

2006

Federally Mandated Destruction of the Black Family: The Adoption and Safe Families

Christina White

Recommended Citation

Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families*, 1 Nw. J. L. & Soc. Pol'y. 303 (2006).
<http://scholarlycommons.law.northwestern.edu/njlsip/vol1/iss1/12>

This Note or Comment is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act

Christina White

I. INTRODUCTION

When it comes to matters of the home, the constitutional provisions of the Fourteenth Amendment give substantial deference to the independence of the familial unit to make its own decisions.¹ There are instances, however, where the government deems it necessary to intrude upon the independence of the familial unit. This intrusion is especially evident in the foster care system. Although the system by its very definition requires some governmental intervention for the welfare of the child, the goal of foster care should be assistance and eventually reunification to allow the family to function as an independent entity. The Adoption and Safe Families Act (ASFA) represents a stark deviation from that goal. With black children representing an overwhelming percentage of the foster care population, the ASFA represents federally mandated destruction of black families. The ASFA devalues the essentialness of preserving the familial bond with regard to black children. It advocates earlier termination of parental rights and makes adoption, instead of reunification, its priority.

This comment criticizes ASFA and its aim of removing black children from their homes as a means to achieve permanency in their lives. Preservation of black families is essential to the advancement of the black community. Legislation must be directed at addressing the underlying social ills that are at the root of foster care dependence. Instead, under the pretext of advancing child welfare, ASFA promotes destruction of black familial bonds and represents a serious threat to black communities.

¹ See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953) (noting the living standards of a family are a matter of the family's concern, not the court's); *Prince v. Mass.*, 321 U.S. 158, 166 (1944) (recognizing the traditionally private realm of family life in which the state must not interfere without a compelling justification).

This comment begins by providing a brief history of child welfare legislation in the United States. It discusses the political tide of the country and political justifications for the creation of ASFA. It examines its specific provisions and details how the legislation disproportionately impacts black children and families. This comment also examines the socio-economic factors of extreme poverty, incarceration, and substance abuse that plague black communities, and advocates dealing with these situations through a holistic approach that works in conjunction with familial reunification efforts instead of against them. Finally, this comment argues that the termination of parental rights has constitutional implications. The legislation has an impact on substantive and procedural due process as well as equal protection rights. Although the comment does not attempt to pose a solution to the child welfare system, it does advocate a shift in the focus of the system. The familial bond is essential to black children, and family preservation and reunification should be the goal of any child welfare system.

II. BRIEF HISTORY OF CHILD WELFARE POLICY

In historical terms, state intervention for the protection of children is a recent development, particularly as it relates to children of color.² Although the institution of slavery dismantled black families, it also fostered a unique system that maintained and cared for black children who were separated from their biological parents.³ When children were stripped from their parents and sold away to other plantations, the slave community as a whole took on the

² Zanita Fenton, *Foster Care: The Border of Family Identity Maintaining, (Re)creating, Destroying*, 36 NEW ENG. L. REV. 59, 60-61 (2001).

³ *Id.* at 60.

responsibility of ensuring these children were cared for.⁴ After emancipation from slavery and the ratification of the Thirteenth Amendment, black children were not welcomed into the formal child welfare system.⁵ They were excluded from the late nineteenth-century orphanages established to rescue destitute immigrant children.⁶ Furthermore, Jim Crow laws prevented black children from being cared for by the institutions of white society that tried to place orphans in adoptive homes.⁷ Even after such discriminatory laws were dismantled, black children were still denied access to most formal child welfare institutions because they were undesirable to white adoptive parents.⁸ A few "colored orphan asylums" existed, but they were overcrowded and generally inferior.⁹ Black people were forced to rely primarily on other resources such as extended family networks and churches to take care of children whose parents were unable to meet their needs.¹⁰ It was not until the late twentieth century that the child welfare system allowed blacks to participate in services that had long been reserved for the white community.¹¹

⁴ See generally NATHAN I. HUGGINS, *BLACK ODYSSEY* 154-82 (1977) (describing the effects of slavery on the black family).

⁵ See JOYCE A. LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* 67 (1978).

⁶ Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 *CHI.-KENT. L. REV.* 1619, 1622 (2001).

⁷ LADNER, *supra* note 5.

⁸ *Id.* at 67-68 (citing Andrew Billingsley & Jeanne Giovanni, *Research Perspectives on Interracial Adoption*, in *RACE RESEARCH & REASON: SOCIAL WORK PERSPECTIVES* 139-73 (Roger Willer ed., 1969) ("When these agencies were unable to place black children as fast as white children, the agencies began to define the children and the families as problems . . . The fact that the agencies had long excluded black children and families, and were thus inexperienced in serving them, was quickly forgotten.")).

⁹ Roberts, *supra* note 6, at 1622.

¹⁰ *Id.*

¹¹ See Ladner, *supra* note 5, at 67 ("Billingsley and Giovanonni assert that it was immediately following World War II that adoption agencies began trying to include black children in their programs.").

The Adoption Assistance and Child Welfare Act of 1980 (AACWA) served as the beginning of pivotal federal legislation in the modern day child welfare arena. The AACWA was the first attempt at providing federal funds to reduce the amount of time children spent in foster care.¹² The government provided financial incentives for states to change child welfare policies and attempt to move children out of foster care and encourage permanent placement through reunification and adoption.¹³ This policy was influenced by the theory that disruption of the parent-child relationship caused a great deal of emotional damage.¹⁴ Therefore, the policy encouraged permanent placement with a family, either biological or adoptive, as opposed to the child becoming “trapped in the system” and spending a long period of time in foster care.¹⁵

With its emphasis on family preservation, the AACWA made kinship foster care a viable addition to the child welfare system.¹⁶ Kinship foster care occurs when relatives become foster parents for children in state custody.¹⁷ In 1979, the Supreme Court in *Miller v. Youakim* established kinship foster care as a means to deal with the increasing foster care population.¹⁸ The Court ruled that kin are entitled to receive the same federal financial support for foster care

¹² Paul Anthony Wilhelm, Note, *Permanency at What Cost? Five Years of Imprudence Under the Adoption and Safe Families Act of 1997*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 617, 623 (2002).

¹³ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

¹⁴ This theory is called the “psychological parent” theory. See Wilhelm, *supra* note 12, at 624 (citing Mary O’Flynn, Comment, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL’Y 243, 251 (1999)).

¹⁵ *Id.*

¹⁶ Madeleine L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453, 1470 (1994).

¹⁷ U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE 5 (2000)[hereinafter REPORT TO CONGRESS].

¹⁸ *Miller v. Youakim*, 440 U.S. 125 (1979).

as non-kin foster parents.¹⁹ Kinship care and the concept of extended family child rearing originated in Africa and have been relied on by black families throughout history.²⁰ The child welfare system began to embrace this concept because it found there was less trauma and disruption in the lives of children placed with kin as opposed to children placed with non-kin.²¹ There was also evidence that the "sense of family identity, self-esteem, social status, community ties, and continuity of family relationships" in kinship arrangements was important to a child.²² The child welfare system therefore determined that children do better within their own families and that placement with kin should be given priority when possible.²³

In addition to allowing for kinship care, the AACWA required "reasonable efforts" to reunify families.²⁴ Although the Act provided little guidance as to what constituted "reasonable efforts," most states determined that such efforts included delivering social services.²⁵ Caseworkers attempted to create an individualized approach with both soft and concrete services to treat families.²⁶ Their services included instituting a plan of "positive parent-child interaction and problem solving" within the home, as well as ensuring the basic needs such as adequate

¹⁹ *Id.*

²⁰ See Sonia Gipson Rankin, *Why They Won't Take the Money: Black Grandparents and the Success of Informal Kinship Care*, 10 *ELDER L.J.* 153, 157 (2002).

²¹ REPORT TO CONGRESS, *supra* note 17, at 9.

²² *Id.* at 10.

²³ *Id.* at 9.

²⁴ 42 U.S.C. § 671(a)(15)(B) (1999).

²⁵ See Wilhelm, *supra* note 12, at 624.

²⁶ See Marianne Berry, *Overview of Family Preservation*, in *CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS* 319, 321 (Gerald P. Mallon & Peg McCartt Hess eds., 2005).

food, safe housing and paid utilities had been met.²⁷ Termination of parental rights was allowed only when the state's "reasonable efforts" to preserve the familial structure failed.²⁸

Child welfare as it relates to foster care is intrinsically linked to general welfare policy in this country.²⁹ Although initially the AACWA was a success, with the foster care population decreasing by over fifty percent, from 500,000 to 243,000, between 1980 and 1982,³⁰ the decrease came right before a period in our history when homelessness, substance abuse and HIV began to overwhelm the country.³¹ By 1983, the foster care population again began to rise and by 1998 it had more than doubled.³² Expenditures for social service programs increased dramatically.³³ Frustrated with the increasing economic and social cost of the welfare system, the country deemed efforts, including child welfare policies like the AACWA failures.³⁴

Tensions grew as the political tide was quickly turning to the right. "Individual responsibility" became a prevailing political value, replacing the idea of "social responsibility"

²⁷ *Id.* at 320-321.

²⁸ *See* Wilhelm, *supra* note 12, at 623.

²⁹ In most cases they serve the same population. *See* Kathy Barbell & Madelyn Freunlich, *Foster Care Today*, in *CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS* 504, 506 (Gerald P. Mallon & Peg McCartt Hess eds., 2005)(stating that more than half the children in foster care qualified for federally assisted foster care, which is tied to eligibility for welfare benefits). Furthermore, the ability to meet the basic needs of children, such as food and shelter, can be a direct reflection on a parent's access to welfare benefits.

³⁰ Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 *NEW ENG. L. REV.* 129, 135 (2001) (citing LEROY PELTON, *FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC WELFARE SYSTEM IN THE U.S.* 6 (1989)).

³¹ *Id.* at 136.

³² *Id.* at 135.

³³ Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 *J. LEGIS.* 239, 255 (2002).

³⁴ *Id.*

that was at the core of the AACWA.³⁵ In the general welfare arena, politicians vehemently attacked public assistance programs, and their attacks included a very strong racial element.³⁶ They proliferated the racist notion that black people were “living off” the system.³⁷ Images of the black welfare queen and the black crack addicted mother spread throughout the media.³⁸ These images supported the position that assistance programs were not helping people in need rehabilitate themselves; they were providing a means for poor blacks to continue their destructive lifestyles.³⁹

This burgeoning political transformation and desire to decrease reliance on welfare programs swept the country. It prompted Congress to enact the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, otherwise known as the Welfare Reform Act (“the Act”).⁴⁰ The Act was designed to eliminate federal entitlements and cut government expenditures and essentially dismantled the federally funded Aid to Families with Dependent Children (AFDC) program.⁴¹

Although the Welfare Reform Act was created to drastically cut social welfare expenditures, it left entitlements for foster care and adoption assistance programs uncapped.⁴²

³⁵ Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 23 (2001).

³⁶ See Dorothy E. Roberts, *Is There Justice In Children’s Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 132 (1999) [hereinafter Roberts, *Is There Justice*].

³⁷ *Id.*

³⁸ See *id.* at 131.

³⁹ *Id.* at 132.

⁴⁰ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

⁴¹ *Id.*

⁴² *Id.*

The increasingly pervasive belief was that it was better to place children out of the home instead of working to correct the social ills that required states to intrude into the home in the first place. Newt Gingrich, the Republican Speaker of the House at that time, echoed this sentiment when he 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.⁴³ Reflections of this sentiment are apparent in the Adoption and Safe Families Act of 1997 (ASFA).

III. THE ADOPTION AND SAFE FAMILIES ACT OF 1997

The ASFA made adoption the core means of achieving permanence in the lives of children in the foster care system. Although the previous legislation, the AACWA, favored permanent placement and created some incentives for adoption, it still funded and focused on solutions that prevented child removal. The AACWA's initiatives were aimed at achieving permanence through "reasonable efforts" for reunification and maintaining the familial structure.⁴⁴ ASFA, however, effectively eliminated the "reasonable efforts" requirement and focused on adoption as the best solution to ensure permanent placement of children in foster care.⁴⁵

Maintaining the foster care system is a major expense, requiring a great deal of government resources.⁴⁶ This expense increases significantly when government programs to

⁴³ *GOP Welfare Plan Would Take Cash from Unwed Mothers to Aid Adoptions*, CHI. TRIB., Nov. 14, 1994, at 7.

⁴⁴ See 42 U.S.C. § 671(a)(15)(B)(1999).

⁴⁵ 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.).

⁴⁶ See Erika Lynn Kleiman, *Caring For Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 360 (1997)(stating that foster care system in the United States costs around \$10,000 to \$20,000 per child annually resulting in an annual cost of around \$9.1 billion).

rehabilitate families become a meaningful part of the foster care system.⁴⁷ When it created the ASFA, Congress, in effect, concluded that reunification efforts were not worth the expense and began strongly pushing adoption for foster care children.⁴⁸ The House Report from the ASFA recognized “that adoption is an effective way to assure that children grow up in loving families and that they become happy and productive citizens as adults.”⁴⁹ With a new focus on finding foster care children permanent adoptive homes instead of rehabilitating families, Congress exponentially reduced its expenditures.⁵⁰ The ASFA’s focus on termination of parental rights and assistance for adoption, has nothing to do with protecting children from abuse or neglect. To reduce costs, Congress shifted its focus from the concerns of the family as a whole, to reducing the amount of time a child needs state support.

“The Adoption and Safe Families Act is designed to force states to quickly seek a hearing on termination, to facilitate permanent adoptions, rather than waste time and money on temporary solutions!”⁵¹ Therefore, after parental unfitness has been established, under the ASFA, states are required to hold permanency hearings and file a petition to terminate parental rights after a child has been in foster care for fifteen months.⁵² After the state files a petition to terminate, a Juvenile Court Judge determines if it is in the best interest of the child

⁴⁷ *See id.*

⁴⁸ H.R. Rep. No. 105-77 at 8 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 2739, 2740.

⁴⁹ *Id.*

⁵⁰ Once a child is adopted, she is no longer dependant on the state and does not require the governmental aid she required while she was in the foster care system.

⁵¹ Baldwin, *supra* note 33, at 260.

⁵² Exceptions are possible when there is a compelling reason why such termination is not in the best interest of the child. 42 U.S.C. § 671(a)(15)(D)(1997).

for the parental rights to be terminated.⁵³ If the judge determines that termination is in the child's best interest, the child's parents are no longer responsible and have no legal rights to their child.⁵⁴ The parents lose the right to participate in the child's upbringing and to interact with the child in any way. After termination, the child permanently loses any legal connection to his or her natural family.

Additionally, ASFA provides financial incentives to states that place children in adoptive homes.⁵⁵ To accomplish this goal, Congress abandoned the social policy that placing black children in black homes was important to the development of black children.⁵⁶ Instead, through the Multi-Ethnic Placement Act (MEPA)⁵⁷ and the Inter-Ethnic Adoption Act⁵⁸, Congress denied federal funding to agencies that placed children according to their race or took race into consideration when making placement decisions. Congress's justification for the change in policy was that race-matching policies, "damage black children by not only denying them placements with white adoptive parents, but also by causing them to languish in foster care."⁵⁹

⁵³ See Abuse and Neglect Unit, <http://www.countyofkane.org/sao/ABUSE/ABUSE.htm> (last visited Apr. 27, 2006).

⁵⁴ See *id.*

⁵⁵ See 42 U.S.C. § 671 (1997).

⁵⁶ ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 94-99 (1993).

⁵⁷ Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994) (repealed 1996).

⁵⁸ Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996).

⁵⁹ *Id.*

IV. THE ASFA DISPROPORTIONATELY AFFECTS THE BLACK COMMUNITY

Although the ASFA refers to child welfare policies generally, it has a disproportionate impact on black children and the black community. Black children represent an overwhelmingly disproportionate number of children in the foster care system, comprising forty percent of the foster care population but only fifteen percent of the general population under the age of eighteen.⁶⁰ For every 1,000 white children in the U.S., five were in foster care as of September 20, 2000. Compared with twenty-one black foster care children for every 1,000 black children in the U.S.⁶¹ In cities where there is a sizeable minority and foster care population, the percentages are even more staggering. For example, Chicago has a foster care population that is ninety-five percent black.⁶² In New York City in 1997, of the 42,000 children in the foster care system, only 1,300 were white children.⁶³ These statistics reveal the foster care system is generally a population of black children, and any social policy addressing the system must take this into consideration.

Contrary to popular opinion, most children are not in foster care because they have been seriously abused. Instead, neglect is the most prevalent reason children enter foster care.⁶⁴

There are substantial differences between abuse and neglect. Child abuse is an act of

⁶⁰ Ruth G. McRoy, *Overrepresentation of Children and Youth of Color in Foster Care*, in CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 623, 623 (Gerald P. Mallon & Peg McCartt Hess eds., 2005)(citing the 2004 statistics from the Adoption and Foster Care Data Analysis System 8 datasets).

⁶¹ *Id.* at 624.

⁶² Natalie Pardo, *Losing Their Children: As State Cracks Down on Parents, Black Families Splinter*, 28 CHI. REP. 1, 7 (1999).

⁶³ Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1718 n.11 (2000)(reviewing ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999)).

⁶⁴ See Dorothy E. Roberts, *Access to Justice: Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y 63, 68 (1999).

commission, in which parents or others act violently or cruelly toward the child.⁶⁵ In contrast, child neglect is an act of omission and is often related to poverty.⁶⁶ Children who are considered neglected are usually chronically deprived of basic needs, such as food, clothing and adequate shelter or adequate parenting practices including hygiene, health care, safety precautions, and minimal nurturing and attention.⁶⁷

Statistics illustrate there is a strong correlation between foster care placement and poverty.⁶⁸ A 1998 study reported that abuse and neglect are reported to be twenty-two times higher among families with incomes less than \$15,000 per year than with families with incomes of more than \$30,000 a year.⁶⁹ This is especially significant because half of all black children are born into poverty in the United States.⁷⁰ Furthermore, black children are more than three times as likely as whites to live in extreme poverty.⁷¹

Extreme poverty itself is responsible for creating circumstances that lead to neglect. For example, “poor nutrition, serious health problems, hazardous housing, inadequate heat and utilities and neighborhood crime” all can result from living in extreme poverty.⁷² Child welfare authorities can remove children from poverty stricken homes if they can demonstrate parental

⁶⁵ Marianne Berry, *Overview of Family Preservation, in CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS* 319, 323 (Gerald P. Mallon & Peg McCartt Hess eds., 2005).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ McRoy, *supra* note 60, at 624.

⁶⁹ *Id.*

⁷⁰ *Id.* at 72.

⁷¹ See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 176 (2003) [hereinafter Roberts, *Child Welfare*].

⁷² See *id.* at 175.

carelessness will increase the likelihood that these hazards will result in actual harm to the child.⁷³

Black children are much more susceptible to state intrusion since they often live in poverty and as a result are frequently forced to interact with government agencies. The state must have probable cause to enter the homes of most American families. If the family is receiving public assistance, however, such privacy rights are substantially eroded because, in order to receive assistance, you must allow state social workers to enter your home.⁷⁴

In addition to public assistance, under-privileged black families lead more public lives than their middle-class, white counterparts. Instead of visiting private doctors, these families are more likely to visit public clinics or emergency rooms for routine medical care.⁷⁵ They are more likely to encounter public building inspectors, instead of hiring contractors to repair their homes, and they often run their errands using public transportation instead of private vehicles.⁷⁶ Because these families interact with public and governmental agencies so regularly their problems are more visible to child protection authorities.⁷⁷ This results in their children being placed in the foster care system more frequently.

Poverty alone, however, does not explain the overrepresentation of black children in foster care population. It is the convergence of both race and class bias that leave black children

⁷³ *See id.*

⁷⁴ *See* Wyman v. James, 400 U.S. 309 (1971)(holding that women receiving New York's Aid to Families with Dependent Children ("AFDC") must permit state social workers to enter their homes even though the visits shared some characteristics of a Fourth Amendment search and seizure for which a warrant would normally be required).

⁷⁵ *See* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 584 (1997).

⁷⁶ *See id.*

⁷⁷ *Id.*

particularly susceptible to foster care placement. Child protective agencies are far more likely to place black children in foster care than they are to place white children in foster care.⁷⁸ With black families, foster care is used as a solution to the problems of the home, instead of offering government assistance that is less traumatic to the family.⁷⁹ A 2002 study by the Minnesota Department of Human Services found that only forty percent of black families receive family centered prevention based counseling compared with sixty percent of white families.⁸⁰ Additionally, the U.S. Department of Health and Human Services reported that black children were more likely than whites to be in foster care placement.⁸¹ In 1998, fifty-six percent of black children who entered the child welfare system were placed in foster care, nearly double the percentage for white children.⁸²

Instead of the state keeping the child in the home and providing counseling and in-home services to the family, black children were placed in foster care even when they faced the same issues as white children.⁸³ Even under identical circumstances, most white children in the child welfare system are allowed to stay with their families, while black children are ripped from their families and placed in foster care.

⁷⁸ Dorothy Roberts, *Racial Harm; Dorothy Roberts Explains How Racism Works in the Child Welfare System*, COLORLINES, Fall 2002, at 19 [hereinafter Roberts, *Racial Harm*].

⁷⁹ *Id.*

⁸⁰ McRoy, *supra* note 60, at 628.

⁸¹ Roberts, *Child Welfare*, *supra* note 71, at 172 (citing ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T HEALTH & HUMAN SERVS., CHILD MALTREATMENT 1998: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (U.S. Gov't Printing Office, 2000)).

⁸² *Id.* at 172.

⁸³ *Id.* at 173.

Removing children from families due to maternal substance abuse has led to an increase in the number of black children in the foster care system.⁸⁴ The system of detecting and reporting drug use during pregnancy, which leads to the removal of the newborn from the care of its mother, is plagued by race bias.⁸⁵ A study in Pennelias County Florida of reporting of prenatal drug usage found that despite similar rates of drug use, black patients were ten times more likely to be reported to child protective authorities for drug usage during pregnancy than white patients.⁸⁶ The desire to remove these children from the care of their mothers can be attributed to pervasive stereotypical images of black crack babies and pregnant black crack addicts.⁸⁷ This racist stereotyping ultimately contributes to the disproportionate number of black children in the foster care system.

Finally, incarceration requires black children to enter the foster care system and places incarcerated black parents in danger of having their parental rights terminated.⁸⁸ In 2000, 1.5 million children had at least one parent in prison and a disproportionately high percentage of these parents were black.⁸⁹ In general, children of incarcerated fathers do not end up in the

⁸⁴ Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL'Y 72, 85 (1999) [hereinafter Roberts, *The Challenge of Substance Abuse*].

⁸⁵ See DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* 175 (1997).

⁸⁶ *Id.*

⁸⁷ Roberts, *The Challenge of Substance Abuse*, *supra* note 84, at 86 (stating that “the public’s willingness to remove so many babies from their mothers is based on largely racialized myths about crack babies and pregnant crack addicts”).

⁸⁸ Antoinette Greenway, *When Neutral Policies Aren’t So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African-American Women*, 17 NAT’L BLACK L.J. 247, 255 (2004) (explaining incarceration often causes parents to place their children in foster care because they have no intervening options for immediate care of their children).

⁸⁹ U.S. DEPARTMENT OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2000* (2000).

foster care system because they continue to reside with their mothers.⁹⁰ In contrast, when mothers are incarcerated, their children are frequently placed in foster care.⁹¹ Although kinship foster care is a viable option to avoid placing the child outside the familial context, oftentimes the extended family is unable to support the needs of the child, and state foster care placement outside the family becomes the only option.⁹²

Nearly eighty percent of incarcerated women are mothers who have two or more children that they had the primary responsibility of caring for prior to incarceration.⁹³ Some of these women have children who were forced to enter the foster care system for the first time after their incarceration.⁹⁴ The percentage of incarcerated mothers is particularly devastating to the black community; nearly half of all imprisoned parents are black.⁹⁵ Black women are six times more likely to be incarcerated than their white counterparts.⁹⁶ Felony conviction or incarceration is an appropriate ground for a judge to terminate parental rights.⁹⁷ While these incarcerated mothers are serving their sentences they cannot “rehabilitate and resume custody” of their children and

⁹⁰ See Greenway, *supra* note 88.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See Martha L. Raimon, *Barriers to Achieving Justice for Incarcerated Parents*, 70 FORDHAM L. REV. 421, 421 (2001).

⁹⁴ CHRISTOPHER J. MUMOLA, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 1 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/iptc.pdf> (reporting 10% of mothers and 2% of fathers in state custody had a child living in a foster home or agency).

⁹⁵ *Id.* at 3.

⁹⁶ THOMAS P. BONCZAR, U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION 1974-2001 5 tbl. 5 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>.

⁹⁷ See Abuse and Neglect Unit, *supra* note 53.

demonstrate their ability to parent.⁹⁸ This makes it easier for a judge to terminate their parental rights and place children of incarcerated black mothers up for adoption.

V. THE ASFA DEVALUES AND DEHUMANIZES THE BLACK FAMILY

Historically, the Supreme Court has held the view that the family is a private institution where individuals are free to pursue their goals without the threat of government intrusion.⁹⁹ The Constitutional basis for family privacy is rooted in the guarantee of “liberty” in the Due Process Clause of the Fourteenth Amendment.¹⁰⁰ Family privacy protects the rights of parents to claim authority over their children and provide the “personal, financial, or custodial responsibility” for their growth into adulthood.¹⁰¹ As far back as 1943, the Supreme Court stated, “[i]t is cardinal with us that the custody, care and nurture of a child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹⁰² These “obligations” include preparing the child to participate in social and political life when he or she reaches adulthood.¹⁰³

The law clearly protects the rights of parents to participate in the nurturing and rearing of their children. In the context of divorce, even if a parent was neglectful or abusive prior to the divorce, he is still entitled to be a part of his child’s life. The goal is to make divorce less

⁹⁸ Greenway, *supra* note 88, at 258.

⁹⁹ *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).

¹⁰⁰ *See id.*

¹⁰¹ *See Hodgson v. Minnesota*, 497 U.S. 417, 446-47 (1990)(holding a parent is entitled to raise their children free from undue state interference).

¹⁰² *Prince v. Massachusetts*, 321 U.S. 158, 166 (1943).

¹⁰³ Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 990 (1993).

onerous on the child.¹⁰⁴ A court may even prevent a custodial parent from relocating out of state to allow the child's relationship with both parents to continue after the divorce.¹⁰⁵ Although a stepparent may obtain rights with respect to his or her stepchild, these rights do not interfere or replace the rights that the law grants to a natural parent. There is a general understanding that the maintenance of family and biological parental ties are beneficial to the child.

The ASFA reveals, however, that Congress places no such value in maintaining the bonds between a black child and her biological parents. Deeply rooted stereotypes about black family dysfunction place no value on the relationship between poor, black parents and their children.¹⁰⁶ With the proliferation of images such as the black welfare queen and crack addicted mother, black mothers are characterized as “deviant and uncaring.”¹⁰⁷ They are criticized for “transferring a degenerate lifestyle of welfare dependency and crime to their children.”¹⁰⁸ Black fathers are simply seen as absent from the lives of their children.¹⁰⁹ These racist stereotypes about black family dysfunction are indiscriminately applied and make it difficult to imagine poor, black parents actually caring for their children. With legislation like the ASFA, the child

¹⁰⁴ See Edwin J. Terry, *RELOCATION: Moving Forward or Moving Backward?*, 31 TEX. TECH L. REV. 983, 1012 (2000) (stating the belief that if the noncustodial parent sees the child on a regular basis, the custodial parent continues to be supported and exercises appropriate discipline and the parents are able to cooperate without conflict then the child's standard of living changes little; and the transition is accompanied by no other major disruptions in the child's life there can be a satisfactory adjustment to the divorce).

¹⁰⁵ See *id.* at 988 (stating “the effect of the move on the relationship between the child and the noncustodial parent is a central concern”).

¹⁰⁶ Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 875 (1994) (“The conception of... the Victorian norm of female domesticity never applied to black women... Even after emancipation, political and economic conditions forced many Black mothers to earn a living outside the home. Americans expected Black mothers to look like Aunt Jemima, working in somebody else's kitchen: ‘outfitted in an unflattering dress, apron, and scarf (‘a headrag’), she is always ready for work and never ready for bed.’ American culture reveres no Black madonna; it upholds no popular image of a Black mother nurturing her child.”).

¹⁰⁷ Roberts, *Is There Justice*, *supra* note 36, at 131.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

welfare system becomes a misnomer. It focuses on punishing what white America has deemed “disgraceful parenting” instead of deciding what is actually best for the child. The attempt to penalize “bad mothers” and bad parenting ultimately hurts the child.¹¹⁰ Separating a child from its familial bond is extremely destructive.

The University of Florida conducted a study of infants born addicted to crack cocaine.¹¹¹ Researchers followed one group of babies that were placed in foster care and another group that remained with their birth mothers.¹¹² Although the birth mothers were struggling with addiction, they were still able to care for the infants.¹¹³ After six months, the babies were measured with regard to infant development.¹¹⁴ The children placed with their birth mothers consistently developed better than those placed in foster care.¹¹⁵ Researchers concluded the separation from their mothers was more toxic than the cocaine to the foster care children.¹¹⁶

The goal of the child welfare system should be to reunify families so that children will not suffer the toxic loss of their familial bonds. Instead, the ASFA provides incentives to states for placing black children in adoptive homes. Joyce Pavao, a family therapist who specializes in adoption issues tells the story of a foster child whose parents had their rights terminated.¹¹⁷ The boy was subsequently adopted by a new family; however, he would go to a telephone booth and

¹¹⁰ Wexler, *supra* note 30, at 134.

¹¹¹ See Family Preservation and Substance Abuse, Issue Papers (citing Kathleen Wobie, et. al., *To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine*, (paper presented at joint annual meeting of the American Pediatric Society and the Society for Pediatric Research)(May 3, 1998)), available at <http://www.nccpr.org/newissues/13.html#4>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Adler, *supra* note 35, at 11.

call his biological grandmother after the adoption was finalized.¹¹⁸ He had communicated with this grandmother for all of his life including while he was in foster care.¹¹⁹ Social workers told the adoptive parents that these lingering connections were illegal and would distract from the bonding process with the new family.¹²⁰ Pavao disagrees with the validity of this assumption stating, “[T]here is no true understanding of the need that these children had for the people who had been positive and present in their very complicated, and often traumatic, lives.”¹²¹ The ASFA and its push for adoption does not value the child’s bonds before foster care. Although there are problematic issues in the home, these issues do not negate the child’s emotional attachment to his or her parents and family members.

When describing the ASFA, one Senator commented, “The law is going to be about the joy of adoption and the bonding of a ‘real family’ to so many kids.”¹²² It is this notion that black families are not “real families” that allows our government to rip black children away from their parents. It is beyond their imagination that “black children in foster care have a strong, loving, healthy and emotional attachment to their parents.”¹²³ By promoting adoption of black children, the ASFA permanently severs this emotional attachment.

After the ASFA took effect, adoptions of foster children increased from 28,000 per year in 1996 to 50,000 per year in 2000.¹²⁴ Although this may seem like a lot, in reality, this amounts

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 12.

¹²¹ *Id.*

¹²² Roberts, *The Challenge of Substance Abuse*, *supra* note 84, at 75.

¹²³ *Id.* at 76.

¹²⁴ Wexler, *supra* note 30, at 144.

to less than one percent of the children in the foster care system being adopted.¹²⁵ Meanwhile, because the ASFA makes it easier to needlessly take children from their homes, the foster care population is increasing by an average of four percent a year.¹²⁶ Children are entering the system at a higher rate than they are being adopted, therefore the ultimate goal of the ASFA will never be realized. “America is not going to adopt its way out of the foster care crisis.”¹²⁷

Furthermore, black children are considerably less likely to be adopted than white children.¹²⁸ A California study of 3873 children who were younger than six years old when they entered foster care found that race had a substantial effect on their experience.¹²⁹ Even when all other things are equal, white children were five times more likely to be adopted than black children.¹³⁰ A black infant had the same likelihood of being adopted as a three to five-year-old white child.¹³¹ Therefore, even after parental rights have been terminated, black children will continue to drift between foster care placements. Now, however, any hope of reunification with their biological parents is lost. Most will never experience “the real family” policymakers imagined, and instead will become permanent wards of the state.

¹²⁵ *Id.*

¹²⁶ *Id.* at 145.

¹²⁷ *Id.*

¹²⁸ McRoy, *supra* note 60, at 628.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

VI. THE ASFA PERPETUATES RACISM AGAINST THE BLACK COMMUNITY

The destruction mandated by the ASFA not only affects individual black families, it perpetuates racism and disrupts the entire black community. Family integrity has always been critical to the welfare of the black community.¹³² After emancipation, many blacks made efforts to find family members and reunify where slavery had disconnected them.¹³³ They understood the necessity of familial connections.¹³⁴ The family served as the means of transferring “survival skills, values and self-esteem” to future generations.¹³⁵ State interference in the black home interferes with the black community’s ability to transmit personal and community identity to its children.¹³⁶

In addition, by devaluing the autonomy and relationships of the black family, the ASFA sends a clear message about the inferiority of the black race. The message that black people do not have the capacity to govern themselves and need state intervention in their families devalues black people and perpetuates the racial hierarchy that continues to oppress the black community. Growing up under this shield of inferiority is especially harmful to black children.

As renowned historian Dr. John Henrik Clarke noted, “[T]he family is the soul, the spirit and the cornerstone of the nation. If the family dies, so does the nation.”¹³⁷ With this understanding that families are the essential network that builds a nation, strong black families

¹³² See JOHN HENRIK CLARKE: A GREAT AND MIGHTY WALK (Black Dot Media 1996) (quoting Dr. Clarke).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Roberts, *Child Welfare supra* note 71, at 179.

¹³⁶ *Id.*

¹³⁷ See JOHN HENRIK CLARKE, *supra* note 132.

are imperative to the liberation and economic advancement of the black community.¹³⁸ Family associations serve an important political function.¹³⁹ They both facilitate and constrain the power of the government by nurturing support and resistance of particular governmental views.¹⁴⁰ Disrupting black families harms the political power of the black community and usurps its ability to effectuate social change.¹⁴¹ It weakens the collective ability for black people to overcome “institutionalized discrimination and work toward greater political and economic strength” and ultimately, “reinforces the continued political subordination of blacks as a group.”¹⁴²

VII. THE ASFA DOES NOT ADDRESS THE SOCIO-ECONOMIC CONTEXT THAT RESULTS IN THE PLACEMENT OF BLACK CHILDREN IN FOSTER CARE

The ASFA represented the first piece of legislation in which “states have a federal mandate to protect children from abuse and neglect but no corresponding mandate to provide basic economic support to poor families.”¹⁴³ It has already been demonstrated that the ASFA’s goal of adoption will do little to cure the overpopulation of children in the foster care system. Instead, policymakers should focus on the underlying social ills of poverty, incarceration and substance abuse that plague the communities of this nation’s poor. Dorothy Roberts, an expert

¹³⁸ *Id.*

¹³⁹ David J. Herring, *Rearranging the Family: Diversity, Pluralism, Social Tolerance and Child Custody Disputes*, 5 S. CAL. INTERDISC. L.J. 205, 221 (1997).

¹⁴⁰ Dailey, *supra* note 103, at 997-98.

¹⁴¹ Roberts, *Is There Justice*, *supra* note 36, at 140.

¹⁴² *Id.*

¹⁴³ *Id.* at 132.

on child welfare policy,¹⁴⁴ noted, “[I]n the past several decades, the number of children receiving welfare services has declined dramatically, while the foster care population has skyrocketed. As the child welfare system began to serve fewer white children and more children of color, state and federal governments spent more money on out-of-home care and less on in-home-services.”¹⁴⁵

Foster care has become the main resource that the child welfare system provides to black families in need.¹⁴⁶ The ideology of “rescuing the child” by removing it from the home has caused caseworkers to separate children from their parents even when it may not be in the best interest of the child.¹⁴⁷ Parents may often still be able to care for their children while they face substance abuse issues.¹⁴⁸ In most cases “keeping children with their parents while offering intensive family preservation services and drug treatment is safer, more stable, and less traumatic for children than placing them in the care of strangers in the foster care system.”¹⁴⁹ Child welfare policy needs to place a greater emphasis on family preservation programs for the sake of the children.

Although family preservation programs are essential to combat the increase in foster care placements, local governments oftentimes do not have the financial resources to fund such

¹⁴⁴ Dorothy Roberts is the Kirkland and Ellis Professor at Northwestern University School of Law and a Faculty Fellow for the Institute for Policy Research. She is a frequent speaker on issues related to race, gender, and the law and has published more than 50 articles in law reviews and books. She has also authored books on the subject including *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* and *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY*.

¹⁴⁵ *Racial Harm*, *supra* note 78, at 19.

¹⁴⁶ *The Challenge of Substance Abuse*, *supra* note 84, at 83.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 84.

programs.¹⁵⁰ A 2005 nationwide survey of city officials released by the National League of Cities and the Institute for Youth, Education and Families, determined that affordable housing, high-quality child care, before and after-school programs and substance abuse programs were significantly lacking in many communities.¹⁵¹ The survey also identified a need for more employment opportunities for adults, parenting education, youth employment and youth crime prevention programs, child abuse prevention efforts and early childhood education programs.¹⁵² All of these programs require a financial commitment from the state. Without such a commitment, more children are likely to be removed from their homes as a consequence of extreme poverty, and black children will continue to be ripped away from their families.

VIII. THE ASFA INFRINGES ON THE CONSTITUTIONAL RIGHT TO FAMILY INTEGRITY

The ASFA can also be analyzed through the framework of constitutionality. The U.S. Supreme Court has recognized family integrity as a fundamental right.¹⁵³ If a right is “fundamental,” it is entitled to heightened protection from state inference.¹⁵⁴ Therefore, any state action that infringes on a fundamental right is subject to strict scrutiny.¹⁵⁵ Strict scrutiny requires courts to perform a two part analysis. First, the state action must be justified by a

¹⁵⁰ See Cheryl Katz & Christopher Hoene, *Strengthening Families in America's Cities: A Survey on Municipal Conditions, Policies and Resources for Children and Families*, in RESEARCH REPORT ON AMERICAN CITIES 4 (National League of Cities 2005), available at <http://www.nlc.org/content/Files/RMPstrengtheningfamiliesrpt05.pdf> (finding communities are being constrained by tight fiscal conditions that limit their ability to address the needs of children and families).

¹⁵¹ *Id.* at 10.

¹⁵² *Id.*

¹⁵³ See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹⁵⁴ See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

¹⁵⁵ *Id.*

compelling governmental interest, and the means chosen must be essential to furthering that interest.¹⁵⁶ Second, the state action must be the least intrusive way of furthering the governmental interest.¹⁵⁷

Child protection is a compelling interest and clearly justifies state intervention into the family sphere.¹⁵⁸ The question then becomes: “Is removal of the child from the parent’s custody the essential, least restrictive means of protecting the child?”¹⁵⁹ Since states have continuously reduced social service programs, foster care is often the only service available to protect the child. Courts should use their authority to require policymakers to develop less “restrictive means” than the removal of children from their homes to further the interest of child protection. Without this check from the bench, legislation like the ASFA will continue to make it easier to remove black children from their homes.

Even if foster care is found to be the “least restrictive means” of achieving child protection, serious constitutional problems arise when the state attempts to terminate parental rights. The fundamental right the parent and child have in staying together remains intact, even after temporary removal through foster care. The state must have a new interest, aside from child protection, to justify terminating the parental rights of a parent. While a state may argue that permanency or providing a safe and stable home for the child is its compelling interest, terminating parental rights is oftentimes not essential to furthering this interest.

¹⁵⁶ Theresa D. Legere, Note, *Preventing Judicially Mandated Orphans*, 38 FAM. & CONCILIATION CTS. REV. 260, 271 (2000).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Under the strict scrutiny standard, the state must demonstrate that terminating parental rights is essential to achieving permanency in the life of a child. Terminating parental rights without more is not an essential means of achieving permanency. Permanency can better be achieved either through reunification or adoption. Although terminating parental rights makes the adoption process easier, as discussed previously, termination alone does not ensure the child is adopted. Termination is therefore not an appropriate “means” to achieve permanency. The strict scrutiny standard requires more. An adoptive home must be in place before parental rights are terminated. This will ensure rights are only terminated where a means of achieving permanency exists. Without such an adoptive home, the fundamental right to the parent-child relationship should not be severed.

Even if a court determines that terminating parental rights is a means to achieve permanency, the termination still does not withstand strict scrutiny. The second part of the strict scrutiny analysis is that the state must demonstrate that termination is the least restrictive means of achieving a safe and stable home for the child. This requirement was put in place to ensure there are no less restrictive alternatives available that would achieve the same interest without violating a fundamental right.¹⁶⁰ There are situations where it is necessary to terminate parental rights because children are being seriously abused and are at serious risk of harm from their parents. The ASFA, however, does not distinguish these serious cases, which are relatively rare, from the majority of cases where children enter foster care because of neglect. These children have not suffered, nor are they at serious risk of suffering, child abuse; therefore the state should not be able to terminate parental rights because less restrictive alternatives are available.

¹⁶⁰ *See id.* at 272.

For example, the state may seek to terminate the rights of a parent whose child was placed in foster care because she was living in unsanitary conditions and was often forced to go hungry. Without government assistance, the parent has been deemed unfit. She is unable to meet the specifics of the case plan to secure adequate housing and a steady income. Instead of severing the fundamental right to a family, a less restrictive means would be for the state to provide adequate funds for the families' basic necessities of food and shelter.¹⁶¹ Terminating parental rights is over-inclusive.¹⁶² Spending money to provide families with meaningful aid is a clear alternative to termination. Furthermore, termination does not get at the heart of the problem that created the neglectful environment. It focuses on punishing the parent for making bad choices or sometimes for simply being poor.

Additionally, in 2001, the Illinois Supreme Court held the fifteen month provision of the state's Adoption Act unconstitutional.¹⁶³ The law, based on the mandate of the ASFA, presumed a parent unfit after a child had been in foster care for fifteen months and moved to terminate parental rights.¹⁶⁴ *In re H.G.* involved a parent whose substance abuse problem prevented her from meeting the requirements stipulated by caseworkers, and therefore from achieving reunification within the fifteen month specification.¹⁶⁵ The Illinois Supreme Court recognized the fundamental right to family integrity and invoked strict scrutiny to analyze the state's

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *In re H.G.*, 757 N.E.2d 864, 874 (Ill. 2001) (holding that the fifteen-month provision of the Illinois Adoption Act, 750 Ill. Comp. Stat. 50/1(D) (m-1)(2001), was unconstitutional under the Fourteenth Amendment and the Illinois Constitution, as it violates substantive due process).

¹⁶⁴ *Id.* at 866.

¹⁶⁵ *Id.* at 867.

action.¹⁶⁶ The court held the provision was unconstitutional as a violation of substantive due process under both the Fourteenth Amendment and the Illinois Constitution.¹⁶⁷ The presumption of unfitness was not narrowly tailored to the compelling goal of identifying unfit parents, because in many cases the length of a child's stay in foster care had nothing to do with the parent's ability or inability to safely care for the child, but instead was due to circumstances beyond the parent's control.¹⁶⁸ This step by the Illinois Supreme Court is indeed a victory for black families.

IX. EQUAL PROTECTION AND PROCEDURAL DUE PROCESS LIMITATIONS OF THE ASFA

There are additional procedural challenges to the constitutionality of terminating parental rights. Since poor, black families are disproportionately affected by the ASFA's fifteen month parental rights termination provision, a discrimination claim may be viable because of the legislation's disparate impact on blacks.¹⁶⁹ *Washington v. Davis*, however, deflates the hopes of substantiating the claim.¹⁷⁰ Although the disparity along racial lines is clear in the foster care system, it can easily be attributed to economics instead of racial discrimination. In *Davis*, the Supreme Court held that under the Equal Protection Clause of the Fourteenth Amendment, if disparate impact on racial grounds is explainable on non-racial grounds, then the law is not

¹⁶⁶ *Id.* at 871.

¹⁶⁷ *Id.* at 874.

¹⁶⁸ *Id.*

¹⁶⁹ Wilhelm, *supra* note 12, at 632.

¹⁷⁰ *Washington v. Davis*, 426 U.S. 229 (1976).

unconstitutional.¹⁷¹ A recent Tennessee District Court decision in *Brian A. v. Sundquist*, however, acknowledged that race impacted foster care services in Tennessee.¹⁷² Although the suit was filed on behalf of all foster children in state custody, it contained a putative subclass of black children alleging that not specifically the ASFA, but the Tennessee adoption and permanency services, generally, had a discriminatory effect on black foster children.¹⁷³ The case was settled on July 30, 2001.¹⁷⁴ The settlement included general provisions to reform the foster care system as well as specific provisions to evaluate if black children “receive disparate treatment or suffer disparate impact, to assess the causes for such disparities, and recommend solutions.”¹⁷⁵ Although this settlement holds the state accountable for its actions on behalf of black children, a more plausible attack on the constitutionality of the ASFA’s termination provision would be a disparate impact claim based not on race, but on poverty.¹⁷⁶

The unconstitutionality of the ASFA’s fifteen month termination provision because of its disparate impact on the poor is supported by the Supreme Court’s decision in *M.L.B. v. S.L.J.*¹⁷⁷ In *M.L.B.*, the Court held that the Fourteenth Amendment does not allow a state to condition appeal from a termination proceeding on an indigent parent’s ability to pay for transcript fees, where the transcript is necessary for the proceedings.¹⁷⁸ The Court stated, “[c]hoices about

¹⁷¹ *Id.*

¹⁷² *Brian A. v. Sundquist*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000).

¹⁷³ *Id.* at 944.

¹⁷⁴ *McRoy*, *supra* note 60, at 629.

¹⁷⁵ *Id.*

¹⁷⁶ *Wilhelm*, *supra* note 12, at 633.

¹⁷⁷ *Id.*

¹⁷⁸ *M.L.B. v. S.L.J.*, 519 U.S. 102, 128 (1996).

marriage, family life, and the upbringing of children are among associated rights this Court has ranked as ‘of basic importance in our society’ ...rights sheltered by the Fourteenth Amendment against the State’s unwarranted usurpation, disregard or disrespect.”¹⁷⁹ The Court concluded that termination of parental rights was comparable to a criminal punishment.¹⁸⁰ Unlike loss of custody, the termination of parental rights is irrevocable and results in the loss of one of the most fundamental relationships.¹⁸¹ This decision introduces the precedent that termination proceedings cannot disparately impact the poor.¹⁸² Indigent parents cannot be forced to endure the severity of a termination of their parental rights because of their poverty.

Under the *M.L.B.* precedent, it could be argued that the Fourteenth Amendment should protect not only the ability to pay transcript fee, but also other limitations imposed by poverty such as the ability to secure housing or obtain adequate heating or utilities. An indigent parent who is unable to retain custody of their children within the ASFA’s fifteen month provision because of challenges created by extreme poverty should be able to argue a viable disparate impact challenge to termination.¹⁸³

Another way to challenge the constitutionality of terminating the parental rights of black parents is through the Due Process Clause.¹⁸⁴ In *Santosky v. Kramer*, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires at least clear and convincing

¹⁷⁹ *Id.* at 116.

¹⁸⁰ *Id.* at 125.

¹⁸¹ *Id.* at 118-119.

¹⁸² Wilhelm, *supra* note 12, at 633.

¹⁸³ *Id.*

¹⁸⁴ Legere, *supra* note 156, at 268.

evidence in a proceeding to terminate parents' rights to their children.¹⁸⁵ The Court noted the evidence presented at termination hearings is very subjective.¹⁸⁶ Value judgments are often included in appraisals of the nature and quality of the parent-child relationship.¹⁸⁷ Additionally, the agency's power in the vast majority of cases is far greater than parents' best efforts at defending themselves.¹⁸⁸ The Supreme Court held that because the process is highly susceptible to error, it is entitled to heightened procedural protection.¹⁸⁹ The Court therefore concluded that proof by preponderance of the evidence is inappropriate and a termination requires at least the intermediate standard of proof, clear and convincing evidence.¹⁹⁰

Instead of the clear and convincing evidence standard the Court dictated in *Santosky*, a more appropriate standard of proof would be proof beyond a reasonable doubt.¹⁹¹ The reasonable doubt standard is used in criminal matters and stems from societal concern regarding the risk of error.¹⁹² Criminal conviction results in incarceration and a deprivation of physical liberty. In order to subject an individual to such severe punishment, our society demands this heightened, reasonable doubt standard of proof. The Supreme Court has stated, "the risk of error to the individual must be minimized even at the risk that some who are guilty might go free."¹⁹³

¹⁸⁵ *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 763.

¹⁸⁹ *Id.* at 769.

¹⁹⁰ *Id.*

¹⁹¹ J. Bohl, "Those Privileges Long Recognized": Termination of Parental Rights Law, the Family Right To Integrity and the Private Culture of the Family, 1 *CARDOZO WOMEN'S L.J.* 323, 365 (1994).

¹⁹² See *Patterson v. N.Y.*, 432 U.S. 197, 208 (1977).

¹⁹³ *Id.*

Termination of parental rights is comparable to a criminal conviction and should require the reasonable doubt standard of proof. In *Santosky*, the Court admits a termination proceeding “bears many of the indicia of a criminal trial.”¹⁹⁴ Comparing incarceration to a termination of parental rights, Justice Stevens commented that “often the deprivation of parental rights will be the more grievous of the two.”¹⁹⁵ Incarceration is usually only for a specific period of time, while termination is irreversible and severs the familial bond forever. Therefore, society should demand the strictest standard of proof before severing familial bonds.

Congress did apply the reasonable doubt standard of proof to the termination of parental rights in the Federal Indian Child Welfare Act (ICWA).¹⁹⁶ The ICWA was enacted because Congress recognized the problems associated with excessive state intrusion into Native American families.¹⁹⁷ They wanted to combat the disproportionately high percentage of Native American children removed from their homes.¹⁹⁸ The ICWA takes the viewpoint that the best interest of the child is to remain with his or her family.¹⁹⁹ The legislation assures parents the procedural protection of assistance of counsel and removes a child from the home only upon the ultimate finding, established by proof beyond a reasonable doubt that continued parental custody would probably result in serious damage to the child.²⁰⁰

¹⁹⁴ *Santosky v. Kramer*, 455 U.S. 745, 762 (1982).

¹⁹⁵ *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 59 (Stevens, J., dissenting).

¹⁹⁶ 25 U.S.C. § 1912(f) (1988).

¹⁹⁷ *See Bohl, supra* note 191, at 358.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 359.

²⁰⁰ 25 U.S.C. § 1912(f).

Congress understood that removing Native American children from their families resulted in the general destruction of Indian culture, but demonstrates no such understanding when it comes to black families and culture. The ICWA adopts the position that it is in the best interests of a Native American child to remain with his or her family and implements this presumption through jurisdictional provisions.²⁰¹ In contrast, the ASFA takes the position that adoption, often to white homes, is in the best interest of black children.

X. CONCLUSION

The ASFA devalues black families by severing the bond between black children and their parents. Under the guise of achieving permanency in the lives of children, the legislation terminates parental rights and makes adoption, instead of reunification, its priority. The ASFA provides financial incentives to terminate the rights of black parents and place their children up for adoption, but no financial support for programs to reunify their families.

Family is the foundation of a community. Preservation of black families is essential to the advancement of the black community. By destroying black families, the ASFA disrupts the political power of the black community and prohibits the community from transferring culture and a sense of identity to future generations. Furthermore, the ASFA's termination of parental rights raises issues of constitutionality on substantive and procedural due process and equal protection grounds.

The child welfare system must take into account the disproportionate effect and destruction the ASFA has on the black community. A shift in the focus of the system, with legislation directed at addressing the underlying social ills that are at the root of foster care

²⁰¹ Bohl, *supra* note 191, at 359.

dependence is essential. Respect for the familial bonds between black children and their parents must be supreme. Our child welfare system must focus its efforts on family preservation and reunification instead of permanently severing the relationship between black children and their parents.