The goal of foster care and adoption out of foster care is to place children in stable, loving homes. A quarter-century ago, when the Interethnic Placement Act was passed, the left and the right agreed that these homes could be provided by parents of any race. That consensus may be disappearing.

Some child advocates in Orleans Parish believe Gray’s activism on the bench is wreaking havoc with the youngest residents of that parish. But Assistant Secretary Hodnett suggests everything is under control. She said that the “repeat maltreatment rates” for Orleans Parish have not changed since the foster care rates started falling.

The state, however, does not seem to have the numbers to back up that claim. A representative of Louisiana’s Department of Children & Family Services says repeat maltreatment claims are tracked only as a regional total for three parishes, and data for Orleans cannot be broken out (even though almost all other child welfare indicators are tracked by parish). And the numbers they do have are only available for six months despite the fact that repeat maltreatment often takes longer to manifest.

Gray said, “I’m not doing research. I don’t know if a family comes back to the attention of the department unless it results in another court case” and she happens to be the one hearing it. She says that “we are trying to figure out how we can gather those numbers,” but right now “it’s all kind of speculation.”

While state officials and advocates such as Casey Family Programs are talking up Judge Gray and her innovative jurisprudence inside of child welfare policy circles, the people of Orleans Parish who vote for their family court judges have received no notice of these changes. And

because court records are kept sealed, it's impossible to evaluate the plan to leave more and more children in homes where parents have been accused of abuse or severe neglect – including cases like Brandajah Smith's.

Her noncustodial father, Brandon Pierre, 29, of Metairie, spoke to the Times-Picayune one day this summer after reviewing records he obtained from his daughter's school. "To read all of that now, to hear all of those things, I choked up all over again," he said. "I can't believe this was going on and I had no idea."