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ASFA: An Assault on Family Preservation by Dorothy Roberts

Roberts, a professor of law at Northwestern University, argues that ASFA is a wrong-headed assault on family preservation that goes far beyond its goal of ensuring children's safety and establishes "a preference for adoption as the means of reducing the exploding foster care population."

Excerpted from *Shattered Bonds: The Color of Child Welfare* (2002), by Dorothy Roberts. Reprinted by permission of Basic Civitas Books, New York, N.Y.

»The New Federal Adoption Law

It is often said that American child welfare policy operates like a pendulum. It swings from expressing the predominant objective of keeping troubled families together to making protection of children from parental harm its top priority. Family preservation and child safety are treated as two opposing ends of the spectrum of child welfare concerns. These shifts have not been based on any real changes in rates of child maltreatment. They are often responses to highly publicized incidents of abuse by parents or by the system and to the political currents surrounding child welfare debates. "Watching federal policy develop in the field of child abuse and neglect over the past two decades has been like watching the sunrise in Barrow, Alaska in late November!" proclaimed one expert. "Federal and state political action over the last several decades could be characterized as being symbolic rather than substantive, reactive and punitive rather than proactive and supportive (of either children or adults)."²

In reality, child welfare policy in the past century has never swung entirely to the side of family preservation or child protection. Federal and state policies have reflected to varying degrees both a family-centered and a child saving philosophy. Programs designed to maintain poor children in their homes have existed alongside the practice of placing poor children in substitute care since the early 1900s. Although child welfare agencies abandoned an official policy of removing children on grounds of poverty alone, they never fully embraced the policy of supporting poor families. Their professed concern for family preservation serves more as a justification for their continued reliance on child removals for parents who are deemed unreformable. ...

In the 1970s Congress began to examine the toll that foster care was taking on children and their families. Leading scholars criticized the child welfare system for unnecessarily removing children from their homes and leaving them to languish in foster care.³ Hearings on Capitol Hill revealed that federal policy created financial incentives for state child welfare authorities to prefer placing children in foster care over keeping families intact.⁴ The federal government reimbursed states for the costs of out-of-home placements but not for services provided to families within the home. Stanford law professor Michael Wald noted in 1976 that, although state child welfare agencies received federal funds for each child in their custody, "the agency loses this money when the child is returned home, even though the agency must still provide services to the child."⁵ Congress attempted to correct the overemphasis on foster care by passing legislation that tied federal funding to reforms in states' approaches to child welfare. The Adoption Assistance and Child Welfare Act of 1980 encouraged states to replace costly and disruptive out-of-home placements with preventive and reunification programs. The law, which is still in effect today, requires that before placing children in foster care, state agencies must make "reasonable efforts" to enable them to remain safely at home. It also mandates that states make reasonable efforts to safely return children in foster care to their parents.

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In the past several years, the pendulum of child welfare philosophy has swung decisively in the opposite direction. Congress has abandoned the focus on preventive and reunification programs it once expressed. Leading the way is the Adoption and Safe Families Act enacted by Congress in 1997 to amend the 1980 Child Welfare Act.⁶ President Clinton signed the law within a year of directing the federal government to take steps to double the number of foster children adopted annually to 54,000 by 2002.⁷ The new federal adoption law -- known as "ASFA" -- represents a dramatic change in the way the federal government deals with the overloaded foster care system. Its orientation has shifted from emphasizing the reunification of children in foster care with their biological families toward support for the adoption of these children into new families.

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. The goal of permanency stands as a pillar of current child welfare philosophy. Two books were particularly influential in convincing policy makers that permanent homes are essential to healthy child development.⁸ Mass and Engler's *Children in Need of Parents*, published in 1959, was the first book to document foster care drift and the psychological harms that stem from multiple placements. The 1973 classic, *Beyond the Best Interests of the Child*, asserted that continuity in children's relationships with a caregiver is essential to normal psychological development. Its authors, Joseph Goldstein, Anna Freud, and Albert Solnit, argued that children separated from their parents can form bonds of attachment with other adults who fulfill the role of parent. The longer children are away from their biological parents, the more likely they will bond with their new "psychological parents." According to "psychological parent" theory, moving children after these bonds have formed causes serious emotional damage. Critics have soundly denounced this perspective for discounting the connections children maintain with their parents even while in substitute care, as well as children's ability to develop relationships with more than one "psychological parent."⁹ Empirical studies show, for example, that children in foster care suffer psychological harm when they are cut off from their family and that they benefit from contact with their parents during placement. Policy makers and judges nevertheless hold fast to the preeminence that Goldstein, Freud, and Solnit accorded permanency.¹⁰

Concern for permanency places a limit on the federal mandate that state agencies make reasonable efforts to reunify children in foster care with their parents. Returning children home quickly satisfies their need for permanency, but what happens if parents are not ready to take back the child? How long can reunification efforts take before the damage of unstable custody arrangements occurs? At what point should agencies give up on parents for the sake of placing children in a permanent home? Judges are not willing to wait forever for parents to become fit enough to regain custody of their children. Most states have enacted statutes that make the length of time a child remains out of the legal custody of the parent a ground for terminating the parent's rights. In fact, the most common reason courts use for termination is a finding that the child has been in foster care longer than the law allows.¹¹ Although the 1980 federal law encouraged reuniting children with their biological parents, it also provided for termination of parental rights as an avenue for permanency. The 1997 amendment intensifies the tension between permanency planning and family reunification by putting added pressure on states to expeditiously free children for adoption. In cases of conflict between reunification and permanency efforts, permanency must prevail.

Proponents of the policy change framed their critique of family preservation philosophy as a defense of children's rights. They argued that keeping families together often sacrifices children's interests for the sake of parental rights. Representative Deborah Pryce 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."¹² The *Washington Post* praised the law for putting "a new and welcome emphasis on the children,"¹³ 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."¹⁴

Advocates drummed up support for ASFA by pointing to cases where family preservation failed miserably. They recounted tragic stories of children who were killed after caseworkers returned them to blatantly dangerous parents. They passed around photographs of abused children to members of Congress. Perhaps the most effective rallying tool was *The Book of David: How*

Preserving Families Can Cost Children's Lives by prominent family violence scholar Richard Gelles. *The Book of David* reported the events surrounding the suffocation of a little boy by his abusive mother after caseworkers sent him home from foster care. Gelles attributed this tragic lapse in judgment to the priority policy makers placed on families, rather than children. According to Gelles, caseworkers were interpreting the requirement to use "reasonable efforts" to preserve families to dictate reunification at all costs. Family preservation policies were a license to risk children's safety. Gelles argued that "the basic flaw of the child protection system is that it has two inherently contradictory goals: protecting children and preserving families." He advocated reinventing the child welfare system "so that it places children first."¹⁵

Numerous newspaper articles at the time also blamed cases of deadly child abuse on family reunification policies. In "The Little Boy Who Didn't Have to Die," *McCall's* claimed that a boy who was returned home from foster care "appears to have been doomed by a decade-old national policy determined to patch up troubled parents and preserve families."¹⁶ *New York Newsday* made the same point in an article explosively titled "Family Preservation -- It Can Kill."¹⁷ Members of Congress waved these stories about tragic child abuse cases as evidence that federal policy should abandon its emphasis on family unity. "Every one of us in this body can turn to and refer to headlines in their papers," Representative Barbara Kennelly, one of the bill's sponsors, stated during the House debate, "the terrible, heartbreaking case with little Emily in Michigan, other cases across the United States, headlines telling us the very worst can happen."¹⁸ Senator John Chafee, the law's coauthor, recalled the child abuse death of Sabrina Green. "Now, Mr. President," he said, "we cannot bring Sabrina Green back to life, but we can take action to prevent such deaths in the future."¹⁹ In short, ASFA supporters placed children's right to be safe in opposition to parents' right to custody of their children.

These statements follow a very common habit of contrasting parents' rights and children's rights. This way of framing the issue assumes that parents and children's interests are in opposition to each other. And it assumes that only parents -- and not children -- have an interest in family integrity. ASFA is said to be "child centered" because it focuses on safety, whereas the prior law was "parent centered" because it focused on keeping families together. But many child welfare scholars and activists have refuted this opposition of children's to families' rights.²⁰ As Bruce Boyer, a clinical professor in the Children and Family Justice Center of Northwestern University Law School, put it, "in family preservation, to my mind, there's a commonality of interests."²¹ Typically, furthering a family's interests will also benefit the children who belong to that family. Children also have an interest in maintaining a bond with their parents and other family members. The reason for limiting state intrusion in the home, therefore, is not only a concern for *parental* interests but also the recognition that children suffer when separated from their parents and community.

ASFA places limits on the reasonable efforts mandate that was blamed for caseworkers' deadly mistakes. It generally narrows the requirement by directing state authorities to make the health and safety of children in foster care their "paramount concern." It also exempts states from using reasonable efforts to return children who are abandoned, tortured, or repeatedly or severely abused. Most people would agree that children have an interest in, if not a right to, government protection from this sort of violence. Yale law professor Akhil Amar has argued that the Thirteenth Amendment requires states to protect children from the domination of an abusive parent just as they protect citizens from enslavement.²²

But the new law's reform goes far beyond ensuring the safety of children who have been removed from violent homes. Victims of severe abuse covered by these provisions are a tiny minority of children in foster care and represented "easy cases" for termination even before the law was amended.²³ Most children in foster care, who were removed from their homes because of poverty-related neglect, will be affected more by Washington's major policy initiative -- the emphasis on terminating parental rights to make children available for adoption. The federal adoption law and the rhetoric promoting it weaken the government's commitment to family preservation and establish a preference for adoption as the means of reducing the exploding foster care population. Congressional sponsors declared that ASFA "is putting children on a fast track from foster care to safe and loving and permanent homes."²⁴ Most of the children referred to in this statement are Black. And the homes the law supports are adoptive, not biological, ones.

Congress implemented its preference for adoption through a set of mandates and incentives to state child welfare departments. The new law establishes swifter timetables for terminating biological parents' rights to "free" children for adoption. Termination of parental rights is the most extreme measure judges can impose in abuse and neglect cases. It permanently severs the legal ties between parent and child, ending the parent's physical custody, "as well as the rights ever to visit, communicate with, or regain custody of the child."²⁵ The laws of every state permit juvenile or family court judges to terminate the rights of parents found to be unfit to care for their children. Judges frequently terminate the rights of parents whose children have been in foster care beyond a statutory deadline. These deadlines have little to do with child abuse; they instead concern the length of time a child has spent out of the parents' custody. Provisions like this affect parents whose children have been in foster care for too long but whose rights could not be terminated on other grounds.

Termination of biological parents' rights is a necessary prerequisite for children to be adopted by new parents. ASFA accelerates this process. The law requires a permanency hearing to be held within a year of a child's entry into foster care. If the child is still in foster care three months later, the child welfare agency may have to start termination proceedings. The law mandates that states file a petition to terminate the rights of parents whose child has been in foster care for fifteen of the previous twenty-two months. (The law allows states to exempt cases where a relative is caring for the child, where a compelling reason exists that termination would not be in the best interests of the child, or where the agency did not make reasonable efforts for reunification.) By 1999, all fifty states had passed legislation that mirrored or was tougher than the federal law.²⁶ Some states imposed even shorter deadlines and expanded the grounds for severing biological ties. In Nevada, for example, a parent's failure to comply with the terms of the reunification plan within six months can trigger a hearing on termination of parental rights. The American Bar Association initiated the "Termination Barriers Project" to develop guidelines for state legislation promoting early termination of parental rights.²⁷

Some child welfare experts have criticized the imposition of accelerated time clocks on parents who are trying to regain custody of their children. In testimony on the proposed federal adoption law, 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."²⁸ Jess McDonald, Director of the Illinois Department of Children and Family Services, charged 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 the child." These experts in the field recognized that it can be harmful to children to place a deadline on agencies' efforts to reunite them with their parents.

ASFA also offers financial incentives to states to get more children adopted. The federal government pays states a bonus for foster child adoptions during the fiscal year that exceed a baseline of the average annual number of children adopted in the state between 1995 and 1997. States receive \$4,000 for each child adopted above the baseline. The bonus goes up to \$6,000 for each adoption of a special needs child. There is also technical assistance to states to increase the number of adoptions. The law provides for the Secretary of Health and Human Services to help states 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 pre-adoptive placements. These federal enticements are spurring states, in turn, to put pressure on agencies to move more children into adoptive homes. Children's Services of Roxbury, a private social service agency in inner-city Boston, was given a quota.²⁹ The state told the agency to double the number of children it usually placed for adoption. The Illinois Department of Children and Family Services circulates a list of agencies ranked by the percentage of children they move into adoptive homes. "It's embarrassing to get a low ranking," says the director of a Chicago agency.³⁰

The incentives appear to be working. There were 46,000 adoptions of foster children in 1999, a 28 percent increase from the previous year. The number of adoptions doubled in Illinois, and they went up 75 percent in Texas and 57 percent in Florida. Forty-two states earned \$20 million in federal adoption bonuses.³¹ The federal incentives to move children out of foster care steer states in one direction. They encourage states to get more children adopted.

But the new law doesn't provide comparable financial incentives or technical help to states to improve their family preservation programs.

Another key component of the move toward adoption is "concurrent permanency planning." This policy places foster children on two trades at the same time -- one trade focuses on reuniting them with their parents; the other seeks to find them a permanent home with another family. Caseworkers must pursue both goals simultaneously. The point of this policy is to ensure that there will be a permanent home waiting for children in the event that reunification efforts fail. Concurrent permanency planning is supposed to keep children from being stranded in foster care. But this policy puts caseworkers in a schizophrenic position. It intensifies the conflict already inherent in child welfare practice between preserving families and seeking adoptive homes. ...

Giving agencies the conflicting missions of reuniting foster children with their families while preparing them for adoption is likely to dilute agencies' efforts at family preservation. When children enter the child welfare system they become candidates for adoption. By offering bonuses for adoption, the new federal law weakens even more caseworkers' incentive to keep families together. "Can unbiased decisions be made with regard to the risk to a child in an atmosphere where adoptive placements are being encouraged and financially rewarded?" asks one social work professor.³³ The scales are weighted toward ending children's ties with their parents and moving them into adoptive homes.

As part of concurrent planning, children are increasingly placed for foster care in a potential adoptive home. The new terms for these arrangements are "fost-adopt" or "pre-adoptive" placements. There is new federal money available to assist states in developing programs that place children in preadoptive families without waiting for termination of parental rights. Turning foster homes into adoptive ones avoids uprooting the child if reunification fails and adoption occurs. Ideally, the child's birth parents will get to know the foster/adoptive parents during the concurrent planning process and can feel more comfortable about the adoption. But these benefits occur only in cases where adoption is inevitable or mutually agreed upon. Placing foster children in preadoptive homes while parents are still struggling to reunify the family preordains the outcome. Seeing foster parents as adoptive parents, moreover, gives them a vested interest in the breakdown of preservation efforts. Foster parents have a great deal of influence over the children in their care and their visitation schedules. They are instructed to report negative incidents between biological parents and children. When both caseworkers and foster parents team up to pursue adoption, it is easy to sabotage biological parents' efforts to maintain ties with their children. ...

The new law's supporters argue that these measures are critical for the more than 100,000 foster children who are awaiting adoption.³⁵ Of course, states should often facilitate adoption of children who have been abandoned by their parents or who cannot be returned safely to their families. But there is a big difference 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. ASFA threatens to permanently separate children from families, families that might have been preserved with the right incentives, adequate state resources, or creative custody arrangements. Family preservation efforts often fail because they are inadequate: children are returned to troubled homes without focusing on the right problems and without providing the level or continuity of services required to solve them. Having never delivered on its promise to support poor families, Congress is now using the alleged failure of family preservation programs to justify permanently separating more ... children from their parents.

»Footnotes

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5. Wald, "State Intervention on Behalf of 'Neglected' Children," 679.

6. *Adoption and Safe Families Act of 1997*, Public Law 105-189, 111 Stat. 2115 (1997) (codified in scattered sections of U.S. Code, vol. 42).

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9. Matthew B. Johnson, "Examining Risks to Children in the Context of Parental Rights Termination Proceedings," *New York University Review of Law and Social Change* 22 (1996): 397.
10. For an excellent study and critique of judicial opinions adopting psychological parent principles, see Peggy C. Davis, "'There Is a Book Out ...': An Analysis of Judicial Absorption of Legislative Facts," *Harvard Law Review* 100 (1987): 1539.
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16. Amanda Spake, "The Little Boy Who Didn't Have to Die," *McCall's*, November 1994, p. 142.
17. Michael Quinn, "Family Preservation: It Can Kill," *Newsday* (New York), January 11, 1996, p. A33.
18. *Congressional Record*, 143d Cong., H2012-06, H2017, daily ed., April 30, 1997.
19. *Congressional Record*, 143d Cong., S12526-92, S12526, daily ed., Nov. 13, 1997.
20. See, for example, Renny Golden, *Disposable Children: America's Child Welfare System* (Belmont, Calif.: Wadsworth, 1997), pp. 152-155; Cornel West and Sylvia Ann Hewlett, *The War Against Parents: What We Can Do for America's Beleaguered Moms and Dads* (Boston: Houghton Mifflin, 1998); Marsha Garrison, "Why Terminate Parental Rights?" *Stanford Law Review* 35 (1983): 423.
21. Golden, *Disposable Children*, p. 153.
22. Akhil Reed Amar and Daniel Widawsky, "Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney," *Harvard Law Review* 105 (1992): 1359.
23. Madelyn Freundlich, *Expedited Termination of Parental Rights: Risks and Benefits* (The Evan B. Donaldson Adoption Institute, February 9, 1999), available at <http://www.adoptioninstitute.org/policy/polexp.html>.
24. *Congressional Record*, 143d Cong., H10776-05, H10787, daily ed., Nov. 13, 1997 (statement of Rep. Kennelly).
25. *Santosky v. Kramer*, 455 U.S. 745, 749 (1982).
26. United States General Accounting Office, *Foster Care: States' Early Experiences Implementing the Adoption and Safe Families Act* (December 1999), p. 2.
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33. Leslie Doty Hollingsworth, "Adoption Policy in the United States: A Word of Caution," *Social Work* 45 (March 1, 2000): 185.
35. See Children's Defense Fund, *The State of America's Children* (Washington, D.C.: Children's Defense Fund, 1998), p. 66.

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