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ABOLITION, SETTLER COLONIALISM, AND THE PERSISTENT THREAT OF INDIAN CHILD WELFARE

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Family separation is a defining feature of the U.S. government's policy to forcibly assimilate and dismantle American Indian and Alaska Native (AIAN) tribal nations. The historical record catalogues the violence of this separation in several ways, including the mass displacement of Native children into boarding schools throughout the 19th century and the widespread adoption of Native children into non-Native homes in the 20th century. This legacy eventually prompted the passage of landmark legislation known as the Indian Child Welfare Act of 1978 (ICWA). ICWA introduced federal protections against the unnecessary removal of Native children and affirmed the role of the tribe as an important

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partner in child welfare proceedings. To what extent has the federal government honored the commitments of ICWA and reversed the trajectory of Native family separation since 1978? What can be done to reduce the threat of the current child welfare system on the well-being of Native families?

In this Article, we use administrative and historical data to statistically evaluate the magnitude of change in AIAN family separation since the passage of ICWA and locate the institutional pathways that funnel AIAN families into the child welfare system. We find that, despite long-standing treaty responsibilities to support the health and well-being of tribal nations, AIAN children remain at incredibly high risk of family separation. In particular, we find that the frequency of AIAN children's placement into foster care has remained relatively stable since the passage of ICWA and that the post-investigation removal decision by child welfare agencies is a key mechanism of inequality in family separation. We situate these findings within theories about settler colonialism and Indigenous dispossession to illustrate that the continuous removal of Native children from their homes is not an anomaly. Instead, we argue that the very intent of a white supremacist settler-state is to dismantle Native communities. Based upon these findings, we argue that the child welfare system in its entirety must be abolished in order to stop the routine surveillance and separation of Native and non-White children from their families by the state. We suggest that ICWA has provided, and will continue to provide, a necessary intervention to protect Native families so long as this intrusive system remains. We conclude by envisioning an abolitionist approach that immediately redirects social and financial resources into the hands of Native families and works cooperatively with tribal nations to promote Indigenous communities of care.

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I. INTRODUCTION

The enduring effects of the settler-state's targeted control of non-white families cannot be understated. Recent data indicate that about 15% of American Indian and Alaska Native (AIAN) children and 11% of Black children can expect to enter foster care at some point before their 18th birthday, rates that are remarkably higher than white children (5%).¹ Indeed, the family has long functioned as a site of state regulation. In the case of Native Peoples, two intertwining conduits of settler colonial violence facilitate this regulation: Indigenous land dispossession and the destabilization of Native families and tribes. The historical record catalogues this violence in several ways, including the mass displacement of Native children into boarding schools throughout the 19th century and the widespread adoption of Native children into non-Native homes in the 20th century. As a result, the child welfare system represents an early yet potent mechanism to reproduce the intentions of a white supremacist settler-state, namely the desire to displace and erase Native and non-white families that resist the settler project.

Throughout this Article, we argue that family separation constitutes a *defining* and continuing feature of the relationship between the U.S. government and American Indian tribal nations. We also underscore how separation reveals the state's long-standing carceral commitments to surveillance, containment, and the coercive control of Native lands, families, and resources. This conclusion is evident in the high and long-standing rates of AIAN family separation that persist despite treaty responsibilities to support the health and well-being of tribal nations. In 1978, the federal government began addressing this separation crisis by passing the Indian Child Welfare Act (ICWA)² and acknowledging tribal jurisdiction over the welfare of Native children. These actions, however, did not stop the routine separation of Native children from their families because the law was left to operate within a much larger child protection system that prioritizes surveillance and separation over welfare

¹ Christopher Wildeman & Natalia Emanuel, *Cumulative Risks of Foster Care Placement by Age 18 for U.S. Children, 2000–2011*, 9 PLOS ONE 1, 5 (2014), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0092785> [<https://perma.cc/3GM2-LWNY>].

² Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963).

and support. The state also failed to implement a systematic way to track when and where Native families are pushed into the child welfare system. This lack of transparency created an inability to estimate the prevalence and frequency of family separation over time. It also made it more difficult for tribes and advocates to determine which stages of child welfare case processing are most precarious for AIAN children, which limits opportunities for increased tribal intervention.

In this Article, we step into this troubling federal gap and provide new empirical evidence about the enduring legacy of Native family separation. We do so within an important national moment of reckoning about the efficacy of the child welfare system, its harmful treatment of minority families, and its undeniable origins in federal policy to assimilate and eradicate Native Peoples. In Part I, we begin by introducing theories about settler colonialism and Indigenous dispossession to situate the social and historical context of Native family separation. We also catalogue key legal moments that illustrate that the continuous removal of Native children from their homes is not an anomaly. Instead, we argue that the very intent of a white supremacist settler-state is to dismantle Native families and tribal nations and that child removal is key to this goal. In Part II, we use administrative and historical data to isolate and illustrate the institutional pathways that lead AIAN families into the child welfare system and evaluate the magnitude of change in AIAN family separation since the passage of the ICWA. In Part III, we provide an overview of our empirical findings, examine their social and legal implications for contemporary Native family separation, and delineate their connection to the settler colonial context we examine in Part I. In Part IV, we suggest an abolitionist approach to address the state's ongoing efforts to dispossess Native communities of their children and homelands. In this section, we look to the AIAN family experience and consider why and how the child welfare system (not ICWA) must be *reimagined* and ultimately *abolished* to cultivate care and responsibility rather than discipline and punishment. An abolitionist approach requires a clear acknowledgment of the harms committed against a community. In the case of Native Peoples, this requires a moral reckoning of the state's allegiance to white supremacy and subsequent attempts to assimilate away the livelihood, values, and kin networks of Indigenous Peoples. From here, this approach would redirect social and financial

resources into the hands of Native families and work cooperatively with tribal nations to promote Indigenous communities of care, as defined by tribal nations. To this end, we urge lawmakers to transfer federal funds, made available through Title IV-E of the Social Security Act, directly to Native families who can provide for children in ways that align with their cultural practices and vision for intergenerational healing.

II. SETTLER COLONIALISM DRIVES FAMILY SEPARATION

Native family separation is an outcome of U.S. colonialism and settlement, made possible by the state's long-standing carceral commitments to surveillance, containment, and the coercive control of Native lands, families, and resources. Three key Congressional measures illustrate these commitments via forced assimilation and Indigenous land dispossession: the Civilization Fund Act of 1819,³ the Indian Removal Act of 1830,⁴ and the General Allotment Act of 1887.⁵ Taken together, these laws demonstrate governmental efforts to break up Native lands and families and fundamentally limit tribal sovereignty. This Congressional legacy provides critical context to current data on Native child removal, linking early histories of settler violence with later assimilationist programs including boarding schools and the adoption of Native children into non-Native homes. We suggest that this history constitutes the origins of the child welfare system generally and specifically led to Native resistance against family separation, most significantly through the Indian Child Welfare Act of 1978 which sought to end generations of abuse, mistreatment, and the forcible removal of Native children from their homes.

A. Colonialism, Settler Colonialism, and Indigenous Dispossession

Historically, colonialism is generally understood as an invasion by European powers onto foreign lands in an effort to exploit local resources to the detriment of the First Peoples living

³ Civilization Fund Act of 1819, Pub. L. No. 15–85, 3 Stat. 516b.

⁴ Indian Removal Act of 1830, Pub. L. No. 21–148, 4 Stat. 411.

⁵ Dawes Act, ch. 119, § 5, 24 Stat. 389 (1887) (current version at 25 U.S.C. § 348).

and caring for these homelands.⁶ To this end, colonialism encompasses an intentional set of political actions and policies designed to control, develop, and extract resources for the gain of the colonial nation-state located elsewhere. Settler colonialism is differentiated from colonialism. This social process involves settlers not only occupying and seizing resources for profit, but permanently settling in the territory, thereby displacing inhabitants in order to secure land to build their own homes and communities.⁷ Settler colonialism is also differentiated from colonialism by its guiding philosophy, namely the logic of elimination, which seeks to physically and culturally eradicate local inhabitants⁸ through violence, coercion, and the implementation of laws, policies, and organizations that fulfill its predatory objectives.

The U.S. is a settler-colonial state and early Americans eagerly removed Native Peoples from their homelands, often with the use of force and violence, to establish settlements, commerce, and statehood. Settler colonialism embodies a series of social processes, expectations, and organizing principles, all of which affect the lives of both settlers and Indigenous Peoples. One key outcome for settlers is the creation and manifestation of white supremacy, which is both a narrative of dominance and superiority⁹ and a structuring process that affects race, space, and place—all of which inform how settlers rationalize their presumptions about entitlements to Indigenous lands and bodies.¹⁰ Whiteness and white supremacy are inherent

⁶ Saskia Sassen, *A Savage Sorting of Winners and Losers: Contemporary Versions of Primitive Accumulation*, 7 *GLOBALIZATIONS*, 23 (2010).

⁷ Evelyn Nakano Glenn, *Settler Colonialism as Structure: A Framework for Comparative Studies of U.S. Race and Gender Formation*, 1 *SOCIO. RACE & ETHNICITY* 52, 55 (2015); Alyosha Goldstein, *The Jurisprudence of Domestic Dependence: Colonial Possession and Adoptive Couple v. Baby Girl*, DARKMATTER, (May 16, 2016), <http://www.darkmatter101.org/site/2016/05/16/the-jurisprudence-of-domestic-dependence/> [<https://perma.cc/E84L-KWA3>]; Margaret D. Jacobs, *Seeing Like a Settler Colonial State*, 1 *MOD. AM. HIST.* 257, 259 (2018).

⁸ Glenn, *supra* note 7, at 57; Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 *J. GENOCIDE RSCH.* 387, 388 (2006).

⁹ Dwanna L. McKay et. al., *Theorizing Race and Settler Colonialism Within U.S. Sociology*, 14 *SOCIO. COMPASS* 1, 3 (2020).

¹⁰ Anne Bonds & Joshua Inwood, *Beyond White Privilege: Geographies of White Supremacy and Settler Colonialism*, 40 *PROGRESS HUM. GEOGRAPHY* 715, 724 (2016).

components of settler colonial structures; in the eyes of settlers, the social inclusion and exclusion of Native Peoples is incumbent upon their assimilation to the standards of the newly established white society.¹¹

B. The Legacy of American Indian Family Separation

Here, we turn to a historical review of three key Congressional interventions that undergird the legacy of family separation and continue to threaten tribal sovereignty. The settler drive towards cultural dominance and land ownership has forcibly displaced tribes, separated them from vital resources including food and water, and prohibited the teaching of Native languages and worldviews. In recent decades, some settler tactics of cultural domination shifted in response to changing institutional reforms such as ICWA, but as the legislation below shows, the ideological origins are longstanding. Despite old and new efforts of erasure by the settler state, the continued, unassimilated existence of Native Peoples and cultures remains vibrant, innovative, and deeply rooted in Indigenous ways of knowing.

1. The Civilization Fund Act of 1819

In 1819, Congress passed the Civilization Fund Act for the “purpose of providing against the further decline and final extinction of the Indian tribes.”¹² The Act allocated federal funds “to employ capable persons, of good moral character, to instruct [Native Peoples] in the mode of agriculture suited to their situation; and for teaching their children in reading, writing and arithmetic.”¹³ The Act also formalized Congressional support of Christian missionaries who were already working and proselytizing among the tribes.¹⁴ Together, linking church and state explicitly, Congress and the Christian missionaries sought to assimilate tribal members into European culture by removing

¹¹ See generally MAILE ARVIN, *POSSESSING POLYNESIANS: THE SCIENCE OF SETTLER COLONIAL WHITENESS IN HAWAII AND OCEANIA* (2019); AILEEN MORETON-ROBINSON, *THE WHITE POSSESSIVE: PROPERTY, POWER, AND INDIGENOUS SOVEREIGNTY* (2015).

¹² Civilization Fund Act of 1819, Pub. L. No. 15–85, 3 Stat. 516b.

¹³ See *id.*

¹⁴ Kathleen Sands, *Territory, Wilderness, Property, and Reservation: Land and Religion in Native American Supreme Court Cases*, 36 AM. INDIAN L. REV. 253, 280 (2012).

their tribal identities and worldviews.¹⁵ Assimilation efforts came in many forms and the imposition of agricultural education was believed to be one way of pacifying tribal members and instilling a patriarchal social order.¹⁶ For example, the missionary schools commonly taught boys husbandry, plowing, and planting, while girls learned housekeeping, spinning, and weaving.¹⁷ This gendered educational schema, designed around manual labor, demonstrates how the Act was used to create a subordinate service class of persons for white families, composed primarily of Native children. Colonial paternalism of this kind eventually promoted the construction of off-reservation Indian boarding schools, where children could be further alienated from their social and cultural teachings.¹⁸ While in boarding schools, children were rarely allowed contact with their family. Instead, Native children were subject to the demands of Christian missionaries who attempted to assimilate them into white culture, often using violence and manipulation.¹⁹ The Indian Boarding Schools carried out the U.S. mission of assimilating Native children until the last school closed in 1973.

2. The Indian Removal Act of 1830

Roughly a decade later, and with a strong push from southern supporters, Congress signed the Indian Removal Act of 1830. The Act provided President Andrew Jackson with unrestrained authority to seize Native lands and relocate tribal nations west of the Mississippi River.²⁰ The intent and effect of the Act allowed white settlers to acquire desirable Native territory with the direct assistance of their government. Indeed,

¹⁵ Alia Wong, *The Schools that Tried—But Failed—to Make Native Americans Obsolete*, ATLANTIC (Mar. 5, 2019), <https://www.theatlantic.com/education/archive/2019/03/failed-assimilation-native-american-boarding-schools/584017/> [<https://perma.cc/N95E-FNGH>].

¹⁶ Alyosha Goldstein, *The Ground Not Given: Colonial Dispositions of Land, Race, and Hunger*, 36 SOC. TEXT 83, 87 (2018) [hereinafter Goldstein, *Ground Not Given*].

¹⁷ *Id.* at 88.

¹⁸ Carlisle Indian School was the first off-reservation boarding school founded by Captain Richard Henry Pratt in 1879. Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 SOC. WELFARE F. 1, 45 (1892).

¹⁹ Theresa Rocha Beardall, *Adoptive Couple v. Baby Girl: Policing Authenticity, Implicit Racial Bias, and Continued Harm to American Indian Families*, 40 AM. INDIAN CULTURE & RSCH. J. 119, 126 (2016).

²⁰ Indian Removal Act of 1830, Pub. L. No. 21–148, 4 Stat. 411.

“buttressed by the twin pillars of greed and racism,”²¹ the Act’s settler-colonial design secured Native lands and resources to establish homes and communities for white people. While Congress and the President were intent on forced removal, Chief Justice John Marshall’s majority opinion in *Worcester v. Georgia*²² suggested a different relationship with tribal nations was possible, one in which tribes were afforded territorial rights, Congressional representation, and nation-to-nation negotiations under the U.S. Constitution.²³ Under Marshall, the Supreme Court concluded that tribes were “distinct political communities, having territorial boundaries, within which their authority is exclusive.” Despite Justice Marshall’s understanding that tribes were being encroached upon by southern states,²⁴ the U.S. began forcing tribes to sign treaties and move west. Most famous to many Americans is the Trail of Tears (1831–1877) that removed many southeastern tribes, such as the Cherokee, from their homelands to what is now Oklahoma. Separating Native Peoples from their lands through the Indian Removal Act mirrors the eventual removal of Native Peoples from their tribes and families.²⁵

3. The General Allotment Act of 1887

The General Allotment Act of 1887, a federal assimilationist tool commonly referred to as The Dawes Act, was designed to transform tribal lands into private property. The Act granted 160 acres of tribal land to each Native head of household and deemed all the remaining tribal lands as surplus.²⁶ The federal government allocated surplus lands to non-Native homesteaders, ultimately reducing the already limited acreage of Native land by two-thirds.²⁷ Unsurprisingly, white settlers were

²¹ N. BRUCE DUTHU, *AMERICAN INDIANS AND THE LAW* 8 (2008).

²² 31 U.S. 515 (1832).

²³ TIM ALAN GARRISON, *THE LEGAL IDEOLOGY OF REMOVAL: THE SOUTHERN JUDICIARY AND THE SOVEREIGNTY OF NATIVE AMERICAN NATIONS* 181 (2009).

²⁴ GARRISON, *supra* note 23, at 190; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

²⁵ John P. Bowes, *American Indian Removal Beyond the Removal Act*, 1 NATIVE AM. & INDIGENOUS STUD. 65 (2014).

²⁶ Dawes Act, ch. 119, § 5, 24 Stat. 389 (1887) (current version at 25 U.S.C. § 348).

²⁷ *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 8 (D.D.C. 1999), *aff’d*, 240 F.3d 1081 (D.C. Cir. 2001).

granted the best allotments and Native Peoples were often forced onto land that was unsuitable to sustain farming or livestock.²⁸ Despite the disparate quality of land, Native land was held in a trust by the U.S. government; Native Peoples were stereotyped as incompetent, and thus vulnerable to unscrupulous whites who wished to buy or lease the land for cheap.²⁹

In addition to a desire for land and resources, legal scholars note that The Dawes Act also sought to assimilate Native Americans into the Western practice of private land ownership and nuclear family households.³⁰ In effect, The Dawes Act forced Native Peoples to cease communal living, with each family being given an allotment of land only to be used by the individual to which it was allotted.³¹ The dual desire for wealth and assimilation explicitly targeted the dissolution of the cultural bonds and kinship networks that are commonly used in child rearing, limiting the intergenerational transfer of language, traditions, cultural practices, histories, and worldviews to Native children. One way to frame the implications of this Act is that it constituted a critical phase of cultural and physical separation and set the stage for tribal members to be continuously disconnected from their Indigenous worldviews.

C. Adoption and the Indian Child Welfare Act of 1978

Native Peoples endured, and continue to endure, a systematic genocide at the hands of the federal government. From boarding schools to kidnapping and forced sterilization this violence included physical, sexual, and emotional abuse. Particular to the issue of family separation is the concerted use of non-Native adoption.³² In 1958, the Bureau of Indian Affairs launched the Indian Adoption Project (IAP), a program designed to “rescue” Native American children from impoverished Native parents and tribes and place them in adoptive homes with white

²⁸ Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609 (2011).

²⁹ Lauren L. Fuller, *Alaska Native Claims Settlement Act: Analysis of the Protective Clauses of the Act Through a Comparison with the Dawes Act of 1887*, 4 AM. INDIAN L. REV. 269 (1976).

³⁰ *Id.*

³¹ See 25 U.S.C. § 348.

³² Brianna Theobald, “The Simplest Rules of Motherhood”: Settler Colonialism and the Regulation of American Indian Reproduction, 1910–1976 (May 2015) (Ph.D. dissertation, Arizona State University) [<https://perma.cc/YJS9-ZNF8>].

families.³³ The IAP was considered to be a cost-effective and permanent solution to “the Indian problem,” a term that describes the U.S. government’s frustration with the presence of Native Americans on the land they desired.³⁴ In effect, the IAP sought to sever cultural ties between Native children and their tribes and families in order to fully assimilate them into white society. In contrast to the Indian Boarding Schools, the IAP cost very little to the taxpayers, as the financial burden of assimilation was placed solely on the children’s adoptive families.³⁵

In 1968, the IAP was incorporated into the Adoption Resource Exchange of North America (ARENA) in order to place even more children outside of their homes.³⁶ These adoptive efforts were disastrously successful. A 1976 report from the Association on American Indian Affairs (AAIA) provided grim findings: upwards of 25 to 35% of all Native children were being placed in out-of-home care and 85% of those children were placed in non-Native homes.³⁷ During the Indian child welfare crisis of the 1960s and 1970s, the Bureau of Indian Affairs often portrayed Native women as impoverished, unwed mothers who lacked the resources to support their families in order to justify placing their children into foster and adoptive homes.³⁸ For this reason, among others, these shocking AAIA data may be a serious undercount of the widespread reality of child removal.

The Indian Child Welfare Act (ICWA) was enacted in 1978 to address the AAIA’s findings and end generations of abuse, mistreatment, and forcible removal of Native children from their homes. The Act clearly states its commitment to protect Native families and tribes by preventing the unnecessary removal and displacement of American Indian children.³⁹ This

³³ MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 18 (2014) [hereinafter, JACOBS, GENERATION REMOVED].

³⁴ *Id.* at 19.

³⁵ *Id.*

³⁶ *Id.* at 20.

³⁷ Cheyaña L. Jaffke, *Judicial Indifference: Why Does the “Existing Indian Family” Exception to the Indian Child Welfare Act Continue to Endure?*, 38 WASH. ST. U. L. REV. 127, 130 (2011); Rocha Beardall, *supra* note 19, at 126.

³⁸ JACOBS, GENERATION REMOVED, *supra* note 33, at 52.

³⁹ Jaffke, *supra* note 37, at 131; Jason R. Williams et al., *Measuring Compliance with the Indian Child Welfare Act*, CASEY FAMILY PROGRAMS 4 (Mar. 2015), <https://theacademy.sdsu.edu/wp-content/uploads/2015/06>

comprehensive legislation was designed to promote the best interests of Native Peoples and children by creating minimum federal standards for removal. Further, ICWA stipulated that when possible, American Indian children should be placed with extended family or “foster or adoptive homes that reflect the unique values of Indian culture” in the event that child removal was unavoidable.⁴⁰ Unfortunately, some social actors may circumvent protective laws such as ICWA by exploiting loopholes that can diminish positive intent.⁴¹ State and federal courts, for example, were inconsistent in their interpretation and compliance with the law,⁴² and in some cases courts drew on the “existing Indian family” exception in order to avoid applying ICWA altogether.⁴³ The “existing Indian family” exception provided state courts the ability to circumvent ICWA if the child or parents cannot demonstrate the maintenance of a significant political, social, or cultural relationship with their tribe.⁴⁴ The federal government responded with new regulations in 2016 to address these profound compliance problems. Notably, these new regulations include more explicit requirements around active efforts to engage tribes, limitations on good cause to refuse transfer to tribal courts, limitations to deviations from placement preferences, and make clear that the “existing Indian family” is not a requirement.⁴⁵

/measuring-compliance-icwa-brief.pdf [https://perma.cc/W3LL-V2SB]; Rocha Beardall, *supra* note 19; Lydia Killos et al., *Strategies for Successfully Recruiting and Retaining Preferred-Placement Foster Homes for American Indian Children: Maintaining Culture and Compliance with the Indian Child Welfare Act*, CASEY FAMILY PROGRAMS 4 (Mar. 2017), <https://www.casey.org/media/icwa-recruitment-retention.pdf> [https://perma.cc/9SFF-T5E7].

⁴⁰ Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1963); GENERATION REMOVED, *supra* note 33, at 3; Williams et al., *supra* note 39.

⁴¹ Mathew L. M. Fletcher & Wenona T. Singel, *Indian Children and the Federal-Tribal Trust Relationship*, 95 NEB. L. REV. 885, 888 (2016).

⁴² Williams et al., *supra* note 39, at 6; Killos et al., *supra* note 39, at 4.

⁴³ Jaffke, *supra* note 37, at 129.

⁴⁴ *Id.* at 136.

⁴⁵ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38,779, 38,801 (June 14, 2016).

III. AN EMPIRICAL STUDY OF INDIAN CHILD WELFARE

Despite substantial efforts to address the ongoing crisis of Native family separation,⁴⁶ American Indian and Alaska Native (AIAN) children in the U.S. are still more likely to be separated from their parents and placed into foster care than children from any other racial or ethnic group.⁴⁷ With a sense of the social and historical context, and the settler-state's long-standing carceral commitments to surveillance, containment, and the coercive control of Native lands, families, and resources, we turn to our empirical study of Native family separation. We use administrative and historical data to isolate and illustrate the institutional pathways that lead AIAN families into the child welfare system, evaluate the magnitude of change in AIAN family separation since the passage of the Indian Child Welfare Act (1978), and situate the child welfare system in the context of ongoing white-settler colonization. We estimate age-specific and lifetime risks of experiencing a child welfare system event for Native and non-Native children, drawing attention to the timing and geographic distribution of these risks.

Our research is motivated by a persistent concern that ICWA's expressed intentions, and desperately needed protections, may in fact be stymied by larger social forces. Namely, in contexts of structural inequality and institutional racism,⁴⁸ we are concerned that white supremacist desires to displace and erase Native Peoples persist in bureaucratic structures such as the national child welfare system. Given the size and influence of this system, and its predatory history among non-white families, the jurisdictional powers and placement preferences of ICWA alone are unlikely to eliminate the inequalities that drive Native family separation.

⁴⁶ Thomas L. Crofoot & Marian S. Harris, *An Indian Child Welfare Perspective on Disproportionality in Child Welfare*, 34 CHILD. & YOUTH SERV. R. 1667 (2012).

⁴⁷ Youngmin Yi et al., *Cumulative Prevalence of Confirmed Maltreatment and Foster Care Placement for US Children by Race/Ethnicity, 2011–2016*, 110 AM. J. PUB. HEALTH 704 (2020).

⁴⁸ Alan J. Dettlaff & Reiko Boyd, *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, 692 ANNALS AM. ACAD. POL. & SOC. SCI. 253 (2020).

A. Quantifying Rates of Family Separation and System Contact

We estimate age-specific and lifetime risks of experiencing a series of child welfare system events for Native and non-Native children, then evaluate how likely cases are to move “up” the chain of more serious outcomes, conditional on experiencing a lower-level outcome. In doing so, we provide evidence that inequalities in child welfare system outcomes for AIAN children emerge at distinct stages of life and distinct phases of child welfare system case processing. We evaluate the following child welfare system outcomes: (1) investigations, (2) confirmed maltreatment cases, (3) foster care removals, (4) placement with non-kin and non-AIAN foster caretakers, and (5) termination of parental rights.

B. Data and Methods

We use three primary forms of data to chart AIAN family contact with child welfare systems. First, we rely on data compiled by the Association on American Indian Affairs (AAIA) to document the breadth and depth of American Indian family separation through a series of surveys in the 1970s.⁴⁹ These data formed a critical portion of the evidence presented by AAIA in support of the passage of ICWA and have become the most widely cited set of statistics on the crisis of Indian family separation in the years preceding the passage of ICWA. Second, we use data from the National Child Abuse and Neglect Data System⁵⁰ (NCANDS) child file for 2014–2018. NCANDS is collected by the U.S. Administration for Children and Families and documents all children who were the subject of a screened-in child welfare investigation. Lastly, we use the Adoption and Foster Care Analysis and Reporting System⁵¹ (AFCARS), a federal data

⁴⁹ *Hearing to Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for other Purposes: Hearing on S. 1214 Before the S. Select Comm. on Indian Affs.*, 95th Cong. 537–597 (1977) [hereinafter *Hearing to Establish Standards*].

⁵⁰ Children’s Bureau, Administration On Children, Youth And Families, Administration For Children And Families, U. S. Department Of Health And Human Services. *National Child Abuse and Neglect Data System (NCANDS)*, *child file* [dataset] National Data Archive on Child Abuse and Neglect (2019), <https://www.ndacan.acf.hhs.gov/datasets/datasets-list-ncands-child-file.cfm>.

⁵¹ NATIONAL DATA ARCHIVE ON CHILD ABUSE AND NEGLECT, U.S. DEPT HEALTH & HUM. SERV., ADMIN. FOR CHILD. & FAM., ADOPTION AND FOSTER

system that tracks all children in foster care or placed in state-sponsored adoption in the U.S., to chart the scale of Native family separation between 2014–2019.

Throughout the 1960s and 1970s, the AAIA collected data on the number of Native children that had been separated from their families through a variety of state and non-state institutions. In Table 1, we provide a summary of the AAIA data on the scale of child removal in the foster care and adoption systems in 13 states (in the early to mid 1970s),⁵² as well as data on contemporary caseloads in those same states (from the 2019 AFCARS). To compare the scope of AIAN family separation in the 1970s and today, we compare point-in-time caseloads for the 13 states with complete data and proportional changes in these caseloads. A point-in-time caseload counts all children in a given system on a single date of the year. AAIA collected point-in-time caseloads for foster care and adoption for each of the surveyed states in the 1970s. Using AFCARS foster care files, we can identify the numbers of Native and non-Native children in foster care for each state and year on the final day of the annual reporting period. AFCARS adoption files only include *new* adoptions in each year's submission. To obtain a point-in-time estimate that is comparable to AAIA's count of children in adoptive households 21 years of age or younger, we aggregate data from 2010–2019, count all AIAN children adopted during this time period, then remove from the count those children who would be over 21 years of age in 2019.

Typically, we would prefer to compare the incidence of foster care through a comparison of per capita rates. However, changes in the composition of the AIAN population between 1976 and 2019 make such comparisons impractical. The magnitude of

CARE ANALYSIS AND REPORTING SYSTEM (AFCARS), FOSTER CARE FILE [dataset] (2019), <https://www.ndacan.acf.hhs.gov/datasets/datasets-list-afcars-foster-care.cfm> [<https://perma.cc/LYU5-MECM>].

⁵² The AAIA focused survey efforts on states with large AIAN populations. These 13 states with complete data on adoption and foster care are Alaska, Arizona, California, Michigan, Minnesota, Montana, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wisconsin. 6 states did not report complete data on adoption, but did report complete data on foster care. These states were Idaho, Maine, Nevada, New Mexico, New York, and Wyoming. The timing of responses to AAIA's agency surveys varied between 1972 and 1976 in these data, but consistently report foster care caseloads as point-in-time estimates of children in out-of-home foster care. They are comparable to contemporary point-in-time caseload counts from AFCARS.

change in the AIAN child population between 1976 and 2019 (243% growth) cannot be explained by population processes alone. Shifting practices of self-identification and Census data collection dramatically changed the scope of the AIAN population enumerated in the Census in decades following the 1960s.⁵³ In 1980, for example, the Census began asking respondents to self-identify their race, rather than relying on Census enumerator classifications. Coupled with an increase in American Indians and Alaska Native Peoples self-identifying as Native, there were dramatic increases in the enumerated Native population in the United States between 1970 and today. Because the population identified as AIAN in the 1970 census is qualitatively different from the population identified in later censuses,⁵⁴ direct population-based comparisons are inappropriate. We summarize the counts of cases and population figures from 1976 and 2019 in Table 1.

Population data are used to compute rates of exposure across groups for the contemporary child welfare system data (2014–2018). We rely on data from the U.S. Census Population Estimates Program (PEP). We use state-level estimates of all individuals identified as AIAN alone or AIAN in combination with any other group by age to measure the size of the AIAN population.⁵⁵

Using AFCARS, NCANDS and Census population data, we compute 2014–2018 period life tables to estimate age-specific and lifetime risks (by age 18) of experiencing a range of child welfare system outcomes for AIAN children.⁵⁶ This period life table approach simulates a cohort life table by making two key assumptions: (1) the age-specific population distribution observed between 2014–2018 will remain constant, and (2) the age specific rates of first event incidence observed between 2014–2018 will remain constant. While these assumptions are likely

⁵³ Joane Nagel, *American Indian Ethnic Renewal: Politics and the Resurgence of Identity*, 60 AM. SOC. REV. 947, 950–53 (1995).

⁵⁴ Jeffrey S. Passel, *The Growing American Indian Population, 1960-1990: Beyond Demography*, 16 POP. RSCH. & POL. REV. 11 (1997).

⁵⁵ U.S. CENSUS BUREAU, ANNUAL COUNTY RESIDENT POPULATION ESTIMATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: APRIL 1, 2010 TO JULY 1, 2019 (2019), <https://www2.census.gov/programs-surveys/popest/datasets/2010-2019/counties/asrh/cc-est2019-alldata.csv>.

⁵⁶ SAMEL H. PRESTON, PATRICK HEUVELINE, & MICHEL GUILLOT, *DEMOGRAPHY: MEASURING AND MODELING POPULATION PROCESSES* (2001).

not realistic—since demographic, policy, and social changes are likely to change both population distributions and event incidence rates—we proceed in this manner in order to simulate lifetime risk of experiencing key child welfare system outcomes. While they provide valuable insight into contemporary rates of contact, caution should be used in interpreting these results to project future rates of contact.

C. The Historical and Contemporary Scale of Native Family Separation

ICWA initiated a dramatic series of changes in the jurisdiction and administration of U.S. child welfare systems. As discussed, the law was intended to address and ameliorate the crisis of family separation in Indian Country. Despite these efforts, however, Native children and families remain at higher risk of separation than any other group in the United States.⁵⁷ Table 1 displays the change in the counts of Native children in foster care or adoption as documented by AAIA's mid-1970s surveys and by AFCARS in 2019. These caseload numbers are point-in-time counts of the number of children in either foster care or adoption.

In 1976, AAIA found that about 5,687 AIAN children were in foster care in the 13 states for which they collected or estimated complete data (6,665 in the 19 states where some data were missing). In 2019, there were 17,241 AIAN children in foster care in these 13 states,⁵⁸ more than three times higher than the number in foster care in 1976. For comparison, there were about 53,364 non-Native children in foster care in these states, compared to about 109,374 in 2019, about double the total number of children. The foster care system has expanded dramatically for all children in the forty years since the passage of ICWA, but far more so for Native children than for non-Native children.

In the mid-1970s, AAIA estimated that 11,157 Native children were in state-involved adoptions, compared to 172,684 non-Native children in the 13 states for which they were able to compile complete data. In 2019, we estimate that there were

⁵⁷ Yi et al., *supra* note 47, at 704.

⁵⁸ These are point-in-time caseloads. AFCARS estimates count children in foster care at the end of the annual reporting period, though more children may have entered and/or exited care than these point-in-time estimates describe.

19,221 Native children in state-involved adoptions (an increase of 72%) compared to 161,318 non-Native children in state-involved adoptions (a decline of 7%). While rates of non-Native adoption have slightly declined in these states since the 1970s, rates of Native adoption have increased substantially.⁵⁹

Additionally, Native family separation has a distinctive geography. During advocacy for ICWA, AAIA researchers identified Maine, Minnesota, and South Dakota as having among the most inequitable foster care systems in the country.⁶⁰ Inequalities in these state systems persist to this day. To evaluate the magnitude of change in state foster care and adoption systems since the passage of ICWA, we display the growth in the numbers of Native children in foster care or adoption for those states for which we have historical data in Figure 1. Some states have seen modest declines in AIAN foster care caseloads over time. Idaho has seen the steepest decline. 83% fewer Native children were in foster care in 2019 than were in foster care in 1976. Maine, New Mexico, Utah, and Wyoming have also seen caseload declines since the passage of ICWA. However, most of these states have seen substantial increases in the numbers of Native children in foster care. Nearly nine times more American Indian children were in foster care in Oklahoma in 2019 than were in foster care in 1976. California saw more than 400% growth in the Native foster care population over this period, and many other states saw caseloads more than double.

⁵⁹ Note that for both foster care and adoption statistics, AAIA estimates from 1976 likely understate the true number of AIAN children affected by these systems. Some states records did not record whether a child was Native, and it is likely that true numbers of family separation in 1976 for AIAN families was higher than those reported. As with census population estimates, cultural practices of self-identification as American Indian/Alaska Native make cross-time comparisons difficult.

⁶⁰ *Hearing to Establish Standards*, *supra* note 49, at 538.

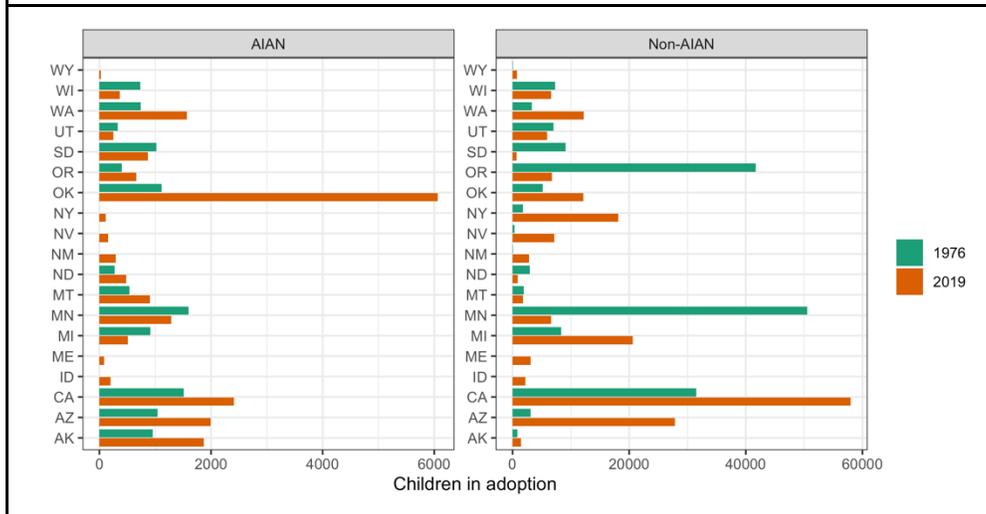
Table 1. Children in foster care and U.S. Census child population 21 year and under, 19 select states, 1976 and 2018.

Group	Period	Foster Care (percent change)	Adoption (percent change)
AIAN	1970s	5687	11,157
	2019	17,241 (+203%)	19,221 (+72%)
Non-AIAN	1970s	55364	172,684
	2019	109,374 (+98%)	161,318 (-7%)

State-involved adoptions of AIAN children have also increased in most of these states since the passage of ICWA. While 5 states saw a reduction in the numbers of AIAN children in adoption between 1976 and 2019 (Wisconsin, Michigan, Utah, Minnesota, and South Dakota), 7 saw increases in the number of AIAN children in state-sponsored adoptions. Oklahoma saw the steepest increase, with about 5 times more Indian children in state-sponsored adoptions in 2019 than there were in 1976.

In the 13 states that had complete adoption and foster care data in the AAIA data collection, there were 16,884 AIAN children in either adoption or foster care, compared to 36,462 AIAN children in adoption or foster care in 2019. However, these numbers exclude children who were living in off-reservation Bureau of Indian Affairs boarding schools. In the 1970s, there were about 26,000 AIAN children in BIA boarding schools in 1974.⁶¹ Inclusive of boarding schools, the magnitude of state-sponsored Native family separation has decreased since the passage of ICWA. However, the magnitude of Native family separation through the child welfare system has substantially increased since the passage of ICWA.

⁶¹ *Id.* at 603.

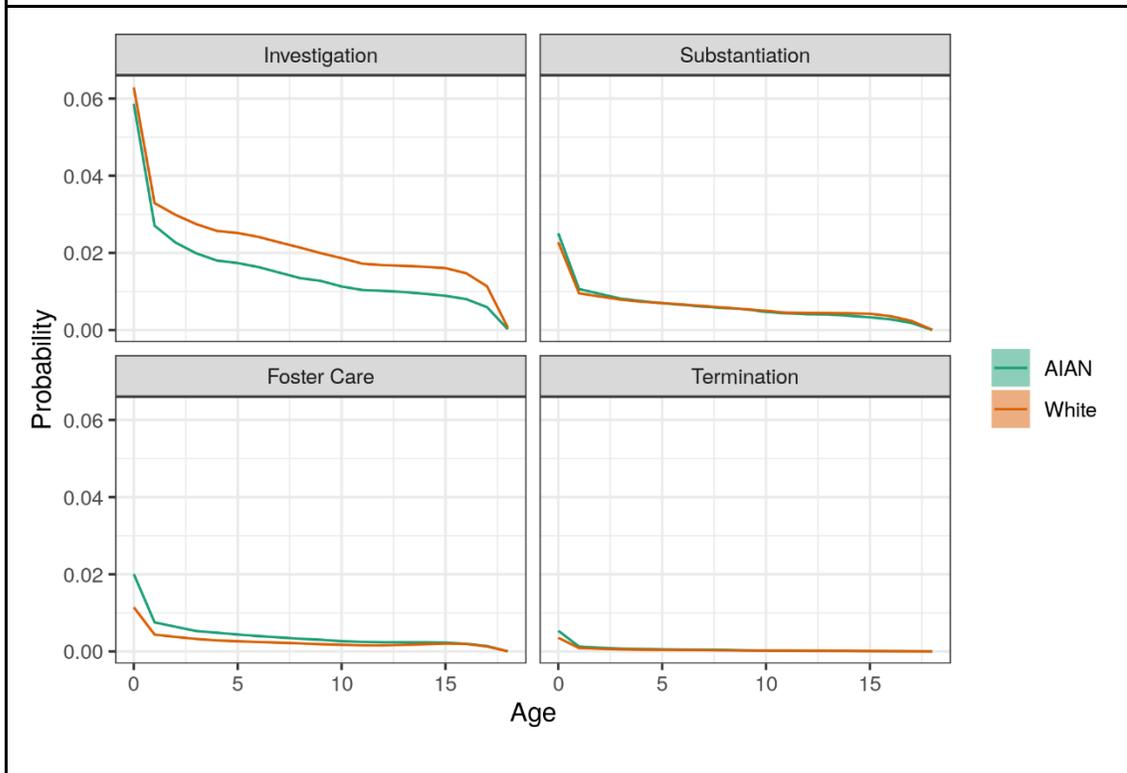
Figure 1. Children in foster care and adoption, select states 1976 and 2019

D. The Timing and Prevalence of Interventions

Across all groups, infants are most likely to be subjected to investigation and separation through the child welfare system. Figure 2 uses data from the 2014–2018 AFCARS and NCANDS to display the age-specific risks of experiencing four child welfare events for the first time in a child’s life: CPS investigation; substantiation or confirmation of a CPS case; removal into foster care; and termination of parental rights. Risks for all outcomes are highest for infants. Mothers with prior history of CPS contact, and mothers subjected to high levels of surveillance while pregnant and during birth, are routinely subjected to intrusive investigations and family separations.⁶²

⁶² Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991); Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOC. REV. 610 (2020).

Figure 2. Probability of child welfare event incidence for AIAN children by age 18, 2014–2018 risk levels, US totals



Over the life course, and at the national level, at risk levels observed between 2014–2018, we find that 26% of AIAN children are ever investigated by a child welfare agency, 11% ever have an allegation of abuse or neglect confirmed by a child welfare agency, 8% ever are removed from their families and placed into foster care, and about 1.2% ever have their parents' rights terminated through the child welfare system. For white children, by contrast, about 35% are ever investigated by a child welfare agency, 11% ever have a substantiated case, 5% are ever removed into foster care, and 0.8% ever have their parents' rights terminated.⁶³

⁶³ Note that these lifetime incidence rates for AIAN children differ from the author's prior published estimates. This difference is a function of the different population data used for computing risks. This study uses adjusted

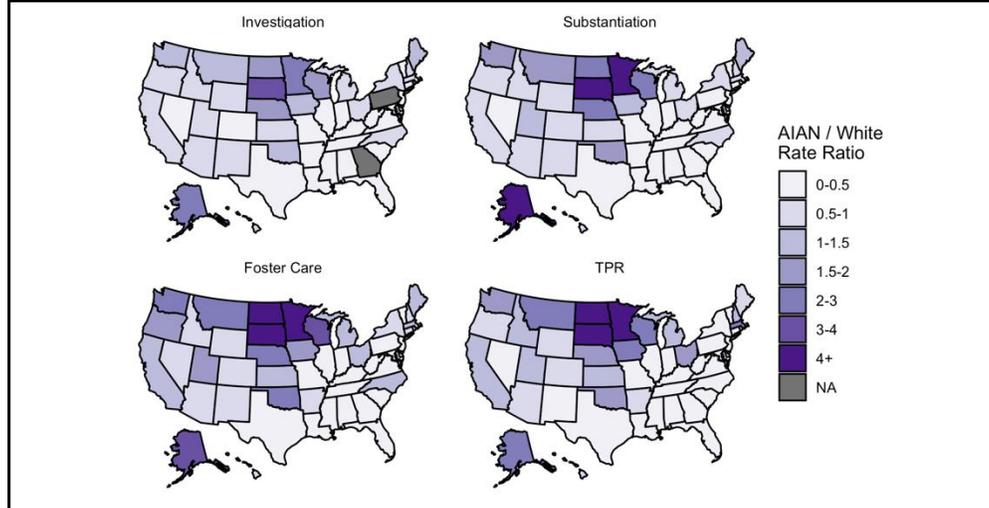
At the national level, AIAN children are 31% less likely than white children to ever be investigated by CPS, as likely as white children to ever have an agency-confirmed case of child abuse or neglect, 60% more likely than white children to ever enter foster care, and 46% more likely than white children to ever have their parents' rights terminated. However, these national averages obscure geographic variation in inequality risk.

E. The Contemporary Geography of Native Family Separation

As shown in the lower-left panel of Figure 3, there are 20 states where AIAN children are more likely than white children to enter foster care. In Minnesota, for example, AIAN children are 8.3 times more likely than white children to ever be separated from their families and placed into foster care. We estimate that about 44% of AIAN children in Minnesota will experience this form of family separation before the age of 18. AIAN children are more than twice as likely as white children to enter foster care in 10 states: Minnesota (8.3 rate ratio, 44% lifetime risk); South Dakota (7.0 rate ratio, 21% lifetime risk); North Dakota (4.3 rate ratio, 25% lifetime risk); Alaska (4.1 rate ratio, 23% lifetime risk); Wisconsin (3.8 rate ratio, 19% lifetime risk); Nebraska (2.8 rate ratio, 19% lifetime risk); Montana (2.8 rate ratio, 28% lifetime risk); Washington (2.4 rate ratio, 15% lifetime risk); Oklahoma (2.4 rate ratio, 17% lifetime risk); and Iowa (2.0 rate ratio, 22% lifetime risk).

AIAN alone or in combination data from the Census PEP, while most prior estimates (See, e.g., Yi et al., *supra* note 47) use data from NIH SEER bridged-race population estimates. This approach is described in Section II.B, *supra*.

Figure 3. Inequality in lifetime risk of experiencing child welfare system events. Cumulative risk computed using 2014–2018 period life tables. Note missing investigations data in PA and GA.



States with high levels of foster care inequality for AIAN families also tend to have high levels of inequality in rates of investigation of AIAN families, the substantiation of investigations of AIAN families, and the termination of AIAN parents' rights. This geographic clustering shows the intensity of the involvement of the child welfare system. The mechanisms of inequality and rates of exposure for AIAN children are complex.

F. Institutional Sites of Inequality in the Child Welfare System

The production of a child welfare case begins with the surveillance of families⁶⁴ by mandated reporters of child maltreatment (primarily police, educators, and medical professionals)⁶⁵ and by family and community members. If participants in this diffuse surveillance network make an affirmative decision to report a child or family to a state or local child protection agency, that agency then makes a screening

⁶⁴ Fong, *supra* note 62.

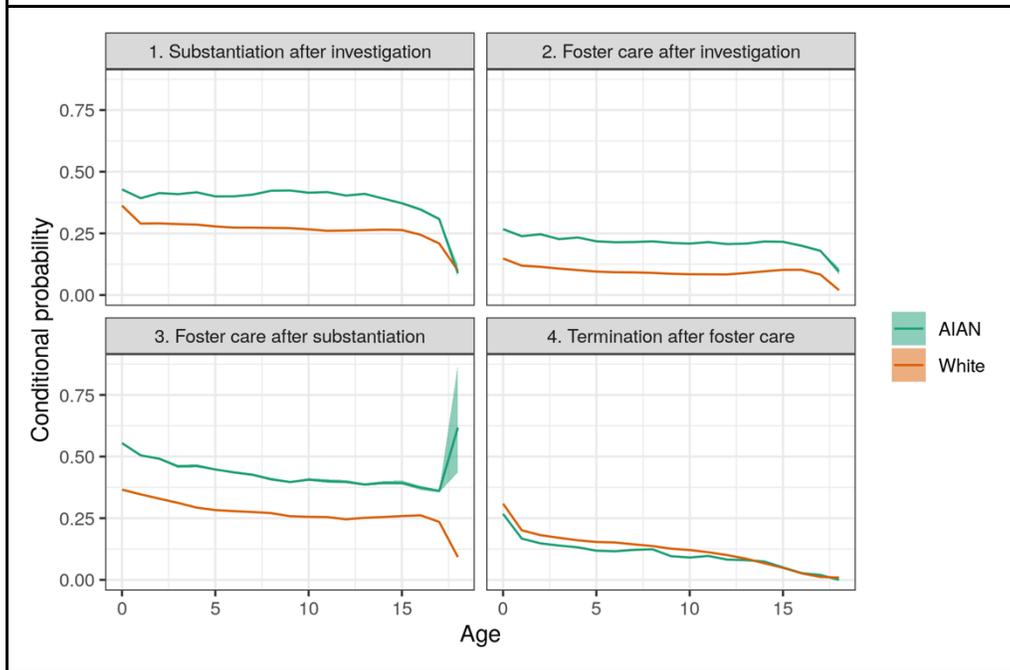
⁶⁵ Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 50, 52–53 (2019).

decision about whether to dispatch an investigator to evaluate the child and family. After the worker's investigation, the agency decides whether allegations of maltreatment could be confirmed or substantiated. At any point after an investigator initiates contact with a family, they can recommend that a child be removed from their family into foster care, subject to the oversight and approval of a family court. If an agency decides that reunification with their family is not in the best interests of the child, or certain timelines specified by federal law⁶⁶ have passed, the agency will often proceed with efforts to formally sever the legal relationship between a child and their family caretakers.

Below, we evaluate the likelihood that children transition from an earlier stage of case processing to a later stage of case processing. We ask, for example: among those children investigated by a child welfare agency, how many had at least one confirmed allegation of abuse or neglect? We conduct this analysis separately for white and AIAN children to reveal the stages in case processing during which inequalities for AIAN children emerge. We evaluate four decision points that are observable by joining the NCANDS and AFCARS data at the child-level: (1) substantiation after investigation; (2) foster care placement after investigation; (3) foster care placement after substantiation; and (4) termination after foster care. Note that children can be removed from their families into foster care without an agency substantiating a case of child maltreatment. Figure 4 displays these conditional probabilities for both AIAN and white children.

⁶⁶ For example, the Adoption and Safe Families Act of 1997 specifies that states should proceed with termination of parental rights after a child has been in foster care for 15 of the prior 22 months. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89.

Figure 4. Age-specific risk of child welfare system event, conditional on prior system event at 2014–2018 levels of risk



At nearly all ages, AIAN children are more likely than white children to have a case substantiated if they are investigated. At all ages, AIAN children are more likely to enter foster care than white children if they are investigated. Around 27% of AIAN infants who are investigated are placed into foster care nationally, compared to around 15% of white infants. Around 55% of AIAN infants that are the subject of a substantiated maltreatment allegation are removed into foster care, compared to about 37% of white children. Nationally, AIAN children in foster care are less likely than White children in foster care to see their parental rights terminated at nearly all ages. But higher levels of foster care placement do result in higher overall rates of termination of parental rights (TPR) for AIAN children than white children.⁶⁷

⁶⁷ Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32 (2020).

Conditional on contact with the child welfare system, AIAN children are far more likely than their white peers to be removed from their families and placed into foster care.⁶⁸ While differential surveillance may explain some variation in removal, the removal decision itself, based on recommendations from child protection social workers and decisions by family court judges, explains a substantial proportion of the inequality in overall exposure to family separation through foster care for AIAN children.

IV. WHY DOES NATIVE FAMILY SEPARATION PERSIST?

We find that the crisis of Native family separation is ongoing. Despite the intent and breadth of the Indian Child Welfare Act, many jurisdictions have failed to fully implement its provisions and AIAN children remain far more likely than their non-Native peers to be removed from their families by the state.⁶⁹ With the closing of the boarding schools, there are now fewer total AIAN children in state custody than there were in the mid-1970s. However, there are dramatically more AIAN children in foster care and adoptive homes in the states for which we have complete data than there were in the 1970s. This transformation in social context, and to some extent a lack of public awareness about this shift, likely shapes how and why the rates of child separation among Native families remain disproportionately high.

Overall, our analyses strongly suggest that post-investigation decision making by child welfare agencies plays a crucial role in this crisis. Agencies are more likely to substantiate maltreatment of Native children once investigated, and more likely to separate them from their family conditional on initial contact. As a result, contact with the child welfare system prompts a crisis for Native families. Even with the necessary protections of ICWA, once AIAN families are the subject of child welfare system investigations, their children are far more likely to be removed from the home than non-Native children. To this point—and within the context of deep austerity, expansive surveillance, assaults on tribal sovereignty, and the ongoing

⁶⁸ *Id.* at 35.

⁶⁹ Note that current federal data systems do not track a child's tribal affiliation or ICWA eligibility. American Indian/Alaska Native is included as a racial category in current versions of AFCARS.

failure to honor treaty obligations—the affirmative protections and active efforts of the Indian Child Welfare Act cannot end the crisis of Native family separation alone. For example, so long as the state fails to remedy the economic and social inequalities that drive referrals to the child welfare system, and continues to deem family separation an appropriate intervention when families are in need of care and resources, this crisis will persist. In the U.S., child welfare systems are broadly tasked with addressing poverty-related family crises—including eviction and housing precarity, routine contact with law enforcement, and a lack of critically needed medical and mental health resources. In the absence of a meaningful welfare state, family separation has become a central intervention to respond to child poverty, deepening already existing inequalities in the family separation crisis.⁷⁰ Set within this larger context, critically needed ICWA protections rightfully fight to keep families together. What these protections cannot do is directly impact the scope of state surveillance over Native children and provide resources to uplift and support Native children and families absent separation into the foster care system. It is likely the case that so long as state child welfare systems prioritize family regulation over care these inequalities will persist.

A. Land, Sovereignty, and Children

As previously described, the founding of the U.S. was predicated upon a desire to erase Native Peoples and their reciprocal relationships to one another and their homelands. To realize these goals, settlers forcibly enacted geographic displacement, separated tribes from vital resources, and prohibited the teaching of Native languages and worldviews. Given the current and ongoing struggles between tribes and the federal government, including legal battles for jurisdiction over children and land, we suggest that these historical logics of elimination and dispossession persist and must be taken seriously in ongoing research.

Treaties signed between early Americans and Native Peoples outlined federal responsibilities for Native health, safety, and well-being. Unfortunately, the continued violations of these binding legal agreements left a trail of broken treaties—and

⁷⁰ Dettlaff & Boyd, *supra* note 48.

subsequently broken families—across the nation.⁷¹ As the spatial control of Native land solidified, and the material and symbolic function of the westward frontier waned, the fictive notion of the frontier was transferred to the control of the Native body. This is not to say that the control of Native lands and bodies was not already taking place simultaneously. But rather, we mark here a particular shift that manifested in a variety of ways, namely in assimilationist projects and the removal of Native children from their homes. Like the concept of *terra nullius*, or “nobody’s land,” we assert that the nation’s child welfare system demands and creates the continuous “discovery” and claiming/taking of Native children as *filius nullius* or “nobody’s child.”⁷² More specifically, we suggest that once physical removal was deemed successful, settlers turned toward the surveillance and management of the Native family as a site of social and cultural control. This nexus of land and body critically illustrates the coercive power of the state to harm Native Peoples⁷³ as well as all other communities that reject colonial intrusion into family well-being.

The dual and dehumanizing framework of “nobody’s land” and “nobody’s child” involves forced dependence and ultimately diminishes tribal sovereignty as a central goal.⁷⁴ Similar to the idea that a vast, untapped land was in need of stewardship and privatization, the concept of a child without a parent or a child without kin rationalizes settler-logics of discovery. That is, when the settler-state’s reliance on cultural assumptions about the appropriateness of a nuclear family steeped in white, middle-class values is not visible, settler assumptions suggest that children have been abandoned, live without care and intention, and need rescue and stewardship, much like the Native lands from which the children were taken. Through this lens, Native kinship is seen as antithetical to settler family norms. Using slippery settler logics as validation, a community that is framed as incapable of appropriately rearing a child is also framed as incapable of producing land and community governance schemas that warrant respect as sovereigns. To undermine tribal sovereignty—which in effect reduces threats against settler

⁷¹ Fletcher & Singel, *supra* note 41.

⁷² Goldstein, *Ground Not Given*, *supra* note 16, at 88.

⁷³ Frederick J. Turner, *The Significance of the Frontier in American History*, ANNUAL REPORT OF THE AM. HIST. ASS’N FOR THE YEAR 1893, 199 (1893).

⁷⁴ Goldstein, *Ground Not Given*, *supra* note 16, at 88.

claims on lands, resources, and children—there is an incentive for the state to continuously “discover” Native children in need of rescue. That is, to diminish the power and futurity of tribal sovereignty, the state manufactures and then rediscovers Native family members made vulnerable by the state, continuing the genocidal practices of removal discussed in Part I.

B. The Native Family as a Site of Settler Regulation

Despite systematic efforts to the contrary, Native families and communities continue to cultivate their relationships and responsibilities to Indigenous lands, waters, and non-human relations. As with any cultural community, the ability to pass on this knowledge to one’s children is paramount to ensure cultural continuity and social cohesion. In Native families, children are also the key to ensuring that tribal communities can continue to exist as independent nations capable of exercising their tribal sovereignty. Unsurprisingly then, settler efforts to control Native lands and bodies highlight the family unit as a key site of settler regulation. Legal scholars Bethany Berger, Addie Rolnick, and Kim Pearson each explain that the practice of separating Native families—by way of child removal specifically—emerges from settler logics about land as well as racist logics about belonging, worthiness, and the family. Rolnick and Pearson unravel these racialized logics and suggest that:

For, although Indians are not identically situated to other racial minority groups, the harm that ICWA was designed to counteract was a racial harm in the sense that the work of severing Native children from tribal communities was part of an effort to eradicate those communities (defined by law and social practice as racially inferior) by absorbing them via interracial marriage and cultural reprogramming.⁷⁵

Armed with destructive racial logics informed by white supremacy, the settler-state has long regulated Native families to assist in its control of Native land, water, and resource rights.

⁷⁵ Addie C. Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to ICWA*, 4 MICH. ST. L. REV. 727, 732 (2017); Bethany R. Berger, *In the Name of the Child: Race, Gender, and Economics in Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295 (2016).

Parallel to attacks against anti-discrimination legislation, the state has also used racist logics to devalue the political import of indigeneity. Anti-ICWA organizations and supporters, for example, use these racist logics to devalue the political and sociocultural orientation of Indigenous Peoples and instead attack ICWA provisions as race-based and exclusionary. This harmful and inaccurate framing erases the political status of Native children and knowingly reduces a tribe's efforts to protect their community's children in the short term, and in the long term diminishes the strength and viability of tribal sovereignty. These anti-ICWA intentions and outcomes in and of themselves are settler colonial.

Scholarship on Native family regulation resonates with legal scholar Dorothy Roberts's identification of the racist logics of U.S. child welfare systems. Following demands for Black inclusion in access to welfare policy systems in the early to mid-20th century, public child welfare systems became more intensely focused on surveillance, regulation, stigmatization, and removal⁷⁶—an approach that disrupts and subordinates families. Roberts explains that Black motherhood has been systematically devalued and denigrated,⁷⁷ while Black children have been constructed as uniquely threatening and unworthy of the privileges of a nurturing childhood by white policy institutions.⁷⁸ Black mothers have been portrayed by policy makers as irresponsible, presenting imminent harms to both their own children and to the nation.⁷⁹ For Black and Native mothers alike, there is an invested interest in presenting them as inherently dangerous and deficient relative to white families. This framing allows child removal to become naturalized as a desirable and logical intervention. Taken together, these experiences demonstrate the state's willingness to intervene into Black and Native family life. This is the case despite our understanding

⁷⁶ Michaela Christy Simmons, *Becoming Wards of the State: Race, Crime, and Childhood in the Struggle for Foster Care Integration, 1920s to 1960s*, 85 AM. SOC. REV. 199 (2020)

⁷⁷ DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 65 (2002) [hereinafter ROBERTS, SHATTERED BONDS] ("Modern social pundits have held Black mothers responsible for the disintegration of the Black family").

⁷⁸ Simmons, *supra* note 76, at 216 ("Scholars have found that black children are often 'denied the developmental reality' of childhood that undergird protective policy and institutions").

⁷⁹ ROBERTS, SHATTERED BONDS, *supra* note 77.

that, “[i]n a liberal-democratic society that respects individual rights and highly values the family and its autonomy, child removal is one of the gravest and most intrusive actions that government can take.”⁸⁰ These patterned actions against minority communities must not be taken lightly.

The manifestation of settler and racist logics in the surveillance of family life have myriad material implications for the health and safety of Native Peoples. For example, Native families have been marginalized and managed by economic dispossession, control of Native women’s bodies and reproduction, and the intrusion of white women and mothers into the socialization of Native children. Each of these elements of social control sought to collectively address the nation’s continued investment in managing the “Indian problem.”⁸¹ In some cases, economic troubles placed Native parents and families in impossible and impoverished situations where their only access to critical resources would be in the hands of the government.⁸² Seemingly benevolent policies traumatized Native families while improving settlers’ likelihood of securing greater control of Native lands and resources.⁸³ Efforts to secure Native lands have also been linked with the regulation of Native women’s biological reproduction through the promotion of

⁸⁰ Leroy H. Pelton, *Separating Coercion from Provision in Child Welfare: Preventive Supports Should Be Accessible Without Conditions Attached*, 51 CHILD ABUSE & NEGLECT 427, 427 (2016).

⁸¹ The “Indian problem” refers to the problem that settlers had with the existence of Native Peoples on land that settlers wanted to create their own homes and societies.

⁸² JACOBS, GENERATION REMOVED, *supra* note 33, at 136.

⁸³ MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880-1940, xxx (2009) [hereinafter JACOBS, WHITE MOTHER TO A DARK RACE] (“Australia’s ‘protection’ policies and the U.S. government’s ‘assimilation’ program, each of which included [I]ndigenous child removal as a key element, have often been characterized as more enlightened approaches, or at least well-intentioned if misguided efforts, that broke with earlier and more brutal methods of colonization. However, these policies shared the same fundamental goal of earlier strategies—that of dispossessing [I]ndigenous people of their land—and aimed to complete the colonization of the American West and Australia by breaking the affective bonds that tied [I]ndigenous children to their kin, community, culture, and homelands.”).

hospital births over midwives, gendered policing of venereal disease, birth control, abortion, and sterilization.⁸⁴

In addition to policy addressing land and bodies, white women played a critical role in securing the Native family as a site of settler regulation. White women constructed a comparative and gendered motherhood binary, where Native women were portrayed as deficient and ill-equipped to raise their own children based upon harmful, racist stereotypes about Native “barbarity.”⁸⁵ In contrast, white women were situated as ideal caretakers and mother figures for Native children, a position that many white women were eager to take on.⁸⁶ In this way, white mothers and families were framed as liberal, caring, and “beyond race,” willing to sacrifice any negativity they might receive from other white people as a result of welcoming non-white children into their home.⁸⁷ These intentions, and their attachment to a domesticity and mothering framed as unreachable by Native mothers, mirror how “the violent displacement of Indigenous nations and the calculated expansion of the U.S. imperial nation-state remained likewise perpetually entangled with more intimate forms of possession and extermination.”⁸⁸ These interdependent connections between the nation and the home suggest a further need to reevaluate the continued reliance on state systems for Native child well-being and call into question any presumptions that Indigenous genocide is anything but ongoing.

V. NATIVE FAMILIES AND THE ABOLITION OF CHILD WELFARE

In this concluding section, we emphasize that routine and persistent intrusions in Native families and tribes are rooted in

⁸⁴ Theobald, *supra* note 32, at 6 (“Native women’s reproductive practices had long been a source of fascination for Euro-American colonizers, who used their perception of Indigenous reproduction to serve a number of purposes”).

⁸⁵ JACOBS, WHITE MOTHER TO A DARK RACE, *supra* note 83, at 42 (“Colonial officials’ rhetoric of rescuing and providing opportunity to [I]ndigenous children depended on harshly stigmatizing [I]ndigenous communities and families”).

⁸⁶ *Id.* at 281–282 (“[T]he state became a legal or fictive guardian to the children, and then subcontracted many of its guardianship responsibilities—providing protection, education, discipline and punishment, affection and emotional support—to white women”).

⁸⁷ Goldstein, *Ground Not Given*, *supra* note 16.

⁸⁸ *Id.*

the settler-state's longstanding investment in white supremacy. Settler desires to displace and erase are not gone but have manifested in a variety of institutional practices and policies that affect the health and safety of Native children and homes. Before transitioning into a summary of how our findings and framing might contribute to the visionary freedom work taking place in abolition collectives around the U.S., we begin with a brief overview of attempts to reform ICWA within the context of the settler-state's persistent attachment to family regulation. Most examples of such efforts focus on the need to ensure and increase ICWA compliance to provide Native families with the protections mandated by the law. Next, we examine the contributions of Black activists and communities at the forefront of the movement to abolish the child welfare system. We conclude by envisioning an abolitionist approach that redirects social and financial resources into the hands of Native families and works cooperatively with tribal nations to promote Indigenous communities of care. To this end, we argue that the child welfare system in its entirety must be abolished in order to stop the routine surveillance and separation of Native children from their families by the state. In so doing, we affirm that ICWA has provided, and will continue to provide, a necessary intervention to protect Native families so long as this intrusive system remains.

A. Existing and Ongoing Reform

Tribal communities and Native family advocates understand the multi-dimensionality of state-violence against Native Peoples in the U.S. and fight to protect Native families from these harms using a variety of tools. In child welfare matters, Native families rely on ICWA to mitigate harms and promote cultural and social stability in the lives of Native families, even despite considerable compliance and resource obstacles. Efforts to enhance the power and reach of ICWA have grown in recent decades using education, public outreach, and collaboration-building between tribes and state and federal social services. To monitor and ensure national ICWA compliance with various systems and jurisdictions, advocacy groups including Casey Family Programs, recommend that ICWA performance measures be developed and integrated into tribal, state, and federal reporting systems such as the federal Administration for Children and Families (ACF) and Family Services Reviews.

Additional efforts focus on the role of judges and courts and emphasize enhanced training on ICWA's intent. Efforts include best practice guidelines and link ICWA compliance with courtroom dynamics and actors involved in child welfare cases. Intentional training would ensure, for example, that presiding judges ask on the record, if not already established, about a child's potential AIAN heritage.⁸⁹ In many jurisdictions, judges, social workers, and attorneys⁹⁰ already receive training to improve their understanding of ICWA compliance and sanctions, but other legal actors such as guardians ad litem and special advocates would also benefit from intentional, data-driven education.⁹¹

Related efforts call for increased empirical evaluation of ICWA compliance and outline a variety of methods to do so. These methods include court observations within and across child welfare cases, reviewing case records to ensure compliance over time,⁹² and the use of qualitative methods such as focus groups to envision additional compliance efforts.⁹³ While we do not disagree with the merit and importance of such data collection, our quantitative findings indicate that the ongoing rate of Native child removal is persistent and may remain so in the event that the larger infrastructure of a punitive child welfare regime stays intact. It is the confluence of our own findings, the findings of tribes and advocates in decades prior, and the critical moment of institutional reckoning unfolding around us that underscore the need to rethink the end goal of compliance-based research. Instead, we suggest that compliance analysis would be greatly enhanced with a reorientation toward liberation and abolition.

B. Thinking with Liberation and Abolition in the Context of Child Welfare

Black activists and communities have long been at the forefront of the movement to promote abolition generally and

⁸⁹ *Id.* at 4.

⁹⁰ *Id.* at 13.

⁹¹ *Id.* at 6.

⁹² ALICIA SUMMERS & STEVE WOOD, MEASURING COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT: AN ASSESSMENT TOOLKIT, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES 8 (2014), https://www.ncjfcj.org/wp-content/uploads/2014/02/ICWA_Compliance_Toolkit_Final.pdf [<https://perma.cc/H8Z4-DH96>]; Williams et al., *supra* note 39.

⁹³ SUMMERS & WOOD, *supra* note 92; Williams et al., *supra* note 39.

abolish the child welfare system specifically. A variety of scholars, including the work of critical geographer Ruth Wilson Gilmore, provide guidance on how to ground oneself in the collective learning, sharing, and service for a free and just future for all peoples. This abolitionist approach to social inequality involves a clear acknowledgment of the harms committed against a community, as well as the roots of that harm, visible.⁹⁴ Abolition subsequently dismantles oppressive systems and builds life-affirming institutions⁹⁵ and spaces that promote healthy communities in ways that resonate with local knowledge. In summary, an abolitionist perspective seeks to address the origins of social insecurity,⁹⁶ acknowledge structural harm,⁹⁷ dismantle institutions that are beyond reform, and reimagine possibilities that prioritize social justice. In the context of child welfare, abolitionists argue that the current child welfare system is flawed beyond repair and reform is insufficient.⁹⁸ Advocates call for a new framework that is fundamentally anti-racist and rethinks how and why society supports the well-being of children and families⁹⁹ above and beyond shifting funds from one social institution to another.

Critical legal scholar Dorothy Roberts and others explain that after being largely excluded from the child welfare system prior to the 1960s, Black children today are disproportionately represented in the surveillance and policing of family life.¹⁰⁰ Similar to the experiences of Native families, advocates for Black children and families note that poverty and single parent family

⁹⁴ Lisa Sangoi, Co-Founder & Co-Director, Movement for Family Power, Keynote Address at upENDING the Child Welfare System: The Road to Abolition Conference, (Oct. 29, 2020), <https://upendmovement.org/2020/10/29/keynote-address-upend-convening> [<https://perma.cc/KZ4F-R9NM>].

⁹⁵ Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, in FUTURES OF BLACK RADICALISM, 224 (Gaye Theresa Johnson & Alex Lubin eds., 2017).

⁹⁶ Theresa Rocha Beardall, *Abolish, Defund, and the Prospects of Citizen Oversight after George Floyd*, SOC'Y FOR THE ANTHROPOLOGY OF WORK (Dec. 1, 2020); Ruth Wilson Gilmore, Keynote Conversation at the Making and Unmaking Mass Incarceration Conference (December 5, 2019), <https://mumiconference.com/transcripts> [<https://perma.cc/9RZY-KV9V>].

⁹⁷ Sangoi, *supra* note 94.

⁹⁸ Alan J. Dettlaff et al., *It Is Not a Broken System, It Is a System That Needs to be Broken: The upEND Movement to Abolish the Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 501 (2020).

⁹⁹ *Id.* at 502.

¹⁰⁰ Dettlaff et al., *supra* note 98, at 2.

structures are predictors of child removal,¹⁰¹ and that even when controlling for poverty and family structure, racial disparities continue to be present.¹⁰² Also salient to the Native experience, Black families receive differential treatment by child welfare workers who show a lack of cultural sensitivity, express judgment about Black parenting styles, and compare Black parenting against white and middle-class parenting perspectives.¹⁰³ The contemporary child welfare system acts as a racialized system of family regulation that blames Black and Native mothers for the structural conditions of poverty and inequality in which they live and parent. The system also blames mothers for the failures of an incredibly austere American welfare state. Instead of providing support to families in crisis, current systems prioritize the surveillance and punishment of Black and Native families. Abolitionists argue that these separation-oriented state family regulation systems do not, and in their current configurations cannot, advance the best interests of Black and Native families.

C. Reimagining Indigenous Communities of Care

Many advocates agree that the child welfare system is beyond repair because the system's disruptive and punitive intentions are antithetical to a support system that centers the dignity of family and extended kin networks. As with the issue of racially-biased policing in the U.S., the question of reform versus abolition relies upon measurable harm reduction and presumptions that more or less state intervention will keep families safe. Critics counter that social systems that are rooted in racism¹⁰⁴ must be abolished. We stand with this position and argue for an abolitionist approach to child welfare that

¹⁰¹ *Id.* at 21.

¹⁰² MILLER, RACIAL DISPROPORTIONALITY IN WASHINGTON STATE'S CHILD WELFARE SYSTEM, WASH. ST. INST. FOR PUB. POL'Y, DOCUMENT NO. 08-06-3901, at 1 (2008), https://www.wsipp.wa.gov/ReportFile/1018/Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf [<https://perma.cc/CD32-TZYJ>].

¹⁰³ Marian S. Harris & Wanda Hackett, *Decision Points in Child Welfare: An Action Research Model to Address Disproportionality*, 30 CHILD. & YOUTH SERV. REV. 199, 207 (2007).

¹⁰⁴ *What Does it Mean to Abolish the Child Welfare System as We Know It?* CTR. FOR STUDY SOC. POL'Y, (June 29, 2020), <https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it> [<https://perma.cc/5Q3D-SD7K>]; Dettlaff et al., *supra* note 98, at 501.

reimagines family safety in ways that center the active dismantling of racist policies.

We conclude by envisioning an abolitionist approach to child welfare in which researchers can play an important role. First, researchers can and must consider how their scholarly interventions can open up space for the fight for abolition to meaningfully grow. One way this may be possible rather quickly is through study design. For example, we rightfully situate our empirical findings within a theoretical framing of the state as a settler-state, a political and sociohistorical actor invested in white supremacist values that manifest in surveillance and family separation. We do so in order to call to account the structural violence that cannot be divorced from the stories the data tell about the effects of centuries of anti-Native subordination. Second, this empirical approach positions our findings and implications in service of the visionary freedom work taking place in abolition collectives and in service of tribes and advocates who continuously demand increased protections for their children and families. We affirm that ICWA has provided, and will continue to provide, a necessary intervention to protect Native families so long as this intrusive and punitive child welfare system remains.

Third, poverty disproportionately burdens Native families and there is a clear relationship between poverty and involvement in the child welfare system.¹⁰⁵ We argue in favor of redirecting funding from the foster care system directly to families and communities;¹⁰⁶ the expansion of social safety net programs to mitigate mistreatment and neglect caused by financial precarity;¹⁰⁷ and a prioritization of increased access to affordable housing,¹⁰⁸ healthcare services, community infrastructure, and fresh food and water. We suggest that child welfare funding that further empowers state authorities, which historically have acted to separate Native families, must be reallocated into Native homes. These homes have often been deemed financially “unfit,” acting as justifiable grounds for child

¹⁰⁵ MILLER, *supra* note 102, at 21.

¹⁰⁶ Dettlaff et al., *supra* note 98, at 508.

¹⁰⁷ *What Does it Mean to Abolish the Child Welfare System as We Know It?* CTR. FOR STUDY SOC. POL’Y, (June 29, 2020), <https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it> [https://perma.cc/5Q3D-SD7K]; Dettlaff et al., *supra* note 98, at 510.

¹⁰⁸ CTR. FOR STUDY SOC. POL’Y, *supra* note 107.

removal for more than a century. These recommendations are attentive to the fact that financial circumstances within urban and tribal communities are complex.¹⁰⁹ Nonetheless, we suggest that resource allocation for Native children and families must be both equitable and reconciliatory as resource constraints remain a grave inequality in Native sovereign nations more broadly and in the administration of child welfare specifically. Importantly, we wish to highlight here that financial resources alone cannot appropriately remedy the problem of family separation. A recognition of and support for the effects of multigenerational trauma, honoring the care found within extended Native kin networks, and movements to revitalize community-centered values to strengthen families are all essential components of a path forward.

Additionally, we advocate for an abolitionist agenda that reimagines child welfare and supports the building of urban *and* reservation Indigenous communities of care led by and for Native Peoples and tribes. Indigenous care communities would prosper alongside the promotion of tribal sovereignty, adherence to treaty obligations, and a return of homelands, resources, and waterways to Native communities. Allies interested in supporting Indigenous communities of care must recognize that tribal autonomy is paramount, must continue to fight against efforts to prioritize family regulation over community support, and educate others about the historical significance of Native land theft and genocide. Some examples of how an abolitionist approach to child welfare might positively impact Native families include the immediate termination of the use of congregate care facilities such as group homes in favor of investing in Native community-based support and greater recognition of informal kinship networks.¹¹⁰ Movements can look to existing programs including individual- and family-level ICWA efforts and the intentional recruitment of ICWA-compliant foster families. Recruitment requires the recognition and elimination of social and economic barriers for Native households to become a foster

¹⁰⁹ See generally Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N.D. L. REV. 759 (2004).

¹¹⁰ CTR. FOR STUDY SOC. POL'Y, *supra* note 107; Dettlaff et al., *supra* note 98, at 510.

family¹¹¹ in ways that speak to the necessity of mutual aid in cultivating safe and affirming homes for all Native families. Similarly, efforts to radically rethink care outside of formal institutions and agencies need not look far as tribal communities in both urban and rural spaces have participated, and continue to participate, in mutual aid collectives that provide nourishment for one another in the face of institutional neglect.

VI. CONCLUSION

In 1978, ICWA introduced federal protections for Native children (enrolled and eligible for membership), families, and tribes against unnecessary removal and affirmed the role of the tribe as an important partner in child welfare proceedings. In this Article, we used administrative and historical data to statistically evaluate the magnitude of change in AIAN family separation since the passage of ICWA and locate the institutional pathways that funnel AIAN families into the child welfare system. We find that the frequency of AIAN children's placement into foster care has remained relatively stable since the passage of ICWA, that AIAN children remain at an incredibly high risk of family separation through the child welfare system, and that the post-investigation removal decision by child welfare agencies is a key mechanism of inequality in family separation. Based upon these findings, and our framing of family separation as an inherent element of white supremacist settler-state logics, we argue that the child welfare system in its entirety must be abolished in order to stop the routine surveillance and separation of Native children from their families by the state. We also suggest that ICWA has provided, and will continue to provide, a necessary and desperately needed intervention to protect Native families so long as this intrusive system remains. We are hopeful that abolitionist principles can intersect with the work of Native child welfare advocates committed to placing social and financial resources into the hands of Native families. Coupled with the

¹¹¹ Killos et al., *supra* note 39, at 12; In a recent pilot, Casey Family Programs purposefully sought to recruit and retain Native families interested in becoming foster families. They did so by working closely with Native families to prepare them for licensure and also by providing financial and material support directly to these families. The goal was to ensure that, in the end, Native children would be placed in foster homes that preserve their connection to their culture, traditions, and birth parents. Such efforts require meaningful collaborations between states and tribes as well as a centralized state application system for those interested in becoming foster families.

necessity of cultural respect and the centering of human dignity and family rights, these efforts can work cooperatively with urban and reservation communities to promote their vision of Indigenous communities of care. The time is now to make right on the nation's promise to end family separation among Native families and tribes.

