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# Bureaucrats Are Ripping Foster Families Apart

By NAOMI SCHAEFER RILEY | October 29, 2020 11:06 AM



(KuznetsovDmitry/Getty Images)

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## 'Children are not chattel'

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**O**N November 4, the day after the election, the Supreme Court will hear oral arguments in the case of *Fulton v. City of Philadelphia*. Lawyers from the Becket Fund for Religious Liberty will speak on behalf of

Sharonell Fulton, an African-American woman who has taken care of more than 40 foster children through Catholic Social Services in Philadelphia. In March 2018, local government officials demanded that the agency violate its religiously based principles and begin placing kids with same-sex couples. The agency was forced to cease its foster-care operations, denying loving, stable homes to hundreds of children in the system.

This new policy was a solution in search of a problem. Same-sex couples have been fostering children in Philadelphia for decades, and there are dozens of agencies that facilitate these placements. Not one person who wanted to be a foster parent ever complained about a lack of access to an agency. But Philadelphia is not alone. In 29 states as well as the District of Columbia, state statute, regulation, or agency policy relating to foster care prohibits discrimination based on sexual orientation or gender identity.

While every violation of religious liberty is significant and worth fighting, it is hard not to wonder whether some part of the public was inclined to brush off debates over the baking of a wedding cake, to dismiss them as having little tangible impact on American life. But this conflict over foster-care providers is different. Unlike bakeries, there are not enough foster parents — almost every state in the country reports a shortage. And most parents who choose to foster do so because of their faith. Moreover, the help of faith-based foster agencies gives parents the ability to do a better job and stay at it longer.

About half of foster parents quit within the first year, but one study, in the *Journal of Sociology and Social Welfare*, found that foster parents recruited through church or religious organizations foster 2.6 years longer than other foster parents. Faith-based organizations have been among the most flexible and innovative in terms of when and how they offer training for foster parents and in ensuring that communities give foster parents the logistical and emotional support they need. Ultimately, those who will suffer most from this

particular violation of religious liberty may be not those whose liberty has been violated but rather the country's most vulnerable children.

That concern was the subject of a noteworthy amicus brief filed in the case by an Arizona-based group called Generation Justice, founded by Darcy Olsen, the former head of the Goldwater Institute and the leader of the "Right to Try" crusade, which has allowed terminally ill patients access to experimental drugs. Olsen has turned her attention to the country's child-welfare systems.

The brief reads in part: "As the parties seek the balance between the right to religious free exercise and the interest in freedom from discrimination, this Court should not lose sight of what may be the most critical matter at stake — the children's profound interest in forming familial bonds. . . . Impeding access to quality foster care, a gateway to timely adoption, hurts children. It has serious, permanent consequences that vastly outweigh the interests of aspiring foster parents to work through a particular organization that does not share their values."

Unfortunately, the attempt to shut down faith-based agencies is only one of countless ways that our child-welfare system seems designed to block "children's profound interest in forming family bonds."

There are about 440,000 children in the foster-care system. They shuttle back and forth between their often abusive and neglectful biological homes and foster homes. Children are sent from one foster home to another, with stops along the way in various forms of institutional care as well. Research shows that, particularly with children under the age of three, the secure attachment formed with at least one caregiver is vital to intellectual, emotional, and social development. But child-welfare systems seem uninterested in the research behind that attachment.

Child-welfare agencies are run by counties and states, with significant funding — but minimal oversight — from Washington. A growing number of foster parents and other concerned observers of the system have decided that the only way to ensure that those bonds are preserved is to get the federal courts involved.

Take the case of five children referred to in court documents with the last name “B-----y.” Four were taken from their parents’ custody in August 2016 after a large local drug ring was busted. The oldest of the children was not yet five. A fifth child was taken in April 2017, at three days old. They were placed with Courtney Fantone and her mother, Claudia. Claudia had a six-bedroom house in Potsdam, N.Y., and she jokes that she “didn’t like living alone.” Over the years, the two women had fostered almost 50 children without incident. They hadn’t planned to adopt.

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But Claudia and Courtney had never seen the kind of severe neglect that the B-----y children had been through. Courtney describes them as “feral.” They were all still in diapers when they arrived. They didn’t speak. The teeth of the oldest child had completely rotted. “It would take him an hour to eat a peanut-butter sandwich,” says Courtney. Eventually, the teeth had to be removed because the rot was getting into his jaw. While there were initially some visits with the biological parents, it quickly became apparent that they were not interested in following the guidance of the St. Lawrence County Department of Social Services. They continued to use drugs regularly and missed most of the visits.

By the time the kids had been with Claudia and Courtney for 18 months, the women realized that they were the only stability in the lives of these siblings and made clear to the department that they would be happy to adopt all five. According to the Adoption and Safe Families Act, when children have been in foster care for 15 of the past 22 months, the state is required to move to sever parental rights and allow for an adoption process to begin, but at each “permanency” hearing, the local family-court judge and the lawyer for the Department of Social Services (DSS) put off this action.

All of the children had acute developmental delays, but they were making progress. The second-oldest child, J., had more-severe problems, eventually diagnosed as reactive attachment disorder, which caused him to want to hurt his siblings. Claudia and Courtney spent a lot of their time with the children trying to prevent him from doing that. During one weekend the children spent at a respite foster home, though, he pushed his older brother out of a second-story window. On another occasion he tried to stab a younger sibling in the eye with a

pencil. The boy was evaluated repeatedly, and at least eight mental-health experts recommended that he receive intensive, residential treatment.

As he grew older, Claudia and Courtney became increasingly concerned for the safety of the other children and spoke up in court about the need for more-intensive treatment for the boy. (They still wanted to adopt all five.) This apparently angered the caseworkers at DSS, who called Claudia and Courtney to scold them for “being inappropriate in court.” (The St. Lawrence County DSS did not return my calls requesting comment.) And they were presented with a “contract” to sign, in which they would promise to “better communicate with DSS.” Things were coming to a head with J. In January he was admitted to a residential facility. And in February 2020, three and a half years after the Fantones first took them in, DSS served them with a ten-day notice of intent to remove all five children from their custody.

It has been eight months since these children have been able to see or speak with the only parents they have ever known. With the help of a local attorney who has spent an estimated 300 hours on their case, the Fantones have filed countless injunctions and appeals to get their children back. The family-court judge, who has suffered a number of stinging rebukes to her judgments in the past, has issued some truly baffling decisions in the Fantones’ case. In the course of one twelve-page document, she rules that the Fantones cannot file for custody of the children because they are foster parents and have no standing to seek permanent custody; she also rules that they can’t “intervene” in the termination of a parental-rights case because they are *not* foster parents, as the children are not currently in their custody. Call it the Schrödinger’s cat of family-court decisions.

While the courts have been backed up because of COVID-19, exacerbating the already slow-moving system, the children have suffered. J. is still in a residential facility, but the other two older children have been placed in as many as 20 different foster homes since they left the Fantones’. The younger two, along with

another baby born to the same mother, have been placed in a different foster home, a trailer with ten other people.

The Fantones recently spoke by phone with a New York State administrative judge who has agreed to hear their case. The lawyer for DSS has asked to postpone the hearing until January in order to prepare. In other words, not only is this child-welfare agency willing to rip five children away from their longtime caregivers without plausible justification, it is dragging out the judicial process to what will be almost a year before a final decision can be made.

In the meantime, the Fantones have filed a federal lawsuit claiming that there has been a violation of due process because they haven't had a fair hearing. In 1970 the Supreme Court ruled that, if a department of social services removed a child from a home in which he or she had resided for twelve months, there had to be a hearing to determine whether the removal was proper. That hearing is supposed to take place within 90 days of the removal. But in the Fantones' case, it never did.

**T**HEIR case is among the most egregious, but foster parents across the country have shared similar stories with me. The same week I heard from Courtney Fantone, I also heard from a different Courtney — Courtney Landry, of New Orleans, who, with her husband Jacob, decided to foster an infant in their home in October 2018. The child was seven weeks old and had been discharged from the neonatal intensive-care unit straight to their home. Like so many other young children in foster care, Baby Z had been born with drugs in his system — opioids, marijuana, and cocaine — and was only eight pounds when he came to the Landrys. His father died a few weeks later. While the mother entered rehab and seemed to be doing better, she died of an overdose in February 2019. Baby Z remained with the Landrys and had regular visits with his maternal grandmother, Elizabeth Hennessey. In April of that year, the Landrys officially became the child's preadoptive home.

Baby Z had developmental delays as well. He wanted to be held constantly, but he began to hit his milestones, sitting up, walking, and even saying “Momma.” Sometime after he was freed for adoption, an uncle in New York contacted a worker at the Department of Children and Family Services (DCFS) in Louisiana, saying that he was interested in taking custody. He and his wife were fostering the child’s half-brother, but they had never met Baby Z, and, as far as the Landrys can tell, he sent nothing more than an occasional text to the department asking about custody.

In October 2019, the child’s grandmother testified on the Landrys’ behalf at an eleven-hour permanency hearing, and so did Charles Zeanah, a Tulane psychiatrist who works under contract with the DCFS. The court ruled that the child should remain in the Landrys’ care but also that the then–one-year-old could be brought to visit the aunt and uncle in New York. The Landrys were not allowed to travel with him.

In June 2020, an appeals court overturned the lower court’s decision, scolding the DCFS for not doing more to follow up with the uncle in the first place, but ordering the lower court to grant full custody to the child’s aunt and uncle because relatives are supposed to be given preference in these cases. A heart-wrenching video of the 22-month-old shrieking his way through the airport was widely shared after an article appeared in the local newspaper. But by that point it was too late. A child almost two years old was taken from the only parents he had ever known and flown across the country to live with relatives he had seen for a few days. The Landrys say that they have had no contact — not even by phone or video chat — with the boy since July, when they went public with their ordeal. Hennessey is devastated about the decision regarding her grandson. “I felt so blessed he was going to have a real chance in life,” she says. “It’s not love at all to rip a child away. It’s nothing less than kidnapping.”

Having exhausted all their other options, the Landrys filed suit in federal court. They have argued, among other things, that their decision to speak out about the

case resulted in the agency's retaliation — the immediate and complete severance of contact with Baby Z. It was a violation of their First Amendment rights. Fear of retaliation, in other words, stifles the ability of adults to speak up about the kids they care about. In October the Louisiana Senate Health and Welfare Committee held a hearing to discuss the Landry's case. Another foster parent who testified described the intensity of that fear: "It's terrifying to be here," she told the committee members. "I don't know what the repercussions are. We have a foster daughter at home right now."

**O**VER the summer, James Dwyer, a law professor at the College of William and Mary, also filed a federal lawsuit. His was on behalf of a two-year-old who had been fostered by a couple he knows. The couple had cared for the child since he was born, but he was removed to live with a grandfather, who was previously deemed unfit because of his long criminal record. Dwyer suspects that race played a role in this decision — the child is black, the mothers are white — even though federal law prohibits discrimination on the basis of race in placement for adoption or foster care. (The black caseworker scolded the mothers at one point for not using beads in the child's hair.)

Dwyer argues in the brief that "at some point, a child's interest in continuity of placement must become sufficiently strong that it receives the same substantive due process protection that the federal courts give to adults' less vital interests in maintaining and receiving recognition for their intimate relationships. Basic respect for the humanity, personhood and fundamental need of a child requires this."

Foster care and family law is generally a state issue, but higher state courts are often reluctant to overturn family-court decisions, because they generally see family court as rehabilitative and the judge who has overseen the case from the beginning as having the greatest familiarity and expertise. This lack of an effective appeal process has devastated countless foster children and is a violation, Dwyer argues, of their due-process rights.

In addition, Dwyer says that children have a “liberty interest” under the 14th Amendment. While conservatives are generally loath to discover new rights in the Constitution, these families have had no choice but to resort to federal civil-rights lawsuits in order to do what is best for the foster children they are trying to protect. Moreover, as the Generation Justice brief argues, there is reason to think that the crafters of the 14th Amendment likely had family bonds in mind and not just the other rights of a citizen. As one member of Congress noted at the time, the states ratified “the universal understanding of the American people” that free individuals have “the right of having a family, a wife, children, [and a] home.”

Until those children’s rights are recognized, though, many experts expect this behavior by child-welfare agencies to continue. Dwyer, who has edited *The Oxford Handbook of Children and the Law*, says he often sees cases in which child-welfare workers “have a turf mentality”: “They think they own the agency and they own the kids and no one will tell [them] what to do.” Even the lawyers for the children, he says, “fear displeasing the agency.”

Sarah Ann Font, a professor at Penn State who studies child-welfare practice and policy, says that “the issue of retaliation by agencies comes up in qualitative research. Agencies will punish you if you raise trouble for them. They really try to make it difficult for foster parents to advocate.” Moreover, says Font, who used to be a caseworker herself, “most foster parents aren’t given any education about the way the legal process works.” Most of the foster parents I’ve spoken with are unaware of the timelines for permanency and unaware that race is not supposed to be considered in determining the best placement for a child. Dwyer said that when he asked the agency why they had not filed a TPR (termination-of-parental-rights motion) at 15 months, “people look at me blankly”: “ASFA [the Adoption and Safe Families Act] is considered ‘soft law.’”

According to Font’s research, in fiscal years 2015–17,

federal reviewers found that states filed for termination of parental rights in just over half — 52 percent — of applicable cases they reviewed. In 26 percent of applicable cases where termination of parental rights was not filed, no reason was given regarding why an exemption was made. Furthermore, in the U.S. Department of Health and Human Services 2010–2013 report to Congress on Child Welfare Outcomes, the department reported that in 2013, of the children who had been in the foster-care system for at least 15 of the past 22 months, only 14.3 percent became legally free for adoption (had their parental rights terminated).

Ronald Richter, who has served as a family-court judge in New York City and as the head of the Administration for Children’s Services there, is outraged by the behavior of these caseworkers who seem satisfied leaving kids in foster care indefinitely but also transfer them from one home to another arbitrarily. “They remove children from homes they’ve been in for the majority of their lives and then act as though children have no relationship with foster parents,” he says. The idea that children who have long-term bonds with foster parents cannot even visit with these adults while the case is pending or after they are returned is particularly galling. To the children, he says, “their parent is the foster parent. To extinguish that relationship artificially is not fair to the kid. That’s a theme that child welfare struggles with.”

He suggests other solutions, including the creation of a statewide children’s-advocate office to which such appeals could be sent. Or, after a child has been in the foster-care system for a certain amount of time, his or her case should be reviewed by a judge from another county. Given budget crunches and the territorial attitudes currently in place, both solutions seem unlikely in the near future. It may be that something will change only when federal courts start taking seriously the claims of these children and the foster parents fighting on their behalf.

Richter recalls that when he was a young lawyer, a family-court judge explained to him a principle that should guide these agencies: “Children are not chattel.

They are not pieces of furniture you can just move around.” Or, as the Generation Justice brief has it: “The victorious North’s desire to protect people’s ability to form familial bonds did not disappear with slavery.”



*This article appears as “Children Are Not Chattel” in the November 16, 2020, print edition of NATIONAL REVIEW.*

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