PUBLIC ADMINISTRATION AND THE CITIZEN: ADMINISTRATIVE BURDENS, POLICY EFFECTS AND THE ART OF THE IMPOSSIBLE

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Submitted to the

Faculty of the School of Public Affairs

of American University

in Partial Fulfillment of

the Requirements for the Degree of

Doctor of Philosophy

In

Public Administration

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12/10/2018

Date

2018

American University

Washington, D.C. 20016

This is dedicated to my grandfather. Thank you for your unconditional love and support. You are missed.

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ABSTRACT

This dissertation examines the effect of public administration on the citizen-client, citizen-community and bureaucrat-citizen. The first chapter, *"Hostages to Compliance": Towards a Reasonableness Test for Administrative Burdens*, examines how the use of administrative rules and burdens affects citizens. It provides a reasonableness test for bureaucrats to use when applying administrative requirements to citizen-clients. The second chapter, *The Indian Child Welfare Act's Preferential Placement Mandates and Permanent Outcomes for Children*, assesses the effect of the Indian Child Welfare Act's preferential placement mandates on the likelihood of an American Indian or Alaska Native child being permanently placed out of the foster care system. The paper demonstrates the need for data collection in order to understand the effects of public administration on a particular community of citizens. Lastly, the third chapter, *"Wishy-Washy Chocolate Hearts": The Art of the Impossible Job*, centers on how public administration structures and expectations affect public administrators. I found that focusing on the process of administration as the product helped bureaucrats feel like they had achieved a measure of success in an impossible job.

PREFACE

The pillars of public administration scholarship are efficiency, economy and effectiveness. Social equity was added as a pillar in the 1960's, although it has struggled to gain the same status as the original three pillars (Norman-Major, 2018). The pillars, with perhaps the exception of social equity, are inward facing. These ideals focus on the organization and could just as easily describe the goals of a private sector business as a public bureaucracy. In the past, public administration scholarship has grappled with the question of how the study of public administration differs from that of the private sector (Boyne, 2002; Rainey, Backoff & Levine, 1976; Rainey& Bozeman, 2000; Van der Wal, De Graaf & Lasthuizen, 2008). This has become a bit out of vogue in public administration scholarship as the reality of government contracting has created the hollow state and the study of non-profits has necessarily been included into the public administration fold (Brooks, 2002; Durant 2000; Fernandez & Rainey, 2006; Milward, 1994; Terry, 2005). However, one of the key defining characteristics of public administration, versus the private sector, is its relationship to politics.

Public administration has always been political, regardless of the Wilsonian dichotomy (Rosenbloom, 1993, 2008; Syara, 2001; Waldo, 2006). Public bureaucracies implement policy that was arrived at through political means. This implementation is often overseen or influenced by political appointees. Public administration scholarship has demonstrated that policy and administrative tools are not neutral, they benefit some and disadvantage others (Fording, Soss & Schram, 2007; Schram et al., 2009; Schram, Soss & Fording, 2010; Soss, Fording & Schram, 2008, 2011). Sometimes these tools are used deliberately for that purpose; other times it is simply the best or only tool for the job (Brodkin, 1990; Brodkin & Majmundar, 2010; Burden et al., 2012). Scholars have studied how and why bureaucracies choose certain administrative tools, how politics affect administrative choices and how public bureaucracies can be held accountable

for the administrative choices they make (Brodkin, 2008; Dahl, 2018; Hood, 1991; O'Toole, 1997; Rosenbloom & Goldman, 1989; Wood & Waterman, 1991). There is also a school of administrative thought that focuses on how these administrative choices affect citizens (Cooper et al., 2006; Durant & Ali, 2013; Frederickson, 1996; Graham, 1995; Maynard-Moody & Musheno, 2000; Moynihan, Herd & Harvey, 2014; Vigoda, 2000). This dissertation contributes to that school of thought.

Mary Parker Follet, one of the first organizational management scholars, stated back in 1920 that, "We have to deal, not with institutions, or any mechanical thing, or with abstract ideas, or 'man,' or anything but just men, ordinary men…Men not things must be the starting point of the future" (Graham, 1995, p. 229). I followed her recommendation and began my inquiries with the citizen. The following chapters examine public administration and its effect on the citizen from a variety of angles.

The first chapter, *"Hostages to Compliance": Towards a Reasonableness Test for Administrative Burdens*, examines how the use of administrative rules and burdens affects citizens. It provides a reasonableness test for bureaucrats to use when applying administrative requirements to citizens. The second chapter, *The Indian Child Welfare Act's Preferential Placement Mandates and Permanent Outcomes for Children*, assesses the effect of the Indian Child Welfare Act's preferential placement mandates on the likelihood of an American Indian or Alaska Native child being permanently placed out of the foster care system. The paper provides preliminary evidence for the positive effect of preferential placements on American Indian and Alaska Native children. It also demonstrates the need for data collection in order to understand the effects of public administration on a particular community of citizens. Lastly, the third chapter, *"Wishy-Washy Chocolate Hearts": The Art of the Impossible Job*, centers on how

public administration structures and expectations affect public administrators, because an employee of bureaucracy does not cease to be a citizen when they become a bureaucrat. Interviews with prison chaplains revealed that focusing on the process of administration as the product helped these bureaucrat-citizens feel they had achieved a measure of success in an impossible job.

This dissertation examines the effect of public administration on the citizen-client, citizen-community and bureaucrat-citizen. It emphasizes the need for public administrators to keep the impact of administrative requirements and procedures on citizens in the forefront when making decisions. Public administration is the study of choices, what requirements to impose, what data to collect or not, and how to measure success. "It is often thought vaguely that our ideal are all there, shining and splendid, and we have only to apply them" (Graham, 1995, p. 249), but this is not the case. Public administration is not neutral and neither are its effects.

ACKNOWLEDGMENTS

Thank you to the members of my committee for your thoughtful feedback and guidance. Thank you to Christine Crossland for fostering my interest in the Indian Child Welfare Act and guiding me through the complex jurisdictions of Indian Country. Lastly, thank you to my mother, Lynn Shrauger, for her copy editing services.

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LIST OF ABBREVIATIONS

ACS	Administration of Children's Services
AFCARS	The Adoption and Foster Care Analysis and Reporting Systems
AFDC	Aid to Families with Dependent Children
AI	American Indian
AN	Alaska Native
APA	Administrative Procedure Act of 1946
ASFA	Adoption and Safe Families Act
CPM	Child Protective Manager
CWA	Child Welfare Administration
DHS	Department of Health and Human Services
DOC	Department of Corrections
DOI	Department of the Interior
DOJ	Department of Justice
FCSIAA	The Fostering Connections to Success and Increasing Adoptions Act of 2008
ICWA	Indian Child Welfare Act of 1978
TANF	Temporary Assistance for Needy Families
SCR	State Central Register for Child Abuse and Maltreatment

CHAPTER 1

"HOSTAGES TO COMPLIANCE": TOWARDS A REASONABLENESS TEST FOR ADMINISTRATIVE BURDENS

Administrative burden on its most basic level refers to "an individual's experience of policy implementation as onerous" (Burden, Canon, Mayer, & Moynihan, 2012, p. 742). It can encompass all aspects of administration from long lines at the Department of Motor Vehicles to mandated services for a parent who wants to regain custody of her children. In the name of efficiency and effectiveness, administrative rules and procedures may be understood first as technical-rational instruments (Adams & Balfour, 2014) aimed at essential goals such as preventing fraud, reducing agency error rates, and rationing scarce products or services. These instruments become "red tape" (i.e., dysfunctional) when they delay or otherwise hinder public employees' efforts to implement policy (Baldwin, 1990; Bozeman, Reed, & Scott, 1992) or when managers perceive them as detrimental to meeting their organization's goals (Pandey & Kingsley, 2000).

However, this conception of administrative burdens is currently being challenged. In particular, Moynihan and his coauthors (2014) have refined the definition of administrative burdens to focus on the compliance, learning and psychological costs citizens encounter in their interactions with the administrative state. Administrative burdens are no longer only routine administrative solutions; they now may become the site of intentional political choices, often occurring without general political deliberation (Moynihan, Herd, & Harvey, 2014). This new conceptualization of administrative burdens raises some troubling normative questions for public administration practitioners and scholars. Moynihan, Herd, and Harvey (2014) have proposed seven important questions to guide the next tranche of empirical studies of administrative

burden, and this article adds an eighth question with a different focus: namely, how should decision makers distinguish between reasonable and unreasonable administrative burdens?

To answer this question, I propose a balancing test, similar to those employed by the Supreme Court, for bureaucrats to use when implementing or assessing bureaucratic procedures and requirements. Toward that end, this article offers a set of five questions based on insights from the existing literature on administrative burden and constitutional competence. Then I apply the five questions to administrative practices at the street level in child welfare. Our normatively guided analysis arrives at similar conclusions as two legal opinions originating from New York State. One opinion, produced by the Supreme Court, ruled that **scheduled** home visits to families receiving benefits from the Aid to Families with Dependent Children (AFDC) does not violate the 4th Amendment right against unreasonable searches. The second opinion, produced United States District Court, E.D. New York, ruled that the New York Administration of Children's Services (ACS) violated the constitutional rights of mothers who experienced domestic violence and children who were exposed to domestic violence under the Fourteenth, Sixth and Fourth Amendments. These violations were due in part to inadequate training of ACS staff and managers, contradictory or nonexistent written policies and informal practices which ignored less harmful alternatives Based on these preliminary results, I offer this balancing test for administrative burdens as a tool for further application and development.

Administrative Burdens

Public administration scholars and practitioners have long understood that administrative agencies serve as "complex settings for policy politics" (Maynard-Moody & Herbert, 1989, p. 139) in which client groups and other stakeholders vie with legislators, elected executives, and senior agency staff experts to influence all stages of rulemaking from pre-proposal agenda

setting (Yackee & Yackee, 2011) to ex-ante and ex-post rule review (Gerber, Maestas, & Dometrius, 2005; Woods, 2005). Because administrative rules have the force and effect of law, they can be seen as rivaling legislation in their importance as policy devices (Kerwin, 2003), which intensifies the need to understand the processes that generate them.

At the level below administrative rules, additional policy-like devices include agency procedures, practices, and guidelines. Designing application forms, constructing web interfaces, and articulating program requirements for the general public qualify as bureaucratic policy-making activities because they directly affect citizens' ability and motivation to understand and interact with programs. Likewise, writing practice manuals, codifying standard procedures, and conducting caseworker training sessions entail policy making because they influence, more or less, the behavior of front-line employees and contractors, who then shape citizens' encounters with government programs (Brodkin, 2003; Riccucci, 2005). Citizen-clients,[1] in turn, react to the signals sent by front-line workers. They may cooperate, fully or partly, or resist, loudly or quietly, or some combination, and their behavior influences the counter-reactions of workers who apply their own personal and professional norms and beliefs in the form of emergent "schema" (Maynard-Moody & Musheno, 2003) to make subtle but important, case-by-case decisions about sanctions, services, and the strictness or leniency around bureaucratic protocols (Sandfort, 2000). At each turn of that co-production cycle (Alford, 2009, 2014), administrative burdens may be created, destroyed, or adjusted with varying impacts on social welfare.

The term 'administrative burden' refers not to an agency's formal or informal rules, procedures, or practices themselves, but to the material and psychological costs imposed on individuals outside the organization who are expected to learn about the agency's requirements

[1] Following the example of Maynard-Moody and Musheno (2000, 2003), I refer to citizens who are clients of various public administration agencies as citizen-clients rather than as clients because their citizenship remains the primary factor in their interactions with a public agency.

and comply with them (Moynihan et al., 2014). Lipsky (1980, p. 265) described in rich detail the "costs to clients of seeking services" in the form of time, money, information, and psychic toll on clients. Administrative-burden-type costs also differ from red tape in being (at least some of the time) deliberate exercises by officials of policy-like authority rather than accidental byproducts of rule accretion and obsolescence. Social control, racial discrimination, and rationing of scarce benefits and services are among the more frequently alleged policy purposes behind administrative burdens (Brodkin & Majmundar, 2010; Heinrich, 2015; Soss, Fording, & Schram, 2011). Administrative burdens thus appear to function as policy instruments in their own right (Moynihan et al., 2014) designed intentionally to shape the citizen-client's encounter with the state and experienced by the citizen-client as more or less costly impositions.

The Uncomfortable Politics of Administrative Burden

Once defined as policy instruments or tools, it comes as no surprise that administrative burdens create a venue for "hidden politics" (Moynihan et al., 2014, p. 43) during times when officials do not want to call attention to controversial decisions, such as those that involve restricting access to program resources or disciplining client groups who are considered deviant or otherwise undeserving (Schneider & Ingram, 1993). In contrast with notice and comment rulemaking, which requires public notifications and public comment periods, and sometimes proceeds via fully negotiated processes with stakeholders, burden making (or unmaking) typically carries no transparency or public-participation requirements. Quite a lot of policy-like action thus can be accomplished out of public sight and under the opposition's radar by changing operating procedures and street-level practices rather than higher-visibility rules.

When such "policymaking by other means" (Lineberry, 1977) occurs, we might expect it to proceed along a path of incremental steps in the direction of the current administration's

policy preferences. Moynihan et al.'s (2014) case-study analysis of Medicaid program changes in Wisconsin under divergent gubernatorial agendas provided preliminary support for this hypothesis. The Wisconsin findings reinforce the widely held view that governors can and will exert considerable power over government agency micro-policies in the absence of legislative oversight or public scrutiny. The mid-20th-century ideal of public administration as an extension of the elected chief executive's agenda (Rosenbloom, 2017) thus appears to be alive and well in state capitals, at least where Medicaid is concerned.

A nationwide study of administrative burdens on Medicaid applicants also identified meaningful correlations with partisan politics, but only when the executive and legislature were controlled by the same party: Medicaid applicants in states with more years of unified Democratic Party control faced lower administrative barriers (Moynihan, Herd, & Ribgy, 2016). This finding appears to modify the Wisconsin study's results by suggesting that checks and balances between the two branches moderate governors' power over bureaucratic policy-making.

Whether via executive power alone, or unified control, the partisan policy preferences of elected officials probably exert significant influence over the creation, destruction, and adjustment of administrative burdens. And well they should, one might argue, given the prevailing post-Wilsonian hostility toward the false idol of bureaucratic neutrality and the false dichotomy between politics and administration (Christensen, 2009; Rosenbloom, 2008). In order to fulfill campaign promises to voters, elected officials in both the legislature and executive need sufficient power to harness the capacities of the administrative state (Weaver & Rockman, 1993), including both notice and comment rulemaking and informal burden making among the various tools of policy design and implementation.

In theory, therefore, some level of partisan politics is not only inevitable, but perhaps also appropriate, to the burden-making process. To take one familiar example, governors who emphasize work requirements for public assistance will be expected to impose heavier administrative requirements on public assistance eligible citizen-clients, while those who practice a more liberal form of politics will be expected to lower obstacles for eligible citizen-clients to apply for and continue receiving assistance. Although the process through which these specific burdens are loosened or tightened is almost never transparent to voters, the overall thrust of bureaucratic policy making should not surprise anyone as long as it is ideologically consistent with the policy promises of elected officials and their parties as Moynihan et al. (2014, 2016) found it to be. According to this relativist perspective, one person's reasonable administrative requirement is another person's onerous, exclusionary burden, and as long as the administrative practice in question does not violate public laws or the US Constitution, there exists no external, universal criterion by which to judge who is right.

Existing studies focus largely on establishing, empirically, where administrative burdens come from and how they affect citizen-clients. If widely disseminated, the results of this research could help inform voters about the less conspicuous actions taken by their elected officials in the name of the administrative state. Yet much of the administrative burden literature also projects discomfort with the purely relativist perspective and with the form and content of politics that accompany burden-making processes in practice. Heinrich (2016, p. 420), for example, recommends reducing administrative burdens, simplifying application processes and requirements, and working through local infrastructure to "support the eligible population's efforts to successfully complete the application process and maintain access to benefits," but does not ask whether these goals align with the policy preferences of citizens as expressed in

elections. Perhaps reducing burdens and maximizing program take-up by eligible clients constitute higher-level goals that trump local policy preferences? Likewise, Moynihan, Herd, and Harvey (2014, p. 44) raise explicitly normative questions about citizen-clients' access to services for which they are eligible and "how the state mediates equity" where administrative burdens are concerned.

These and other themes in the existing literature point to the values dimension of administrative burden-making and merit further attention.

Establishing Grounds For Normative Analysis

Public administration lacks a central normative framework and this analysis is not attempting to provide one here. Administrative burdens may be viewed positively or negatively depending on which values one is emphasizing. For example, clamping down on documentation requirements for public assistance applicants may be seen as either protecting against fraud (upholding the rule of law as a value) or harassing the most vulnerable and least administratively competent citizen-clients (violating equity as a value), depending on one's perspective and priorities. Similarly, increasing reporting requirements for businesses that use potentially harmful chemicals may be seen either as a necessary precaution to protect human health and the environment (upholding effectiveness as a value with respect to protecting the general welfare) or an excessive restraint on economic activity (violating free markets as a value). While "[e]mpirical research can help to inform these types of tradeoffs with analyses of the degree to which reductions in burdens actually undermine other values" (Moynihan, Herd, and Harvey 2014, p. 65), some value conflicts will prove real and irreducible. Such cases motivate the search for larger value-based principles by which the legitimacy of specific administrative burdens may be judged.

In the US context, the Constitution provides the only universally accepted touchstone for examining values. The Declaration of Independence, Constitution, and the Bill of Rights, known collectively as the Charters of Freedom, are the foundational documents of the United States and express the foundational political ideals of the US government. They are "fundamental principles of [the US] polity which, ordinarily, should guide administrative behavior," which generate "regime values" in John Rohr's sense (Shafritz, Krane, & Wright, 1998, p. 1929). While acknowledging limitations of the regime-value concept (Overeem, 2015), I take the Constitution as the source of values in the US polity because of its status as the repository of American political values, creating a moral community out of US citizens that rises above the pluralism of moral beliefs in the US (1989). However, I differ from other scholars of the constitutional school (Rohr, Rosenbloom and Newbold), in that our normative analysis includes administrative burdens that do not necessarily rise to the level of a constitutional violation. For "a government that promises protection to an individual is not necessarily constitutionally responsible for failing to provide it. That moral responsibility falls on public administration" (Rosenbloom, O'Leary, & Chanin, 2010, p. 144)

Balancing Test

Administrative burdens are most frequently a result of a clash between two or more different values. These often time irreducible conflicts must involve tradeoffs between values. Thus, bureaucrats need a tool to aid them in determining which value should be given precedence. The balancing test approach was developed for Supreme Court cases that involve "a clash of several rights, or a conflict between individual rights and [a] necessary function of government" (Shapiro, 1966). Balancing tests first appeared during the same progressive movement that gave birth to our current conception of the administrative state (Cohen-Eliya &

Porat, 2010). However, they did not gain traction within the Supreme Court until the late 1950's, as the Court began to assert itself and stop deferring to the opinions of 'expert' administrators (McFadden, 1988; Rosenbloom, 2000).

Balancing tests ask a series of questions to help the court, or administrators, deduce which value should take priority. In our case, the balancing test becomes a series of questions to determine when an administrative burden, whatever value it may be supporting, has become unreasonable. The reasonable person is the standard by which bureaucratic actions or inactions are judged. The Supreme Court and various lower courts have constructed the reasonable person test through court opinions and precedents. In their book *A Reasonable Public Servant: Constitutional Foundations of Administrative Conduct in the United States* (2015), Lee and Rosenbloom describe this reasonable person as "a person of ordinary prudence, physical attributes, mental faculty, knowledge and skills identical with a reasonable person in his or her place. The reasonable person exercises those qualities of attention, knowledge, intelligence, and judgment which *society* expects of a reasonable person under like circumstance" (emphasis in the original, p. xv). The balancing test takes the reasonable person as its baseline.

The following five questions were drawn from existing literature on administrative burden and the constitutional school. The questions rely heavily on Rosenbloom's concept of constitutional competence for public administrators, with an emphasis on an awareness of citizens' fundamental rights. The intention is to draw the administrators' focus outside the institution to the impact burdens have on the citizen-clients their administration is intended to serve.

Question 1: Are the administrative burden's purposes clear and logical?

Some administrative burdens may fail a test of arbitrariness if they are designed largely as ordeals for the sake of creating ordeals. Regulations which are so unclear that the administrator or the citizen-client does not understand their requirements, unnecessarily 'chill' citizen's exercise of fundamental rights, or harm citizen rights but do accomplish the policy purpose, have all been found unconstitutional (*Kolender v. Lawson* 1983; *Shelton v. Tucker* 1960; *Church of Lukumi Babalu Aye v. City of Hialeah* 1993; Rosenbloom et al. 2010). Unclear, illogical burdens also violate the core concepts behind due process in the Administrative Procedure Act of 1946 (APA), which requires agencies to articulate rational reasons for rules. Policy justifications for burdens must include persuasive arguments for why the burden is expected to accomplish the goal. If evidence suggests otherwise, this should be addressed.

However, burdens may also result from quieter, behind-the scenes bureaucratic choices that are not quite policies and not quite official agency rules, but have the force of rules and polices when viewed from the perspective of citizens who must comply with them. Such as child case-workers who are socialized to use non-court ordered removals of children from their families in the case of domestic violence, even though no written policy exists to this affect. Individually, these burdens may not rise to the level of a constitutional violation but they still must be examined for their effect on citizen-clients to avoid unnecessarily infringing on individual rights. Thus, bureaucrats and front line workers should pause and ask themselves, is there a clear and logical reason for the burden I am imposing on this citizen-client?

Question 2: Is a less burdensome alternative available to meet that purpose?

A citizen's rights are not absolute and may be infringed upon for a compelling government interest. However, public bureaucracies may not infringe on a citizen-client's fundamental rights at-will. The Supreme Court has put forth the concept of the "least restrictive alternative" as a guide for how to negotiate this balancing act (Rosenbloom et al. 2010). The "least restrictive alternative" essentially means that the state must chose the policy option that accomplishes the policy goal in the manner least restrictive to individual rights. As Salamon (2001) noted, the more coercive the policy or administrative tool, the greater the burden of proof should be that it serves a legitimate public purpose. Less coercive means should be favored unless they are likely to be less effective with respect to the legitimate public purpose.

Question 3: Could an average person figure out what the requirements are and comply with them? Could a person with the disadvantages expected in the target population comply with them?

Administrative burdens tend to justify their existence in the face of widespread unpopularity by pointing to important public benefits that they purportedly generate, such as fraud prevention and horizontal equity in benefit distribution. Yet, there is empirical proof that overly onerous administrative burdens affect vulnerable and marginalized citizens the hardest. Within Temporary Assistance for Needy Families (TANF), for example, those most likely to be excluded by procedural barriers are the "administratively disadvantaged," i.e., high school dropouts, single mothers, and others in deep poverty (Brodkin and Majmunder, 2010, p. 841). Based on Cherlin et al.'s (2002; Moffitt, Cherlin, Burton, King, & Roff, 2002) interviews with TANF recipients, benefit sanctions and procedural case closings seemed to fall more heavily on

families with higher levels of hardship, including those without a car or telephone and those living in marginalized neighborhoods. Overly complex or burdensome requirements create situations of administrative exclusion that prevent those who need administrative services the most from accessing them and rewarding the less needy or those who know how to game the system.

To avoid this scenario, but still uphold important public benefits, such as fraud prevention and horizontal equity, bureaucrats must ask not only if a reasonable person could figure out the bureaucratic requirements and comply, but also could their target population do so. Note that understanding and compliance need to be combined because one cannot comply if one cannot find out about or understand the requirements. An average person may be able to understand and comply with a bureaucratic requirement, but if an agency primarily serves marginalized or vulnerable populations, using the average person as a standard will be ineffective and create unreasonable burdens on the citizen-client's who utilize their agency.

Question 4: Can citizen-clients readily register their concerns about a change in bureaucratic procedures without having to sue the agency or facing punitive measures?

In *Unmasking Administrative Evil* (2014), Adams and Balfour demonstrate how administrators may be insulated from the harm administrative policies or requirements generate due to the nature of the bureaucracy. Meaning, a reasonable bureaucrat may not know that policies or requirements are causing harm, creating a need for some form of citizen feedback in order to catch administrative evil. However, this feedback loop must not be an exercise in tokenism. The difference between tokenism and true feedback being that feedback can produce change in an organization, whereas tokenism is listening to citizen-client feedback merely for the

sake of appearances. Additionally, citizen-clients must not fear retribution for voicing concerns over bureaucratic actions or procedures or the feedback will not be useful.

Historically, constitutional tort law was an effective avenue for citizens to hold public employees accountable for violations of their fundamental rights. Citizens could seek monetary damages in civil suits against government actors whose on-the-job actions had violated their rights or municipalities whose policies, including inadequate training, caused violations of individual's constitutional rights. According to Rosenbloom and Rene (2016) "Such legal accountability closely relates to professional accountability because liability for damages depends on whether the officials or employees violated 'clearly established…constitutional rights of which a reasonable person' in their positions 'would have known'" (p. 235) Unfortunately, since the 2000s, the Supreme Court has enfeebled constitutional tort law as an accountability mechanism (Rosenbloom & Rene, 2016). This makes true citizen feedback loops even more important in ensuring bureaucratic accountability.

Question 5: Does the administrative burden meet a balancing test with respect to its known or expected impacts on a citizen-client's fundamental interests?

Decisions about administrative burdens should be mindful of "reasonable person" standards for the known or expected impacts on citizen-clients. The reasonable person test is the main test applied by courts when deciding whether to grant a summary judgment of qualified immunity from litigation in cases when citizens are petitioning to sue a public official (Lee, 2004). The question for administrators implementing bureaucratic procedure would be as follows: could a reasonable person have foreseen that the burden would have an adverse impact that outweighed the governmental benefit or function? For "ethical scrutiny of decision-making

in the public sector must take into account of both the ethics within the decision-making process and the ethics of decision outcome" (James, 2003, p. 99).

Case Studies

To pilot the balancing test above, I will apply those questions to two court cases originating out of New York State. One is a Supreme Court case, *Wyman v. James* (1971), which decided whether or not a person receiving benefits from AFDC has the right to refuse a scheduled home visit without punitive action. The Court found that termination of benefits after refusing a scheduled home visit did not violate the Fourth and Fourteenth Amendments prohibition of unreasonable search and a search without a warrant. The second is a class action lawsuit against the New York City ACS. In the suit, *Nicholson v. Williams* (2002), ACS's actions were declared unconstitutional under the Fourteenth, Sixth and Fourth Amendments. The suit charged that ACS was removing children from the home and charging mothers with 'failure to protect,' even though the mothers' themselves were victims of domestic violence and the only risk factor for the child, i.e. the child was not being abused or maltreated by the mother, was that the women were experiencing domestic violence. This was because at the time ACS administrative policy defined a child witnessing domestic violence as child neglect.

These case studies were chosen for several reasons. One, the administrative burdens described were found to be part of the agency's policy and training, not the result of a "bad apple". Two, AFDC's actions were found to meet the legal definition of reasonable and ACS's actions were found to meet the legal definition of unreasonable. If our test fails to identify these burdens as unreasonable, then it is objectively ineffective as a balancing test. Three, we picked case studies which had both voluntary and non-voluntary clients. These are citizen-clients who

chose to avail themselves of a particular service and those who did not choose to interact with this administrative agency.

There were ten named defendants in *Nicholson v. Williams* (2002), each with their own unique history, many displaying deep negligence and poor domestic violence training, but this examination will not be focusing on cases of negligence or the systemic lack of understanding of domestic violence. Instead, I will focus on specific examples of administrative burdens from the case studies in order to test the normative criteria. This allows for a better understanding of the way administrative burdens affected these citizen-clients and whether the costs were reasonable or unreasonable.

Wyman v. James (1971)

Background

Barbara James applied for AFDC assistance in 1967, sometime before the birth of her son Maurice. As a condition of this application a caseworker scheduled a visit to her apartment, Mrs. James allowed the visitation, and assistance was granted. On May 8th, 1969, as a condition of continuation of assistance, a caseworker wrote to Mrs. James and informed her that she would visit Mrs. James' apartment on May 14th. Mrs. James called the caseworker and stated that although she would "supply information 'reasonable and relevant' to her need for public assistance," (*Wyman v. James*, 1971) she did not want the interview taking place in her home. The worker informed Mrs. James that the home visit was statutorily required and without the home visit Mrs. James benefits would be terminated. Mrs. James still refused permission for the home visit.

In response, on May 13th, a notice was sent to Mrs. James letting her to inform her that her AFDC benefits were going to be discontinued because of her refusal to allow a home visit. It

also informed her that she was entitled to a hearing before a review officer to challenge the discontinuation. Mrs. James requested a hearing and it was held on May 27th. Mrs. James had an attorney present at the hearing and explained she was willing to cooperate, but still refused to allow a scheduled home visit. The review officer ruled that her refusal to permit a scheduled home visit was a reasonable ground for termination of assistance and a second notice of termination of benefits was sent on June 2nd, 1969.

Mrs. James then instituted a civil rights suit with the District Court citing a denial of rights under the First, Third, Fourth, Fifth, Sixth, Ninth, Tenth and Fourteenth Amendments. A temporary restraining order was issued on June 13th, 1969. A divided District Court found that the home visitation requirement qualified as a search of the home, and either permission or a warrant is required to enter a person's home. Therefore making continuation of benefits contingent on home visits, as required by the New York Social Services Law, was an "invalid and unconstitutional" application of the law under the Fourth and Fourteenth Amendments (*Wyman v. James*, 1971).

The New York State and City social services commissioners appealed the decision to the Supreme Court. Neither the Mrs. James nor the New York State and City social services commissioners disagreed on the timeline of events and the basic facts of the suit. The Supreme Court reversed the decision of the District Court and found that the scheduled home visitation requirement served a reasonable purpose and was the least restrictive alternative for accomplishing this purpose. However, the Court was careful to establish in the assenting opinion for *Wyman v. James* that this ruling cover neither unscheduled home visitation by caseworkers nor the contents of the interview during the home visit.

Balancing Test Applied and Discussion

Question 1: Are the administrative burden's purposes clear and logical?

The first question asks bureaucrats to ensure that the purpose of an administrative burden is clear and logically linked to the exercise of the burden. In the case of *Wyman v. James,* the administrative burden was a scheduled home visit. The purpose of this burden was twofold. One, to ensure that the citizen-client receiving AFDC assistance was using this money for the best interest of the child and two, that the citizen-client and dependent child were residing in a physical residence. The purpose of the AFDC program is to "encourage the care of dependent children in their own homes or in the homes of relatives" (*Wyman v. James*, 1971) through financial and other forms of assistance. Thus, the home visit clearly served the purpose of ensuring that government funds were being spent on the child, preventing exploitation of children for AFDC aid and verifying that there was indeed a physical residence. The physical residence verification was a perquisite for receiving AFDC assistance.

Mrs. James' counsel argued that this information could be obtained through secondary sources. Secondary sources could include interviews with school employees, examining birth certificates and lease agreements, as well as medical records. If secondary sources were not sufficient a warrant could be issued. Counsel did not argue against the need for this information to be obtained, but the manner in which the information was obtained. The burden's purpose was clear and logical to Mrs. James; the disagreement over the burden lay in the level of burdensomeness to the citizen-client.

Question 2: Is a less burdensome alternative available to meet that purpose?

There is not a less burdensome alternative available to meet the purpose of verifying the assistance was being spent in the child's best interest, and the presence of a physical residence. According to the Court document, the secondary sources suggested by Mrs. James' counsel

cannot fully verify that AFDC assistance is being used in the child's best interest or the presence of a physical residence (*Wyman v. James*, 1971). The Court does not fully explain why the secondary sources are insufficient, but some potential reasons could include informal leases, which produce no documentation, or that the child has not reached school age, so there is no one other than the citizen-client to corroborate that the assistance is being spent in the best interests of the child. The Court also argues, that the privacy intrusion resulting from interviewing school employees or a child's doctor may be just as burdensome or stigmatizing as scheduled, private home visit.

Additionally, Mrs. James did not specifically state why the home visit was especially burdensome. She "complains of no proposed visitation at an awkward or retirement hour. She suggests no forcible entry. She refers to no snooping. She describes no impolite or reprehensible conduct of any kind" (*Wyman v. James*, 1971). A warrant, another suggested alternative for obtaining the information AFDC requires for continuation of assistance if permission for a home visit was refused, could be served without warning, at any hour of the day and by force. This is a much more burdensome alternative, even if serving a warrant requires a greater burden of proof by AFDC.

Question 3: Could an average person figure out what the requirements are and comply with them? Could a person with the disadvantages expected in the target population comply with them?

An average person could understand and comply with the home visitation requirements of AFDC. Mrs. James was provided with written notice several days before the scheduled home visitation and the date was specified. During her conversation with caseworker Mrs. James agrees that she was told clearly what would occur if she refused to comply with the home

visitation. The requirement of a home visit was clearly communicated, in a written language Mrs. James could understand and she was fully aware of consequences of noncompliance. Mrs. James' only source of income at this time was the assistance from AFDC, making her a disadvantaged member of the target population for AFDC. She was able to understand the requirements and did also comply with the initial home visitation requirement (*Wyman v. James*, 1971). However, if the applicant had limited literacy, spoke a language other than English, or had to schedule a home visit around a full time job, it is unknown how this would affect their ability to comply.

Question 4: Can citizen-clients readily register their concerns about a change in bureaucratic procedures without having to sue the agency or facing punitive measures?

The answer to this question is a bit unclear. The AFDC program in New York State did have a process through which Mrs. James could appeal the decision to terminate her assistance. The notice to terminate form sent to Mrs. James after she refused permission for a home visitation included information about the hearing process where she could register her complaint and have a review officer decide on the merits of her case. The review officer had no contact with her prior to the hearing and Mrs. James was allowed to have counsel present at the hearing. Additionally, her assistance continued throughout the hearing process, awaiting the outcome of the review officer's decision. This way Mrs. James was not punished for challenging the caseworker's decision to terminate her benefits and a third party deliberated on the validity of her claim. The hearing was also scheduled in a timely manner so that Mrs. James did not have to spend time and money awaiting a decision.

However, the review officer's decision upheld the termination of benefits and after the decision a second notice of termination was sent. This was when Mrs. James initiated her civil

rights suit. Mrs. James did need to sue the agency in an effort to remove the home visitation requirement. Also, many citizen-clients of the AFDC program may not be in a position to retain counsel for their review hearings, perhaps rendering them at a disadvantage. Still, there was a system in place for Mrs. James' concerns to be heard, and her AFDC assistance was not terminated during the hearing process in a punitive manner. Overall, given the information presented in the opinion for *Wyman v. James,* I would argues that the AFDC program provided a space for citizen-clients could readily register their concerns without facing punitive measures from the program.

Question 5: Does the administrative burden meet a balancing test with respect to its known or expected impacts on a citizen-client's fundamental interests?

The burden of a scheduled home visit meets a balancing test with respect to the known or expected impacts on a citizen-client's fundamental interest in privacy and retaining their assistance. There is a clear purpose for the home visitation requirement that cannot be accomplished through other less burdensome means. The requirement of a home visitation was clearly communicated to the citizen-client in advance of the date so that the citizen-client could prepare for the visit. The result of refusing to comply was also clearly communicated and a way to appeal the decision was clearly provided. Additionally, the citizen-client retained her benefits until the appeal was settled, so she was not punished for appealing the decision. A scheduled home visit is an intrusion on the privacy of a family but it is the least burdensome way to accomplish the stated goal of the AFDC program. It is important to note, Mrs. James' counsel objected to neither the purpose of the home visit, nor the manner in which the initial home visit was conducted.

Administrative burdens should serve a legitimate and reasonable function. They should not impugn unnecessarily on citizen-client's fundamental interests, but there are times, such as in the case of *Wyman v. James*, when certain fundamental interests will be impacted. The administrative processes used by the AFDC program in New York State were set up to minimize the impact of citizens-clients and for a legitimate governmental purpose. The scheduled home visitation requirement is undeniably an administrative burden, but in this case it is not an unreasonable one.

Nicholson v. Williams

While Sharwline Nicholson is the titular face of the class action lawsuit filed against New York City's ACS, she was but one of 10 plaintiffs. All of the plaintiffs were women of color (Mandel, 2005) and their children ranged in age from newborns to seventeen. Each of the women has a unique case history that cannot be summarized here, but specific examples from their case histories will be described during the application of the balancing test. However, before an explanation of the burdens these women and their children experienced can progress, a brief history of child welfare in New York City and the administrative processes of ACS must be explained.

Brief History of Child Welfare Services in New York City

In 1972, under the Child Welfare Administration's (CWA) Office of Direct Care Services, 90 percent of foster care placements in New York City were controlled by private religious agencies. This system disadvantaged children of color and in 1973 a class action lawsuit, *Wilder v. Sugarman*, was filed against public and private officials challenging the system (*Nicholson v. Williams*, 2002). The resulting Wilder decree stated that private foster care agencies, supported in part by public money, must accept children for placement on a first come

first serve basis (*Wilder v. Sugarman*, 1974). Unfortunately, the Wilder decree did not gain widespread integration into practice and a 1989 study showed that ethnicity continued to be a criterion for foster care placement New York City. "By 1990, it was widely acknowledged that the child protective system in NYC was failing" (*Nicholson v. Williams*, 2002).

In 1995 CWA came under for fire for the alleged mishandling of two high profile child maltreatment cases. One, Elisa Izquierdo was tortured to death, while under the attention of CWA; and Marisol who almost died from starvation in a closet while CWA allegedly ignored evidence of her maltreatment. A class action lawsuit was filed against the New York City, (*Marisol v. Giuliani*, 1996) and CWA was disbanded. ACS was created in 1996 to replace to CWA. The Marisol suit was settled in 1999 and resulted in an advisory panel of child welfare experts to oversee ACS reforms.

Nicholas Scoppetta was selected to be the new commissioner of ACS. The new agency's mission statement stated:

> Any ambiguity regarding the safety of the child will be resolved in favor of removing the child from harm's way. Only when families demonstrate to the satisfaction of ACS that their homes are safe and secure, will the children be permitted to remain or be returned to the home, where the child and family can be both supported and monitored (*Nicholson v. Williams*, 2002)

Scoppetta immediately commissioned a report entitled "Protecting the Children of New York: A Plan of Action for the ACS." The report described endemic organizational problems, extremely high levels of staff turnover, lack of resources, questionable practices, and mission confusion (*Nicholson v. Williams*, 2002). To address these weaknesses Scoppetta increased hiring standards for caseworkers and supervisors, hired more caseworkers and field managers to reduce caseloads, improved and expanded training for supervisors and caseworkers and instituted a scholarship program for ACS employees to attend local social work schools. Scoppetta's effort bore fruit and during this time the foster care population in New York City declined even though

reports of maltreatment were increasing. This was most likely due to the increased use of preventative services by ACS caseworkers (*Nicholson v. Williams*, 2002).

However, as the Court found in *Nicholson v. Williams* ACS still had several areas in need of improvement. One of the most pressing of these was the treatment of domestic violence. According to testimony in *Nicholson,* "senior officials in the City's administration have long recognized blatant inadequacies in its program separating children from abused mothers" (*Nicholson v. Williams*, 2002). The legal description of domestic violence ACS was operating as that

> the non-offending parent, despite her knowledge of the offender's violent nature, engaged in act of domestic violence in front of the child, thereby placing the child at risk or in danger. As a result, both the offending and non-offending parent [are] charged with 'Failure to Protect.'…[The mother] is held responsible for protecting the child (*Nicholson v. Williams*, 2002)

During the *Nicholson* testimony, Elizabeth Roberts, ACS's Director for Domestic Violence Policy and Planning, stated that this language misrepresented domestic violence dynamics but the language had not been changed because "we would need to tell them what would be appropriate language instead" (*Nicholson v. Williams*, 2002), indicating the difficulty of how to approach domestic violence in the child welfare setting. Under Scoppetta two successful pilot programs focusing on identifying domestic violence in caseloads and reducing unnecessary removals by focusing on the abuser were instituted. Yet, neither of the pilot programs were expanded after their initial success.

Even with ACS's focus on additional training, newly hired ACS workers only receive two days of domestic violence training, much of which is based on outdated conceptions of domestic violence. This outdated training encourages case workers to use punitive means and approach safety as a prescriptive process, leading one expert to testify that "Safety planning, as it is practiced by ACS, amounts to 'the old contracting method that this was supposed to have

replaced … an ultimatum and then you use a priority of threat and intervention, including placement…as a way of coercing adherence to a plan" (*Nicholson v. Williams*, 2002). Additionally, Dr. Evan Stark (plaintiff expert) stated, after an examination of case records, ACS organizational structure and other data, that workers with domestic violence expertise had little or no influence on ACS policy decisions or caseworker practice.

A second area in need of improvement for ACS, non-court ordered removals, stems directly from its mission statement. ACS was warned in *Tenebaum v. Williams* that 'hair trigger' non-court ordered removals were unconstitutional but Judge Segal, a former Family Court Judge, testified that he did not see "any perceptible change in ACS's practice of removing children without court order" (*Nicholson v. Williams*, 2002). Judge Segal also attested that "[i]n ten years on the bench, my best recollection is that there were no more than ten instances where [ACS petitioned the court for permission to remove a child before doing so]. If the City wanted custody of the children, they would seize them unilaterally and ask the court to confirm or ratify hat action after the fact" (*Nicholson v. Williams*, 2002). Many of the children in *Nicholson* were removed from their homes using non-court ordered removals.

The Court found for the plaintiffs in *Nicholson v. Williams* and issued an preliminary injunction against ACS. It found that ACS unnecessarily removed children from the home without a court order and prosecuted mothers experiencing domestic violence for neglect without first exploring preventative services. The Court pointed to the inadequate or lack of training ACS caseworkers and managers received about domestic violence and the contradictory guidance provided in written ACS policies on the issue as one of the reasons for the unnecessary removals. It also found that ACS routinely delayed returning children to their parents after the Court had ordered them to be returned. The opinion stated, "in many instances, the delays are due to

administrative inefficiency. In many others, it is due to pique of the ACS employee or to the employee using bureaucratic power to punish the mother and child until the mother becomes pliant to ACS orders" (*Nicholson v. Williams*, 2002). Lastly, the Court pointed out that those affected by these problems could not receive relief due to an ineffective and underfunded counsel system (*Nicholson v. Williams*, 2002).

ACS Administrative Process

A child welfare investigation begins when an ACS field office receives a report from the State Central Register for Child Abuse and Maltreatment (SCR). Next, an applications worker will forward it to a supervisor, who will then assign it to a caseworker to investigate. During the investigation, a Child Protective Manager (CPM) will oversee the supervisor-case-worker team and approve any major decisions, such as removing a child or prosecuting a parent. Investigations should be completed as indicated or unfounded within sixty days and no independent body assesses ACS's conclusion.

ACS can commence child protective proceedings against the parents in Family Court during the investigation or after the investigation concludes, if the investigation is indicated . The Court has the power to remove the child if it is necessary to protect the child's life or health. The Court considers, among other things, whether ACS made appropriate and reasonable efforts to prevent or eliminate the need for removal, and whether imminent risk to the child would be negated by a temporary order of protection against the offender. If ACS believes that there is not enough time to go through a petition and preliminary hearing with the Court, it is authorized to seek a preliminary order of removal for the child. In cases where ACS believes, based on an 'objective test,'[2] that there isn't enough time for expedited process it may remove a child from

[2] What this objective test consists of is unclear. The *Nicholson* findings simply state,

their parents without a court order. Once a child is removed in this manner ACE must file a petition within 24 hours of the removal and no more than three business days after the removal.

If the child is removed without a court order, the parents have the right to ask for a court hearing to get their child back. This hearing is required to take place within three days of their application and is to be treated like an initial removal hearing. The parents should have the opportunity to be represented by counsel at any hearing during their involvement with ACS. After a removal hearing, the Court may uphold the removal, return the child to their parent and dismiss the charges, or return the child to their parents pending the outcome of a lengthy fact-finding trial, this process is known as "paroling" a child back to their parents. If a child is paroled, ACS retains broad supervisory powers over the child and their family, including the right to make unannounced home visit and to require the parents to accept services, such as parenting classes or domestic violence counseling.

Many cases, due to the length and administrative burdens inherent in the fact-finding trial, never reach a dispositional phase and are settled with ACS. Settlements can mean the parents admitting culpability or a dismissal of the court proceeding as long as the parents cooperate with ACS's supervision and conditions for a specified amount of time, often six to twelve months.

The test for emergency removal is characterized as an objective one, not one based on appearances. See N.Y. Fam. Ct. Act § 1024(i)(a) (Consol. 2001); see also N.Y. Fam. Ct. Act § 1024, cmt. (practice commentary) (McKinney 1999) ("This section places a further restriction on removal without prior court order by establishing a factual, objective test rather than one based on state of mind.") (*Nicholson v. Williams*, 2002).

Balancing Test Applied and Discussion

Question 1: Are the administrative burden's purposes clear and logical?

Administrative burdens must be in service to a government function or value if they are to be seen as reasonable. In the case of ACS, the function or value in question, would be the welfare of the child. If a bureaucratic procedure or requirement that imposes a burden cannot be clearly and logically linked to protecting the welfare of the child, then the burden fails the first test of reasonableness. The most common burden experienced by the women and children in *Nicholson v. Williams* was the placement of children into foster care or the delayed return of children from foster care once they had been 'paroled' back into their mothers' care. In many cases, this burden is undoubtedly necessary to protect the welfare of the child. However, as the cases of the women below demonstrate, ACS could and did implement this burden for illogical reasons.

Udoh

Ms. Udoh was born and raised in Nigeria and immigrated to the US after her parents arranged her marriage to Mr. Udoh, a man she had never met. He became abusive after the premature birth of their first child and Ms. Udoh frequently called the police to report instances of abuse. Mr. Udoh would also beat their five daughters. It was one such beating that triggered ACS involvement. Initially, ACS intended to file a petition only against Mr. Udoh, and thus allowed Ms. Udoh to retain custody of her children. However, after the legal department informed Ms. Udoh's CPM that, based on the history of domestic violence, Ms. Udoh could also be included on the neglect petition for "engaging in domestic violence," the CPM decided to include Ms. Udoh on the petition and immediately remove the children from Ms. Udoh's custody without a court order (*Nicholson v. Williams*, 2002).. The CPM was fully aware that children should only be removed from their parent's custody without a court order if there is reason to

believe the child is imminent danger. On the petition filed with the court after the children were removed, the spaces on the petition that explained why there was not enough time to obtain a court order before removal were left blank. In the *Nicholson* proceedings the CPM testified the reason the children were removed from Ms. Udoh's custody were because the parents "might 'be in [Family] court at the return of the children from school and [the children] wouldn't have parents to come home to…'" and because the children might not have keys to the house (*Nicholson v. Williams*, 2002). The CPM could not recall if the children were asked if they had keys, or if the caseworker that picked up the children offered to wait with them until Ms. Udoh arrived back home from Family Court. The CPM testified "the removal of the Udoh children was in accord with ACS's stated policy of resolving any ambiguity regarding the safety of the child in favor of removing the child" (*Nicholson v. Williams*, 2002).

The stated reason for the removal of all of Ms. Udoh's children from her custody and into foster care was clearly illogical. There were many other less extreme steps that could have been taken and it is unclear how the children, aged twelve, thirteen, sixteen and seventeen, were in imminent danger of harm. There is no law mandating at what age children may be left home alone, but many parents allow twelve and thirteen year old children to remain home alone for short periods of time or have their seventeen year old children babysit younger siblings. Removing Ms. Udoh's children from her custody for a potentiality that many parents practice across the US everyday places an unreasonable burden on both the children and Ms. Udoh that can not be justified by protecting the children's' welfare.

Tillet

Ms. Tillet was visited by ACS after admitting to hospital staff that the father of her child had choked her two days before her child was born. Her child was subsequently removed to

foster care without a court order. In the petition filed before the court after her child's removal ACS charged Ms. Tillet with child neglect because she did not have a crib and instead slept with her child in the same bed. However, during the *Nicholson* proceedings the CPM testified that Ms. Tillet's sleeping arrangement "was not neglectful per se. She could not explain why Ms. Tillet should not be permitted to sleep with Uganda when ACS does not consider it to be neglectful when other mothers do so" (*Nicholson v. Williams*, 2002).

The burden, in this case the continued placement of an infant in foster care, cannot be clearly and logically linked to protecting the infant's welfare. Even the CPM who authorized the charges on the petition could not justify why a mother sleeping with her infant in a bed counted as child neglect. It should also be noted that the Family Court, who is intended to review ACS actions and provide a check against abuses of discretion, upheld the ACS petition.

Nicholson

Ms. Nicholson's children were removed from her custody without a court order and she was charged with "engaging in domestic violence." After the Family Court determined that it was safe for her two children to be paroled back to her custody, ACS delayed their return to Ms. Nicholson for fourteen days. The stated reason for this delay was a lack of adequate bedding, however the children's bedding was located at her residence which ACS had ordered her not to enter due to potential danger to herself. At the time Ms. Nicholson was working full-time and taking night classes. ACS offered no assistance to Ms. Nicholson to resolve the situation.

The burden in this case was the two-week delay in returning Ms. Nicholson's children to her custody. The only reason Ms. Nicholson did not have adequate bedding was due to the ACS requirement that she not stay in her own home. ACS would not parole her children back to her while she was staying at her home, and once she was no longer staying at her home delayed the

return of her children because their bedding was at the home she was forbidden from entering. This is clearly illogical and could have been easily resolved. The delay in returning the children to their mother's custody, a mother who had not harmed her children, was clearly not in the best interests of the welfare of the children. As Judge Walker stated in his opinion,

> ACS unnecessarily protracts the return of separated children to abused mothers even after the Family Court has ordered that they be reunited. In many instances, the delays are due to administrative inefficiency. In many others, it is due to pique of the ACS employee or to the employee using bureaucratic power to punish the mother and child until the mother becomes pliant to ACS orders – even though the ACS demands may not be necessary to protect the children (*Nicholson v. Williams*, 2002).

Administrative burdens should serve a clear and logical purpose. They should not be used as a shield for inefficiency or as punishment. In the cases above, the very real burden of being separated from their children was done for illogical reasons and could have been resolved with much less drastic actions on the part of the ACS. Which brings us to the second question a bureaucrat must ask themselves when implementing a bureaucratic procedure.

Question 2: Is a less burdensome alternative available to meet that purpose?

Administrative burdens must not be unduly onerous, particularly when they may infringe on individual rights. It is a standard of constitutional law that individual freedoms and rights may only be curtailed through the "least restrictive" means (Piotrowski & Rosenbloom, 2002). If a burden is imposed to achieve a government purpose that could have been achieved through a less burdensome alternative, which a reasonable person in the position should have been aware of, then the burden becomes unreasonable. Again in the *Nicholson* case, the government function or value is to protect the welfare of the child and the burden being imposed is the removal or continued removal of children from their mother's custody. According to best practices at the time, removal of children from the non-offending parent should be the action of last resort, as it introduces children to a foster care system which may be more dangerous than the situation from

which they are being removed and can have significant effects on a child's development (*Nicholson v. Williams*, 2002). However, ACS workers in the *Nicholson* cases appeared to be operating under the "when in doubt, take them out" model of child welfare which resulted in systematic infringements of both mother's and children's rights (Beller, 2014).

Rhodes

Ms. Rhodes had been in an abusive relationship with the father of her two children, but she had recently obtained orders of protection against him. ACS was referred to Ms. Rhodes because she had not appeared in court to extend her current order of protection. When a caseworker visited Ms. Rhodes apartment an unidentified male voice answered the intercom and provided no details as to Ms. Rhodes whereabouts. However a neighbor informed the caseworker that Ms. Rhodes and the children were out trick-or-treating. Based off of this information, without speaking to Ms. Rhodes, the CPM on the case decided the children should be removed without a court order. During the *Nicholson* testimony the same CPM stated that there were less burdensome actions that ACS could have taken, such as changing the locks on Ms. Rhodes apartment, but that none were offered before the children were removed.

Removing a child from a parent is a serious invasion of family life and should not be done in a cavalier manner. There were clear less burdensome alternatives to placing Ms. Rhodes' children into foster care that a reasonable person would have been aware of. These alternative actions also would have been more efficient and economical in protecting the welfare of Ms. Rhodes children and saving the scant resources of ACS.

Jane Doe

Ms. Doe's husband had a history of abusing alcohol and of domestic violence against his wife. The family had previously been investigated by ACS but the case was closed after it was

determined Ms. Doe was a "responsible and involved caretaker…[who] appears able to protect [the child]" (*Nicholson v. Williams*, 2002). A second investigation was opened after a school counselor reported that Ms. Doe's child said that Mr. Doe had drunkenly threatened to kill Ms. Doe. ACS then removed Ms. Doe's child from her custody before speaking to either parent and without a court order. ACS then charged both parents with "engaging in domestic violence" and for refusing to participate in ACS referrals. However, it is unclear how either parent could have refused services, since the child was removed before speaking to them.

Again, a less burdensome alternative may have been available but front line workers did not utilize it. In the court petition after the child was removed there were no services mentioned to help Ms. Doe and nowhere in the case record was there a description of Ms. Doe failing to accept services. This is not meant to diminish the seriousness of the threat of violence, but less drastic interventions were available to the ACS workers in this case. In fact the only ACS complaint against Ms. Doe, that she had not pressed charges against her husband, was discovered after the child had been removed. As Philip Segal, a judge on the New York State Family Court for the City of New York testified during the *Nicholson* proceedings "Often, ACS would remove the children as a first resort, rather than providing services such as the removal or arrest of the batterers, obtaining orders of protection for the mothers or children, or placing the families in domestic violence shelters" (*Nicholson v. Williams*, 2002).

Rodriguez

ACS had removed Ms. Rodriguez's children from her custody without a court order and charged her with "engaging in domestic violence." After Ms. Rodriguez appeared in Family Court, the court paroled her children back to her. However, ACS workers informed Ms. Rodriguez she would not get her children back unless she entered a domestic violence shelter,

she had been staying with a relative. Ms. Rodriguez complied and entered into an Emergency Assistance Unit, a temporary shelter for homeless people. ACS then returned her children to her and after a week they were placed in a different shelter in the Bronx, which was also not a domestic violence shelter. Ms. Rodriguez and her children stayed at this shelter until they were moved to a more permanent facility. Ms. Rodriguez was forced to quit her job due to the curfew at the new facility and go on public assistance. The CPM testified that this was "in conformance with regular practice" (*Nicholson v. Williams*, 2002).

There are clear less burdensome alternatives that ACS could have imposed on Ms. Rodriguez to protect the welfare of her children. Examples include requiring Ms. Rodriguez to stay with a relative, or assisting Ms. Rodriguez in finding an apartment within her budget. These are both options offered to other plaintiffs in the *Nicholson* case and thus a reasonable person would have known they were options for Ms. Rodriguez. It is unclear how forcing Ms. Rodriguez from the home of a relative into a homeless shelter in order to receive custody of her children protected the welfare of her children.

Administrative burdens should follow the least restrictive means to accomplish the government function or value. If there are less burdensome alternatives that a reasonable person would be aware of, those alternatives should be explored. In the cases above, drastic actions were taken when much less intrusive actions were available and those drastic actions resulted in harm to the mothers and children, in terms of both material and emotional welfare.

Question 3: Could an average person figure out what the requirements are and comply with them? Could a person with the disadvantages expected in the target population comply with them?

If the average person cannot figure out what the bureaucratic procedures or requirements are, then they will not be able to comply with them. Administrative burdens that are hidden or incredibly hard to comply with raise troubling questions about equity. Involuntary citizen-clients of public bureaucracies may have resource constraints or have not been trained to deal with the bureaucracy and thus may be uniquely unable to cope with hidden or overly burdensome requirements (Maynard-Moody and Musheno 2003; Rosenbloom et al 2010; Lipsky 1980). This was particularly the case in *Nicholson v. Williams*.

Nicholson

The CPM assigned to Ms. Nicholson's case gave conflicting testimony about how fast ACS is required to file a petition in court once children have been removed from their parent's custody. He stated that ACS was required to file the next business day, that "ACS 'should try' to do so, and that in domestic violence cases, it is common to wait a few days before going to court in order to 'try to work things out with the mother'" (*Nicholson v. Williams*, 2002). The CPM also stated during his testimony that during his training he had been told ACS had a couple of days after a child is removed to file a petition because "after a few days of the child being in foster care, the mother will usually agree to ACS's conditions for their return without the matter ever going to court" (*Nicholson v. Williams*, 2002). The same CPM also rejected multiple relatives Ms. Nicholson proposed who could care for her children rather than placing them in foster care, even though under ACS policy women who experience domestic violence are allowed to make decisions about who will care for their children without court approval.

In both of these instances there was no way a reasonable person, let alone a disadvantaged person, could have easily learned ACS policy and complied. ACS policy was being applied unevenly and at times contradicted written guidelines. The burden placed on Ms.

Nicholson, the placement of her children into foster care, was seemingly unavoidable for her because there were no clear guidelines she could comply with. There were also less drastic burdens, such as kinship care, that could have been applied, but due to confusing and contradictory implementation of ACS procedures Ms. Nicholson was left with little recourse and at the mercy of her CPM.

Tillet

Ms. Tillet had her child paroled back into her custody after a hearing in Family Court. However, ACS would not return her child until Ms. Tillet underwent a psychological exam. There was no mention of a psychological evaluation in the order of the Family Court. Ms. Tillet objected to having undergo a psychological evaluation and debate over this requirement resulted in a two month delay in returning her child to her. The CPM admitted in testimony that the psychological evaluation "wasn't necessary" for the child to be returned to Ms. Tillet's custody (*Nicholson v. Williams*, 2002).

In this case, ACS was adding bureaucratic requirements that Ms. Tillet could in no way have foreseen and complied with. The psychological evaluation was not listed as a requirement of the parole and an average person cannot be expected to assume that additional caveats will applied to a Family Court order. Additionally, when Ms. Tillet objected to having to comply with an unnecessary bureaucratic requirement she was punished by the delayed return of her son. The burden, the delayed return of her son, was not justified by Ms. Tillet's lack of compliance with a hidden bureaucratic requirement.

Garcia

Ms. Garcia was attacked by her former partner while he was returning their child to her custody. Her former partner was charged with assault, although he was never arrested, and Ms.

Garcia spent a week and a half in the hospital. After leaving the hospital, Ms. Garcia obtained an order of protection against her former partner and moved into a relative's home with her children while she searched for a new apartment. ACS contacted Ms. Garcia on July 26th and asked to interview her and her children after being referred to Ms. Garcia by Ms. Garcia's counselor at the Victim's Service Agency. Ms. Garcia agreed to meet with ACS on July 30th, ACS wanted to meet with Ms. Garcia earlier, but Ms. Garcia stated that with work and hospital appointments July 30th was the earliest she could meet. Her caseworker then proceeded to make unannounced visits to Ms. Garcia's home each day, without legal grounds, to make a safety assessment.

Ms. Garcia was attempting to comply with the requirements of ACS. An average person would assume that once an interview date had been set they were in compliance with the agency's requirements. ACS was harassing Ms. Garcia for not complying with this particular caseworker's desired schedule. Ms. Garcia complained about this treatment, since she believed she was in compliance with ACS requirements, and this was likely a factor in the removal of her children from her custody (*Nicholson v. Williams*, 2002).

Administrative requirements and procedures need to be clear and reasonably easy to comply with. In the cases above, administrative requirements and procedures were contrary, hidden and unevenly applied; however, failure to comply with these measures often resulted in punitive measures or heavy burdens for the citizen-clients involved.

Question 4: Can citizens-clients readily register their concerns about a change in bureaucratic procedures without having to sue the agency or facing punitive measures?

Administrative burdens at the street-level can be used to punish citizen-clients who are seen as deviant or less deserving in the eyes of street-level bureaucrats (Lipsky 1980; Maynard-

Moody and Musheno 2003). This was certainly the case in *Nicholson v Williams*, where the judge stated that children were being used as "hostages to compliance" by ACS workers (*Nicholson v. Williams*, 2002). If citizen-clients cannot readily register their concerns with the public agency, abuses will occur.

Garcia

Ms. Garcia was charged with child neglect, even though ACS's own domestic violence expert had concluded that there was no need to remove the children. According to the *Nicholson* proceedings, this decision was likely motivated by ACS's opinion that Ms. Garcia was refusing to work with ACS, both for registering her concerns over her children being interviewed by ACS personnel and her call complaining about the harassing behavior of the caseworker. There was a note in the case record that the CPM "ordered the caseworker to file the case and ask for a remand 'based on the fact that [Ms. Garcia] has blatantly refused to cooperate with ACS'" (*Nicholson v. Williams*, 2002). Additionally, one of Ms. Garcia's children testified that, "When she asked the caseworker why she and her siblings were being taken away from their mother, the caseworker replied '[o]ver a phone call, if your mom would have called, you would not have been removed" (*Nicholson v. Williams*, 2002). It appears that Ms. Garcia was being punished for registering her concerns.

Removing a child from the custody of their parent is a particularly onerous burden that should not be used as a punishment for voicing concerns about bureaucratic practice. According to ACS's own expert, there was no imminent danger to the children that would warrant their removal. If citizen-clients cannot voice concerns without fear of punitive measures then this sort of abuse of power will be able to occur.

Tillet

Ms. Tillet objected to undergoing a psychological evaluation in order to have custody of her son returned to her. The attorney that she had obtained to represent her advised her that ACS could not require her to undergo the evaluation, as it was not included in the order paroling her child back to her. As part of the negotiations over the psychological exam, Ms. Tillet was asked to attend a meeting with ACS officials. Ms. Tillet brought her attorney to the meeting and the CPM on the case then refused to allow the attorney to attend the meeting because "ACS policy was not to permit mothers to bring any legal representation to such conferences, even though everything the mother says is recorded and she might, among other things, incriminate herself" (*Nicholson v. Williams*, 2002). In point of fact, according to written ACS guidelines at the time, a mother is allowed to bring counsel to any hearing concerning her children.

ACS was punishing Ms. Tillet for not undergoing an unnecessary psychological exam. Additionally, by not allowing Ms. Tillet to bring her attorney to the meeting they were creating an environment where Ms. Tillet could not register her concerns about ACS policy without fear of more punitive measures. Without the ability to register concerns about bureaucratic processes or actions, overly burdensome measures are allowed to continue.

Rodriguez

Ms. Rodriguez was informed by ACS that her former partner had a past allegation of sexual abuse while he possessed custody of her children. Concerned about their safety, she subsequently called ACS about the issue. Sometime after calling Ms. Rodriguez received a call from her former partner who said, "You really did it this time…They are going to take the kids away" (*Nicholson v. Williams*, 2002). She then received a call from one of her caseworkers who told her "that she 'had gotten them into trouble'" (*Nicholson v. Williams*, 2002).

Ms. Rodriguez behaved as a reasonable parent when she called ACS to voice concerns that a man with past allegations of sexual abuse had custody of her children. ACS's response to a legitimate concern was to chastise her and prevent her from retaining custody of her children without a court order. These actions were not in the best interests of the children and potentially put the children in a much more harmful situation.

ACS did not create an environment where citizen-clients concerns could be heard. The fact that Nicholson et al. had to form a class action lawsuit to hold ACS accountable for the punitive measures these mothers and children experienced demonstrates the ineffectiveness of ACS's citizen feedback loops. Refusal to blindly accept all ACS prescriptions and requirements was unjustly interpreted as "the mother's refusal to protect her children" and created an institution where abuse of discretion could flourish" (*Nicholson v. Williams,* 2002).

Question 5: Does the administrative burden meet a balancing test with respect to its known or expected impacts on citizen-client's fundamental interests?

As the cases and examples of the women and children above demonstrate, there is often considerable overlap between the balancing test questions. If an administrative burden's purposes are not clear and logical, there often is a less burdensome alternative that could be more logically applied. If an average person cannot figure out what the bureaucratic procedures are, they cannot logically comply and may face punitive measures if they complain about the confusing or unnecessary bureaucratic procedures. If a purposed burden fails the previous questions, it is unreasonable.

However, some burdens may meet all the previous criteria and still be unreasonable. A burden may seem to be unrestrictive, logical and easy to understand to the bureaucrat. The

bureaucrat may believe they have a system in place for citizen-clients to voice their concerns without punitive measures or having to sue the agency. Many unreasonable burdens follow an internal bureaucratic logic and are in service to a governmental function or value. In the case of *Nicholson v. Williams* (2002), the underlying governmental value was the safety and welfare of the child, but this value was not balanced against citizen-clients' fundamental interests. Instead ACS front line workers balanced the welfare of the child against concern for agency reputation. As Judge Walker stated,

> Much of the actual policies as applied by ACS are driven by fear of an untoward incident of child abuse that will result in criticism of the agency and some of its employees. The concern over institutional self-protection, rather than children's best interests, explains a good deal of ACS's predisposition toward counterproductive separation of abused mothers and their children (*Nicholson v. Williams*, 2002).

ACS workers lost sight of whom they were intended to serve. Not all impacts of burdens on citizen-clients can be known when they are implemented; hence the necessity of non-punitive citizen feedback loops. However, ACS had been warned that the practice of using non-court ordered removals as a measure of first resort negatively impacted citizen-clients' fundamental constitutional rights. "Judge Segal…stated that the Second Circuit court of appeals holding in *Tenenbaum v. Williams*, warning about the unconstitutionality of hair-trigger non-court ordered removals, did not cause 'any perceptible change' in ACS's practice of removing children without court order" (*Nicholson v. Williams*, 2002). ACS knew that non-court ordered removals were having a negative impact on the citizen-clients they were intended to serve and protect, but continued the practice. This is where, if this practice had passed all of the other questions, the burden becomes unreasonable.

Bureaucrats cannot know or predict all the consequences of a bureaucratic action or requirement (Simon, 1957). However, using the reasonable person standard, we can ask them to

balance known or expected impacts of bureaucratic procedures with citizen-clients' fundamental rights.

Conclusion

Not all administrative burdens are unreasonable; many are necessary for efficiency, effectiveness, economy or equity. Sometimes, a seemingly small change to streamline applications results in extraordinary compliance costs. Unintended burdens are an unfortunate effect of administrative functioning, but many unreasonable burdens can be avoided. It is important for wielders of public authority to be reminded that such authority should "be used economically (i.e., non-intrusively) and fairly (i.e., only where appropriate, and only when citizens have rights to protest" (Moore, 1994, p. 302). When administrative burdens arise in the state's exercise of its coercive powers over citizens, the governmental interest or function must be balanced with the fundamental rights of individuals. I submit these five criteria as a jumping off point to examine and evaluate the normative aspect of administrative burdens.

CHAPTER 2

THE INDIAN CHILD WELFARE ACT'S PREFERENTIAL PLACEMENT MANDATES AND PERMANENT OUTCOMES FOR AMERICAN INDIAN AND ALASKA NATIVE CHILDREN

Senator James Abourezk stated in his opening remarks before the Indian Affairs Subcommittee hearings on Indian child welfare in 1974 that, "Up to now…public and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indian" (*Indian Child Welfare Program*, 1974, pp. 1-2). This premise, and government programs such as the Indian Adoption Project, resulted in disproportionately high removal rates of American Indian (AI) and Alaska Native (AN) children and subsequent adoption and foster care placement with non-AI and AN families (Jacobs & Shahan, 2014; Mannes, 1995). To combat these policies, AI and AN leaders lobbied Congress for 15 years, which resulted in the Indian Child Welfare Act (ICWA) of 1978 (Matheson, 1996). AI and AN leaders hoped the new law would help protect the integrity of AI and AN families and tribal nations by providing unique protections and placement preferences for AI and AN children involved in the child welfare system.

Since the enactment of the law researchers and policymakers have had trouble measuring ICWA's effectiveness. To date, there are no national studies on ICWA's effectiveness. This study begins to rectify that gap by examining the effect of ICWA's placement preferences on permanency for AI and AN youth. Specifically, this study focuses on whether placing AI and AN children with AI and AN foster parents increases the likelihood of a permanent placement. I find that being placed with an AI and AN foster parent does not increase the likelihood of an AI and AN child achieving permanent placement within the federal fiscal year, but does increase the likelihood of an AI and AN child achieving permanent placement if a child is not placed within

the federal fiscal year. The length of time affects whether or not being placed with an AI and AN foster family increases an AI and AN child's likelihood of permanent placement.

A Brief Review of the Context and Content of ICWA

There are 573 federally-recognized and 26 state-recognized tribal nations in 11 different states. Each tribal nation has a unique culture and government structure, and while there may be some similarities, there is no monolithic AI and AN culture or experience (Silver & Miller, 1997; Strickland, 1997; Williams, 1992). Federally recognized tribal nations are considered sovereign, "domestic dependent" nations with separate citizenship requirements.[3] The US has a government-to-government relationship with federally recognized tribal nations and a special trust responsibility for tribal nations. The special trust responsibility holds the US legally responsible for the protection of tribal lands, assets, resources and treaty rights. This trust responsibility is reflected in federal policy that makes specific provisions for AI and AN health, education, housing and child welfare (Pevar, 2012).[4]

ICWA was passed in 1978 after years of grassroots activism by AI and AN advocates because state and private agencies were placing AI and AN children into foster care at disproportionate rates and in non-AI or AN homes (Fletcher, 2009; Fletcher, Singel, & Fort, 2009). The Act's purpose is

> ...to protect the best interest of Indian Children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the

[3] Tribal nations establish their own membership criteria. Common requirements for tribal membership are lineal descendancy or a relationship to a tribal member who descended from someone on the tribal nation's original membership roll, tribal blood quantum, tribal residency or continued contact with tribal nation (Fletcher, 2012).
[4] However, in 1953 under Public Law 83-280, the federal government transferred criminal and civil jurisdiction over AI and AN people living on tribal land in six states from the federal government to the state government, with the option for other states to take up jurisdiction. This was done without consulting tribal nations and resulted in a diminishment of the special relationship between tribal nations in those states and the federal government and an increased state role in civil matters (Garrow & Deer, 2015; Public Law 83-280).

> removal of Indian children and placement of such children in homes which will reflect the unique values of Indian culture... (The Indian Child Welfare Act of 1978).

ICWA is overseen by the Department of the Interior (DOI), the Department of Justice (DOJ) and the Department of Health and Human Services (DHS). ICWA vests DOI with regulatory authority, DOJ advises client agencies on ICWA issues and defends client agencies in court when sued on ICWA. DHS's authorities under ICWA come from sec. 203 (a) which allows HHS to use appropriated funds for Indian Child and Family Programs to the extent that those programs meet the requirements of the Act(s) from which the funds are derived (Title IV-e and IV-b of the Social Security Act in the child welfare context). HHS also supports training, capacity building, and court improvement, which includes state implementation of ICWA (The Indian Child Welfare Act of 1978; Pevar, 2012). Eight states[5] have passed their own state ICWA laws that exceed the minimum federal requirements set by ICWA. Additionally, an updated version of ICWA regulations went into effect December 1st, 2016 to improve uniform ICWA implementation between and within states.

ICWA applies to an Indian child who is the subject of a state court proceeding regarding foster placement or termination of parental rights. ICWA defines an Indian child as "any unmarried person who is under age eighteen and is 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" (The Indian Child Welfare Act of 1978). ICWA requires that "active efforts" be made to prevent the breakup of the Indian family; tribal notice of pending proceedings, rights of intervention and transfer to a tribal court; and a tiered preferential placement schema (The Indian Child Welfare Act of 1978). Sec. 105(b) of the Act specifies that in any out-of-home placement, absent "good cause", preference should first be given to a member of the child's extended

[5] States with their own ICWA laws are California, Iowa, Michigan, Minnesota, Nebraska, Oklahoma, Wisconsin, and Washington.

family; second to a foster home licensed, approved, or specified by the Indian child's tribe; third to an Indian foster home licensed or approved by an authorized outside authority; and lastly, to an institution approved by an Indian tribe or operated by an Indian organization (The Indian Child Welfare Act of 1978).[6] The provision on preferential placements is the focus of this study.

Previous Research on the Effects of ICWA

Most of the academic literature on the effectiveness of ICWA is located within the law literature. There are countless law review articles debating the merits of ICWA (Bakeis, 1996; Goldsmith, 1990; Guerrero, 1979; Metteer, 1997), or the effect of ICWA court cases on the implementation of ICWA (Jones, 2014; Kruck, 2015; Maldonado, 2008). However, there is a much smaller empirical literature that focuses on the effects of ICWA. This could be for a variety of reasons: AI and AN children represent a small percentage of the population making statistical analysis challenging; the lack of a national database to track ICWA implementation; or the difficulty of monitoring a federal law that is implemented through local administrative processes, to name a few. Yet, these challenges have encouraged interested researchers to find diverse ways to study the effectiveness of ICWA.

One area researchers have examined is whether the mandates of ICWA promote permanent placement of the child. Permanent placement is considered best practice and is the stated goal of federal child welfare legislation, such as the Adoption and Safe Families Act of 1997 (ASFA) and The Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCSIAA). Several approaches to evaluating permanency for children in the child welfare system exist and have been employed to study ICWA effectiveness by researchers. Some

[6] It should be noted family placements are preferred for all children, under The Adoption and Safe Families Act (1997) and The Fostering Connections Act (2008).

approaches focused on AI and AN adoptions, such as the Barth, Webster and Lee (2002) study which analyzed the likelihood, type and timing of AI child adoption. The authors established that in California, pre-ASFA, kinship adoption for AI and AN children, less than six years old, was higher than for children of other racial groups. However, they also discovered that AI and AN children remained in non-kinship foster care at higher rates than Caucasian or Latino children (Barth, Webster, & Lee, 2002).

Other researchers have studied the relationship between compliance with ICWA and the rate of reunification of AI and AN children with family or tribal members (Landers & Danes, 2016). For instance Limb, Chance and Brown (2004) found, through case record reviews in one Southwestern state, that 83% of AI children were placed according to ICWA preferences with almost all cases demonstrating "active efforts" to prevent family dissolution. The authors stated that this indicates that compliance with ICWA promotes reunification (Limb, Chance, & Brown, 2004).

Other researchers have focused on the factors predicting placement into foster care for AI and AN children. The factors for predicting out-of-home placement for AI and AN children are contested but have included the age of the child, the type of maltreatment, alcohol or drug abuse by the parent, parental mental health issues and poverty (Barth, Wildfire, & Green, 2006; Carter, 2009, 2010; Donald, Bradley, Critchley, Day, & Nuccio, 2003; Fox, 2004; Gustavsson & Maceachron, 1997; Merila & Bradley, 2015). One study found that being an AI and AN child may, in and of itself, predict placement into foster care (Lawler, LaPlante, Giger, & Norris, 2012). Lastly, many researchers have not explicitly focused on ICWA but have concentrated on the disproportional representation of AI and AN children in out-of-home placement or racial bias

in Child Protective Services decision-making (Harris & Hackett, 2008; Hill, 2007; Lancaster & Fong, 2014; Lawler et al., 2012).

Recent research addressing the empirical effects of ICWA mandates on permanent placements for AI and AN children have focused on state or county-level child welfare data.[7] Larger national studies of AI and AN children in the child welfare system have concentrated on predicting placement, documenting the continuing disproportionate numbers of AI and AN children within the system or describing strategies to reduce the disproportionate numbers of AI and AN children in the system (Lidot, Orrantia, & Choca, 2012; Miller & Esenstad, 2015). This leaves a need for a national study on the effects of ICWA mandates on AI and AN children's permanent placements.

The Challenge: Data and Measurement

The Adoption and Foster Care Analysis and Reporting Systems (AFCARS) data represents the best available national records on children with state agency experiences.[8] AFCARS data elements include the child's demographic information, removal reasons, length of current and previous foster care placements, number of previous foster care placements, type of placement, service goals and some demographic information on the biological and foster parents.[9] Although AFCARS contains information from every child welfare agency that receives federal Title IV-E funds, it does not currently contain a category or proxy for tribal membership or citizenship. AFCARS does collect race-based data using the Office of Management and Budget race category definitions. However, ICWA is not applied based on race. Not all the

[7] There were several older studies which examined the effectiveness of ICWA nationally (Davies, 1982; MacEachron, Gustavsson, Cross, & Lewis, 1996).
[8] Specifically agencies who receive funds authorized by Title IV-E of the Social Security Act (42 U.S.C. § 672; 45 CFR § 1356.71).
[9] However, this information varies from state to state.

children or foster parents identified as AI and AN in AFCARS are tribal members or citizens. Yet, though imperfect, the AFCARS racial category "American Indian/Alaska Native" is the best available indicator to whom ICWA might apply.

Research Methods

Study Sample

The sample comprises of children, ages 0-21 years old, whose information was reported by Title IV-E agencies to AFCARS from all 50 states between 2005-2015. Table 1 provides a breakdown of the number of AI and AN children reported to AFCARS by year. The percentage of AI and AN children reported to AFCARS has steadily increased over the time period of the study. However, the overall AI and AN population has not increased, staying steady around two percent of the US population ("2015 Population Estimates,"). Illustrating that AI and AN children continue to be disproportionately represented in child welfare caseloads nationally.

Table 1: The Number of American Indian and Alaska Native Children removed to Out-of-Home Care

Year	Total Number of AI/AN Children	Total Number of Children	Percent of Total
2005	26,196	752,857	3.48%
2006	27,661	753,152	3.67%
2007	27,868	739,285	3.77%
2008	27,529	711,446	3.87%
2009	26,329	661,679	3.98%
2010	24,949	634,669	3.93%
2011	25,226	611,101	4.13%
2012	25,770	602,450	4.28%
2013	26,844	603,945	4.44%
2014	28,483	614,151	4.64%
2015	30,297	631,723	4.80%
Cumulative	297,152	7,316,458	4.06%

Source: AFCARS.

Table 2 contains descriptive statistics on all children removed into out-of-home placement.[10] The age groupings were fairly similar between AI and AN and non-AI and AN children. At the end of the federal fiscal year, when the state reported to AFCARS, or when the child exited out-of-home placement, 39% of AI and AN children and 34% of non-AI and AN children were between the ages of zero and five. 29% of AI and AN children and 25% of non-AI and AN children were between the ages six and 11. 23% of AI and AN children were between

[10] Each of the following tables descriptive statistic has a slightly different N due to the reporting differences between states and the subset of the sample being examined.

the ages of 12 and 16, and 27% of non-AI and AN children. The last age group, seventeen to twenty-one, had the smallest percentage of both AI and AN, 9%, and non-AI and AN children, 15%. Both the AI and AN, 50%-50%, and non-AI and AN, 48%-52%, sample were fairly evenly split between female and male children. Approximately 28% of AI and AN children and non-AI and AN children were diagnosed with a clinical disability.

Table 2: Descriptive Statistics for American Indian and Alaska Native and Non-American Indian and Alaska Native Children

	AI/AN Children	Non-AI/AN Children
Child's Age		
0-5	38.67%	33.68%
6-11	28.97%	25.34%
12-16	22.99%	26.54%
17-21	9.37%	14.45%
N	297,152	7,019,306
Sex		
Female	49.66%	47.89%
Male	50.34%	52.11%
N	297,060	7,018,571
Clinical Disability		
Yes	28.42%	28.93%
No	58.59%	54.96%
Not Yet Determined	12.99%	16.11%
N	274,384	6,541,193

Source: AFCARS.

Table 3 contains home and parental characteristics that were reported to AFCARS as removal reasons. These parental characteristics were the most consistently reported from state to state. AFCARS does collect other parental information, such as caretaker family structure and year of birth, but it is not consistently reported over time or between states.

Removals for inadequate housing, 11%, were the same for both AI and AN children and non-AI and AN children. Confirming previous research on predictors of out-of-home placement a larger percentage, 20%, of AI and AN children were removed due to parental alcohol abuse, as opposed to 7% of non-AI and AN children. 27% of AI and AN children and 25% of non-AI and AN children were removed as a result of parental drug abuse. Less than one percent of both AI and AN and non-AI and AN children were placed out of the home because of parental death. Lastly, nine percent of AI and AN children were removed as a result of parental incarceration and seven percent of non-AI and AN children.

Table 3: Parental and Housing Characteristics of American Indian and Alaska Native and Non-American Indian and Alaska Native Children

Removal Reason	AI/AN Children	Non-AI/AN Children
Inadequate Housing		
Yes	11.40%	10.56%
No	88.60%	89.44%
N	295,516	6,732,270
Alcohol Abusing Parent		
Yes	20.05%	7.10%
No	79.95%	92.90%
N	295,516	6,732,333
Drug Abusing Parent		
Yes	27.40%	24.64%
No	72.60%	75.36%
N	295,516	6,732,336
Parent Died		
Yes	0.51%	0.80%
No	99.49%	99.20%
N	295,516	6,732,315
Parent Incarcerated		
Yes	8.80%	6.76%
No	91.20%	93.24%
N	295,516	6,732,315

Source: AFCARS.

Table 4 displays the cumulative number of removal reasons a child was placed in out-of-home care and the number of total removals. The possible removal reasons reported in AFCARS are: physical abuse, sexual abuse, neglect, alcohol abuse by a parent, drug abuse by a parent, alcohol abuse by a child, drug abuse by a child, child disability, child behavior problem, parental death, parental incarceration, caretaker inability to cope, abandonment, relinquishment by a caretaker and inadequate housing. Not all states have the same definitions for removal reasons and not all states use all of the possible removal reasons. However, all states do record multiple removal reasons if needed. 50% of AI and AN children and 56% of non-AI and AN children were removed for one reason.

The total number of removals indicates how many times a child was removed from their home. Ideally, a child would not be removed from home as current best practice focuses on preventative services and preserving family integrity, and if a child does need to be removed from home, the fewer removals the better (Pecora et al., 2017). 73% of AI and AN children had been removed from their home once, and 78% of non-AI and AN children. 19% of AI and AN children had been removed from the home twice, and 17% of non-AI and AN children. Five percent of AI and AN children and four percent of non-AI and AN children had been removed from the home three times. Three percent and two percent of AI and AN and non-AI and AN children, respectively, had been removed from the home four or more times.

Table 4: American Indian and Alaska Native Children and Non-American Indian and Alaska Native Children Removals

	AI/AN Children	Non-AI/AN Children
Cumulative Removal Reason		
One Reason	49.77%	55.70%
Two or More Reasons	50.23%	44.30%
N	293,191	6,690,546
Total Removals		
1	72.68%	78.14%
2	19.34%	16.53%
3	5.39%	3.89%
4 or higher	2.60%	1.45%
N	296,838	7,010,579

Source: AFCARS.

Table 5 provides a breakdown of the number of AI and AN foster parents reported to AFCARS by year. The percentage of AI and AN foster parents steadily increases each year, while the overall total of foster parents decreases. The percentage of AI and AN foster parents is approximately half the percentage of AI and AN children in out-of-home placements,[11] although it is not a one to one match, due to sibling groups and foster families who take in more than one child.

[11] Out-of-home placements differ from foster care in that out-of-home placement can include group homes and other institutional settings.

Table 5: The Number of American Indian and Alaska Native Foster Parents Nationally

Year	Total Number of AI/AN Foster Parents	Total Number of Foster Parents	Percent of Total
2005	6,711	575,840	1.17%
2006	6,693	515,656	1.30%
2007	6,590	491,746	1.34%
2008	6,650	471,573	1.41%
2009	6,656	458,374	1.45%
2010	6,589	442,157	1.49%
2011	6,455	426,615	1.51%
2012	6,794	419,514	1.62%
2013	7,370	440,149	1.67%
2014	8,147	454,140	1.79%
2015	8,490	435,814	1.95%
Cumulative	77,145	5,131,578	1.50%

Source: AFCARS.

Table 6 provides the total number of AI and AN children placed into foster care from 2005-2015, as reported by AFCARS. It also displays the number of AI and AN children placed with AI and AN foster parents versus those placed with foster parents of other races or ethnicities. The proportion of AI and AN children placed with AI and AN foster parents stayed relatively stable over the decade, with approximately 25% of AI and AN children in foster care being placed with AI and AN foster parents.

Table 6: The Proportion of American Indian and Alaska Native Children Placed with American Indian and Alaska Native and Non-American Indian and Alaska Native Foster Parents

Year	Total Number of AI/AN Children Placed with AI/AN Foster Parents	Total Number of AI/AN Children Placed with Non-AI/AN Foster Parents	Percent of Total
2005	4,487	18,620	24.10%
2006	4,640	18,706	24.80%
2007	4,454	17,889	24.90%
2008	4,404	17,643	24.96%
2009	4,461	18,493	24.12%
2010	4,395	18,751	23.44%
2011	4,403	19,095	23.06%
2012	4,637	19,868	23.34%
2013	4,977	21,074	23.62%
2014	5,628	22,109	25.46%
2015	6,250	20,387	30.66%
Cumulative	52,736	212,635	24.80%

Source: AFCARS.

Table 7 reports the percentages of AI and AN and non-AI and AN children discharged for permanent placement. States can report ten different responses as the discharge reason to AFCARS. These are: not applicable (indicating the child does not yet have a permanent placement), reunification, kinship care, adoption, emancipation, guardianship, transferred to another agency, runaway, death of the child or reason missing. The Children's Bureau considers a permanent placement to be reunification, kinship care, adoption and guardianship. 23% of AI and AN children were reunited with their parent or primary caretaker and 26% of non-AI and AN children. Two percent of AI and AN children and four percent of non-AI and AN children were placed in kinship care. Eight percent of AI and AN children were adopted and 10% of non-AI and AN children. And four percent of both AI and AN and non-AI and AN children were placed into guardianship.

Table 7: Permanent Placement for American Indian and Alaska Native and Non-American Indian and Alaska Native Children

Placement	AI/AN Children	Non-AI/AN Children
Reunification	22.99%	26.09%
Kinship Care	1.73%	4.06%
Adoption	8.43%	10.17%
Guardianship	4.35%	3.60%
N	94,037	2,393,642

Source: AFCARS.

Measures

The dependent variable, permanent placement, is a composite variable combining the discharge reason reported to AFCARS and whether or not the child entered into a permanent placement within the fiscal year. To create the dependent variable the discharge reason was first coded as a dichotomous variable. A child was coded as either as being discharged to a permanent placement, according to the Children's Bureau definitions or as remaining in non-permanent care. This analysis does not examine cases with non-permanent discharge reasons or negative outcomes. This would include: emancipation, being transferred to another agency, a runaway, death of the child, or missing discharge reasons. After this step, 40% of AI and AN children in the sample were coded as being permanently placed and 47% of non-AI and AN children.

Table 8: Placement of American Indian and Alaska Native Children and Non-American Indian and Alaska Native Children

Placement	AI/AN Children	Non-AI/AN Children
Non-Permanent	59.80%	52.78%
Permanent Placement	40.20%	47.22%
N	233,896	5,034,277

Source: AFCARS.

Next, this variable was combined with the AFCARS variable that records whether the child's discharge date fell during the fiscal year. The time element was included in the analysis because best practice and relevant federal child welfare legislation, encourages permanent placement within 12 months of entering care (Pecora et al., 2017). This created a categorical variable with three outcomes: still in care, permanent placement within the fiscal year, and permanent placement not within the fiscal year. Less than one percent of both AI and AN and non-AI and AN children were placed outside of the federal fiscal year. However due to the size of the sample percentages may not capture the true impact. Less than one percent of children permanently placed equates to 965 AI and AN children and 44,678 non-AI and AN children.

Table 9: Placement of American Indian and Alaska Native Children and Non-American Indian and Alaska Native Children with the Time Element

Placement	AI/AN Children	Non-AI/AN Children
Non-Permanent	59.80%	52.78%
Permanent, FY	39.79%	46.35%
Permanent, not FY	0.41%	0.87%
N	233,896	5,034,277

Source: AFCARS.

The independent variables are AI and AN children and AI and AN foster parents. These are being measured using the AFCARS designation for AI and AN children and the AFCARS designation for AI and AN foster parents. The AI and AN designation is being used as a proxy for a child to whom ICWA applies. As previously mentioned, ICWA does not apply to every child identified as AI and AN, it only applies to children who are members of a tribal nation or eligible for membership in a tribal nation. However, since AFCARS does not collect ICWA-related data elements, this is the best proxy available.

The same logic applies to the use of AI and AN foster parents as a proxy for the placements preferences mandated by ICWA: extended family; a foster home approved by the Indian child's tribe; an Indian foster home; or an institution approved by an Indian organization. Although it should be noted that the first two preferred placements do not explicitly mention tribal affiliation or race. Thus, this is an imperfect proxy, but it is the best available given the data's limitations. Given these caveats, Table 10 displays the percentage of AI and AN children in foster care who achieved permanent placement. 32% of AI and AN children placed with AI and AN foster parents were permanently placed within the federal fiscal year and 0.34% entered permanent placement beyond the fiscal year. While 35% of AI and AN children placed with non-AI and AN foster parents achieved permanent placement within the federal fiscal year and 0.37% were permanently placed beyond the fiscal year.

Table 10: Permanent Placement of American Indian and Alaska Native Children with American Indian and Alaska Native Foster Parents and Non-American Indian and Alaska Native Foster Parents

Placement	AI/AN Children Placed with AI/AN Foster Parents	AI/AN Children Placed with Non-AI/AN Foster Parents
Permanent, FY	32.26%	35.31%
Permanent, not FY	0.34%	0.37%
N	14,345	46,897

Source: AFCARS.

Model

A multinomial logistical estimator was used to estimate two different models. The first model examines the likelihood of an AI and AN child achieving permanent placement within the fiscal year, and beyond the fiscal year, compared to children of other races and ethnicities. The second model examines if placement with an AI and AN foster parent has an effect on the

likelihood of an AI and AN child's permanent placement within the fiscal year their case was reported to AFCARS and permanent placement, beyond the fiscal year, as opposed to remaining in care. The same control variables are used in both models.

The control variables include the age and sex of the child, whether the child has a diagnosed disability, the number of times the child was removed from their home, the total number of removal reasons and whether the child was removed for parental substance abuse issues, inadequate housing, parental death or parental incarceration. Whether or not the child has a diagnosed disability was controlled for because children with disabilities are more likely to be removed from the home, and less likely to be placed in kinship care (Lightfoot, Hill, & LaLiberte, 2011; Manders & Stoneman, 2009; Sinanan, 2008; Slayter, 2016). The number of removals and the total number of removal reasons were controlled for because they indicate whether or not the family's problems are chronic, and the severity of those problems, both of which would affect the types of services and placements that would be available for the child and their family. Parental substance abuse was controlled for, due to it being a significant predictor of AI and AN children's placement into out-of-home care (Donald, Bradley, Day, Critchley, & Nuccio, 2003). Inadequate housing was used as a proxy for lower economic status, since poverty was a significant predictor of AI and AN children being placed into out-of-home care. Lastly, parental death and parental incarceration were controlled for because they would affect the type of services and placements available for the child. State and year fixed effects were also used to control for the differences between states and years.

Results

Table 11 reports the relative risk ratios of the first model estimating the likelihood of an AI and AN child having a permanent placement both within and beyond the fiscal year,

compared to non-AI and AN children. AI and AN children were approximately 15% less likely to achieve permanent placement within the fiscal year relative to non-AI and AN children. However, AI and AN children were approximately 12% more likely to achieve permanent placement beyond the fiscal year than non-AI and AN children. AI and AN children were more likely to be permanently placed within the fiscal year, than beyond, if they were removed due to parental alcohol abuse than non-AI and AN children. This indicates that AI and AN children who are removed due to parental alcohol abuse achieve permanent placement more quickly, all other variables held constant, than non-AI and AN children. Whereas AI and AN children for parental drug abuse, parental death, parental incarceration, multiple removal reasons and three or more removals take longer to be permanently placed, all other variables held constant, than non-AI and AN children. For AI and AN children who were removed from the home twice, the number of removals appears to have no effect on achieving permanent placement outside of the fiscal year, although two or more removals decreases the likelihood of achieving permanent placement within the fiscal year by 15%. This is notable as it is the only non-statistically significant finding among all the covariates.

Table 11: Likelihood of a Permanent Placement for an American Indian and Alaska Native Child compared to Non-American Indian and Alaska Native Children

	Permanent Placement, FY	SE	Permanent Placement, not FY	SE
AI/AN Child	0.846***	0.004	1.118**	0.054
Age	0.965***	0.000	0.988***	0.001
Sex	1.026***	0.002	0.941***	0.010
Clinical Disability	1.216***	0.002	1.339***	0.012
Inadequate Housing	0.885***	0.003	0.924***	0.015
Alcohol Abusing Parent	1.027***	0.004	0.828***	0.018
Drug Abusing Parent	0.981***	0.002	1.149***	0.014
Parent Died	0.837***	0.010	1.087*	0.048
Parent Incarcerated	1.078***	0.004	1.125***	0.021
Cumulative Removal Reason	0.862***	0.002	1.154***	0.015
Total Removals				
2	0.845***	0.002	1.004	0.014
3	0.794***	0.004	1.072***	0.028
4 or higher	0.803***	0.007	1.362***	0.054

***p < 0.01, **p < 0.05, and *p < 0.1. N= 4,731,568 Pseudo R2 = 0.126

Table 12 reports the likelihood of an AI and AN child achieving a permanent placement within the fiscal year and beyond the fiscal year if they are placed with an AI and AN foster parent relative to remaining in an out-of-home placement. AI and AN children placed with an AI and AN foster parent are 16% less likely to achieve a permanent placement within the fiscal year. However, an AI and AN child placed with an AI and AN foster parent is 77% more likely to achieve a permanent placement, beyond the fiscal year. As in the previous model, if the child was removed due to parental alcohol abuse they are more likely to be permanently placed within the fiscal year, than beyond, all other variables held constant. The same trends as the previous model also held for children removed to parental drug abuse, parental death, those removed for

more reason and those who were removed from their homes more than once. Indicating that AI and AN children removed for parental drug abuse, parental death, multiple removal reasons or who were removed multiple times took longer to be permanently placed, all other variable held constant.

Table 12: Likelihood of a Permanent Placement for an American Indian and Alaska Native Child Placed with an American Indian and Alaska Native Foster Parent

	Permanent Placement, FY	SE	Permanent Placement, not FY	SE
AI/AN Foster Parent	0.985	0.016	0.905	0.11
AI/AN Child	0.879***	0.006	0.993	0.068
AI/AN Foster Parent and AI/AN Child	0.834***	0.018	1.772***	0.306
Age	0.966***	0.000	0.988***	0.001
Sex	1.019***	0.002	0.935***	0.011
Clinical Disability	1.137***	0.002	1.216***	0.013
Inadequate Housing	0.888***	0.003	0.924***	0.016
Alcohol Abusing Parent	1.063***	0.005	0.822***	0.02
Drug Abusing Parent	0.986***	0.003	1.123***	0.015
Parent Died	0.942***	0.012	1.242***	0.058
Parent Incarcerated	1.073***	0.005	1.097***	0.023
Cumulative Removal Reason	0.871***	0.003	1.321***	0.02
Total Removals				
2	0.862***	0.003	1.063***	0.017
3	0.821***	0.006	1.141***	0.035
4 or higher	0.826***	0.009	1.584***	0.07

***p < 0.01, **p < 0.05, and *p < 0.1. N= 3,475,826 Pseudo R2 = 0.125

Discussion

On the surface it would appear that these models could demonstrate the ineffectiveness of ICWA preferential placement mandates for achieving permanent placement for AI and AN children within 12 months. However, one possible explanation for the different results for AI and AN children who achieve permanent placement within the fiscal year and those who do not, may be the difference between AI and AN children who are placed in care and the available number of AI and AN foster parents. Approximately one fourth of AI and AN children who are placed into foster care are placed with an AI and AN foster parent, most likely because there are not enough AI and AN foster parents for the amount of AI and AN children in care. Perhaps being placed with AI and AN foster parent increases the likelihood of an AI and AN child achieving permanent placement, but it may take longer to place a child with an AI and AN foster or adoptive parent, due to the disproportionate numbers. Another possible explanation could be that AI and AN children are often placed out of state and the process to achieve permanent placement takes longer when a transfer to another state is included in the administrative process (Zenone, 2017). An alternative explanation could be that using AI and AN foster parents as a proxy for ICWA's preferential placements does not capture the true effect of those placements.

These results point to the need for increased empirical work on the effect of ICWA mandates. In the current study, being placed with an AI and AN foster parent increased the likelihood of an AI and AN child achieving a permanent placement by 77%, compared to remaining in care. However, the benefit of being placed with an AI and AN foster parent did not appear if the time to placement was not considered.[12] This indicates that there is some benefit in placing AI and AN children with AI and AN foster parents but that it may not appear within the fiscal year.

[12] This model is included in the appendix.

Limitations

This study has several limitations. First, it does not necessarily examine the permanent placement likelihood of ICWA-eligible children specifically because ICWA-eligibility is not based on race, but citizenship in a federally recognized tribe. Instead, due to data constraints, this analysis uses the caseworker-documented race of children and families and data entered may not accurately represent how those children and families identify. This is a concern because AI's and AN's are particularly vulnerable to racial misidentification (Frost, Taylor, & Fries, 1992; Jim et al., 2014; Stehr-Green, Bettles, & Robertson, 2002). Second, this is a repeated cross sectional design, so causality cannot be determined or attributed. Also, this analysis ended in 2015 before the new rule to improve ICWA implementation went into effect. Uneven implementation of ICWA within and between states could also have affected these results.

Conclusion

This research should be viewed as a preliminary step in examining the effect of ICWA placement preferences on permanent placements for Indian children. From 2005-2015, AI and AN children in the US were 77% more likely to achieve a permanent placement than remain in care when they were placed with an AI and AN foster parent. However, they were less likely to achieve permanent placement, when placed with an AI and AN foster parent, within the fiscal year.

One possible explanation for these results is the disparity between AI and AN children being placed in out-of-home care and the availability of AI and AN foster parents. Perhaps if there existed parity between the numbers of AI and AN children being placed into foster care and the number of AI and AN foster parents permanent placement could be achieved within the fiscal year. This would require a concentrated effort by state foster agencies, and those receiving state

funding, to recruit AI and AN foster parents. It could also require a greater use of tribally-run foster agencies or greater funds dedicated to building capacity for tribally-run foster programs.

Another possible explanation is that this analysis does not truly capture the effect of ICWA's preferential placement schema, due to the limited nature of the data. The policy solution, which would be beneficial regardless of the explanation of these results, is to add ICWA-related variables to the data AFCARS is statutorily required to collect from states. Examples of these variables include, but are not limited to: whether or not a child is an enrolled member of a tribe, whether or not the child's placement meets ICWA's foster care and adoption preferential placement schema, if "active efforts" were made to prevent removal of the child, and tribal notification of the child's custody hearing.

These results indicate that more nuanced research needs to be done to tease out the effect of ICWA placement preferences. This method of inquiry is important because recent court cases challenging the ICWA statue, such as the Baby Lexi case and *Carter v. Washburn*, contend that ICWA is not in the best interests of the child and actively disadvantages AI and AN children. Empirical data on how ICWA affects Indian children is needed to address these concerns. [13]

[13] As of this writing, DHS has reopened the final rule adopting new data elements for AFCARS, including ICWA related variables, which had already gone through two notice and comment periods, and an additional supplemental notice and comment period (Fort, 2018).

CHAPTER 3

"WISHY-WASHY CHOCOLATE HEARTS": THE ART OF THE IMPOSSIBLE JOB

The term impossible job has been bandied about in the public administration literature since the advent of Hargrove and Glidewells' seminal book *Impossible Jobs in Public Management.* Impossible jobs are public management positions where the stated objectives of the agency's mission are unachievable (Hargrove & Glidewell, 1990). Yet, there are many people who inhabit these jobs every day, given that public organizations have distinctively multiple, vague and conflicting goals (Heinrich, 1999; Lipsky, 2010; Lowi, 1979; Wildavsky, 1979; Wilson, 1989), how do public servants cope with impossible jobs?

The answers may lie in an unlikely source. Prison chaplains occupy a unique nexus of roles: state employees, religious figures, criminal justice professionals, and front-line managers. This complex amalgamation of roles, and the ways in which prison chaplains navigate them can provide insight into the skills needed for other complex or 'impossible' jobs within public administration. Prison chaplains represent an understudied population both within the public administration and the criminal justice literatures.

This study examines how to conceptualize success in an impossible job, using qualitative interviews with prison chaplains. It offers two theoretical extensions to the impossible jobs framework. First, building off of previous studies, I add to the evidence base that performance management is not the most effective tool for determining success in an impossible job (Berry, 2008; Head & Alford, 2013; Morrell & Currie, 2015; Moynihan, 2005). Second, I propose two different ways bureaucrats with impossible jobs can accomplish success: relationship building and process as product. I conclude by suggesting that art, not science, may be the best way to conceptualize success in an impossible job.

Impossible Jobs

Hargrove and Glidewell (1990) argue that some public sector jobs are simply impossible. They focus on directors of large bureaucratic departments and refer to these positions as commissioners. The authors describe four dimension of impossibility: clients, constituencies, respect for professional authority and agency myths. The specific conditions for these impossible jobs are intractable, "illegitimate clients"; multiple conflicting constituencies, particularly constituencies with moralistic or ideological differences; low public respect for professional authority; and weak, controversial "agency myths" that leave the job holder vulnerable to the vagaries of public opinion. In later chapters of Hargrove and Glidewells' book other authors detail various impossible jobs, such as a department of corrections director (DiIulio, 1990), a state mental health commissioner (Miller & Iscoe, 1990), a social welfare executive (Lynn, 1990) or a manager of large urban police departments (Moore, 1990).

Each of these impossible jobs is defined in terms of the public perception of the job. This is because commissioner positions are generally politically appointed and the public face for the organization. Hargrove and Glidewell formed their dimensions of impossibility based on their assessment of the public's political views. They argue that the public views certain populations as less worthy, such as criminals or "welfare dependents," and the public has strong and conflicting views on the best solution for these clients with enthusiasm for these various solutions waxing and waning over time (1990). They also contend that the public only has strong respect for the authority of "scientifically-based" professions such as engineering, and less professional respect for those engaged in education or corrections (Hargrove & Glidewell, 1990, p. 7). The amorphous public is the yardstick by which a commissioner's job feasibility and success is measured. Although, the commissioner may also feel that they were unable to achieve

success in their impossible job due to these various dimensions (Hargrove & Glidewell, 1990, p. 5).

Central to this framework is the outward facing element of a public bureaucracy. Morell and Currie (2015) describe this as "a two-way relationship between (1) the image, purpose, and identity of the agency discharging a service and (2) the wider public" (p. 265). They suggest that the impossible jobs framework complements the inward-facing street level bureaucrat literature which focuses on the difficulties and dilemmas of a front-line worker. Whereas front-line workers work in a universe of rising need and scarce resources, forcing them to "rationalize the discrepancy between service ideals and service provision" (Lipsky, 2010, p. 140) for individual clients. Commissioners in the impossible jobs framework work in a universe of nebulous public support and extreme public accountability as they are attempting to provide a service or good they can never fully deliver (Morrell & Currie, 2015).

Morrell and Currie also add two other important contributions to the impossible job literature: the inclusion of frontline supervisors and the differentiation between an impossible job and impossible tasks in a possible job. Using the case of front-line policing practices in urban riots the authors demonstrate how front-line managers can affect client legitimacy and stakeholder perceptions, two of the dimensions of an impossible job. The scholars also suggest differentiating between impossible jobs and impossible tasks. A job is holistic, bringing with it a sense of identity, tradition and circumscribing a domain of component tasks, which may or may not be impossible (Morrell & Currie, 2015, p. 271). The job is not impossible but certain tasks may be impossible to achieve to all stakeholders' satisfaction.

One of the solutions proposed to fix the impossible job or task conundrum has been the introduction of performance management. Maranto and Wolf (2013) argue that data-based

management can demonstrate the effectiveness of reformers in seemingly impossible jobs and create accountability for professional subordinates of commissioners who may be demonstrating negligent or satisficing behavior. However, Moynihan (2005) found this not to be the case, using the Alabama Department of Corrections as a case study. Instead, the commissioner encouraged their professional subordinates to achieve the bare minimum of compliance and focus instead on what the commissioner determined to be more beneficial tasks. Results-based reforms were seen as a symbolic tool to increase resources, but not a useful way of holding their subordinates accountable. The two above articles provide mixed evidence as to the efficacy of performance management as a solution to impossible jobs.

The current study extends the impossible job literature by looking for solutions to the impossible job dilemma using front-line managers with impossible jobs and possible tasks. Prison chaplains are front-line mangers in an environment that is seemingly anathema to their ability to accomplish their job, even if they daily perform possible tasks. This complex amalgamation of the various aspects of the current impossible jobs framework, and the ways in which prison chaplains conceptualize their work can provide insight into ways of achieving success in other impossible jobs within public administration.

The Tasks of a Prison Chaplain

Prison chaplains are responsible for a myriad of activities. They are the gatekeepers of prisoners first amendment right to free expression of religion and must ensure that all prisoners have the ability to practice their faith by providing religious programing and services. Prison chaplains are also expected to provide pastoral counseling for inmates, and sometimes inmate families; facilitate inmate marriages; death notifications; volunteer recruitment and training; conducting services for their own religious denomination, and providing general education,

skills-based or substance-abuse prevention programing as well. Prison chaplains may also serve as chaplains or counselors to staff members at their correctional facilities (Hicks, 2008; Sundt & Cullen, 1998, 2002). In addition to these formalized duties, many chaplains I spoke with included "the ministry of presence" as one of their duties (Avery, 1986; Hicks, 2008; Opata, 2001). This could be walking the yard, visiting inmates in isolation or walking along the cellblock. Eric, a Christian chaplain at a minimum security prison stated, "I can stand there, and it gives people a chance to connect with you. Or I go out on the yard on a sunny day and I eat an apple, and people come by and talk." The emphasis for the chaplains was on being present for inmates to speak with, regardless of whether the conversation was about religion.

The Pew Research Center's survey of prison chaplains found that for almost half of those surveyed, 45%, administrative tasks took up the majority of their time (Boddie & Funk, 2012). The chaplains interviewed in this study echoed this finding. Donna, a Christian chaplain at a medium security prison, described this emphasis on administrative tasks as an aspect of the job that had changed over time:

> Twenty-four years ago, I used to spend most of my time in the population, with staff, with inmates… And now today, what is a more typical day is to come to the office, to spend most of the time in the chapel, in the office, doing one of several different things. Either spending time on the computer, arranging with volunteers for their activities, answering questions from family and volunteers, and staff members, and emailing administration and others about different and various situations. So that takes a huge chunk of time now.

Several chaplains also stated that to be successful a chaplain must have good administrative skills or, ideally, more support positions so that "they didn't have to spend all their time on the computer."

None of these tasks are inherently impossible; yet prison chaplains occupy an impossible job.

Method

To examine how prison chaplains felt they were able to achieve success in an impossible job, I used semi-structured qualitative interviews as my method of data collection. Semi-structured qualitative interviews are useful because they allow the participants to express their thoughts in their own words and allow for the interview to be guided by the participants' expertise. (Kvale & Brinkmann, 2009).

To recruit participants I used purposive snowball sampling (Tongco, 2007). This involved cold-calling professional chaplain associations and correctional facilities (with permission from various department of corrections communications staff), as well as introductions via a key informant. This sampling framework was used, in part, due to the small population size of state-employed prison chaplains and the difficulty of gaining access to those employed in total institutions where security is a primary concern (Riemer, 1977). However, it introduces an element of bias as I was only able to secure interviews in states with a relatively open stance on research in prison facilities and I was only able interview those chaplains who answered the phone and were willing to be interviewed. Nonetheless, this is an exploratory study, intent on generating knowledge for theory building, not on creating sweeping generalizations about prison chaplaincy.

Sample

I conducted sixteen interviews with prison chaplains across six states. All participants worked for state departments of corrections. Three worked in minimum level security facilities, four worked in medium security facilities and seven worked in maximum security facilities. Two participants were in upper management positions within religious services in the department of corrections. Participants had a range of experience working as prison chaplains, ranging from a

year to twenty plus years. Participants also had experience at different levels of management within religious services programing, from the former director of religious programs for the entire department of corrections in one state to chaplains who worked in front-line positions with prisoners and staff. The participants came from three major faith backgrounds, ten were of various Christian faiths, three were Catholic and two were Jewish rabbis. The vast majority of those interviewed were men (13). Racial information was not collected.

Interviews were conducted in person and over the phone, given the geographic disbursement of interview participants. The majority of interviews were recorded, but some interviews were not recorded, at the request of the participant or due to the location of the interview. For those interviews that were not recorded and transcribed, the researcher took notes during the interview. All participants' identities are confidential and interview notes and excerpts will be presented using pseudonyms.

Interviews and interview notes were coded using an iterative process of inductive and deductive thematic analysis (Fereday & Muir-Cochrane, 2006). This approach allowed the researcher to be more responsive to the data, using both data-driven and theory driven codes to conduct a thematic analysis. All quotes used are representative of three or more participants' views. Additionally, as a construct validity check, key informants reviewed initial drafts of the manuscript.

Results: The Impossible Job of Prison Chaplains

According to Hargove and Glidewell (1990) an impossible job consists of four criteria: illegitimate clients; multiple conflicting constituencies; low public respect for professional authority; and weak, controversial agency myths. A prison chaplain's job fits each of these dimensions.

Clients

An impossible job serves clients who are seen as illegitimate and intractable by the larger public. As Schneider and Ingram (1993) illustrated in their article on the social constructions of various target populations, inmates are seen by the public as deviant. Those constructed as deviant have little to no public power and are perceived as needing coercive, authoritarian tactics, even if the goal is rehabilitation (Schneider & Ingram, 1993). Steven, a Christian chaplain at a medium security prison, affirmed that his clients are there due to deviant behavior, although he would not label them deviants.

> Regardless of our relationship with people, we are in a prison and that always has to be remembered. The people … that are here are here not because they get along well with others or because they're really good at following rules. That doesn't make them bad people. It makes them people who have, for whatever reason ignored the rules. They've ignored the law. They've broken the law.

Chaplains in prisons serve clients who have in some way demonstrated they are a threat to public safety. Yet, all of the chaplains interviewed viewed their role as a non-coercive rehabilitative one. A few chaplains used the language of accountability to describe their role in rehabilitating inmates, but most described their role in terms of listening to those who have been most often discounted by society. This dichotomy between public views of their inmates and how chaplains conceptualize their role in prison fits the first dimension of impossibility.

Constituencies

Depending on the state that a prison chaplain is located in, there are a variety of constituencies they must attempt to balance. In some states prison chaplains are state employees making their two main constituencies, their clients, the inmates, and prison administration. It has been suggested in the literature that if prison chaplains are paid employees of a prison then this creates a conflict of interest between their religious duties, care of the inmates, and their duties as

state employees (Murton, 1979; Sundt & Cullen, 2002; Sundt, Dammer, & Cullen, 2002). The fear is that the balance between the two constituencies is always weighted in favor of the prison administration and thus, more punitive measures (Sundt & Cullen, 2002). As Wilmer, a Christian chaplain at a maximum security prison described it as follows:

> A warden in a prison…is very much like a captain of a sailing ship in the British Navy in the early 1800s. When they leave port, he is one step below God. And if God can't be found, the captain's it. And that's the way a warden is. Like everything on the ship depended on how the captain wanted to run things, everything in the prison depends on how the warden wants to run things.

This can make a chaplain's job impossible if a warden is not supportive of what a chaplain sees as their duty to a prisoner.

In other states where a prison chaplains' placement is sponsored by their denomination, there is a third constituency that must be balanced. Bob, a Catholic chaplain at a maximum security prison, used the example of gay marriage to illustrate this balancing test. While Bob is a state employee as a prison chaplain, if he had married two men in the discharge of his duties as a prison chaplain, the bishop who had recommended his placement could have him removed from his state employee position for violating a tenant of Catholicism. Bob pointed out that in his state prison chaplains cannot perform marriages so this conflict was purely academic, but stated this was an easy example to illustrate the way an inmate's legal right could conflict with his job as a Catholic diocesan's deacon. Hargrove and Glidewell contend that when the differences between constituencies are ideological or moral, this leads to an impossible job (1990).

Professional Authority

Hargrove and Glidewell (1990) argued that scientifically-based professional authority is the most solidly respected by the general public. Prison chaplain's professional authority does not fall into the scientifically-based category. Denney (2017), in his interviews with prison

chaplains found that chaplains did not believe security staff respected their role in prisons, maligning their professional authority as "Hug-a-Thug." The lack of respect for chaplain's professional authority, Michael, a Catholic former director of religious services, argued can be seen in the budget.

> Here in [state], in the first year of their incarceration, 95 percent of the women had attended some …[religious] program voluntarily and 71 percent of the men. No other program is touching those levels of involvement. But, if it's considered at all, it's considered last. And it gets a tiny amount of education work. They're all getting lots of money. Security is getting money at this level. Four percent of the budget in [state] goes on programming. Four percent of the whole budget. And the job is to correct. So, if four percent of your mission (sic) is going to your mission to help people change, you can imagine why you don't get so good outcomes. Four percent, then chaplaincy is way, way down within that bucket.

Other chaplains interviewed stated that their mission was seen as marginal even to their own church. Reginald, a Jesuit priest at a maximum security prison, lamented that "what we are doing is not seen as valuable and getting the church outside (not just prisoners and victims) to care is difficult…it's a lonely ministry."

Agency Myths

The four goals of correctional facilities are punishment, deterence, incapcitation and rehabilitation and public enthusiasm for each of these goals has waxed and waned in American ever since the Jacksonian era (DiIulio, 1990). However, several studies have found that prison staff, including security officers and prison management, support all four goals (Arthur, 1994; Cullen, Latessa, Burton, & Lombardo, 1993; Cullen, Lutze, Link, & Wolfe, 1989; DeMichele & Payne, 2012; Jacobs, 1978; Jacobs & Kraft, 1978; Sundt & Cullen, 2002; Wade-Olson, 2016; Whitehead & Lindquist, 1989). Interestingly, in Sundt and Cullen's (2002), study the majority of prison chaplains surveyed considered incapacitation the main purpose of putting a person in prison. Yet, many of the chaplains interviewed in this study spoke against the warehousing of

inmates, which they believed was occurring in the modern prison system. Leo, a Christian chaplain at a minimum security prison, thought this was because incapacitation of inmates was easy for the public to support, "the culture in general is quite content having prisons well outta the way – well out of sight and mind. Store their problems where they're out of sight; it's a very normative coping mechanism."

Some chaplains also believed that punishment of inmates currently holds too much emphasis in correctional agency myths. Michael stated, "This country does really believe in punishment. The research is very clear that most punishment, if anything, it increases recidivism rather than reduces it." Prison chaplains in Sundt and Cullen's study believed that changing a inmate's values through religion was the best method of reducing recidivism or rehabilitating inmates (2002). This also held true for the prison chaplains in this study, who felt they were working toward the agency myth that inmates can be rehabilitated. Although many of those interviewed felt a lack of public and at times administrative support for that goal. Wilmer illustrated this point by describing an initial interaction with his current warden where he attempted to discuss religious service programing with him after a staff meeting, "He became angrier and angrier and angrier until he was screaming and spital was coming out of his mouth... Until he finally jumped up in a rage and finally ran out of the room."

Even chaplains who did not perceive a lack of support, also commented on the difficulty of holding on to the hope of rehabilitation in the face of inmate recidivism, calling it as one of the most difficult aspects of the job. Randy, a Christian chaplain at a maximum security prison, described "seeing guys come back for second, third, or fourth time. You know I pour myself into these men, and sometimes these guys will come back, and you know it makes it more difficult

for them. It's like, I'm just a failure." Certain agency myths, such as rehabilitation, cannot be achieved for every client, making it an impossible job.

However, Randy followed up his above statement by saying "And I go, no, you failed, but that doesn't make you a failure unless you give up."

Ways to Succeed at an Impossible Job

Prison chaplains in this study offered unique insights on how to succeed in a seemingly impossible job. Keeping the four agency myths of prison in mind, chaplains interviewed described the various skills, goals and coping mechanisms through which they achieved success. Below are the three most common themes that appeared throughout the interviews.

Soft Skills Are Key

All of the chaplains interviewed emphasized the importance of soft skills in their line of work. Part of the impossibility of an impossible job is that it is not a hard-science profession, but those soft skills are part of what chaplains believed was the key to success. Soft skills to prison chaplains comprised a variety of skills, but the most cited were teamwork, listening, and communication. As Donna described it:

> I would define "success" as being an individual who can work and play well with others at their institution… You have to have those relationship building skills so that you can be successful, in that you can work within your structure, facilitating change when needed and supporting others without falling off your map, sort of thing.

Donna also gave a specific example of when her soft skills helped her achieve success. Success in this instance was achieving a religious programing goal she had set for herself, and one that had been requested by the inmates.

> Recently we wanted to rescale how our powwow was done, but if we just did that as two chaplains here, we'd probably be up a creek with lots of grievances. So, we took it to our

> Correctional Rehab Assistant Superintendent and said, "We need to talk about this. We need to talk about the problems we've have with powwow for the last three years, and how we would like to make some changes, and this, and that." He took all of our recommendations together because we have a good relationship with him and we work and play well with others. And he took that to the executive team and brought us back a package that was more than what we were asking to be changed, in better ways.

Donna pointed out that this was only possible due to her past history of listening and compromising with officers outside of her team. She was able to achieve a "real-life example of how you build and bring about success" because of her flexibility and past relationship building with other corrections officers.

Several chaplains also stated that the process of relationship building, particularly with security officers, can be a slow and involves building up trust. Kit, a Christian chaplain at a medium security prison, commented that because chaplains deal with the "touchy-feely" aspects of inmates' rehabilitation they need to build trust with security in order to accomplish any religious programing goal. He indicated that security will initially view a chaplain as a "chocolate heart," but if you can consistently demonstrate that you take security and safety seriously over time your credibility and ability to accomplish tasks will increase. Jack, a Jewish rabbi at a maximum security prison, stated that "building relationships is a big part of what we do…work with people if you want to survive." Laurie, a Christian chaplain at a medium security prison, described one of the tactics that she used to build productive relationships with prison administration.

> My strategy is to keep them informed and so I do a lot of communicating with administration. First through my immediate supervisor, but also all the way up to the warden, the captain, constantly bringing things forward. I also hold, once a month, a religious rep meeting, and so offenders of every faith tradition, and living unit, come together once a month to talk about issues related to practicing their faith here in the institution and if they have any issues with movement or security or religious items not being allowed or whatever, we can work those things out. The administration then gets a copy of those minutes and I follow up with them on decisions that have to be made or protocols that have to be lifted up.

Relationship-building with those outside of the their department within the prison, especially with those staff who might be predisposed to devalue their work, was key to helping prison chaplains achieve success in their goals.

Numbers Cannot Be The Only Goal

Previous research on prison chaplains has found that their particular brand of public service motivation does not lend itself well to the creation of numeric goals (Kerley, Matthews, & Shoemaker, 2009). This study was specifically looking at the creation of numeric goals in terms of conversions to a particular faith denomination; however, chaplain in this study echoed this sentiment against numeric goals. Donna believed that defining success as a prison chaplain was "trying to quantify something that's very unquantifiable." Wilmer stated that his thinking on the setting of numeric goals had evolved over the years as the impossibility of his impossible job had increased.

> I've changed on my thoughts of that through the years. Because of the time of negative experiences here, I saw my program get disassembled. At one point I felt like I'd built this big program and … here's this hurricane coming in and the ocean is eating my house and I'm on the back side trying to hang on to the door to the storage shed while the rest is being sucked into the ocean and destroyed. That's how I felt about this. That was very challenging. Success at that point could not be defined ... if I wanted to survive mentally and emotionally, I could not define success by the size of the program. I could not define success by the variety of religious activities that we were able to hold. I couldn't define success by how much attention I would get from outside organizations because of the excellence of my chaplaincy work. Couldn't define it by any of those things… I had to decide where the line marked tolerable was. We would often say, 'This is intolerable. I can't take this.' Well, the intolerable actually means that I can't stand this anymore, I cannot tolerate this anymore. So I had to decide where tolerable was. I decided that tolerable would have to be that as long as I am permitted to come here and to be with them that then that would be successful. I couldn't say that I had to do this, do that, or do the other because all of that could be taken away and was being taken away. But if I defined it in terms of to be present with them, that was tolerable, that was acceptable, and that was success…. By laying aside the corporate model of success, laying aside these very technical concerns for what defines success, that's allowed me to be able to stay here and to maintain and to continue.

Wilmer pointed to the lack of administrative support as a reason to avoid numeric goals.

However, other chaplains found that their avoidance of numeric goals as a measure of success came from their experiences with clients. As Reginald put it, "You can't fix people sometimes…it has to be enough to accompany people through a dark time." Not every inmate will be rehabilitated and simply because an inmate has not gone back to prison does not mean they are rehabilitated. Leo, a chaplain in a state with fairly low rates of recidivism, discussed why he did not use recidivism rates as a measure of success, "somebody that we'll consider a success here in [state], that's still living in squalor, surrounded by violence, addicted, but just has not had another felony. They manage not to get sentenced again, even though fullness of life would not be what I see there." Leo believed that success needed to be more than an absence of crime and that focusing on recidivism rates missed the bigger picture of his calling. Essentially, focusing on numeric goals was missing the forest for the trees.

Whether it be unsupportive administration and scarce resources, intractable clients or misspecified goals, numeric goals did not help most prison chaplains feel as if they had achieved success. This finding also supports Moynihan's (2005) finding that results-based management may not be useful for achieving 'impossible' jobs.

Take Your Wins Where You Can Get Them

Impossible jobs by their very nature rebut any form of success, so what do chaplains consider a success if not numeric goals? Prison chaplains emphasized not using external sources for a sense of success or accomplishment, recognizing the small wins and focusing on the process as the product. Prison chaplains deal work clients who are incapacitated because they are perceived to be a threat to public safety. Some of the inmates will be rehabilitated, but according

to the prison chaplains in this study, this is not necessarily the norm.. Eric emphasized how difficult it is to define a successful accomplishment when focusing on the actions of others.

> **Eric**: One of my clerks at the pen had been in prison for 20 years for killing his wife, and putting her in the trunk of his car…So, he gets out. Gets connected with a real estate guy. And he's doing fixer-up jobs for this realtor and stuff. But over the course of two or three years, the recession hits, and he's – I don't know what happened but there was obviously conflict between his employer and him – he ended up hanging himself. But so, then I get this call from the real estate company, "[X] hung himself." And so, when I look at it, I still think in a way that's a success story because -
>
> **Interviewer**: He didn't kill anyone else?
>
> **Eric**: Right. In the past, when there was a conflict, [X] killed his wife. This time, there's a conflict, and instead of killing someone else, he chose to kill himself. So, do we have a success story? Success is really hard to define. I feel like to some extent, we have some success there because no one else got hurt this time.

It points to the difficulty of using inmate trajectories to define whether or not a chaplain has done a successful job. Chaplains, like most workers in an impossible job, cannot control the actions of their clients so basing the efficacy of their job performance exclusively on those actions is too variable a measure of success.

This is not to say that chaplains do not conceptualize success using their clients actions. However, many chaplains found focusing on small victories to be a better tool to measure success. Michael described one of these small victories.

> I was working with a man and I got the sense he might be sociopathic in nature. He's telling me what he needs and he wants desperately to reconcile with his wife. I said, "Okay, tell me more of what's going on." He's saying, "Chaplain, you're the man of god and you can help me." I actually get in touch with his wife. She's terrified of him because they found his mother buried in the back yard. He has a bad history and I figured out that he's telling me lies. I went back to him and didn't say, "Well, you're a liar." This is where he's at. This is who he is. I say, "I'd be glad to help you with that and I talked to your wife. Your wife is interested, but here's the way we'd have to do it." "Oh, no, no, Chaplain, that won't work." I would've done it in a certain safe way, and he wasn't going to go there. So, he then backs off and then I was able to get more information to his wife to make her safer and then he's safe. And then the person's situation is safe. We don't have somebody who is trying to break the rules in the prisons system.

In this situation, an inmate did not break prison rules by contacting a person outside the prison, and a person outside the prison was able to have more information. No lives were endangered and an inmate was not punished. Burke, a rabbi at a maximum security prison, provides another example. He told the story of consoling a man with visible Nazi tattoos after a family death notification. Afterwards, Burke said a blessing in Hebrew for the inmate and the inmate thanked him. Burke said he could have focused on the fact that the inmate had Nazi tattoos or he could celebrate that a man with anti-Semitic tattoos was able to thank a Jewish rabbi for saying a blessing in Hebrew and mean it. Focusing on small successes reminds chaplains that they can successfully accomplish goals, at least some of the time.

Lastly, many of the chaplains emphasized the processes of their jobs as a way to define success. For many this took the form of ensuring listening and treating every inmate equally, regardless of their religious affiliation. Steven described how he tried to ensure each inmate he interacted with felt as if their concerns were truly heard.

> I do not get caught up in the game of have I been successful. I don't think about that. What I focus on is when inmates bring a question to me, have I answered it. Did I give them an answer or did I brush them aside. Hopefully I gave them an answer and didn't just brush them aside. One of the difficulties within D.O.C. [Department of Corrections] land, one of the difficulties is so many of the inmates feel disregarded. And so one of my goals is to say, "Do you have a question? I've got two big ears. What do you want?" Because again, a common complaint is people don't listen to me. So I try intentionally to listen. Does that make me a success? Well, not necessarily but if I have listened to someone while they're speaking, hopefully they go away feeling better about the situation than when they came to me. I guess in sense, I would call that success.

The act of intentionally listening to inmates, even if the complaint cannot be solved, is the act of putting process at the forefront of success. It is a task that can be accomplished by the person in the impossible job.

Conclusion

Impossible jobs are made up of possible tasks; it is the yardstick by which one measures success that determines an impossible job. Thus far, the impossible job literature has focused on outward-facing opinions of success and output-based measures in order to determine whether or not a job is impossible. However, women and men wake up everyday and go to their impossible jobs, and many of them feel as if they are succeeding at them. This is possible by focusing on relationship-building, internal barometers of success and process as the product. Performance management, results-based management and other such tools are all useful in different environments but perhaps they are not best suited to impossible jobs. The jobs which have been labeled impossible are difficult jobs, but it is the ways in which administrators define success that determine their impossibility.

Lynn (1994) bemoaned the triumph of art over science in public management over two decades ago. Since that time there has been an increase of studies examining the various ways in which science can be applied to public management and the advent of new public management (Gore, 1994; Heinrich, 1999; Kelemen, 2000; Kettl, 1997; Moynihan, 2008). There is now a surfeit of different ways in which science can be applied to be public management. Yet, these different scientific techniques have not solved the problem of impossible jobs. This may be because success in an impossible job is more an art than a science.

An impossible job can never truly be finished, that is part of what makes it impossible. This does not make these goals less worthwhile, it is simply a "wicked problem" (Rittel & Webber, 1973) with which society and those brave enough to enter into impossible jobs must contend. Thus success becomes a process, an art form. Eric described it best:

> To me, science is one plus one is two, and it's very military...Right? You do this, you do this, you get this result. … I think prison chaplains, they come into the system, and they lose this sense of vision and passion, and they get caught up in the structure, you know?

And, ‘This is what I have to do.’ And checks and balances kind of thing. My thing is a lot of people come into the position because they have some passion to help people change lives, and then they lose that. But if you see chaplaincy as an art, it’s never fixed. It’s never complete.

CONCLUSION

Each of these chapters centers on citizens and the choices they make as they interact with public administration. These interactions highlight the difference between the letter and administration of the law. The letter of the law is strict. It provides a moral basement for the actions and choices of the citizen-client, citizen-community and bureaucrat-citizen. The administration of the law is more amorphous; it is a focus on how to operationalize the law. Operationalization is open to interpretation; success is much harder to measure and gauge. Public administrators are charged with obeying the letter of the law and operationalizing the law everyday. This difference between the letter and administration of the law can lead to mixed messages about the relationship of citizen-clients and citizen-communities to their government.

The letter of the law can create procedural justice and the administration of the law can create moral inversions. In the court cases highlighted in *"Hostages to Compliance": Towards a Reasonableness Test for Administrative Burdens*, adherence to the letter of the law created procedural justice for Barbara James, even if she may not have seen it that way, and uneven administration of the law created a process of moral inversion for ACS caseworkers. Mrs. James, a citizen-client of AFDC, received procedural justice because her caseworker followed the letter of the law. Mrs. James was informed of the required administrative burdens and the consequences of refusing those burdens at every step of the way. In each step of the process the bureaucrat-citizens interacting with Mrs. James followed the letter of the law, and while Mrs. James disagreed with the law requiring home visitation, she did not find fault with her treatment by the public administrators.

The children who interacted with ACS caseworkers, on the other hand, did not experience procedural justice, but the negative outcomes associated with the process of moral inversion by ACS caseworkers. Moral inversion is when something bad or evil is repackaged as

something good or productive (Adams & Balfour 2014). Here the moral inversion was application of petty conditions that were ostensibly in the best interests of the child, but resulted in children remaining in out-of-home care for much longer than necessary. The provisions from the letter of the law were administered unevenly, negating procedural justice, and generating outcomes detrimental to the well-being of the children affected, creating a moral inversion. The letter of the law, if administered and applied evenly, can produce a feeling of trust and respect between a citizen-client and their government, even if the outcome is not the one desired by the citizen (Epp, Maynard-Moody & Haider-Markel, 2014). However, the operationalization of the law, if administered and applied unevenly, can produce feelings of distrust and a loss of citizen engagement (Soss, 1999). Administration matters and affects a citizen's relationship to the government.

The next chapter, *The Indian Child Welfare Act's (ICWA) Preferential Placement Mandates and Permanent Outcomes for Children*, illustrates the obscuring effect controversial politics can manifest between the letter and administration of a law. ICWA was a response to the assimilation policies of the US toward AI and AN citizens and a recognition of the sovereign status of tribal nations. However, it has been a controversial law since its inception, subject to variable modes of administration and implementation by bureaucrat-citizens (Fletcher, 2009; Matheson, 1996). Indeed, as of October 25th, 2018 the attorney general of Texas instructed the General Counsel of the Texas Department of Family and Protective Services to no longer enforce ICWA (Mateer, 2018). The controversial nature of ICWA is most likely partially responsible for the fact that no data elements related to its implementation were included in the creation of the AFCARS data system, regardless of the fact that ICWA was passed into law roughly 20 years prior. ICWA is still federal law, however the heightened politics around the law have obscured

administrators and researchers from being able to determine if administration of the law is following the letter of the law and what affect the law is having on citizen-clients. ICWA is also larger than that; it is part of how a citizen-community, tribal nations, conceptualizes their relationship to the US government. When the effects of ICWA are unable to be measured in a systematic fashion due to politics and uneven administration, this increases distrust between tribal nations and the US government.

The last chapter of the dissertation, *"Wishy-Washy Chocolate Hearts": The Art of the Impossible Job*, examines how bureaucrat-citizens, in this case prison chaplains, cope with the inherent difficulties of a career in public administration. As the previous two chapters demonstrated, bureaucrat-citizens face an ostensibly impossible task. They must uphold the letter of the law in each and every administrative encounter with a citizen-client in order to uphold standards of procedural justice and avoid moral inversions. Bureaucrat-citizens are also tasked with reconciling the political compromises that allowed laws to come into being, administering the law in a complex political environment not of their making. Success at balancing these two intricate directives often seems impossible, yet bureaucrat-citizens continue to strive toward achieving these goals everyday. The key to coping, for many of the bureaucrat-citizens interviewed in the chapter, is to view the process of administration as the product of their work, rather than focusing on outputs beyond their control. Bureaucrat-citizens cannot control the actions of citizen-clients. They cannot solve deep-rooted political differences on important social problems that affect citizen-communities. However they can control how they frame their responses to these issues. Success can be zero-sum, either an inmate was rehabilitated or they were not, or it can be process-oriented. Process-orientation focuses on the small interactions with citizen-clients and the day-to-day actions and tasks that can build into larger projects. Focusing

on those aspects of law and administration that they can control allows bureaucrat-citizens to face their impossible jobs and impossible tasks, and continually rise to the challenge.

This dissertation examines the effect of public administration on the citizen-client, citizen-community and bureaucrat-citizen. These effects often center on the difference between the letter and administration of the law. Bureaucrat-citizens are placed in the unenviable place of interpreting the letter of the law into practice. The potential of moral inversions, contentious politics and the difficulty of measuring success will continue to plague their work, for these are "wicked problems" (Rittel & Webber, 1974). However, this dissertation has offered a few tools to assist bureaucrat-citizens in their work. Chapter One offers a balancing test for bureaucrat-citizens to use before implementing administrative burdens. Chapter Two provides initial evidence on the effectiveness of ICWA preferential placement mandates for bureaucrat-citizens involved in child welfare and for the citizen-community of tribal nations. Lastly, Chapter Three provides a way of framing success for bureaucrat-citizens persevering in impossible jobs. In closing, I will end my inquiry the way I began, with the sage words of Mary Parker Follet, "Progress is an infinite advance towards the infinitely receding goal of infinite perfection" (Graham, 1995, p. 248). I submit these chapters toward that advance.

APPENDIX A

THE INDIAN CHILD WELFARE ACT'S PREFERENTIAL PLACEMENT MANDATES AND PERMANENT OUTCOMES FOR AMERICAN INDIAN AND ALASKA NATIVE CHILDREN

Table 13: Likelihood of a Permanent Placement for an American Indian and Alaska Native Child Placed with an American Indian and Alaska Native Foster Parent

	Odds Ratio	SE
AI/AN Foster Parent	0.984	0.016
AI/AN Child	0.880***	0.006
AI/AN Foster Parent and AI/AN Child	0.838***	0.018
Age	0.967***	0.000
Sex	1.017***	0.002
Clinical Disability	1.138***	0.002
Inadequate Housing	0.890***	0.003
Alcohol Abusing Parent	1.055***	0.005
Drug Abusing Parent	0.990***	0.003
Parent Died	0.957***	0.012
Parents Incarcerated	1.073***	0.005
Cumulative Removal Reason	0.881***	0.003
Total Removals		
2	0.866***	0.003
3	0.827***	0.006
4 or higher	0.841***	0.009

***p < 0.001, **p < 0.01, and *p < 0.05. N= 3,437,918 Pseudo R2 = 0.104

Table 14: Chi2 Test of the Dependent Variable for American Indian and Alaska Native Children

Dependent Variable	Chi2
Permanent Placement, not FY = Permanent Placement, FY	33.32***
Permanent Placement, not FY = Non-Permanent Placement	5.36*
Permanent Placement, FY = Non-Permanent Placement	996.28***

***p < 0.001, **p < 0.01, and *p < 0.05

APPENDIX B

"WISHY-WASHY CHOCOLATE HEARTS": THE ART OF THE IMPOSSIBLE JOB

Table 15: Interview Participants

Pseudonym	Religious Affiliation	Security Level of the Prison
Bob	Catholic	Maximum
Burke	Jewish	Maximum
Casey	Christian	Director of Religious Programing
Dave	Christian	Minimum
Donna	Christian	Medium
Eric	Christian	Minimum
Jack	Jewish	Maximum
Kit	Christian	Medium
Laurie	Christian	Medium
Leo	Christian	Minimum
Michael	Catholic	Former Director of Religious Programing
Midge	Christian	Maximum
Randy	Christian	Maximum
Reginald	Catholic	Maximum
Steven	Christian	Medium
Wilmer	Christian	Maximum

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