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ASSIMILATION, REMOVAL, DISCIPLINE, AND CONFINEMENT: NATIVE GIRLS AND GOVERNMENT INTERVENTION

Addie C. Rolnick*

A full understanding of the roots of child separation must begin with Native children. This Article demonstrates how modern child welfare, delinquency, and education systems are rooted in the social control of indigenous children. It examines the experiences of Native girls in federal and state systems from the late 1800s to the mid-1900s to show that, despite their ostensibly benevolent and separate purposes, these institutions were indistinguishable and interchangeable. They were simply differently styled mechanisms of forced assimilation, removal, discipline, and confinement. As the repeating nature of government intervention into the lives of Native children makes clear, renaming a system does not change its effect. The historical roots of these systems must be acknowledged, and the current systems must be abolished and replaced. To answer the question of what a non-punitive, non-assimilative system would look like, this Article looks to tribal courts and indigenous justice systems. It points to specific examples of how Native communities have reshaped ideas

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about caring for and disciplining children, including traditional adoption, kinship care, wellness courts, family group conferencing, and a "best interests" standard that emphasizes the link between individual and collective well-being.

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I. PROLOGUE: GHOST BUILDINGS

In the late 1800s, Fort Marion in Florida and Fort Sill in Oklahoma housed Native¹ prisoners of war, including Kiowa, Comanche, and Apache prisoners.² In 1886, a group of Apache prisoners were sent from Fort Sill to Florida; the men went to Fort Pickens and the women and children to Fort Marion.³ Colonel Richard Pratt visited Fort Marion that year; he returned with a group of Apache children and an order that all children from the Florida prisons should be sent to his new school for Indian children in Carlisle, Pennsylvania.⁴ Pratt, the architect of

¹ This Article employs the word “Native” interchangeably with the word “indigenous” to describe the peoples indigenous to the territories that make up the present-day United States. Indigeneity is a political status and a racialized category. The “Indian” racial category (for example, on the census) includes people who are not legally considered Indians. The “Indian” legal category includes many people of mixed racial backgrounds. Neither is coextensive with the indigenous category, which may encompass anyone affiliated with colonized peoples. See generally Addie C. Rolnick, *The Promise of Mancari: Indian Civil Rights as Racial Remedy*, 86 N.Y.U. L. REV. 958, 967 (2011) (examining the relationship between the Indian legal and racial categories). Where this Article refers to specifically to the legal category of Indian (federally recognized Indian tribes and their members, a subset of indigenous people), it uses the terms “Indian” and “tribe.”

² See generally ALICIA DELGADILLO & MIRIAM A. PERRETT, FROM FORT SILL TO FORT MARION, A DOCUMENTARY HISTORY OF THE CHIRACAHUA APACHE PRISONERS OF WAR, 1886–1913 (2013) (history of Apache internment at forts). See also Manu Vimalassery, *Antecedents of Imperial Incarceration: Fort Marion to Guantanamo*, in THE SUN NEVER SETS: SOUTH ASIAN MIGRANTS IN AN AGE OF U.S. POWER 350–367 (Vivek Bald et al. eds. 2103) (describing military imprisonment and torture at Fort Marion).

³ Delgado & Perrett, *supra* note 2; Heather Shannon & Jeff Haozous, *The Youngest Prisoners: General Nelson A. Miles’s Photographs of Apache Children*, NATIONAL MUSEUM OF THE AMERICAN INDIAN Blog (Apr. 17, 2013), <https://blog.nmai.si.edu/main/2013/04/the-youngest-prisoners-general-nelson-a-miles-photographs-of-apache-children.html> [<https://perma.cc/VN4J-D6LT>] (describing separation of Apache men, women, and children and eventual removal of children to Carlisle School); Jaime G. Vela, *Returning Geronimo to His Homeland: The Application of NAGPRA and Broken Treaties to the Case of Geronimo’s Repatriation*, 1 AM. J. INDIGENOUS STUD, SI78, SI86 (2017) (describing imprisonment of Apache prisoners of war).

⁴ Letter from R.H. Pratt to Comm’r of Indian Affs., Nov. 9, 1886 (on file with author) (available at <https://carlisleindian.dickinson.edu>) (documenting 1886 transfer of Apache children, including eight girls, from Fort Marion and noting instructions from Interior and War Departments that all children between 12 and 22 should be transferred from Fort Marion to Carlisle); Letter from R.B. Ayres to Asst. Adjutant General, May. 3, 1887 (on file with author)

the federal government's Indian boarding school program, had previously worked at Fort Marion, overseeing prisoners and creating and refining a program of assimilation that would later form the blueprint for the Carlisle School.⁵ Carlisle was styled as an alternative to the strategy of killing Native people in order to solve "the Indian problem."⁶ Pratt proposed instead to "kill the Indian in him and save the man."⁷

Carlisle was the first federal Indian boarding school. Pratt refined his assimilationist curriculum and disciplinary techniques on the Apache children and later generations of Native children. He employed methods developed during his time working as a prison guard at Fort Marion.⁸ Carlisle's first generation of Apache children had been prisoners and then students, but the same approaches were used in the prison and the school and, indeed, the same person imposed them.

Pratt's Carlisle experiment would spawn a national network of boarding schools for Native children. The Chemawa Indian School is one of the many federally run boarding schools opened in Carlisle's image. Opened in 1880 in Oregon and then moved to a new building in 1885, Chemawa is the oldest

(available at <https://carlisleindian.dickinson.edu>) (documenting 1887 transfer of 62 prisoners, including 32 children to Carlisle); Special Order No. 92, May. 10, 1888 (on file with author) (available at <https://carlisleindian.dickinson.edu>) (order from Assistant Adjutant General Whipple directing transfer of children from Fort Barrancas to Carlisle).

⁵ Sarah Kathryn Pitcher Hayes, *The Experiment at Fort Marion: Richard Henry Pratt's Recreation of Penitential Regimes at the Old Fort and its Influence on American Indian Education*, 1 J. FLORIDA STUDIES 1, 2 (2018) (describing Pratt's work at Fort Marion and its influence on his education plan, and noting that his prison career is deemphasized by historians in favor of a focus on his work at Carlisle).

⁶ For an explanation of the "problem" presented by the continuing presence of indigenous peoples on land sought by white settlers, see Nelson A. Miles, *The Indian Problem*, 128 N. AM. REV. 304 (1879).

⁷ Richard H. Pratt, *The Advantages of Mingling Indians with Whites*, 19 SOC. WELFARE F. 1, 45 (1892). See also Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 397 (2006) (describing Pratt's assimilationist philosophy).

⁸ See Hayes, *supra* note 5, at 3–4 (discussing the prison's influence on Pratt's methods and his belief in the rehabilitative possibilities of a prison setting, including its architecture).

continuously operating boarding school in the United States.⁹ Eight Puyallup boys who would become students at the school built it under the supervision of Lieutenant Melville Wilkinson, a friend of Pratt's; the school was initially called Forest Grove and served students from the Puyallup and Nisqually reservations in Washington.¹⁰ Students were trained in gender-specific industries: blacksmithing, shoe making, carpentering, and wagon making for boys, and sewing and cleaning for girls.¹¹

The assimilationist philosophy of boarding schools has long since been rejected, and the Bureau of Indian Education since the 1970s has pursued a goal of supporting self-determination and sovereignty.¹² But many of the children who attended Chemawa are still buried in unmarked graves around the building.¹³ In 2003, a student named Cindy Gilbert SoHappy

⁹ CHEMAWA HISTORY, CHEMAWA INDIAN SCHOOL (Aug. 8, 2017), <https://chemawa.bie.edu/history.html> [<https://perma.cc/M4MY-JENB>]; Charles E. Larsen, *History of Chemawa Indian School*, WILLAMETTE U. ARCHIVES, 1–3, <https://libmedia.willamette.edu/cview/archives.html#!doc:page:manuscripts/5408> (last visited June 1, 2021) (reporting on initial construction).

¹⁰ Larsen, *supra* note 9, at 9 (reporting on 1880 construction).

¹¹ Larsen, *supra* note 9, at 3–4.

¹² *Health and Safety Risks of Native Children at Bureau of Indian Education Boarding Schools: Hearing Before the S. Comm. for Indigenous Peoples of the United States*, 116th Cong. (2019) (statement of Mark Cruz, Deputy Assistant Sec'y, Pol'y & Econ. Dev. Indian Aff., U.S. of the Dep't Interior), <https://www.doi.gov/ocl/indian-boarding-schools> [<https://perma.cc/FP2Z-82UZ>] (testifying about Chemawa student deaths and that Chemawa is one of four off-reservation schools directly operated by the Bureau today and describing that the schools' mission as "to provide Indian children with a high-quality, culturally-relevant education and, to build within our students the knowledge, skills, and character needed to address and overcome the challenges of adulthood, while giving them the educational foundation to pursue their dreams"). See Natalie Pate, *Student Deaths, Lack of Accountability at Chemawa Bring Heat From Congress*, STATEMAN J. (May 20, 2019), <https://www.statesmanjournal.com/story/news/education/2019/05/20/salem-oregon-chemawa-indian-school-health/3686698002> [<https://perma.cc/XLV8-4T6N>] (describing hearing). See also Press Release, U.S. Dep't Interior, Bureau of Indian Affairs, Chemawa Indian School Old Spirits and a Fresh Beginning (Dec. 23, 1976), <https://www.bia.gov/as-ia/opa/online-press-release/chemawa-indian-school-old-spirits-and-fresh-beginning> [<https://perma.cc/Z8BT-SBP>] (press release describing Chemawa as "adolescent" in 1976).

¹³ Marsha Small's research has revealed "multiple unmarked graves," many from the late 1800s. Telephone interview with Marsha Small, Ph.D. Candidate, Montana State University in Bozeman (Apr. 24, 2021) (on file with author). See also Marc Dadigan, *Unmarked Graves Discovered at Chemawa*

was found dead at Chemawa.¹⁴ She died in a locked room that was one of four small cells used by the school as drunk tanks.¹⁵ A subsequent Inspector General investigation blamed her death on poor supervision by school officials.¹⁶ Cindy attended a school with a mission of supporting tribal self-determination, but her death amid by the unmarked graves on the campus reveals the carceral roots of the system—indeed, the building—in which she was being educated.

Around the same time the federal government opened Chemawa, the State of South Dakota opened the Dakota Reform

Indian School, AL JAZEERA, (Jan. 3, 2016), <https://www.aljazeera.com/features/2016/1/3/unmarked-graves-discovered-at-chemawa-indian-school> [<https://perma.cc/LW8D-AT5P>] (describing Marsha Small's unpublished thesis, "A Voice for the Children of Chemawa Cemetery"); Erin Deitrich, Graduating Grandmother's Research Examines Painful Native American Boarding School History, *Bozeman Daily Chronicle* (May 9, 2015) (describing Small's work mapping the grave sites). Small explained that when she began mapping the cemetery, "it was unkempt. It was overgrown." Interview with Marsha Small, *supra*. She described the mapping project as "really heavy work" driven by a "responsibility to these children and families." *Id.* Her work links Chemawa's history to present policies; she notes that the removal of children to boarding schools "opens that door that you can just take our kids." *Id.*

¹⁴ Suzan Shown Harjo, *A Native Child Left Behind*, INDIAN COUNTRY TODAY (Jul. 2, 2004), <http://www.senaa.org/DOI/achildleftbehind.htm> [<https://perma.cc/J466-5QXU>]; *Warm Springs: A Place Where Children Die*, OREGONIAN (2004).

¹⁵ Although Chemawa is nominally a school, it appeared on the Bureau's inventory of juvenile detention facilities because it, in effect, had its own on-site jail. U.S. DEP'T INTERIOR, OFFICE INSPECTOR GENERAL, ASSESSMENT NO. X-EV-BIA-0114-2003, INTERIM REPORT ON INDIAN COUNTRY DETENTION FACILITIES 2 (Apr. 2004) (explaining that the school appeared on the Bureau's detention inventory because of the cells "used to temporarily detain unruly or intoxicated students").

¹⁶ Federal officials determined that staff failed to check on Cindy every fifteen minutes as required. See Memorandum from Earl E. Devaney, Inspector General, U.S. Dep't Interior, to Secretary Dep't Interior (Nov. 1, 2005), <https://www.doioig.gov/sites/doioig.gov/files/Chemawa081406.pdf> [<https://perma.cc/SAP6-MNX5>]. The FBI also investigated, but declined to file involuntary manslaughter charges against staff members. Christopher Lee, *Report Cites BIA in Death of Teenager*, WASH. POST (July 26, 2006), <https://www.washingtonpost.com/archive/politics/2006/07/26/report-cites-bia-in-death-of-teenager/194ef5ec-4af9-4ed8-ba6d-96ec5244925a> [<https://perma.cc/NF4K-KMDZ>]. The U.S. later paid Cindy's family \$1.8 million to settle their civil suit. Associated Press, *Oregon: Family Settles Lawsuit After Death at Indian School*, N.Y. TIMES (Sept. 16, 2006), <https://www.nytimes.com/2006/09/16/us/16brfs-001.html> [<https://perma.cc/H8F4-RRL4>].

School, later known as the South Dakota State Training School.¹⁷ The building, located in Plankinton, S.D., served as a juvenile prison during the 1990s tough-on-crime era of juvenile justice¹⁸ and then housed a juvenile boot camp for girls in 1998 and later a program for serious female juvenile offenders.¹⁹ In South Dakota, Native children make up a large portion of the young people in state juvenile facilities²⁰—a legacy of colonization, federal underinvestment in reservations, and federal efforts to relocate Indian people to cities.²¹ Naturally, the training school housed many Native girls. In 1999, a resident named Gina Score died of heat exhaustion after being forced to run almost three miles in the sun as part of the school's program of harsh rehabilitative discipline.²² Videos produced during a subsequent consent decree show staff with shields, handcuffs, and batons in combative encounters with Native girls, sometimes tying them down to beds to control them.²³ Juvenile facilities are ostensibly rehabilitative, but the use of shields and restraints against Native girls at the facility was a visual reminder of how the state and federal governments have long treated Native children as a problem to be contained and controlled, violently if necessary.

Fort Sill, where the Apache prisoners were first sent, was repurposed in the 1940s as an internment facility for Japanese Americans and then again as a military prison until it closed in

¹⁷ Opened in 1886 as the Dakota Reform School, the Plankinton site became the State Training School in 1905. Addie C. Rolnick, *Native Youth & Juvenile Injustice in South Dakota*, 62 S.D. L. REV. 705, 722 n.102 (2017) [hereinafter, Rolnick, *Native Youth & Juvenile Injustice*].

¹⁸ Addie C. Rolnick, *Untangling the Web: Native Youth and Juvenile Justice*, 19 N.Y.U. J. L. & PUB. POL'Y 49, 74–75 (2016) [hereinafter Rolnick, *Untangling the Web*] (describing 1990s era of juvenile justice).

¹⁹ Rolnick, *Native Youth & Juvenile Injustice*, *supra* note 17, at 722 n.102.

²⁰ *Id.* at 720–22.

²¹ See *infra* notes 66–71 and accompanying text (describing Termination Era policies); Kevin Abourezk, *Native Sun News Today: Tribal Takeover of Troubled Hospital Questioned*, INDIANZ (Nov. 30, 2018), <https://www.indianz.com/News/2018/11/30/native-sun-news-today-tribal-takeover-of.asp> [<https://perma.cc/XN84-4DQ4>] (describing the influence of relocation policy on Rapid City's Native population, even though the city was not an official target of federal relocation).

²² See Bruce Selcraig, *Camp Fear*, MOTHER JONES (Dec. 2000), <https://www.motherjones.com/politics/2000/11/camp-fear> [<https://perma.cc/5V6F-8886>] (detailing Score's death and describing conditions at Plankinton).

²³ See Rolnick, *Native Youth & Juvenile Injustice*, *supra* note 17, at 722 n.103.

2010.²⁴ Most recently, it was used briefly by the Trump Administration as a holding facility for migrant children.²⁵ The cell where Cindy Gilbert SoHappy died was removed from Chemawa after the Inspector General investigation that followed her death.²⁶ The larger question of why a boarding school had a jail inside it was not addressed in the reports. The school continues to house several hundred Native students a year. After multiple iterations, the former South Dakota State Training School is now Aurora Plains Academy, a privately run residential treatment facility.²⁷ Despite its name change, reinvention as a residential treatment facility, and private owners, it is still a place for confining delinquent children, many of them Native, and it is still plagued by allegations of abuse.²⁸

The persistence of physical structures of confinement are a reminder that child welfare, education, and juvenile justice were created as systems of racial and gendered social control. Each wave of reform seems intended to leave behind the problems created by these systems, but the buildings tell a different story. The jail cell at Chemawa was a physical reminder of the roots of Indian education as a tool of assimilation achieved through removal, discipline, and confinement. The imposing jail building at Plankinton is a reminder that mental health treatment is being offered to young people only after they have entered a system where punishment hangs over their heads. The use of Fort Sill as a detention facility for migrant children was a reminder that the federal government removes and contains its problem populations, and that the country is dotted with

²⁴ Gillian Brockell, *Geronimo and the Japanese Were Imprisoned There. Now Fort Sill Will Hold Migrant Children Again, Sparking Protests.*, WASH. POST (June 23, 2019), <https://www.washingtonpost.com/history/2019/06/12/geronimo-japanese-were-imprisoned-there-now-fort-sill-will-hold-migrant-children-again> [<https://perma.cc/5H9J-UWMP>].

²⁵ *Id.*

²⁶ Harjo, *supra* note 14.

²⁷ Rolnick, *Native Youth & Juvenile Injustice*, *supra* note 17, at 722 n.102.

²⁸ Bart Pfankuch, *Aurora Plains Academy: Unsafe Place to Live, Difficult Place to Work*, S.D. NEWS WATCH (June 5, 2019), <https://www.sdnewswatch.org/stories/aurora-plains-academy-unsafe-place-to-live-difficult-place-to-work> [<https://perma.cc/2JZF-FJB4>]; Bart Pfankuch, *Investigation: Residents Suffer Physical, Mental and Sexual Abuse at Aurora Plains* MITCHELL REP. (June 8, 2019), <https://www.mitchellrepublic.com/news/4623167-investigation-residents-suffer-physical-mental-and-sexual-abuse-aurora> [<https://perma.cc/N8DE-6RWK>].

buildings designed to serve that purpose, whatever they are called. A person observing the buildings over time might understandably have difficulty distinguishing between the prison, the school, and the treatment center.

II. INTRODUCTION

American law, historically, has been a tool of social control specifically directed at fixing, confining, and punishing communities of color. For Native girls, at least three separate institutions have functioned this way: education, child welfare, and juvenile delinquency. All these institutions had ostensibly benevolent purposes: to educate, protect, or rehabilitate children, respectively. But all have simultaneously functioned as sites of forced assimilation, removal, discipline, and confinement. This interplay is important in understanding the role of schools, courts, foster care, and secure confinement in addressing the needs of Native girls today. The history of Native girls and state intervention is also an origin story of the child removal practices that characterize modern child welfare and juvenile delinquency systems and affect all children.

This Article looks backward in order to look forward. Its ultimate conclusion is that modern education, child welfare, and delinquency systems cannot help Native girls unless they are fundamentally remade. Looking backward, it focuses on the historical period between the late 1800s and mid-1900s—a period in which Indian boarding schools, federal and state jurisdiction, juvenile courts, and state child welfare systems were created or expanded. It foregrounds the gendered nature of state interventions²⁹ in these areas and reveals how governmental power over children has been used to enforce gendered and racial hierarchies.

²⁹ Child welfare, in particular, has been a site of gendered control over mothers. *See e.g.*, LAURA BRIGGS, *TAKING CHILDREN: A HISTORY OF AMERICAN TERROR* (2020) (arguing that child-taking has been used to punish women of color for resistance); DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (documenting the over-representation of Black children in the child welfare system and arguing that this reflects a political choice to address poverty by punishing, rather than aiding, Black mothers). In contrast to these texts, I focus here on how it has also functioned to control daughters.

This Article discusses the experiences of Native children, focusing specifically on girls whenever possible.³⁰ Centering the analysis on girls reveals the interrelationship between race and gender hierarchies in state and federal approaches to children. This dynamic is not unique to Native girls, but focusing on their experiences most clearly reveals the way the systems work. The Article takes an intersectional approach in order to highlight intersecting systems of oppression, “conceptualizing Native gender oppression as inextricably linked to settler colonialism and Western imperialism.”³¹ As Kimberlé Crenshaw has written, if we begin by “addressing the needs and problems of those who are most disadvantaged and with restructuring and remaking the world where necessary, then others who are singularly disadvantaged would also benefit.”³² Accounts of delinquency, in particular, typically follow an additive approach that begins with white boys, then engages in endless tweaks to theory and policy to account for the continued inequality of anyone whose experience differs. Instead, this Article employs an intersectional approach by centering multiply marginalized people (here, Native girls) when examining a system (here, child welfare and delinquency) to identify insights, criticisms, and proposals that benefit everyone.³³

Intersectionality theory is also important for understanding how the experiences of Native girls (and Native children more generally) should be understood within the larger

³⁰ Information on Native children’s experiences is limited, and much of the existing research does not differentiate among genders.

³¹ Sarah Deer, *(En)Gendering Indian Law: Indigenous Feminist Legal Theory in the United States*, 31 YALE J. L. & FEMINISM 1, 6 (2019).

³² Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. F. 139, 167.

³³ See Angela Harris & Zeus Leonardo, *Intersectionality, Race-Gender Subordination, and Education*, 42 REV. RES. IN ED. 1 (2018). A similar approach was advocated by Mari Matsuda in her article *Looking to the Bottom*, which suggests assessing law and policy by attending to the voices of those at “the bottom” who are most impacted by it. Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987). While I do not wish to suggest there is one “bottom” of youth policy, Native girls have certainly borne its weight disproportionately.

conversation about child welfare and juvenile justice.³⁴ By providing a detailed picture of exactly how those themes were enacted upon Native girls, and how Native nations have responded, this piece underscores at least two important distinctions between Native girls' experience and that of other children. First, assimilation was an *explicit* goal of these systems for Native girls. Second, Native nations were, and continue to be, uniquely positioned to reimagine child welfare and juvenile justice because they operate independent justice systems recognized by federal and state courts. By identifying shared experiences, as well as specificities, intersectional analyses of subordination can facilitate coalitions between groups and strengthen those coalitions by highlighting differences between them.³⁵ Using the experiences of Native girls, this Article uncovers themes of state control that will resonate for many other children of color, including the method of separating children of color from their communities as a way to control them and the way that control includes gender-specific indoctrination.

The history of Native girls' involvement with federal and state government interventions clearly shows how the various systems that affect children are interchangeable. Despite the distinct histories and different purposes of the education, child welfare, and juvenile systems, these institutions were simply differently styled mechanisms of assimilation, removal, discipline, and confinement for Native youth. Overlap between these separate systems is sometimes framed as a new problem, as in discussions about the school-to-prison pipeline,³⁶ the

³⁴ The historical portion of this essay discusses education because of the centrality of the school model as the original vehicle for state intervention into the lives of Native youth. For Native youth, schools are the precursors to modern delinquency and child welfare courts as much as they are the precursors to modern schools. Because it is primarily intended as a critique of the modern child welfare and delinquency systems, this essay does not focus on contemporary education policy; undoubtedly, a similar essay could be written about the present-day education system.

³⁵ Devon W. Carbado et al., *Intersectionality: Mapping the Movements of a Theory*, 10 DUBOIS REV. 303, 305–06 (2012); Dorothy E. Roberts & Sudatha Jesudeson, *Movement Intersectionality: The Case of Race, Gender, Disability, and Genetic Technologies*, 10 DUBOIS REVIEW 313, 315–16 (2012).

³⁶ See, e.g., MONIQUE W. MORRIS, RACE, GENDER, AND THE SCHOOL-TO-PRISON PIPELINE: EXPANDING OUR DISCUSSION TO INCLUDE BLACK GIRLS, AFRICAN AMERICAN POLICY FORUM 2 (2012).

punitive turn in child welfare,³⁷ or the criminalization of welfare.³⁸ For Native children, there has never been a noticeable difference between the systems. Government interventions have been remade and renamed several times, but the central purpose—to assimilate Native children—has changed little. This consistency of purpose is evident in the physical buildings themselves, some of which have been recycled from prisons to schools to prisons, and back to schools again. The fact that these structures remain, even as governments have formally rejected their origins, speaks to a failure of memory and a failure of imagination. This Article directly counteracts the failure of memory by demonstrating that what we imagine today as benevolent, helpful systems originated as ways to control, eradicate, or confine disfavored populations.

Looking forward, this Article addresses the failure of imagination. Most people have come to expect, without question, that government intervention is necessary to educate, protect, and rehabilitate children. Even when the focus of these systems shifts nominally to helping parents and children and reunifying families, it is assumed that punitive threats of child removal and/or confinement will be necessary to force some parents and children to comply.

These assumptions are obviously problematic when applied to Native girls today. Academics and policymakers have highlighted the role of personal and intergenerational trauma in creating the conditions that disrupt education and call for child welfare and juvenile delinquency intervention.³⁹ Yet, proposals for addressing this trauma are still linked to the existing punitive systems. Why, if the core issue is trauma caused by past violent policies, should we fix it by sending girls back into the systems that created (and recreate) that violence? There is no one answer to the question of exactly how to re-envision (or even replace) these systems. To raise the possibility of transformation, this

³⁷ See, e.g., Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1478 (2012).

³⁸ See, e.g., KAARYN S. GUSTAFSON, *CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY* (2011) (documenting how modern welfare rules subject poor people to surveillance and regulation, treats them as presumptive criminals, and leads to entanglement in the criminal justice system).

³⁹ See Addie C. Rolnick, *Resilience and Native Girls: A Critique*, 2018 BYU L. REV. 1407, 1415–16.

Article briefly considers how some tribal courts have structured their child welfare and delinquency systems using traditional ideas about child-rearing, discipline, and communal responsibility.

III. ASSIMILATION, REMOVAL, DISCIPLINE,
AND CONFINEMENT: BOARDING SCHOOLS,
COURTS, REFORMATORIES, AND FOSTER
PARENTS

Modern child welfare and juvenile courts were established during the late 1800s and early 1900s—the same period that assimilationist boarding schools were a centerpiece of Indian policy. These systems began as ways for white upper-class reformers to protect and retrain poor and minority children, first through private organizations, and eventually through state government systems. While assimilation was not the formal goal, this goal was assimilative in nature, and the key mechanisms used were removal and confinement. Early houses of refuge and training schools for children were subject to minimal judicial oversight, allowing caretakers to experiment with discipline, physical punishment, isolation, manual labor, and even resettlement of children in other communities.⁴⁰ For Native youth, it is significant that the dominant policy approaches to both misbehaving children and Native people in late 1800s and early 1900s favored removing children from home, sending them far away, and subjecting them to programming intended to mold them into race- and gender-specific roles.

Child welfare and delinquency systems underwent significant formalization in the mid-1900s. Also in the 1950s, Congress again embarked on a campaign to dismantle tribal sovereignty and to end the separate political status of Native nations and the special tribal-federal relationship. One of the primary tools of the Termination Era was the delegation of civil and criminal jurisdiction on reservations to a handful of states,

⁴⁰ By separating juvenile courts from adult criminal courts, juvenile delinquency professionals gained very broad authority about which children they could sweep into the system and how to treat them once there, including: the type of programming, whether to lock children up, whether and when to employ physical punishment, how long to keep them in the system, and whether and when to use delinquent children as labor. See Rolnick, *Untangling the Web*, *supra* note 18, at 72 (describing experimentation and lack of oversight in early juvenile institutions).

effectively handing over federal responsibility for law enforcement to those states. While there is no evidence that increased state power in Indian country improved reservation public safety, it opened state courts, jails, and prisons to a new population of Indian country offenders, including juveniles. During the same period, Native children were also being removed from their communities via state child welfare workers, foster care, and adoption. Child welfare removal—the heir to federal boarding school policy—was premised on the same assumption that Native families and communities were dysfunctional. By this logic of dysfunction, leaving children in the custody of their parents, or even their extended families and communities, would cause harm so severe that child welfare intervention was needed. As more and more Native children came under state jurisdiction through dependency or delinquency courts, they experienced removal and confinement at extraordinarily high rates.

Drawing from government documents and youth narratives, this Part highlights the themes of assimilation, removal, discipline, and confinement across multiple institutions. The goal of these institutions, described in Section A, was to assimilate. Federally run boarding schools were the centerpiece of the U.S. government's efforts to forcibly assimilate Native people.⁴¹ Boarding schools were an entry portal for Native children into government systems, but the schools interacted with criminal courts, juvenile courts, and child welfare institutions—institutions that had assimilative tendencies of their own. Over time, these institutions continued the work of assimilating Native children even after the formal policy of assimilation was rejected. The primary means through which government actors accomplished the goal of assimilation was through removal, discussed in Section B. Because the goal of assimilation was to eliminate Native peoples by changing Native individuals,⁴² the first step in changing children was to remove them from their families and communities. This removal usually happened under circumstances that scared children and parents; it is frequently described as kidnapping. Finally, as described in

⁴¹ See generally ANDREW WOOLFORD, *THIS BENEVOLENT EXPERIMENT: INDIGENOUS BOARDING SCHOOLS, GENOCIDE, AND REDRESS IN CANADA AND THE UNITED STATES* (2016) (comparative examination of U.S. and Canadian boarding schools that situates them as the primary means by which governments carried out assimilation policies).

⁴² Wolfe, *supra* note 7, at 397.

Section C, assimilation policy relied on discipline and physical and architectural confinement in order to counter children's resistance. Once children were in these institutions, the formal curriculum was supplemented by rigid discipline, including everyday practices and egregious abuse. Locks, transfers, and recapture were used to confine the children when they tried to escape.

A. Solving "The Indian Problem": Erasure Through Assimilation

The boarding school heyday spanned from the late 19th century to the mid-20th century. Congress ended the policy of making treaties with Indian tribes in 1871, putting new emphasis on legislation geared toward civilization and assimilation. The goal of the policy included detribalization through the division of communally held tribal land⁴³ and indoctrination into a Western, capitalist way of life through individualized property ownership.⁴⁴ The federal government established a policy that Native children should be removed from their homes and placed in church or government-run boarding schools. Thousands of children were institutionalized in government-run schools, often far from their families.⁴⁵ Boarding schools introduced the American educational, child welfare, and

⁴³ The Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended in scattered sections of 25 U.S.C.), authorized a policy of allotting tribal lands.

⁴⁴ Tribal land holdings were broken up into individual allotments, which allowed for "surplus" lands to be made available for sale to white settlers and facilitated a transition for Native people to the American system of individual property ownership and agricultural land use. The Allotment and Assimilation Era lasted from approximately 1871 until 1934. CHRISTINE BOLT, *AMERICAN INDIAN POLICY AND AMERICAN REFORM: CASE STUDIES OF THE CAMPAIGN TO ASSIMILATE THE AMERICAN INDIANS 95–97* (1987) (discussing government policies and programs to assimilate Indians). *See generally* ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM 30–36* (2005); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (giving 1928 as end of Allotment and Assimilation Era); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights as Racial Remedy*, 86 N.Y.U. L. REV. 959, 980 n.96 (2011) (describing assimilation policy).

⁴⁵ Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 139 (2013) [hereinafter Jacobs, *Remembering*].

juvenile justice systems to Native children as brutal instruments of acculturation designed to produce subservient Americans.⁴⁶

The goal was to “civilize” Native children by forcing them to adopt the norms of Christian Anglo-American culture.⁴⁷ Children were often sent hundreds or thousands of miles away from their homes in order to separate them from the traditional practices of their people. Once they arrived, children were punished for speaking their languages and engaging in non-Christian spiritual practices. Native children were forced to cut their hair and were punished for speaking Native languages.⁴⁸

The assimilation program was gendered. Margaret Jacobs describes the entire endeavor as “steeped in Victorian gender ideals” and explains that assimilation policy “imagined the assimilated Indian mother and the reconstituted Indian family” as essential for civilization.⁴⁹ Thus, while assimilation was encouraged generally, girls at the schools were encouraged to accept a subservient role. Katrina Paxton describes a separate curriculum for girls at the Sherman Institute.⁵⁰ Although some American women at the time pursued professional lives, Native girls were trained to accept a specific version of womanhood. They were taught domestic labor skills and discouraged from

⁴⁶ See MARGARET D. JACOBS, *A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD* xxxi (2014) (referring to the use of “military force to wrest children away” from their parents and “military-style regimens” and “manual labor” as instruments of acculturation within the schools).

⁴⁷ See generally Helen M. Bannan, *The Idea of Civilization and American Indian Policy Reformers in the 1880s*, 1 J. AM. CULTURE 787 (2004) (discussing 1880s policy reformers’ focus on “civilizing” Indians).

⁴⁸ See generally BOLT, *supra* note 44; K. TSIANINA LOMAWAIMA, *THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL* (1994) (relating Indian experience of assimilation through boarding school program); MARGARET CONNELL SZASZ, *EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928* (1999) (discussing educational programs as a vehicle for assimilation of Indians). See also Patrick Gerald Eagle Staff, *Settler Colonial Curriculum in Carlisle Boarding School: a Historical and personal Qualitative Research Study* 117–18 (Ph.D. dissertation, Portland State University) (2020) (ProQuest) (describing the role of haircutting in the assimilation curriculum).

⁴⁹ Jacobs, *Remembering*, *supra* note 45, at 139.

⁵⁰ Katrina A. Paxton, *Learning Gender: Female Students at the Sherman Institute, 1907–1925*, in *BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES* 174–86 (Trafzer et al., eds., 2006) (discussing gendered nature of the training and indoctrination experienced by Native youth).

other pursuits, leading to more limited opportunities than were available to boys.⁵¹

This gendered vision of assimilation had racial and religious overtones: Pratt believed that Black people and Native people were best suited to a second-class version of Americanness⁵² and boarding schools impressed a Protestant vision of womanhood upon girls who attended the schools.⁵³ Native people were not U.S. citizens until 1924, but individuals were granted U.S. citizenship, usually in exchange for accepting allotments and agreeing to adopt an agricultural lifestyle. In these instances, U.S. officials administered an oath of citizenship that was different for men and women. Whereas men were told to exchange their bows and arrows for plows, women were handed a purse and told, “this means you have chosen the life of the white woman—and the white woman loves her home. The family and the home are the foundation of our civilization. Upon the character and the industry of the mother and homemaker largely depends the future of our nation.”⁵⁴

One of the federal government’s other major tools of assimilation and control over Native people during this period was criminal law. The federal government used criminal jurisdiction to reeducate and control Native people and to remake indigenous ideas about justice. In 1885, the Major Crimes Act extended—for the first time—federal court jurisdiction over certain crimes committed by Indians against other Indians on reservations.⁵⁵ The push for federal jurisdiction came primarily from federal Indian agents, who argued that traditional justice

⁵¹ *Id.*

⁵² Hayes, *supra* note 5, at 2.

⁵³ Paxton, *supra* note 50.

⁵⁴ See Nicole Montclair Donaghy, *The New Assimilated American*, LRINSPIRE (Apr. 28, 2016) <https://lrinspire.com/2016/04/28/the-new-assimilated-american-by-nicole-montclair-donaghy> [<https://perma.cc/NX6M-B32S>] (reproducing Ritual on Admission of Indians to Full American Citizenship); Jared Farmer, *Last Arrow Ceremony*, JARED FARMER BLOG <https://jaredfarmer.net/curios/last-arrow-ceremony> [<https://perma.cc/N4SS-ZJA2>] (describing citizenship ceremony). See also Gloria Valencia-Weber, *Racial Equality: Old and New Strains and American Indians*, 80 NOTRE DAME L. REV. 333, 334 (2004) (describing men’s and women’s naturalization ceremonies).

⁵⁵ 18 U.S.C. § 1153 (2006). See Sidney L. Haring, *The Distorted History that Gave Rise to the “So Called” Plenary Power Doctrine: The Story of Kagama v. United States*, in INDIAN LAW STORIES 149, 150 (Carole Goldberg et al. eds., 2011).

systems were incapable of handling serious crimes in a manner that settlers would recognize as real justice.⁵⁶ For example, in the case immediately preceding enactment of the law, the Brule Lakota Council addressed a murder by ordering restitution, an outcome Indian agents and settlers viewed as insufficiently punitive.⁵⁷

The federal government also supplanted traditional justice systems by addressing less serious crime in local administrative courts. Called CFR courts, these courts implemented a federal Code of Indian Offenses that prohibited cultural and religious activities as well as basic lifestyle choices.⁵⁸ When a woman arrested for adultery and convicted in a CFR court argued that Department of the Interior lacked authority to define offenses or try and punish offenders, a federal court upheld the constitutionality of CFR courts on the theory that criminal punishment was merely being used as a teaching tool, further blurring the line between punishment and education in federal Indian policy. The court described them as “mere disciplinary and educational instrumentalities” and pointed out that the reservation itself “is in the nature of a school” that gathers Indians “under the charge of an agent, for the purpose of acquiring the habits, ideas, and aspirations which distinguish the civilized from the uncivilized man.”⁵⁹ While rehabilitation is

⁵⁶ See generally SIDNEY L. HARRING, *CROW DOG’S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY* (1994). The Supreme Court had already signaled that they did not regard Native nations’ justice systems as real criminal systems when it held that a white Cherokee citizen could be prosecuted in federal court under federal enclave laws that exempted crimes between Indians. The Court viewed federal jurisdiction as necessary to “preserve the peace” and shield Indians from “mischievous and dangerous” settlers, never mind that the Cherokee authorities had arrested the defendant and expected to try him for his crime. Bethany Berger, *Power Over This Unfortunate Race: Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 1969, 1984–85 (2004).

⁵⁷ See *Ex Parte Crow Dog*, 109 U.S. 556 (1883). On the other hand, the Supreme Court had also reviewed a Cherokee sentence of death for murder. See *Talton v. Mayes*, 163 U.S. 376 (1896).

⁵⁸ See LUANA ROSS, *INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY* 18, 41–45 (1998) (describing how the codes criminalized religious activities, plural marriage, and the practices of medicine people as well as the use of more typical criminal laws to punish acts of resistance by Native people against settlers).

⁵⁹ See *United States v. Clapox*, 35 F. 575, 577 (D.C. Ore. 1888) (holding that these “CFR courts” did not violate Article I of the U.S. Constitution).

one of several justifications for criminal punishment in American law, it is arguably the most important reason for criminal punishment of Native people in the United States. The version of rehabilitation experienced by Native people bears more resemblance to the Quaker idea of moral reeducation than it does to more modern concepts of counseling and job skills.

Like the CFR courts, boarding schools focused on changing individual Native people by remaking their cultural, religious, linguistic, and familial identities until they resembled white Americans. Boarding schools, though, were the favored instrument of assimilation because they worked their experiment on children, who were seen as more malleable. The boarding school philosophy linked the idea of rehabilitation with the practices of removal, education, and punishment.

Boarding schools flourished during the same period that states were exploring methods to contain, control and reform poor children in cities through houses of refuge⁶⁰ and later juvenile courts.⁶¹ The dominant policy approaches to both misbehaving children and Native people in late 1800s favored removing children from home, sending them far away, and subjecting them to a curriculum of reprogramming.⁶² Although they were denominated schools, boarding schools were in this sense not much different from the nascent juvenile delinquency system.⁶³ The “child savers,” who viewed crime as a result of incomplete moral and social development, shared a goal of

⁶⁰ *Ex parte* Crouse, 4 Whart. 9, 11 (Pa. 1839) (describing houses of refuge as “schools” but upholding their use as prisons for “juvenile convicts”).

⁶¹ See generally DAVID S. TANENHAUS, *JUVENILE JUSTICE IN THE MAKING* 4 (2004) (tracing the movement to create separate juvenile courts to the 1888 efforts of Lucy Flowers); DAVID L. PARRY, *ESSENTIAL READINGS IN JUVENILE JUSTICE* 41–42 (2005).

⁶² Michael Grossberg, *Changing Conceptions of Child Welfare in the United States, 1820–1935*, in *A CENTURY OF JUVENILE JUSTICE* 3–4, 17 (Michael Rosenheim et al. eds., 2002).

⁶³ While children in cities were sent to training schools because they were deemed dependent or delinquent, Native children sent to boarding schools were deemed deficient solely on the basis of their Indianness. The doctrine of *parens patriae* was not necessary to intervene in the lives of Native children because the legal status of American Indians is premised in part on the *ward-guardian relationship*, in which the federal government functions as a guardian vis-a-vis its Indian wards. Although narrowly interpreted in its earliest iterations, and more limited today, this doctrine was broadly construed in the late 19th and early 10th century to justify massive intrusions into the lives of Native people, most in the name of assimilation.

rescuing and rehabilitating poor and minority children.⁶⁴ Each institution touted a rehabilitative goal in which the exercise of control over children was employed as a method of controlling a disfavored population.

This theme of solving the problem posed by the existence of an entire group of people by controlling and remaking their children also spurred the high rates of adoption and foster care placement experienced by Native children from the 1950s through the 1970s and beyond.⁶⁵ Again, the high point for child removal coincided with the dominance of a policy approach focused on eradicating separate Native communities by encouraging the physical, cultural, and political transformation of reservation-based Native nations into individual Americans.⁶⁶ Congress again embarked on a campaign to dismantle tribal sovereignty and to end the separate political status of tribes and the special tribal-federal relationship, but this time it used state power, rather than federal power.

This federal-to-state shift occurred in two areas significant to state control over children: child welfare and criminal/juvenile jurisdiction. Congress passed laws that effectively handed over federal responsibility for law enforcement to some states.⁶⁷ Congress formally terminated its government-

⁶⁴ See generally ANTHONY PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 15–100 (2009). Platt's study emphasized the paternalistic roots of the child saving movement, noting that it "was essentially a middle-class movement, launched by the 'leisure class' on behalf of those less fortunately placed in the social order." *Id.* at 77. During this same period, federal Indian policy focused explicitly on "saving" Indian people, and a central tool of this was a network of federally sponsored boarding schools for Native children.

⁶⁵ In her forthcoming memoir, Wenona Singel describes two distinct waves of adoption. WENONA SINGEL, *FIVE GENERATIONS REMOVED: A MEMOIR OF INDIAN CHILD REMOVAL IN MICHIGAN* (forthcoming).

⁶⁶ This period, called the Termination Era, lasted from approximately 1940 until 1962. See generally CAROLE GOLDBERG ET AL., *AMERICAN INDIAN LAW: NATIVE NATIVES AND THE FEDERAL SYSTEM* 33–35 (7th ed. 2015); COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW*, § 1.06 (discussing Termination Era from 1943 to 1961).

⁶⁷ Pub. L. No. 83-280, 67 Stat. 588 (1953) (codified at 25 U.S.C. §§ 1162, 1360, 1321 (2006)). Public Law 280 automatically transferred Indian country jurisdiction to six states and permitted other states voluntarily to assume jurisdiction over Indian country within the state. The mandatory states were Alaska, California, Minnesota (except the Red Lake Reservation), Nebraska, Oregon (except the Warm Springs Reservation), and Wisconsin. See CAROLE

to-government relationship with specific Native nations, leaving the citizens of those nations subject to state power on the same terms as any other people.⁶⁸ A corollary federal relocation program was also established to move Indian people from reservations to urban areas.⁶⁹ The justifications for state control were not as transparently assimilationist as were the justifications for federal power during the late nineteenth century. Instead, state power was viewed as necessary to protect and control reservation populations.⁷⁰ Finally, the Bureau of Indian Affairs (BIA) worked with private groups and state child welfare agencies to facilitate the removal and adoption of Native children.⁷¹ This was, in some sense, just a different approach to financing the same goal of assimilation.

As Jacobs explains, “the B.I.A. longed to terminate the responsibilities it had taken over for the care of Indian children by privatizing its earlier child removal policies.”⁷² Indian boarding schools still existed, but the federal government had come to see them as a financial burden better passed on to the

GOLDBERG-AMBROSE, *PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280* (1997) (discussing shifts in state and federal jurisdiction over tribal lands under Public Law 280). States voluntarily accepting jurisdiction over some or all reservations pursuant to § 1321 were Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah, and Washington. In the voluntary states, the exact scope of state jurisdiction is defined by state statute, but delinquency and child welfare were popular areas for state jurisdiction. *See, e.g.*, Rev. Code of Wash. 37.12.010 (accepting jurisdiction over delinquency, dependency and adoption matters).

⁶⁸ H.R. Con. Res. 108, 83rd Cong. (1953) (urging termination of federal relationship with certain tribes “at the earliest possible time”); Charles F. Wilkinson & Eric R. Biggs, *The Evolution of Termination Policy*, 5 AM. INDIAN L. REV. 139, 151 (1977) (listing individual acts).

⁶⁹ The relocation program began in 1931 as a voluntary program to move returning veterans to cities, but by the 1950s, relocation of reservation residents to urban areas had become the Bureau of Indian Affairs’ highest priority, resulting in a withdrawal of funding from other priorities. Participants received limited federal assistance—usually a one-way ticket and a subsistence allowance until they received their first paycheck. Once relocated, they were cut off from the federal services that had been available on reservations. The transition was financially and personally difficult, and many people eventually returned to reservations. *See generally* DONALD F. FIXICO, *TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945–1960* (1986) (examining motives for enactment and effects of relocation program on Native people).

⁷⁰ *See* H.R. Rep. No. 848, 83rd Cong., 1st Sess. 5–6 (1963).

⁷¹ Terry L. Cross, *Child Welfare in Indian Country: A Story of Painful Removals*, 33 HEALTH AFFAIRS 2256 (2014).

⁷² Jacobs, *Remembering*, *supra* note 45, at 153.

states, like federal criminal law enforcement on reservations. Private and religious organizations advocated in favor of adoption as a benefit for Native children, but their advocacy was connected to the longstanding idea of how to solve the “Indian problem”—now recast as the burden Native communities placed on federal resources. Arnold Lyslo, a former Bureau employee who went on to head the Indian Adoption Project, framed the project as a financial benefit:

It has been apparent for some time, from the reports of the Area and Agency Welfare State of the B.I.A., that many children who might have been firmly established in secure homes at an early age through adoption, have been passed from family to family on a reservation or have spent years at public expense in federal boarding schools or in foster care.⁷³

State child welfare systems negotiated with federal officials about the terms upon which they would incorporate Native children into their foster care systems. For example, Minnesota reported to federal officials on the likely cost of caring for Native children, asking for more federal money and comparing foster care costs to the costs the federal government would save by closing a boarding school.⁷⁴ State officials explained the high proportion of Native children in need of foster care by noting that “[many] social, economic, and other factors contribute to the high incidence of hopeless family breakdown among Indians in Minnesota today.”⁷⁵ As to why specific children had been placed in foster care, the report cited “three major problems . . . born out of wedlock, neglected or improperly supervised, or home situation otherwise unsatisfactory.”⁷⁶ Proponents of the foster care solution were thus able to cite vague factors like “neglect” and “family breakdown” to explain the influx of Native children while obscuring the role of federal policy

⁷³ *Id.*

⁷⁴ Minnesota Legislative Interim Committee on Indian Affairs, Statement Prepared for Senate Committee on Organization for Dep’t of the Interior, Mar. 1957, at 3–4.

⁷⁵ Minnesota Dep’t of Public Welfare, Foster Care of Indian Children, Mar. 15, 1957, at 1.

⁷⁶ *Id.*, at 6.

in instigating that breakdown and the way the foster care influx also benefitted the private adoption industry.

By the 1950s, child removal was no longer animated by an express intent to annihilate indigenous cultures and undermine group social and political cohesion. However, it was still premised on the assumption that Native families and communities were dysfunctional.⁷⁷ The rhetoric of child protection also camouflaged a governmental investment in white families as superior and the use of child placement as a tool of assimilation.⁷⁸ The role of assimilation in foster care policy is

⁷⁷ LAURA BRIGGS, *SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* 7–8 (2012) (“American Indian children, like African American children, became targets for child welfare removals after they began receiving state-financed welfare assistance in large numbers.”). See also Jacobs, *Remembering*, *supra* note 45, at 148 (describing representations of Indian families as chronically dysfunctional and recounting the story of a visitor who took children and alleged that the mother was alcoholic); Bethany Berger, *In the Name of the Child: Race, Gender & Economics*, as reprinted in *Adoptive Couple v. Baby Girl*, 67 FLA. L. REV. 295, 343–45; Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 85 (1994) (“Congress was especially critical of the general standards employed by the child welfare system in determining the necessity of intervention. One survey cited found that ninety-nine percent of the cases involving the removal of Indian children from their families were predicated ‘on such vague grounds as ‘neglect’ or ‘social deprivation’ and on allegations of the emotional damage the children were subjected to by living with their parents.’ Congress was altogether dismayed at the lack of understanding non-Indian child welfare workers had of Indian family society.”). Systematic removal of Indian children is not only a relic of the past; South Dakota child welfare officials were recently found to have adopted procedures facilitating easy removal of Indian children from their homes, violating the Indian Child Welfare Act and denying Indian parents their rights to due process prior to removal. See *Oglala Sioux Tribe v. Van Hunnik*, 100 F. Supp. 3d 749, 754, 773 (D.S.D. 2015) (granting partial summary judgment), *judgment vacated by Oglala Sioux Tribe v. Fleming*, 904 F.3d 603 (8th Cir. 2018) (holding that district court should have exercised *Younger* abstention and dismissed).

⁷⁸ Cross, *supra* note 71; Gallagher, *supra* note 77, at 85 n.27 (quoting H.R. REP. NO. 95-1386, 10 (1978)) (“Indian communities are often shocked to learn that parents they regard as excellent caregivers have been judged unfit by non-Indian social workers For example, the dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for

revealed in anecdotes: for example, one veteran of the Maine foster care system described being encouraged by foster parents to pass as white.⁷⁹

B. Severing Ties Between Children, Families, and Nations:
Removal as the Mechanism for Assimilation

Narratives of kidnapping and loss are central to the history of Indian boarding schools: parents were sometimes forced or coerced into giving up their children, who were sent to far away schools and not permitted to return home for long periods of time.⁸⁰ Boarding school narratives in history and literature often begin with allusions to kidnapping or stories of government raids. While some parents voluntarily sent their children to boarding school, many resisted, and their children were taken by force.

The people of Old Oraibi, a Hopi village, split into two factions when one group refused to cooperate with assimilation plans, including mandatory schooling. The non-cooperative group, called the Hostiles, were ejected from the village. The superintendent tried to convince the Hostile families to send their children to school, but the fathers refused, and seventy-five men were arrested and sentenced to ninety days hard labor. Helen Sekaquaptewa, a Hopi woman, describes the day the children were rounded up.

terminating parental rights. Because in some communities the social workers have, in a sense, become a part of the extended family, parents will sometimes turn to the welfare department for temporary care of their children, failing to realize that their action is perceived quite differently by non-Indians.”) *See also* Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 520 (1984) (describing the role of biases and misunderstandings in facilitating removal of Indian children).

⁷⁹ ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMMISSION, BEYOND THE MANDATE: CONTINUING THE CONVERSATION 22–23 (2015), https://d3n8a8pro7vhmx.cloudfront.net/mainewabanakireach/pages/17/attachments/original/1468974047/TRC-Report-Expanded_July2015.pdf [<https://perma.cc/ZJ8E-29XN>].

⁸⁰ *See* KENNETH LINCOLN, *NATIVE AMERICAN RENAISSANCE* (1985) (referring to stories of kidnapping); Ann Murray Haag, *The Indian Boarding School Era and Its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 150–55 (2007) (detailing a history of government boarding schools for Indian children); Maureen Smith, *Forever Changed: Boarding School Narratives of American Indian Identity in the U.S. and Canada*, 2 INDIGENOUS NATIONS STUD. J. 57 (2001) (analyzing boarding school narratives).

Very early one morning toward the end of October, 1906, we awoke to find our camp surrounded by troops who had come during the night from Keams Canyon. Superintendent Lemmon called the men together, ordering the women and children to remain in their separate family groups. He told the men it was a mistake to follow Yokeoma blindly; that the government had reached the limit of its patience; that the children would have to go to school. Yokeoma angrily defied them and refused to yield. He was taken to a house and put under guard. All the children of school age were lined up and registered to be taken to school . . . We were taken to the schoolhouse in New Oraibi, with military escort.⁸¹

Hostile children were not allowed to leave the school in the summer because their families would not agree to send them back in the fall.⁸² Helen saw her mother only twice during her four-year tenure at the Keams Canyon school.

The conflict between the Hostiles and the superintendent was an especially dramatic example, but the idea of captured children is common among Native peoples. Kootenay parents hid their children from government agents.⁸³ Navajo elders told of a time when agents would “come through and steal the children.” They told of children being kidnapped from their hogans or captured while they were out herding sheep. Navajo leaders had signed a Treaty with an education clause, never imagining the form such education would take. Boarding school recruitment was so much like theft that one Navajo father shot an agent for trying to steal his son.⁸⁴ In Leslie Marmon Silko’s story *Lullaby*, a Navajo mother fled with her children as soon as she realized the agents meant to take them: “Ayah ran with the baby toward Danny; she screamed for him to run and then she grabbed him

⁸¹ HELEN SEKAQUAPTEWA ME AND MINE: THE LIFE STORY OF HELEN SEKAQUAPTEWA, AS TOLD TO LOUISE UDALL 91–92 (1969).

⁸² *Id.* at 98–99.

⁸³ Janet Campbell Hale, *The Only Good Indian*, in REINVENTING THE ENEMY’S LANGUAGE 123, 141 (Joy Harjo & Gloria Bird et al. eds., 1997).

⁸⁴ Berenice Levchuk, *Leaving Home for Carlisle Indian School*, in REINVENTING THE ENEMY’S LANGUAGE, *supra* note 83, at 176, 179.

around his chest and carried him too. She ran south to the foothills of juniper trees and black lava rock.”⁸⁵

Later generations of boarding school students were not literally “taken” by the government, but many schools retained their reputations as dreaded places where bad children were sent. In his memoir, Basil Johnston describes a 1940s-era boarding school: “the word or the name ‘Spanish’ might seem to be no more filled with menace than any other word, but it inspired dread from the very first time we Indian boys heard it.”⁸⁶ Mary Brave Bird (formerly known as Mary Crow Dog), a Lakota woman, is even more explicit in her description of children being taken to school.

[I]n the traditional Sioux families, especially in those where there is no drinking, the child is never left alone. It is always surrounded by relatives, carried around, enveloped in warmth. It is treated with the respect to due any human being, even a small one. It is seldom forced to do anything against its will, seldom screamed at, and never beaten . . . And then suddenly a bus or car arrives, full of strangers, usually white strangers, who yank the child out of the arms of those who love it, taking it screaming to the boarding school. The only word I can think of for what is done to these children is kidnapping.⁸⁷

Capture or kidnapping as the introduction to boarding school highlights the unwillingness of parents and children to succumb to the schools’ mission to eradicate or change their cultures. Government and school officials pathologized tribal cultures and traditions, and boarding schools were seen as a tool to solve the “Indian problem.” In the end, many children learned both academic and vocational skills at school, but any benefits remained tainted by the fact that schooling was forced upon them. Long after these students had been educated and perhaps returned to their communities, the omnipresent references to kidnapping are a constant reminder of the forced nature of their education.

⁸⁵ LESLIE MARMON SILKO, *Lullaby*, in STORYTELLER 43, 45 (1981).

⁸⁶ BASIL Johnston, INDIAN SCHOOL DAYS 6 (1995).

⁸⁷ MARY CROW DOG & RICHARD ERDOES, LAKOTA WOMAN 29 (1990).

Boarding school stories focus not only on the physical experience of being taken, but also on the emotional trauma of forced separation. In *Lullaby*, Ayah saw her children only twice after they were taken from her. The first time, her son hid shyly and her daughter did not even recognize her. She hugged them, but the visit did not last long. They visited again that summer, when her daughter looked at her with fear “like she was a spider crawling slowly across the room,” and her son did not remember enough Navajo to answer her questions.⁸⁸ In Ayah’s case, the separation was permanent. Her children had effectively become strangers, and they never came home again. In the story, the loss of the children estranged Ayah from her husband and distanced them both from social supports, ending with the parents freezing to death in a ditch. Boarding school not only cut the roots of one generation, it also distanced their parents from family and community ties.

Mary Crow Dog views boarding schools as a last-ditch effort before complete extermination of Native people. Cultural annihilation was used as a substitute for murder, and this annihilation was accomplished by severing ties between children and their parents and communities. Children were “taken away from the villages and pueblos, in their blankets and moccasins.” They were kept completely isolated from their families, with no contact allowed for years. When the children returned, some after as long as ten years, they were “caricatures of white people.”⁸⁹ Even their clothing was constricting and unnatural: “their short hair slick with pomade, their necks raw from stiff, high collars, their thick jackets always short in the sleeves and pinching under the arms, their tight patent leather shoes giving them corns, the girls in starched white blouses and clumsy, high-buttoned boots”⁹⁰

Crow Dog tells of a different ending than Silko, though. In her story, the children returned to the reservation only to discover that they were in limbo between two worlds. Native cultures and white culture had been completely juxtaposed against one another, so that the children were strangers in both worlds.

⁸⁸ SILKO, *supra* note 85, at 48–49.

⁸⁹ CROW DOG & ERDOES, *supra* note 87, at 30.

⁹⁰ *Id.*

References to kidnapping and forced separation are more common in stories from the early boarding school era. The underlying sadness of separation, however, is still present in the stories of later generations, whose enrollment in boarding school seemed voluntary on the surface. Emma LaRocque, a Cree/Metis woman, writes about the wrenching sadness she felt every time the train took her away from her parents after a visit home. “I was leaving a culture, a familiar way of life, for a world that was, initially, foreign, frightening, and, at times, excruciatingly lonely.”⁹¹ Berenice Levchuk, a Navajo writer, also remembers “how devastated, frightened, broken-hearted, and lonely I felt when I arrived as a little girl in Ft. Defiance, Arizona.” After nine months working and attending classes, three months at home was too short.⁹²

State foster care systems had a similar disruptive effect, severing the ties between Native children and their communities.⁹³ The damaging effect of removal on children was separate from harm caused by abusive practices in foster and adoptive homes, and it was present even in homes that were not abusive. In a brief filed in *Adoptive Couple v. Baby Girl*, the Supreme Court’s second Indian Child Welfare Act case, adults who were adopted before the Act’s passage described their “shared sense of alienation and dislocation occasioned by being Indian children raised in families and communities apart from their tribes,” an effect “common to those with happy and unhappy adoptive situations alike.”⁹⁴

The themes of removal and disappearance also surface in literary accounts of foster care. Vickie Sears’ piece *Dancer* tells the story of a girl who appeared as a foster child. She came from out of nowhere; “they said her tribe was Assiniboin, but they weren’t for certain.”⁹⁵ The girl arrived “all full up with anger and

⁹¹ Emma LaRocque, *Tides, Towns, and Trains*, in REINVENTING THE ENEMY’S LANGUAGE, *supra* note 83, at 361, 364

⁹² Levchuk, *supra* note 84, at 177.

⁹³ See Brief for Amicus Curiae Adult Pre-ICWA Indian Adoptees Supporting Birth Father and the Cherokee Nation at 14–20, *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) (No. 12-399).

⁹⁴ *Id.* at 14 (noting that “[e]ven loving and attentive adoptive parents may sincerely believe that they must, in the words of one adoptive parent, ‘kill the Indian to save the man.’”).

⁹⁵ Vickie Sears, *Dancer*, in TALKING LEAVES: CONTEMPORARY NATIVE AMERICAN SHORT STORIES 250 (Craig Lesley & Kathryn Stavrakis eds., 1991).

scaredness” and carried the baggage of her past in the form of vivid, screaming nightmares.⁹⁶ Inez Peterson, a Quinault woman, writes about how her own family was chopped up by adoption and foster care. Eleven siblings were spread out in different homes, beginning with the accidental adoption of one of her brothers. A church couple offered to care for him while her mother was in hospital delivering another baby. “She said yes, signed some papers, and the church people moved out of Taholah, off the reservation, out of our lives.”⁹⁷ Her unknown brother was only the first step in the family’s separation. Later, she rode in the back seat of a Dodge Dart, her arms around her little sisters, watching as the social worker dropped off brother after brother at different houses, waiting for her turn to be left behind. Similarly, legal scholar Wenona Singel describes the loss of multiple generations of girls in her family to foster care and adoption.⁹⁸

Boarding school severed an entire generation of Native children from their families and communities. When Mary Brave Bird writes about the elders uniting with the younger generation during the genesis of the American Indian Movement, she notes a conspicuous absence. “Not the middle aged adults. They were of a lost generation which had given up all hope, necktie-wearers waiting for the Great White Father to do for them.”⁹⁹ Beyond their effect on individual children, boarding schools disrupted family structures and intergenerational learning. As Jacobs explains, it “normalized Indian child removal and undermined the customary socialization of Indian children; several generations grew up without learning how to raise children within their own cultural contexts.”¹⁰⁰

C. Punishing Resistance: Controlling Children Through Discipline and Confinement

To supplement the assimilative educational curriculum, boarding school officials used violence, confinement, and outsourcing to control Native children once they arrived at the

⁹⁶ *Id.*

⁹⁷ Inez Peterson, *Missing You*, in REINVENTING THE ENEMY’S LANGUAGE, *supra* note 83, at 104, 106.

⁹⁸ Singel, *supra* note 65.

⁹⁹ Mary Brave Bird, *We AIM Not to Please*, in REINVENTING THE ENEMY’S LANGUAGE, *supra* note 83, at 337, 342.

¹⁰⁰ Jacobs, *Remembering*, *supra* note 45, at 149.

schools. Children experienced sanctioned violence through formal punishment and military-style discipline, and unsanctioned violence through physical and sexual abuse. Federal policymakers highlighted this violent discipline as a reason to abandon the assimilationist schools. The 1928 Meriam Report found that “[t]he discipline in the boarding schools is restrictive rather than developmental. Routine institutionalism is almost the invariable characteristic of the Indian boarding school.”¹⁰¹ A 1969 report described the school environment as “sterile, impersonal and rigid, with a major emphasis on discipline and punishment, which is deeply resented by the students.”¹⁰² This emphasis on discipline is not surprising if one recalls that Pratt, who created the boarding school policy, developed his approach after experimenting on Apache prisoners of war when he was superintendent of a Florida prison.¹⁰³

Children who attended boarding schools have told stories of being physically and mentally abused.¹⁰⁴ Former students have described harsh disciplinary practices that ranged from the everyday to the grotesque, often far more severe than the way physical discipline was employed at other schools during the same period.¹⁰⁵ Edith Young describes routine assimilationist discipline: “We were yelled at and slapped. In the third grade, I

¹⁰¹ MERIAM LEWIS ET AL., U.S. DEP’T OF HEALTH, EDUC. & WELFARE, THE PROBLEM OF INDIAN ADMINISTRATION 13–14 (1928).

¹⁰² COMM. ON LABOR & PUB. WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY—A NATIONAL CHALLENGE, S. REP. NO. 91-501, at 64 (1969).

¹⁰³ Hayes, *supra* note 5, at 2–4; R.L. Brunhouse, *Apprenticeship for Civilization: The Outing System at the Carlisle School*, EDUCATIONAL OUTLOOK, May 1939, at 30, 31 (account of Carlisle outing system describing how Pratt drew on his experiences at the prison) (account of Carlisle outing system describing how Pratt drew on his experiences at the prison). *See supra* notes 5–8.

¹⁰⁴ *See* LINCOLN, *supra* note 80, at 21, (referring to stories of kidnapping); Haag, *supra* note 80, at 153–54 (detailing a history of government boarding schools for Indian children); Maureen Smith, *supra* note 80, at 65–67 (2001) (describing incidents of abuse); Gretchen Millich, *Survivors of Indian Boarding Schools Tell Their Stories*, WKAR NEWS, <http://wkar.org/post/survivors-indian-boarding-schools-tell-their-stories> [<https://perma.cc/45VW-UC3U>] (recounting stories of abuse from various schools) (last visited Dec. 20, 2017).

¹⁰⁵ *See Native Americans File Lawsuit Against Boarding School Abuses*, VOICE AM. NEWS (Oct. 30, 2009) <https://www.voanews.com/archive/native-americans-file-lawsuit-against-boarding-school-abuses-2003-08-10> [<https://perma.cc/8UQU-AWHD>] (describing litigants’ claims of physical abuse and neglect in lawsuit against government-sponsored, church-run boarding schools); Millich, *supra* note 104.

asked the teacher why she was teaching that Columbus discovered America when Indians were here first. She came over and slapped me across my face. To be humiliated in front of the class, I'll never forget that."¹⁰⁶ While not official policy, sexual abuse occurred at boarding schools as well.¹⁰⁷ Boarding school residents have described how abusive physical discipline (often severe violence in the form of "beatings" and humiliation) was central to the schools' pedagogical approach and aimed at breaking children's spirits.¹⁰⁸

Children resisted forced schooling and harsh discipline, often by running away. School officials responded by confining them in the system, using a creative combination of retrieval, transfer, and outsourcing. Children who resisted were labeled incorrigible or difficult. For example, Pratt's letters describe a group of Osage boys who were transferred by the Carlisle to Martinsburg after being labeled incorrigible by the visiting Martinsburg superintendent. At Martinsburg, they were made to work for farmers. According to news reports, they threatened the superintendent with guns, then ran away after they were disarmed by school officials. Pratt, however, disputed the "incorrigible" characterization and characterized the transferred students as "among the best" at Carlisle.¹⁰⁹ Girls were labeled

¹⁰⁶ INDIAN SCHOOL: STORIES OF SURVIVAL (Films Media Group 2011).

¹⁰⁷ See Ewa Skal, *Civilization and Sexual Abuse: Selected Indian Captivity Narratives and the Indian Boarding School Experience*, 27 *CROSSROADS* 77, 84–85 (2019) (summarizing stories of sexual assault from boarding school narratives); MENDING THE SACRED HOOP TECHNICAL ASSISTANCE PROJECT INTRODUCTORY MANUAL, TRACING THE PATH OF VIOLENCE: THE BOARDING SCHOOL EXPERIENCE 5 (2003), https://www.peerta.acf.hhs.gov/sites/default/files/public/uploaded_files/Tracing%20the%20Path%20of%20Violence.pdf [<https://perma.cc/CHY4-GX6W>] (recounting stories of sexual abuse by boarding school survivors).

¹⁰⁸ See Patrick Gerard Eagle Staff, *Settler Colonial Curriculum in Carlisle Boarding School: a Historical and Personal Qualitative Research Study*, 121–23 (June 4, 2020) (Ed.D. dissertation, Portland State University) https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=6521&context=open_access_etds [<https://perma.cc/D6AB-G9NH>] (recounting interviews with boarding school survivors who described physical abuse as "a learning tool").

¹⁰⁹ See Letter from R.H. Pratt to Comm'r of Indian Affs. (Nov. 3, 1885) (on file with author) (available at <https://carlisleindian.dickinson.edu>). See also Letter from Superintendent Perkins, Rice Station School, to Comm'r of Indian Affs. (May 5, 1915) (on file with author) (available at <https://carlisleindian.dickinson.edu>) (listing fifteen boys who "are obedient while

troublemakers for behavior that involved resistance or sexuality. For example, Ernie Newton, superintendent of the Phoenix Indian School, described what he saw as a need for separate reform schools for boys and girls:

Two girls, retained as witnesses in a case against a white man, are now in the hospital, one being treated for gonorrhoea, the other for gonorrhoea and syphilis. Another girl, only fifteen, was held on a larceny charge. Upon examination, she was found to be mentally defective. A test for gonorrhoea, also, showed positive. The grave question now is, what is to be the future of these girls? Many of our so-called incorrigibles are really defective, requiring special treatment and training.¹¹⁰

The officials' descriptions of students reveal the complicated construction of misbehavior and delinquency. The extensive rules and forced separation created the conditions for them to break rules by leaving. For girls, the "troublemaker" label was constructed by viewing individual behaviors through the lens of promiscuity, disease, and "mental defectiveness," transforming one incident into a permanent status.

Officials debated what to do with those students deemed incorrigible. Initially, they were disciplined in the schools.¹¹¹ Because Native children were not allowed to leave the school facilities, the boarding schools essentially operated as detention facilities.¹¹² In some instances, Indian schools partnered directly

at school, but run away whenever they feel like it and stay until returned by the police. Their home surroundings are not calculated to be elevating, as they live in dirt and squalor, under the influence of medicine men and idle members of the tribe. A few will work while away and when they tired of work they quit."); Letter from R.H. Pratt to Comm'r of Indian Affs. (Mar. 16, 1894) (on file with author) [hereinafter 1894 Pratt Letter] (available at <https://carlisleindian.dickinson.edu>) (describing Sibbald Smith as a discipline problem for running away and persuading others to accompany him).

¹¹⁰ Letter from Ernie Newton to Cato Sells, Comm'r of Indian Affs. (Mar. 15, 1915) (on file with author) (available at <https://carlisleindian.dickinson.edu>).

¹¹¹ 1894 Pratt Letter, *supra* note 109 (recommending that Sibbald Smith be "continued under Carlisle restraint" against the wishes of his mother that he return home).

¹¹² See generally Haag, *supra* note 80.

with state-run juvenile reformatories.¹¹³ In others, students considered disruptive were sent to specific off-reservation schools.¹¹⁴ Some officials suggested designating one or more off-reservation boarding schools as reform schools, while others argued that it would be best to send these children to state reform schools.¹¹⁵

To boarding school officials, Native families and communities were the biggest obstacles in the assimilation campaign; boarding schools were criticized as unsuccessful because educated children “returned to the blanket.”¹¹⁶ The schools therefore attempted to keep children away from their parents for as long as possible. At Carlisle, for example, children came under a “contract,” a promise that they would not return home for three or five years.¹¹⁷

Boarding schools, reformatories, and refuge houses—the nineteenth century precursors of schools, juvenile detention facilities, and child welfare—also employed a practice called “outings.” Pratt wrote,

[T]he outing principle, practised at the Reformatory, is by far one of the most hopeful

¹¹³ See Letter from R.H. Pratt to Comm’r of Indian Affs. (Jan. 4, 1892) (on file with author) [hereinafter 1892 Pratt Letter] (available at <https://carlisleindian.dickinson.edu>) (confirming the process for “getting incorrigible Indian youth from the schools into the reformatories of the state”).

¹¹⁴ See Letter from R.H. Pratt to Comm’r of Indian Affs. (Nov. 3, 1885) (on file with author) (available at <https://carlisleindian.dickinson.edu>) (describing and expressing regret over transfer of students from Carlisle to Martinsburg). See also Letter from O.H. Lipps to Cato Sells, Comm’r of Indian Affs. (Mar. 11, 1915) (on file with author) (available at <https://carlisleindian.dickinson.edu>) (describing Carlisle as “a dumping ground for incorrigibles”).

¹¹⁵ Letter from O.H. Lipps to Cato Sells, Comm’r of Indian Affs. (Feb. 17, 1915) (on file with author) (available at <https://carlisleindian.dickinson.edu>) (advocating for conversion of one federal boarding school into a reform school); Letter from Cato Sells, Comm’r of Indian Affs., to O.H. Lipps (Mar. 1915) (on file with author) (available at <https://carlisleindian.dickinson.edu>) (describing practical difficulty of creating an Indian reform school and suggesting sending children who violate state law could to state reform schools and handling others “beyond out easy control” through “a very high order of discipline” within the school or by sending them home); Letter from R.H. Pratt to Mr. Francis (Mar. 20, 1915) (on file with author) (available at <https://carlisleindian.dickinson.edu>) (advocating for use of state reform schools).

¹¹⁶ SZASZ, *supra* note 48, at 10.

¹¹⁷ Levchuk, *supra* note 84, at 182.

features. I may also add that recently there has sprung up in the state the system of taking children from alms-houses and placing them in country homes, and this promises to be a most advantageous method of decreasing pauperism. Both alms-house outing and the reformatory outing have sprung since we have made such success.¹¹⁸

This practice of loaning children out to live and work in the homes of rural families was part of the reform practices of early juvenile delinquency institutions.¹¹⁹ The philosophies of all these institutions linked the idea of rehabilitation with the practices of removal, education, and punishment.¹²⁰ Boys were placed on farms or in places where could “learn trades,” while girls were “placed in homes where they could learn the duties of the household.”¹²¹ Although conceived by Pratt as a reward, the outing system at Carlisle also served the school’s overall assimilation goals and can thus be understood to serve a disciplinary function, as it did at the reformatories Pratt modeled it after.¹²²

By placing children in private homes as a way to assimilate them, the outing system practiced by the boarding schools was also a direct progenitor of foster homes as tools of assimilation. Native adults who spent time in state foster care systems during the 1950s–1970s describe experiences of punishment and abuse that differ little from early boarding school accounts. The Maine Wabanaki-State Child Welfare Truth and Reconciliation Commission highlighted accounts of mistreatment of Native youth in the Maine child welfare system. One person described punishment ranging from being locked in

¹¹⁸ 1892 Pratt Letter, *supra* note 113 (describing agreement to send Carlisle students to Pennsylvania reformatory for “violation of the laws of the State of Pennsylvania”).

¹¹⁹ PARRY, *supra* note 61, at 42; Grossberg, *supra* note 62, at 201–21 (describing the practice of sending East Coast offenders to live with families in the Midwest).

¹²⁰ Brunhouse, *supra* note 103, at 1 (explaining Pratt’s belief that “Indian boys and girls should have an opportunity to live in private homes for a period of time in order to gain practical experience in self-support and to learn the ways of civilized living”).

¹²¹ *Id.* at 4.

¹²² *Id.* at 4–6.

an attic to being submerged in a tub of icy water.¹²³ Another described a foster parent washing their mouth out with soap for speaking their Native language.¹²⁴

Congress has explicitly rejected its goal of Indian assimilation and has acted to reverse its legacy when it comes to tribal criminal justice systems, child welfare, and education. Since 1968, Congress has affirmed and expanded tribal courts' inherent criminal jurisdiction.¹²⁵ Congress has also reiterated the federal government's commitment to protecting tribal sovereignty, recognized the importance of tribal courts to sovereignty, and directed significant fiscal and administrative resources toward supporting the very tribal justice systems that the federal government had previously and actively sought to dismantle.¹²⁶ Perhaps the most direct rejection of assimilation

¹²³ ME. WABANAKI-STATE CHILD WELFARE TRUTH & RECONCILIATION COMM'N, *supra* note 79, at 22.

¹²⁴ *Id.*

¹²⁵ See Indian Civil Rights Act of 1968, Pub. L. No. 90-284, tit. II, § 201, 82 Stat. 77 (1968) (codified at 25 U.S.C. §§ 1301–02) (affirming tribal “powers of self-government” and imposing certain due process requirements on tribal criminal courts). Section § 1301(2) was amended in 1990 to clarify that “powers of self-government” includes “the inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians.” Department of Defense Appropriations Act of 1991, Pub. L. No. 101-511, tit. VIII, § 8077(b), 104 Stat. 1856 (1990); Act of Oct. 28, 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991) (removing sunset date to make prior amendment permanent). The Tribal Law and Order Act, Act of Jul. 29, 2010, Pub. L. No. 111-211, tit. II, 124 Stat. 2261 (codified in scattered sections of 25 U.S.C.), amended the Indian Civil Rights Act (ICRA) to increase the length of sentences and the size of fines that tribal criminal courts may impose. The Violence Against Women Act (VAWA), Pub. L. No. 103-322, tit. IV, §§ 40001–40730, 108 Stat. 1796 (1994) (codified in part at 42 U.S.C. §§ 13701–14040), restored tribes' power to prosecute and imprison certain non-Indian domestic violence offenders.

¹²⁶ The Indian Tribal Justice Act, Pub. L. 103-176, § 2, 107 Stat. 2004 (codified at 25 U.S.C. §§ 3601–3631 (2006)), recognized that that tribal justice systems “are an essential part of tribal governments,” established a federal Office of Tribal Justice Support, and authorized the Secretary of Interior to enter into self-determination contracts “for the development, enhancement, and continuing operation of tribal justice systems and traditional tribal judicial practices by Indian tribal governments.” The Indian Tribal Justice and Technical and Legal Assistance Act of 2000, Pub. L. No. 106-559, 114 Stat. 2778 (codified at 25 U.S.C. §§ 3651–3682 (2006)), recognized that “enhancing tribal court systems and improving access to those systems serves the dual Federal goals of tribal political self-determination and economic self-sufficiency” created the Department of Justice's Office of Tribal Justice; and, authorized grants to

policy was the Indian Child Welfare Act of 1978 (ICWA), which recognized and reaffirmed Native nations' primary authority over child welfare matters.¹²⁷ This affirmation of jurisdiction did not occur in a vacuum: Congress specifically acknowledged the role of federal¹²⁸ and state¹²⁹ governments in breaking up Native families and harming Native children. ICWA affirms the existence of tribal jurisdiction even outside Indian country,¹³⁰ and it recognizes that tribal authority over children within Indian country is exclusive.¹³¹ Although ICWA applies only to dependency matters, its philosophical underpinnings regarding the importance of tribal control over children apply to juvenile delinquency as well.¹³²

tribes and non-profit organizations to improve tribal courts and provide legal services to civil and criminal litigants in tribal courts. Notably, the Act specifically provided that it should not be construed to “encroach upon or diminish in any way the inherent sovereign authority of each tribal government to determine the role of the tribal justice system within the tribal government or to enact and enforce tribal laws,” to “impair the rights of each tribal government to determine the nature of its own legal system or the appointment of authority within the tribal government,” or “alter in any way any tribal traditional dispute resolution fora.” *Id.* § 105. The Tribal Law and Order Act and the Violence Against Women Act also likewise increased funding to support tribal criminal justice systems.

¹²⁷ Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–63).

¹²⁸ REESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES, H.R. REP. NO. 95-1386, at 9 (1978) (“The Federal boarding school and dormitory programs also contribute to the destruction of Indian family and community life In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social or cultural environment much different than their own.”).

¹²⁹ 25 U.S.C. § 1901 (4)–(5).

¹³⁰ 25 U.S.C. § 1911 (a)–(b).

¹³¹ 25 U.S.C. § 1911(a).

¹³² See Stacie S. Polashuk, *Following the Lead of the Indian Child Welfare Act: Expanding Tribal Court Jurisdiction over Native American Juvenile Delinquents*, 69 S. CAL. L. REV. 1191, 1209–15 (1996). As Polashuk explains, the specific injuries and interests cited by Congress to support passage of the Indian Civil Rights Act, including the importance of self-determination in general and the particular significance of retaining control over children, also apply in the context of delinquency proceedings. *Id.* at 1210 (“Because child-rearing includes punishment, the same reasons apply equally to children being separated for juvenile proceedings as for custody.”).

IV. RE-ENVISIONING JUSTICE FOR CHILDREN

The history of Native girls under state control reveals that the conception of education, child welfare, and juvenile justice as three separate institutions with three separate purposes is a false one. For Native children, the choice to name a particular institution a school, a reformatory, or a treatment center means little because the goal (assimilation) and the means (removal, discipline, and confinement) have always been the same. This history simply demonstrates that federal and state actors have been endlessly creative in reforming and renaming their systems of social control, but the underlying truth of the system remains unchanged. This framework is also helpful in understanding government treatment of other children. As just one example, the Trump Administration's plan to house migrant children, allegedly for their own protection, and based on the insinuation that their parents were lawbreakers, was abandoned after commentators drew on the Fort's history as a place used to confine disruptive populations, beginning with Native prisoners and children.¹³³

This history also makes clear that any effort to fix child welfare, education, or delinquency systems will require abolition of the old, intractable systems, and a new vision of the relationship between children and the government. In this regard, Native children—at least those affiliated with federally recognized tribes—are uniquely situated because federal law recognizes that tribes are separate governments with jurisdiction over child welfare and delinquency. This means that Native communities can remove them from the federal and state systems that have been so harmful and recreate new systems.¹³⁴

¹³³ Ken Miller, *Plan Halted to House Migrant Kids at Oklahoma's Fort Sill*, ARMY TIMES (July 28, 2019), <https://www.armytimes.com/news/your-army/2019/07/28/plan-halted-to-house-migrant-kids-at-oklahomas-fort-sill/> [<https://perma.cc/4PX9-HCEB>].

¹³⁴ 25 U.S.C. § 1911(a) (recognizing tribes' exclusive jurisdiction over child welfare matters in Indian country). ICWA codified the Supreme Court's holding in *Fisher v. District Court*, 424 U.S. 382, 387–89 (1976), which affirmed inherent tribal jurisdiction over child welfare and adoption, exclusive of state jurisdiction for matters involving Indians in Indian country. Because tribes have jurisdiction based on both membership and territory, their jurisdiction over child welfare matters also extends beyond Indian country. See *John v. Baker*, 982 P.2d

As sovereign governments, Native nations have a unique power to reshape their child welfare and delinquency systems.

Of course, this recognition of jurisdiction is only the first step towards abolition and recreation. Disentangling tribal systems from the federal and state models that surround them is a difficult undertaking, especially because non-tribal courts must be willing to recognize and enforce tribal laws and decisions. As I have described in the context of tribal juvenile justice systems, the influence of federal policy and funding decisions can push tribes toward mimicking the very systems from which they seek to remove children.¹³⁵

While tribal systems sometimes resemble state systems in key ways, they also depart from state systems to a significant degree. In these departures, seeds of a reimagined system can be found. This Part outlines three areas in which indigenous approaches to justice for children have led to fundamental changes in the relationship between government systems, families, and children. The approaches described here have the potential to serve Native girls in a way the systems described in Part III cannot. Their specific impact on girls cannot be fully captured because of the general absence of data on indigenous justice approaches and the failure of most research on youth to center girls as subjects. Their benefits are not specific to Native girls, however, and they are described here in general terms of how they reshape children's relationship to the legal system.

The purpose of this Part is to identify concrete ways that the experiences of Native children described in Part III have motivated specific interventions into contemporary child welfare and juvenile justice systems that reimagine central components of the systems. As an intervention into the conversation on child welfare and abolition, it aims to show how Native communities have been leaders in reimagining child welfare and juvenile justice. The approaches described below, however, are typically adopted in a context that largely resembles existing systems. In this sense, this Part does not describe abolitionist practices.

738, 755–59 (Alaska 1999). *See also* Rolnick, *Untangling the Web*, *supra* note 18, at 87–99 (describing tribes' inherent territorial and member-based jurisdiction over juvenile delinquency).

¹³⁵ Addie C. Rolnick, *Locked Up: Fear, Racism, Prison Economics and the Incarceration of Native Youth*, 40 AM. INDIAN CULTURE & RES. J. 55, 73–74 (2016) [hereinafter Rolnick, *Locked Up*].

Moreover, like the buildings described in the opening of this essay, these interventions are sometimes at risk of being coopted in service of the same disciplinary, assimilationist systems that they are intended to replace.¹³⁶ Each of them, though, somehow redefines the relationships between children, families, communities, and governments. It is this kind of shift—not cultural competency trainings, targeted programs, or rebranding of juvenile justice—that is necessary to abolish the old systems and replace them with systems that actually help children heal.

A. Customary Adoption and Kinship Care

At their worst, state child welfare systems pit struggling parents against their children's foster families. At their best, these systems offer help to parents, but continue to do so under the threat of child removal should the parent slip up. Helping children is linked with removing them because state law recognizes a maximum of two parents. If a child needs additional care, the system provides that care through a substitute parent. A foster parent who desires a long-term relationship and legal decision-making rights must usually displace a parent in order to have those rights recognized.

Many indigenous legal systems recognize some form of customary adoption.¹³⁷ In this arrangement, a child gains additional parents, but does not lose any parents. In many communities, this practice of sharing children was common. This practice recognized that child care is a collective responsibility and allowed children to be redistributed among community members in a way that ensured families had the resources to care for them, and invoked the support of extended families and the community. By incorporating customary adoption into modern child welfare laws, Native nations are reimagining adoption as child-sharing instead of child-taking, fundamentally disrupting a central aspect of child welfare law. The child-taking model of

¹³⁶ See Paura Moyle & Juan Marcellus Torri, *Māori, Family Group Conferencing and the Mystifications of Restorative Justice*, 11 VICTIMS & OFFENDERS 87, 94–99 (2015) (drawing on Māori experiences to contest the “myth” that family group conferencing employs indigenous justice principles).

¹³⁷ See, e.g., WHITE EARTH BAND OF OJIBWE JUD. CODE, tit. IV, §§ 1.05(32) and 11.12 (2017) (defining and authorizing customary adoption); NATIVE VILLAGE OF BARROW IÑUPIAT TRADITIONAL GOVERNMENT TRIBAL CHILDREN'S CODE, § 4-4-12 (2020) (defining a form of customary adoption called *iñuguq*).

termination and adoption also means that, even with early interventions aimed at reunifying families, the punitive threat of losing one's children looms over every step of the child welfare process. By adopting a non-taking model, customary adoption potentially removes the punitive threat, allowing government intervention to be premised on collaboratively helping children.

While tribal laws commonly recognize customary adoptions as a permanency option, it is a separate question whether state and federal authorities will treat it that way. This is significant because only a permanent placement will stop the timeline set in motion by the Adoption and Safe Families Act—which requires termination of parental rights as a step towards permanency in most proceedings once a child has been in foster care for a certain period of time. Some state laws now recognize customary adoption as a permanent placement. For example, California incorporated a customary adoption provision into its state court practice for Native children.¹³⁸

Along with helping to redefine adoption, Native children's courts have also helped to redefine foster care. As it is practiced in most U.S. jurisdictions, foster care often means care by strangers. Children are removed from their homes and then disappear into a mysterious network of foster care placements. They may move around to the homes of different foster parents, and may lose contact with parents, siblings, and extended family as they enter the worlds of their foster families. In Native communities, foster care is more likely to mean placement with a relative. Vivien Olsen, a tribal attorney for Prairie Band Potawatomi Nation, describes tribal communities as “an extended family network;” and notes that “to place a child away from their relations, frequently prevents them from interacting with tribal elders including their own grandparents. Tribes traditionally generally provide deference and respect for their tribal elders. Grandparents and elders have the obligation to

¹³⁸ See JUD. COUNCIL OF CAL. ADMIN. OFF. OF CTS., CTR. FOR FAMS., CHILD. & THE CTS., JUDICIAL BRANCH REPORT TO THE LEGISLATURE: TRIBAL CUSTOMARY ADOPTION 4–5 (2013), http://www.nrc4tribes.org/files/lr-Tribal-Customary-Adoption-Report_123112.pdf [<https://perma.cc/9WGW-6969>] (describing customary adoption legislation and defining customary adoption as a tribal adoption that does not require termination of the birth parents' rights).

instruct tribal youth in the ways and customs of the Tribe.”¹³⁹ In describing how tribal courts are better suited than state courts for maintaining the connection between children and their relatives, Olsen points to specific provisions in the Prairie Band Potawatomi code, including placement preferences that specifically include tribal relatives-by-blood, tribal relatives-by-marriage, tribal non-blood relatives,¹⁴⁰ and a grandparents rights provision that includes “a duty to provide instruction and training regarding tribal customs and traditions.”¹⁴¹

Initially, the role of relatives as foster placements was not supported by federal laws that require permanency, nor by the laws of many states. A child in the care of a relative was therefore treated as one who needed a placement, not one who had a stable home.¹⁴² Relatives who cared for children could encounter difficulties obtaining federal foster care payments if they were not separately licensed as foster parents, and some states required relatives to pass stringent licensing and background requirements. Federal law began to recognize relatives as caregivers with the Indian Child Welfare Act, and later amendments the Adoptions and Safe Families Act clarified that kinship care could count as a permanent placement and relatives caring for children could qualify for federal foster care payments.¹⁴³ States have increasingly eased requirements for relatives to take advantage of foster care benefits.¹⁴⁴ In this manner, Native nations have helped reimagine foster care as family caregiving instead of sending children into strangers’ homes.

Viewed against the history of assimilative removal practices, this change is especially significant. For many

¹³⁹ Vivien Olsen, *After Adoptive Couple: ICWA from a Tribal Government Perspective* (2014) (unpublished manuscript) (on file with the University of Kentucky).

¹⁴⁰ PRAIRIE BAND POTAWATOMI L. & ORD. CODE § 6-4-7.

¹⁴¹ PRAIRIE BAND POTAWATOMI L. & ORD. CODE § 6-5-10.

¹⁴² This approach recalls the height of state child welfare removals, where children being cared for in multigenerational homes or by relatives was treated as an indicator of parental neglect and cause for removal.

¹⁴³ U.S. DEPT. OF HEALTH & HUM. SERVS., *REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE* (2000) (describing a growing practice of licensing relatives as foster parents and provisions of the Adoption and Safe Families Act that permit states to exempt children in foster care with a relative from its termination timelines).

¹⁴⁴ *Id.*

adoption advocates, assistance to Native children has been synonymous with replacing their families with new white families. Kinship foster care changes that. Instead of condemning a child's parents and entire family as dysfunctional, relative placements position the child's family as a solution, separating help for children from efforts to undermine Native families.

B. Wellness Courts and Family Group Conferencing

Native nations have taken a front seat in reimagining child welfare, supported by federal laws that recognize tribal control over child welfare and funding intended to help build stronger tribal systems. While the same support for tribal control over delinquency is lacking, Native nations and indigenous peoples have also helped to reimagine juvenile delinquency systems.

One specific form of this reimagining has taken place via Healing to Wellness Courts. The wellness court model was developed by Native communities to serve indigenous people and to address drug and alcohol use in a non-punitive setting. Wellness courts were loosely based on the non-Native drug court model and were federally supported beginning in 1997. A coalition of tribal courts and Native organizations developed and refined an approach, now called a Healing to Wellness Court, based on indigenous justice principles like community accountability and reconciliation.¹⁴⁵ These courts "utilize a nonadversarial approach, integrating traditional concepts of

¹⁴⁵ Patricia Riggs, *Tribal Healing to Wellness Court: Program Development Guide* 5 (Tribal L. & Pol. Inst., Draft Publ'n No. 5, 2002) (defining wellness courts as those that "administer justice in a manner that draws on tribal cultural components and strengths tribal traditions, spiritual healing practices, traditional dispute systems, and tribal fundamental beliefs and values"); Joseph Thomas Flies-Away & Carrie E. Garrow, *Healing to Wellness Courts; Therapeutic Jurisprudence*, 2013 MICH. ST. L. REV. 403, 427–36 (2013) (setting forth detailed conceptual framework for wellness courts and therapeutic jurisprudence); Caroline S. Cooper et al., *Tribal Healing to Wellness Courts: Treatment Guidelines for Adults and Juveniles* 19–20 (Tribal L. & Pol. Inst., Draft Publ'n No. 3, 2002) (underscoring the importance of indigenous healing practices and a holistic approach). TRIBAL L. & POL. INST., TRIBAL HEALING TO WELLNESS COURTS: THE KEY COMPONENTS 1–2 (2003) (identifying community resources and indigenous justice approaches as core aspects of wellness courts).

healing and community involvement toward healing, rather than punishing, their addicted tribal members.”¹⁴⁶

Healing to Wellness Courts have been a cornerstone of Native nations’ efforts to reduce juvenile detention and incarceration.¹⁴⁷ This is especially important because roughly one third of youth in tribal or BIA detention facilities came into contact with the juvenile system because of an alcohol or drug-related offense.¹⁴⁸

In a similar vein, family group conferencing is another model used increasingly in U.S. jurisdictions to reshape juvenile justice. This model originated in New Zealand courts, where it was developed to reflect Māori understandings of children as belonging to an entire community. The family group conferencing model brings a child’s extended family together to address the problems and make decisions.¹⁴⁹ One goal is to reduce government intervention into children’s lives by directing state power toward assisting in family decision-making,¹⁵⁰ not replacing it, or wielding a threat of removal. It positions children’s families as part of the solution rather than understanding families as part of the problem, and thereby defining separation from families as necessary to protect or rehabilitate children.¹⁵¹ There is some evidence, however, that

¹⁴⁶ JOSEPH THOMAS FLIES-AWAY ET AL., TRIBAL L. & POL. INST., OVERVIEW OF HEALING TO WELLNESS COURTS 10 (2d ed. 2014).

¹⁴⁷ *Id.* at 13 n.26 (describing three juvenile Healing to Wellness courts).

¹⁴⁸ Rolnick, *Locked Up*, *supra* note 135, at 65–66 (citing 2013 data from the Jails in Indian Country Report indicating that 33% of youth in detention at mid-year were there for drug and alcohol offenses, including 27% percent who had been charged with public intoxication).

¹⁴⁹ Neelum Arya, *Family-Driven Justice*, 56 ARIZ. L. REV. 623, 687–89 (2014) (describing family group decision-making model).

¹⁵⁰ F.W.M. McElrea, *The New Zealand Model of Family Group Conferences 2* (Mar. 1998) (unpublished conference paper), <http://restorativejustice.org/am-site/media/the-new-zealand-model-of-family-group-conferences.pdf> [<https://perma.cc/VW6J-F6GF>] (listing the transfer of power from the state to the community as one of the distinctive elements of the model).

¹⁵¹ *See, e.g.*, Mary Mitchell, *Reimagining Child Welfare Outcomes: Learning from Family Group Conferencing*, 25 CHILD & FAM. SOC. WORK 211, 212 (2020) (“In child welfare, a child’s right to participate is often at odds with his/her right to protection, and those parents with whom partnership is required are also those identified as being in need of support, direction, and correction. Families with care and protection needs are often caught in conflicting policy and practice expectations: parents are expected to take on responsibilities for

girls respond less positively than boys to family group conferencing. Researchers in New Zealand found statistically significant differences between girls and boys concerning whether they felt like others in the conference treated them with respect and whether they felt like they could say what they wanted.¹⁵²

C. Best Interests

Indigenous communities have also helped redefine what it means to act in a child's best interest. The "best interest of the child" standard, central to most judicial proceedings involving children, is usually set forth in individual terms.¹⁵³ While state courts may also consider the rights of parents, extended family members, and even tribes, each of these are understood as separate entities with separate interests. Stated in individual terms, children's interests can easily seem to be in tension with the interests of their parents or their communities. For example, opponents of ICWA sometimes characterize protection of tribal interests as dangerous to the safety and well-being of Native children.¹⁵⁴

A different formulation of children's best interests would acknowledge the link between individual and collective well-being.¹⁵⁵ Rather than pitting children's interests against tribal interests, such a standard would acknowledge that tribal

care, while being positioned as failing. This dichotomous positioning can often be at odds with child welfare outcomes discourse, impacting on the way work with children and families is approached.") (citations omitted).

¹⁵² Gabrielle Maxwell & Venezia Kingi, *Differences in How Girls and Boys Respond to Family Group Conference: Preliminary Research Results*, 17 SOC. POL'Y J. OF N.Z. 171 (2001).

¹⁵³ See CHILD WELFARE INFO. GATEWAY, DETERMINING THE BEST INTERESTS OF THE CHILD 2–3 (2020) (collecting state and territorial statutes and listing factors used in determining best interests, including health, safety, resources for children, and child's relationship to parents).

¹⁵⁴ See, e.g., Timothy Sandefur, *Treat Children as Individuals, Not as Resources*, CATO UNBOUND (Aug. 1, 2016), <https://www.cato-unbound.org/2016/08/01/timothy-sandefur/treat-children-individuals-not-resources> [<https://perma.cc/CF5L-U766>] (characterizing ICWA as "making it harder to rescue [Indian children] from abusive families" by "[giving] tribal governments extraordinary powers" and "overrid[ing] the best interests standard").

¹⁵⁵ See Addie C. Rolnick, *Indigenous Children*, in OXFORD HANDBOOK ON CHILDREN'S RIGHTS LAW (Jonathan Todres & Shani M. King, eds., 2020). See also Lorie M. Graham, *Reconciling Collective and Individual Rights: Indigenous Education and International Human Rights Law*, 15 UCLA J. INT'L L. & FOREIGN AFFS. 83 (2010).

continuity and connection to culture and community is *part of* children's best interests, along with physical safety, education, and food. Measured against such a standard, removal of children from their families and communities is presumptively not in their best interests. "[F]orcible removal of Indigenous children for education and for reasons of child protection are acts that undermine the ability of Indigenous peoples to pass on Indigenous knowledge, as well as violate the right of Indigenous children to an identity."¹⁵⁶ A reconceptualized best interests standard is a critical step in reshaping the relationship of state power to Native children because Native children's interests have so often been defined in opposition to their families and their communities. In the context of foster care and adoption, the exercise of state power to remove and assimilate children has been defended as necessary to protect the individual best interests of Native children.¹⁵⁷

As Peter J. Herne, former Chief Judge of the St. Regis Mohawk Court, explains—contrasting the state law standard in New York with a standard crafted for Native children—one aspect of Native children's interests is a belonging, or the idea "that the best interests of an Indian child can only be realized when an 'Indian child' can establish, develop, and maintain political, cultural, and social relationships with their Indian family, community, and Nation."¹⁵⁸ While Herne points to tribal justice systems as the source of this standard, he notes that the Indian Child Welfare Act adopts this approach in that its "best interests" standard for children "is intertwined with the interests of Indian parents and Tribal Nations."¹⁵⁹ The laws of some Native nations incorporate a detailed best interests standard that recognizes that children's interests are intertwined with the

¹⁵⁶ Allyson Stevenson, *Child Welfare, Indigenous Children and Children's Rights in Canada*, 10 REVISTA DIREITO E PRÁXIS 1239, 1247 (2019).

¹⁵⁷ See *id.* at 1242 (describing how an individualized best interests standard made possible the "sixties scoop" of indigenous children by Canada's adoption and child welfare system and noting that by doing so "Indigenous child removal logic operated against meaningfully addressing the economic and political conditions that made families vulnerable, and caused communities struggle to provide the necessary elements for healthy children and families.")

¹⁵⁸ Peter J. Herne, *Best Interests of an Indian Child*, N.Y. STATE BAR ASS'N J. 22, 23 (2014), https://www.srmt-nsn.gov/_uploads/site_files/Herne-Mar-Apr2014.pdf [<https://perma.cc/RD47-7ZH5>].

¹⁵⁹ *Id.*

interests of their families and communities.¹⁶⁰ Similar expressions can be found in the best interests standards developed by aboriginal and Torres Islander communities in Australia, another settler colonial country¹⁶¹ that engaged in wholesale indigenous child removal as a tool of assimilation.¹⁶²

Indigenous understandings of children's best interests have already reshaped international law on children's rights. Prompted by emphasis on collective rights and self-determination in the U.N. Declaration on the Rights of Indigenous Peoples, the Committee on the Rights of the Child issued a clarification to its "best interests" standard, explaining that "the best interests of the child is conceived both as a collective and an individual right, and . . . the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights."¹⁶³ The Committee still anticipated possible conflict between individual and collective rights, and privileged individual rights over collective, but cautioned that "considering the collective cultural rights of the child is part of determining the child's best

¹⁶⁰ See, e.g., YUOK CONSTITUTION & TRIBAL CODE § 13.25.010 ("A determination of the best interests of the child should include consideration of the rights of the child as a Yurok and the interest of the Yurok community and Tribe in retaining its children in its society; political membership in the Tribe and the attendant benefits such as hunting and fishing rights; the child's cultural heritage; and the opportunity to participate in the ongoing customary life of the Tribe and maintain the connection that each Yurok has with the Yurok territory and their extended family."); WHITE EARTH BAND OF OJIBWE JUD. CODE, tit. IV, §1.05(14)(a) (2017) (defining the best interests of the child to include consideration of "the ability of the tribe and reservation community to provide for the care of the child").

¹⁶¹ Wolfe, *supra* note 7, at 397.

¹⁶² Maureen Long & Rene Sephton, *Rethinking the "Best Interests" of the Child: Voices from Aboriginal Child and Family Welfare Practitioners*, 64 AUSTRALIAN SOC. WORK 96, 100 (2011) (study of aboriginal views of the best interests standard that identifies tensions between individualist standards and the importance of collective responsibility for children). See also Cindy Blackstock et al., *Indigenous Ontology, International Law and the Application of the Convention to the Over-Representation of Indigenous Children in Out of Home Care in Canada and Australia*, CHILD ABUSE & NEGLECT, June 2020, at 1.

¹⁶³ U.N. Comm. on the Rts. of the Child, *General Comment No. 11: Indigenous Children and Their Rights Under the Convention*, ¶ 30, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009).

interests.”¹⁶⁴ The U.S. Supreme recognized the connection between children’s interests and tribal interests in its first case involving ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*,¹⁶⁵ although its most recent ICWA case, *Adoptive Couple v. Baby Girl*, fails to acknowledge the link.¹⁶⁶

Some indigenous approaches to juvenile justice similarly recognize this alignment between children’s interests and tribal interests. Judge Abby Abinanti, Chief Judge of the Yurok Tribe, described the Yurok Tribe’s integration of cultural approaches to juvenile justice:

We survived a horrendous/debilitating invasion that created many hardships heretofore unknown to the People, some of those hardships continue or new ones arise. However, the People have a core strength and a worldview that focuses on our responsibility to and for ourselves, our lands, all the beings in our world and our neighbors who also are struggling in a time of concern for all. We do not intend to walk away from any of those cultural responsibilities. We are stronger every year as we increase our cultural participation and return to our responsibilities in dance/language and stewardship.¹⁶⁷

¹⁶⁴ *Id.* ¶ 32. See also U.N. Comm. on the Rts. of the Child, Day of General Discussion on the Rights of Indigenous Children (Oct. 3, 2003), <https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/Recommendations/Recommendations2003.pdf> [<https://perma.cc/722Z-S6TF>].

¹⁶⁵ 490 U.S. 30, 49 (1989). See Addie C. Rolnick & Kim Hai Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 MICH. STATE L. REV. 727, 744, 744 n. 65 (describing the *Holyfield* formulation of the connection between the child and the tribe).

¹⁶⁶ 570 U.S. 637, 656 (describing Indian father as “play[ing] his ICWA trump card at the eleventh hour to override . . . the child’s best interests”). *But see id.* at 689 (Sotomayor, J., dissenting) (“As we observed in *Holyfield*, ICWA protects not only Indian parents’ interests but also those of Indian tribes.”).

¹⁶⁷ *Hearing Regarding Justice for Native Youth: The GAO Report on “Native American Youth Involvement in Justice Systems and Information on Grants to Help Address Juvenile Delinquency” Before the S. Comm. on Indian Affs.*, 115th Cong. 1, 8 (2018) (Statement of Hon. Abby Abinanti, C.J., Yurok Tribal Court), https://www.indian.senate.gov/sites/default/files/Abby%20Abinanti%20Yurok%20Tribe%20Testimony%20Juvenile%20Justice%209_18.docx.pdf [<https://perma.cc/Z97R-AT3D>].

In this formulation, what is best for children is not a separate question from what is best for their communities. The Indian Child Welfare Act recognizes that tribal communities need children to survive,¹⁶⁸ but indigenous conceptualizations of children's best interests make this link bidirectional by emphasizing that children also need their communities to survive.¹⁶⁹

The purpose of this Part has been to highlight the transformative efforts of indigenous communities when it comes to the government's role in caring for and raising children. Each of the innovations described above involves a fundamental reconceptualization of a core aspect of child welfare or juvenile justice, a reimagining of the relationship between child, parent, family, and government. A sustained examination of these specific interventions is beyond the scope of this Article, and my purpose here is not to suggest that any of these models work perfectly, or that Native nations have fully succeeded in restructuring child welfare and juvenile justice. They have, however, developed innovative models. Unfortunately, these models are most often discussed in national child welfare and juvenile justice circles as creative intervention programs—a framing that fails to acknowledge the way each intervention potentially alters the foundations of an entire system. Just as the history of Native girls under state control reveals themes that will echo for other children, the innovations tribes have created may also be useful models for other communities interested in abolition and reinvention.

V. CONCLUSION

Changing policies is important, but it does not relieve policymakers of the duty to understand the historical context in which today's institutional responses echo. For Native girls, abuse, neglect, and delinquency are in a very real sense a result of the policing of Native identity and the criminalization of

¹⁶⁸ 25 U.S.C. § 1901(3).

¹⁶⁹ Brief for Amici Curiae Adult Pre-ICWA Indian Adoptees, *supra* note 93, at 16, 18, 20 (describing the the process of reconnecting with their communities as “becoming more complete” and the lack of a connection with their tribes as “a permanent hole in my soul” and explaining the significance of not having anyone “to show me who I was”).

trauma.¹⁷⁰ Native girls come into contact with the child welfare and juvenile justice systems not merely because of the intersection of gender and race, but also the historical trauma that underlies the contemporary Native experience. Medical research has confirmed what Native women have been saying all along: inherited trauma can have physical and psychological effects for generations.¹⁷¹ A system designed without awareness of this context will often respond in ways that retraumatize children.

For example, when Native girls who get into trouble are sent far from their communities and placed in military or prison-style facilities, these practices materially and theoretically echo the boarding school era. A close examination reveals that government intervention under any name—school, foster home, adoptive family, reformatory, boot camp, prison, treatment center—is just a continuation of the pattern of assimilation via removal, discipline, and confinement. While tearing apart the system is essential, abolition and deconstruction is practically difficult. Nevertheless, indigenous communities, especially those exercising child welfare and delinquency jurisdiction directly, have taken significant steps to reimagine these systems.

¹⁷⁰ See LUANA ROSS, *INVENTING THE SAVAGE: THE SOCIAL CONSTRUCTION OF NATIVE AMERICAN CRIMINALITY* 18, 41–45 (1998) (describing how Native women’s criminality was manufactured by laws that criminalized behaviors associated with Native lifestyles or deemed inconsistent with Victorian morals); Rolnick, *Locked Up*, *supra* note 135, at 72.

¹⁷¹ AM. ACAD. OF PEDIATRICS, *ADVERSE CHILDHOOD EXPERIENCES AND THE LIFELONG CONSEQUENCES OF TRAUMA* 2 (2014), https://www.aap.org/en-us/documents/ttb_aces_consequences.pdf [<https://perma.cc/527U-QL7P>]; Kathleen Brown Rice, *Examining the Theory of Historical Trauma Among Native Americans*, 3 *PROF. COUNSELING* 117, 117–18 (2013). See also Maria Yellow Horse Brave Heart & Lemyra M. DeBruyn, *The American Indian Holocaust: Healing Historical Unresolved Grief*, 8 *AM. INDIAN & ALASKAN NATIVE MENTAL HEALTH RSCH.* 56 (1998) (defining the concept of historical trauma); Dolores Subia BigFoot et al., *Honoring Children: Treating Trauma and Adverse Childhood Experiences in American Indian and Alaska Native Communities*, *AM. PSYCH. ASS’N* (Nov. 2018), <https://www.apa.org/pi/families/resources/newsletter/2018/11/native-american-trauma> [<https://perma.cc/265J-NWW9>] (noting that “[h]istorical trauma impacts populations who have experienced long term-term widespread trauma over the span of generations”); AMANDA LECHNER ET AL., *ADDRESSING TRAUMA IN AMERICAN INDIAN AND ALASKA NATIVE YOUTH* (2016), <https://aspe.hhs.gov/sites/default/files/private/pdf/207941/ALANYouthTIC.pdf> [<https://perma.cc/P2W9-SCU6>] (describing historical trauma in connection with boarding schools).