Domestic Violence, the Indian Child Welfare Act, and Alaska Natives: How Domestic Violence is Weaponized Against Alaska Native Survivors

Sumaya H. Bouadi†

ABSTRACT: After the forced separation of Indian families, Congress passed the Indian Child Welfare Act (ICWA) to create heightened procedural protections to maintain and preserve Indian families. Following Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013), courts have indicated concern that the heightened standards of ICWA may be overbroad and harm Indian children. This Note provides an empirical counter to that concern, illustrating that, under similar circumstances, Alaska Native parental survivors of domestic violence lose custody of their children at considerably higher rates than non-Alaska Natives. The continued disparate treatment suggests that ICWA continues to serve an important purpose in protecting Indian families and ought to be strengthened.

INTRODUCTION ........................................................................................................................................ 170
I. STANDARDS FOR THE TERMINATION OF PARENTAL RIGHTS ................................................. 172
   A. In General ....................................................................................................................................... 172
   B. Requirements for Termination of Parental Rights under ICWA ............................................. 174
II. METHODOLOGY ................................................................................................................................. 175
III. ANALYSIS ........................................................................................................................................ 176

   Christina J.: Risk of Domestic Violence in Termination of Parental Rights ......................................... 176
   Charlotte: Leaving the Abuser, Gaining Custody ............................................................................. 178
   Andrea C.: Abuse and Custody ........................................................................................................... 180
   Claire W.: Substance Abuse and Domestic Violence, Sparse Facts............................................ 183

III. ICWA AND NARRATIVES OF TRAUMA ...................................................................................... 183

   Narratives of Domestic Violence in the Alaska Native Community ................................................ 184

CONCLUSION ......................................................................................................................................... 186

† Yale Law School, J.D. (2021); University of Chicago, B.A. (2015). I am grateful to Jishian Ravinthiran and Caroline Lawrence for their assistance in editing and proofreading, as well as Porter Nenon, Alexis Kallen, Sonia Qin, Chelsea Thompson, Bianca (B.) Rey, Kataey Wooten, and the other editors at the Yale Journal of Law and Feminism for their work on this Note.

Copyright © 2021 by the Yale Journal of Law and Feminism
INTRODUCTION

In the aftermath of *Adoptive Couple v. Baby Girl*, many have been written on the Indian Child Welfare Act (ICWA) and the hypothetical risk that ICWA poses to Indian children. In particular, many claim to be concerned about the risk that ICWA may put the interests of the tribe “over the best interests of the child.” These arguments suggest that ICWA results in Indian parents maintaining custody at higher rates than non-Indian parents. However, at least within Alaska Native termination hearings that involve allegations of domestic violence, the opposite holds true. In numerous cases, under similar facts, Alaska Native domestic violence survivors face the termination of their parental rights, while non-Indian survivor parents do not. This disparate treatment both violates ICWA and indicates that the heightened standards of ICWA do not result in harm to Indian children relative to non-Indian children. Contrary to Justice Alito’s hystericis on the dangers of the “ICWA trump card,” ICWA has thus far failed to equalize the treatment of Indian parents and non-Indian parents. Despite the additional statutory protections of ICWA, Indian families still face separation at higher rates than non-Indian families, even in cases with nearly identical facts. Rather than being undermined, ICWA ought to be strengthened.

ICWA, passed in order to prevent the dissolution of Indian families, establishes heightened standards and scrutiny for separation of Indian families. Among its provisions, it gives tribal courts exclusive jurisdiction over any custody case that involves an Indian child who is domiciled or resides within the boundaries of a reservation, or is a ward of the tribe. If an Indian child is not domiciled within the reservation, tribal courts have concurrent jurisdiction with state courts, and the tribal court may intervene in state custody hearings. Under

---

4. Throughout the course of this paper, I will be using the terms “Indian” and “Alaska Native.” The term “Indian” is a legal term that is unique to an individual who is an enrolled member of a tribe; therefore, someone could have Native American heritage, but not be considered “Indian.” Similarly, when I use the term Alaska Native, I am referring to an individual who is recognized as such by their tribe and the United States government. Due to systemic purging of enrollment rolls, many individuals who have Native American heritage or Alaska Native heritage may not be considered as “Indian” or “Alaska Native.” When I am speaking about Native Americans generally, and not within the federal government’s construct, I will use the term “Native American.” In drawing these distinctions, I remain aware of the ways in which the federal government has interfered in the sovereignty of tribes to select their members.
7. *Id.* at § 1911.
ICWA, a child is considered an “Indian child” if the child is unmarried, under eighteen, and “either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”8 In order to terminate the parental rights of an Indian parent over an Indian child, “evidence beyond a reasonable doubt … [must support] … that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”9

Despite the heightened procedural and evidentiary protections that ought to be applied to cases of Indian children, Alaskan courts frequently perceive domestic violence inconsistently across termination cases of Indian and non-Indian children. Children’s exposure to domestic violence is frequently used as a justification to terminate custody of the non-abuser Indian parent, especially if the abusive parent has a history of engaging in domestic violence. However, in cases of a non-abuser non-Indian parent, exposure to domestic violence is rarely used as justification for removal of custody of the non-abuser parent, and abuser parents can receive custody of the children, despite their prior record of abuse.

This disparate application runs counter to the intention of ICWA, which was to enforce additional protections in the specific cases of Indian children. The United States government forcibly separated Indian children from their parents and communities, and ICWA served as a response to this history of forced separation and the deep harm that it caused to the tribes and individuals.10 Against the backdrop of this troubled history, the disparate use of domestic violence in taking away Indian children demonstrates the limitations of ICWA.

This Note will begin by establishing the standards for the termination of parental rights, which are higher for Indian parents than non-Indian parents under ICWA. After establishing these standards, the Note turns to a comparative analysis of termination of parental rights cases, all of which involve domestic violence. In order to engage in this comparative analysis, all available Westlaw cases (150) which cited Alaska Statutes 47.10.088 (involuntary termination of parental rights) and mentioned domestic violence were read and analyzed in order to ensure an accurate, unbiased understanding. The Note then uses a representative set of cases from this survey to illustrate that, under very similar facts, Alaska Native survivors are disproportionately more likely to lose custody

---

8. Id. at § 1903.
9. Id. at § 1912.
10. See, e.g., To Establish Standards for the Placement of Indian Children in Foster or Adoptive Homes, To Prevent the Breakup of Indian Families, and For Other Purposes: Hearing on S. 1214 Before the S. Comm. on Indian Affairs, 95th Cong. 154-61 (1977) (statement of Calvin Isaac, National Tribal Chairman’s Association) [hereinafter Senate Hearing 1977]; Problems That American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearing Before the S. Subcomm. on Indian Affairs, 93rd Cong. 40-51 (1974) (statement and submission of Bertram Hirsch, Staff Attorney, Association on American Indian Affairs) [hereinafter Senate Hearing 1974].
of their children than non-Alaska Natives, despite ICWA. This Note concludes by discussing the underlying trauma that led to the creation of ICWA and that continues to be perpetrated on Indian families by the state separation.

I. STANDARDS FOR THE TERMINATION OF PARENTAL RIGHTS

Termination of parental rights in Alaska is a difficult task, as courts and legislators have created a series of protections for parental rights. In general, any individual having their parental rights terminated is entitled to due process, and the child must be found need of aid. ICWA requires evidence in favor of termination beyond a reasonable doubt, rather than the lower clear and convincing evidence standard for non-Indian termination cases in Alaska. Furthermore, ICWA requires the state to engage in active efforts to keep the family intact, which is not required in non-Indian termination cases.

A. In General

The procedural protections for the termination of parental rights, regardless of ICWA, are significant. The Supreme Court has established that “freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.” Santosky v. Kramer rejects the use of a fair preponderance of the evidence standard for termination of parental rights, determining that the standard violates the Due Process clause of the Fourteenth Amendment. Lassiter further clarifies the strength and importance of parental rights, claiming that “[it is] now made plain . . . that a parent’s desire for and right to ‘the companionship, care, custody and management of his or her children’ is an important interest that ‘undeniably warrants deference and . . . protection.’” Due process requires that “parents will not be separated from their children without due process of law except in emergencies.”

12. Compare Indian Child Welfare Act of 1975, 25 U.S.C. §§ 1912(f) (2018) (“No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt . . .”) with Alaska Stat. § 47.10.088 (2015) (“[T]he rights and responsibilities of the parent regarding the child may be terminated for purposes of freeing a child for adoption or other permanent placement if the court finds by clear and convincing evidence . . .”).
To terminate parental rights, a child must be found “in need of aid.”17 Under Alaska law, the only consideration of domestic violence in finding a “child in need of aid” is whether they have been exposed to “conduct by or conditions created by the parent . . . placed the child at substantial risk of mental injury as the result of . . . exposure to conduct by a household member . . . against another household member that is a crime” under Alaska Stat. §§ 11.41.100–11.41.220.”18 Alaska Stat. §§ 11.41.100–11.41.220 list a variety of violent crimes, from homicide to assault in the third degree. Reckless endangerment and stalking are excluded, as is assault in the fourth degree. However, assault in the fourth degree is included as grounds for mandating that a child is in need of aid in the case of “repeated exposure.”19 The definition of repeated exposure is unclear and can range from daily abuse20 to “multiple reports”21 to an unclear number of incidents, with only one involving a police response.22

In order for the court to involuntarily terminate custody of a child, the court must find:

[C]lear and convincing evidence that the child has been subjected to conduct or conditions described in AS 47.10.011; the parent has not remedied the conduct or conditions in the home that place the child at substantial risk of harm or has failed, within a reasonable time, to remedy the conduct or conditions in the home that place the child in substantial risk so that returning the child to the parent would place the child at substantial risk of physical or mental injury; and the department has complied with the provisions of AS 47.10.086 concerning reasonable efforts.23

Reasonable efforts consist of the Office of Children’s Services (OCS) “identif[y]ing the family support services that will assist the parent . . . actively offer[ing] the parent or guardian, and refer[ing] the parent or guardian to, the services identified . . . [and] document[ing] the department’s actions.”24 Mental injury, which frequently arises in the discussion of the effects of domestic violence, must be “evidenced by an observable and substantial impairment in the child’s ability to function in a developmentally appropriate manner.”25 Furthermore, testimony of a qualified expert witness is required to support the

---

17. ALASKA STAT. § 47.10.011 (2015).
19. Id.
23. ALASKA STAT. §47.10.088 (2015).
24. Id.
contention of mental injury. 26 At minimum, the child must demonstrate a serious, overt behavioral or emotional problem. 27

B. Requirements for Termination of Parental Rights under ICWA

ICWA, enacted in response to the “consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement,” 28 increases procedural safeguards for the termination of parental rights, as well as adoption and placement proceedings, of Indian children. 29 ICWA requires evidence beyond a reasonable doubt, rather than clear and convincing evidence, for the termination of parental rights, as well as active efforts, rather than passive efforts, on behalf of family reunification. 30 Active efforts “require that the state actually help the parents develop the skills required to keep custody of the children.” 31 Active efforts must be evaluated on a case-by-case basis, but “[a]ctive efforts generally entail a social worker taking a parent through the steps of a reunification case plan, rather than simply devising a plan and requiring the parent to develop the necessary resources.” 32 However, the Court may take into account the parent’s willingness to cooperate in determining if OCS has met this burden. 33

Thus, ICWA generally presents significantly higher burdens of evidence, OCS effort, and procedural safeguards than non-ICWA proceedings. On its face, this would suggest that Indian parents would maintain custody in cases in which non-Indian parents may not, or, at a minimum, that all parents would be held to the same standards. The Congressional record strongly supports the proposition that ICWA was enacted to establish a higher standard of protection for Indian children. 34 However, Alaska courts frequently use the specter of domestic violence in order to terminate custody of Indian parents, though they do not do so for non-Indian parents, suggesting that despite the higher standard, more efforts are still needed.

26. Id.
29. Id.
34. See generally Senate Hearing 1977; Senate Hearing 1974; 123 CONG. REC. 21,042-44 (June 27, 1977).
II. METHODOLOGY

In order to provide a representative sample of cases of parental termination hearings and domestic violence in Alaska, a set of rules was established to ensure that no data-mining occurred and provide a comprehensive overview of available cases. These searches were run in Westlaw, and thus may be limited by the depth of the database. The first search was for “domestic violence” and not “Indian” in Westlaw, limiting to cases that cited Alaska Stat. 47.10.088 (involuntary termination of parental rights). This search resulted in 56 cases. In two cases, parental rights were partially terminated due to a history of domestic violence.\footnote{See Simone H. v. State, 320 P.3d 284, 287 (Alaska 2014) (affirming termination where the trial court found that the child “was … in need of aid due to: (1) Simone’s history of violent relationships and her failure to seek medical attention for Irving following the bicycle accident; (2) Simone’s history of relationships involving domestic violence; (3) Simone’s history of substance abuse and failed attempts at treatment; and (4) the combination of Simone’s mental illnesses, her inconsistency in taking her prescribed mental health medication, her abuse of substances, and her continued participation in abusive relationships.” However, the case plan for Simone did not seem to involve domestic violence classes.); Barbara P., 234 P.3d at 1258 (in which the trial court found that Barbara experienced domestic violence, finding Barbara’s denial of violence not credible; the subsequent termination of parental rights, however, was only partially based on this finding of violence. Furthermore, the court did not discuss Barbara’s history of violent relationships, and used domestic violence to terminate the rights of the couple as a unit, rather than Barbara individually, stating that “[t]his evidence supports a finding that Leo’s acts toward Barbara created a significant risk of mental injury to the children if they had been placed with their parents.”).} However, each one of these cases involved only a minimal discussion of domestic violence in the justification for the termination of parental rights. The second search was for “domestic violence” and “Indian” in Westlaw, limiting to cases that cited Alaska Stat. 47.10.088 (involuntary termination of parental rights). This search resulted in 94 cases.\footnote{Although I dislike using simple empirical comparisons of number of cases, as numerous uncontrolled for factors implicate the types of cases that are reported and make it up through the court system, it is worth noting that there are significantly more Indian than non-Indian cases, especially given that the Indian population is smaller than the non-Indian population in the state of Alaska.} Three cases suggested that the parental rights of the abuser’s partner were not terminated, all of which were prior to 2002.\footnote{T.D.W. v. State, No. S-10177, 2002 WL 863289, at *1 (Alaska May 1, 2002) (T.D.W is an Indian parent, who assaulted his first partner, K.S, while she was pregnant with their child, T. He was arrested and ordered to have no contact with K.S. He later dated and also beat J.C., resulting in her hospitalization. They had a mutual child, D. T.D.W. was ordered to have no contact with J.C. His and K.S.’s parental rights to T were terminated, while J.C. maintained her parental rights to D. T.D.W’s parental rights to D. were also terminated. It is unclear from the facts of the case if J.C. is an Indian parent, though both children are Indian children.); K.B. v. State, No. S-9822, 2001 WL 34818265, at *1 (Alaska July 18, 2001) (K.B. has five children with R.S. There was a minimal discussion of domestic violence in this case, although both K.B. and R.S. were mandated to take domestic violence classes. K.B.’s parental rights were terminated, while R.S.’s were not).} In all other cases—91 in total—the parental rights of either the abuser or the partner of the abuser were terminated.
III. ANALYSIS

The following cases offer representative examples of the results of this search, and illustrate that, despite the promise of ICWA, disparate treatment continues to harm Indian parents in termination hearings, resulting in the state separation of Indian families.

Christina J.: Risk of Domestic Violence in Termination of Parental Rights

The case of Christina J. is enlightening as well as disturbing.38 Christina was taken away from her parents’ home by OCS at the age of eleven or twelve, and placed into foster care. She started drinking at that age, and transitioned in and out of foster care throughout her childhood.39 At eighteen, Christina began dating Damian, age twenty-eight. He assaulted her throughout their relationship, including during her pregnancy with their first child, Gideon. Damian was convicted for fourth degree assault.40

Christina and Damian reconciled, and Damian’s violence towards Christina decreased, but did not completely abate. OCS received a domestic violence report on April 14, 2009, and worked with Christina and Damian to develop an informal safety plan.41 Under the plan, Christina and Damian would live with Karen, Christina’s former foster mother while in Fairbanks. However, Christina did not spend more than a year living with Karen prior to this informal plan, and understood the plan to ban her from returning to Venetie, where Ronda, Damian’s mother, lived.42

The record is not clear about where Christina lived immediately after the creation of the plan. What is clear, however, is that Gideon remained with Karen. Damien then took Gideon from Karen, who contacted OCS. During this time, Christina experienced post-partum depression, which led to alcohol misuse, a suicide attempt, hospital stay, and an attempt to move Christina and Gideon into a shelter. OCS found both parents intoxicated in a hotel and took away Gideon, who was mildly dehydrated but otherwise unharmed.43 OCS then successfully filed a petition for temporary custody. Gideon was placed with Ronda initially, but eventually placed in a foster home in North Pole. OCS developed a plan for Christina, which included substance abuse assessments, attending a Level III residential treatment program, and domestic violence awareness classes. Later in the process, OCS required Christina to participate in a victim-focused program.
(a program intended to teach victims of domestic violence to counter patterns of abuse). 44 Five months after Gideon was taken into OCS custody, OCS changed their goal from reunification or adoption to solely adoption.

One of the factors that OCS listed as placing Gideon at risk was “domestic violence in the family home” and that Christina “failed to remedy the . . . domestic violence issues that led OCS to take custody of Gideon.” 45 The superior court categorized Christina’s struggles with domestic violence as “on the domestic violence front, [she] did virtually nothing.” 46 This characterization was apparently based on Christina’s minimal attendance of the Changing Patterns domestic violence treatment program, and continuing her relationship with Damien. 47 The Alaska Supreme Court noted the “risk that [Christina] will continue to be involved in violent relationships.” 48 Further, the court states that “[t]o the extent that Christina has not addressed the underlying factors that made her a victim of domestic violence and may even be involved with her abuser, she has failed to remedy the conditions placing Gideon at risk.” 49 Although Christina J.’s termination of parental rights was not solely based on her continued relationship with her abuser, domestic violence played a significant role in the termination of her parental rights.

The case of Christina J. is not unique. 50 Margot B. entered into a relationship with Ryan. They shared a child who was taken by OCS due to domestic violence concerns. Margot complied with her case plan and completed Mental Health Court, although after completing her requirements, she only sporadically visited her therapist. Ryan and Margot lived apart but saw each other several times a week and remained a couple. The court stated that “Margot failed to demonstrate that she had internalized the harms of domestic violence to the children despite counseling.” 51 A pattern of “remaining in an abusive relationship” is frequently

44. Id. at 1101.
45. Id. at 1104.
46. Id. at 1105.
47. Id. at 1106.
48. Id.
49. Id.
50. See Margot B. v. State, No. S-16318, 2017 WL 1102975, at *2 (Alaska Mar. 22, 2017); see also Casey K. v. State, 311 P.3d 637, 640 (Alaska 2013) (“The court found that Cheyenne needed permanency, which Casey was unable to provide to her; that there was no evidence that Casey was going to change her behavior, and ‘without change, the best predictor of future behavior is past behavior.’”); Cara G. v. State, No. S-14638, 2012 WL 3764417, at *10 (Alaska Aug. 29, 2012) (“Given Philip’s history of violence and Cara’s inability to end their relationship, the superior court did not commit clear error by finding that returning Joey and Jeremiah to Cara’s custody would be likely to cause serious harm to the children.”); Iris R. v. State, No. S-14204, 2011 WL 4715212, at *3 (Alaska Oct. 5, 2011) (“There is also ample evidence in the record to support the superior court’s finding beyond a reasonable doubt that return of the children to Iris’s care would likely result in serious damage to the children. Iris had been involved in numerous domestic violence situations.”).
cited as one of the reasons for removal of custody, as is failure to complete a domestic violence class, and perceived lack of understanding of the harms of domestic violence.

Charlotte: Leaving the Abuser, Gaining Custody

Charlotte represents the rare Indian survivor of domestic violence who maintained custody of her children. The details of the case are similar to that of Christina J.; Charlotte was assaulted while pregnant by her partner, Victor, who ultimately plead to and was convicted of assault in the fourth degree. After a long-standing pattern of abuse, Charlotte ultimately left Victor, and testified that she “thought domestic violence was normal while growing up but now understands that it is not. . . . [S]he does not plan on continuing a relationship with Victor because she realizes that their relationship was unhealthy due to their history of domestic violence.” Although OCS petitioned for the termination of Charlotte’s parental rights, they ultimately failed. Although the exact details are unclear, it is likely that Charlotte’s attendance of domestic violence classes, compliance with her case plan, and ending of her relationship with Victor led the court to decide that “her continued custody of Nora would not result in serious emotional or physical damage to the child.”

However, Charlotte’s case is in many ways the exception that proves the rule. Firstly, the details of her case are found in the context of the hearing for termination of Victor’s parental rights. Furthermore, the court focuses on Charlotte’s understanding of the harms of domestic violence using her ability to leave the violent relationship as evidence of her understanding of these harms. The court’s reliance on the survivor of domestic violence leaving their abuser is particularly concerning due to the number of times it often takes an individual to leave their abuser, as well as the risk in doing so. Leaving an abusive relationship

52. Casey K., 311 P.3d 637 at 641 (“[S]he continued to associate with past partners who had been accused of committing domestic violence.”).
53. See, e.g., Sarah G. v. State, No. S-14804, 2013 WL 1390732, at *6 (Alaska Apr. 3, 2013) (“Sarah refused to complete a domestic violence class.”); Barbara P., 234 P.3d at 1250 (Alaska 2010) (“She had begun attending domestic violence classes with AFS but believed she had to stop taking those classes after she was asked to leave the shelter in December 2006. By mid–2007 she had not resumed the classes.”).
54. See, e.g., Margot B., No. S-16318, 2017 WL 1102975 at *2 (“On cross-examination, Margot could not explain why domestic violence was harmful for the children: ‘Because it just isn’t. . . . I don’t know how to explain it. It’s just — it’s just not good for the kids, I guess’. . . Margot demonstrated only a ‘fleeting’ understanding of how domestic violence affects children.”); Iris R., No. S-14204, 2011 WL 4715212 at *4 (“The superior court also relied on the expert testimony of Shelly Gomez, OCS family services supervisor, who testified that Iris does not acknowledge any understanding of how domestic violence incidents may have affected her children.”).
56. Id. at *2.
57. Id. at *3.
can be one of the most dangerous times in a survivor’s life.\textsuperscript{58} By requiring that
an individual leave their abuser in order to maintain custody of their children, courts are placing Indian survivors of violence in the position to decide between risking their own lives or losing custody of their children. In many cases, even if the survivor does leave their abuser, their past history of being involved in violent relationships is often sufficient for the court to determine that they still pose a risk to their children.

An example of this situation can be found in the case of Cara G.\textsuperscript{59} Cara G. entered into a relationship with Joseph and had a child with him. Joseph abused Cara physically and emotionally. Cara then became pregnant with another child, fathered by Philip. Philip had a prior conviction for assaulting a child from a previous relationship.\textsuperscript{60} Philip eventually began physically assaulting Cara. Cara also suffered from problems with alcohol abuse. However, Cara followed her case plan and successfully completed the first step of her outpatient treatment program. The counselor at her recovery center testified that Cara was “actively ‘engaged in changing her current lifestyle’ and . . . going through the 12 steps of recovery . . .”\textsuperscript{61} Cara lived apart from Philip and had separated from him as a romantic partner. In fact, an OCS employee testified that she was “unaware of any current incidents of domestic violence.”\textsuperscript{62}

Despite these improvements, the court found that Cara was “likely to continue associating with unsafe partners.”\textsuperscript{63} Despite leaving Philip, she remained good friends with him, which the court took as sufficient evidence. The court further used the fact that Cara “remain[ed] in a relationship with Joseph for years, despite repeated incidents of domestic violence” as evidence that she was likely to continue to engage in violent relationships. No mention is made of the fact that Cara eventually ended her relationship with Joseph as evidence that she could leave unsafe partners. Furthermore, although Cara testified that she had ended her romantic relationship with Philip, which OCS supported, the court stated that Cara was unable to end the relationship.\textsuperscript{64}

\begin{itemize}
\item \textsuperscript{59} Cara G., No. S-14638, 2012 WL 3764417.
\item \textsuperscript{60} Id. at *2-3.
\item \textsuperscript{61} Id. at *6.
\item \textsuperscript{62} Id. at *7.
\item \textsuperscript{63} Id. at *10.
\item \textsuperscript{64} Id.
\end{itemize}
Thus, even in cases when domestic violence survivors leave their abusers, their history of engaging in violent relationships is often used by the courts as evidence that they will continue to engage in violent relationships. Courts appear to view Indian women leaving their abusive partners as a temporary situation, rather than a serious change, and it is a rare case in which leaving the partner is sufficient to remove the threat of domestic violence in the judgement of the court. Consistently, judges question the judgment and doubt the word of Alaska Native women, even as non-Native women are believed and given second chances.

**Andrea C.: Abuse and Custody**

In the case of Andrea C., a non-Indian parent, the court does not provide the detailed personal history of the parent.\(^{65}\) However, the notes that the court does provide paint a concerning picture. Andrea C. divorced her husband, Marcus, who had a “history of domestic violence.”\(^{66}\) However, despite this history of domestic violence, he eventually gained physical and legal custody of the children.

Prior to this custody dispute, Andrea attempted to get OCS involved in their children’s (Daniel and Bryson’s) lives. Andrea filed a report with OCS, claiming that Marcus kicked a barbeque grill at Daniel.\(^{67}\) OCS chose not to intervene, citing a lack of evidence. Bryson reported Marcus choking him, which Daniel contradicted, stating that Marcus did not choke him, but instead “had ‘grabbed [him] by the shirt, held him back against a wall, and yelled at him.’” The superior court found that Marcus did not commit domestic violence against Bryson or Daniel.\(^{68}\)

However, the superior court noted that both parents had emotionally abused the children, and that Andrea was the primary abuser.\(^{69}\) Ultimately, the superior court gave Marcus sole legal custody and primary physical custody and awarded Andrea physical custody for “seven consecutive weeks in the summer and over certain holidays.”\(^{70}\)

The case of Andrea and Marcus is not unique. Another case of a non-Indian survivor of abuse not losing her custody rights is that of Kylie L.\(^{71}\) Kylie’s partner, Kurt, threw a glass bottle at Kylie’s head, and missed, injuring Belinda, Kylie’s child.\(^{72}\) Kylie then entered into a second abusive relationship, in which

\(^{66}\) Id. at 523.
\(^{68}\) Id. at *5.
\(^{69}\) Andrea C., 355 P.3d at 523.
\(^{70}\) Id. at 524.
\(^{72}\) Id. at 445.
she “had difficulty accepting that [her partner] was dangerous.”\textsuperscript{73} Belinda was burned with a cigarette in Kylie’s custody, an incident which Kylie “minimized.”\textsuperscript{74} Kylie then resumed contact with Kurt, her original abusive partner. However, the decision terminating Kylie’s parental rights was vacated on the basis of insufficient efforts by OCS.\textsuperscript{75} The record does not involve a discussion of domestic violence in the petition to terminate parental rights.\textsuperscript{76} Contrasting this case with that of Cara G. is jarring. Cara left her abusive partners but was deemed to be at-risk of returning and denied custody; Kylie continued her relationship, and yet maintained custody.

Often, even if the non-Indian parent does lose parental rights, the justification for termination of non-Indian parental rights does not center on the discussion of domestic violence. For example, Trina and Wyatt were involved in numerous “domestic violence incidents” and both suffered from substance abuse problems.\textsuperscript{77} Trina remained with Wyatt, who had a history of domestic violence. Her parental rights were ultimately terminated, but the justification given by the court rested exclusively on her substance abuse, not domestic violence.\textsuperscript{78}

Thus, to the degree that exposure to domestic violence is used as justification for the termination of non-Indian parental rights, it often co-occurs with other allegations. Bernadette K. suffered emotional and physical abuse at the hands of her partner, against whom she filed numerous domestic violence protective orders.\textsuperscript{79} However, the termination of her parental rights included a single reference to domestic violence, sandwiched between two other sentences that pointed to Bernadette’s neglect:

[A]fter OCS took custody of the children, she repeatedly minimized the gravity of the situation. For example, she dismissed a report of sexual abuse, telling an OCS caseworker that “whoever made the report[ ] should be in jail because they’re creating more problems.” The same OCS caseworker testified that Bernadette minimized the impact of domestic violence on the children, denying “that the neglect or the domestic violence had anything to do with the kids [being] in custody.”

\textsuperscript{73} Id.
\textsuperscript{74} Id. at 446.
\textsuperscript{75} Id. at 450-1.
\textsuperscript{76} Id.
\textsuperscript{77} Wyatt W. v. State, No. S-16628, 2018 WL 473153, at *6 (Alaska Jan. 17, 2018); see also Joy B. v. State, 382 P.3d 1154, 1156 (Alaska 2016). Joy B. and here children were subjected to “extreme abuse and torture” by her prior partner, Drake. Joy fled to Alaska along with her children. Due to these reports of domestic violence, OCS intervened and assumed custody of the children. Joy was not referred to any domestic violence assistance programs, and refused to cooperate with OCS. Her parental rights were terminated due to abandonment.
Bernadette testified at trial that Yasmine’s teeth were “pretty good” despite overwhelming evidence to the contrary.\textsuperscript{80}

The case of Sherry R. provides a useful contrast to the cases of Indian women discussed above.\textsuperscript{81} Sherry R. was involved in numerous physically violent relationships, with the court describing domestic violence as a “significant factor in Sherry and her children’s lives.”\textsuperscript{82} Many of her prior relationships were abusive, and her relationship with David, the father of her children, included him beating her on numerous occasions. After ending her relationship with David, she entered into two more violent relationships, one with Jerry, who had been convicted of sexual abuse of a minor.\textsuperscript{83} During the termination trial, Sherry continued to be seen with Jerry, although the status of their relationship was unclear.

However, despite this fact pattern that could easily be characterized as a “pattern of violent relationships,” as in the cases of Margot B., Cara G., Casey K., and Christina J., the court does not mention her history of violent relationships in justifying the termination of her custody. The expert witness, Dr. Cranor, characterized the domestic violence within their household as “a home where the adults argue frequently and where there may be physical fights, it is difficult to maintain the routine that the children need.”\textsuperscript{84} Dr. Cranor’s great concern regarding Sherry’s relationships was that “Sherry might focus on her relationship with her boyfriend to the detriment of the children’s needs.”\textsuperscript{85}

The record does not suggest that Sherry was mandated to attend domestic violence classes, nor does the court discuss the impression that Sherry did not understand the “impact of domestic violence on her children” — narratives that are frequently invoked in the cases of Alaska Native women. This stark difference in treatment represents a consistent pattern in which Alaska Native women are assumed not to understand facts that their non-Native counterparts do. Because of judicial distrust, Alaska Native survivors have their parental rights terminated in cases where non-Alaska Native survivors would not, despite the heightened scrutiny that ICWA requires.

\textsuperscript{80} Id. at *4; see also Jordan J. v. State, No. S-15631, 2015 WL 1985060, at *5 (Alaska Apr. 29, 2015) (who engaged in “multiple relationships with sex offenders”).

\textsuperscript{81} Sherry R. v. State, 74 P.3d 896, 901 (Alaska 2003).

\textsuperscript{82} Id. at 900.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 901.

\textsuperscript{85} Id.
Claire W.: Substance Abuse and Domestic Violence, Sparse Facts

On its face, the case of Claire W., a non-Indian woman, looks rather similar to that of Christina J.\(^{86}\) Similar to Christina, Claire suffered from substance abuse and domestic violence.\(^{87}\) However, Claire was found to have abandoned/neglected her children.\(^{88}\) Unlike in Christina’s case, the court does not provide a detailed description of her childhood or of the domestic violence incidents alleged. One of the reasons for termination was Claire’s failure to complete a program regarding the impact of domestic violence within the home.\(^{89}\) However, the sparse record regarding Claire’s life and the minimal discussion of domestic violence within the reasons for termination (particularly within the discussion of mental injury) illustrate a broader point: the narratives regarding Alaska Native women and domestic violence are detailed to the point of near-absurdity, often going far back into their childhoods. This phenomenon does not seem to occur in the cases of non-Alaska Native women. Even when the outcomes of the case are the same—the termination of parental rights—the narrative surrounding the termination is radically different. This phenomenon may arise out of a desire to detail a culture perceived as “foreign” by the judiciary or to provide a more detailed backdrop that reaffirms the idea that Alaska Native women cannot escape their cycles of abuse.

III. ICWA and Narratives of Trauma

As discussed above, ICWA constructed a heavier burden for the state in proceedings involving the termination of parental rights of Indian children. This burden ought to protect Indian families from the forcible removal and breakup of families that has been seen throughout the residential schools era. Though Alaska courts may be following the letter of the law in ICWA, the way in which courts use domestic violence against Indian parents—particularly against Indian parent-survivors of domestic violence, rather than against the abusers—is a significant deviation from the principles and proper practice of ICWA. Indian families are separated in ways that non-Indian families are not, continuing the racist tradition of the residential schools.

\(^{87}\) Id. at *2.
\(^{88}\) Id.
\(^{89}\) Id. at *3.
Narratives of Domestic Violence in the Alaska Native Community

Given the deep amount of detail and time dedicated to describing the troubled childhoods of Alaska Native women who suffer from domestic violence, as well as the detail paid to the exact incidences of the violence, it seems probable that Alaskan courts are operating under a specific paradigm that views Native domestic violence as an intractable problem in which the burden of proof falls upon the Native women to show that they have escaped. It is empirically true that Alaska Native and American Indian women experience domestic violence at disproportionately high rates. However, the causes for this empirical differential are varied, including poverty, alcoholism, the remoteness of their communities, and intergenerational trauma.

The (unnamed) narrative of intergenerational trauma, in particular, appears frequently in court descriptions of termination proceedings against Alaska Native women. The detailed descriptions of troubled childhoods, drinking at a young age, substance abuse, and prior violent histories could be seen as an attempt to acknowledge the extreme difficulty the Alaska Native population faces; on the other hand, these could simply be gratuitous descriptions of violence leveraged in order to justify disparate treatment.

Evidence suggests that alcohol consumption is much lower in Alaska Native communities than prior research indicates, particularly among elders. Like all populations, Native communities are varied; while some Native communities have high rates of substance abuse, others have low rates, with significant variation between tribes and across time periods. Despite this, judges may be relying on a stereotype of Native Americans and alcoholism.

A missing aspect in this narrative, is, of course, where the problems of substance abuse and poverty originated. Some authors argue that domestic violence is a (relatively) new occurrence within Native cultures, primarily due


91. Oetzel & Duran, supra note 90, at 53.

92. See generally Judy Shepherd, Where Do You Go When It’s 40 Below? Domestic Violence Among Rural Alaska Native Women, 16 AFFILIA 4 (Nov. 2001) (showing the difficulty for rural Alaska Native women in accessing support for survivors of intimate partner violence due to poor road conditions, severe weather).


95. N.A.T’L RESEARCH COUNCIL, CHANGING NUMBERS, CHANGING NEEDS: AMERICAN INDIAN DEMOGRAPHY AND PUBLIC HEALTH 236 (Gary D. Sandefur et al. eds., 1996).
to the introduction of alcohol in Native communities, as well as the introduction of patriarchal power structures.96 Scholars also perceive the extent of alcohol abuse in the American Indian community as a function of “internalized aggression, internalized oppression, and unresolved grief and trauma.”97 Parallels are drawn between the research on the historical trauma of Holocaust survivors, providing a theoretical and clinical framework for the idea of inherited trauma. Within the Lakota tribe, there have been clinical interventions to “stimulate[e] the process of grieving historical trauma,” which many Lakota parents credited with allowing them to think differently about their healing and parenting.98 Boarding schools are another frequently cited seat of violence, in which the trauma of the boarding school system operates a space in which individuals learned to abuse others.99

ICWA is, in many ways, a response to the trauma of the boarding school era, in which Indian children were removed from their families and raised in white culture. The justification for removal of the children included the idea that “American Indians [were] culturally and racially inferior.”100 In studies of intergenerational trauma, a frequent refrain is the loss of Indian identity by children who spent their childhoods with white foster families, as well as fear of their own identity.101 Boarding schools were frequently invoked in ICWA testimony102 as “helping to destroy a generation of [Alaska Native] children.”103 In the opening statement of William Byler, he characterizes the boarding school program as causing inter-generational harm:

[W]hen we remove children from the home or disrupt family life - with families as the basic economic, health care, and educational unit in human life - when you break that up, you impede the ability of the child to grow, to learn, for himself, or herself, to become a good and responsible parent later.104

One intention of ICWA was to stop a new generation of American Indian and Alaska Natives from being taken away from their families, losing their cultural identity in the process. It was no accident that Christina J. spent her

98. Id.
99. McEachern, supra note 96 at 37.
100. Brave Heart, supra note 97 at 63.
102. Senate Hearing 1977 at 577.
104. Id.
childhood in foster care.\textsuperscript{105} However, when Alaska courts use the fear of domestic violence in Alaska Native cases, they do so ahistorically—they are aware of the high rates of domestic violence in the Alaska Native communities, and thus disbelieve the progress of women leaving their abusers, but they do not tie this cycle of domestic violence into the boarding school and foster care systems that necessitated ICWA.

Considered against this backdrop, the detailed, racialized narratives of Alaskan Indian women in domestic violence proceedings can be understood not simply as an explanatory exercise, but as a grounding and re-creation of the narratives that led to the boarding school system—of the danger of Indian parents, of the violence inherent in the Indian community—while ignoring the historical causes and creation of this violence. Given that ICWA was enacted specifically in reference to this violence and to mitigate the harm that it caused, the disparate treatment of Alaska Native survivors of domestic violence in termination proceedings ought to be considered a violation of ICWA. Alaska judges hold Indian survivors to higher standards than non-Indian survivors, requiring them to prove that they truly understand the harms of domestic violence, and invoking the violence they experienced as proof of their inability to do so. Instead of grounding the understanding of domestic violence in Indian country in the context of boarding schools, genocide, and historical trauma, Alaskan courts invoke the specter of domestic violence in order to separate Indian families, reinforcing the systems that ICWA intended to end.

\textbf{Conclusion}

Despite the frequent handwringing at the possibility of ICWA harming the best interests of Indian children, little evidence has been mustered to support this proposition. This Note intended to test the proposition through a simple quasi-empirical experiment: if ICWA worked, then under similar facts, Indian parents would maintain custody more frequently than non-Indian parents, given the heightened standards of ICWA. As this Note illustrated, the opposite is true. In this limited case—domestic violence survivors in Alaska—non-Indian parents maintain custody in cases in which Indian parents do not. If ICWA were succeeding, this outcome would be incoherent, given that ICWA places a higher burden on the courts. If Indian and non-Indian parents lost custody at equal rates that would be a failure of ICWA; the fact that Indian parents lose custody at higher rates is even more troubling, and points to the failure of ICWA to rectify

\textsuperscript{105} Christina J., 254 P.3d at 1098.

underlying issues within the judicial system. The state-sponsored separation of Indian families, rather than ending after the residential schools era, continues via the judicial system, despite these statutory protections. Rather than being phased out or weakened, ICWA ought to be strengthened. Renewed attention should be paid to the disparate treatment of Indian and non-Indian families by courts, judges, and the entirety of the family law system, from care workers who testify that Indian mothers do not understand the impact of domestic violence, to judges that take such statements at face value. The era of family separation has not ended, and much more must be done to preserve and value Indian families.