

**Is There Justice in Children's Rights?:
The Critique of Federal Family
Preservation Policy**

Dorothy E. Roberts
Northwestern University
School of Law
and
Faculty Fellow
Institute for Policy Research

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The Adoption and Safe Families Act (ASFA), enacted in November 1997, represents a shift in federal child welfare philosophy from an emphasis on reunification of children in foster care with their biological families toward an emphasis on adoption. The promotion of ASFA and the critique of family preservation policy is framed as a defense of children's rights. The debate surrounding the law pitted children's interests against the state's interest in keeping families together, and children's right to be safe against parents' right to custody of their children. This paper uses the perceived antagonism between children's rights and family preservation policies to explore the politics of children's rights. I argue that there are both pragmatic and philosophical flaws in ASFA's emphasis on adoption that undermine the claim that the law advances children's rights. America's foster care problem stems more from the removal of too many children from their homes than from the failure to place enough children in adoptive homes. I also argue that the passage of ASFA reflected contemporary developments in race and class politics, particularly welfare reform and changes in federal policy on transracial adoption. A grossly disproportionate number of children placed in substitute care are poor and Black. I conclude by making a case for injecting a deliberate attention to social justice in discussions about children's rights.

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Introduction: Pitting Children's Rights against Family Preservation

In November 1997, President Clinton signed the Adoption and Safe Families Act ("ASFA")² aimed at doubling the number of children adopted annually by 2002.³ The act represents a dramatic shift in federal child welfare philosophy from an emphasis on the reunification of children in foster care with their biological families toward the adoption of these children into new families. Its predecessor, the Adoption Assistance and Child Welfare Act of 1980,⁴ encourages states to develop preventive and reunification programs instead of costly and

¹ Professor, Northwestern University School of Law; Faculty Fellow, Institute for Policy Research. I presented earlier versions of this essay at a conference on Children's Rights and the Constitution sponsored by University of Pennsylvania Journal of Constitutional Law and as the Orthwein Lecture at Washington University School of Law, and thank the participants for their comments. I am also grateful to Donyelle Gray for excellent research assistance and to the Institute for Policy Research for generous research support. This essay is part of a larger book project entitled, "Shattered Bonds: Race and the Politics of Child Welfare."

² Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

³ Cheers for New Law on Adoptions, N.Y. Times, Nov. 20, 1997, at A24. In 1995, only 20,000 children in foster care were adopted. U.S. Dep't of Health & Human Servs., Adoption 2002: A Response to the Presidential Executive Memorandum on Adoption Issued Dec. 14, 1996 (1997). In response to President Clinton's Adoption Initiative, the U.S. Department of Health and Human Services prepared the report Adoption 2002 outlining an agenda to overcome barriers to adoption and to accelerate permanency for children in foster care. See *id.* President Clinton's 1998 budget requested \$10 million for technical assistance to states aimed at meeting the Adoption Initiative's goals. *Id.* at ___.

⁴ Public Law 96-272.

disruptive out-of-home placements that had dominated child welfare practice.⁵ The new law amends the 1980 act to direct state authorities to make the health and safety of children in foster care their top priority.⁶

Support for ASFA was generated largely through tragic stories of children who were killed after caseworkers returned them to blatantly dangerous parents. But ASFA's reform of federal child welfare policy goes beyond mandating steps to ensure the safety of children who have been removed from violent homes. The act and the rhetoric surrounding it weaken federal commitment to family preservation and establish a preference for adoption as the means of reducing the exploding foster care population. The law's congressional sponsors declared that the legislation "is putting children on the fast track from foster care to safe and loving and permanent homes," referring to adoptive families.⁷ The preference for adoption is implemented through swifter

⁵ M. Allen and J. Knitzer, "Child Welfare: Examining the Policy Framework," in B.G. McGowen and W. Meezan, eds., *Child Welfare: Current Dilemmas, Future Directions* (Itasca, IL.: Peacock, 1983): 93, 120-21. The Child Welfare Act provides that "in each case, reasonable efforts will be made (a) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of a child from his home, and (b) to make it possible for the child to return to his home." 42 U.S.C. 671 (a)(15).

⁶ Both ASFA and the 1980 Child Welfare Act reflect the prevailing wisdom that children in foster care should be quickly placed in permanent homes because the instability of foster care damages children's psychological and social development. See generally Henry S. Maas & Richard E. Engler, Jr., *Children in Need of Parents* (1959) (documenting foster care "drift"); Joseph Goldstein, et al., *Beyond the Best Interests of the Child* (1973) (asserting the influential theory that continuity in children's relationships with a caregiver is essential to normal psychological development). While the 1980 law emphasized returning children to their biological parents, the AFSA amendments emphasize freeing children for adoption. The Child Welfare Act, however, also provided for termination of parental rights as an avenue for permanency. For critiques of the prominence of permanency planning in child welfare policy, see Marsha Garrison, *Why Terminate Parental Rights?*, 35 *Stan. L. Rev.* 423 (1983); Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of- Custody Ground for Termination of Parental Rights*, 71 *N.Y.U. L. REV.* 1251, (1996).

⁷ Statement of Kennelly, 143 *Cong. Rec.* H10776-05, H10787.

timetables for terminating the rights of biological parents to “free” children for adoption⁸ and the provision of technical assistance to states to facilitate adoptions.⁹ The act also gives states financial incentives to move more children into adoptive homes.¹⁰ Although ASFA retains the requirement that states make reasonable efforts to reunify children with their families, it encourages concurrent efforts to place these children with adoptive parents.¹¹ In case of a conflict

⁸ ASFA requires states to file a petition to terminate the rights of parents whose child has been in foster care for 15 of the previous 22 months, unless a relative is caring for the child, a compelling reason exists why termination would not be in the best interests of the child, or the state did not provide reasonable efforts for reunification. 42 U.S.C. S 675 (5)(E). ASFA also requires a permanency hearing to be held within 12 months of a child's entry into foster care. 42 U.S.C. S 675 (5)(C).

⁹ ASFA provides that, the Secretary of Health and Human Services may provide technical assistance to states to increase the numbers of adoptions, including help in developing guidelines for expediting termination of parental rights, specialized units for moving children toward adoption as a permanency goal, and models to encourage fast-tracking of infants into preadoptive placements. 42 U.S.C. S 673 (b) (i).

¹⁰ Under ASFA, the federal government pays states \$4,000 multiplied by the amount by which the number of foster child adoptions in the state during the fiscal year exceeds a base number of foster child adoptions. The government pays \$6000 for each adoption of a special needs child. 42 U.S.C. 673 (d) (1).

¹¹ States may concurrently “identify, recruit, process, and approve a qualified family” to adopt the child. 42 U.S.C. 673 (a)(F). These dual purposes of reuniting foster children with their families while preparing them for adoption create conflicting incentives for child welfare agencies that are likely to attenuate their efforts at family preservation. See Hand, *supra* note ___, at 1289 (noting that “[l]ength-of-time-out-of-custody statutes cast the child welfare agency in the conflicting roles of family preserver and advocate for termination”). Hand explains why this conflict exacerbates caseworkers' antagonism toward biological parents:

The agency is usually responsible for investigating the biological family and making the initial recommendation to remove the child from the home. Thus, from the start the agency's role is more that of an adversary than that of an advocate. Furthermore, the agency is responsible for recruiting and training foster parents, thus creating a certain allegiance to them. Despite the possibility that the agency, because of these factors, may be closely allied to the foster parent and even antagonistic to the biological parent, ... the

between reunification and permanency efforts, the permanency plan prevails.¹²

The law's supporters argue that these provisions promote adoptions for the 100,000 children in foster care who cannot return safely to their birth families.¹³ Of course, the state should promote adoptions of children who have been abandoned by their parents or who have little chance of being reunited with their families. The act's impact, however, may be to permanently separate children from families that might have been preserved with adequate state resources or alternative custody arrangements.¹⁴ Family preservation efforts often fail because they are inadequate:

agency [has] the role of reunifying the biological family. Given these conflicting incentives, it is not surprising that child welfare agencies are often found not to have made reasonable efforts at reunification.

Id. at 1289-90. ASFA intensifies this conflict by encouraging caseworkers to pursue adoption, weakening even more their incentive to preserve the biological family. Caseworkers' conflicting roles reflect a more fundamental "dual-role" structure of public child welfare agencies that combines helping impoverished families with coercing them to conform to agency standards through the threat of removing their children. See LeRoy Pelton, *For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in the United States* ___ (1989). Social work professor LeRoy Pelton proposes addressing this problem by transferring the investigative and foster care functions of child welfare agencies to law enforcement agencies and the civil court system, respectively, so that the child welfare system can be devoted to providing preventive services to families on a nonjudgmental, voluntary acceptance basis. Id.

¹² 673 (a)(C).

¹³ See Children's Defense Fund, *The State of America's Children* 66 (1998).

¹⁴ In testimony regarding the Adoption Promotion Act of 1997, the Children's Welfare League of America expressed concern that the bill's deadline for initiating termination proceedings might "disrupt good and timely progress toward reunification." Prepared Testimony of Child Welfare League of America before the House Ways and Means Committee Human Resources Subcommittee, H.R. 867, The "Adoption Promotion Act of 1997" (April 8, 1997). See also Prepared Testimony of Jess McDonald, Director, Illinois Department of Children and Family Services on behalf of the American Public Welfare Association before the House Ways & Means Committee, Human Resources Subcommittee (April 8, 1997) (expressing concerns that

children are returned to troubled homes without assessing the parents' problems or providing the level or continuity of services required to solve them.¹⁵ Having never delivered on its promise to support poor families, Congress is now using the failure of family preservation programs to justify taking more poor children from their parents. Moreover, states are unlikely to find adoptive homes for most of these children. The act also sends an alarming message: we should be quicker to abandon the poor, Black, and struggling families whose children are typically put in foster care while encouraging more privileged couples to adopt them.

The critique of federal family preservation policy is framed as a defense of children's rights. As Representative Pryce of Ohio argued before Congress on the bill's behalf, "we will elevate children's rights so that a child's health and safety will be of paramount concern under the law.... Let us do it for the children."¹⁶ The Washington Post praised the law for putting "a new and welcome emphasis on the children."¹⁷ And a Milwaukee columnist declared that ASFA was "to the abused and neglected children in our nation's foster care system what the Voting Rights Act was

the time frame to initiate termination of parental rights proceedings "is an overly prescriptive mandate ... [that] does not allow states the flexibility to decide on a case by case basis what is in the best interests of a child"). Timetables are a critical element of state child protection schemes because "the most commonly used ground for termination is a finding that a child has been out of the custody of the parent, usually in foster care, for a statutory period of time during which the parent has failed to remedy the circumstances that led to the child's removal from the home." Hand, *supra* note ___, at 1251, 1261-67.

¹⁵ Marcia Robinson Lowry, Commentary, 8 *The Future of Children* 123, 125 (1998).

¹⁶ 143 Cong. Rec. H10776-05, H10789.

¹⁷ From Foster Care to Adoption, *The Washington Post*, May 10, 1997, at A24.

to black Americans in 1965.¹⁸ *The Book of David: How Preserving Families Can Cost Children's Lives*, by prominent family violence scholar Richard Gelles, galvanized support for ASFA on similar grounds.¹⁹ *The Book of David* reports the startling events that surrounded the suffocation of a little boy by his mother after he was returned to their abusive home. Gelles attributes this tragic lapse in judgment to the priority policymakers placed on families, rather than on children. According to Gelles, family preservation policies encouraged caseworkers to interpret the mandate to use "reasonable efforts" to reunify foster children with their families as a license to risk children's safety.²⁰ He argues that "the basic flaw of the child protection system is that it has two inherently contradictory goals: protecting children and preserving families."²¹ Gelles therefore advocates reinventing the child welfare system "so that it places *children first*."²²

The debate over family preservation policies, thus, pits children's interests against the state's interest in keeping families together. ASFA supporters placed children's right to be safe at

¹⁸ Jeff Katz, Finally the Law Puts These Kids' Interests First, *Milwaukee J. Sentinel*, Dec. 28, 1997, at 1.

¹⁹ Richard J. Gelles, *The Book of David: How Preserving Families Can Cost Children's Lives* (1996).

²⁰ *Id.* at 115-20. Numerous newspaper articles at the time also blamed tragic cases of child abuse on family reunification policies. See, e.g., Michael Quinn, Family Preservation -- It Can Kill, *Newsday* (New York), Jan. 11, 1996, at A33. The Child Welfare Act requires states to show reasonable efforts toward reunifying foster children with their biological families to receive federal funding for foster care services. 42 U.S.C. S 671(1) (15) (1994).

²¹ Gelles, *supra* note ____, at 152.

²² Gelles, *supra* note ____, at 143 (emphasis in original).

odds with parents' right to custody of their children.²³ It is understandable that in *Disposable Children* Renny Golden entitled the chapter on this topic "Family Preservation Versus Children's Rights."²⁴ A number of scholars and activists, many of whom are children's advocates themselves, have refuted this opposition of children's rights and family rights.²⁵ As Bruce Boyer, the supervising attorney for the Children and Family Justice Center of Northwestern Law School, puts it, "[i]n family preservation, to my mind, there's a commonality of interests."²⁶ Typically,

²³ Children's rights advocates frequently assert a conflict between parents' rights and children's interests in the context of foster care and adoption. See, e.g., Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* 50 (1993) (arguing that barriers to adoption sacrifice children's interests for the sake of parental rights); John J. Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. Cal. L. Rev. 633, 656 (1981) ("[I]t is clear that parental rights are all but absolute, even though they may conflict with the child's need for permanence."); David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. Pitt. L. Rev. 139 (1992). But, as Marsha Garrison insightfully observes, this perceived conflict is a striking departure from "the general emphasis on relationship protection that has characterized advocacy on behalf of children." Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U Rev. L. & Soc. Change 371, 373 (1996).

²⁴ Renny Golden, *Disposable Children: America's Welfare System* 149 (1997).

²⁵ See, e.g., *id.* at ___; Cornel West & Sylvia Ann Hewlett, *The War Against Parents* (1997) (proposing a parents' bill of rights as a means of furthering children's interests); Garrison, *Parents' Rights vs. Children's Interests*, *supra* note ___, at 394 (arguing that terminating parents' rights neglects children's emotional needs); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, ___ Ohio State L.J. ___ (forthcoming 1999). Marcia Robinson Lowry, the executive director of Children's Rights, Inc., a national advocacy organization that works to reform child welfare systems, rejects the choice between family preservation and child protection. See Lowry, *supra* note ___, at 125. She criticizes both the abuse of family preservation philosophy "as a justification for doing nothing until families disintegrate and cause devastating harm to children" and the abuse of child protection philosophy "in which children are removed from many shaky but salvageable families to endure the questionable benefits of foster care systems." *Id.*

²⁶ Quoted in Golden, *supra* note ___, at 153.

furthering a family's interests will also benefit the children who belong to the family. Children, moreover, have an interest in maintaining the bond with their parents and other family members and are terribly injured when this bond is unnecessarily disrupted.²⁷ When the state seeks to protect children,

it takes on the exquisitely difficult task of deciding when intervention is reasonably necessary to the physical or emotional well-being of a child and when it is destructive, both of the bonds upon which the child depends for healthy nurturance and of the child's right to grow in a community that is open, flexible, and self-defining, rather than state-controlled.²⁸

The reason for limiting state intrusion in the home is not only a concern for parental privacy but also the recognition that children suffer when separated from their parents and community.

These divergent understandings of the relationship between children's interests and preserving families suggest, at least, that is no fixed meaning of children's rights in any particular contest involving children's welfare. In this essay, I use the perceived antagonism between children's rights and family preservation policies to explore further the politics of children's rights. The use of children's rights in the debate that led to ASFA demonstrates how easily this concept can obscure political struggles. Part II considers pragmatic and philosophical flaws in ASFA's emphasis on adoption that undermine the claim that the law advances children's rights. Part III explores developments in race and class politics in America that influenced the shift in federal child

²⁷ See Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1979), 32-34.

²⁸ Peggy Cooper Davis and Gautum Barua, "Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law," *University of Chicago Law School Roundtable 2*(1995): 139, 141-42.

welfare policy. I contend that ASFA had as much to do with these political struggles as with concern for children's rights. Finally, in Part IV I argue that it is critically important to inject into the development of children's rights a deliberate attention to social justice.

II. Does ASFA Advance Children's Rights?

A preliminary step in assessing ASFA as a children's rights measure is to determine whether or not it furthers children's interests. Certainly the clarification of the "reasonable efforts" requirement to ensure that children are not returned to violent homes protects children. ASFA amends the federal child welfare law to make children's health and safety "the paramount concern" and to exempt from family preservation requirements parents who commit specified violence crimes against their children, subject their children to aggravating circumstances such as torture, or have already had their parental rights involuntarily terminated.²⁹ Most people would probably agree that children have an interest in, if not a right to, government protection from this sort of violence.³⁰

The child victims of severe abuse covered by these provisions, however, are only a minority

²⁹ 42 U.S.C. 671 (a)(15)(A) & (D) (1994).

³⁰ See Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 Harv. L. Rev. 1359 (1992) (arguing that the Thirteenth Amendment requires states to protect children from the domination of an abusive parent). However, efforts to reunify child victims of severe abuse with a nonviolent parent may nevertheless be warranted where only one parent inflicted the injuries. Social workers and judges often blame mothers who fail to protect their children from abuse and sometimes unfairly deprive them of custody of their children. See generally Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vanderbilt L. Rev. 1041 (1991); Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L. Rev. 95 (1995). See, e.g., *In re Farley*, 469 N.W.2d 295 (Mich. 1991) (terminating a battered woman's parental rights based on a psychologist's prediction that the woman was at risk of entering into a relationship with another abusive man).

of the children affected by the new law. Most children in foster care were removed from their homes because of parental neglect related to poverty. Their well being will be determined more by ASFA's other major policy initiative – the act's emphasis on termination of parental rights to free children for adoption. The act attempts to place children on a "fast track" to adoption by imposing swifter timetables for severing children's ties with their parents and by allowing concurrent planning for adoption. These deadlines have little to do with child abuse; they concern the length of time a child has spent in foster care.³¹ This shift in the government's approach to the foster care problem has both pragmatic and philosophical flaws.³²

A. Pragmatic Problems

The policy of promoting adoption at the expense of terminating parental rights assumes that adoption will significantly reduce the large numbers of children in out-of-home placements. The key supporters of ASFA operated according to the premise that the foster care problem stems from barriers to adoption. They singled out for criticism family preservation policies that make it difficult to terminate parental rights. They implied that if states removed this barriers — if courts terminated parental rights sooner — the foster care problem would dissipate and even disappear.

³¹ See Hand, *supra* note ___, at 1252 (“[T]he length-of-time-out-of-custody ground allows for the termination of parental rights without a showing of abuse, abandonment, or other separate statutory grounds.”); 2 Ann M. Haralambie, *Handling Child Custody, Abuse and Adoption Cases* S 13.17 (1983) (“This ground addresses the problem of the parent whose rights cannot be terminated under other grounds but whose child would otherwise be relegated to the uncertain life a long-term foster care.”).

³² For an argument that ASFA fails to further children's interests because it does not go far enough to promote adoption, see Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 Minn. L. Rev. 637 (1999).

This is a false hope. There are not enough people wishing to adopt to absorb the high volume of children already pouring into foster care. Data on the foster care system over the last twenty years show that the number of terminations of parental rights far outpaces the number of adoptions. Martin Guggenheim's study of statistics gathered from Michigan and New York over the period from 1987 to 1993 showed a dramatic increase in the number of children who become "state wards" — children whose parents' rights have been terminated and are waiting in foster care to be adopted.³³ Although the number of state wards adopted also increased, it lagged behind the number of children newly becoming state wards as a result of termination of their parents' rights. Both states, in short, experienced "a dramatic increase in the number of children who are freed for adoption but not adopted." Indeed, in New York the number of unadopted state wards jumped 225 percent in four years, from 648 in 1987 to 2,383 in 1991.³⁴ Guggenheim concludes:

Five years of aggressively terminating parents rights has produced a clear pattern: The number of children freed for adoption goes up every year; the number of children fails to keep pace with the number of adoption-eligible children; and the total number of orphaned children not adopted continues to increase fastest of all.³⁵

Thus, even before ASFA was passed, states were already excessively terminating parental rights. The accelerated deadlines for termination of parental rights will only increase the state ward

³³ 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 *Fa. L. Q.* 121 (1995).

³⁴ *Id.* at ____.

³⁵ *Id.* at 131.

population; the act's adoption incentives, on the other hand, even if they achieve congressional goals, will not produce enough new homes for all of these children. The short fall is exacerbated by the fact that the children most likely affected by ASFA's expedited termination process are the very ones least likely to be adopted. Black parents' rights are already terminated sooner than those of white parents, yet Black children are less likely to be adopted than white children.³⁶

It is difficult to see how these children's interests are furthered by the extinction of their legal connection to their parents. "State governments appear to be destroying family ties of a large, and continually increasing number of children," Guggenheim charges, "with no concomitant benefit to children."³⁷ Termination always disrupts the relationship between children and their

³⁶ Joyce E. Everett, "Introduction: Children in Crisis," in Joyce E. Everett, Sandra S. Chipungu & Bogart R. Leashore, eds., *Child Welfare: An Africentric Perspective* (New Brunswick, NJ: Rutgers University Press, 1991): 1, 3; Sylvia S. Gray and Lynn M. Nybell, "Issues in African-American Family Preservation," *Child Welfare* 69 (1990): 513, 513-14; Sandra M. Stehno, "Differential Treatment of Minority Children in Service Systems," *Social Work* 27 (1982) : 39, 39-41.

³⁷ Guggenheim, *supra* note __, at 134. Accord Garrison, *Why Terminate Parental Rights?*, *supra* note __, at 473 ("[T]he permanency program's solution to the problem of foster care drift will probably hurt the interests of foster children more than it will help them."). Jennifer Ayres Hand argues that courts should not terminate parental rights because of length of time out of custody when the following factors indicate that permanency will not be achieved: "when a child has substantial bonds with the parent, when the child is not likely to be adopted, or when the state child welfare agency has not made reasonable efforts at helping the parent to remedy the circumstances that led to the child's placement." Hand, *supra* note __, at 1270. See also Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 *Stan. L. Rev.* 623, 691, 696-99, 706 (1976) (recommending termination of parental rights after 1 year for all children who cannot be returned home, except when there is a close parent-child relationship, the child is placed with a relative who does not wish to adopt, or "permanent placement is not feasible or desired by the child"); Patrick R. Tamilia, *A Response to Elimination of the Reasonable Efforts Required Prior to Termination of Parental Rights Status*, 54 *U. Pitt. L. Rev.* 211, 217 (1992) ("[[T]ermination of parental rights is not a wise option unless there is a prospective adoptive parent available for the child.").

parents while it may not result in a permanent placement. This hardly enhances family stability for many foster children.

The act's focus on severing biological ties to make room for adoptive ones overlooks the diversity of parent-child relationships as well as alternatives to adoption. Before seeking termination of parental rights, agencies should consider the strength of the attachment between parent and child and the likelihood of adoption, both of which are probably related to the child's age.³⁸ It usually makes more sense on both counts to terminate parental rights in the case of abandoned infants than in the case of adolescents or teens, especially those who have maintained contact with their parents.³⁹

There are also alternatives to adoption that could ensure stability while preserving the parent-child relationship.⁴⁰ For example, children can often be safely placed in the long-term care of relatives or neighbors with visitation by their parents, leaving open the possibility that the

³⁸ Hand, *supra* note ___, at ___; Gordon, *supra* note ___, at 667-72 (criticizing ASFA's "lack of age sensitivity").

³⁹ Douglas J. Besharov, *Commentary*, 8 *The Future of Children* 120, 123 (1998).

⁴⁰ Garrison, *Parents' Rights vs. Children's Interests*, *supra* note ___, at 378 (suggesting foster guardianship or "open" adoption as alternatives to traditional adoptive placement); Nadine Taub, *Assessing the Impact of Goldstein, Freud, and Solnit's Proposals: An Introductory Overview*, 12 *N.Y.U. Rev. L. & Soc. Change*, 485, 491-92 (same); Mark Hardin, *Legal Placement Options to Achieve Permanence for Children in Foster Care*, in *Foster Children in the Courts* 128 (Mark Hardin ed., 1983) (discussing various options for long-term placement). Professor Garrison correctly asserts that any "[j]ustification for a policy favoring adoption over those alternatives must be based on the evidence demonstrating that severance of parental ties better serves children's interests than does preservation." Garrison, *Parents' Rights vs. Children's Interests*, *supra* note ___, at 379.

parents regain custody if circumstances improve.⁴¹ In a 1994 survey of children in Illinois state custody who had been living with a relative for more than one year, 85 per cent of relatives reported that the best plan for the children was to remain with them until the children were grown.⁴² Many of these relatives, however, shun adoption because it disrupts customary kinship norms and creates an adversarial relationship with the parents.⁴³ For children living in such arrangements, expedited termination rules that disconnect them from their parents to make them available for formal adoptive placements make them worse off. Yet some courts mechanically abide by statutory deadlines even when there is evidence that termination would not be in the

⁴¹ See Charlene Ingram, *Kinship Care: From Last Resort to First Choice*, 75 *Child Welfare* 550 (1996); Megan M. O'Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key to the Pendulum of Terminations vs. Reunification*, 51 *Van. L. Rev.* 1427 (1998) (advocating a federal kinship care policy).

⁴² Prepared testimony of Jess McDonald. See also Prepared Testimony of Gary J. Stangler, Director Missouri Department of Social Services on Behalf of the American Public Welfare Association before Senate Committee on Finance, Subcommittee on Social Security and Family Policy (May 21, 1997) ("For many children, foster placement with relatives is the best permanent placement for a child."). Illinois, Maryland, and Delaware were approved for child welfare demonstration waivers that allow these states to address issues of kinship care through a program of subsidized guardianship. *Id.*; Prepared Testimony of Jess McDonald. Subsidized guardianship adds legal permanence to the relationship between children and kin caretakers without the disruption caused by adoption. See generally Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 *N.Y.U Rev. L. & Soc. Change* 441 (1996) (advocating subsidized guardianship as an option for permanency for children in foster care). Without the federal waiver, the Adoption Assistance and Child Welfare Act of 1980 requires states to prefer adoption over guardianship. See 42 U.S.C. §§ 670-671 (1994).

⁴³ Richard P. Barth et al., *From Child Abuse to Permanency Planning: Child Welfare Services Pathways and Placements* 213 (1994); Jesse L. Thornton, *Permanency Planning for Children in Kinship Foster Homes*, 70 *Child Welfare* 593, 597-98 (1991) (finding that 85 % of sample of kinship foster parents did not want to adopt).

child's best interests.⁴⁴

Although ASFA encourages state authorities to move more children into adoptive homes and holds them accountable for injuries caused by abusive parents, it exacts no corresponding scrutiny of excessive removal of children from their parents or terminations of parental rights. Nor does it mandate that states implement meaningful family preservation programs. ASFA clarified the definition of reasonable efforts by making child safety a priority, but not by establishing specific guidelines governing the services agencies should provide to families. Far from leading invariably to risky reunifications, the act's vague reasonable efforts language permits judges frequently to terminate parental rights without any real inquiry into the agency's activities.⁴⁵ This focus on child safety reflects the judgment that the risk of wrongful reunification of families outweighs the risk of wrongful disruptions of families. This judgment, too, is misguided. The priority placed on child safety was cast as a correction of the Child Welfare Act's reasonable efforts requirement, which encouraged the return of foster children to violent homes. The reasonable efforts requirement, however, was itself enacted in response to evidence that agency caseworkers offered families

⁴⁴ See, e.g., *In re J.M.*, 574 N.W.2d 717 (Minn. 1998).

⁴⁵ Hand, *supra* note ___, at 1281 (noting that the lack of legislative definition allows judges to "rubber stamp" agencies' reasonable efforts); Shotton, *supra* note ___, at 227 ("[M]any judges simply ignore the reasonable efforts requirement or else make positive findings based on inaccurate or incomplete information."). The Child Welfare Act does not require that states make reasonable efforts a prerequisite to termination of parental rights. Hand, *supra* note ___, at 1278. Ten states have statutes permitting termination of parental rights based on length of time out of custody without any reasonable efforts requirement. *Id.* at 1278 n.146. But see Debra Ratterman, *Judicial Determination of Reasonable Efforts*, 15 *Children Today* 26, 30-32 (1986) (reporting that many agencies studied "recognize the importance of documenting preventive services in obtaining a favorable judicial determination"). See generally Debra Ratterman, G.D. Dodson & Mark. Hardin, *Reasonable Efforts to Prevent Foster Care Placement: A Guide to Implementation* (1987).

minimal assistance and even obstructed parents' attempts to reunite with their children.⁴⁶

Even after the Child Welfare Act was passed, state agencies continued to make anemic efforts to prevent out-of-home placements and to reunify families.⁴⁷ Family preservation programs often fail because they do not address the needs of families, are inadequately funded, and do not last long enough.⁴⁸ Caseworkers caught in the dual role of supporting families while recruiting foster and adoptive parents sometimes sabotage parents' quest to reunite with their children.⁴⁹ A 1997 report issued by the General Accounting Office stated that more than half of the family support programs it surveyed "were not able to serve all families who needed services primarily due to the lack of funds and staff."⁵⁰

⁴⁶ Hand, *supra* note ____, at 1279.

⁴⁷ See Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 Cal. W. L. Rev. 223, 241-50 (1989-1990) (describing agencies' failures to provide assistance to parents with children in foster care); Richard Barth & Marianne Berry, *Implications of Research on the Welfare of Children Under Permanency Planning*, in 1 *Child Welfare Res. Rev.* 323, 325 (Richard P. Barth et al. eds., 1994) ("[F]amily preservation services are still not available for the vast majority of families in need.).

⁴⁸ Mark E. Courtney, *Factors Associated with the Reunification of Foster Children with Their Families*, 68 Soc. Serv. Rev. 81 (1994) (stating that survey of children entering foster care between 1988 and 1991 found 70% received only emergency response services, 20% received no services, and only 10% received extensive services); Edith Fein & Anthony N. Maluccio, *Permanency Planning: Another Remedy to Jeopardy*, 66 Soc. Serv. Rev. 335, 339 (1992) (describing family preservation programs as "short-term, crisis-oriented, and stopgap.").

⁴⁹ See Hand, *supra* note ____, at 1280 ("Caseworkers have been known to fail to assist parents in obtaining housing, to unreasonably oppose visitation of the child by the parents, to place children in homes that are not easily accessible to the parent, to fail to tailor the reasonable efforts to the specific problems facing the family, and, in some instances, to not do much of anything at all.").

⁵⁰ General Accounting Office, *Child Welfare: States' Progress in Implementing Family Preservation and Support Services* 3 (1997).

Services for families in California, for example, are permitted to continue for a maximum of 6 months and, on average, end after only half this time.⁵¹ How can agencies expect to solve problems arising from any combination of deplorable conditions -- chronic poverty, dangerous neighborhoods, shoddy housing, poor health, drug addiction, profound depression, lack of childcare -- with a 3-month parenting course or ephemeral crisis intervention? It is not surprising that 20 to 32 percent of children returned home in connection with family preservation plans end up back in foster care.⁵² "Reunifying these children with families who are not adequately prepared or supported," writes social work professor Marianne Berry, "is equal to setting the family up for yet another crisis, possibly resulting in further abuse, neglect, or even death."⁵³ The ideology of family preservation is then blamed when inadequate efforts result in tragedy.

ASFA's focus on child safety is also defended as a correction of judicial bias in child welfare proceedings against children's interests and in favor of parental rights. It seems more likely, however, that risk averse judges would be more afraid of making the wrong decision to return a child to an abusive home than a wrong decision to keep a child in state custody.⁵⁴ The

⁵¹ Marianne Berry, *Keeping Families Together* 4 (1994).

⁵² *Id.* Despite the federal reasonable efforts mandate, the foster care population grew by 45 % between 1985 and 1990, from 276,000 to 400,000 children. House Comm. on Ways & Means, 102nd Cong., 2d Sess., *Overview of Entitlement Programs*, 1992 Green Book 903 (Comm. Print 1992). The average length of stay in foster care, moreover, remained about 2 years over this period. Select Comm. On Children, Youth & Families, 101st Cong., 1st Sess., *No Place To Call Home: Discarded Children in America* 6 (Comm. Print 1989).

⁵³ Berry, *supra* note ___, at 4.

⁵⁴ Davis & Barua, *supra* note ___, at 152. See also Hand, *supra* note ___, at 1286-87 ("Many commentators ... have observed that the lack of definition of reasonable efforts ... opens the door to judicial and agency bias against the biological parent."); R.J. Hunner, *Active*

former error may generate scathing headlines and public outcry, while the latter will probably go unnoticed. State officials rarely receive negative feedback as a result of mistaken decisions to intervene in poor families. ASFA exaggerates these biases against parents already present in child welfare law and puts extra pressure on judges to terminate parental rights quickly.

B. ASFA's Philosophical Flaw

The pragmatic problems with ASFA's emphasis on adoption are related to a more fundamental philosophical flaw. Congress has misidentified the foster care problem. The injustice of the American foster care system does not stem from the low number of children being adopted. It stems, rather, from the high number of children removed from their homes. This is an injustice that is magnified by the class and race dimensions of foster care. Virtually all of the parents who permanently lose custody of their children are poor. A startling percentage are Black.

Each year more than 200,000 children are removed from their homes and placed in foster care.⁵⁵ Black children are the most likely of any group to suffer this experience. In 1994, Black children made up 47 per cent of the foster care population although they were only 15 per cent of the general population under age eighteen.⁵⁶ They are three times more likely than white children

and Reasonable Efforts To Preserve Families: A Guide for Delivering Services in Compliance with the Indian Child Welfare Act of 1978 and the Adoption Assistance and Child Welfare Act of 1980 (Seattle, Wa.: Northwest Resource Associates 1986) (observing that fear of liability motivates social workers to avoid the risk of harm by removing children from the home).

⁵⁵ [Check figure and cite source]

⁵⁶ Adoption and Support of Abused Children: Testimony Before the Senate Comm. On Finance, 105th Cong., available in 1997 WL 14151914 (statement of Valora Washington, program director for the Families for Kids Initiative of the W.K. Kellogg Foundation). [Find

to be in foster care.⁵⁷ In the nation's urban centers, the racial disparity is even greater. Chicago's foster care population, for example, is almost 90 percent Black.⁵⁸ Of 42,000 children in foster care in New York City, only 750 are white.⁵⁹ Once Black children enter foster care, they remain there longer, are moved more often, and receive less desirable placements than white children.⁶⁰ Even if all of the thousands of Black children in foster care were adopted tomorrow, there would still be cause for concern. Acquiring permanent out-of-home placements for all these children would do nothing to stem the tide of family disruption.

The focus on adoption as the solution to the foster care problem directs attention away from the wide scale removal of poor Black children from their homes. When Congress states its aim was "to make sure that every child has the opportunity to live in a safe, stable, loving and permanent home"⁶¹ it had in mind terminating parents' rights, not reducing poverty or building stronger supports for families. I believe this philosophical flaw injures children, their families, and their communities. It violates children's rights as much as the government's failure to protect children from domestic violence.

additional sources]

⁵⁷ Children's Defense Fund, *Black and White Children in America: Key Facts* (Washington, D.C., 1985). [Update]

⁵⁸ Patrick Murphy, *Wasted* __ (1997).

⁵⁹ Remarks of Martin Guggenheim, Children's Rights Conference, University of Pennsylvania School of Law, Feb. 6, 1999. [Find additional support]

⁶⁰ Edmund Mech, *Public Social Services to Minority Children and Their Families*, in *Children in Need of Roots* (R.O. Washington & Joan Baros-Van Hull, eds. 1985).

⁶¹ 144 Cong. Rec. S12452-01, S12452.

By promoting adoption so myopically, we forget that our ultimate goal should be to *reduce* the need for adoptions. In an ideal society we would expect nearly all children to be raised by their biological families in a healthy, safe, and flourishing environment.⁶² Adoptions would be a well-accepted but rare alternative for children whose parents are unable or choose not to take care of them.⁶³ Although adoption is as valuable as biology as a way to form a parent-child relationship, it typically occurs because of an unfortunate circumstance -- the death of the biological parents, an unplanned pregnancy, or child abuse or neglect. We can support adoption while working to curtail these sources of the need for adoption. By reducing poverty and the hazards it poses for children, an ideal society would reduce the need for adoption. But this is a good thing.

Expansive social welfare programs, however, do not necessarily result in a relatively smaller foster care population. LeRoy Pelton observes that Western European countries with coercive, judgmental child protection systems like ours place children in foster care at similar rates

⁶² Professor Larry May, a philosopher at Washington University, suggested that my statement that there would be fewer adoptions in an ideal society suggests that I harbor a bias against adoptive parents. See Response of Larry May to Dorothy Roberts, Orthwein Lecture on Race, Poverty and New Directions in Child Welfare Policy, Washington University School of Law, March 10, 1999. I believe that adoptive families should have the same legal and social status as biological families. See Dorothy E. Roberts, *The Genetic Tie*, 62 U. Chi. L. Rev. 209 (1995) (arguing that we place too much importance on genetic relatedness). Adoptive parents are just as good as biological ones. My criticism is directed at the system that produces children in need of adoption, not at adoption itself or at people who adopt. I am grateful to Professor May for his comments.

⁶³ Alternatively, we could imagine a society in which biology and adoption are treated as real, equally valued options for selecting the legal parents of every single child. In this hypothetical society, genetic relatedness would never be privileged over adoption. The state might select the parents for all children or all biological parents might be socialized to freely give their children to others to raise. This notion of parenthood, however, differs dramatically from the one held by most people in our society and, indeed, in most human societies.

as the United States, despite their substantially lower child poverty rates.⁶⁴ “When it is placed under the cover of benevolent intervention,” Pelton explains, “a coercive system can take on a life of its own and expand independently of need.”⁶⁵ According to Pelton, the main reason for the expansion of America's foster care population is the dysfunctional, dual-system structure of the child welfare apparatus. Child protection agencies are assigned the conflicting tasks of providing services to help families and investigating families for the purpose of removing children from their homes. This structure, along with the lopsided federal funding of foster care, encourage the rescue system to dominate even during periods of asserted government adoption of family preservation ideology. Thus, Pelton concludes that

the overall growth of the foster care population has less to do with the growth or decline of poverty rates or services designed to ameliorate the effects of poverty than it does with the growth of the rescue system itself, and the number of families we decide to scrutinize for the abundant pitfalls of poverty that we may then elect to blame on individual parents.⁶⁶

Certainly providing adequate family preservation services and (better yet) decreasing child poverty would help to curtail the expansion of foster care. But Pelton makes a compelling case that even

⁶⁴ See LeRoy H. Pelton, Commentary, 8 *The Future of Children* 126, 128 (1998); LeRoy H. Pelton, *Child Welfare Policy and Practice: The Myth of Family Preservation*, 67 *Am. J. Orthopsychiatry* 545, ___ (1997). In 1992, less than 2 percent of Swedish children lived in poverty, while more than 20 percent of American children were poor. Duncan Lindsey, *The Welfare of Children* 222, figure 8.16 (1994). See also Ruth Sidel, *Keeping Women and Children Last: America's War on the Poor* 180-82 (1996) (attributing low poverty rates in the Netherlands, France, and Sweden to generous national welfare programs).

⁶⁵ Pelton, Commentary, at 128.

⁶⁶ Pelton, *Child Welfare Policy and Practice*, at 552.

more critical is the elimination of the child welfare system's rescue mentality. This brings us back to ASFA's philosophical flaw: the law embraces more tightly the philosophy of child rescue by emphasizing adoption as the solution to foster care.

C. Disparaging Biological Bonds

Perhaps the most disturbing aspect of ASFA's focus on adoption is the message it sends about the poor and minority families whose children have been placed in foster care. Throughout the congressional testimony, reunification of children with their biological families was portrayed as risky and adoption portrayed as safe. Virtually every mention of biological families was negative, while every mention of loving and stable homes referred to adoptive families. Foster parents were described as "loving care-givers" who are unfairly prevented by biological parents' rights from developing stable relationships with the children they take in.⁶⁷ Permanence and safety, the testimony assumed, came in the form of adoption, not reunification of children with their parents. Barbara Kennelly of Connecticut introduced the bill in the House of Representatives, for example, as a step toward "providing protection and permanency for our Nation's abused, neglected, and sometimes forgotten children."⁶⁸

It was rarely stated during the congressional discussion that it is usually in children's interest to stay with their parents or at least to maintain contact with them.⁶⁹ To the contrary, the

⁶⁷ Pomeroy, 143 Cong. Rec. H10776-05, H10789.

⁶⁸ 143 Cong. Rec. H10776-05, H10788.

⁶⁹ An exception is Rep. DeWine's Senate testimony, 142 Cong. Rec. S5710-01, S5712.

congressional record as well as the public debate was saturated with stories about parents who were permitted to brutally torture and murder their children because of caseworkers' insistence on family reunification. Family preservation policies were blamed both for returning children willy nilly to violent homes and for inflating the foster care population. Representative Dave Camp of Michigan accused the 1980 child welfare act of "creat[ing] a system where nearly half a million children currently reside in foster care."⁷⁰ After describing the "sufferings of the abused, abandoned, and neglected; infants who have been burned at an open fire; children raped and assaulted," an article in the *Washington Post* claimed that "[t]he Family Reunification and Preservation Act is the cause of these grotesque practices."⁷¹ The message was clear: Preserving families endangers children; placing children in adoptive homes protects them.

The congressional record presents a fascinating reversal of the typical comparison of adoptive and biological bonds. The dominant American culture has always revered the genetic connection between parents and children, and treated adoption as a second-best and unnatural alternative.⁷² The fortunes spent on fertility treatment and high tech means of conception, such as in vitro fertilization, are a powerful illustration of the value Americans place on genetic relatedness. Yet in supporting ASFA, speaker after speaker referred to adoptive families as real families and biological families as fake ones. Representative Pryce of Ohio urged her colleagues to support the

⁷⁰ 143 Cong. Rec. H10776-05, H10788.

⁷¹ Mary McGrory, *Adopt a Sense of Outrage*, *Washington Post*, May 12, 1996, at ____.

⁷² Bartholet, *supra* note ____, at ____; Roberts, *The Genetic Tie*, *supra* note ____, at ____.

legislation “in the interest of thousands of children who need a *true* family to love and protect them.”⁷³ The law “is going to bring about the joy of adoption and the bonding of a *real* family to so many kids.”⁷⁴ Others repeatedly pointed out, on the other hand, that biology alone does not make someone a real parent. Erasing the stigma of adoption is an important step in expanding our notions of family. It seems, however, that this reverence of adoption over biology is reserved for the poor and minority families that are the clients of the child welfare system.⁷⁵

The preference for permanence at the expense of parental rights in the context of foster care also stands in stark contrast to the treatment of this issue in the context of divorce.⁷⁶ Advocates on behalf of children generally emphasize the importance of protecting children's relationships with their parents — even parents who have lost custody of their children. When parents divorce, judges typically issue orders that require visitation by the non-custodial parent and that often impose a great deal of inconvenience, instability, and trauma on parents and children alike. When custodial parents remarry, a stepmother or stepfather is rarely treated as a substitute for a biological parent whose relationship with the child can now be discarded. Family law recognizes a strong emotional attachment between children of divorce and their non-custodial

⁷³ 143 Cong. Rec. H10776-05, H10789.

⁷⁴ 143 Cong. Rec. H10776-05, H10790.

⁷⁵ Several child welfare advocates warned me when I wrote *The Genetic Tie*, which criticizes the importance we place on genetic relatedness, not to advocate eliminating legal recognition of the biological bond between parents and children because this move would disadvantage poor and minority parents whose relationship with their children is already devalued. See Roberts, *The Genetic Tie*, supra note ____.

⁷⁶ Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y. U. Rev. L. & Soc. Change 371 (1996).

parents and views interference with this relationship as a terrible injury to the child. Marsha Garrison summarizes the contrast between the approaches non-custodial relationships in divorce and foster care:

In divorce, the child's relationship with a noncustodial parent is almost invariably described as a positive factor in her development that should be encouraged and facilitated; termination of the parental relationship is approved only in extreme cases where the parent threatens the child's health and safety. In foster care, however, the noncustodial parent is typically seen as a threat to the child's relationship with her foster parent or her opportunity to obtain adoptive parents; termination of parental rights is urged whenever the child's return home cannot be accomplished quickly.⁷⁷

This deference to non-custodial relationships after divorce raises additional questions about ASFA's support for termination of parental rights. Why do many children's rights advocates appreciate the importance of preserving the parent-child bond in the case of divorce but not foster care? For some, the reason may be economic.⁷⁸ Preserving children's ties to non-custodial middle-class fathers helps to guarantee that these children will not need public assistance. In contrast, terminating the rights of poor parents so their children may be adopted by wealthier ones yields a financial gain for the state. For others, the critical distinction may be the parental maltreatment that led to removal of children in foster care, although divorced parents may also lose

⁷⁷ Id. at 373.

⁷⁸ Id. at 386 ("If the child is adopted by parents who can afford to pay his keep, he costs the state nothing, and even subsidized adoption is cheaper than foster care.").

custody because of they are unfit.⁷⁹ Parental unfitness, moreover, does not necessarily lessen children's attachment to their parents.⁸⁰

Perhaps the major reason is this society's centuries-old depreciation of the relationship between poor parents and their children, especially those who are Black. Most Americans can grasp a white middle-class child's emotional attachment to her biological father even though she is being raised by a stepfather. No one doubts the immediate re-connection of a wealthy child with his family when he returns from a year at boarding school. The public has a harder time imagining a strong emotional bond between Black parents and their children. Jacquelynn Moffett, Executive Director of Homes for Black Children, discovered that the white participants in a workshop on Black adoption she conducted in Charleston, West Virginia "really did not have a concept of Black families."⁸¹ "They really did not believe that Black families exist," Moffett explained, "so they had

⁷⁹ See Judith S. Wallerstein & Joan Berlin Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce* 253 (1980) (finding that 15% of middle-class divorced fathers studied suffered from severe psychiatric illness, 40 % of father-child relationships were "profoundly troubled," and 20% of surveyed children moderately or intensely feared their fathers).

⁸⁰ Garrison, *Parents' Rights vs. Children's Interests*, supra note ____, at 379, citing John Bowlby, *Maternal Care and Mental Health* 120 (1952) ("Even when they are with kindly foster-parents these children feel their roots to be in the homes where, perhaps, they have been neglected and ill-treated, and [they] keenly resent criticisms directed against their parents."). Other research demonstrating that most children in foster care continue to value ties to their parents despite physical separation includes Michael C. Rutter, *Maternal Deprivation Reassessed* __ (2d ed. 1981); Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 *N.Y.U. Rev. L. Soc. Change* 557, 563-72 (1983-1984); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 *Geo. L.J.* 1745, 1777-86 (1987); Penny Ruff Johnson, Carol Yoken, & Ron Voss, *Family Foster Care Placement: The Child's Perspective*, 74 *Child Welfare* 959, 963, 967 (1995) (finding that 56% of 95 children aged 11-14 in foster care between 6 months and 2 years stated they missed their parents most of the time).

⁸¹ Jacquelynn A. Moffett, *Practice with Black Families in Empowering the Black Family: A Roundtable Discussion with Ann Hartman, James Leigh, Jacquelynn Moffett, Elaine*

no concept of Blacks being caring toward children.”⁸² Poor Black mothers are typically considered deviant and uncaring; they are blamed for transferring a degenerate lifestyle of welfare dependency and crime to their children.⁸³ Black fathers are simply thought to be absent.⁸⁴ When parents of children in foster care are portrayed as deranged and violent monsters, it is all the more difficult for the public to believe that their children would want to maintain a relationship with them.

We should not glorify genetic relatedness as the only legitimate basis for family, nor should we discount the damage that abuse and neglect does to children's relationships with their parents. But we should not ignore, in the name of children's rights, the interest most children in foster care have in maintaining some connection to their parents and in returning home.

III. Race, Class, and Child Welfare Politics

Given the practical and philosophical flaws in the promotion of AFSA as a children's rights vehicle, what were the political forces driving the shift in federal policy? I do not deny the genuine concern of children's rights advocates who fought to prevent the endangering of children by caseworkers who misinterpreted the reasonable efforts standard. But the embrace of adoption as a solution to the foster care problem stemmed from broader political concerns that reflected race and

Pinderhughes, Barbara Solomon, and Carol Stack 57, 58 (Sylvia Sims Gray, Ann Hartman, & Ellen S. Saalberg eds. 1985).

⁸² Id.

⁸³ Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* 8-21 (1997).

⁸⁴ Dorothy Roberts, *The Absent Black Father*, in *Lost Fathers: The Politics of Fatherlessness in America* (Cynthia Daniels ed., 1998).

class struggles in this country. The passage of AFSA corresponded with the growing disparagement of mothers receiving public assistance and welfare reform's retraction of the federal safety net for poor children. The rejection of public aid to poor families in favor of private solutions to poverty, such as marriage and child support enforcement, was mirrored in the appeal to adoption to fix the overload of children in foster care. The intersection of these federal welfare and adoption reform laws marks the first time in this nation's history that "states have a federal mandate to protect children from abuse and neglect, but no corresponding mandate to provide basic economic support to poor families."⁸⁵ The act was also tied to the growing interest in removing barriers to white-middle class couples' ability to adopt, especially race-matching adoption policies.

A. Welfare Reform

AFSA was passed on the heels of the overhaul of federal welfare policy. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRA") ended the federal guarantee of cash assistance to America's children and allowed the states to implement extensive welfare reform programs. These welfare reform measures make it more difficult for some poor mothers to take care of their children in several ways: they reduce the amount of cash assistance to families; they cut off payments altogether to some families; and they require mothers to work and to participate in job training, counseling, and other programs, often without adequate child care.⁸⁶

⁸⁵ Martha Matthews, Assessing the Impact of Welfare Reform on Child Welfare, ___ Clearinghouse Review ___, ___ (1999).

⁸⁶ See id. at ___; Mark E. Courtney, The Costs of Child Protection in the Context of Welfare Reform, 8 *The Future of Children* 88, 95-97 (1998); Kristen Shook, Assessing the Consequences of Welfare Reform for Child Welfare, 2 *Poverty Research News* ___ (Winter

What will happen to the children of mothers who fail to meet new work rules because of child care or transportation problems, who are unable to find work within the two-year time limit, or who leave their children at home without adequate care while they participate in required work programs? It is likely that some of them will be removed from their mother's custody and placed in foster care. A recent *New York Times* article on Wisconsin's welfare plan reports that 5 percent of mothers cut off public assistance have been forced to "abandon their children."⁸⁷ There may not be enough families lifted out of poverty by welfare-to-work programs to offset the numbers who will be forced into the child welfare system by time limits, sanctions, and working conditions.⁸⁸ In short, welfare reform is likely to cause a net increase in the number children moved into foster care.

The elimination of guaranteed federal assistance to poor families is related in a number of ways either directly or indirectly to the recommendation of adoption for poor children. Some advocates of work requirements anticipated welfare mothers' loss of custody by promoting the use of institutional arrangements for poor children. Republican Speaker of the House Newt Gingrich, for example, argued that government funds going to children born to welfare mothers should be

1998). I discuss welfare reform's impact on poor mothers more fully in Dorothy Roberts, "Welfare's Ban on Poor Motherhood," in Gwendolyn Mink, ed., *Whose Welfare?* (Ithaca, NY: Cornell University Press, forthcoming 1999).

⁸⁷ Jason DeParle, A Welfare Plan Justifies Hopes and Some Fear, *New York Times*, Jan. 15, 1999.

⁸⁸ Matthews, *supra* note ____, at ____.

diverted to programs that would put their babies up for adoption or place them in orphanages.⁸⁹

These suggestions fostered the notion that poor children are better off under state supervision than under their parents' care.

Along with work requirements and benefit reductions that make children vulnerable to child welfare intervention, the new welfare law contains provisions that affect funding of child welfare programs and promote disruption of poor families. The PRA leaves federal funds for foster care and adoption assistance an uncapped entitlement while reducing and capping federal funds for cash assistance to families and for child protective services that support families.⁹⁰ Child welfare agencies will be faced with the choice of finding the funds to preserve families whose welfare benefits have expired or placing the children in foster care. The availability of federal matching funds for foster care may provide a financial incentive to remove these children from their homes.

In addition, federal law no longer mandates that states give cash assistance to relatives who care for poor children. Like parents, relatives are subject to work requirements and lose their benefits if they fail to find work within the time limits.⁹¹ Some recipients caring for a relative's child may return the child to foster care rather than undergo the added burdens of job-related

⁸⁹ GOP Welfare Plan Would Take Cash from Unwed Mothers to Aid Adoptions, *Chicago Tribune*, Nov, 14, 1994, p. A7.

⁹⁰ Rob Green and Shelley Waters, *The Impact of Welfare Reform on Child Welfare Financing* ____ (Urban Institute, 1998).

⁹¹ Matthews, *supra* note ____, at _____. Kinship caregivers may also qualify for federal or state foster care benefits and may receive a "child only" TANF grant that does not entail compliance with welfare-to-work requirements. *Id.* at _____.

requirements or community service.⁹² The law, moreover, may make agencies more reluctant to place children with relatives who are not economically self-sufficient.

Welfare reform also makes it more difficult for parents whose children had been removed from the home to regain custody. The federal welfare law cuts off aid to parents for children who are away from home for 45 days or more.⁹³ This hardly gives parents with children temporarily placed in foster care time to correct the conditions that led to the removal. The loss of benefits may cause parents to be evicted from their homes, run out of food, and lose other resources needed for reunification with their children. They may also be required to comply with a conflicting set of requirements from two state agencies -- for example, attending parenting classes, completing a drug treatment program, and finding safer housing under a child welfare case plan while attending job readiness classes and searching for a job under a welfare-to-work plan.⁹⁴ New expedited termination procedures under ASFA and state law intensify the time pressure these parents face.

B. Transracial Adoption

The shift in federal policy from family preservation toward adoption also corresponded with the change in the federal position on transracial adoption. For decades, the federal government permitted public adoption agencies to enforce race-matching policies that sought to

⁹² Green & Waters, *supra* note ____, at ____; Mark Hardin, *Sizing Up Welfare Reform's Impact on Child Protection*, 15 *Child L. Prac.* 104 (1996).

⁹³ States may elect to extend this limit up to 180 days and may exempt families that are working toward reunification. 42 U.S.C. S 602(1)(10).

⁹⁴ Matthews, *supra* note ____, at ____.

place Black children with Black adoptive families alone. In laws passed in 1994 and 1996, however, Congress prohibited agencies receiving federal funding from placing children according to race or even from taking race into account in placement decisions.⁹⁵ Federal support of transracial adoption has been championed as a critical step in increasing the numbers of adoptions of Black children, the population that has the lowest rate of permanent placements. Race-matching policies, it is argued, damage Black children by denying them placements with white adoptive parents and are a principal reason for the plight of Black children languishing in foster care.⁹⁶ But adoption policy has historically tracked the market for children, serving the interests of adults seeking to adopt more than the children who need stable homes. Child welfare officials abandoned the child rescue philosophy of the 19th century and refrained from terminating parental rights when the supply of newborn infants available for adoption exceeded the demand.⁹⁷ In more recent decades, the growing demand for adoptable older children generated policies reminiscent of the rescue approach that terminate parental rights quickly to free children for adoption.⁹⁸ The escalated retreat from family preservation programs and from race-matching rules can similarly be seen as an effort to increase the supply of children for white adoptive families.

⁹⁵ See The Multiethnic Placement Act of 1994, 42 U.S.C. S 5115a (prohibiting agencies receiving federal funding from placing children according to race); 42 U.S.C. 1996b (prohibiting agencies receiving federal funding from denying anyone the opportunity to become an adoptive or foster parent from delaying or denying the placement of a child on the basis of race).

⁹⁶ Bartholet, Family Bonds, *supra* note ____.

⁹⁷ Garrison, Parents' Rights vs. Children's Rights, 376, citing Alfred Kadushin & Judith Martin, *Child Welfare Services* 535-40 (4th ed. 1988).

⁹⁸ *Id.*

Both congressional and media discussions of ASFA linked family preservation policies to the difficulties white middle-class couples had in adopting Black children in foster care. A *U.S. News and World Report* story about ASFA, for example, opened with the story of a white North Carolina physician and his wife who resorted to adopting two Romanian orphans after several American agencies rejected their offer to adopt a Black child.⁹⁹ This article and others implied that the emphasis on reunifying Black children with their biological families unfairly prevented white couples from adopting children in this country. The rhetoric supporting ASFA praised reforms in federal child welfare policy for removing the twin barriers to adoption – race-matching restrictions and prolonged family preservation efforts. Terminating parents' rights faster and abolishing race-matching policies were presented as a combined strategy for increasing the numbers of adoptions of Black children by white families. By linking these two issues – family preservation and transracial adoption — commentators seemed to claim that the foster care problem could be solved by moving more Black children permanently from their parents into white adoptive homes.

The emphasis on freeing children for adoption heightens the tension between foster parents and biological parents, a contest that increasingly takes on a racial cast. The major motion picture *Losing Isaiah* portrayed the legal battle between a Black recovered crack addict who tries to regain custody of the son she abandoned in a garbage dump after he had been raised for several years by a loving white nurse. Cities across the country have been riveted by similar real life conflicts between Black biological mothers and white foster parents. The *Baby T* case captured

⁹⁹ Amanda Spake, Adoption Gridlock, *U.S. News & World Rep.*, June 22, 1998, at _____.

front page headlines in Chicago for more than a month.¹⁰⁰ The case pitted a Black mother who lost custody of her son when he was born cocaine-exposed against one of Chicago's most powerful couples, a white alderman and appellate court judge, who had been his foster parents for nearly three years. Having recovered from her drug addiction and followed the permanency plan, the mother sought to regain custody of her son. The *Chicago Tribune* closely covered the parental fitness hearing in juvenile court for three weeks, including detailed descriptions of testimony, moving color photographs of the parties, interviews with experts, and explanations of the state procedures for terminating parental rights.¹⁰¹ It was an unusual display of attention to the kind of custody hearing concerning a Black child that takes place in Chicago courts every day. The *Baby T* case became a cause celebre not only because of the notoriety of the foster parents, but also because of their race.

These contests bring to the surface a theme that runs more subtly through some of the discourse supporting transracial adoption — the belief that Black children fare better when they are raised by white adoptive families than if they are returned to their homes. Advocates of transracial adoption frequently assert the benefits of racial assimilation that Black children and white parents will experience by living together. In *Family Bonds*, for example, Elizabeth

¹⁰⁰ Bonnie Miller Rubin & Robert Becker, Will Clout Decide Battle for “Baby T”?: Powerful Burkes Contend with Mother for Custody, *Chi. Tri.*, June 7, 1998, News, at 1.

¹⁰¹ See, e.g., Robert Becker & Bonnie Miller, Burkes Lose Key Adoption Supporter; Public Guardian Backs Mother, Blasts DCFS in Custody Dispute, *Chi. Tribune*, Oct. 3, 1998, at 1; Robert Becker and Bonnie Miller Rubin, Mom Could Win Battle but Lose War, *Chicago Tribune*, Oct. 26, 1998, at 1; Bonnie Miller Rubin & Robert Becker (with Gary Washburn contributing), Baby T's Mom Ruled Fit in Fight for Toddler; Judge Rejects State's Case, All but Dooming Burkes' Adoption Bid, *Chi. Tribune*, Nov. 5, 1998, at 1.

Bartholet rejects the claim that Black children belong with Black parents not only because “there is no evidence that black parents do a better job than white parents of raising black children with a sense of pride in their racial background,” but also because Black children reap substantial advantages from a white environment.¹⁰² Unlike Black children “living in a state of relative isolation or exclusion from the white world,” Bartholet contends, “black children raised in white homes are comfortable with their blackness and also uniquely comfortable in dealing with whites.” As in the rhetoric promoting ASFA, the rhetoric promoting transracial adoption described adoptive homes as *superior* to children's existing family relationships.

IV. Adding Social Justice to Children's Rights

The notion of rights in general is subject to the criticism of being indeterminate.¹⁰³ But children's rights, without attention to their political context, are especially indeterminate. Children's rights talk is easily coopted by powerful people to achieve their social objectives and to maintain their social position. An example is the way the anti-abortion movement seized the valuable monopoly on the claim of caring about children's lives. As I discussed above, it is not at all clear that speedy termination of parental rights to free children for adoption furthers the interests of most children in foster care. Moreover, what is advocated as benefitting children in foster care contradicts the traditional understanding of children's need to maintain a relationship with their parents. Most important, the shift in federal child welfare policy directs attention away

¹⁰² Bartholet, Family Bonds, *supra* note ____, at ____.

¹⁰³ [Cite CLS sources]

from the chief injustice of the foster care system – the removal of hundreds of thousands of poor and disproportionately Black children from their homes.

Framing the critique of family preservation in terms of children's rights masks battles between other political interests. Children rarely speak for themselves, so the issue underlying a claim of children's rights is often determining which adult will speak for children. These contests are often political struggles that are influenced by hierarchies of race, class, and gender. A dominant contest in the debate about family preservation is between the interests of two sets of parents, not between children and their biological parents. ASFA gives foster parents and preadoptive parents an opportunity to appear in hearings that affect children's custody.¹⁰⁴ Senator Grassley defended this provision on the grounds that foster and preadoptive parents "are the ones in the best position to ... represent the children's concerns. It is an important change to make as we seek to better represent the children's best interests."¹⁰⁵ Thus, the act chooses foster and preadoptive parents over biological parents to represent children in foster care.¹⁰⁶ Allowing preadoptive parents to intervene in unfitness hearings intensifies the class and race conflicts often inherent in these adjudications. Deciding the best interests of the child in this setting might conjure

¹⁰⁴ § 104 (3).

¹⁰⁵ 143 Cong. Rec. S12668-03, S12672.

¹⁰⁶ The Clinton Administration opposed this provision of ASFA out of concern that it gives foster parents standing that is "incongruent with their role as temporary caregivers of children" and "could result in the creation of unnecessary adversarial relationships between foster parents and biological parents and/or between foster parents and the State child welfare agency." Prepared Testimony of Olivia A. Golden, Administration for Children and Families, U.S. Dep't Health & Human Servs., before House Comm. on Ways & Means, Subcomm. On Human Resources (April 8, 1997).

up the question, would this child be better off in the comfortable home of this well-to-do couple or struggling on public assistance with that neglectful mother?

The de-politicized conception of children's rights leads to uncertain results. It is natural to feel empathy with any suffering child and to seek to end that suffering as soon as possible. In attending to the suffering of one child, however, we may neglect or even harm many others.¹⁰⁷ Our celebration of the "rescue" of a child fortunate enough to find an adoptive home may come at the expense of hundreds of others who have no hope of ever leaving foster care. In focusing on the physical pain of children abused by their parents, we may forget the emotional pain of children who were needlessly removed from their parents and desperately want to return home.¹⁰⁸ As Professor Garrison poignantly observes, for most foster children "loving foster or adoptive parents will not, any more than stepparents, erase the ties that bind parent and child."¹⁰⁹ Once again, which tragic story gets broadcast by the media and appeals most to the public may depend less on the amount of children's suffering than on the political interests at stake.

Finally, a notion of children's rights devoid of political context is based on an inaccurate description of the sources of children's welfare. Each child is embedded in a social network

¹⁰⁷ See Robin West, *Law and Fancy*, 95 Mich. L. Rev. 1851, 1857-65 (1997) (reviewing Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (1995) (arguing that empathy toward the suffering of one individual may blind us to competing collective interests); Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 Roger Williams U.L. Rev. 175, 193 (1998) (arguing that "[e]mpathy does not guarantee that our emotions will lead us to act in an ethical or just way").

¹⁰⁸ See Garrison, *Parents' Rights vs. Children's Interests*, supra note ____, at 394 (arguing that adoption's powerful symbolism of rebirth obscures the emotional need of foster children to maintain connection with their biological parents).

¹⁰⁹ *Id.* at 395.

composed of her family, community, social groups, and the broader society. The rights of Black children must be interpreted in the context of racial oppression. Individualized explanations of harm do not account for the particular injury inflicted by racially disparate state intervention in families. Focusing on individual cases, many of which are difficult to judge, obscures the impact of state interventions taken as a whole as well as the impact on the Black community. High rates of removal of Black children from their homes harm Black people *as a group*, as well as individuals and their families.¹¹⁰

Black Americans' welfare is determined not only by the atomistic decisions of each individual but also by the condition of the entire community. The excessive disruption of Black families affects the stability of the group as a whole, weakening its ability to struggle against the many forms of institutional discrimination. The devaluation of Black families' autonomy and relationships sends a message of inferiority about every member of the group. As part of the group, Black children are severely harmed by these indignities.

My understanding of rights and inequalities of power leads me to be skeptical of any purely individualized notion of rights. Without careful attention to social justice, rights tend to reinforce social hierarchies and benefit the most privileged members of society. To be just, children's rights must be part of a broader struggle to eradicate oppressive structures that imprison children and to create a more egalitarian society that cherishes all children. Supporting families to prevent removal of children from their homes and the termination of parental rights fits within this struggle.

¹¹⁰ I elaborate this argument in Dorothy E. Roberts, *Why Race Matters to Child Welfare Interventions* (unpublished paper written for Center for Families in an Open Society, N.Y.U. Law School).