

COLUMBIA JOURNAL OF RACE AND LAW

VOL. 11

JULY 2021

NO. 3

ARTICLE

TWENTIETH CENTURY BLACK AND NATIVE ACTIVISM AGAINST THE CHILD TAKING SYSTEM: LESSONS FOR THE PRESENT

Laura Briggs*

This Article argues that the historical record supports activism that takes the abolition of the child welfare system as its starting point, rather than its reform. It explores the birth of the modern child welfare system in the 1950s as part of the white supremacist effort to punish Black communities that sought desegregation of schools and other public accommodations; and Native communities that fought tribal termination and the taking of indigenous land. Beginning with the “segregation package” of laws passed by the Louisiana state legislature in 1960, the Article shows how cutting so-called “illegitimate” children off the welfare program, called Aid to Dependent Children, (ADC) and placing those whom their mothers could no longer support in foster care was an explicit response to school desegregation. While the National Urban League initially mounted a formidable national and international mutual aid effort, “Operation Feed the Babies,” its ultimate response—appealing to the federal government to reform the welfare and child welfare systems—backfired in disastrous ways. The Eisenhower administration responded by providing federal funds for a program it called ADC-foster care, giving states resources to dramatically expand the foster care system, resulting in hundreds of

* Laura Briggs is Professor of Women, Gender, Sexuality Studies at the University of Massachusetts. She received her Ph.D. in American Studies from Brown University. This Article is for all parents who have lost their children, and all children separated from parents.

thousands of Black children in foster homes within a year. Native Tribal nations, in contrast, fought throughout the late 1960s and 70s to get states out of Indian child welfare. After a decade of activism, in 1978, they succeeded in passing the Indian Child Welfare Act, which put American Indian kids under the jurisdiction of tribal courts instead of the states'. Over the next decades, the number of Native children in foster care shrank dramatically. While history rarely offers clear guidance for the present, these two stories strongly suggest the limits of reform for state child welfare systems, and the wisdom of contemporary activists who call for abolition.

I. Introduction	614
II. Black Freedom, Welfare, and Illegitimacy	618
III. Taking Children	621
IV. The Indian Child Welfare Act	627
V. History's Lessons	636

I. INTRODUCTION

In her keynote for this conference,¹ Dorothy Roberts walks us through the arguments against reforming the foster care system, which are in many ways akin to those against continuing to reform the police. In doing so, she joins many scholars and activists voicing similar frustrations with what seems to be an entrenched, unmovable child welfare system that engages in racialized harm to families by disproportionately separating Black, Indigenous, Latinx, and impoverished white children from their parents, kin, and caregivers.² Roberts identifies the ways that efforts to rethink how we support and care for families mirrors activism for prison abolition and defunding the police. When we allow ourselves to be led by the inspiration of the radical, creative imagination of these movements, and how they have caught fire in recent years, we can dream bigger and imagine caring for children without the involvement of a racist state that has demonized impoverished families for generations. It is important, Roberts argues, to listen to the growing radicalism of the analysis of parents and activists involved with the system. They are not calling for reform, she argues; they are calling for an end to the system as we know it.

As we consider the current abuses of the child welfare system, it may be useful to know that Black racial justice and Native sovereignty activists have confronted the foster care system before in ways that offer powerful lessons for the present.

¹ Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 COLUM. J. RACE & L. 455 (2021).

² E.g., the Movement for Black Lives vision statement in 2020 includes a call to “[e]liminate the foster system’s power to permanently and irreversibly destroy Black families through termination of parental rights,” a political demand not present in the 2016 statement. *End the War on Black People: End the War Against Black Women*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/end-the-war-black-women>, (last visited Jan 8, 2021); Erin Cloud, Rebecca Oyama, & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68 (2017), <http://www.cunylawreview.org/family-defenseblack-lives-matter/> [<https://perma.cc/BE2M-79EX>]; Michael Fitzgerald, *Rising Voices For ‘Family Power’ Seek to Abolish Child Welfare System*, IMPRINT (2020), <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141> [<https://perma.cc/N5P5-KRGU>]. See also the Center for Social Policy statement on its commitment to work “to create a society in which the forcible separation of children from their families is no longer an acceptable solution for families in need.” CTR. FOR STUDY SOCIAL POL’Y, <https://cssp.org/our-work/project/upend> (last visited June 1, 2021).

This Article tells two stories. In the 1950s and 60s, the National Urban League confronted a child welfare system that was used as part of the white South's "massive resistance" to school desegregation, taking Black children away from their parents to terrorize communities fighting for civil rights.³ While the Urban League's mass mobilization was extraordinary, its activists ultimately compromised with the system, and agreed to reform it instead of abolishing it. In doing so, the Urban League became complicit in supporting a federally funded, state-sanctioned child welfare system. Within a year, it was clear that this approach had been disastrous. The child welfare system grew in size and scope, resulting in a massive increase in the number of Black children entering foster care.⁴ Reform, then, brought new money into the system, allowing states to take more children, particularly from impoverished Black single mothers. In contrast, activists for Native sovereignty largely refused reform, insisting that state child welfare workers get off reservations and out of Native families.⁵ For at least a decade, the number of Native children in out-of-home care shrank. History confirms the intuition and experience of 21st century activists: working to end the child welfare system can accomplish a great deal, while every compromise with the child welfare system makes it stronger, and such reform leads it to break up more families.

³ See, Taryn Lindhorst & Leslie Leighninger, "Ending Welfare as We Know It" in *1960: Louisiana's Suitable Home Law*, 77 SOC. SERV. REV. 564–84 (2003).

⁴ Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, in *SERVING AFRICAN AMERICAN CHILDREN: CHILD WELFARE PERSPECTIVES* 9–30 (Sondra Jackson & Sheryl Brissett-Chapman eds., 1998). We are in a position to understand this acquiescence as never before, as it echoes the frustration and fury of current "defund the police" activists in the aftermath of the Obama-era police reforms in Minneapolis: never agree to anything that ends with more money for a system designed to uphold white supremacy. *E.g.*, Philip V. McHarris & Thenjiwe McHarris, Opinion, *No More Money for the Police*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/opinion/george-floyd-police-funding.html> [perma.cc/39KV-S8GM]; Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, Opinion, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [https://perma.cc/8H5C-HQK4].

⁵ THE DESTRUCTION OF AMERICAN INDIAN FAMILIES (Steven Unger ed., 1977).

While the child welfare system in the 1950s and 60s was dramatically smaller than the present one,⁶ it was a commonplace site of political concern in Native and Black newspapers, and a subject of forceful political campaigns. The passage of the Indian Child Welfare Act in 1978 and the National Association of Black Social Workers 1972 “Preserving Families of African Ancestry” statement have been (mis)remembered for their impact on adoption and demonized by the political right—as well as liberals like Harvard Law Professor Elizabeth Bartholet. But viewed in their actual context, these actions were part of long campaigns against the operation of foster care systems.⁷ This Article will focus on that earlier generation’s fights, particularly their insistence that child “welfare” was a political project of white supremacy and disruption of Native sovereignty.

This piece begins with an unorthodox history of the civil rights era, focused on Black single mothers and their children. In the 1940s and 50s, as now, single mothers were particularly vulnerable to poverty, and Black and Native mothers exceptionally so. Indeed, the middle of the 20th century was worse than the current moment for single mothers, as post-war defense plant layoffs explicitly targeted women to make room for men coming home from war, and the Black women who had followed the economic expansion of World War II to get out of the apartheid South—with its lynching and other racial violence—were suddenly unemployed and unemployable in a racist job market.⁸ New Deal and post-war government programs to raise up a middle class—such as housing loans, GI bill grants for a

⁶ The child welfare system doubled in size in the late 1980s and 90s with the racially targeted invention of the “crack baby.” See my account of this history in Laura Briggs, *Orphaning the Children of Welfare: “Crack Babies,” Race, and Adoption Reform*, in *Outsiders Within: Writing on Transracial Adoption* 75-88 (Jane Jeong Trenka et al., 2006); Laura Briggs, *Somebody’s Children: The politics of Transracial and Transnational Adoption* 97–105 (2012); Laura Briggs, *Taking Children: A History of American Terror* 106–12 (2020).

⁷ See, e.g., *Ensuring Equal Protection for Native American Children*, Goldwater Inst., (Mar. 15, 2021) <https://goldwaterinstitute.org/indian-child-welfare-act> [perma.cc/6GYM-8EKL]; Laura Briggs, *Somebody’s Children*, 11 J.L. & Fam. Stud. 373 (2008). See also Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Pa. L. Rev. 1163–256 (1991).

⁸ Many historians have told this story. For a particularly clear and well-researched version, See ANNELESE ORLECK, *STORMING CAESAR’S PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY* (2005).

college education, the building of the suburbs—by design excluded African-American men and nearly all women of any racial group. Women were supposed to be dependent on a male breadwinner, Black folks were supposed to work in the fields picking crops or cleaning white folks' homes, and Indians were supposed to vanish.⁹

In this same period, federal recognition of many tribal nations was terminated, and Native people were relocated in nuclear family groups to cities as a result of the federal government's abandonment of its treaty obligations. Poverty in Native communities, federal policy-makers insisted, was not caused by centuries of settler colonialism and Indian wars, but rather that Native people lived far from meaningful employment opportunities in urban centers.¹⁰ So while the post-war period saw unprecedented economic growth and prosperity for predominately white families as a result of government programs, the federal government's institutionalization of nuclear families and female dependency on male breadwinners, the rising tide of inequality left Black and Indigenous people under water. The growth of welfare programs to support widowed, divorced, and unmarried mothers with children initially excluded largely numbers of people of color. Once they were included, the political right attacked these programs viciously, arguing that the policies promoted laziness.¹¹ Arizona and Nevada refused to participate in the federal Aid to Dependent Children (ADC) program in order to evade paying benefits to Native mothers. State leaders justified refusing federal money by insisting Native people had no right to those dollars by insisting that those living on reservations were not

⁹ A compact account of the whiteness of the post-World War II programs can be found in George Lipsitz, *The Possessive Investment in Whiteness: Racialized Social Democracy and the "White" Problem in American Studies*, 47 AM. Q. 369–387 (1995). On the gendered dimensions of postwar federal policy, see, e.g., Melissa E. Murray, *Whatever Happened to G.I. Jane: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91 (2002). On the persistence and long durée of the vanishing Indian trope, see JEAN O'BRIEN, *FIRSTING AND LASTING: WRITING INDIANS OUT OF EXISTENCE IN NEW ENGLAND* (2015).

¹⁰ Ted Jojola & Timothy Imeokparia, *Fitting a Square Peg in a Round Hole: The History of Tribal Land-Use Planning in the United States*, in *THE WORLD OF INDIGENOUS NORTH AMERICA* (Robert Warrior ed., 2014).

¹¹ WINIFRED BELL, *AID TO DEPENDENT CHILDREN* (1965).

U.S. citizens and didn't even speak English.¹² Conservatives also sought to shrink, and even eliminate federal and state programs that supported single mothers and children of color, saying that they were unworthy of community support, that mothers were immoral, and the children were, in the derogatory word of the period, "bastards"—fatherless.¹³

II. BLACK FREEDOM, WELFARE, AND ILLEGITIMACY

The context of the right-wing attacks on welfare and "out-of-wedlock" babies was *Brown v. Board of Education*.¹⁴ The NAACP brought this case to the Supreme Court to end segregation in all public accommodations by focusing narrowly on Black children and schools. Seeking to overturn *Plessy v. Ferguson*,¹⁵ lawyers for the group avoided using a Black man like Homer Plessy as plaintiff—always already damned in racist discourse as a would-be rapist—focusing instead on adorable children like elementary student Linda Brown. White supremacists responded by doubling down on their demonization of Black children as "bastards," the product of illicit sex. While much church-based civil rights activism cultivated the appearance of demonstrators in their "Sunday best" and a politics of respectability, white segregationists sought to draw attention to the most marginalized and least defended. U.S. Representative Robert Byrd, who coined the term "massive resistance" to refer to the white South's response to school desegregation, also gave us the phrase "welfare abuse" to refer to Black women supposedly grifting off the system. He claimed before Congress that 60% of welfare cases were fraudulent, offering evidence that women on welfare were working—as domestics, child minders, and sex workers—and that they had men ("paramours") in their homes and beds who should be

¹² Wilbur J. Cohen, *Public Assistance Provisions for Navajo and Hopi Indians: Public Law 474*, SOC. SEC. BULL. 8–10 (1950); Deanna M. Lyter, *Domination, Regulation, and Resistance: The Impact of Aid to Dependent Children and Tribal law on White Mountain Apache Women, 1934–60* (Dec. 6, 2002) (Ph.D. dissertation, American University) (on file with author).

¹³ REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945* (1993); RICKIE SOLINGER, *WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE* (1992); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (2nd ed. 1996).

¹⁴ 347 U.S. 483 (1954).

¹⁵ 163 U.S. 537 (1896).

supporting them and their “illegitimate” children.¹⁶ The more African-Americans fought for civil rights, the more officials cut welfare for impoverished Black women and children. White supremacists used poverty and the desperate struggles of Black single mothers to keep children housed, clothed, and fed to try to break the community’s revolt. According to one Black leader, “the white landlords are being overheard to say now more and more when Negroes ask for assistance, ‘let the NAACP support you this winter.’”¹⁷

In 1954, within days of *Brown v. Board of Education* ordering the desegregation of schools, the state legislature of Mississippi attached a rider to an appropriations bill cutting children off welfare if their mothers failed to keep a “suitable home,” decrying common law marriage—poor people’s marriage—as “an illicit relationship or promiscuity” and a threat to “civilization.”¹⁸ According to the *Clarion Ledger-Jackson Daily News*, Mississippi used this law to deny 8,392 children welfare between 1954 and 1960.¹⁹ A state legislator in Mississippi, backing a related, but failed legislation to sterilize mothers who had borne three illegitimate— explained that, “when the cutting starts, they [Black people] will head to Chicago.”²⁰ The state legislature believed they could drive Black families out of Mississippi to Northern cities to prevent “bastard” children and their siblings from attending school. Those who could not gather resources to move, legislators hoped, would nevertheless be forced to keep their children home—without resources to afford shoes or school clothes. A study conducted by several colleges in Mississippi in 1957 found that the legislation had the intended racially differentiated effect: of the 323 families contacted, only three white families had been cut off for reasons of illegitimacy. The study also found that being denied welfare (alongside the larger context of Black poverty, poor health care, and substandard housing in Mississippi) had left mothers and

¹⁶ GWENDOLYN MINK & RICKIE SOLINGER, *WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY* 217–222 (2003).

¹⁷ Lindhorst & Leighninger, *supra* note 3, at 15.

¹⁸ BELL, *supra* note 11, at 96–100.

¹⁹ MINK & SOLINGER *supra* note 16; SOLINGER, *supra* note 13.

²⁰ Student Nonviolent Coordinating Committee, *Genocide in Mississippi*, reprinted in *PRINT CULTURE OF THE CIVIL RIGHTS MOVEMENT, 1950–1980*, TUL. U. DIGIT. LIBR. (Mar. 15, 2021), <https://digitallibrary.tulane.edu/islandora/object/tulane%3A21196/datastream/PDF/view> [https://perma.cc/U3V9-B56B].

children in appalling situations. It also underscored the sexual violence that gave rise to “illegitimacy.” As one of the authors of the Mississippi report noted in a case report on a mother who had been cut off from welfare:

[One] former recipient of ADC [Aid to Dependent Children] is in very severe circumstances . . . Her house is located in the middle of a cotton patch, and as is typical of such houses, it is old, crudely constructed, and rotting away. Seven of her children are known to be illegitimate. The oldest child, one of the two legitimate ones, was raped at school and now has an illegitimate child of her own.²¹

It bears noting how hard the community worked to keep mothers and children fed, although everybody around them was impoverished, too. While this mother and her ex-husband were separated, he, a sharecropper, planted and worked a crop for her and the children. The caseworker also noted the mutual aid enabled them to keep body and soul together, “when [another] mother was in the hospital, some of her colored neighbors sent her an occasional fifty cents . . . She was not so worried about clothing [because her sister sent her hand-me-downs], but when the children cry for food, that does bother her.”²²

Within a few years, five other states—Georgia, Florida, Virginia, Arkansas, and Texas—followed Mississippi’s lead. In Arkansas in 1957, at the height of the school desegregation crisis at Central High School in Little Rock, Governor Orville Faubus enacted a “suitable home” regulation to remove Black children from the welfare rolls. He argued that ADC “rewarded sin.”²³ Looking back at his administration in 1960, he proudly asserted that “8,000 illegitimate children were taken off the welfare rolls during my term of office” as a result of the suitable home rule.²⁴ In Alabama, in the midst of Black Birmingham’s rebellion, between 1957 and 1967, the city of Birmingham decreased its total expenditures on welfare from \$31,000 to \$12,000 a year.²⁵

²¹ See BELL, *supra* note 11, at 107.

²² BELL, *supra* note 11, at 103.

²³ BRIGGS, TAKING CHILDREN, *supra* note 6, at 37.

²⁴ *Id.* at 107.

²⁵ ROBIN D. G. KELLEY, RACE REBELS: CULTURE, POLITICS, AND THE BLACK WORKING CLASS 95 (1996).

III. TAKING CHILDREN

Some “suitable home” rules went further—not just leaving impoverished Black families to starve, but actively enabling courts and welfare workers to take children. In 1959 in Tennessee and 1960 in Florida, state legislatures enacted new “suitable home” statutes. In Florida, common law marriages previously recognized by the state became “illicit relationships,” and children were retroactively made “illegitimate.” Both statutes required welfare case workers to pressure mothers to “voluntarily” relinquish their children to a relative if they were denied ADC. If mothers refused, their cases were referred to juvenile court for child neglect.²⁶

Florida social workers conducted a study in 1960 on the effects of the law. From it, we learn that state welfare workers challenged the “suitability” of 13,000 families, of which only 9% were white, even though white families made up 39% of the total caseload.²⁷ In the first year of the policy, 2,908 families were asked to place their children with relatives, while a similar number were given trial periods to reform the “moral environment” of their homes. To the surprise of welfare workers—reared on an old, self-justifying belief from slavery times that Black women had little maternal feeling, and that it was customary among African-Americans to circulate children among relatives—only 186 families being starved by the welfare system voluntarily relinquished their children. Of the 24 who had at the time of the study already been referred to juvenile court, only three lost their children,²⁸ suggesting that the children were not being abused or neglected, despite state efforts to punish mothers receiving state welfare checks. Another 3,000 families “voluntarily” withdrew from the welfare program rather than lose their children.²⁹

While we have fewer records of what happened in Tennessee, the “voluntary relinquishment” program worked the same way—mothers could keep their children by withdrawing

²⁶ BELL, *supra* note 11, at 124–36.

²⁷ *Id.*, at 124–33 (citation omitted).

²⁸ This is certainly an undercount, since the pace of court hearings was glacial, and the report covered less than the first full year after the enactment of the suitable home rule.

²⁹ *Id.*, at 124–33 (citation omitted).

their applications for ADC.³⁰ While the situation in the first seven³¹ states that enacted “suitable home” rules in response to *Brown* was dire for the families involved, the policies barely made the news. This is familiar; U.S. publics largely ignored the consequences of the termination of AFDC in 1996, despite studies that have shown increased rates of death, mothers scrounging in dumpsters to feed their children, and women pushed back into violent relationships with partners without the AFDC transitional safety net.³² In the 1950s, too, stories of impoverished Black mothers pushed off welfare were of little interest, except to the case workers who pressured them to relinquish, or refer their families to juvenile court as neglectful, and the judges who took their children.

All of that changed, however, in Louisiana. The use of welfare restrictions in Louisiana to punish Black communities fighting to desegregate schools and public accommodations not only made the news, but also became an issue of national and even international concern. When confronted with a court order to desegregate schools in New Orleans in 1960, the governor of Louisiana, Jimmie Davis, and the state legislature, went into extraordinary session and announced a “segregation package” of new laws designed to stop the order, create chaos, and terrorize Black communities. Nearly all the bills were immediately struck down by a federal judge, including bills that aimed to: freeze school transfers; abolish the school board; deny accreditation to integrated schools; strip all teachers in integrated schools of their certification; eliminate the requirement that children attend school; grant state police special powers; and deny that the state of Louisiana was subject to federal law. Yet the “suitable home” rule designed to cut 23,000 “illegitimate” black children from the

³⁰ *Id.*, at 124–25.

³¹ Georgia, Florida, Virginia, Arkansas, Texas, Mississippi and Tennessee.

³² Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES (Apr. 8, 2012), <https://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html> [<https://perma.cc/UUV4-G8TH>]; DANA-AIN DAVIS, BATTERED BLACK WOMEN AND WELFARE REFORM: BETWEEN A ROCK AND A HARD PLACE (2006); Jonathan Leonard & Alexandre Mas, *Welfare Reform, Time Limits, and Infant Health*, 27 J. HEALTH ECON. 1551 (2008); Richard M. Tolman & Jody Raphael, *A Review of Research on Welfare and Domestic Violence*, 56 J. SOC. ISSUES 655 (2000); Elizabeth T. Wilde et al., *Impact of Welfare Reform on Mortality: An Evaluation of the Connecticut Jobs First Program, A Randomized Controlled Trial*, 104 AM. J. PUB. HEALTH 53 (2013).

welfare rolls was, alone, allowed to stand.³³ The “suitable home” rule cut nearly a third of the state’s welfare caseload, and as in other Southern states, the overwhelming majority of those targeted were Black. Only 5% of those affected were white.³⁴

Among Louisiana’s Black residents, the suitable home rule was clearly understood as punishment for school desegregation, designed to push those who could to migrate. A Black child welfare worker described the legislature’s mood as “vindictive,” and they were clearly intent on hurting Black residents in retaliation for school desegregation.³⁵ It was, she said, a “tit for tat.”³⁶ If Black children were to be the civil rights warriors who desegregated public accommodations, and if their mothers wanted to refuse second class status in exchange for inadequate charity from state officials, white supremacists sought to make them pay.

Even though the Louisiana law did not require welfare workers to take the children of those who lost their aid, as the Florida and Tennessee laws did, that was the outcome. As one Black child welfare worker remembered forty years later:

We would get referrals [to take children into foster care] after public assistance cut them off, and they weren’t able to feed their kids. I remember several families who were referred—the women had to give up their kids if they couldn’t care for them. I never removed kids from their families because of poverty—but I know other workers who did. I remember one woman who loved her kids. She

³³ *The Text of the Federal Court Ruling Invalidating Louisiana Integration Curbs*, N.Y. TIMES, (Dec. 1, 1960), <http://timesmachine.nytimes.com/timesmachine/1960/12/01/99898337.html>.

³⁴ *Louisiana Drops 23,000 Children On Relief Rolls as Illegitimates*, N.Y. TIMES, (Aug. 28, 1960), <http://timesmachine.nytimes.com/timesmachine/1960/08/28/99951830.html>; *Louisiana Explains Relief Cuts to U.S.*, N.Y. TIMES, (Sept. 14, 1960), <http://timesmachine.nytimes.com/timesmachine/1960/09/15/99802841.html>; *U.S. To Study Curbs in Louisiana Relief*, N.Y. TIMES, (Oct. 3, 1960), <http://timesmachine.nytimes.com/timesmachine/1960/10/04/99958155.html>.

³⁵ Lindhorst & Leighninger, *supra* note 3, at 568 (interviewing Gale Durham and Millie Charles).

³⁶ *Id.*, at 564–84. See also MINK & SOLINGER, *supra* note 16, at 195; Lisa Levenstein, *From Innocent Children to Unwanted Migrants and Unwed Moms: Two Chapters in the Public Discourse on Welfare in the United States, 1960-1961*, 11 J. OF WOMEN’S HIST. 10 (2000); BELL, *supra* note 10, at 137–51.

didn't want to give them up, but ended up having to. Families didn't understand why this was happening. I am haunted by a woman who had to give her child up. The resolution for many families was that they gave their children away.³⁷

The effect of suitable home laws, by design, was to allow welfare case workers to visit recipients, stop their checks, and refer families to the child welfare system once they had no means of support. The goal was to take children, coercively if necessary, and put them in foster care.

Through the work of activists, cutting "illegitimate" children off welfare in Louisiana became a national and international scandal in a way previous states' efforts did not. It became widely known simply as the "Louisiana Incident." While Governor Jimmie Davis was slandering welfare mothers as "prostitutes" and "promiscuous women," New Orleans Urban League president J. Harvey Kerns mobilized national and international networks to feed their children so they could keep their families together.³⁸ He travelled to New York and asked the National Urban League convention for help, and it launched Operation Feed the Babies. Calls for support for the children "cry[ing] for food in New Orleans" circulated through Black newspapers around the country as the newest front in the school desegregation battle.³⁹ Food, clothing, and cash flowed to destitute families in Louisiana, and welfare workers in Illinois alone donated almost \$4,000. In New Orleans, the Urban League coordinated dozens of groups to mobilize to feed people, including community groups, local Black businesses, labor organizations, and Black churches, especially the Baptist Emergency Relief Committee. At its height, Operation Feed the Babies was helping 300 people a day and distributing thousands of pounds of food. Local activists brought groceries and clothing to single mothers, cooked food, and gave rent money to those who had lost their welfare assistance. The Urban League called on the federal government to address the widespread hunger and threatened to approach the United Nations if federal funds did not materialize. In a move that was particularly designed to embarrass the

³⁷ Lindhorst & Leighninger, *supra* note 3, at 572 (internal quotations omitted).

³⁸ *Id.* at 572.

³⁹ *Kids "Cry For Food" in New Orleans*, CHICAGO DEF., 1 (Sep. 3 1960).

Eisenhower Administration—which framed welfare as a “states’ rights” issue—those as far away as England airlifted food, money, and clothing to the “starving babies” of New Orleans. In Louisiana, the Urban League, social welfare activists, Black churches, and community groups pressured the state legislature to reinstate the “innocent children” to the welfare rolls.⁴⁰

This campaign may have been the high-water mark of concern and activism for impoverished Black single mothers and children, and their ability to get welfare. Unfortunately, the National Urban League pivoted from this radical call to support Black families through mutual aid to push reform through the Social Security Administration.

This was more than a strategic mistake. Its results were devastating, inviting not just state governments, but the federal government to intervene in the lives of African-American children and mothers, and it created the modern foster care system. The National Urban League filed a complaint with the Social Security Administration, which administered the federal portion of welfare benefits. Social Security responded with a hearing to consider whether the state’s suitable home provision was allowable under federal rules. The Urban League was joined by the American Civil Liberties Union, the Child Welfare League and even the American Legion, all of which filed amicus briefs.⁴¹

Unfortunately, they lost. The Department of Health, Education, and Welfare, having allowed virtually every other Southern state, and Michigan, to pass suitable home rules, could not find a reason to stop Louisiana’s. However, the federal government was resistant to these shenanigans by states, at least when state policy was enacted in open defiance of federal initiatives, and when the federal government recognized the policies for what they were: punishment aimed at African-Americans, attempting to splinter the Black freedom movement. In a move subsequently made into law, Arthur Flemming, the

⁴⁰ Reading the local Black press, especially the *Louisiana Weekly* and talking to community people in 2000 did important work in holding up these local efforts by the Urban League and New Orleans activists and community organizations, rather than just the attention-grabbing international stunt of British women sending aid that other historians of the Louisiana Incident have noted. Lindhorst & Leighninger, *supra* note 3. International attention did not happen without tremendous local groundwork.

⁴¹ Lawrence-Webb, *supra* note 4.

Secretary of Health, Education, and Welfare—which then administered Social Security—issued a rule saying that states could not cut benefits to children in “unsuitable” homes, unless they were removed and placed elsewhere.⁴² Louisiana’s policy ending welfare to families turned into a policy of taking children. Isaac Abramson, in his testimony for the state of Louisiana, described the position that ultimately became the agreement between state and federal governments: “We just take the position that not every house is a home. A home means a respectable home in which a child may be brought up to become a respectable citizen. A child must be in that kind of a home to get Federal-state money.”⁴³

Thus, in trying to stop Southern states from evading their responsibility to provide eligible Black children with welfare, the Urban League’s reform effort provided a vehicle for a bait and switch that poured federal money into state foster care systems, giving them license to engage in wholesale terrorizing of never married, divorced, and widowed Black mothers. As Secretary Flemming stated,

Whenever there is a question of the suitability of the home for the child’s upbringing, steps should be taken to correct the situation or, in the alternative, to arrange for other appropriate care of the child. It is completely inconsistent, however, to declare a home unsuitable for a child to receive assistance and at the same time permit him to remain in the same home exposed to the same environment.⁴⁴

The following year, this rule, the Flemming Rule, was made into law, and Congress authorized funding for the program known as ADC-foster care, which provided federal matching funds to states to place children in out-of-home care. 150,000 Black children were placed in out-of-home care in 1961 alone. In subsequent years, the Flemming Rule (enacted as P.L. 87-31 and the 1962

⁴² See Cynthia P. Honoré-Collins, *The Impact of African American Incarceration on African American Children in the Child Welfare System*, 12 RACE, GENDER & CLASS 107 (2005); MINK & SOLINGER, *supra* note 16.

⁴³ Bess Furman, *U.S. to Continue Louisiana Relief As State Alters Child Home Law*, N. Y. TIMES, Dec. 16, 1960, at 16, <http://timesmachine.nytimes.com/timesmachine/1960/12/16/99979358.html>.

⁴⁴ BELL, *supra* note 11, at 147 (citations omitted).

Public Service Amendments) transformed ADC and foster care from a system that ignored Black children to one that acted vigorously to take them. Tens of thousands of mothers lost their children to foster care, and the federal government largely funded it.⁴⁵

These policies were not limited to the South, either. Outside New York City, the City of Newburgh sought to displace Black residents and reduce their welfare costs by taking children, issuing rules that “prior to certifying or continuing any Aid to Dependent Children cases[,] a determination shall be made as to the home environment. If [the home] is not satisfactory[,] the city shall take such children and place them in foster homes in place of welfare aid to family adults.”⁴⁶ So many Black children entered the child welfare system in the next decade that “some observers began to describe this decade as the ‘browning’ of child welfare in America.”⁴⁷ While federal officials decried “the recurrent suggestion of asking the courts to take all illegitimate children away from their mothers and place them in foster care homes,” in 1962, once Congress authorized federal funding, they could not stop local officials from doing just that.⁴⁸ In the course of a few years, as Dorothy Roberts argued in *Shattered Bonds: The Color of Child Welfare*, foster care went from being a system that ignored the needs of Black children, to one that seemed primarily designed to harm them and break up Black families.⁴⁹

IV. THE INDIAN CHILD WELFARE ACT

As in the Black community in the South, Native people in the 1950s and 60s also fought state welfare workers who tried to

⁴⁵ See HOWARD ALTSTEIN & RUTH G. MCROY, DOES FAMILY PRESERVATION SERVE A CHILD'S BEST INTERESTS? (2000); Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 FUTURE CHILD. 23–38 (1998); Lawrence-Webb, *supra* note 4. This pattern was not limited to the South; in New York City, for example, the percentage of Black and Puerto Rican children (versus white children) also soared after 1960. See L. TREVOR GRANT, THE POLITICIZATION OF FOSTER CARE IN NEW YORK CITY (1996).

⁴⁶ Tom Blair, *The Newburgh Story*, in WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY, *supra* note 16, at 206; GRANT, *supra* note 45, at 31.

⁴⁷ Lawrence-Webb, *supra* note 4, 49.

⁴⁸ Bureau of Public Assistance, *Illegitimacy and Its Impact on the Aid to Dependent Children Program*, in WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY, *supra* note 16, at 188.

⁴⁹ DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

take their children. The federal government's goal was tribal "Termination" (the administrative term for reversing federal recognition of tribal status), and ongoing depredations of Native land, livelihoods, and people. Especially in the West, the federal government and states sought to "get out of the Indian business"—that is, they sought to evade their treaty obligations to support Indigenous nations, including those who had voluntarily in negotiations, or involuntarily in the context of Indian Wars, exchanged Indigenous land for promises of food, health care, and housing to supports generations in perpetuity.⁵⁰ As the early 20th century saw the federal renunciation of these commitments, Native nations that demanded reparations and insisted on their right to state support through the public welfare system instead saw state social workers come and take their children.

In contrast to the Urban League, the Association of American Indian Affairs (AAIA) and Native nations did not seek reform of the child welfare system in the 1960s and 70s, but freedom from it. Activists and attorneys confronted state welfare workers and insisted they had no authority on reservations or over Native people. When state welfare workers denigrated Native families and caregiving structures—insisting grandmothers were too old to care for children, and that leaving babies and young people with relatives evidenced a mothers' neglect—lawyers and members of tribal councils said they lacked understanding of Native kinship, culture, and community. When state officials criticized the absence of indoor plumbing, overcrowding, and poor housing as child neglect, Native activists argued that state social workers were trying to make life on the reservation itself a crime. Finally, tribal leadership and activists called for child welfare matters to be under the jurisdiction of tribal nations, rather than reforming state systems that had taken one-fourth to one-third of Native kids from their homes in many states. While this approach did not solve all the problems of the child welfare system's treatment of Native children, it reduced the presence of children in state child welfare systems; and at the very least, did not make things worse, as the Urban

⁵⁰ Stephen Wall, *The State of Indigenous America Series: Federalism, Indian Policy, and the Patterns of History*, 25 WICAZO SA REV. 5–16 (2010).

League's compromise with the federal government had for Black communities.⁵¹

Among the places where tribal nations were most resistant to termination included the Dakotas. There, state and federal officials displaced 150,000 people living on tribal land through the Pick-Sloan flood control plan that safeguarded Anglo communities at the expense of Native communities by building dams and putting reservation households under the Missouri River. Although fights over American Indian land in the Dakotas in the 1940s and 50s and "Termination" policy in general did not attract the national attention that school desegregation did in the South, they were no less bitter.⁵² As Joseph W. Thompson, former chairman of the Lower Brule Tribal Council testified to a U.S. Senate subcommittee in 1959, the flooded bottom lands were "our heart lands. No similar lands are for sale. We depend on our land for our livelihood, it furnishes our income. To take our land is to take our homes and income, and a part of our history and heritage."⁵³ He demanded reparations, just as generations of Lakota people have fought for federal accountability for so many injustices, including the Plains Indian Wars; the taking of the Black Hills; the Wounded Knee massacre; the Ghost Dance "crisis" in the 19th century; the demand to end corrupt tribal leadership allied with the FBI and U.S. Marshal Service in the 1972–73 standoff at Wounded Knee in the 20th century; and, most recently, the "Water is Life" protests against the Dakota Access Pipeline.⁵⁴

Child-taking was the front line in the Termination era. It repeated a deep history of separating Native children from their kin as a key tactic for the detribalization, thus extinguishing land

⁵¹ STEVEN UNGER, *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* (1977).

⁵² See NICK ESTES, *OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE* (2019).

⁵³ *Hoopa Valley Reservation Boundary Adjustment Act and the Lower Brule Sioux Infrastructure Development Act: Hearing on H.R. 79 and S. 156 Before the S. Comm. On Indian Affairs*, 105th CONG. 34 (1998) (statement of Joseph W. Thompson, Chairman, Lower Brule Sioux Tribe).

⁵⁴ See ESTES, *supra* note 52; ELIZABETH COOK-LYNN, *THE POLITICS OF HALLOWED GROUND: WOUNDED KNEE AND THE STRUGGLE FOR INDIAN SOVEREIGNTY* (1999); PETER MATTHIESSEN, *IN THE SPIRIT OF CRAZY HORSE* (1992); EDWARD LAZARUS, *BLACK HILLS WHITE JUSTICE: THE SIOUX NATION VERSUS THE UNITED STATES, 1775 TO THE PRESENT* (1999).

claims. This practice began with the military boarding school policy that ended the Indian Wars in the 1880s by essentially taking children as hostages and attempting to destroy the passing on of indigenous languages and ways of life.⁵⁵ Without a next generation, land claims would be extinguished in a handful of years. There was also a centuries-long conflict over the settler colonial demand that Native people adopt Anglo gender and family forms.⁵⁶ In the 1960s, as protests by the AAIA revealed, children were being taken if found in the care of a grandmother rather than a nuclear family, especially if the grandmother or an unmarried mother was receiving state welfare payments. As in the South, Western states, like North Dakota, passed a suitable home law that demanded the presence of a legally related father. If mothers did not pass this suitable home requirement, they were labeled as immoral, regardless of the actual harm this label and practice did to community kinship norms.⁵⁷

⁵⁵ See DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* (1995); MARGARET ARCHULETA ET AL., *AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCES, 1879–2000* (2000); Morton Beiser, *A Hazard to Mental Health: Indian Boarding Schools*, 131 *AM. J. PSYCHIATRY* 305–306 (1973); JOHN BLOOM, *TO SHOW WHAT AN INDIAN CAN DO: SPORTS AT NATIVE AMERICAN BOARDING SCHOOLS* (2000); BRENDA J. CHILD, *BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940* (1998); WARD CHURCHILL, *KILL THE INDIAN, SAVE THE MAN: THE GENOCIDAL IMPACT OF AMERICAN INDIAN RESIDENTIAL SCHOOLS* (2004); ESTHER BURNETT HORNE & SALLY MCBETH, *ESSIE'S STORY: THE LIFE AND LEGACY OF A SHOSHONE TEACHER* (1999); K. TSIANINA LOMAWAIMA, *THEY CALLED IT PRAIRIE LIGHT: THE STORY OF CHILOCCO INDIAN SCHOOL* (Third Printing ed., 1995); RICHARD HENRY PRATT & DAVID WALLACE ADAMS, *BATTLEFIELD AND CLASSROOM: FOUR DECADES WITH THE AMERICAN INDIAN, 1867–1904* (Robert M. Utley ed., 2004). The lived experience of a century of boarding schools was more complicated, as they became also a place of Native survival. However, as Pratt's autobiography and some of the more critical histories like Adams and Churchill make clear, their intention was the extermination of children's "Indianness."

⁵⁶ See, e.g., Kim Tallbear, *Making Love and Relations Beyond Settler Sex and Family*, in *MAKING KIN NOT POPULATION: RECONCEIVING GENERATIONS* 145, 145–166 (Adele Clarke & Donna Haraway eds., 2018); Scott Lauria Morgensen, *Settler Homonationalism: Theorizing Settler Colonialism within Queer Modernities*, 16 *GLQ: A J. OF LESBIAN & GAY STUD.* 105–131 (2010); MARK RIFKIN, *WHEN DID INDIANS BECOME STRAIGHT?: KINSHIP, THE HISTORY OF SEXUALITY, AND NATIVE SOVEREIGNTY* (2010).

⁵⁷ See *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES*, *supra* note 4; Pauline Turner Strong, *To Forget Their Tongue, Their Name, and Their Whole Relation: Captivity, Extra-Tribal Adoption, and the Indian Child Welfare Act*, in

Indigenous communities used different tools to fight the use of the child welfare system than the Urban League. Rather than appeal to federal and state governments to treat their families fairly, they asserted a legal right to be left alone by demanding recognition of tribal sovereignty, and autonomous control of child welfare matters through tribal councils. Control over children became a fundamental issue in fighting the tribal Termination policy. In the 1950s, tribal nations used existing laws to demand that states cease policing their families, and by the late 1970s, began to petition Congress for a new law, the Indian Child Welfare Act (ICWA), that would relocate all Native child welfare matters to tribal courts, not state courts. It was a demand for autonomy from and self-determination in relation to a racist, anti-Native child welfare system. ICWA was finally passed by Congress in 1978 after years of hearings and lobbying. Since then, it has been the subject of unrelenting hostility by conservative groups like the Goldwater Foundation, which took a case to the Supreme Court as recently as 2013 that weakened ICWA, and a Texas attorney general who won a judgement in 2018 that the whole act was unconstitutional. While the Fifth Circuit ultimately reversed this holding, it is worth noting how fundamentally the effort of tribal nations to stand up to the states' child welfare systems continues to irritate conservatives and even many liberals.⁵⁸

RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES 468–93 (Sarah Franklin & S. Mckinnon eds., 2001); Pauline Turner Strong, *What is an Indian Family? The Indian Child Welfare Act and the Renascence of Tribal Sovereignty*, 46 AM. STUD. 205–31 (2005). See also, INDIAN FAMILY DEFENSE: A BULLETIN OF THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC, ISSUES 1–11, (1974), which detailed case after case.

⁵⁸ Emma Platoff, *5th Circuit upholds Indian Child Welfare Act as Constitutional, Reversing Lower Court*, TEX. TRIB. (Aug. 10, 2019), <https://www.texastribune.org/2019/08/10/5th-circuit-upholds-indian-child-welfare-act-constitutional-texas> [https://perma.cc/34CQ-Q3CG]. For a liberal critic, see Randall Kennedy, who writes:

ICWA's architects stressed the disparity between the numbers of non-Indian versus Indian children who were removed from the care of their biological parents . . . They did not negate the counterhypothesis that much of the purportedly 'racial' disparity was actually attributable not to individual discrimination but to some other cause—perhaps

Of all the Native nations that fought child removal, one of the earliest and most persistent was the Devil's Lake Sioux, known presently as the Spirit Lake Dakota. That nation took the state child welfare system to court repeatedly in the 1950s and 60s to resist losing their children to the foster care system in North Dakota.⁵⁹ They won an order from the state Supreme Court in 1963 that child welfare was to be adjudicated by tribal courts. Nevertheless, in 1968 state police came onto the reservation and arrested a grandmother, Mrs. Elsa Greywind, who stood in the doorway of her home to prevent a state welfare worker from taking her grandchildren and putting them in a white foster home. Another grandmother, Mrs. Fournier took her boy in her arms and refused to let go, even as the social worker grabbed him and tried to pull him away. Welfare workers took a child named Ivan Brown and placed him with a white foster family because they said that, at the age of 63, his grandmother was too old to be caring for a child. When social workers drove onto the reservation in their conspicuously new cars, children were hidden under beds, in the woods, or sent fleeing with their parents through the reservation's back roads.⁶⁰

Despite the courage and toughness of women like these, and the high value Native peoples placed on cultural survival, including especially through the rearing of children, tribal nations continued to lose children to state welfare agents. Welfare workers disparaged the f of reservations, and shamed mothers, especially grandmothers, who cared for children.

to the disproportionate impact of disease, unemployment, violence and family dysfunction on Native Americans

RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 498 (2003). In this, Kennedy is wrong. The many volumes of testimony for ICWA showed again and again that it was the particularities, not of "race," but of Native patterns of kinship and the conditions of reservation life themselves that were cited by case workers as they took children. Also, ICWA's architects did not rely on numbers in the 1974 or 1976 hearings on Indian child welfare; it was the failure of strategies of storytelling that pushed them toward relying on numbers in 1977.

⁵⁹ *AAIA and Devils Lake Sioux Protest Child Welfare Abuses*, INDIAN AFFAIRS, Aug. 1968.

⁶⁰ *Devil's Lake Sioux Resistance*, INDIAN FAMILY DEFENSE, Winter, 1974; MARGARET D. JACOBS, *A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD* 100 (2014); *The Destruction of Indian Families*, INDIAN FAMILY DEFENSE, Winter, 1974, at 1.

Spirit Lake tribal Chairman Louis Goodhouse went to the Association of American Indian Affairs, with whom the nation was working on another matter. They sent Bertram Hirsch, a young lawyer, to get Ivan Brown back to his grandmother. Over the months of filing motions and trying to extract Ivan from the white foster family, Hirsch went house to house and found that a quarter of the children born to families on the reservation were either in white foster or adoptive homes, or at off-reservation boarding schools. He continued gathering data until the mid-1970s, eventually producing the well-known statistic that 25 to 35% of Native children were in out-of-home care. He talked about the importance of understanding that this was a problem that was affecting a lot of people. When he began collecting statistics, he said:

Native people thought, ‘this is my problem. They didn’t know that the family a mile down the road . . . or over the next butte . . . was experiencing the same thing. Everybody was feeling shame about it and was not talking about it. They thought it was their own personal circumstance . . . So people kind of kept it to themselves and they did not seek out assistance from their own tribes.’⁶¹

Investigating further, he found that while Native people constituted less than 2% of North Dakota’s population, their children were 50% of the state’s foster population.⁶²

In 1968, a defiant Devil’s Lake Tribal Council passed a resolution prohibiting county officials from removing children from the reservation under any circumstances.⁶³ The county responded by halting all welfare payments to the tribe, despite a 90% unemployment rate, regardless of the fact that the money came, not from the state government, but from the Bureau of

⁶¹ JACOBS, *supra* note 60, at 103–04 (quoting Bertram Hirsch, interview by author, Sept. 30, 2011).

⁶² See Bertram Hirsch, Keynote Address, in *THE INDIAN CHILD WELFARE ACT THE NEXT TEN YEARS: INDIAN HOMES FOR INDIAN CHILDREN 18–26* (Troy R. Johnson ed., 1990); AAIA and Devils Lake Sioux, *supra* note 59; Devil’s Lake Sioux Resistance, *supra* note 60; Native American Training Institute, “30 Years of ICWA; Native American Training Institute,” conference poster, North Dakota (2008); William Byler, Sam P. Deloria & A. Gurwitt, *Another Chapter in the Destruction of American Indian Families*, YALE REPORTS [RADIO PROGRAM] (1973).

⁶³ Devil’s Lake Sioux Resistance, *supra* note 60.

Indian Affairs.⁶⁴ Over the next few years, another North Dakota group, the Three Affiliated Tribes (or Mandan, Hidatsa and Arikara Nation) of the Fort Berthold Reservation, and three Lakota tribal nations in South Dakota—the Sisseton-Wahpeton Sioux, the Standing Rock Sioux, and the Oglala Sioux—joined the organized resistance to state foster care. All five nations passed Tribal Council resolutions denouncing the manner and the rate at which Native children were being placed into off-reservation foster homes.⁶⁵

The AAIA, unable to find justice in North Dakota or in Washington, D.C., through the Bureau of Indian Affairs, sought to halt the taking of Native children by jumping scales: they took it to the foreign press at the height of the Cold War.⁶⁶ Greywind, Fournier, and three other women who had become activists for the nation's children at Spirit Lake—Alvina Alberts, Annie Jane DeMarce Leftbear, and Genevieve Hunt Longie Goodhouse—were at the press conference.⁶⁷ Although we don't remember their names alongside the icons of the Red Power movement like Russell Means (Oglala Lakota) or Dennis Banks, nevertheless, the movement for the defense of Native children that these women launched was critical not only to the futures of Native kids, but also to the defense of sovereignty of tribal nations, their ability to conduct their own affairs and control their land without interference from state governments. While the fight for legal respect for tribes as sovereign entities with rights enshrined in treaties and the unceded sovereignty of autonomous nations to govern their own people was—and is—an ongoing struggle, a minimal requirement of self-government was surely what most white households expect as a baseline: the freedom to raise their own children.⁶⁸ Where North Dakota sought to punish the Devil's

⁶⁴ 1961 U.S. CENSUS BUREAU, STATISTICAL ABSTRACT U.S., <https://www.census.gov/library/publications/1961/compendia/statab/82ed.html> (last visited Aug 12, 2019).

⁶⁵ *Tribes Act to Halt Abuses*, INDIAN FAMILY DEFENSE, Winter, 1974, at 7.

⁶⁶ The concept of jumping scales from the local to the national and transnational is Maylei Blackwell's; See MAYLEI BLACKWELL, *SCALES OF RESISTANCE: THE PRACTICE OF INDIGENOUS AUTONOMY IN THE AGE OF NEOLIBERALISM* (forthcoming).

⁶⁷ *AAIA and Devil's Lake Sioux*, *supra* note 59.

⁶⁸ The best-known statement of this un-seceded sovereignty is FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW: WITH REFERENCE TABLES AND INDEX* (1942).

Lake Sioux for their obstinate insistence on the right of the tribal nation to control the placement of their own children, these activists launched a political movement.

ICWA finally passed in 1978, after three sets of Senate hearings and the mobilization of Native communities, activists, and communication networks for a decade. Although it did not retroactively undo any adoptions that were already finalized, it contained procedural requirements that enshrined the notion of tribal sovereignty. Indian⁶⁹ child welfare cases were to be considered in tribal courts when children resided on the reservation. Even when children do not reside on the reservation state courts can, with good reason, exercise jurisdiction. There is a preference in the law for keeping Indian children with first, their own extended family, second, other members of their tribal nation, and third, other Native people. The Act sets the evidentiary standards higher than for non-Native children in dependency hearings or termination of parental rights. There is a requirement that the family be offered crisis intervention services before a child can be taken.⁷⁰

Throughout the 1970s and early 80s, the number of Native children in out-of-home care declined. The AAIA and tribal nations successfully fought back the incursions of state child welfare agencies. Since then, however, it has not always been clear that tribal child welfare agencies have been overwhelmingly better than state ones, any more than that the 1970s dream that putting more Black cops on the streets would end racist policing. Religious-right forces within tribal nations can be as harsh to single mothers coping with alcoholism or children dealing with sexual violence as state-run child welfare agencies ever were, and several decades later, it was not clear that even the numbers of Native children in out-of-home care

⁶⁹ This Article employs the term “Indian” or “American Indian” for the purposes of accuracy. These are legal terms in U.S. government policy. ICWA protects those defined as “American Indians,” but excludes many indigenous children (including those from Mexico, Canada, or Hawaii, or those from tribal nations recognized by states but not the federal government, or those from terminated tribes.)

⁷⁰ Indian Child Welfare Act, 25 U.S.C. §§ 1901–63.

have declined.⁷¹ By leaving in place what was still essentially a new framework—the permanent and legal alienation of parents from their children—the drafters of ICWA unintentionally handed tribal social services a vicious tool that continued its existence, ready to be activated. This reactivation occurred in the late 1980s, when an unfounded argument that fetal alcohol syndrome was blighting the futures of as many as a third of Native children created a moral panic about maternal drinking and harm to children.⁷² Its call for social services to support families in crisis was bureaucratic, and also unfunded, making it more of a remote promise than a realistic solution.

V. HISTORY'S LESSONS

Mid-20th century activists made a number of significant interventions that are worth thinking with. The National Urban League and religious and community groups in Louisiana articulated the principle of mutual aid to care for single mothers and children. Children and caregivers need rent money, food, and clothing that is not dependent on its donors' approval of family morality. Activists in Native and Black communities both

⁷¹ On conservative takes on mothers within Native communities, see, e.g., Elizabeth Cook-Lynn, *The Big Pipe Case*, in *READING NATIVE AMERICAN WOMEN: CRITICAL/CREATIVE REPRESENTATIONS* (Inés Hernández-Avila ed., 2005), about an alcoholic, parenting teen who lost her child and was referred by tribal agencies to the FBI for “felony child abuse” after breastfeeding while drunk and did time at Leavenworth; and the documentary, *Kind Hearted Woman*, (PBS & Frontline, 2013), about Spirit Lake authorities who placed two children with a father who sexually abused one of them, seemingly because he came from a high-status family (the BIA subsequently put the child welfare agency in receivership). The number of Native children in out-of-home care declined from 1974 until 1988, then rose to rates higher than before. See MARGARET PLANTZ, *INDIAN CHILD WELFARE: A STATUS REPORT: FINAL REPORT OF THE SURVEY OF INDIAN CHILD WELFARE AND IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT AND SECTION 428 OF THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980* (1988).

⁷² A book about Native children and fetal alcohol syndrome, MICHAEL DORRIS, *THE BROKEN CORD* (1989), a novelistic account that begins with the adoption of his son Adam, put it on the map as a national crisis. He is responsible for the claim that it affected one in three Native children, while other public health commentators put the figure one hundred times lower. See ELIZABETH M. ARMSTRONG, *CONCEIVING RISK, BEARING RESPONSIBILITY: FETAL ALCOHOL SYNDROME AND THE DIAGNOSIS OF MORAL DISORDER* (2003); JANET GOLDEN, *MESSAGE IN A BOTTLE: THE MAKING OF FETAL ALCOHOL SYNDROME* (2005). See also Elizabeth Cook-Lynn, *Review of The Broken Cord*, 5 *WICAZO SA REV.* 42–45 (1989), for a sharp response to Dorris's claims about the pathologies of Lakota peoples.

rejected the centrality of the nuclear family as a keystone of a “suitable” family. Lest this sound like an archaic problem, it bears noticing that when these questions were relitigated in the context of welfare reform in 1996, the preamble to that law centered on cutting off welfare to single mothers, starting with the words “[m]arriage is the foundation of a successful society,” and continuing with the supposed benefits of nuclear families to children (a principle reiterated in gay marriage cases, too). It also made it much easier for those who applied for welfare to lose their children.⁷³ The argument by advocates of ICWA that tribal communities have a right to be left alone by social workers who neither understand nor respect the forms that caregiving and kinship take was powerful. The rejection of compromise or reform was, for a decade, much more successful than the Urban League’s agreement with the federal government to reform what some have called, not a child welfare system but a “family regulation system.”⁷⁴

ICWA’s demand for freedom from this family regulation system represents one model of what it could mean to abolish the child welfare system, allowing communities to articulate varieties of forms of care for children. ICWA also extended to impoverished communities the form of child welfare enjoyed by white middle-class families when parents are in crisis—children go to extended family members or someone known to the parents, not to a stranger, or at the very least, someone culturally similar to the parents. Tribal nations also demanded that foster care and adoption not be used in place of decent wages or other support for

⁷³ Pub. L. No. 104-193 (1996). The most striking gay marriage case claiming the supposed benefits of marriage to children is the *Windsor* case—striking because it was a tax case involving a childless couple, so Justice Kennedy, writing for the majority, had to work hard to get to an argument that the absence of federal recognition of gay marriage “humiliates children.” *United States v. Windsor*, 570 U.S. 744 (2013).

⁷⁴ Erin Miles Cloud, *Toward the Abolition of the Foster System*, 15 S&F ONLINE (2019), <https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system> [<https://perma.cc/4L9F-WFKH>] (last visited Feb 17, 2021); Michael Fitzgerald, *Rising Voices For ‘Family Power’ Seek to Abolish Child Welfare System*, IMPRINT, (July 8, 2020) <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141> [<https://perma.cc/R2QA-Q372>]; Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020) <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/7F24-37TQ>].

poverty alleviation, as many case workers in the 1960s seemed to believe. Louisiana's activists enacted the principle of temporary supports for families in crisis, choosing rent parties (a social event where attendees contribute to help pay another's rent) and community kitchens for households with children facing homelessness or other adversity, such as grave illness, substance use disorders, sexual and domestic violence, rather than incarceration, or child taking. If these mid-century movements missed anything, we might say it was feminism and a reproductive justice politics that articulated an analysis of the feminization of poverty and violence to say why so many unmarried mothers lacked the resources they needed to safely raise their children. Still, they got a lot right. And that is worth paying attention to in this crucial moment.