The controlling federal family regulation law, the Adoption and Safe Families Act of 1997 ("ASFA"), has long been criticized for unnecessarily terminating the rights of parents and leaving thousands of children in its wake without legal parents or any prospect for adoption. Critics highlight the irreparable destruction ASFA has caused to the Black community, and many suggest that this result is by design, not disproportionate impact. As a result, a growing movement of impacted parents, advocates, and scholars has called for ASFA's total repeal. This article draws on the work of these parents, advocates, and scholars to argue that a law whose foundation is built on inherently prejudicial policies cannot be repaired; it must be dismantled in its entirety. Dismantling is necessary not only for practical legal reasons, but also because of the symbolic importance of repeal to those most impacted by the law and its attendant policies. Laws have expressive value, and as such, repeal of harmful laws demonstrates our priorities, our beliefs and who we are as a society. This article examines previous attempts at reform to demonstrate that any attempt to amend ASFA would be insufficient to address its fundamental flaws. Finally, the article concludes by proposing a path forward that is led by impacted families, respects the right to family integrity and recognizes the importance of supporting and investing in communities.

The Adoption and Safe Families Act is Not Worth Saving: The Case for Repeal

Shanta Trivedi[1*]

"[B]ad laws, if they exist, should be repealed as soon as possible." – Abraham Lincoln[2]

INTRODUCTION

The Adoption and Safe Families Act ("ASFA") has been described by critics as a "continuation of many troubling histories in the United States where normative judgements around who were worthy families and who were not, who were worthy communities and who were not . . .

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[2] Abraham Lincoln, *The Perpetuation of Our Political Institutions (Address by Abraham Lincoln before the Young Men's Lyceum of Springfield)*, 6 J. OF THE ABRAHAM LINCOLN ASS'N 6, 10 (1984), http://hdl.handle.net/2027/spo.2629860.0006.103.

wreaked havoc on communities."[3] Preeminent family regulation[4] scholars Dorothy Roberts and Martin Guggenheim have respectively called ASFA "an assault on family preservation" and "the worst law affecting families ever enacted by Congress."[5] This is because ASFA has had a disproportionate impact on families of color and is therefore viewed by many as the "federally mandated destruction of the Black family."[6] Federal attempts to preserve families within ASFA's existing structure, such as the 2018 Family First Prevention Services Act ("Family First Act"), have not succeeded and have led to more surveillance of Black families. Even the most recent attempt at reform, the 21st Century Children and Families Act ("the CCFA") falls short of addressing many of ASFA's most problematic provisions.

While reform might address some of ASFA's problems, it will not remedy the past injustices and deep, "ineffable" pain[7] that ASFA has caused to those it affected, particularly members of the Black community.[8] In addition to reparations, advocates call for the government to "explicitly acknowledge [its] responsibility for destroying the lives and futures of generations of Black children and families, with numbers in the millions, . . . to make amends for the wrongs done," and to implement "actions to secure for the generations ahead a future free from policing, regulation, and destruction of Black family life."[9]

ASFA must therefore be repealed. In the last few years, a growing coalition of impacted parents, children, activists, advocates, and scholars has called for such a full repeal, citing ASFA's destructive impact on families and communities of color and lack of empathy for parents struggling with poverty, substance use, mental health concerns, disabilities, and incarceration.[10] ASFA's impact in conjunction with its history underscores the importance of repeal.

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[3] Ashley Albert et. al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE L. 861, 878 (2021).

[4] First coined by Emma Williams in her piece, "Dreaming of Abolitionist Futures, Reconceptualizing Child Welfare: Keeping Kids Safe in the Age of Abolition," and later made popular by Dorothy Roberts, the term "family regulation system" serves to better define the misnomer of "child welfare." The term recognizes that in any intervention in which a child is removed, it is not only that child but the entire family that experiences trauma and violation. Further, the term calls out the true nature of the system. Even when it does seek to protect, the means used are regulatory from start to finish, with state intrusion into the home, ongoing state surveillance, mandated state services, and forced compliance. As this article points out on more than one occasion—words and language matter.

[5] Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE L 711 (2021), https://doi.org/10.52214/cjrl.v11i3.8749.

[6] Christina White, *Federally Mandated Destruction of the Black Family*, 1 NW. J. L. & SOC. POL'Y 303 (2006).

[7] Albert et. al., *supra* note 3, at 892.

[8] The author acknowledges that ASFA has had negative impacts on many marginalized communities, including indigenous people, the Latinx community, the LGBTQ+ community, low-income and immigrant populations generally. The author stands with those communities. This article, however, will focus specifically on the harms to the Black community.

[9] Angela Burton and Joyce McMillan, https://publications.pubknow.com/view/288644440/44/

[10] *See e.g. Repeal ASFA*, https://www.repealasfa.org; Elizabeth Brico, *The Civil Death Penalty – My Motherhood is Legally Terminated*, FILTER MAGAZINE (Jul. 13, 2021), https://filtermag.org/motherhood-legally-terminated; Latagia Copeland Tyronce, *Yes, the Adoption and Safe Families Act (ASFA) Can and Should Be Repealed!*, MEDIUM (Dec. 24, 2018), https://medium.com/latagia-copeland-tyronces-tagi-s-world/yes-the-adoption-and-safe-families-act-asfa-can-and-should-be-repealed-9c18ac391997; Victoria Copeland, *Centering unacknowledged histories: revisiting NABSW demands to repeal ASFA*, 16 J. of Pub. Fam. Regul. 1, 1-6, https://doi.org/10.1080/15548732.2021.1976349.

Repeal is "an effort to nullify, annul or undo a previously enacted law."[11] It may "represent a decades-long effort" to change laws and when successful, can result in "dramatic changes to the nation's policy and programs."[12] Repeal "has a declaratory value, is educational, and provides members of the minority group," being targeted by the law "with venues to claim redress."[13] As Toni Morrison wrote, [w]hen you say "[n]o or [y]es or [t]his and not that, change itself changes."[14]

Other measures short of repeal may have some value but do not necessarily lead to full equality.[15] Because laws can also be symbols[16] and "the unconscious meaning of a symbol may be shared by a limited number of persons or by a certain group,"[17] it is important to recognize the symbolic nature of ASFA and what it means to the members of the Black community. ASFA was enacted in the 1990s, during a time of moral panic in the United States. The War on Drugs raged, the public lamented the birth of "crack babies," and the media falsely created a generation of superpredators with "no conscience, no empathy."[18] We judged parents as "crackheads" and "welfare queens," undeserving of help or empathy and certainly unworthy of raising their children. And once children were thrust into the system, adoption was viewed as the only path to permanence as ASFA's title clearly demonstrates.[19] Black Americans, who were individually and collectively harmed by ASFA, are also more likely to have suffered from intergenerational trauma, historical trauma, or both.[20] Intergenerational trauma is the idea that trauma is transmitted from one generation to the next.[21] Historical trauma is "the cumulative exposure to traumatic events [such as the legacy of slavery, impact of massacres, and removal from homelands] that not only affect the individual exposed, but continue to affect subsequent generations."[22]

ASFA must therefore be evaluated in the context of the broader and shameful history of permissive taking of Black children from their parents.[23] From the time Black people were taken from their countries and enslaved in this one, their children were the property of their white masters.[24] Children were taken from their mothers without a second thought.[25] These were

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[11] JORDAN M. RAGUSA & NATHANIEL A. BIRKHEAD, CONGRESS IN REVERSE: REPEALS FROM RECONSTRUCTION TO THE PRESENT, 7 (2020).
[12] *Id*., at 3.
[13] Udi Sommer & Victor Asal, *A cross-national analysis of the guarantees of rights*, 35 INT'L POL. SCI. REV. 1, 10, https://journals.sagepub.com/doi/10.1177/0192512112455209.
[14] TONI MORRISON, *A Knowing So Deep, in* WHAT MOVES AT THE MARGIN 31 (Mar. 25, 2008) (internal quotations omitted).
[15] *Id*.
[16] *See generally* Christopher E. Smith, *Law and Symbolism*, 1997 DET. C.L. L. REV. 935 (1997).
[17] C. G. Schoenfeld, *On the Relationship Between Law and Unconscious Symbolism*, 26 LA. L. REV. 56 (1965).
[18] Jonathan Capehart, *Hillary Clinton on 'Superpredator' remarks: 'I Shouldn't Have Used Those Words*, WASH. POST, (Feb. 25, 2016), https://www.washingtonpost.com/blogs/post-partisan/wp/2016/02/25/hillary-clinton-responds-to-activist-who-demanded-apology-for-superpredator-remarks.
[19] *Id*.
[20] Sarah Katz, *Trauma-Informed Practice: The Future of Child Welfare?*, 28 WIDENER L. REV. 51, 61 (2019).
[21] *Id*.
[22] *Id*.
[23] LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR 17-45 (2020).
[24] *Id*.
[25] Act XII, *Laws of Virginia*, Dec. 1662.

commercial transactions – nothing more. Laws were changed to ensure that even when white slaveowners raped and impregnated enslaved Black women, their children would be born enslaved.[26] In this way, rape was not only dehumanizing, but it was also profitable.

In making his "*Case for Reparations*," Ta-Nehisi Coates reminded us that "[a]n America that asks what it owes its most vulnerable citizens is improved and humane.[27] And in recent conversations about the symbolic importance of taking down confederate monuments, historian Karen Cox said "[t]aking down the statues means that first of all, our society is evolving."[28] Repealing discriminatory laws sends the same message. Although these symbolic acts are important, they cannot occur in isolation. Scholars argue that we must also engage in "memory work," which requires "building the capacity of a community to recover from past injustices."[29] This requires an understanding not only that injustices occurred but that they continue to contribute to future inequality.[30] This is in line with the abolitionist framework that drives the Repeal ASFA movement.[31] The movement emphasizes that ASFA is so inherently harmful that it cannot be reformed and that alternatives exist to address the concerns that originally drove the creation of the law.[32]

Rather than wasting energy and more resources trying to fix something that is inherently toxic, our efforts should be directed to understanding how we can support families so that they are never ensnared in the family regulation system. Staying within the confines of ASFA limits the possibilities for creating a society that reduces or even eliminates the need for coercive family regulation. Because similar conversations are occurring in the criminal legal system, we have an opportunity to listen to those most impacted and think about how systems work together to surveil and oppress marginalized communities. Not only do we have the opportunity, but we also have an obligation to consider what child protection really means.

As such, in conversations surrounding the future of "child welfare" we must listen to those most impacted – families who have suffered from family regulation intervention and particularly the destructive effects of ASFA. Repealing ASFA would be an acknowledgement that the law has caused such pain, and it has both practical and symbolic meaning to those who must live in the wake of its destruction. To imagine a world without ASFA, we can learn from abolitionist principles, centering the voices of these families and the larger impacted community.

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[26] *See, e.g.,* Sojourner Truth, *Ain't I a Woman*, MODERN HISTORY SOURCEBOOK (1997), http://www.fordham.edu/halsall/mod/sojtruth-woman.asp ("I could work as much and eat as much as a man – when I could get it – and bear the lash as well! And ain't I a woman? I have borne thirteen children, and seen most all sold off to slavery, and when I cried out with my mother's grief, none but Jesus heard me!).

[27] Ta-nehesi Coates, *The Case for Reparations*, THE ATLANTIC (Jun. 2014), https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631.

[28] Mark Abadi et. al, "*Our Society is evolving": What historians and activists are saying about the movement to remove statutes,* BUSINESS INSIDER (Jul. 1, 2020), https://www.businessinsider.com/confederate-statues-removal-slavery-protests-2020-6.

[29] Joshua F.J. Inwood & Derek H. Alderman, *Why Taking Down Confederate Statutes is Only the First Step*, THE CONVERSATION (Jun. 14, 2017), https://theconversation.com/why-taking-down-confederate-memorials-is-only-a-first-step-78020.

[30] *Id.*

[31] Repeal ASFA, www.repealasfa.com.

[32] Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed***,** 12 COLUM. J. RACE L. 557, https://doi.org/10.52214/cjrl.v12i1.9947.

Part I of this Article analyzes ASFA's history and explains why the assumptions and policies that led to its creation make reform attempts inadequate to remedy its fundamental flaws. This Part also highlights AFSA's constitutional deficiencies and its destructive impact on families and communities of color. Part II analyzes prior attempts at reform to demonstrate why those efforts were insufficient. Part III explains the symbolic importance of repeal and recommends a path forward that is led by impacted parents and children and that recognizes their constitutional right to be together and make decisions about their family without intrusive and unnecessary state intervention. Part IV briefly concludes.

I. HOW ASFA LED TO THE DESTRUCTION OF BLACK FAMILIES AND COMMUNITIES

"We will not continue the current system of always putting the needs and rights of the biological parents first . . . [a]lthough that is a worthy goal, it's time we recognize that some families simply cannot and should not be kept together."
– Senator John H. Chafee, lead sponsor of ASFA.[33]

A. ASFA's Key Provisions and Their Impact

Laws have expressive meaning that can be found not only in the legislators' stated intent but also in the way the law is perceived by the public.[34] The Adoption and Safe Families Act of 1997 was captioned as "an Act to promote the adoption of children in foster care."[35] To do so, the law created a strict timeline for the termination of parental rights ("TPR") and subsequent "freeing" of children for adoption. This timeline requires that, with a few exceptions, states move to terminate parental rights when children have been in foster care for fifteen out of the previous twenty-two months.[36] Although the law does provide that family regulation agencies make reasonable efforts to preserve family unity (a requirement created by ASFA's predecessor), these efforts are not defined, and this requirement is waived if the "parent has subjected the child to aggravated circumstances."[37] These circumstances include previously having parental rights to another child involuntarily terminated, regardless of the circumstances of that termination or how much time has passed.[38] To further promote adoption over reunification, ASFA explicitly provides for "adoption incentive payments."[39] These payments are made available to states that exceed "the base number of foster child adoptions" each year, and they offer states up to $10, per

[33] Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES (Nov. 17, 1997), https://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html.
[34] Steven D. Smith, *Expressivist Jurisprudence and the Depletion of Meaning*, 60 Md. L. Rev. 506, 510 (2001), https://digitalcommons.law.umaryland.edu/mlr/vol60/iss3/6.
[35] Adoption and Safe Families Act of 1997, Pub. L. 105-89, 11 Stat. 2115 (codified as 42 U.S.C. § 1305) (hereinafter "ASFA").
[36] *Id*. at 2118 (Exceptions include when a child is in a foster home with a biological relative, when there is a compelling reason that termination is not in the child's best interest, and when the state had failed to provide necessary services to support reunification.).
[37] *Id*. at 2116.
[38] *Id*. at 2117.
[39] *Id*. at 2122.

child adopted over that quota.[40] Quite literally, the federal government is putting a price tag on children's heads.

From top to bottom, ASFA is problematic in its enthusiastic promotion of adoption over family reunification. First and foremost, names matter. They have meaning and they affect focus, interpretation, and impact.[41] ASFA's title makes clear that the law's first priority is adoption; even keeping families "safe" is secondary. This title forecloses any doubt that the law was designed to prioritize adoption as the only acceptable version of permanency.

The ASFA House Report states 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."[42] ASFA's push towards adoption resulted primarily from concerns about "foster care drift," the idea that children were shuffling between foster placements without any chance at finding permanent homes. This was based on an outdated and inaccurate view that most of the children in the foster care system were abandoned and had no relationships with their biological parents. With no loving family on the other side of the equation, it was easier for these policies incentivizing adoption to take hold.[43]

Further, ASFA offers overarching guidance that the "safety and health of the child shall be paramount."[44] This is meant to delineate the shift away from family preservation, which is seen as prioritizing the rights of the parent, as opposed to an alleged focus on the child. This problematic framing is a thread throughout family regulation law and policy. It presumes that the interests of the child and her parent are divergent, and that only a parent- and not the child -- has an interest in keeping their family intact.[45] This approach is not supported by human experience, social science, or the law.[46] Children suffer irreparable harm when separated from their parents. Anxiety, grief, post-traumatic stress disorder and toxic stress are just some of the effects that children experience after a removal.[47] The Supreme Court has also clearly stated that until the State proves parental unfitness, "*the child and his parents* share a vital interest in preventing erroneous termination of their natural relationship."[48] Yet ASFA was designed on the premise that some parents cannot be saved, so instead we should save their children.[49]

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[40] *Id*. at 2123. (ASFA also provides an additional $2000 in incentive payments for each special needs adoption that exceeds the special needs adoption base number each year.). More recent legislation has increased the financial incentives up to $10,000, *See* John Kelly, *How the New Adoption Incentives Would Work*, THE IMPRINT (Jul. 8, 2014) https://imprintnews.org/analysis/how-the-new-adoption-incentives-would-work/7437

[41] Adam Liptak, *Laws Deserve More than Those Cute Names*, N.Y. TIMES (Dec. 30, 2013), https://www.nytimes.com/2013/12/31/us/colorful-names-for-laws.html; Press Release, U.S. Dep't of the Interior, Bureau of Indian Affs., Indian Adoption Project Increases Momentum (Apr. 18, 1967), https://www.indianaffairs.gov/as-ia/opa/online-press-release/indian-adoption-project-increases-momentum.

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

[43] Chris Gottlieb, *The Short Life of the Civil Death Penalty: Reassessing Termination of Parental Rights in Light of its History, Purposes, and Current Efficacy* (forthcoming).

[44] ASFA, *supra* note 35 at 2116.

[45] DOROTHY E. ROBERTS, SHATTERED BONDS, 108 (2009).

[46] *See generally* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019).

[47] *Id*.

[48] Santosky v. Kramer, 455 U.S. 745, 760 (1982) (emphasis added).

[49] Guggenheim, *supra* note 5, at 723.

To this end, ASFA "succeeded." Between 1998 and 2017, the number of children adopted annually from foster care rose from roughly 38,000 to nearly 60,000.[50] This increase meant a reduction in the average amount of time children spent in foster care. In the same period, the average time spend in care dropped from 32.6 months to 20.1 months. However, these successes have also meant a sharp decrease in the amount of time between the removal of a child from a home and the TPR.[51] Between 2012 and 2017, the percentage of children in foster care whose parents' rights had been terminated rose by twenty percent. As a result, the increase in the number of finalized adoptions has been significantly outpaced by the increase in children "waiting for adoption." That number climbed by twenty-three percent in the same time period, jumping from 100,379 to 123,437.[52] These children become "legal orphans," who lack legally recognized ties to any parents -- biological or adoptive. Overall, between 1997 and 2017, more than a million children and parents had their legal relationship terminated.[53]

AFSA's structure also undermines efforts to keep families together. Although ASFA does contain a requirement, leftover from preceding federal laws, that states make "reasonable efforts" to prevent children from being removed from their parents and, once a child has been removed, to reunify the family,[54] adoption lobbyists and many parents opposed that requirement. They cautioned that it might lead to children staying or being reunified with their abusive parents and might prevent more favorable adoptions.[55] At the same time, Congress found the requirement annoying and expensive. Because of the reasonable efforts requirement, states had to pay both for services in furtherance of reunification *and* for foster care.[56] Promoting adoption therefore made financial sense, despite the fact that, for many children and particularly children of color, adoption is unlikely.[57] Congress therefore allowed "concurrent planning,"[58] which means that theoretically the child protective agency should both be making reasonable efforts to reunify families – the more onerous and expensive route – and simultaneously planning for adoption. While ASFA does not mandate concurrent planning, it allows it, which opened the door for forty-six states to require it from the beginning of a foster system placement.[59] Further, making its priority clear, ASFA provides financial incentives for adoption, but does not similarly reward successful reunification after children are temporarily placed in foster care.[60] It certainly does not reward keeping families whole in the first place, despite evidence that removal from one's family and placement into foster care have deleterious long-term impacts on children.[61]

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[50] Kim Phagan-Hansel, *One Million Adoptions Later: Adoption and Safe Families Act at 20*, THE IMPRINT (Nov. 28, 2018).
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. Legis. 239, 260 (2002), http://scholarship.law.nd.edu/jleg.
[55] *Id*.
[56] *Id*. at 257.
[57] *Id*.
[58] Concurrent planning was initially introduced by AACWA, but was solidified in ASFA. Linda Katz, *Permanency Action Through Concurrent Planning*, 20 ADOPTION & FOSTERING 8, 8 (1996).
[59] Chris Gottlieb, The Short Life of the Civil Death Penalty: Reassessing Termination of Parental Rights in Light of its History, Purposes, and Current Efficacy (forthcoming).
[60] Emilie Stoltzfus, *Child Welfare: Structure and Funding of the Adoption Incentives Program along with Reauthorization Issues*, CONG. RSCH. SERV. (Apr. 18, 2013), https://sgp.fas.org/crs/misc/R43025.pdf.
[61] *See generally* Trivedi (2019), *supra* note 46.

Although ASFA did retain the reasonable efforts requirement of its predecessor, The Adoption Assistance and Child Welfare Act of 1980 ("AACWA"), this intended check on unnecessary family separation was half-baked. Nowhere does Congress define "reasonable efforts." As a result, child protective agencies and judges have no guidance to determine what efforts are actually sufficient,[62] and months often pass before any efforts are made whatsoever. In the absence of clear guidance, judges also enforce this requirement inconsistently, with some admitting to making findings that reasonable efforts were made when they do not believe this to be true.[63] Moreover, the Supreme Court's holding in *Souter v Artis M.,* that individuals have no private right of action to enforce the reasonable efforts requirement, undermines any real possibility of enforcement.[64]

Further, in many situations, AFSA eliminates the reasonable efforts requirement altogether, permitting states to bypass any such efforts when "aggravated circumstances" exist.[65] Aggravated circumstances include, among other things, a parent having their rights to a previous child terminated or having committed certain crimes.[66] But ASFA is clear that this list is not meant to be comprehensive, and states may determine what additional parental behaviors qualify.[67] In these cases, states are not required to make any effort to support the family to avert removals or to assist those families in reunification. Additionally, much like reasonable efforts, states have failed to define "aggravated circumstances" with the specificity necessary for equal application.[68] This vagueness not only makes application difficult, it increases the likelihood that the term will be interpreted in an arbitrary and discriminatory way.[69] When the law is passed against a backdrop of societal degradation of Black mothers, Black children, and Black families, it becomes entirely predictable who will be discriminated against, and that is exactly what has happened.

Most states consider prior terminations to be aggravated circumstances, thereby requiring no efforts towards reunification. In these cases, the state may proceed straight to TPR once a child has been removed.[70] Many states also allow courts to terminate parents' rights to a new child

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[62] Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 241 (1990) ("Many [family regulation] workers want to know what their duty under the reasonable efforts requirement is . . . .").

[63] CUTLER INSTITUTE FOR CHILD AND FAMILY POLICY & CENTER ON CHILDREN AND THE LAW, MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 105 (August 2005), https://muskie.usm.maine.edu/Publications/cf/MI_CourtImprovementProgramReassessment.pdf.

[64] Souter v Artis M., 503 U.S 347 (1992).

[65] 42 U.S.C. § 671(a)(15)(D).

[66] *Id*., at § 671(a)(15)(D)(i)-(iii).

[67] In ASFA aggravated circumstances include murder or sexual abuse of another child as well as if the parent has had their rights to another child terminated. Ultimately, these are just examples as Congress has given states the power to decide when such efforts are unnecessary. Some states, such as Missouri, have left the agency with the discretion to make reasonable efforts in implementing these exceptions. *See* MO. ANN. STAT. § 211.183(7) (West 2018).

[68] Shanta Trivedi, *My Family Belongs to Me: A Child's Right to Family Integrity*, 56 HARVARD C.R.-C.L.L. REV. 267 (2021).

[69] *Id*., at 269.

[70] Vivek S. Sankaran, *Child Welfare Scarlet Letter: How A Prior Termination of Parental Rights Can Permanently Brand a Parent as Unfit*, 41 N.Y.U. REV. L. & SOC. CHANGE 685, 695 (2017).

based solely on a prior TPR, considering no other factors. Not only do such states not have to make reasonable efforts, they also no longer have to prove that the parent is currently unfit, regardless of how long ago the parent's rights were terminated in the prior case.[71]

Notably, while ASFA states that "the child's health and safety shall be the paramount concern," it implies that removal is always the safer course of action. It suggests that children cannot both be safe and remain in their parents' custody.[72] This approach fails to consider the psychological bond between the parent and child and the effect that disruption is likely to have on the child.[73] Therefore, as Richard Wexler, Executive Director of the National Coalition for Child Protection Reform has argued, whenever ASFA states that safety should be paramount, it should be followed by a clause that reads "consistent with the understanding that in the overwhelming majority of cases the safest option will be to allow children to remain in their own homes, with all necessary support provided to their families."[74]

The cruelest of ASFA's many problematic provisions is the timeline for TPR and the near universality of its application. With very limited exceptions, ASFA requires that if a child is in foster care for fifteen of the prior twenty-two months, the state must file a petition to terminate the parent's parental rights.[75] TPR has been likened to the death penalty, as it is permanent and generally irreversible. As the Repeal ASFA Campaign Steering Committee has written, "TPRs are a violent legal mechanism that kills families, and ASFA is the civil death penalty that enacts the execution."[7677]

To avoid this penalty, families with family regulation involvement, are required to engage in a host of services that the agency believes are necessary to address the underlying issues that led to state intervention. These services range from parenting classes to substance use treatment and counseling. For those who are incarcerated or in immigration detention, for example, recommended services such as anger management or parenting classes may not be available.[78] Parents struggling with mental health diagnoses or substance use may not be able to fully address the underlying issues that led to child protective involvement in such a strict timeline because recovery is a lifelong process.[79] And for many parents, the demands of everyday life, including

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[71] *Id*.

[72] Dorothy E. Roberts, *Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy,* 2 U. PA. J. CONST. L. 112, 115-16 (1999).

[73] Baldwin, *supra* note 54, at 260.

[74] Richard Wexler, *ASFA's Timelines are Horrible for Children but Another Part of the Law is Even Worse*, YOUTH TODAY (Mar. 29, 2021), https://youthtoday.org/2021/03/asfas-timelines-are-horrible-for-children-but-another-part-of-the-law-is-even-worse.

[75] ASFA *supra* note 35 at 2118.

[76] Albert et. al., *supra* note 3, at 887.

[77] ASFA does make an exception for kinship placements. In cases where children are placed with family, the state is not required to terminate parental rights. ASFA, Pub. No. L. 105-89, 111 Stat. 2115. Currently 34% of children in foster care live with relatives so this exception is certainly meaningful. AFCARS Report No. 27, U.S. Dep't Children's Bureau (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf.

[78] Deseriee A. Kennedy, *"The Good Mother": Mothering, Feminism, and Incarceration,* 18 WM. & MARY J. WOMEN & L. 161, 175 (2012).

[79] Nora Volkow, *Access to Addiction Services Differs by Race and Gender,* NAT'L INST. ON DRUG ABUSE (July 16, 2019), https://www.drugabuse.gov/about-nida/norasblog/2019/07/access-to-addiction-services-differs-by-race-gender, archived at https://perma.cc /697X-E982.

working multiple jobs while taking unreliable public transportation, make meeting these requirements untenable in a short timeframe. The "15 out of 22-month" timeline is rightly critiqued as arbitrary and unfair.[80] The COVID-19 pandemic shone a light on the absurdity of this timeline, as many services were unavailable, visitations were halted, and advocates and parents had no idea whether the ASFA clock was still running or if exceptions would be made.[81] Advocates proposed legislation to stop the clock during the pandemic, but these efforts were unsuccessful.[82]

These developments demonstrate that ASFA's emphasis on termination and adoption is inconsistent with other aspects of children's health and safety and disregards the interests of their parents. As the next sentence demonstrates, ASFA also fails to respect basic constitutional principles regarding the fundamental right to family integrity for both children and their parents.

B. ASFA's Constitutional Violations

Many of ASFA's provisions are constitutionally suspect. The Fourteenth Amendment protects a parent's fundamental right to direct the care, custody, and control of their children[83] as well as the right of family integrity for both parents and children.[84] When the state abrogates a fundamental right, it must have a compelling interest, and the means used to effectuate that interest must be narrowly tailored.[85] While the state may have a compelling interest in protecting children, its over-reliance on family separation, foster care, and termination as the primary means to further that interest is arguably not narrowly tailored and is therefore unconstitutional.[86] Three aspects of ASFA are particularly concerning from a constitutional standpoint: 1) its overreliance on adoption to achieve "permanency and safety" 2) its creation of "aggravated circumstances" in which reasonable efforts at reunification are not required; and 3) its creation of financial incentives for adoption but not for family reunification.

Throughout ASFA, the focus is on "permanency" and "safety." It is clear however, that when ASFA refers to permanency, it refers to permanency through adoption. Indeed, the very first words of ASFA describe it as "an Act to promote the adoption of children in foster care."[87] Thus, the very premise of ASFA – promoting adoption over family integrity – is problematic from a constitutional perspective.

ASFA's other major goal is safety. Notably, while ASFA states that "the child's health and safety shall be the paramount concern," it implies that removal is always the safer course of

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[80] Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Families Act Can't Be Repealed, Here's How to At Least Make it Better,* IMPRINT, (Feb. 9, 2021), https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490.
[81] Michelle Chen, *How Covid 19 Supercharged a Foster System Crisis*, THE NATION, (Mar. 15, 2021), https://www.thenation.com/article/society/foster-care-covid/.
[82] H.R. 7976, 116th Cong. (2020).
[83] *See* Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).
[84] Trivedi (2021), *supra* note 68.
[85] *See e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942).
[86] Trivedi (2021), *supra* note 68.
[87] ASFA, *supra* note 35.

action. It suggests that children cannot both be safe and remain in their parents' custody.[88] This has led to an overreliance on removal in many cases where families could safely remain together. The fact that over 63% of cases nationwide are due to neglect and not abuse[89] suggests that there are many cases where children could safely remain in their homes with support. Under these circumstances, ASFA's emphasis on removal and its overt promotion of adoption over reunification is not a narrowly tailored means of achieving its interest in child safety.

Requirements that the state make "reasonable efforts" to prevent a child's removal and achieve reunification following removal may appear to make the law more constitutionally viable. However, ASFA's failure to define reasonable efforts undermines judges' ability to enforce it.[90] Moreover, the aggravated circumstances exception further erodes parents' constitutional right to family integrity. In the presence of aggravated circumstances, the state is not required to make any efforts to keep a child with their family or to reunify that family once the child has been removed. Consider the example of a parent who has had their rights to a child terminated a decade earlier when they were a teenager. Now that person has had another child who is the subject of an investigation. Although the parent is in a completely different place in her life and her circumstances may be entirely changed, the state would not be required to make any efforts to keep her and her child together. This is akin to using a decades old trial verdict to convict a person of a crime today. Allowing states to jettison efforts to keep families together if the parent has previously lost parental rights to another child – an "aggravated circumstance" – violates the constitutional right to family integrity for both children and parents.[91] Constitutional jurisprudence is clear that before terminating a parent's rights, the state must prove that the parent is unfit by clear and convincing evidence.[92] A decision to terminate parental rights cannot be based solely on the court's determination that the termination would be in the child's best interest.[93] Nor can it be based on a parent's decades old conduct toward another child.

Further, even when ASFA does require reasonable efforts, it allows states to engage in "concurrent planning." This means that states are able to make efforts to reunite the family while simultaneously creating the conditions for a potential adoption. That ASFA provides for "adoption incentive payments," with no similar financial incentive for family reunification creates a clear conflict of interest in this process. ASFA initially authorized these incentive payments for agencies who successfully increased the number of children adopted each year.[94] Subsequent amendments allowed bonuses for timely adoptions completed less than twenty-four months after removal and for agencies who were able to beat their previous adoption records.[95] This approach prioritizes the interests of foster parents who have no right to family integrity,[96]

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[88] Roberts (1999), *supra* note 72, at 115-16.
[89] AFCARS Report No. 27, U.S. Dep't Children's Bureau (2020), https://www.acf.hhs.gov/cb/report/afcars-report-27.
[90] Vivek Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 227 (2016).
[91] Trivedi (2021), *supra* note 68.
[92] Sankaran (2017), *supra*, note 70, at 690.
[93] *Id*.
[94] ASFA, *supra* note 35 at 2122.
[95] Administration for Children and Families, *Adoption and Legal Guardianship Incentive Payments* (Jul. 18, 2015) https://www.acf.hhs.gov/sites/default/files/documents/cb/pi1508.pdf.
[96] Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977).

while undermining the deeply rooted constitutional right of the child's family of origin. Permitting states to engage in concurrent planning, while providing financial rewards only for adoption, violates the right to family integrity.[97] Rather than being narrowly tailored to meet the goal of child safety, this structure discourages the agency from working to support families and instead encourages hasty TPR. The Constitution prohibits this shortcut.

Finally, ASFA's much-critiqued timeline that children's rights to their parents be terminated if the child is in foster care for fifteen of the prior twenty-two months creates an arbitrary time by which the state must act to permanently sever a family's legal relationship. ASFA's timeline mandates that states proceed with termination even when no adoptive family has been identified. This too, undermines the right to family integrity.

At a fundamental level, the Supreme Court has made clear that, prior to a finding of unfitness, the Constitution presumes that parents act in the best interest of their children.[98] Despite this, the family regulation system continues to equate basic parenting choices or hardships created by societal failings with parental unfitness, often with limited inquiry. This is evidenced by the fact that most children in foster care are there, not for abuse, but instead for neglect.[99] For so many of these children, neglect means that their families did not have enough food, adequate shelter, or childcare.[100] The same system that failed parents, fails their children by inflicting trauma on them and their families and weakening their communities. Other parents struggling with substance use disorder, mental health concerns or disability we brand as unworthy and unable to parent. And for those parents who have committed acts that are considered abusive, legal systems presume that they are beyond repair. This assumption fails to acknowledge that so many of the factors that contribute to abuse – such as poverty and unemployment – are societal failures, yet we continue to "weaponize our systemic shortcomings and use them against parents."[101] ASFA's multiple constitutional violations and its detrimental practical implications demand redress. And the profound symbolic effect that repeal would have on the impacted community demonstrates that this law should not be salvaged.

C. ASFA in Context

ASFA cannot be analyzed in isolation. To be able to envision a post-ASFA world, we must first understand ASFA's origins and context and what it was designed to do. Its history and relation to other social policies at the time is crucial context for understanding why it ASFA came to be and how it impacts people now. The "government should neither make nor enforce laws that express attitudes that unfairly stigmatize people."[102] Yet ASFA was the product of social, political, and

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[97] Trivedi (2021), *supra* note 68, at 298-99.
[98] Troxel v. Granville, 530 U.S. 57, 58 (2000).
[99] AFCARS REPORT NO. 27, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILDREN'S BUREAU (2020), https://www.acf.hhs.gov/cb/report/afcars-report-27.
[100] Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 228 (2013) ("That poverty has been confused and conflated with child neglect and even parental turpitude is not new.").
[101] Jerry Milner & David Kelly, *It's Time to Stop Confusing Poverty with Neglect*, THE IMPRINT (Jan. 17, 2020), https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222.
[102] Alan Strudler, *The Power of Expressive Theories of Law*, 60 MD. L. REV. 492 (2001), http://digitalcommons.law.umaryland.edu/mlr.

economic forces that made it easy for lawmakers and constituents alike to adopt and embrace a prejudiced narrative about Black people, and Black parents in particular. These forces, in combination with our historical treatment of Black parents, allowed our country to diminish the importance of Black families and treat them as entities that were not worth preserving.

No conversation about the systemic impact of laws on Black families in this country can ignore the legacy of slavery. Children were regularly taken from their parents and sold to others without any regard for them and certainly not for their parents. The possibility of family separation through the sale of a family member caused enslaved people constant anxiety as it usually came without warning. This callous treatment of Black families was commonplace because they were not seen as real families. Their love for each other was not recognized and parents were not free to make basic decisions about their children. Black families were seen as incapable of the "normal" family relationships that white people enjoyed.[103]

These attitudes toward Black families persisted after slavery was formally abolished. Immediately after abolition, Black children were forced into apprenticeships with white families, often without parental consent.[104] While some states used apprenticeship laws that were already on the books, many Southern states added new provisions to compel apprenticeship of Black children to be "bound out." As a result, if parents were accused of unfitness, being unmarried or unemployed, or even if a judge found the displacement simply to be better "for the habits and comfort of the child" the judge could order the child into apprenticeships for white people.[105] Often, their former owners were given first preference.[106] This continued enslavement, though by another name, was justified by the idea that this was in the children's best interest as they would learn from their white masters, rather than their incapable Black parents. If these children tried to escape, they were recaptured and brutally beaten.[107] As reconstruction ended, despite being "free," many Black families continued to work under conditions similar to those during slavery, under threat of violence from the Klu Klux Klan and others.[108]

And when social programs began to provide "welfare" to mothers, beginning with mother's pensions, critics claimed that they rewarded women's immoral behavior such as failed marriages, poor financial management and having children out of wedlock. In response to these criticisms, only those who were "fit" and kept a "suitable home" received benefits. These rules were used primarily to exclude Black mothers.[109] If a caseworker found the home "unsuitable" the family lost its benefits, regardless of how impoverished they were.[110] Only two Black mothers in the entire South received payments at all, and overall 96 percent of recipients were white.[111] The justification for this was that there were more job opportunities for Black women who had

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[103] *See generally*, Peggy Cooper Davis, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1998).
[104] *Id*. at 114.
[105] DOROTHY E. ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES--AND HOW ABOLITION CAN BUILD A SAFER WORLD 97 (2022).
[106] ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 201 (2014).
[107] Roberts (2022), *supra* note 105 at 100.
[108] Briggs, *supra* note 23, at 29.
[109] Stephanie K. Glaberson, *The Epistemic Injustice of Algorithmic Family Policing* (forthcoming).
[110] Tarek Z. Ismail, *Family Policing and the Fourth Amendment*, CAL. L. REV. (forthcoming).
[111] Briggs, *supra* note 23, at 30-31.

"always gotten along."[112] In reality, white people relied on Black women's work in the fields and as domestic laborers.

In the decades following, as war erupted, many Black people moved North. Many Black women were able to get jobs in factories producing goods for war, while Black men either enrolled or were drafted into the military. But once the war ended, so did employment amongst Black people, partly because many were fired to make room for white soldiers who were returning home.[113]

After World War II, public assistance was expanded as Aid to Dependent Children (later "Aid to Families with Dependent Children ("AFDC")) and was primarily offered to married women whose husbands had left them, had died, or were unable to work.[114] Ironically, unmarried Black women who did not have access to these programs later became the poster-children for welfare programs.[115] As Michele E. Gilman writes, "single mothers of children have always occupied a shifting and uneasy space between these two poles. White widows have received the most sympathy, while unmarried women of color have been the targets of approbation."[116]

As Black people fought for civil rights and access to social welfare benefits, hostility toward these programs increased. In 1962, Senator Robert Byrd launched an investigation into what he dubbed "welfare abuse," arguing that 60% of welfare recipients were actually working and had paramours in their beds who should be supporting them and their "illegitimate" children instead of the government.[117]

This type of condemnation continued in Secretary of Labor Daniel Patrick Moynihan's infamous 1965 Report entitled "The Negro Family: The Case for National Action" ("the Moynihan Report"). In his report, Moynihan stated:

> At the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family. It is the fundamental source of the weakness of the Negro community at the present time. There is probably no single fact of Negro American life so little understood by whites.[118]

This, he argued, was the root cause of the expansion of public assistance programs.[119] And while he acknowledged the impact of slavery, racism and segregation on the Black community, he

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[112] *Id*.
[113] Briggs, *supra* note 23, at 30-31.
[114] Gene Demby, *The Mothers Who Fought Radically Reimagine Welfare*, NPR (June 9, 2019), https://www.npr.org/sections/codeswitch/2019/06/09/730684320/the-mothers-who-fought-to-radically-reimagine-welfare.
[115] Premilla Nadasen, *From Widow to "Welfare Queen" Welfare and the Politics of Race*, 1 BLACK WOMEN, GENDER & FAM. 52, 55 (2007).
[116] Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC POL'Y & L. 247, 257–58 (2014).
[117] Briggs, *supra* note 23, at 33.
[118] DANIEL P. MOYNIHAN, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).
[119] Anthony E. Cook, *The Moynihan Report and the Neo-Conservative Backlash to the Civil Rights Movement*, 8 GEO. J.L. & MOD. CRITICAL RACE PERSP. 1 (2016).

nonetheless attributed various features of inequality to "the tangle of pathology."[120] In his report, Moynihan used the word "pathology" eleven times.[121] Ultimately, the deterioration of the Black family and the large numbers of single mothers was seen as "the *single most important* social fact of the United States," because it lead to "crime, violence, unrest, disorder."[122] Moynihan highlighted the "absence" of Black fathers due to "broken homes." He noted a rise in the number of families that experienced "desertion" as the largest contributor to the increase in families receiving public assistance from 1948-55, again attributing it to individual flaws rather than societal failings.[123]

Moynihan's work, which was perhaps well-intentioned but deeply flawed, was selectively used and amplified by those who latched on to the idea of Black people as degenerate freeloaders and ignored any complicity on the part of white people.[124] These ideas were echoed even by then-President Lyndon B. Johnson, who gave a speech at Howard University of all places, stating that "Negro poverty is not white poverty. Many of its causes and many of its cures are the same. But there are differences – deep, corrosive, obstinate differences – radiating painful roots into the community, and into the family, and the nature of the individual."[125]

Moynihan lamented that the "most conspicuous failure of the American social system in the past 10 years has been its inadequacy in providing jobs for Negro youth" and argued for a focus on policies that would "bring the Negro American to full and equal sharing in the responsibilities and rewards of citizenship" by designing programs to "have the effect, directly or indirectly, of enhancing the stability and resources of the Negro American family." As a response to the problems he identified in his Report, Moynihan later advocated for guaranteed income and job assistance for impoverished people and universal healthcare.[126]

Instead, however, the government enacted a series of laws that "blamed the victim."[127]

In part, these policies were driven by the trope of the welfare queen. In 1976, while campaigning for President, Ronald Reagan invoked the story of a woman named Linda Taylor who would gain notoriety as the "welfare queen."[128] As Reagan told it, Ms. Taylor used different identities to

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[120] *Id*.
[121] Moynihan, *supra* note 118.
[122] Alycee Lane, *"Hang Them If They Have to Be Hung": Mitigation Discourse, Black Families, and Racial Stereotypes,* 12 NEW CRIM. L. REV. 171, 193 (2009).
[123] Moynihan, supra note 118.
[124] Cook, *supra* note 119, at 2.
[125] Lyndon B. Johnson, *Commencement Address at Howard University: "To Fulfill These Rights."* THE AMERICAN PRESIDENCY PROJECT (JUN. 04, 1965), https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights.
[126] Joe Klein, *Daniel Patrick Moynihan Was Often Right. Joe Klein on Why It Still Matters*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/15/books/review/daniel-patrick-moynihan-was-often-right-joe-klein-on-why-it-still-matters.html.
[127] Reginald Leamon Robinson, *Seen but Not Recognized: Black Caregivers, Childhood Cruelties, and Social Dislocations in an Increasingly Colored America*, 117 W. VA. L. REV. 1273, 1347 (2015).
[128] Gillian Brockwell, *She was Stereotyped as 'The Welfare Queen.' The Truth Was More Disturbing, a New Book Says,* WASH. POST (May 21, 2019), https://www.washingtonpost.com/history/2019/05/21/she-was-stereotyped-welfare-queen-truth-was-more-disturbing-new-book-says/.

collect benefits in the amount of $150,000 a year.[129] While the "welfare queen" stereotype is most often used to thwart anti-poverty measures, this narrative also contributed to the degradation of Black families. It conjured an image of single, Black mothers gaming the system for money they were not entitled to and "gave credence to a slew of pernicious stereotypes about poor people and [B]lack women."[130]

Once in office, President Reagan redoubled his assault, continuing the War on Drugs launched by his predecessor.[131] Crack cocaine became its focus because it was primarily a drug used in low-income, urban centers.[132] Additionally, despite the fact that men and women used crack equally, society focused its attention on female crack users, in part due to the enormous increase in drug-exposed newborns in the late 80's and early 90's (although many tested positive for other substances).[133] Additionally, as part of the continued – and still unsuccessful – War on Drugs, Congress passed the 1986 Anti-Drug Abuse Act (ADAA) and the Omnibus Anti-Drug Abuse Act of 1988 ("OAAA"),[134] two years later.[135] These laws created disparate legal treatment of possession and sale of crack versus powder cocaine, based on an alleged but untrue assertion that crack was more dangerous and addictive and that it caused crime.[136] The ADAA established a 100-1 quantity ratio of powdered cocaine to crack cocaine, meaning that it would take 100 times as much powdered cocaine as crack cocaine to trigger a mandatory minimum.[137] Additionally, the ADAA created a five-year mandatory minimum and twenty-year maximum sentence for possession of crack while the maximum penalty for powder cocaine was only one year.[138] These laws funneled mostly Black men into prison, leaving single mothers and children behind.

President George H.W. Bush picked up right where Reagan left off. Bush famously held up a bag of crack cocaine during a nationwide address, remarking that something that looked like candy was destroying our country.[139] He focused his efforts on policing, prosecution, and incarceration, culminating in a $1.5 billion increase in federal police spending – the largest ever on drug enforcement.[140]

The War on Drugs also undermined the short-lived pendulum swing in favor of family preservation contained in AACWA.[141] AACWA required states to make "reasonable efforts" to

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[129] *Id*.
[130] *Id*.
[131] Ronald Reagan, *President of the U.S., Radio Address to the Nation on Federal Drug Policy*, THE AMERICAN PRESIDENCY PROJECT (Oct. 2, 1982), https://www.presidency.ucsb.edu/documents/radio-address-the-nation-federal-drug-policy.
[132] DOROTHY E. ROBERTS, KILLING THE BLACK BODY 155 (1998).
[133] *Id*.
[134] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.
[135] Jesselyn McCurdy, *The First Step Act Is Actually the "Next Step" After Fifteen Years of Successful Reforms to the Federal Criminal Justice System*, 41 CARDOZO L. REV. 189, 203 (2019).
[136] *Id*.
[137] SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING, U.S. SENTENCING COMMISSION at 161 (Feb. 1995).
[138] Anti-Drug Abuse Act of 1988, *supra* note 134, at 4370.
[139] Matthew R. Pembleton, *George H. W. Bush's Biggest Failure? The War on Drugs*, WASH. POST (Dec. 6, 2018), https://www.washingtonpost.com/outlook/2018/12/06/george-hw-bushs-biggest-failure-war-drugs/.
[140] *Id*.
[141] Sarah H. Lorr, *Unaccommodated: How the ADA Fails Parents,* Calif. L. Rev. (forthcoming)

prevent children from being removed as a means of reducing the foster care population.[142] By1990, however, the media was rife with stories about the so-called "crack baby," a child who screamed with "high-pitched cat cries." The front page of the New York Times cautioned that "inner-city schools, already strained by the collapse of families and the wounds of poverty, will face another onslaught this fall – the first big wave of children prenatally exposed to crack."[143] A woman who used drugs while pregnant was portrayed as "the exact opposite of a mother: she was promiscuous, uncaring and self-indulgent."[144] Harvard Law Professor Alan Dershowitz wrote that no woman had "the right to inflict a lifetime of suffering on her child simply in order to satisfy a momentary whim for a quick fix."[145] In his Washington Post column entitled *Crack Babies: The Worst Threat is Mom Herself*, Douglas Besharov, the first director of the National Center on Child Abuse and Neglect, suggested "a sixteen-year-old crack addict who just happens to be pregnant" was not worthy of a relationship with her child.[146] A 1991 Time Magazine cover story exclaimed "CRACK KIDS: their mother used drugs, and now it's the children who suffer."[147] Needless to say, the crack baby "whose biological inferiority is stamped at birth"[148] was usually Black, as was his mother."[149]

These portrayals made it easy to justify removing children from their undeserving mothers[150] even though this panic was based on inconclusive data[151] that was later debunked. Babies exposed to crack did not exhibit the problems that people had predicted when they grew up.[152] But the impact of the panic on family regulation policy was already made. Around the same time, an article by Princeton academic John DiLulio advanced the idea of the "superpredator.".[153] DiLulio described these youth as those who grew up in "moral poverty" with no one "to teach morality by their own everyday example and who insist that you follow suit."[154] As compared to the children of "the churchgoing, two-parent black families of the South" in "black inner-city

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[142] *Id*.
[143] Susan Chira, *Children of Crack: Are the Schools Ready? A Special Report: Crack Babies Turn 5, and Schools Brace*, THE N.Y. TIMES (May 25, 1990), https://www.nytimes.com/1990/05/25/us/children-crack-are-schools-ready-special-report-crack-babies-turn-5-schools.html.
[144] *Id*.
[145] MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY 19 (2020).
[146] Douglas J. Besharov, *Crack Babies, the Worst Threat is Mom Herself*, WASH. POST (Aug. 6, 1989), https://www.washingtonpost.com/archive/opinions/1989/08/06/crack-babies-the-worst-threat-is-mom-herself/d984f0b2-7598-4dc1-9846-3418df3a5895/.
[147] *Kids Addicted to Crack*, TIME MAGAZINE, (May 13, 1991), http://content.time.com/time/covers/0,16641,19910513,00.html.
[148] Charles Krauthammer, *Children of Cocaine,* WASH. POST (Jul. 30, 1989), https://www.washingtonpost.com/archive/opinions/1989/07/30/children-of-cocaine/41a8b4db-dee2-4906-a686-a8a5720bf52a/?utm_term=.377dd1ee0a27.
[149] Roberts (1998), *supra* note 132.
[150] Raz, *supra* note 145, at 109.
[151] Katharine Greider, *Crackpot Ideas*, MOTHER JONES (1995), https://www.motherjones.com/politics/1995/07/crackpot-ideas/.
[152] Kathleen Wobie, et. al., *To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine*, 43 PEDIATRIC RSCH. 234 (1998), https://doi.org/10.1203/00006450-199804001-01391.
[153] Carroll Bogert & LynNell Hancock, *How the media created a 'superpredator' myth that harmed a generation of Black Youth***,** NBC NEWS (Nov. 20, 2020), https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101.
[154] John DiLulio, *The Coming of the Super-Predators*, THE WASH. EXAM'R WKLY STANDARD (Nov. 27, 1995), https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators.

neighborhoods" these youth were in gangs and "homicidal."[155] The idea of the superpredator caught on like wildfire, garnering media attention[156] and impacting legislative efforts.[157]

Therefore, by the mid-90's, many in America viewed Black mothers – and particularly single Black mothers – as one of only two things: a welfare queen or a crack addict. Both selfish and both undeserving. A Black man was either a superpredator or a drug-dealing criminal, and thus did not deserve to remain with those mothers and certainly not with his children. As othering frequently does, this led to fear that was magnified by the media and politicians, culminating in a series of policies in the 1990s designed to "fix" the problems plaguing the Black community, punish deviant behavior, and reduce dependence on government.

Then came Bill Clinton. On the campaign trail prior to his election, Clinton promised to "end welfare as we know it to break the cycle of welfare dependency."[158] He also "vowed that he would never permit a Republican to be perceived as tougher on crime than he."[159] Once elected, Clinton made good on his promises, culminating in the enactment of the Violent Crime Control and Law Enforcement Act ("the 1994 Crime Bill"),[160] the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"),[161] and the Adoption and Safe Families Act of 1997.

As impacted parent, Ashley Albert, and family defense attorney and adoptive parent, Amy Mulzer, have written:

> ASFA, the crime bill, and PRWORA all constituted violent attacks on low-income communities and communities of color, and all three were supported by the same racist rhetoric, with supporters framing the laws as necessary to address an epidemic of drug addiction, violent crime, single motherhood, child abuse and abandonment, welfare fraud, and general dysfunction in urban – predominantly Black and brown – communities.[162]

The 1994 Crime Bill was the most expansive criminal regulation in the nation's history.[163] Though multiple factors led to mass incarceration, the 1994 Crime Bill corresponded with a historic increase in incarceration of people at both the federal and state levels, decimating communities of color across the country.[164] As the ACLU has argued, "the right way to view the 1994 crime bill is as the moment when both parties, at a national level, fully embraced the

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[155] *Id*.
[156] Bogert & Hancock, *supra* note 153.
[157] Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, 73 VAND. L. REV. 425, 439 (2020).
[158] *The true story behind the welfare queen stereotype*, PBS NEWS WEEKEND (June 1, 2019), https://www.pbs.org/newshour/show/the-true-story-behind-the-welfare-queen-stereotype.
[159] Allison E. Korn, *Detoxing the Child Welfare System*, 23 VA. J. SOC. POL'Y & L. 293, 302 (2016).
[160] Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, 108 Stat. 1796 (1994).
[161] Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, Pub. L. No. 104-193, 100 Stat. 2105 (1996) (codified as amended primarily in scattered sections of 42 U.S.C.).
[162] Albert & Mulzer, *supra* note 32.
[163] Korn, *supra* note 159, at 302.
[164] Alexander Afnan, *An Abolitionist Vision: Reclaiming Public Safety from A Culture of Violence*, 28 VA. J. SOC. POL'Y & L. 1, 27 (2021).

policies and political posturing that exacerbated the mass incarceration crisis we are trying to fix today."[165] Both parties were fighting to be "tough on crime"[166] and both vowed to stop people from taking advantage of the welfare system.[167]

While the 1994 Crime Bill dealt with the "criminals, welfare reform efforts focused on Black, single mothers. Racial politics took center stage leading to more punitive policies that were designed to "regulate the lives of poor women, deciding how they should raise their children, whom they could see, how to spend their money and when they should enter the labor market."[168] To this end, AFDC was replaced with Temporary Assistance for Needy Families ("TANF").[169] Whereas AFDC was an entitlement for low-income families meant to help white widows, PROWRA and TANF tried to ensure that Black, single mothers were not "abusing" the welfare system.[170] The government aimed to reduce long-term and inter-generational dependency on public assistance and encourage a shift away from out-of-wedlock pregnancies and single motherhood, and towards marriage,[171]

PROWRA's priorities were clear: to extricate people from the "tangle of pathologies" identified by the Moynihan Report. PROWRA blatantly stated a goal of "encourage[ing] the formation and maintenance of two-parent families.[172] To catch the crack-addicted mothers, it forced recipients to undergo drug testing.[173] To punish the welfare queen, it imposed mandatory work and income reporting requirements.[174] This emphasis on forcing parents to work in order to continue receiving benefits made it impossible for impoverished single-mothers to both work and take care of their children.[175] And failure on either metric could lead to involvement with the family regulation system.

ASFA grew out of these priorities, and it reflected and reinforced the devaluation of Black families. In combination, the 1994 Crime Bill, PROWRA and ASFA, along with the political forces that led to their passage, caused significant destruction of Black families. They reflected the view that these were simply not the kind of people that deserved the privilege of raising their children. As the Repeal ASFA Steering Committee describes it:

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[165] Udi Ofer, *How the 1994 Crime Bill Fed the Mass Incarceration Crisis*, ACLU (June 4, 2019), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-1994-crime-bill -fed-mass-incarceration-crisis.
[166] *Id*.
[167] Bill Clinton, *How We Ended Welfare, Together*, N.Y. TIMES (Aug. 22, 2006), https://www.nytimes.com/2006/08/22/opinion/22clinton.html.
[168] PREMILLA NADASEN, RETHINKING THE WELFARE RIGHTS MOVEMENT 5-6 (2011).
[169] Andrea Freeman, *You Better Work: Unconstitutional Work Requirements and Food Oppression*, 53 U.C. DAVID L. REV. 1531, 1560 (2020).
[170] Jamila Young, *Dethroning the Myth of the Welfare Queen: A Proposal to End Drug Testing Laws as A Precedent for Government Aid*, 7 S. REGION BLACK L. STUDENTS ASS'N L. J. 30, 37–38 (2013).
[171] Steven D. Schwinn, *Toward A More Expansive Welfare Devolution Debate*, 9 LEWIS & CLARK L. REV. 311, 312 (2005).
[172] Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 381–83 (2011).
[173] Young, *supra* note 170, at 37-38.
[174] Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 661 (2009).
[175] Guggenheim, *supra* note 5, at 719.

> They would use language to pathologize us for accessing what little government assistance was left, and blame us for the harms of living under centuries of oppression, calling Black, Brown, and low-income mothers "crackheads" and "welfare queens." They would push them into systems, and turn their backs on families and communities. They would disappear adults into the prison system and children into the family regulation system.[176]

This history demonstrates the myriad ways in which ASFA is a continuation of the historic, institutionalized norms of dehumanizing and oppressing Black people. It is part of a legacy of branding them as incapable or unworthy of caring for their own children and taking those children away as punishment. Viewed through this lens, ASFA is not a well-intentioned, albeit imperfect, law that can be amended or reformed. Rather, it is a law that should not be saved.

II. AMENDMENT IS NOT THE ANSWER

"[R]epeated attempts to improve the sole option offered by the state, despite how consistently . . . injurious it has proven itself, will neither reduce nor address the harm . . . [w]hat can we imagine for ourselves and the world?" - Mariame Kaba[177]

In recent years, government actors have begun to acknowledge some of ASFA's adverse effects and have attempted to enhance family preservation efforts. In particular, the Family First Act, enacted in 2018, provided in-home services to families to treat certain underlying parental concerns. More recently, the 21st Century Children and Families Act (CCFA) attempts to strengthen agencies' obligations to reunify families. But these efforts are insufficient. Despite good intentions, the Family First Act has already been criticized for increasing surveillance of Black and low-income families.[178] Additionally, while the CCFA attempts to address some of AFSA's problematic provisions, it does not remedy many of the constitutional deficiencies or practical problems. Further, despite these attempts, calls to repeal ASFA have not subsided – they have gotten louder. For those who have been most affected by ASFA, these attempts at reform will never be enough.

A. The 2018 Family First Prevention Services Act – Surveillance Not Support

In 2018, Congress passed the Family First Prevention Services Act as part of its Bipartisan Budget Act.[179] The stated purpose of the law is to "to enable States to use Federal funds . . . to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services."[180] By reallocating funds from Title

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[176] Albert et. al., *supra* note 3, at 875.
[177] MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE 3 (2021).
[178] Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System,* 11 YALE L.J. 767 (July 2021).
[179] *Family First Prevention Services Act*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Apr. 26, 2022), https://www.ncsl.org/research/human-services/family-first-prevention-services-act-ffpsa.aspx.
[180] *Id*.

IV-E of the Social Security Act, which traditionally had been reserved only for post-removal services,[181] Congress was deliberately shifting at least some of the federal government's financial focus from child removal to primary prevention.[182] In theory, this would allow parents to receive in-home services including mental health, substance use disorder prevention and treatment services as well as parenting skills programs to allow children to safely stay at home and avoid the trauma of removal.

On its face, this Family First Act was an important, meaningful, and welcome change in the way the family regulation system approaches intervening in the lives of children and families. Many celebrated its passage and were hopeful that it would lead to fewer removals.[183] Instead of waiting until families are too deep in crisis to avoid a removal, the Act envisions a model through which government systems can assist families in addressing concerns earlier to ensure that their children can safely be kept at home.[184] A closer look, however, reveals that the law continues to further the same flawed system that pathologizes primarily low-income, Black parents and ignores the most basic needs of families facing family regulatory action.

Despite compelling evidence that poverty is an overwhelming and unifying characteristic of families entangled in the family regulation system, the Family First Act does not dedicate any funding toward addressing poverty-based needs such as housing or childcare.[185] The act makes no reference to providing material resources as a preventative strategy, instead placing its singular focus on behavior modification through substance abuse intervention, family therapy, motivational interviewing, and other home visiting programs designed to cultivate parenting skills that are presumed to be lacking.[186] Rather than provide meaningful reform, the Act codifies the family regulation system's reliance on pathology, control, and punishment.[187] Given that Black people are nearly three times as likely to live in poverty as their white counterparts in the United States[188] they are in greater need of services and supports that address poverty. Without them, they are more likely to be subject to state surveillance and intervention.

Instead of material support, parents are offered services such as parenting classes that allow state officials into their homes to monitor and judge their parenting. In so doing, The Family First Act disguises "mandatory measures as compassionate rehabilitation" and "redefin[es] . . . coercion as compassionate pedagogy . . . ."[189] While many of these workers may care about the families and

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[181] *A Primer on Title IV-E Funding for Child Welfare*, CHILD TRENDS (2016), https://www.childtrends.org/wp-content/uploads/2016/01/2016-04TitleIV-EPrimer.pdf.
[182] Mack, *supra* note 178, at 783.
[183] *See e.g. Family First Prevention Services Act Will Change the Lives of Children in Foster Care*, THE ANNIE E. CASEY FOUND. (Feb. 12, 2018), https://www.aecf.org/blog/family-first-prevention-services-act-will-change-the-lives-of-children-in-f.
[184] Family First Prevention and Services Act, Pub. L. 115-123, Title VII, § 50702.
[185] Mack, *supra* note 178, at 781.
[186] *Id*., at 789.
[187] *Id*., at 791.
[188] John Creamer, *Inequalities Persist Despite Decline in Poverty for All Major Race and Hispanic Origin Groups*, U.S. CENSUS BUREAU (Sep. 15, 2020). https://www.census.gov/library/stories/2020/09/poverty-rates-for-blacks-and-hispanics-reached-historic-lows-in 2019.html#:~:text=In%202019%2C%20the%20share%20of,share%20in%20the%20general%20population.
[189] Mack, *supra* note 178, at 802.

hope to see them succeed, at the end of the day, these counselors, caseworkers, and therapists are arms of the family regulation system. As such, they are tasked not only with monitoring the parent's progress but also with determining whether the parent is "fit." Too often, the focus of the intervention shifts from child safety to parental compliance with these services. As Kmea Jones, a mother embroiled in the family regulation system explained:

> I am desperately fighting to have them come home to me, and stop my parental rights from getting terminated, but ACS and foster care create so many barriers for me to navigate. Nothing I do seems to matter; the goalposts for reunification are continuously moved after I reach them.[190]

A parent's willingness and/or ability to fully participate can then be used to justify both the current involvement and the ultimate consequences that flow from that involvement. This self-justifying logic erases the structural problems facing families and displaces any truly effective means of assistance that may be available.[191] Thus, these "helpers" are not there simply to assist and support parents. Ultimately, they are gathering evidence that in many cases lands in the hands of investigators, prosecutors, and judges. Further, these workers can and do report parents and recommend removals. As a result, The Family First Act merely shifts the focus from immediate removal of children to the ever-present threat of removal based on a parent's compliance with so-called voluntary services.

Reminiscent of Moynihan's recommendations, this focus on parental behaviors rather than systemic poverty-related issues also suggests that classic pathways to family regulation, such as housing instability, lack of childcare and insufficient food are due to personal deficiencies, rather than societal factors. Additionally, activists, scholars, and advocates note that the prevention plans are often developed by simply stringing together a list of standardized services without any real consideration for the families' individual needs, material or otherwise.[192] Even though these plans often do not address the family's needs or feel necessary to address the allegations, parents frequently feel that they have no other choice but to engage in the services in order to protect their familial integrity. If they do not, they risk the state removing their children, but even if they do, they remain under the state's constant and watchful eye. As one parent explained "[family regulation involvement] is like going to jail. They tell you what to do to get your life back. You have to jump through hoops to make people happy but then you are not happy because your children are not happy. Then, when your children come home, you're still in jail because you are being watched with everything you do in your life."[193]

Ultimately, the Families First Act does not remove punishment as a pillar on which the family regulation system rests. Moreover, some advocates worry that the Act drags even more families into the system because families that would have otherwise escaped surveillance are offered

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[190] Kmea Jones, *ACS Took My Childhood; Now They're Taking My Children*, JMACFORFAMILIES, https://jmacforfamilies.org/acs-took-my-childhood.
[191] S. Lisa Washington, *Pathology Logic*, N.W. U. L. REV. (forthcoming 2023).
[192] Mack, *supra* note 178, at 803.
[193] Teresa Bachiller, et. al., *Centering Parent Leadership in the Movement to Abolish Family Policing*, 12 Colum. J. Race L. 436, 440 (July 2022).

"optional" services under the Act, leading to continuous state interaction. Thus, the Act, continues to use punishment – by way of increased surveillance, the potential of children being removed to the foster system, TPR, and adoption – as the primary way of purporting to support families. And the Family First Act made absolutely no effort to address some of the major critiques of ASFA. As a result, a few years after the Family First Act's passage, the CCFA was proposed as a way to confront ASFA's most detrimental provisions.

B. The 21st Century Children and Families Act Demonstrates Why Reform is Not Enough

In late 2021, Representative Karen Bass introduced the CCFA, stating:

> I've spoken with former foster youth, social workers, and family regulation professionals over the years and the consensus is that more needs to be done to improve foster kids' options for stability in their lives. Premature modification of parental rights too often leaves children in foster care with no legal family . . . Change is needed. The 21st Century Children and Families Act would preserve the aspects of family regulation laws that have proven effective, while updating family regulation policy so more children can safely and expeditiously leave foster care for safe, stable, and permanent family.[194]

While this is reminiscent of ASFA's equivocal directive that the "safety and health of the child shall be paramount," CCFA does propose some important changes. CCFA aims to tackle the most vociferous complaints about ASFA, including the requirement that a petition to terminate a parent's rights be filed if a child is in foster care for fifteen out of twenty-two months.[195] CCFA also addresses disproportionality head-on and increases the availability of counsel for parents at risk of losing their children.[196]

Most significantly and laudably, CCFA extends the timeline for TPR and gives states discretion about when to file termination petitions. In place of ASFA's previous command that if a child has been in foster care for fifteen out of twenty-two months, the state "*shall* file a petition to terminate the parental rights," CCFA provides that states "may consider filing" such a petition if a child is in foster care for 24 consecutive months" and is not in the care of a relative.[197] Parents will also be exempted from the timeline if they are actively engaged in services, their children are with kin, or the reason for petition is based on incarceration or immigration detention.[198]

Further, CCFA attempts to give teeth to the reasonable-efforts requirement by creating a higher burden for states to file a TPR. To file a TPR under CCFA, the state must demonstrate by clear and convincing evidence that it has provided the family with "such services, supports, and time needed to address the reasons for foster care and enable the family to safely reunify." The state must also demonstrate compelling reasons why the termination is in the best interests of the

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[194] Press Release, *Rep. Bass Introduces 21st Century Children and Families Act to Improve Stability for Kids in Foster Care* (Nov. 4, 2021), https://bass.house.gov/media-center/press-releases/rep-bass-introduces-21st-century-children-and-families-act-improve.
[195] 21st Century Children and Families Act, H.R. 5856, 117th Cong. § 2 (2021).
[196] *Id.*
[197] *Id.*, at § 3(1).
[198] *Id.*

child.[199] These provisions recognize that time should not be the only factor in deciding to terminate parental rights. The provisions also require courts to examine the overall family picture, including whether the state has actually met its obligations to provide the family with the assistance to address the underlying concerns. This provision is meant to address scenarios such as the one described by impacted parent, Lorie Cox, who wrote, "[i]t seemed like the social workers lined up foster/adoptive parents quickly, but took their time in getting me referrals for any services that were court ordered, such as drug treatment, therapy, and parenting classes I needed."[200]

CCFA also prevents states from filing termination petitions in certain circumstances. Specifically, the state may not file a termination petition even when a child has been in state care for twenty-four months or more if the parent is "actively engaged in services to address the reasons the child entered foster care." This includes treatment for substance abuse, mental health problems, or parenting skills. This protection also extends to children who are in state care based primarily on their parent's incarceration, detention by the Department of Homeland Security, or deportation.

Without question, these are significant non-reformist, reforms - important steps towards change by reducing the funding allocated to those specific terminations and reducing terminations overall.[201] The importance of these changes cannot be overstated and would have a huge impact on many families currently impacted by family regulation intervention.

CCFA also recognizes the disparate impact that ASFA has had on minority communities and tackles them in two ways: (1) by requiring states to demonstrate that the local family regulation agency is addressing disproportionality in family regulation involvement and disparities in access to services in their individual systems, and (2) by requiring state Court Improvement Programs to train judicial officers and other staff on "race, culture and equity."[202]

Unfortunately, CCFA does not address many of ASFA's other deficiencies. For example, CCFA does not fix the vague language that invites and facilitates discrimination. CCFA still fails to define reasonable efforts, despite years of accumulated knowledge that this is one of AFSA's major deficiencies.[203] Further, CCFA continues to allow states to bypass reasonable efforts when "aggravated circumstances" purportedly exist, allowing further discrimination and violating the right to family integrity.[204]

Perhaps CCFA's most significant flaw is that it tries to address reasonable efforts only prior to termination – which is long after children, their families, and communities have suffered the devastating impacts of removal. Clarifying the state's obligation to support families prior to

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[199] *Id*., at § 2.
[200] Lynne Miller, *Good Intentions, Mixed Outcomes- To give families a fair chance, ASFA must clarify the supports that child welfare systems, courts and lawyers must provide*, RISE (Jan. 9, 2010), https://www.risemagazine.org/2010/01/good-intentions-mixed-outcomes/.
[201] Albert et. al., *supra* note 3, at 892.
[202] 21st Century Children and Families Act, *supra* note 195, at § 2(b), 4(b).
[203] *Id*.
[204] *Id*.

removal would lead to fewer children being removed in the first place and then "languishing" in foster care – one of the original reasons for ASFA's passage.[205]

And finally, while CCFA can make many positive changes going forward, it does not heal the historic harms ASFA has done. CCFA is motivated by good intentions and seeks to rectify *some* of AFSA's shortcomings, but it does not fundamentally alter the punitive nature of the current family regulation system. For those parents, children, and communities impacted by that system, simply amending ASFA will never heal the deep wounds it inflicted. It will not alter what ASFA's existence communicates to people about who they are and what their families are worth. For those people, there is only one just solution. We must repeal ASFA and completely re-envision the government's involvement in families.

III. THE WAY FORWARD – REPEAL ASFA

"If we merge mercy with might, and might with right, then love becomes our legacy, and change our children's birthright. So let us leave behind a country better than the one we were left . . . We will raise this wounded world into a wondrous one." – Amanda Gorman[206]

A. The Symbolic Importance of Repeal

While reform may be appropriate in many circumstances, this is not one. "Policies adopted out of contempt or hostility toward a racial group, or with the purpose of branding a racial group as inferior, are expressively harmful."[207]ASFA was enacted as part of a backlash against allegedly selfish, lazy, drug-addicted Black, single mothers and their deadbeat, criminal partners. From its inception, ASFA denigrated Black families and devalued their family integrity. It was the product of misinformation and bias fueled by political and social circumstances that made it easier for people to support this backlash.

What ASFA expressed had actual consequences. Fifty-three percent of Black children will experience a family regulation investigation in their lifetime.[208] Year after year, Black children are disproportionately represented in foster care and Black parents' rights continue to be disproportionately terminated,[209] even though their children are unlikely to be adopted.[210] In August of 2022, the United Nations Committee to End Racial Discrimination ("CERD") expressed concern not only at the disproportionate number of Black and Native children in the foster system, but also that racial and ethnic minorities were more likely to be surveilled and

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[205] *Id*.
[206] AMANDA GORMAN, THE HILL WE CLIMB (1998).
[207] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1542 (2000).
[208] Hyunil Kim, et. al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, AM. J. OF PUB. HEALTH (Feb. 2017), https://ajph.aphapublications.org/doi/abs/10.2105/AJPH.2016.303545.
[209] Christopher Wilderman, et. al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 21 CHILD MALTREATMENT 32 (Feb. 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6868298/#:~:text=American%20Indian%20and%20Alaska%20Native,the%20termination%20of%20parental%20rights.
[210] *African American Babies and Boys Least Likely to Be Adopted Study Shows*, CALTECH (Apr. 20, 2010), https://www.caltech.edu/about/news/african-american-babies-and-boys-least-likely-be-adopted-study-shows-1610.

investigated and less likely to be reunified with their families.[211] In making its recommendations, the CERD specifically mentioned ASFA when it urged:

> that the State party take all appropriate measures to eliminate racial discrimination in the child welfare system, including by amending or repealing laws, policies and practices that have a disparate impact on families of racial and ethnic minorities, such as the Child Abuse Prevention and Treatment Act, the Adoption and Safe Families Act and the Adoption Assistance and Child Welfare Act. The Committee encourages the State party to hold hearings, including Congressional hearings, to hear from families who are affected by the child welfare system.[212]

Although amending AFSA may ameliorate some of the law's future impacts, this approach will not remedy the profound and irreversible harms of the past. Attempts at reforming laws like ASFA ignore the expressive and symbolic damage that they cause, particularly when they are enforced so disproportionately against Black and brown families.

AFSA has been called the civil death penalty for its the fatal blow to families, but the two laws are similar in other ways. Both ASFA and capital punishment also disproportionately affect Black people and further discriminatory social norms.[213] Just as drafters and supporters of AFSA shaped the law as a means of protecting children from harm and promoting the benefits and joys of adoption, proponents of capital punishment often tout its deterrent benefits and express their concern about the message abolition would send to would-be criminals. They argue that "punishment is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation."[214] As middle ground, courts and lawmakers attempt to reform the system to make it "safer" or more efficient. But such reforms serve "as little more than window dressing, providing a false sense of coherence and legal legitimacy to prop up a regime that is both arbitrary and discriminatory. And race is at the heart of this disconnect."[215] Given that every legal action holds symbolism, – the decision to modify rather than abolish the death penalty sends a message that state-sanctioned murder is acceptable. At a deeper level, it tells those disproportionally faced with the possibility of death by execution, that the racial disproportionality baked into the criminal legal system is not a problem worth solving. It tells them that as a society, we will continue to undervalue their lives. ASFA sends the same message.

Abolition of toxic and discriminatory laws is possible and can send a powerful message about what direction we hope to push our social norms. "... [T]he expressive function of law has a great deal to do with the effects of law on prevailing social norms. Often law's 'statement' is designed to move norms in fresh directions."[216] *Brown v. Board of Education* is an example of this. When *Plessy v. Ferguson* declared that "separate but equal" was both constitutionally and morally

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[211] CONCLUDING OBSERVATIONS ON THE COMBINED TENTH TO TWELFTH REPORTS OF THE UNITED STATES OF AMERICA, COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION 10 (Aug. 30, 2022).
[212] *Id.*
[213] Executions by Race and Race of Victim, TENTH DEALTH PENALTY INFO. CENT. (2022), https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim.
[214] San M. Kahan, *What Do Alternative Sanctions Mean?,* 63 U. CHI. L. REV. 591, 593-94 (1996).
[215] Susan A. Bandes, *All Bathwater, No Baby: Expressive Theories of Punishment and the Death Penalty*, 116 MICH. L. REV. 905, 906 (2018), https://doi.org/10.36644/mlr.116.6.all.
[216] Sunstein, *supra* note 215, at 2051.

acceptable, the expressive power of law was front and center. *Plessy* stated that such laws "did not 'mean' Black inferiority."[217] Of course, the opposite was true. Despite the fact that "tangible" factors might be equal, there was an "independent expressive . . . stigmatic harm" because of the obvious message such laws sent to the community.[218] The resulting outrage was not only about the practical effects of segregation, but also the symbolic meaning of the laws that created it. In *Brown*, the Court recognized that this was not a system capable of being reformed. Overruling *Plessy* sent a message that separate but equal was inherently inequitable.

When ASFA was passed as "an Act to promote the adoption of children in foster care," it used the force of government to move the needle of our social norms towards adoption as the preferred outcome of the family regulation and foster systems. In doing so, it helped to normalize the permanent taking of children from their parents. ASFA thus conveys to society that certain families are not worthy of even being a family and that we should focus instead on finding children new ones. Such a law should not be rehabilitated – it should be rescinded. Just as laws have expressive value, so too does action.[219] Repeal demonstrates a recognition of the harm that ASFA has caused and sends a message to those impacted that they have been heard and that they and their families matter.[220] To repair the damage to those whose lives and families have been destroyed by ASFA we must repeal it and build a future that centers their needs and their vision.

B. A World Without ASFA

The movement to repeal ASFA is rooted in abolitionist principles, many of which were developed in the criminal justice context. As the Repeal ASFA Campaign Steering Committee has written, "we build a new world, not just by repealing laws, but through transforming and undoing oppressive social orders, actions and interactions." Derecka Purnell, author of *Becoming Abolitionists,* thinks of abolition as "an invitation to create and support lots of different answers to the problem of harm in society, and, most exciting, as an opportunity to reduce and eliminate harm in the first place."[221] Our current approach replicates a history of taking children from their parents because their parents are not valued or respected. It allows us to ignore the fact that our current laws are based on faulty evidence and misguided approaches to solving problems that did not really exist. Our current approach causes harm.

Matthew Clair and Amanda Woog have identified three principles central to the criminal justice abolition movement that are clearly applicable to the family regulation context: (1) power shifting; (2) community investment; and (3) transformation.[222] Repealing ASFA is only the first step; it is an acknowledgement of harm and an apology for creating a system built on stereotypes and bias. The next step is returning to all parents the power of their fundamental right to parent[223]

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[217] Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996),
[218] Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1542 (2000).
[219] *Id*. at 2021.
[220] Albert et. al., *supra* note 3, at 892 ("Abolitionists' steps towards change also demand a transformative repair, not only as we heal as individuals but as society becomes accountable to the harms it inflicted on our communities.").
[221] Derecka Purnell, *How I Became a Police Abolitionist*, The Atlantic (Jul. 6, 2020), https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/.
[222] Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 Cal. L. Rev. 1, 25 (2022).
[223] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

and creating a system that puts resources into communities to support families. In this way, we create a system where parents and their children can thrive without coercive state intervention.

1. Power Shifting

"In this world, we govern our own communities, and have participatory policy making. Parents and community leaders support each other . . . We believe that leadership and participation should not be defined or constrained by educational degrees, institutional approval, or socio-economic status. And that those with power should leverage what they have for the greater good.
– Repeal ASFA Steering Committee[224]

Repealing AFSA is a necessary component of restoring power to families. ASFA shifted power to make basic decisions about their children away from Black families and thereby shifted collective power away from their communities. Arbitrary timelines and vague definitions have allowed child protective workers, lawyers, and judges to wield immense power over parents and make life altering decisions about who is and is not a family. The system assumes that removal will be better for the child when in reality, it usually is not. And it fails to consider that children have an independent right to be with their parents.[225] At a fundamental level, the system refuses to acknowledge the power and value of a parent's love for their child.

To shift power, we must first listen to those who have suffered the consequences of the law. We must center coalitions like Repeal ASFA,[226] the Movement for Family Power ("MFP"),[227] Just Making a Change for Families ("JMacforFamilies"),[228] the Parents Legislative Action Network ("PLAN"),[229] and Rise[230] that give parents' voices a platform. As MFP, explains "building the power of impacted people and communities is critical to creating meaningful, lasting change."[231] We need to "center the leadership of parents and families affected by the Foster System, amplifying their voices, and advancing their political agendas."[232] To this end, JMacforFamilies runs programs to "harness the knowledge, power and passion of parents by creating a space in which they are empowered to dive into personal healing and advocacy work with the goal of abolishing the Family Policing System . . ." including learning how to "communicate effectively to lawmakers through oral and written testimony [and] sharing their stories and expertise for change."[233]

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[224] Repeal ASFA, https://www.repealasfa.org/our-work.
[225] Trivedi (2021), *supra* note 68.
[226] Repeal ASFA, *supra* note 31.
[227] Movement for Family Power, www.movementforfamilypower.org/.
[228] JMacforFamilies, https://jmacforfamilies.org/.
[229] *Legislative Advocacy*, JMACFORFAMILIES (2022), https://jmacforfamilies.org/plancoalition.
[230] *About Rise*, RISE (2022), https://www.risemagazine.org/about/.
[231] *Our Areas of Work*, MOVEMENT FOR FAMILY POWER (2019), https://www.movementforfamilypower.org/indexa
[232] *Id*.
[233] H.E.A.L., JMACFORFAMILIES (2022), https://jmacforfamilies.org/heal

For parents to be able to take back their power, they must also know their rights. Currently, parents are not provided with counsel at the investigation stage, and therefore often have their rights violated. Bills such as in S5484A in New York[234] would require child protective workers to advise parents of their rights at the beginning of an investigation similar to *Miranda* rights in the criminal context.[235] Such legislation is necessary because parents cannot assert their rights if they are not apprised of those rights. So far, however, the legislation has failed to pass.[236] Joyce McMillan, founder of JMacforFamilies has not let this stop the movement. Ms. McMillan has continued to provide education to parents through her website and through Know Your Rights events, signs and billboards around New York City.[237]

This does not preclude a role for advocates and allies, as "the work of changing the system cannot be the burden of affected families alone and that therefore collaboration among those directly affected and other advocates is essential." But those with relative power and privilege must be willing to learn and grow, act with humility and be accountable to impacted people advocating for change.[238]

2. Community Investment

"Our mission is to support parents' leadership to dismantle the current family policing system by eliminating cycles of harm, surveillance and punishment and creating communities that invest in families and offer collective care, healing and support." - Rise[239]

Drawing from W.E.B. Du Bois' "abolition democracy," we also need to invest in communities that have been oppressed by the current system.[240] Currently, the family regulation system spends ten times more on adoption and foster care than it does on helping to preserve and reunify families.[241] While this is not a problem directly caused by ASFA, the funding structures currently in place are reflective of ASFA's priorities. Despite this lack of funding, there have been many successful community-based initiatives that allow parents to create social networks that they can lean on before they are in crisis.

For example, Rise in New York City created a vision for Collective Care Networks. In these networks, peer supporters serve as "safe, nonjudgmental people to talk to who have the

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[234] S. 5484B, 2021-2022 Leg., Reg. Sess. (N.Y. 2021).
[235] Madison Hunt, *Miranda Warning'-style Bill for Parents Fails in New York City Council*, THE IMPRINT (Dec. 16, 2021), https://imprintnews.org/top-stories/miranda-warning-style-bill-for-parents-fails-in-new-york-city-council/61243.
[236] *Id*.
[237] *Get Help Now*, JMACFORFAMILIES (2022), https://jmacforfamilies.org/plan.
[238] Rise, *supra* note 229.
[239] *What We Do*, RISE (2022), https://www.risemagazine.org/what-we-do/.
[240] Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CA. L. REV. (FORTHCOMING 2022).
[241] *Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (Jul. 31, 2005), https://aspe.hhs.gov/reports/federal-foster-care-financing-how-why-current-funding-structure-fails-meet-needs-child-welfare-field-0 (See figure 8, percentages add up to almost 90 percent for adoption/foster care and 9% for title IV-B funding, reunification).

community knowledge to make useful connections."[242] Rise also utilizes Community Supporters who are members of trusted community organization who can help parents navigate systems and accompany parents to appointments and other obligations.[243] These supports build on principles of mutual aid and support and give parents in heavily policed areas somewhere to turn to when they are facing stressful situations. As Rise describes it, "[i]ntentionally supporting relationships that cultivate trust, love and joy can be a powerful change mechanism for strengthening communities."[244]

Similarly, *Strong Communities* in South Carolina used community gathering spaces like such as churches and community centers to create opportunities for socialization and fellowship amongst parents and community outreach workers who worked with families creatively and connected them with opportunities for mutual support. Additionally, the King County Blended Funding Project in Washington State used the idea of "co-production," looking for strengths in the community that could be used to benefit others. For example, people who were formerly incarcerated created a support group for those now dealing with the same situation, and a grandmother who was raising her grandchildren shared her experience with others in the same position. [245]

Investing more in programs like these would increase access to support for families before a child is endangered, preventing that harm and ultimately saving resources.[246] Repealing ASFA would allow us to completely rethink the family welfare funding structure and determine how best to allocate the *10 billion dollars* currently allocated to family regulation programs.[247] For example, in 2022, President Biden requested $75 million dollars to fund adoption incentives, the same amount allocated in the prior year.[248] In 2021, $70.4 million of the requested funds were actually awarded. If that amount was invested in childcare, mental health and substance use disorder treatment or affordable housing, many children could leave the family regulation system immediately. Given that the majority of family regulation cases are due to neglect and not abuse[249] – and so many of those are really due to poverty – investing in these priorities might allow us to send home more than half of the over 400,000 children that remain in foster care.[250]

3. Transformation

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[242] *Rise's Vision for Peer Collective Care,* RISE MAGAZINE 13, (2021), *https://www.risemagazine.org/wp-content/uploads/2021/05/Rise_PeerCareInsights2021_Final.pdf.*
[243] *Id.*
[244] *Id.*
[245] Bob Jones, *The King County Blended Funding Project*, A RESOURCE GUIDE TO WRAP AROUND, https://nwi.pdx.edu/NWI-book/Chapters/Jones-2.4-(cmty-wrap).pdf.
[246] Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 930 (2014).
[247] 2021 Consolidated Appropriations Act, P.L. 116-260, Div. H.
[248] *The President's Fiscal Year 2022 Budget Request,* CHILD WELFARE LEAGUE OF AMERICA (Jun. 4, 2021), https://www.cwla.org/wp-content/uploads/2021/06/CWLA-Summary-of-Presidents-FY-2022-Childrens-Child-Welfare-Budget-1.pdf.
[249] Vivek Sankaran, *With Child Welfare, Racism Is Hiding in the Discretion*, THE IMPRINT (Jun. 12, 2020), https://imprintnews.org/child-welfare-2/with-child-welfare-racism-is-hiding-in-the-discretion/44616.
[250] *AFCARS Report No. 27*, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMILIES, CHILDREN'S BUREAU (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf.

"We want Freedom to use resources in our community for the purposes that they are intended without fear of having those services or the people who work in those services judging us based on false narratives that have been taught to them that they have never personally experienced, that creates fear. Control is the starting point; judgment is a tool used to legitimize their control. Surveillance is collecting information and instilling fear and terror. Information is gathered, along with judgment/false narratives about who we are and what we deserve or are entitled to. All that is used to build Systems that deny our humanity and agency and autonomy and keep us under control." - Joyce McMillan[251]

To transform our system, we need to transform our thinking. ASFA's guidance that the "child's health and safety must be paramount" is not entirely wrong, but it has been misinterpreted and misapplied. Under ASFA, safety has always been equated with removal, rather than maintaining familial bonds, despite mountains of evidence that demonstrate the detrimental and lifelong effects of removal. True safety means acknowledging these harms as well as recognizing that most children fare better when they remain with their families and their communities, rather than being placed in the foster system. We must reject the false premise that removal is always the safer course of action.[252]

In addition, our understanding of children's safety should be broadened. MFP, for example, seeks to "reclaim the narrative of family safety from violent State actors, and work to support the healers in our community who are building out alternatives when needed."[253] Safety also means security. When children are taken from their homes and communities, they face instability and uncertainty which is compounded by multiple foster placements as opposed to the security that they experience through their family and community bonds.[254] Security should "include increasing access to resources to increase economic, housing, health . . . and require that all new legislative, policy, and funding initiatives address these areas."[255] It means "guaranteeing children health care, food, clothing, shelter, free child care, and other benefits designed to minimize the disadvantages many children currently endure because of their bad luck of having been born poor."[256]

As Ruth Gilmore explains, "[a]bolition is about presence, not absence. It's about building life-affirming institutions."[257] Angela Davis teaches that abolition requires "revitalization of

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[251] *Divest from Harm-Causing Approaches: Repeal the Child Abuse Prevention and Treatment Act*, FAMILY INTEGRITY & JUSTICE Q., Summer 2022, at 42, https://publications.pubknow.com/view/288644440/42/.https://publications.pubknow.com/view/288644440/42/.
[252] Trivedi (2019), *supra* note 46.
[253] *Strategies*, MOVEMENT FOR FAMILY POWER (2019), https://www.movementforfamilypower.org/solution-and-strategies.
[254] Help is NOT on the Way: How Family Policing Perpetuates State Directed Terror, UPEND 57 (2022), https://upendmovement.org/wp-content/uploads/2022/06/upEND-Movement-Help-is-NOT-on-the-Way-06_2022.pdf
[255] Margaret E. Johnson, *Changing Course in the Anti-Domestic Violence Legal Movement: From Safety to Security*, 60 VILL. L. REV. 145, 148 (2015).
[256] Martin Guggenheim, The (Not So) New Law of the Child, 127 YALE L.J. FORUM 942, 955 (2018).
[257] J. Carl Gregg, *Another World Is Possible: What Does Prison Abolition Really Mean?*, UNITARIAN UNIVERSALIST CONGREGATION OF FREDERICK 9 (Jan. 24, 2021), https://frederickuu.org/sermons/prisonabolition.pdf (quoting prison abolitionist and scholar Ruth Wilson Gilmore).

education at all levels, a health system that provides free physical and mental care to all, and a justice system based on reparation and reconciliation rather than retribution and vengeance."[258] If parents are truly endangering their children, we cannot simply intervene after the harm has taken place. We need to address the root causes of endangerment, such as poverty, unemployment, social isolation.[259] If parents are struggling, they should have non-punitive access to substance use disorder treatments or mental health services without being at risk of losing their children.

This is not impossible. Other countries with comparable wealth have adopted policies that reduce poverty and enhance outcomes for children. These include universal healthcare, paid parental leave, better childcare policies and increased educational access.[260] We know these are the things that actually improve children's welfare, yet we continue to put faith in a system that causes serious and long-lasting harm.[261] At a time when our society is examining what justice requires and who we want to be, a crucial step in the right direction is to repeal ASFA.

CONCLUSION

Instead of trying to reform a law that is inherently harmful, we should envision what would actually be useful to ensure that children can be safely raised by their parents, within their communities. If we dismantle ASFA, imagine what we can build.

[258] *Id*. (quoting ANGELA DAVIS, ARE PRISONS OBSOLETE 107 (2003)).
[259] *Risk and Protective Factors*, CENTER FOR DISEASE CONTROL, CHILD ABUSE AND NEGLECT, https://www.cdc.gov/violenceprevention/childabuseandneglect/riskprotectivefactors.html.
[260] *See generally* MAXINE EICHNER, THE FREE MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) (2020).
[261] Lyra Walsh Fuchs, *The Carceral Logic of Child Welfare,* DISSENT (Apr. 1, 2022), https://www.dissentmagazine.org/online_articles/carceral-logic-child-welfare-dorothy-roberts.