Adoption and the Anti-discrimination Wars

America has had a relatively decentralized and pluralist approach to adoption, with a wide variety of both private and public actors helping to match children with families. But recently, controversies have arisen over what role, if any, is appropriate for religious and other agencies that decline to work with gay parents or that give preference to coreligionists. Is it possible to balance the rights of prospective parents, the belief systems of private agencies, and the urgent need for children to find homes? At a Cato conference, Stephanie Barclay of Brigham Young University, Sarah Warbelow of the Human Rights Campaign, Cato’s Walter Olson, and Robin Fretwell Wilson of the University of Illinois discussed this question.

STEPHANIE BARCLAY: I want to start with some first principles that I imagine many of us can agree with. Number one: gay couples can be fantastic parents and should not be banned from adopting or fostering children. Number two: there’s a shortage of foster and adoptive homes for foster children. And number three: our policy decisions should ultimately be aimed at what is best for these children, who have suffered so much.

There are 400,000 children right now in foster care nationally, and of those, 100,000 are just waiting to be adopted. Every year, about 20,000 foster children age out, which means that they leave foster care not having been able to find a permanent family. Studies show that these children, who are predominantly minority children, are more likely to end up in poverty.

I also want to clarify the difference between public and private adoption. With private adoption, the paradigmatic example is a teen mother giving up her child voluntarily. That’s very different from what we’re going to spend most of our time talking about, and that is public adoption, where children have been removed from their homes because they have suffered abuse and neglect, sometimes of unspeakable levels. These children, who need to be adopted, have been placed temporarily in foster homes as wards of the state. Agencies cannot help those children unless they have a contract with the government to do so.

The government relies on private agencies because they can’t find enough homes on their own. They need all hands on deck.

If a prospective family contacts a private agency, there are a number of reasons why that agency might refer them elsewhere. There are foster agencies that focus exclusively on doing placements for Native American children with Native American families. There are agencies that exclusively find homes for LGBTQ children or that focus on particular medical or behavioral health issues. And so, if, for example, a couple approached an agency that specializes in placing Native American children with Native American families, and that couple didn’t have Native American heritage, that agency would say, “We’re happy to refer you elsewhere, but that’s not our mission.”

If a family proceeds with a particular agency, generally that agency will perform a home study, which involves an in-depth evaluation of the family and of any relationships of adults in that family. They will then provide a certification or endorsement of not just that family but those relationships.

And that’s where the conflict arises for some faith-based agencies. A religious agency in Michigan, for example, said that they couldn’t give a written certification of an unmarried couple, or a same-sex couple. The agency said that same-sex couples could still adopt children in their care if they received that written endorsement through another agency—and, in fact, that has happened multiple times in the past. They just cannot provide that document contradicting their religious beliefs.

We are richer as a country when we have a plurality of voices—when we have faith-based and secular agencies serving a range of populations, all working together to bring in as many homes as possible for children who so desperately need them.

SARAH WARBELOW: There’s been a lot of attention on this as an LGBTQ issue. And certainly, same-sex–headed families are being excluded by these agencies, despite the fact that they are well qualified and willing to take children in. But these are not the only families that are being excluded. In South Carolina, a Christian adoption agency refused to place children in the care of a very experienced foster family who happened to be Jewish.

We are talking about an emergency in this country, where there are not enough families for children in need. It’s outrageous that we would allow agencies to turn away qualified families because they don’t fit a narrow model of what an ideal family should look like for that particular agency. We also know that children are not being placed with single parents despite the fact that single women are more willing to take in hard-to-place children—older children, children with disabilities. There are over 2 million LGBTQ people who are interested in adopting and being foster parents. These are also individuals who are willing to take in hard-to-place children.

Much of this debate got kicked off because the state of Virginia was contemplating adopting a regulation that prohibited foster agencies from discriminating against prospective families, including on the basis of sexual orientation and gender identity. The knee-jerk reaction of the legislature
was to adopt a law that allowed these agencies to continue to accept taxpayer funding—including funding from people that they would not serve—in order to refuse to place children in loving families who are willing to accept them into their arms. That is a very serious problem.

Some of the proposals on the table would also allow child welfare agencies to refuse to place children with their biological families, if the agency deemed the person ineligible based on their sexual orientation or gender identity. Think about that—an agency saying, “We would rather place a child in congregate care or with a stranger than place them with a qualified aunt who happens to be lesbian.”

Some of these policies also permit discrimination against LGBTQ youth themselves. About 25 percent of youth in the foster care system are LGBTQ. LGBTQ youth are at high risk for rejection from their families and make up around 40 percent of runaway and homeless youth. But some of the proposals and laws that have passed, including in Texas, would allow agencies to place these children with families who are hostile to them, who will subject them to conversion therapy, or refuse to recognize that a transgender child is transgender.

At the federal level, you may have heard of the proposed Aderholt Amendment that was added to the HHS funding bill in the House. This bill would allow for all of those dangers; every single one of them. We need to make sure that all children have every opportunity to be adopted.

**WALTER OLSON:** Seven years ago, when I first wrote about this problem, I cited a cautionary example: the well-known litigation in *Wilder v. Bernstein*. This was a case in New York City, whose foster care system was run largely by institutions from major religious groups. The groups tended to provide foster placements for their communities; the Catholic agencies would make arrangements for Catholic kids, etc.

Then along came public interest lawyers arguing that this was unconstitutional, that this was religious discrimination, and in particular, that it perpetuated inequalities. The Catholic and Jewish agencies were known for doing an exceptionally good job, but this was not true for the Protestant agencies, which served a largely black population. And this inequality was unacceptable to the litigators. So, the city agreed to scrap the system and cut back drastically on religious matching. The agencies had to adopt something closer to a first-come–first-served method of assignment. They became more like interchangeable outposts in a single foster care system.

Outcomes were already pretty darn bad, and they became even worse as the high-performing religious agencies lost their oomph. Volunteers scattered, and the city’s foster care system lurched from crisis to crisis through 26 years of litigation. I hoped, seven years ago, that we would not repeat the same mistakes with adoption. But I fear that we may be doing that.

You don’t spend very long in the adoption world without noticing that two groups are tremendously overrepresented. The first is those of intense religious faith, who have a mission to help needy children. And the second group is gay people, who often cannot become parents directly.

And I’m not just talking about the easy cases: the teenage expectant mother who has 25 people who would love to adopt her baby. I’m talking about the hardest-to-place cases: the medically fragile cases, the older sibling groups, the behaviorally challenged kids. So often, it was either the highly religious people or the gay people who would step in for placements that no one else would make.

I think a lot of those cultural collisions, as it were, were beneficial on both sides because both sides had some suspicion to get over about whether the “other group” was really there for the right reasons. But you saw it in action. You saw how much they cared. It became hard to see them as an enemy; not after you saw what they were doing.

And then came the beginning of what may be 26 years of litigation against each other. I’ve been writing about litigation for more or less my whole adult life, and I know that if you want to go on liking and respecting people, you probably shouldn’t be in litigation with them.

I’m critical of some of the same things that Stephanie was critical of, like the idea that by taking one dollar of public money, you must convert to complete nondiscrimination, even if, as an agency, you stand ready to deal with parents who were brought in by other agencies of different religious views. I agree that when you press the logic that far, children will probably wait longer.

But unfortunately, as Sarah very rightly said, a lot of the remedies that we are now hearing often provide a sweeping and absolute right for religious agencies not to be discriminated against over any of their decisions; not just defunding but also adverse action.

**STEPHANIE BARCLAY:** We are richer in this country when we have a plurality of voices.
I’m an adopted child myself. My mom and dad literally changed the entire arc of my life. To borrow a phrase from Stephanie, we need all hands on deck. That means that anybody who can give these children a good family should be able to do so. Gay couples have been disproportionately stepping up to the plate to adopt and foster. In Oklahoma—which just passed a stand-alone, religious adoption agency protection—24 percent of gay couples were raising adopted kids, compared to 4 percent of heterosexual couples.

But I think it also means that we have to keep every one of these agencies, including religious agencies, in the marketplace. Agencies that work in niche markets are successful because the people that they’re drawing forward to foster and adopt often share their values. And we should not be glib about that. We need agencies in every niche market, whether they’re faith communities, or Spanish-speaking communities, or African-American communities, or LGBT communities.

There’s a second point, though, that Sarah has addressed, which is that these are tax-funded agencies turning folks away. In Maryland, Catholic Charities received 70 percent of its funding from federal, state, and local dollars, meaning that a public-money-public-rules position taken in its same-sex marriage legislation would cause them to downsize 70 percent, or possibly close.

So, this brings me to the deep structural problem here: The state is picking winners and losers—the agencies that it allows to do this important work. But these agencies do not get paid until the child is placed. So that means that the agencies bear huge upfront costs to develop families who can foster or adopt. That back-ended payment structure rewards large agencies over small ones, and that yields a natural monopoly.

And there’s also a second choke point here that is harming children, and that is that gay couples can’t adopt or foster without certification. Now, as Stephanie said, for many religious agencies, their only concern is that they not be asked to pass judgment on a family by certifying the family.

What’s needed today is a fairer funding mechanism that pieces off the front-end cost and pays agencies directly. That would draw more agencies to the certification work and reduce the scarcity that leads to clashes. Instead of putting the support for that certification cost in the hands of state-picked agencies, we should put it directly in the hands of the families that are making these commitments to children. In other words, we should empower the prospective foster and adoptive family to hire the agency that best meets their needs.

We have a model for this already. We do this with early childhood development for poorer families, where we give families a certificate and let them choose where to spend it: with grandma, with a Montessori school, or with a Lutheran day school. And that structure has assured us a diversity of providers and given families choice. It has

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Why a train enthusiast lost faith in subsidized rail

A Fine Romance?

Cato senior fellow Randal O’Toole is a man who loves trains—in fact, he says, “Few people can say they love passenger trains more than I do.” He still thrills at the memory of his first ride on a train, at five years old. And he still treasures the model trains—custom painted by his father to match his favorite railroad—that he received for Christmas in his youth. He has spent hours volunteering to lovingly restore a vintage train. He collects train memorabilia: dining car china, old brochures, sleeping car blankets. He even met his wife on a cross-country train trip.

All of that makes O’Toole an unlikely candidate for one of the nation’s most vigorous critics of passenger rail. In fact, O’Toole was once an ardent supporter of increased funding for Amtrak and government-funded trains. And yet—as his new book *Romance of the Rails* explains—despite his enduring love for the elegance and nostalgia of train travel, he has since become “completely disillusioned” with the idea of government-subsidized train travel and has come to realize that, as majestic as trains can be, they have little place in the future of mass transit.

His book, therefore, is a “love letter to a dying friend,” a comprehensive history of how train travel came to be, why it once worked so well, and why it doesn’t work anymore.

In city after city, the numbers prove that passenger rail is no longer the best method of transportation for most commuters; new technology, including cheap air travel and ride-sharing, has replaced trains once replaced steamboats and horse-drawn carriages. Nevertheless, local governments continue to pursue doomed forays into subsidized rail, like Nashville’s commuter transit project, the Music City Star, whose higher-than-expected operating costs and lower-than-expected revenues have left the city with staggering deficits. By 2016, the total subsidy was more than $28 per ride, so that someone who rode the train to and from work 250 days a year would cost taxpayers more than $14,000. “This means it would have cost less to buy every daily round-trip rider a new Toyota Prius, not just once but every other year for the expected life of the train,” O’Toole writes.

O’Toole tackles and debunks all the common refrains of rail enthusiasts, such as, “Why can’t America just have great train systems like Europe?” The answer: in reality, Europe’s trains are plagued by the same problems as American trains. In Italy, for example, economists have dubbed the country’s high-speed rail system “devastating” to the national budget, with dismal ridership numbers. France has built 1,640 miles of high-speed train lines since 1981. But by 2013, France’s rail programs were more than $50 billion in debt, and they have continued to lose money while only 10 to 15 percent of French residents regularly use high-speed rail. The United Kingdom has one of the most financially successful train systems, but only thanks to a privatization program that has increased rail passenger miles in the U.K. faster than in any other European nation.

Even in the golden age of trains, O’Toole notes, train transit was an elite, glamorous activity; it has never made much sense as a subsidized travel solution for the masses. The truth is that the romantic fantasy of high-speed rail lines that whisk all Americans to work every day is just that—a fantasy. “I still love passenger trains,” O’Toole writes, “but I don’t think other people should have to subsidize my hobby.”

PURCHASE *ROMANCE OF THE RAILS* AT CATO.ORG/STORE AND BOOKSTORES NATIONWIDE.

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worked across five presidential administrations, from Bush I to Obama and now Trump.

And notice what happens here: Suddenly, we don’t have tax-funded agencies deciding to assist or not assist a family with public money. We have families deciding where to spend those dollars; families that know best who will make them more comfortable and successful in fostering and adopting children. Common sense and experience show that we, in fact, can take children out of the culture war, where they do not belong.