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# IS THERE JUSTICE IN CHILDREN'S RIGHTS?: THE CRITIQUE OF FEDERAL FAMILY PRESERVATION POLICY

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## I. INTRODUCTION: PITTING CHILDREN'S RIGHTS AGAINST FAMILY PRESERVATION

In November 1997 President Clinton signed the Adoption and Safe Families Act ("ASFA" or the "Act"),<sup>1</sup> aimed at doubling the number of children adopted annually by 2002.<sup>2</sup> ASFA 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 support for the adoption of these children into new families. The Act's predecessor, the Adoption Assistance and Child Welfare Act of 1980 ("1980 Act"),<sup>3</sup> encouraged states to replace the costly and disruptive out-of-home placements that had dominated child welfare practice with preventive and reunification pro-

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\* Professor, Northwestern University School of Law; Faculty Fellow, Institute for Policy Research. Earlier versions of this essay were presented at a conference on Children's Rights and the Constitution sponsored by the *University of Pennsylvania Journal of Constitutional Law*, at a University of Chicago Law School public interest law workshop, and as the Orthwein Scholar in Residence 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.

<sup>1</sup> 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.).

<sup>2</sup> See *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. See Memorandum on Adoption and Alternate Permanent Placement of Children in the Public Child Welfare System, 32 WEEKLY COMP. PRES. DOC. 2513 (Dec. 14, 1996). 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 U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: A RESPONSE TO THE PRESIDENTIAL EXECUTIVE MEMORANDUM ON ADOPTION ISSUED DEC. 14, 1996 (1997) (visited Sept. 20, 1999) <<http://www.acf.dhhs.gov/programs/cb/special/2002toc.htm>>. President Clinton's placement plan is intended to "provide states with funding to identify barriers to permanency . . . ." See Memorandum on Adoption and Alternate Permanent Placement of Children in the Public Child Welfare System, 32 WEEKLY COMP. PRES. DOC. at 2514.

<sup>3</sup> Pub. L. No. 96-272, 94 Stat. 500 (1980).

grams.<sup>4</sup> ASFA amends the 1980 Act to direct state authorities to make the health and safety of children in foster care their top priority.<sup>5</sup>

Support for ASFA was generated largely by focusing on the failure of federal family preservation policies. Critics recounted tragic stories of children who were killed after case-workers returned them to blatantly dangerous parents.<sup>6</sup> ASFA's reform, however, 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. ASFA's congressional sponsors declared that the legislation "is putting children on a fast track from foster care to safe and loving and permanent [adoptive] homes."<sup>7</sup> ASFA's preference for adoption is implemented through swifter timetables for terminating the rights of biological parents in order to "free" children for adoption.<sup>8</sup>

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<sup>4</sup> See MaryLee Allen & Jane Knitzer, *Child Welfare: Examining the Policy Framework*, in CHILD WELFARE: CURRENT DILEMMAS, FUTURE DIRECTIONS 93, 120-21 (Brenda G. McGowan & William Meezan eds., 1983). The Child Welfare Act provides that in each case, "reasonable efforts shall be made . . . (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home . . . ." 42 U.S.C. § 671(a)(15)(B) (Supp. III 1997).

<sup>5</sup> 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 JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973) (asserting the influential theory that continuity in children's relationships with a care giver is essential to normal psychological development); HENRY S. MAAS & RICHARD E. ENGLER, JR., CHILDREN IN NEED OF PARENTS (1959) (documenting foster care "drift"). While the 1980 law emphasized returning children to their biological parents, the ASFA amendments emphasize freeing children for adoption, and provide for termination of parental rights as an avenue for permanency. See 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.). 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), and 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).

<sup>6</sup> See *infra* notes 21, 22 and accompanying text.

<sup>7</sup> 143 CONG. REC. H10776-05, H10787 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly).

<sup>8</sup> 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. See 42 U.S.C. § 675(5)(E) (Supp. III 1997). ASFA also requires a permanency hearing to be held within 12 months of a child's entry into foster care. See 42 U.S.C. § 675(5)(C) (Supp. III 1997).

by the provision of technical assistance to states to facilitate such adoptions,<sup>9</sup> and through financial incentives to states to move more children into adoptive homes.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> In case of a conflict between reunification and permanency efforts, permanency prevails.<sup>13</sup>

The law's supporters argue that its permanency provisions promote adoptions for the 100,000 children in foster care who cannot return safely to their birth families.<sup>14</sup> While 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 practical impact may be broader, as it could permanently separate children from families that might have been preserved with adequate state

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<sup>9</sup> 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. See 42 U.S.C. § 673b(f) (Supp. III 1997).

<sup>10</sup> 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 over that base number of a special needs child. See 42 U.S.C. § 673b(d)(1) (Supp. III 1997).

<sup>11</sup> See 42 U.S.C. § 671(a) (Supp. III 1997).

<sup>12</sup> See Hand, *supra* note 5, 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"). 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 H. PELTON, *FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES* 118-25 (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. See *id.* at 156.

<sup>13</sup> See generally 42 U.S.C. § 671 (Supp. III 1997).

<sup>14</sup> See CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* 66 (1998). It is important to recognize the distinction between removing barriers to the adoption of children who are already available to be adopted and viewing the legal relationship between children in foster care and their parents as a barrier to adoption.

resources or alternative custody arrangements.<sup>15</sup> Family preservation efforts often fail because they are inadequate: children are returned to troubled homes without assessing parents' problems or providing the level or continuity of services required to solve them.<sup>16</sup> 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, despite the fact that states are unlikely to find adoptive homes for most of these children.<sup>17</sup>

ASFA's advocates framed their critique of federal family preservation policy as a defense of children's rights. Representative Pryce of Ohio argued that ASFA "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."<sup>18</sup> The *Washington Post* praised the law for putting "a new and welcome emphasis on the children,"<sup>19</sup> 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 to black Americans in 1965."<sup>20</sup>

Prominent family violence scholar Richard Gelles' *The Book of David: How Preserving Families Can Cost Children's Lives* galvanized support for ASFA on similar grounds.<sup>21</sup> The

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<sup>15</sup> 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." H.R. 867, *The "Adoption Promotion Act of 1997": Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 73 (1997) (statement of Child Welfare League of America); see also *id.* at 37 (statement of Jess McDonald, Director, Illinois Department of Children and Family Services on behalf of the American Public Welfare Association) [hereinafter McDonald Testimony] (expressing concerns that 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 5, at 1251.

<sup>16</sup> See Marcia Robinson Lowry, *Commentary*, THE FUTURE OF CHILDREN, Spring 1998, at 123, 125.

<sup>17</sup> See *infra* notes 36-38 and accompanying text.

<sup>18</sup> 143 CONG. REC. H10776-05, H10789 (daily ed. Nov. 13, 1997).

<sup>19</sup> *From Foster Care to Adoption*, WASH. POST, May 10, 1997, at A24.

<sup>20</sup> Jeff Katz, *Finally the Law Puts These Kids' Interests First*, MILWAUKEE J. SENTINEL, Dec. 28, 1997, at 1.

<sup>21</sup> RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1996).

*Book of David* reported the startling events that surrounded the suffocation of a little boy by his mother after he was returned to her abusive home. Gelles attributed 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.<sup>22</sup> He argued that "the basic flaw of the child protection system is that it has two inherently contradictory goals: protecting children and preserving families,"<sup>23</sup> and advocated reinventing the child welfare system "so that it places *children first*."<sup>24</sup> In short, ASFA supporters placed children's right to be safe at odds with parents' right to custody of their children.<sup>25</sup>

A number of scholars and activists, however, many of whom are children's advocates themselves, have refuted this opposition of children's to families' rights.<sup>26</sup> As Bruce Boyer,

<sup>22</sup> See *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* (N.Y.), 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. See 42 U.S.C. § 671(1)(15) (Supp. III 1997).

<sup>23</sup> GELLES, *supra* note 21, at 152.

<sup>24</sup> GELLES, *supra* note 21, at 143.

<sup>25</sup> In *Disposable Children*, Renny Golden entitled the chapter describing this debate "Family Preservation Versus Children's Rights." See RENNY GOLDEN, *DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM* 149 (1997).

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); 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); 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."). However, 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).

<sup>26</sup> See, e.g., GOLDEN, *supra* note 25, at 152-55; CORNEL WEST & SYLVIA ANN HEWLETT, *THE WAR AGAINST PARENTS: WHAT WE CAN DO FOR AMERICA'S BELEAGUERED MOMS AND DADS* (1998) (proposing a parents' bill of rights as a means of furthering children's interests); Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. (forthcoming 1999); Garrison, *supra* note 25, at 394 (arguing that terminating parents' rights neglects children's emotional needs). Marcia Robinson Lowry, the executive director of Children's Rights, Inc., a national advocacy organization that works to reform child welfare systems,

the supervising attorney for the Children and Family Justice Center of Northwestern University Law School put it, "[i]n family preservation, to my mind, there's a commonality of interests."<sup>27</sup> Typically, furthering a family's interests will also benefit the children who belong to that family. Children have an interest in maintaining a bond with their parents and other family members and are terribly injured when this bond is disrupted.<sup>28</sup> The reason for limiting state intrusion in the home, therefore, is not only a concern for parental privacy, but also the recognition that children suffer when separated from their parents and community.<sup>29</sup>

The divergent understandings of the relationship between children's interests and preserving families suggest, at least, that there is no fixed meaning of children's rights in any particular context involving children's welfare. This essay uses the perceived antagonism between children's rights and family preservation policies to further explore 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 examines developments in American race and class politics that influenced the shift in federal child welfare policy. I contend that ASFA resulted as much from these political struggles as from a concern for children's rights. Finally, in Part IV I argue that it is critically important to focus on social justice to develop a sound definition of children's rights.

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rejects the choice between family preservation and child protection. See Lowry, *supra* note 16, at 125 ("The real question is not whether family preservation or child protection works best . . ."). She criticizes both the abuse of family preservation philosophy "as 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.*

<sup>27</sup> GOLDEN, *supra* note 25, at 153.

<sup>28</sup> See GOLDSTEIN ET AL., *supra* note 5, at 32-34.

<sup>29</sup> When the state seeks to protect children:

[I]t 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.

Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 141-42 (1995).

## 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. Its clarification of the "reasonable efforts" requirement protects children by ensuring that they are not returned to violent homes.<sup>30</sup> In addition, ASFA amends 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 violent crimes against their children, subject their children to aggravating circumstances such as torture, or have already had their parental rights involuntarily terminated.<sup>31</sup> Most would probably agree that children have an interest in, if not a right to, government protection from this sort of violence.<sup>32</sup>

The child victims of severe abuse covered by these provisions, however, are only a minority 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.<sup>33</sup> As a result, their well being will be determined more by ASFA's other major policy initiative, an emphasis on terminating parental rights in order 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

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<sup>30</sup> See, e.g., 42 U.S.C. § 671 (Supp. III 1997).

<sup>31</sup> 42 U.S.C. § 671 (a)(15)(A), (D) (Supp. III 1997).

<sup>32</sup> See Akhil Reed 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 VAND. L. REV. 1041 (1991); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993); 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).

<sup>33</sup> See DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 139-56 (1994) (criticizing the removal of poor children from their homes for parental neglect); PELTON, *supra* note 12, at 66 (same); Alex Morales, *Seeking a Cure for Child Abuse*, USA TODAY (MAGAZINE), Sept. 1, 1998, at 34, 34 ("Approximately 55% of the kids who are seriously mistreated suffer from severe neglect."). After reviewing numerous studies on the reasons for child removal, Duncan Lindsey concluded that inadequacy of income, and not child abuse, is the major reason children are removed from their parents. See LINDSEY, *supra*, at 155, 157-83 (criticizing the preoccupation with severe physical abuse and sexual assault rather than child poverty, which affects a much larger population of children).



with their parents and by allowing concurrent planning for adoption. These deadlines have little to do with child abuse; they instead concern the length of time a child has spent in foster care.<sup>34</sup> As I explain below, the government's shift toward promoting adoption for children in foster care fails both in theory and practice to address the child welfare system's fundamental problem—the placement of too many children in substitute care.<sup>35</sup>

#### *A. ASFA's New Focus Cannot Solve the Foster Care Problem*

ASFA's promotion of adoption is unlikely to improve the situation of most children in foster care. There are insufficient adoptive homes for the increasing number of children removed from their biological families. Moreover, unnecessarily separating children from their biological parents does not advance children's interests, but rather destroys family bonds that usually benefit children. Beyond expediting the termination of parental rights, ASFA aids in the dissolution of biological families by neglecting to adequately monitor state removal programs and by failing to require that states implement family preservation programs.

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 criticized family preservation policies that made it difficult to terminate parental rights. They implied that if states removed these barriers—if courts terminated parental rights sooner—the foster care problem would dissipate and even disappear.

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 parental rights

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<sup>34</sup> See 2 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 13.17 (1993) ("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 of long-term foster care."); Hand, *supra* note 5, 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.").

<sup>35</sup> 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).

terminations 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 who are waiting in foster care to be adopted.<sup>36</sup> Although the number of adopted state wards also increased, it lagged behind the number of children 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."<sup>37</sup> ASFA's accelerated deadlines for termination of parental rights will probably increase the state ward population; its adoption incentives, on the other hand, even if they achieve congressional goals, will probably fail to provide enough new homes for these children. This shortfall 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 than white children to be adopted.<sup>38</sup>

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."<sup>39</sup> Termination *weakens* family stability for many foster

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<sup>36</sup> See 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 FAM. L.Q. 121 (1995).

<sup>37</sup> Indeed, in New York the number of unadopted state wards jumped 225% in four years, from 648 in 1987 to 2,383 in 1991. See *id.* at 130. 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 adopted 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.

*Id.* at 131.

<sup>38</sup> See Joyce E. Everett, *Introduction: Children in Crisis*, in CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE 1, 3 (Joyce E. Everett et al. eds., 1991); Sylvia Simms Gray & Lynn M. Nybell, *Issues in African-American Family Preservation*, 69 CHILD WELFARE 513, 513-14 (1990); Sandra M. Stehno, *Differential Treatment of Minority Children in Service Systems*, 27 SOCIAL WORK 39, 39-41 (1982). Black children make up 56 percent of the 110,000 children in foster care waiting to be adopted. See U.S. Dep't of Health and Human Services' Administration for Children and Families, *Administration on Children, Youth and Families, Children's Bureau, Foster Care and Adoption Statistics* (visited Aug. 6, 1999) <<http://www.acf.dhhs.gov/programs/cb/stats>>.

<sup>39</sup> Guggenheim, *supra* note 36, at 134; see also Garrison, *supra* note 5, at 473

children by disrupting their relationship with their parents, while failing to result in permanent placement.

The Act's focus on severing biological ties to make room for adoptive ones overlooks both the diversity of parent-child relationships as well as alternatives to adoption. Before petitioning for 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.<sup>40</sup> 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.<sup>41</sup>

There are alternatives to adoption that could ensure family stability while preserving the parent-child relationship.<sup>42</sup> For example, children can often be safely placed in the long-term care of relatives or neighbors with parental visitation, leaving open the possibility of parents regaining custody if circumstances improve.<sup>43</sup> In a 1994 survey of children in Illinois

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("[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 5, at 1270; see also Patrick R. Tamilla, *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."); 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 one 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").

<sup>40</sup> See Gordon, *supra* note 35, at 667-72 (criticizing ASFA's "lack of age sensitivity"); Hand, *supra* note 5, at 1272-73.

<sup>41</sup> See Douglas J. Besharov, *Commentary, THE FUTURE OF CHILDREN*, Spring 1998, at 120, 123 (1998).

<sup>42</sup> See Garrison, *supra* note 25, 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 (1983-84) (same). 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, *supra* note 25, at 379.

<sup>43</sup> See generally Charlene Ingram, *Kinship Care: From Last Resort to First Choice*, 75 CHILD WELFARE 550 (1996); Megan M. O'Laughlin, Note, *A Theory of Relativity:*

state custody who had been living with a relative for more than one year, 85% of relatives reported that the best plan for the children was to remain with them until the children were grown.<sup>44</sup> Many of these relatives shun adoption, however, because it disrupts customary kinship norms and creates an adversarial relationship with the parents.<sup>45</sup> Programs intended to encourage long-term care of foster children by relatives could promote family preservation and stability while preventing the unnecessary tension within the child's biological support group that would result from termination of parental rights and adoption. ASFA's effect, however, may be to encourage courts to mechanically abide by statutory deadlines even when there is evidence that termination would not be in the child's best interests.<sup>46</sup>

In addition to ignoring viable alternatives to adoption, ASFA does foster children a disservice by failing to require that state authorities scrutinize the excessive removal of children from their parents or the terminations of parental rights by state authorities. It also permits states to implement meaningless 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 rea-

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*Kinship Foster Care May Be the Key to Stopping the Pendulum of Termination vs. Reunification*, 51 VAND. L. REV. 1427 (1998) (advocating a federal kinship care policy).

<sup>44</sup> See McDonald Testimony, *supra* note 15; see also *Hearings on Child Welfare Revision Before the Subcomm. on Soc. Sec. and Family Policy of the Senate Comm. on Fin.*, 105th Cong., available in 1997 WL 10572021 (testimony of Gary J. Stangler, Director of the Missouri Department of Social Services on Behalf of the American Public Welfare Association) [hereinafter Stangler Testimony] ("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. See Stangler Testimony, *supra*; McDonald Testimony, *supra* note 15. 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. §§ 670-71 (Supp. III 1997).

<sup>45</sup> See RICHARD P. BARTH ET AL., FROM CHILD ABUSE TO PERMANENCY PLANNING: CHILD WELFARE SERVICES PATHWAYS AND PLACEMENTS 213-14 (1994); Jesse L. Thornton, *Permanency Planning for Children in Kinship Foster Homes*, 70 CHILD WELFARE 593, 597 (1991) (finding that 85% of sample of kinship foster parents did not want to adopt).

<sup>46</sup> See, e.g., *In re J.M.*, 574 N.W.2d 717 (Minn. 1998); *Andrea L. v. Superior Court*, 75 Cal. Rptr. 2d 851 (Cal. Ct. App. 1998).

sonable efforts language permits judges to terminate parental rights without any real inquiry into the agency's activities.<sup>47</sup>

ASFA's focus on terminating parental rights reflects the judgment that the risk of wrongful reunifications outweighs that of wrongful disruptions of families. This judgment, too, is misguided. The priority ASFA placed on child safety was cast as a correction of the 1980 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 minimal assistance and even obstructed parents' attempts to reunite with their children.<sup>48</sup>

Even under the Child Welfare Act's reasonable efforts requirement, state agencies continued to make anemic efforts to prevent out-of-home placements and reunify families.<sup>49</sup> Family preservation programs often fail because they do not address the needs of families, are inadequately funded, and do not last long enough.<sup>50</sup> Caseworkers caught in the dual

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<sup>47</sup> See Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 227 (1989-90) ("[M]any judges simply ignore the reasonable efforts requirement or else make positive findings based on inaccurate or incomplete information."); Hand, *supra* note 5, at 1281 (noting that the lack of legislative definition allows judges to "rubber stamp" agencies' reasonable efforts). The Child Welfare Act does not require that states make reasonable efforts a prerequisite to termination of parental rights. See Hand, *supra* note 5, at 1278. Ten states have statutes permitting termination of parental rights based on length of time out of custody without any reasonable efforts requirement. See *id.* at 1278 n.146. But see Debra Ratterman, *Judicial Determination of Reasonable Efforts*, 15 CHILDREN TODAY 26, 31 (Nov.-Dec. 1986) (reporting that many agencies studied "recognize the importance of documenting preventive services in obtaining a favorable judicial determination"). While shortening the time frame for parents to recover in 1997, Congress considered and rejected proposals to expand both reunification and drug treatment services for families involved with child protection agencies. See Gordon, *supra* note 35, at 665 (citing Safe Adoptions and Family Environments Act of 1997, S. 511, 105th Cong. §§ 202, 304 (1997) (giving priority in drug treatment in federally funded programs to persons referred by child protection agencies and reimbursing under Title IV-E program one year of reunification services)).

<sup>48</sup> See Hand, *supra* note 5, at 1279.

<sup>49</sup> See Richard P. Barth & Marianne Berry, *Implications of Research on the Welfare of Children Under Permanency Planning*, in 1 CHILD WELFARE RESEARCH REVIEW 323, 325 (Richard Barth et al. eds., 1994) ("[F]amily preservation services are still not available for the vast majority of families in need."); Shotton, *supra* note 47, at 241-50 (describing agencies' failures to provide assistance to parents with children in foster care).

<sup>50</sup> See 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 in Jeopardy?*, 66 SOC. SERV. REV. 335, 339 (1992) (describing family preservation programs as "short-term, crisis-oriented, and stopgap").

role of supporting families while recruiting foster and adoptive parents sometimes sabotage parents' quest to reunite with their children.<sup>51</sup> 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."<sup>52</sup>

Services for families in California, for example, are permitted to continue for a maximum of six months and, on average, end after only half this time.<sup>53</sup> 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 three month parenting course or ephemeral crisis intervention? It is not surprising that 20 to 32% of children returned home in connection with family preservation plans end up back in foster care.<sup>54</sup> "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."<sup>55</sup> The ideology of family preservation is then blamed when inadequate efforts result in tragedy.

Finally, 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 of making the wrong decision to keep a child in state custody.<sup>56</sup> The former error may generate

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<sup>51</sup> See Hand, *supra* note 5, at 1280 ("Caseworkers have been known to fail to assist parents in obtaining housing, to unreasonably oppose visitation of the child by the parent, 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.").

<sup>52</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, REP. NO. HEHS-97-34, CHILD WELFARE—STATES' PROGRESS IN IMPLEMENTING FAMILY PRESERVATION AND SUPPORT SERVICES 3 (1997).

<sup>53</sup> See MARIANNE BERRY, KEEPING FAMILIES TOGETHER 4 (1994).

<sup>54</sup> See *id.* Despite the federal reasonable efforts mandate, the foster care population grew by 45% between 1985 and 1990, from 276,000 to 407,000 children. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 102nd CONG., OVERVIEW OF ENTITLEMENT PROGRAMS 903 (Comm. Print 1992). The average length of stay in foster care, moreover, remained about two years over this period. STAFF OF HOUSE SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, 101st CONG., NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA 6 (Comm. Print 1989).

<sup>55</sup> BERRY, *supra* note 53, at 4.

<sup>56</sup> See Davis & Barua, *supra* note 29, at 152; see also LINDSEY, *supra* note 33, at

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.

ASFA suffers from a number of pragmatic problems as a result of its focus on adoption, rather than reunification, as a remedy to the foster care problem. Congress relied on the faulty premise that expediting termination of parental rights will yield a corresponding increase in adoptions. The Act's misguided emphasis on adoption ignores potential for excessive removal by state authorities, fails to require states to develop family preservation programs, and underestimates the dangers of wrongful disruptions of families. In addition to these pragmatic shortcomings, the Act is also philosophically unsound.

### *B. ASFA Mischaracterizes the Foster Care Problem*

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 small number of children being adopted. It stems, rather, from the large number of children removed from their homes.

The class and race dimensions of foster care magnify this problem—virtually all of the parents who lose custody of their children are poor, and a startling percentage are black. More than 200,000 children are removed from their homes and placed in foster care annually.<sup>57</sup> In 1998, black children made up 45% of the foster care population while comprising only 15% of the general population under age eighteen.<sup>58</sup> In the nation's urban centers, the racial disparity is even greater. Chicago's foster care population, for example, is almost 90% black.<sup>59</sup> Of 42,000 children in foster care in New

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136-37 (observing that fear motivates social workers to avoid the risk of harm by removing children from the home).

<sup>57</sup> See Gregory A. Loken, *"Thrownaway" Children and Throwaway Parenthood*, 68 TEMP. L. REV. 1715, 1718 n.21 (1995).

<sup>58</sup> See U.S. Dep't of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Current Estimates as of January 1999 (1)* (visited Sept. 23, 1999) <<http://www.acf.dhhs.gov/programs/cb/stats/ar0199a.htm>>.

<sup>59</sup> See PATRICK T. MURPHY, *WASTED: THE PLIGHT OF AMERICA'S UNWANTED CHILDREN* 95 (1997).

York City in 1997, only 1300 were white.<sup>60</sup> Moreover, once black children enter foster care, they remain there longer, are moved more often, and receive less desirable placements than white children.<sup>61</sup> 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 stated that its aim was "to make sure that every child has the opportunity to live in a safe, stable, loving and permanent home,"<sup>62</sup> it had in mind terminating parents' rights, not reducing poverty or building stronger supports for families. Congress' focus on terminating parental rights represents a philosophical flaw in the Act that 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.

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.<sup>63</sup> Adoptions would be a well-accepted but rare alternative for children whose parents are unable or choose not to take care of them.<sup>64</sup> Although adop-

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<sup>60</sup> See Martin Guggenheim, Commentary, *The Foster Care Dilemma and What to do About It: Is the Problem that Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 106, 108 (1999).

<sup>61</sup> See Edmund Mech, *Public Social Services to Minority Children and Their Families*, in CHILDREN IN NEED OF ROOTS 133 (R.O. Washington & Joan Baros-Van Hull eds., 1985).

<sup>62</sup> 144 CONG. REC. S12452-01, S12452 (daily ed. Oct. 13, 1998) (statement of Sen. DeWine).

<sup>63</sup> 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 Larry May, Response to Dorothy Roberts at the Washington University School of Law Orthwein Lecture on Race, Poverty and New Directions in Child Welfare Policy (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.

<sup>64</sup> 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



tion is as valuable as biology with respect to forming parent-child relationships, it typically occurs because of an unfortunate circumstance—the death of the biological parents, an unplanned pregnancy, child abuse or neglect. As a result, we can support adoption while working to curtail its causes. By combating poverty and its dangers to children, an ideal society would radically decrease its need for adoption.

In reality, however, expansive social welfare programs do not automatically result in smaller foster care populations. LeRoy Pelton observes that Western European countries with coercive, judgmental child protection systems like ours place children in foster care at similar rates as the United States, despite their substantially lower child poverty rates.<sup>65</sup> “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.”<sup>66</sup> 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 both providing services to help families and investigating families for the purpose of removing children from their homes. This structure, along with lopsided federal funding of foster care, encourages the rescue system to dominate even under a family preservation ideology.<sup>67</sup>

Providing adequate family preservation services and (better yet) decreasing child poverty would certainly help curtail fos-

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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.

<sup>65</sup> 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.

Leroy H. Pelton, *Child Welfare Policy and Practice: The Myth of Family Preservation*, 67 AM. J. ORTHOPSYCHIATRY 545, 551-52 (1997) [hereinafter Pelton, *Child Welfare Policy and Practice*]; see LeRoy H. Pelton, *Commentary, THE FUTURE OF CHILDREN*, Spring 1998, at 126, 128 [hereinafter Pelton, *Commentary*]. In 1992, less than 2% of Swedish children lived in poverty, while more than 20% of American children were poor. See LINDSEY, *supra* note 33, at 222 fig.8.16; 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).

<sup>66</sup> Pelton, *Commentary*, *supra* note 65, at 128.

<sup>67</sup> See Pelton, *Child Welfare Policy and Practice*, *supra* note 65, at 552.

ter care expansion. But Pelton makes a compelling case that the elimination of the child welfare system's rescue mentality is as critical to restrict foster care's growth. This brings us back to ASFA's philosophical flaw: the law wrongly embraces the philosophy of child rescue by emphasizing adoption as the solution to foster care.

### C. ASFA Disparages Biological Bonds

Perhaps the most disturbing aspect of ASFA's focus on adoption and its rescue mentality is the message it sends about the poor and minority families whose children have been placed in foster care. Throughout congressional testimony regarding the Act, adoption was portrayed as safer than the reunification of children with their biological families. Virtually every mention of biological families was negative, while adoptive homes were referred to as loving and stable. 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.<sup>68</sup> Congress assumed that permanence and safety came from adoption, not from reunifying children with their parents.<sup>69</sup>

Congress obscured the idea that it is usually in children's interest to stay, or at least to maintain contacts with their parents.<sup>70</sup> To the contrary, the congressional record as well as the public debate surrounding ASFA was saturated with stories about parents who were permitted to brutally torture and murder their children because of caseworkers' insistence on family reunification.<sup>71</sup> Family preservation policies were blamed both for arbitrarily returning children to violent homes and for inflating the foster care population. Representative Dave Camp of Michigan accused the 1980 Act of "creat[ing] a system where nearly half a million children currently reside in foster care."<sup>72</sup> After describing the "sufferings of the abused, abandoned, and neglected; infants who have been burned at an open fire; children raped and assaulted,"

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<sup>68</sup> 143 CONG. REC. H10776-05, H10789 (daily ed. Nov. 13, 1997) (statement of Rep. Pomeroy).

<sup>69</sup> For example, Barbara Kennelly of Connecticut introduced the bill in the House of Representatives as a step toward "providing protection and permanency for our Nation's abused, neglected, and sometimes forgotten children." 143 CONG. REC. H10776-05, H10788 (daily ed. Nov. 13, 1997).

<sup>70</sup> Sen. DeWine's testimony is an exception. See 142 CONG. REC. S5710-01, S5712 (daily ed. June 4, 1996).

<sup>71</sup> See, e.g., GELLES, *supra* notes 21, 22.

<sup>72</sup> 143 CONG. REC. H10776-05, H10788 (daily ed. Nov. 13, 1997).

an article in the *Washington Post* claimed that "[t]he Family Reunification and Preservation Act is the cause of these grotesque practices."<sup>73</sup> 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. Dominant American culture has always revered the genetic connection between parents and children, and treated adoption as a second-best and unnatural alternative.<sup>74</sup> 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 and biological families as false. Representative Pryce of Ohio urged her colleagues to support the legislation "in the interest of thousands of children who need a *true* family to love and protect them . . . ."<sup>75</sup> Representative Shaw of Florida predicted that the law "is going to bring about the joy of adoption and the bonding of a *real* family to so many kids."<sup>76</sup> Senator DeWine, on the other hand, referred to the homes of abused children as "households that look like families but are not."<sup>77</sup> While erasing the stigma of adoption is an important step in expanding our notions of family, it seems that this reverence of adoption over biology is reserved for poor and minority families that are most often clients of the child welfare system.<sup>78</sup>

The preference for permanence at the expense of parental rights in foster care stands in stark contrast to the treatment of this issue in the divorce context.<sup>79</sup> Child advocates generally emphasize the importance of protecting children's relationships with their parents—even parents who have lost

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<sup>73</sup> Mary McGrory, *Adopt a Sense of Outrage*, WASH. POST, May 12, 1996, at C1.

<sup>74</sup> See BARTHOLET, *supra* note 25, at 30-38; Roberts, *supra* note 63, at 217 (discussing critics' claim that adoption alienates children by "disrupting the genetic bond").

<sup>75</sup> 143 CONG. REC. H10776-05, H10789 (daily ed. Nov. 13, 1997) (emphasis added).

<sup>76</sup> 143 CONG. REC. H10776-05, H10790 (daily ed. Nov. 13, 1997).

<sup>77</sup> 142 CONG. REC. S5710-01, S5710 (daily ed. June 4, 1996).

<sup>78</sup> Several child welfare advocates warned me when I wrote *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995), 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.

<sup>79</sup> See, e.g., Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371 (1996).

custody. 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. Family law recognizes a strong emotional attachment between children of divorce and their non-custodial parents and views interference with this relationship as a terrible injury to the child. Marsha Garrison summarizes the contrast between the treatment of non-custodial relationships in foster care and divorce situations:

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 or 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.<sup>80</sup>

The 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.<sup>81</sup> 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 the removal of children in foster care (although divorced parents may also lose custody because of they are unfit).<sup>82</sup> Parental unfitness, however, does not necessarily negate children's bond with their parents,<sup>83</sup> and therefore does not conclusively determine chil-

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<sup>80</sup> *Id.* at 373-74.

<sup>81</sup> *See 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.").

<sup>82</sup> *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 25% of surveyed children moderately or intensely feared their fathers).

<sup>83</sup> *See* Garrison, *supra* note 79, at 379 (citing JOHN BOWLBY, *MATERNAL CARE AND*

dren's interest in maintaining contact with their biological parents.

Perhaps the major reason for preferring extinction of parental ties in foster care is 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, however, imagining a strong emotional bond between black parents and their children. Jacquelyn 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."<sup>84</sup> Moffett explained that "[t]hey really did not believe that Black families exist . . . so they had no concept of Blacks being caring toward children."<sup>85</sup> Poor black mothers are stereotyped as deviant and uncaring; they are blamed for transferring a degenerate lifestyle of welfare dependency and crime to their children.<sup>86</sup> black fathers are simply thought to be absent.<sup>87</sup> When parents of children in foster care are portrayed as deranged and violent monsters, it becomes even 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

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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 RUTTER, *MATERNAL DEPRIVATION REASSESSED* (1st ed. 1972); Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 563-72 (1983-84); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1777-86 (1987); Penny Ruff Johnson et al., *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).

<sup>84</sup> Jacquelyn A. Moffett, *Practice with Black Families*, in *EMPOWERING THE BLACK FAMILY: A ROUNDTABLE DISCUSSION WITH ANN HARTMAN, JAMES LEIGH, JACQUELYNN MOFFETT, ELAINE PINDERHUGHES, BARBARA SOLOMON, AND CAROL STACK* 57, 58 (Sylvia Sims Gray et al. eds., 1985).

<sup>85</sup> *Id.*

<sup>86</sup> See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 8-21 (1997).

<sup>87</sup> See Dorothy Roberts, *The Absent Black Father*, in *LOST FATHERS: THE POLITICS OF FATHERLESSNESS IN AMERICA* 145, 146 (Cynthia R. Daniels ed., 1998).

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. ASFA suffers from both practical and philosophical shortcomings that cause it to function as a disservice to the children and families involved in the child welfare system. In examining means of remedying ASFA's flaws, it is important to address the political forces that motivated the Act's acceptance.

### III. RACE, CLASS, AND CHILD WELFARE POLITICS

Given the practical and philosophical flaws in the promotion of ASFA 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 caseworkers from endangering children by misinterpreting the reasonable efforts standard. But the embracing of adoption as a solution to the foster care problem stemmed from broader political concerns that reflected national race and class conflicts. The passage of ASFA 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."<sup>88</sup> The Act also corresponded with new federal policy on trans-racial adoption, which removes barriers to white-middle class couples' ability to adopt children of color.

#### A. Welfare Reform

Race and class politics are critical to understanding ASFA's impact because ASFA's emphasis on adoption was influenced by concurrent trends in federal welfare reform. ASFA was passed on the heels of the overhaul of federal wel-

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<sup>88</sup> Martha Matthews, *Assessing the Effect of Welfare Reform on Child Welfare*, 32 CLEARINGHOUSE REV. 395, 397 (Jan.-Feb. 1999).

fare 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 states to implement extensive welfare reform programs. State welfare reform measures hinder the ability of many poor mothers to care for their children: they reduce cash assistance to families, eliminate payments to some families altogether, and require mothers, often without adequate child care, to work and participate in job training, counseling, and other programs.<sup>89</sup> 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% of mothers removed from public assistance have been forced to "abandon their children."<sup>90</sup> Welfare-to-work programs may not rescue enough families from poverty to offset the numbers forced into the child welfare system by time limits, sanctions, and working conditions.<sup>91</sup> In short, welfare reform may cause a net increase in the number of children entering foster care.

The elimination of guaranteed federal assistance to poor families is related to the recommendation of adoption for poor children. Some work requirements advocates 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 diverted to programs that would put their babies up for adoption or place them in orphanages.<sup>92</sup> These

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<sup>89</sup> See *id.*; Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, THE FUTURE OF CHILDREN, Spring 1998, at 88, 95-97. See generally Kristen Shook, *Assessing the Consequences of Welfare Reform for Child Welfare*, POVERTY RES. NEWS (Northwestern Univ./Univ. of Chicago Joint Ctr. for Poverty Research, Evanston, Ill.), Winter 1998, at 8. I discuss welfare reform's impact on poor mothers more fully in Dorothy Roberts, *Welfare's Ban on Poor Motherhood*, in WHOSE WELFARE? (Gwendolyn Mink ed., forthcoming 1999).

<sup>90</sup> Jason DeParle, *Wisconsin Welfare Overhaul Justifies Hope and Some Fear*, N.Y. TIMES, Jan. 15, 1999, at A1.

<sup>91</sup> See Matthews, *supra* note 88, at 398 ("[W]elfare to work program successes seem unlikely to decrease significantly the demand for child welfare services, or even offset the impact on child welfare systems of families whose economic circumstances are worsened by time limits and sanctions.").

<sup>92</sup> See *GOP Welfare Plan Would Take Cash from Unwed Mothers to Aid Adoptions*,

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 as an uncapped entitlement federal funds for foster care and adoption assistance, while reducing and capping federal funds for cash assistance to families and for child protective services that support families.<sup>93</sup> Child welfare agencies will be faced with the choice of either 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.

Federal law also 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 time limits.<sup>94</sup> Some recipients caring for a relative's child may return the child to foster care rather than undergo the added burdens of job requirements or community service.<sup>95</sup> Moreover, the law may discourage agencies from placing children with relatives who are not economically self-sufficient.

Welfare reform also makes it more difficult for parents whose children had been removed to regain custody. The federal welfare law cuts off aid to parents for children who are away from home for forty-five days or more.<sup>96</sup> This hardly gives parents 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. Parents may

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CHI. TRIB., Nov. 14, 1994, at 7.

<sup>93</sup> Rob Geen & Shelley Waters, *The Impact of Welfare Reform on Child Welfare Financing*, in *NEW FEDERALISM: ISSUES AND OPTIONS FOR STATES* 1, 3 (Urban Inst. No. A-16, 1997).

<sup>94</sup> See Matthews, *supra* note 88, at 403. Kinship care givers may also qualify for federal or state foster care benefits and may receive a "child only" Temporary Assistance to Needy Families ("TANF") grant that does not entail compliance with welfare-to-work requirements. See *id.*

<sup>95</sup> See Mark Hardin, *Sizing Up the Welfare Act's Impact on Child Protection*, 30 CLEARINGHOUSE REV. 1061, 1066 (Jan.-Feb. 1996) (noting that "relatives may no longer [due to federal welfare reform] be financially in a position to become a custodian or guardian").

<sup>96</sup> See 42 U.S.C. § 608(a)(10)(A) (Supp. III 1997). States may elect to extend this limit up to 180 days and may exempt families that are working toward reunification. *Id.*



also be required to comply with conflicting requirements from two state agencies. For example, they may be simultaneously 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.<sup>97</sup> Finally, new expedited termination procedures under ASFA and state law intensify the time pressures these parents face.

Welfare reform makes it more difficult for many poor families to seek help without losing their children to foster care, and more difficult for those same families to regain custody after state intervention. New welfare policy, thus, may very well increase the number of children relegated to foster care.

### *B. Trans-racial Adoption*

The shift in federal policy from family preservation toward adoption also corresponded with the change in the federal position on trans-racial adoption. For decades, the federal government permitted public adoption agencies to enforce race-matching policies that sought to place black children exclusively with black adoptive families.<sup>98</sup> 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.<sup>99</sup> Federal support of trans-racial adoption has been championed as a critical step in increasing the numbers of adoptions of black children, the population with the lowest rate of permanent placements. Race-matching policies, it is argued, damage black children by not only denying them placements with white adoptive parents, but also by causing them to languish in foster care.<sup>100</sup>

Adoption policy has historically tracked the market for children, serving the interests of adults seeking to adopt more than the interests of children needing stable homes. For example, child welfare officials abandoned the child rescue philosophy of the 19th century and refrained from terminat-

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<sup>97</sup> See Matthews, *supra* note 88, at 405.

<sup>98</sup> See BARTHOLET, *supra* note 25, at 94-99.

<sup>99</sup> See Multiethnic Placement Act of 1994, 42 U.S.C. § 5115a (1994) (repealed 1996) (prohibiting agencies receiving federal funding from placing children according to race); see also 42 U.S.C. § 1996b(1)(a) (1994 & Supp. III 1997) (prohibiting agencies receiving federal funding from denying anyone the opportunity to become an adoptive or foster parent or from delaying or denying the placement of a child on the basis of race).

<sup>100</sup> See, e.g., BARTHOLET, *supra* note 25.

ing parental rights when the supply of newborns available for adoption exceeded demand.<sup>101</sup> In more recent decades, however, the growing demand for adoptable older children helped to generate policies that free children for adoption by terminating parental rights quickly.<sup>102</sup> The modern retreat from family preservation programs, much like the abolition of race-matching rules, can be seen as an effort to increase the supply of children for white adoptive families.

Congressional and media discussions of ASFA linked family preservation policies to white middle-class couples' difficulties in adopting black children in foster care. A *U.S. News and World Report* article about ASFA, for example, began 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.<sup>103</sup> This article and others implied that the emphasis on reunifying black children with their biological families unfairly prevented white couples from adopting American children. 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 strategy for increasing adoptions of black children by white families. Linking these two issues—family preservation and trans-racial adoption—allowed commentators 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 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 front page headlines in Chicago for over

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<sup>101</sup> See Garrison, *supra* note 79, at 376 (citing ALFRED KADUSHIN & JUDITH A. MARTIN, *CHILD WELFARE SERVICES* 535-40 (4th ed. 1988)).

<sup>102</sup> See *id.*

<sup>103</sup> See Amanda Spake, *Adoption Gridlock*, U.S. NEWS & WORLD REP., June 22, 1998, at 30.

a month.<sup>104</sup> 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 both 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.<sup>105</sup> 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 trans-racial adoption—the belief that black children fare better if raised by white adoptive families than if returned home. Advocates of trans-racial adoption frequently assert the benefits of racial assimilation that black children and white parents experience by living together. In *Family Bonds*, for example, Elizabeth 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,”<sup>106</sup> but also because black children reap substantial advantages from a white environment.<sup>107</sup> 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.”<sup>108</sup> As in the rhetoric promoting ASFA, the rhetoric promoting

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<sup>104</sup> See, e.g., Bonnie Miller Rubin & Robert Becker, *Will Clout Decide Battle for “Baby T”?: Powerful Burkes Contend with Mother for Custody*, CHI. TRIB., June 7, 1998, at 1.

<sup>105</sup> See, e.g., Bonnie Miller Rubin & Robert Becker, *Baby T's Mom Ruled Fit in Fight for Toddler; Judge Rejects State's Case, All but Dooming Burkes' Adoption Bid*, CHI. TRIB., Nov. 5, 1998, at 1; Robert Becker & Bonnie Miller Rubin, *Burkes Lose Key Adoption Supporter; Public Guardian Backs Mother, Blasts DCFS in Custody Dispute*, CHI. TRIB., Oct. 3, 1998, at 1; Robert Becker & Bonnie Miller Rubin, *Mom Could Win Battle but Lose War; Tina Olison May be Ruled Fit and Still Not Regain Her Child*, CHI. TRIB., Oct. 26, 1998, at 1.

<sup>106</sup> BARTHOLET, *supra* note 25, at 105.

<sup>107</sup> See *id.*

<sup>108</sup> *Id.*

trans-racial adoption promotes the disruption of poor minority families by depicting adoptive homes as *superior* to children's existing family relationships.

In sum, ASFA's emphasis on adoption and its popularity stemmed largely from concurrent developments in government policy related to welfare and trans-racial adoption. Determining whether ASFA furthers children's rights must take into account this political context.

#### IV. ADDING SOCIAL JUSTICE TO CHILDREN'S RIGHTS

The notion of rights in general is subject to the criticism of being indeterminate.<sup>109</sup> But children's rights, without attention to their political context, are especially indeterminate. Children's rights talk is easily co-opted by powerful people to achieve their social objectives and maintain their social position. 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 benefiting 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 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 frequently involves determining which adult will speak for them. 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 custody hearings.<sup>110</sup> Senator Grassley defended this provision on the grounds that foster and preadoptive parents "are the

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<sup>109</sup> For this critique of rights, see Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983). I do not share the rejection of rights that some critical legal scholars advocate. Rather, I emphasize the importance of including concern for social justice in our notion of rights.

<sup>110</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 104, 111 Stat. 2115, 2120 (codified as amended in scattered sections of 42 U.S.C.).

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."<sup>111</sup> Thus, the Act chooses foster and preadoptive parents over biological parents to represent the interests of children in foster care.<sup>112</sup> 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 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.<sup>113</sup> 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.<sup>114</sup> 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."<sup>115</sup> Once again, the tragic story chosen for broadcast by the media may depend less on the amount of children's suf-

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<sup>111</sup> 143 CONG. REC. S12668-03, S12672 (daily ed. Nov. 13, 1997).

<sup>112</sup> 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." H.R. 867, *The "Adoption Promotion Act of 1997": Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. 24 (1997) (prepared testimony of Olivia A. Golden, Ph.D., Acting Assistant Secretary, Children and Families, U.S. Department of Health & Human Services).

<sup>113</sup> See Dorothy E. Roberts, *Sources of Commitment to Social Justice*, 4 ROGER WILLIAMS U.L. REV. 175, 193 (1998) (arguing that "empathy does not guarantee that our emotions will lead us to act in an ethical or just way"); 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)).

<sup>114</sup> See Garrison, *supra* note 79, at 394 (arguing that adoption's powerful symbolism of rebirth obscures the emotional need of foster children to maintain connection with their biological parents).

<sup>115</sup> *Id.* at 395.

fering 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 composed of her family, community, social groups, and society at large. 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 their impact on the black community. High removal rates of black children harm black people *as a group*, as well as individuals and their families.<sup>116</sup>

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 that is severely harmful to black children.

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.

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<sup>116</sup> I elaborate on this argument in Dorothy E. Roberts, *Why Race Matters to Child Welfare Interventions* (unpublished paper written for Center for Families in an Open Society, New York University Law School).