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"THE PAST NEVER VANISHES": A CONTEXTUAL CRITIQUE OF THE EXISTING INDIAN FAMILY DOCTRINE

Lorie M. Graham*

Here I walk the road of beauty with my little one as we wear beautiful, beaded moccasins. Let the sunrays be on us, among the carpeted colors of flowers. My child and I will be recognized by our little tiny friends — animals, birds, and butterflies. My child and I will touch the clear water of coolness in the stream as we live. Ha ho ya tahey. My child asked me, "Who am I?" I said, "You are my child who is life like that sun and that rainbow." Then my child ran, jumped, yelled, laughed and chased his shadow. I said to our Creator, our Maker, "Let us live in pure spirit and in happiness."

— Navajo Pregnant Woman's Prayer**

I. Introduction

"I don't know my own culture, . . . I am going to need your help in understanding . . . Teach me, teach my children." These are the words of a forty-three-year-old Navajo woman on her first visit back to the Navajo Nation since her birth. Stolen as an infant, along with her twin brother, and adopted out on the black market, she was recently reunited with her family and community. Her journey home comes at a time when Native American nations are fighting proposed legislation and court-made rules that seek to limit the reach of the Indian Child Welfare Act of 1978 (ICWA).²

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** Quoted in AMERICAN INDIAN STUDIES CTR., THE INDIAN CHILD WELFARE ACT: UNTO THE SEVENTH GENERATION, CONFERENCE PROCEEDINGS 417-18 (Troy R. Johnson ed., 1992).

1. *Navajo Native Finally Home*, BOSTON GLOBE, June 2, 1996, at A1; see also Royal Ford, *Identity Retrieved*, BOSTON GLOBE, May 2, 1996, at B1; *A Cyber-Search For Family*, BOSTON GLOBE, May 7, 1996, at A18; Royal Ford, *Reunion Day*, at 43.

2. 25 U.S.C. §§ 1901-1963 (1994). Although the word "Indian" is a misnomer originating from Christopher Columbus' mistaken assumption that he had reached Asia in 1492, the term is still widely employed to describe indigenous peoples of the Western Hemisphere. However, where possible, the author will refer to indigenous groups by their individual affiliation. Other terms such as American Indian and Native American, as well as Native American nation, tribe, or community will be used interchangeably in this article. The title of this article is borrowed in

Congress passed the ICWA in response to the massive displacement of Native American children in this country. Prior to the law's passage, one-third of all Native American children were being separated from their families and communities and placed in non-Indian adoptive homes, foster care, and educational institutions by federal, state and private child welfare authorities.³ While there were a myriad of interrelated factors that led up to this Indian child welfare crisis, at its core was the failure of mainstream society to recognize and respect the cultural values and social norms of Native American nations. In a poignant statement to Congress in 1978 on the treatment of American Indian families in this country, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians noted that:

Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing. Many of the individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.⁴

This assimilative attitude that Native American children were better off growing up in a non-Indian environment did not surface overnight. Rather it percolated from centuries of U.S. sanctioned policies — from boarding schools, to "placing out" programs, to Indian adoption projects — aimed at the erasure of Native American cultures.⁵

The passage of the ICWA marked a reversal in federal Indian policy toward one of self-determination for Native American nations. The law recognized the sovereign authority of tribes to address Indian child welfare issues. Tribal courts were designated as the exclusive forum for certain custody proceedings involving Native American children domiciled or residing on the reservation or a ward of the tribal court, and the preferred forum for proceedings involving non-domiciliary children.⁶ Additionally, in state cases

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part from an editorial on the lost children of El Salvador's civil war. *El Salvador's Shame*, BOSTON GLOBE, July 16, 1996, at A14.

3. See *infra* notes 99-106 and accompanying text.

4. *Hearings Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong. 191-92 (1978) [hereinafter *1978 Hearings*], quoted in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35 (1989).

5. See *infra* notes 39-94 and accompanying text.

6. See 25 U.S.C. § 1911 (1994). There is an exception to the exclusive jurisdiction of tribal courts for proceedings in States where Public Law 280 grants civil jurisdiction to state courts. However, even in those states, tribes have concurrent jurisdiction by virtue of their inherent sovereignty. See *Native Village of Venetie I.R.A. Council v. Alaska*, 944 F.2d 548 (9th Cir. 1991). See generally Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption*

involving the termination of parental rights, foster care, and adoption, the law sought to protect the rights of Native American children to be raised and nurtured, whenever feasible, in their families and communities of origin through the establishment of minimum federal standards and procedural safeguards.⁷ The law is limited to Native American children who are members of or eligible for membership in a federally recognized tribe.⁸ As one ICWA attorney noted, "the hopeful vision" for the ICWA was a future "in which the states, tribes, and federal government work[ed] together . . . to protect Indian children and to reaffirm the value of Indian family life."⁹

While the law is not flawless, it provides vital protection to Native American children, their families, and tribes.¹⁰ Yet recent studies suggest that one-fifth of all Native American children "are still being placed outside of their natural tribal and family environments."¹¹ Courts, social welfare agencies, and attorneys who fail to follow the letter and spirit of the law have all contributed to this ongoing crisis. The "Existing Indian Family" doctrine, a state judicially created exception to the ICWA that has received some recent

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Under the Indian Child Welfare Act, 28 ARIZ. ST. L.J. 589, 601 (1996) [hereinafter Metteer, *Pigs in Heaven*] (discussing jurisdiction questions under the ICWA). In the only U.S. Supreme Court decision to date involving the ICWA, the Court applied a uniform federal definition of "domicile" to avoid inconsistent results among states over jurisdictional issues. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

7. For a discussion of the ICWA's stated goals, see *infra* notes 143-52 and accompanying text. Title I of the ICWA, which is the aspect of the law that the Existing Indian Family Doctrine seeks to avoid, addresses the sometimes contentious and often confusing relationship between tribes and states regarding child custody matters. The Act applies to child custody proceedings, such as adoption, termination of parental rights, and foster care placement, involving American Indian children. Important safeguards of the Act include: (1) notification of tribes regarding the placement of Indian children and the ability to intervene in the state court proceedings, (2) appointment of counsel for the parents and children, (3) the right to petition for invalidation of any placement violating ICWA, (4) established procedures for voluntary consent to termination of parental rights, and (5) a requirement that the laws and court orders of Indian tribes be afforded full faith and credit. 25 U.S.C. §§ 1911-1914, 1916, 1920 (1994); see also *Holyfield*, 490 U.S. at 43. The Act also establishes Indian child placement preferences to be followed in the absence of good cause. If a child is to be placed in foster, pre-adoptive or adoptive care, the state court must attempt first to place the child with extended family members, members of the tribe, tribally approved homes and institutions, or other American Indian families. In meeting the preference requirements, state courts must look to the social and cultural standards of the tribe. 25 U.S.C. § 1915 (1994); see Bruce Davies, *Implementing the Indian Child Welfare Act*, 16 CLEARINGHOUSE REV. 179 (1982).

8. "Indian child" is defined as any unmarried person under the age of eighteen who is either a member of a Native American tribe or eligible to be a member of a tribe. If the child is not currently a member, then he or she must also be the biological child of a member. 25 U.S.C. § 1903 (1994).

9. See Davies, *supra* note 7, at 196.

10. See *infra* notes 151-52 and accompanying text.

11. See *Introduction to THE INDIAN CHILD WELFARE ACT: UNTO THE SEVENTH GENERATION: CONFERENCE PROCEEDINGS* (Troy R. Johnson ed., 1993) [hereinafter *CONFERENCE PROCEEDINGS*].

congressional support, is one such example.¹² While the doctrine varies slightly from state to state, the end results are the same: to cutoff a number of Native American children from their extended families and cultural heritages by thwarting the express language and goals of the ICWA and ignoring indigenous views of what constitutes an "Indian family." It is in this way that the doctrine is reminiscent of past U.S. policies. Indeed, these recent challenges to the ICWA cannot be properly evaluated without placing them in the larger historical context of U.S. Indian policy toward American Indian children. The legacies of these policies remain with us today as Native American nations struggle to reconnect with their lost loved ones and maintain a sense of community for their children and their children's children. To ignore the past, as the author believes the Existing Indian Family doctrine does, is to risk reversing all that has been achieved by Native American nations in the past twenty years with respect to familial self-determination.

In order to demonstrate how the Existing Indian Family doctrine perpetuates past assimilative attitudes, part 2 of the article begins with a brief historical overview of the treatment of American Indian children in this country. Part 3 demonstrates just how deeply ingrained these assimilative attitudes had become in our society by the 1970s, culminating in an Indian child welfare crisis. Within this larger historical context, part 4 provides a critique of the Existing Indian Family Doctrine and explores some current ideological debates that may be underlying these recent challenges to the ICWA.

II. The Historical Realities of American Indian Children

*If we do not understand each other, if we do not know the culture or the history of each other, it is difficult to see the value and dignity of each other's societies.*¹³

— Chief Justice Yazzie, Navajo Nation Supreme Court, 1993

A. Some Indigenous Views of Family and Community

Indigenous nations, tribes, or communities are "culturally distinctive groups" that have "their ancestral roots imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity."¹⁴ It is

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12. See *infra* notes 156-57 and accompanying text.

13. Chief Justice Robert Yazzie, Navajo Nation Supreme Court, *quoted in* Lisa Driscoll, *Tribal Courts: New Mexico's Third Judiciary*, 32 N.M. B. BULL., Feb. 18, 1993, at A5.

14. See JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 3 (1996). In the opening paragraphs, Anaya offers the following definition of "indigenous peoples":

Today, the term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by

estimated that there are some 5000 indigenous nations and 500,000,000 indigenous peoples in the world.¹⁵ In this country alone, there are over 550 federally recognized Native American nations and some 1.9 million people who identify with their American Indian ancestry.¹⁶ These indigenous nations are not defined by any "racial" category, but rather by their distinct histories, cultures, governments, economic institutions, languages, philosophies, and senses of spirituality.

What follows are but small fragments of a large body of knowledge on familial relations that have existed in North American indigenous communities for centuries. In attempting to explicate these familial concepts, it is important to be cognizant of what Robert Warrior calls "an ossifying of American Indian existence."¹⁷ Certainly, the child-rearing traditions of indigenous peoples are as diverse as the communities that embody them. Moreover, as Greg Sarris so aptly points out, "tradition itself is not fixed, but an on-going process."¹⁸ Yet subsumed within these traditions are unifying concepts that are important to a fuller understanding of Indian family life. A brief look at some of these concepts and traditions will help to establish a contextual framework for evaluating past U.S. policies aimed at destroying the cohesiveness of the Indian family and the more current existing Indian family doctrine.

For many Native American nations, "family" denotes extensive kinship networks that reach far beyond the Western nuclear family. It is a "multi-generational complex of people and clan and kinship responsibilities" that

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settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the tribal peoples of Asia, and other such groups are among those generally regarded as indigenous. They are *indigenous* because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the extent they comprise distinct communities with a continuity of existence and identity that links them to the communities, tribes, or nations of their ancestral past.

Id.

15. Winona LaDuke, *An Indigenous View of North America*, THE LINEUP, VOL. 2.1, at 28 (1995). LaDuke notes that "[w]e share under international law the recognition as nations in that we have common language, territory, governing institutions, economic institutions and history, all indicators under international law of nations of people."

16. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, WE THE . . . FIRST AMERICANS (1993). There are a number of state recognized and unrecognized Native communities in this country, as well as urban Indian organizations that work closely with American Indian children and their families.

17. ROBERT ALLEN WARRIOR, TRIBAL SECRETS xvii (1995).

18. GREG SARRIS, KEEPING SLUG WOMAN ALIVE: A HOLISTIC APPROACH TO AMERICAN INDIAN TEXTS 179-80 (1993).

extends to past and future generations.¹⁹ According to Vine Deloria, Jr., "kinship and clan were built upon the idea that individuals owed each other certain kinds of behaviors and that if each individual performed his or her task properly, society as a whole would function."²⁰ As Evelyn Blanchard explains "Indian people have two relational systems":

They have a biological relational system, and they have a clan or band relational system. It is the convergence, if you will, of these two systems in tribal society that creates the fabric of tribal life. And each of us as an Indian person has a very specific place in the fabric. Those responsibilities are our rights, individual rights. And even our mother has no right to deny us those rights. We want that. We know ourselves, and that is necessary for these children.²¹

Understanding this interplay between "collective responsibility" and "individual rights" is essential to understanding indigenous familial relations. Where children and community are concerned, they are actually two sides of the same coin. For instance, a child's right to love and nourishment (e.g., cultural, emotional, spiritual, and physical) is the community's responsibility. "Those [collective] responsibilities are our individual rights."²² To place a child outside the kinship community absent culturally relevant safeguards, as was the case before the ICWA was passed, would be to deny that child certain rights otherwise recognized by her tribe.

The kinship community plays an integral role in the care and education of Native American children, from newborn infants to those on the threshold of adulthood. While parents might assume responsibility for the basic guidance of the child, extended family members often have distinct child-rearing responsibilities. For instance, according to Blackfoot tradition, it is not uncommon for grandparents to raise one of their grandchildren.²³ Moreover, if a small child should lose her mother, a grandmother or elderly widow in the community often steps in to care for the child.²⁴ In the Navajo culture, when a child is born into a family, the whole clan has child-rearing responsibilities.

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19. VINE DELORIA, *INDIAN EDUCATION IN AMERICA* 22 (1991).

20. DELORIA, *supra* note 19 at 22; *see also* Martine Segalen, *Kinship and Kinship Groups*, *HISTORICAL ANTHROPOLOGY OF THE FAMILY*, 43-44 (1986).

21. *Indian Child Welfare Amendments: Hearings on S. 976 Before the Senate Select Committee on Indian Affairs*, 100th Cong. 97 (1988) [hereinafter *1988 Hearings*] (statement of Evelyn Blanchard); *see also* Donna Goldsmith, *There Is Only One Child, and Her Name Is Children*, 36 *FED. B. NEWS & J.* 446, 449 (1989); Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 *HARV. WOMEN'S L.J.* 1 (1990) [hereinafter Goldsmith, *Individual vs. Collective Rights*].

22. *1988 Hearings*, *supra* note 21, at 97.

23. *See* BEVERLY HUNGRY WOLF, *THE WAYS OF MY GRANDMOTHERS* 195 (1980).

24. *Id.*

This is reflected in the Navajo language. There are no Navajo words for aunt or uncle, niece or nephew. When a young boy addresses his mother he refers to her as *shima'* (mother). When the boy addresses his mother's sister he refers to her as *shima' ya'zhi'* (which means little mother). And the aunt addresses the boy as *shiyazov* (her little child or little son).²⁵ Other indigenous nations have similar customs. According to Comanche custom, a child's paternal aunt might assume the role of mother when the child's mother is unavailable.²⁶ These customs and traditions continue to serve as important guideposts for determining appropriate placement of American Indian children in need of care and supervision.²⁷

In his book *Look to the Mountain: An Ecology of Indigenous Education*, Gregory Cajete describes how the context of family and community traditionally defined the content and process of a child's indigenous "education":

The living place, the learner's extended family, the clan and tribe provided the context and source for teaching. In this way, every situation provided a potential opportunity for learning, and basic education was not separated from the natural, social, or spiritual aspects of everyday life. Living and learning were fully integrated.²⁸

As this quote suggests, child-rearing and indigenous education practices often go hand in hand. Within the context of the home and community, a child learns to develop her full potential as an individual and to harmonize that individuality with communal needs.²⁹ This is done through a holistic system of education that teaches the child that all things in life are related.³⁰

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25. Interviews with Dr. Manley Begay, Executive Director of the Harvard Project on American Economic Development, Harvard University (July 1997).

26. See *infra* note 231 and accompanying text.

27. *Id.*

28. See GREGORY CAJETE, *LOOK TO THE MOUNTAIN: AN ECOLOGY OF INDIGENOUS EDUCATION* 33 (1994). Cajete's book represents an effort "to build intellectual bridges" between Western and Indigenous systems of "knowing the world." *Id.* at 13; see also *RESPECT FOR LIFE: THE TRADITIONAL UPBRINGING OF AMERICAN INDIAN CHILDREN* (Sylvester M. Morey & Olivia L. Gilliam eds., 1974). George Pettitt, in his 1940s study of Native child-rearing practices, noted that education was "a community project in which all reputable elders participated at the instigation of individual family." GEORGE PETTITT, *PRIMITIVE EDUCATION IN NORTH AMERICA* (1946), cited in MARGARET CONNELL SZASZ, *INDIAN EDUCATION IN THE AMERICAN COLONIES* 11 (1988) [hereinafter SZASZ, *COLONIES*].

29. Cajete notes that traditional indigenous education revolved around "experiential learning (learning by doing or seeing), storytelling (learning by listening and imagining), ritual/ceremony (learning through initiation), dreaming (learning through unconscious imagery), tutoring (learning through apprenticeship), and artistic creation (learning through creative synthesis)." CAJETE, *supra* note 28, at 34.

30. The Lakota expression "Mitakuye Oyasin" ("we are all related") speaks to this understanding that the life of an individual is inextricably linked to that of other people as well

Children are taught from an early age to pay close attention to the "constructive and cooperative relationships" that make up the universe.³¹ It is in this way that they learn how their survival and that of the community are dependent upon maintaining a proper balance between the earth and all living things. The following examples help to illustrate this point.

The late Simon Ortiz explains in the following passage how his family's "indigenous sense of gaining knowledge" influenced his life's work as a writer and poet:

It was the stories and songs which provided the knowledge that I was woven into the intricate web that was my Acoma life. In our garden and our cornfields I learned about the seasons, growth cycles of cultivated plants, what one had to think and feel about the land; and at home I became aware of how we must care for each other: all of this was encompassed in an intricate relationship which has to be maintained in order that life continue. After supper on many occasions my father would bring out his drum and sing as we, the children, danced to themes about the rain, hunting, land, and people. It was all that is contained within the language of oral tradition that made me explicitly aware of a yet unarticulated urge to write, to tell what I had learned and was learning and what it all meant to me.³²

A community's spiritual and cultural practices, such as initiation ceremonies that mark different stages of one's life, are equally important to a child's education and upbringing. These practices have been described as the "wellspring" of instructions for Native peoples, as individuals and collectively as societies.³³ Such knowledge is often interwoven into the land and language of the community, as Keith Basso demonstrates in his book *WISDOM Sits in Places: landscape and language among the western Apache*:

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as the natural world. See CAJETE, *supra*, note 28 at 26 (1994); Ella Cara Deloria, *Waterlily*, in *GROWING UP NATIVE AMERICAN* 57 (Patricia Riley ed., 1993). Vine Deloria similarly speaks to this interconnectedness of life in his description of Indian metaphysics: "the realization that the world, and all its possible experiences, constitutes a social reality, a fabric of life in which everything had the possibility of intimate knowing relationships because, ultimately, everything [is] related." DELORIA, *supra* note 19, at 10.

31. *Id.* at 15; see also SZASZ, *COLONIES*, *supra* note 28, at 12.

32. SIMON ORTIZ, *The Language We Know*, in *GROWING UP NATIVE AMERICAN*, *supra* note 30, at 32; cf. Leslie Marmon Silko, *Uncle Tony's Goat*, in *GROWING UP NATIVE AMERICAN*, *supra* note 30, at 300.

33. WINONA LADUKE, *An Indigenous View of North America*, 2.1 THE LINEUP 28, 28-29 (1995). In *Look to the Mountain*, Cajete discusses the spiritual ecology of indigenous education. He notes that at the "innermost core" of indigenous education is "education about the life and nature of the spirit that moves us." CAJETE, *supra* note 28, at 42-73. It informs practically every aspect of a person's life and can manifest itself through language, song, story, prayer, and thought. *Id.*

The knowledge on which wisdom depends is gained from observing different places (thus to recall them quickly and clearly), learning their Apache names (thus to identify them in spoken discourse and in song), and reflecting on traditional narratives that underscore the virtues of wisdom by showing what can happen when its facilitating conditions are absent.³⁴

Winona Laduke similarly demonstrates the "intergenerational residency" of knowledge in a story about a Cree man who lives "on the same trap line that his great-great-great-great-grandparents were on":

A few years ago I was up goose hunting with James in the spring. He said to me, Winona, you know the martins are migrating west . . . I said what do you mean the martins are migrating west. He said, They migrate west once every seventy years. Who knows the martins migrate west once every seventy years? The only people who know martins migrate west, except for all of you now, up on James Bay is Crees. There is no person with a Ph.D. who has gone up there for 210 years or 280 years to figure out how many times the martins migrate. That is something only the Crees know. That is intergenerational residency in place . . . . Because he has lived there for that long and he has all that body of knowledge which was transferred down to him. That is the source of our knowledge . . . those kinds of experiences and those kinds of practices.³⁵

These stories are merely illustrative of the complex symbiotic relationship that exists between child and community.³⁶ Indeed, the "cumulative knowledge"³⁷ that is passed from community to child and from generation to generation is the lifeblood of Native American nations. When a child is

34. KEITH BASSO, *WISDOM SITS IN PLACES* 134 (1996). American Indian nations see the loss of their language as "one of the most critical problems" facing tribes today, because it "leads to a breakdown in communication between children and their grandparents and causes them to be 'cut off from their past and their heritage.'" JOHN REYNER & JEANNE EDER, *A HISTORY OF INDIAN EDUCATION* 2 (1989) [hereinafter *HISTORY OF INDIAN EDUCATION*].

35. LADUKE, *supra* note 33, at 29-30.

36. In the past few decades, there has been an increased interest in the ecological worldviews of indigenous peoples. See, e.g., DAVID SUZUKI & PETER KNUDTSON, *WISDOM OF THE ELDERS: SACRED NATIVE STORIES OF NATURE* (1992). Yet little attention has been paid to the intellectual foundations of indigenous knowledge beyond this context, particularly where children, family, and education are concerned. However, such knowledge could be profoundly useful to members of other societies. When viewed in the proper context, it has the potential for creating a deeper understanding of the role of community and family in the education of all children. If we are to understand and learn from the "cultural and human realities" of Native peoples we have to be willing to open our universities, schools, and individual minds to the many different ways of thinking about the world.

37. DELORIA, *supra* note 19, at 39.

removed from the kinship community without appropriate safeguards, it breaks the cycle of indigenous life. Congress recognized this fact in the legislative history to the Indian Child Welfare Act: "The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today."³⁸ Unfortunately, for much of this country's history, these destructive forces have predominated.

B. Assimilationist Policies and European Colonialism

It has been posited that children are the most "logical targets of a policy designed to erase one culture and replace it with another" since they are the most "vulnerable to change and least able to resist it."³⁹ The chiefs of the Iroquois Confederacy were keenly aware of this when they declined an offer by the College of William & Mary, in 1744, to "educate" their children:

You, who are wise, must know that different Nations have different Conceptions of things; and you will not therefore take it amiss, if our Ideas of this kind of Education happen not to be the same with yours. We have had some Experience of it; Several of our young people were formerly brought up at the colleges of the Northern Provinces; they were instructed in all of your Sciences; but, when they came back to us . . . [they] were neither fit for Hunters, Warriors, not Counsellors . . . We are however, not the less oblig'd by your kind Offer, tho' we decline accepting it; and, to show our grateful Sense of it, if the Gentlemen of Virginia will Send a Dozen of their sons, we will take great care of their Education, instruct them in all we know, and make Men of them.⁴⁰

Yet starting with the colonial missionaries, education became one of the most pernicious methods used to separate American Indian children from the influences of family and community and assimilate them into mainstream society. Colonial educators, such as Rev. John Eliot of the Roxbury Latin School in Boston and Rev. Eleazar Wheelock of Dartmouth College, believed that separation from the kinship community was essential to the affair of "Christianizing" and "civilizing" the Indian.⁴¹ Early examples of removal

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38. H.R. REP. NO. 1386, 95th Cong. 9 (1978), *reprinted in* 1978 U.S.C.A.N. 7530 [hereinafter HOUSE REPORT].

39. CLYDE ELLIS, *TO CHANGE THEM FOREVER* 3 (1996).

40. BENJAMIN FRANKLIN, *TWO TRACTS* 28-29 (3d ed. 1794); *see also* 4 *THE PAPERS OF BENJAMIN FRANKLIN* 481-83 (Leonard W. Labaree et al. eds., 1961).

41. For a more detailed account of colonial Indian education, *see* SZASZ, *COLONIES*, *supra* note 28. *See generally* JAMES AXTELL, *THE EUROPEAN AND THE INDIAN: ESSAYS IN THE ETHNOHISTORY OF COLONIAL NORTH AMERICA* (1981); JAMES AXTELL, *THE INVASION WITHIN: THE CONTEXT OF CULTURES IN COLONIAL AMERICA* (1985); FRANCIS JENNINGS, *THE INVASION OF AMERICA: INDIANS, COLONIALISM, AND THE CANT OF CONQUEST* (1975); James P. Ronda,

include Eliot's "praying towns" in the 1600s where American Indians from different nations came together to be educated in "Christian ethics and arts," while completely disavowing their indigenous cultures and identities.⁴² Eliot and his fellow missionaries also advocated for the removal of American Indian children to colonial schools. One such child was Caleb Cheeshahteumuck, who at the age of ten was taken from his Wampanoag home on Martha's Vineyard to attend preparatory school on the mainland. The following passage from a letter Cheeshahteumuck wrote to his "most honoured benefactors" while later attending Harvard College epitomizes the self-deprecating system of education these children were expected to endure in the name of Christianity:

The ancient philosophers state that this serves as a symbol to show how powerful the force and virtue of education and of refined literature are in the transformation of the barbarians' nature . . . . The lord delegate you to be our patrons, and he endowed you with all wisdom and intimate compassion, so that you may perform the work of bringing blessing to us pagans . . . . We were naked in our souls as well as in our bodies, we were aliens from all humanity, and we were led around in the desert . . . . [M]ost illustrious and most loving men, what kind of thanks . . . should we give to you . . . for our education . . . .⁴³

'We Are Well as We Are': An Indian Critique of Seventeenth-Century Christian Missions, 34 WM. & MARY Q. 66 (1977). There were of course other missionary efforts besides the English throughout the Americas. With the French and Spanish explorers came the Catholic missionaries. Similar to the Protestant missionaries, they sought to "Christianize," "civilize," and "educate" American Indians in the ethos of European culture. In North America, the Franciscans and Jesuits sought to separate American Indian families from their "nomadic way of life" by "sett[ing] them around churches in a feudal pattern," and providing them with religious instruction and agricultural training. HISTORY OF INDIAN EDUCATION, *supra* note 34, at 13. Jon Reyhner and Jeanne Eder describe the daily indoctrination of American Indian students in a 1637 Jesuit mission school in the Northeast:

The students rose to say their prayers and then go to mass. After breakfast they were taught reading and writing. After a brief recess, the priest taught them the catechism. After dinner they had more prayers with reading in the afternoon. Then they had a recreation period, supper, more prayers, then they went to bed.

A HISTORY OF INDIAN EDUCATION, *supra* note 34, at 13.

42. In a recent historical account of John Eliot and the founding of the Roxbury Latin School, F. Washington Jarvis noted that "Eliot is still the subject of intense historical interest. Controversial in life, he remains controversial in death. Many of his New England contemporaries despised him as a 'do-gooder' for his work among the Indians. Several present-day historians despise him as a cultural imperialist for that very work." F. WASHINGTON JARVIS, SCHOLA ILLUSTRIS: THE ROXBURY LATIN SCHOOL 1645-1995, at 3-4 (1995). See generally DANE MORRISON, A PRAYING PEOPLE (1995); NEAL SALISBURY, MANITOU AND PROVIDENCE: INDIANS, EUROPEANS, AND THE MAKING OF NEW ENGLAND, 1500-1643 (1982); Neil Salisbury, *Red Puritans: The "Praying Indians" of Massachusetts Bay and John Eliot*, 31 WM. & MARY Q. 27 (1974); HISTORY OF INDIAN EDUCATION, *supra* note 34, at 14-15.

43. The original document in Latin is housed in the Royal Society's archives in London, a

In 1754, Eleazar Wheelock carried on Eliot's ethnocentric mission through the establishment of the first coeducational boarding school for Native American students. Like Eliot before him, Wheelock believed that separation from the tribal community was essential to the affair of Christianizing and civilizing the "savages."⁴⁴ He described the difficulty of one teacher who tried to "instruct" Mohegan children in the ways of the English:

[S]uch is the savage Temper of many [Indian students] . . . that their School-Masters, tho' skilful and faithful men, constantly complain that they can't keep the Children in any Measure constant at School . . . The Children are suffered to neglect their Attendance on Instruction, and waste much Time, by which means they don't learn so much in several Years as they might, and others do in one, who are taken out of the reach of their Parents, and out of the way of *Indian* Examples, and are kept to School under good Government and constant Instruction.⁴⁵

In themes that would reverberate throughout the nineteenth and twentieth centuries, Wheelock sought to educate the students "in a Christian manner," instruct them "in Agriculture," and teach them "to get their Living by their Labour" so they would no longer "make such Depradations on our Frontiers."⁴⁶ He included American Indian girls in his mission, because of the role they would play in "the Care of the Souls" of future generations of Native Americans.⁴⁷ One such girl was Miriam Storrs from the Delaware

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copy of which is on file at the Harvard University Native American Program. For a translation and interpretation, see Wolfgang Hochbruck & Beatrix Dudensing-Reichel, "*Honoratissimi Benefactores*": Native American Students and Two Seventeenth-century Texts in the University Tradition, *STUD. IN AM. INDIAN LIT.*, Summer/Fall 1992, at 35; Walter T. Meserve, *English Works of Seventeenth-Century Indians*, 8 *AM. Q.* 264 (1956). Within a year of being the first Native American to graduate from Harvard College, Cheeshahteumuck died of tuberculosis in Charlestown. See Lorie M. Graham, *The Indian College*, 9 *HARV. C. NEWS* 16 (1997). To learn more about Harvard College's founding purpose to educate "the English and Indian youth country," see *id.* See also DANIEL GOOKIN, *HISTORICAL COLLECTIONS OF THE INDIANS IN NEW ENGLAND* (1672); WILLIAM KELLAWAY, *THE NEW ENGLAND COMPANY, 1649-1776* (1961); SAMUEL ELIOT MORISON, *HARVARD IN THE SEVENTEENTH CENTURY*, Vol. 1 (1932); Arthur Railton, *The Vineyard's First Harvard Men Were Indians*, 29 *DUKES COUNTY INTELLIGENCER* 97 (1988).

44. ELEAZAR WHELOCK, *NARRATIVE OF THE INDIAN CHARITY SCHOOL* 20-21 (Boston, 1763).

45. *Id.*

46. SZASZ, *COLONIES*, *supra* note 28, at 220 (quoting Letter from Eleazar Wheelock to General Thomas Gage (Feb. 22, 1764) (available in Dartmouth College Archives, file 764172.2)).

47. *Id.* at 221 (quoting Rev. John Sergeant). Wheelock agreed with Rev. Sergeant and other New England missionaries and set out to raise funds supporting schooling for Indian girls as well as boys. Contending he did not have sufficient space to board these girls at the school, they were placed in nearby homes "where they were treated as servants, possibly even as slaves." *Id.* at 222. For those interested in learning more about Moor's Indian Charity School, which later became

community. She was eleven years old when she arrived at Moor's Indian Charity School and, as would be true for many of the American Indian students who would later attend U.S. boarding schools, she experienced cultural and spiritual disorientation in "her search for a place in the colonial world."⁴⁸ One of Miriam's fellow students described it as having "no peace of conscience."⁴⁹ When she left the school as a teenager, Miriam traveled from city to city looking for work and, in letters to Wheelock, wrote of the "many trials" in her life that "caused [her] so to weep at night."⁵⁰

In the end, colonial missionaries and educators met with very little success in their efforts to convert large numbers of American Indian children into English adults.⁵¹ European warfare, disease, and slavery were the major forces behind the massive depopulation of Native peoples in North America and the destruction of many of their social, political, and economic structures. The colonial experiments in Indian education would nevertheless set the tone for emerging U.S. policies — from religious indoctrination, to cultural intolerance, to wholesale removal of American Indian children.

C. U.S. Sanctioned Policies

Although the federal government has a constitutionally based political relationship with Native American nations, federal Indian policy in this country has often vacillated between respect for tribal autonomy and support for complete assimilation. Beginning with the Continental Congress, the United States pledged to "secure and preserve the friendship of the Indian nations."⁵² Through numerous treaties, agreements, statutes, and executive orders, tribes ceded millions of acres of land to the U.S. in return for promises to protect the tribes' sovereign status and provide various services, such as health and education.⁵³ During the nineteenth century, however,

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Dartmouth College, see *id.* at 218-31; FREDERICK CHASE, *HISTORY OF DARTMOUTH COLLEGE AND THE TOWN OF HANOVER, NEW HAMPSHIRE* (1928); JAMES MCCALLUM, *ELEAZAR WHELOCK, FOUNDER OF DARTMOUTH COLLEGE* (1939); as well as the Archives at Dartmouth College where the correspondence of Wheelock and early American Indian students are located.

48. SZASZ, *COLONIES*, *supra* note 28, at 230.

49. *Id.* at 225 (quoting Letter of Hezekiah Calvin to Wheelock (June 10, 1767), in *THE LETTERS OF ELEAZAR WHELOCK'S INDIANS* (James McCallum ed., 1932).

50. SZASZ, *COLONIES*, *supra* note 28, at 225 (quoting Letter of Miriam Storrs to Wheelock (n.d.) (available in Dartmouth College Archives, file 768624)).

51. AXTELL, *THE INVASION WITHIN*, *supra* note 41, at 273-75.

52. FELIX S. COHEN'S *HANDBOOK OF FEDERAL INDIAN LAW* 58 (Rennard Strickland et al. eds., 1982) [hereinafter COHEN].

53. From 1778 to 1871, 389 treaties were entered into between the U.S. and Native American Nations. See *id.* at 62-105. The U.S. Constitution recognized "all Treaties made," and all existing and future treaties were considered the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Although formal treaty making was terminated in 1871, existing treaties were expressly validated and the federal government continued to deal with Indian tribes by agreements, statutes, and executive orders. At the end of the treaty-making period, official U.S. policy recognized that

"humanitarian reformers" began advocating for the absorption of American Indians into the mainstream of American society. Other proponents of assimilation claimed that if American Indians were "civilized" by Western terms they would need less land, which in turn would create a surplus for the settlers.⁵⁴ States were equally hostile to the notion of tribal sovereignty.⁵⁵ Each of these groups voiced opposition to the social, cultural, and spiritual practices of Native American nations. The tribes' kinship networks and their communal connections to the land were seen as particular impediments to complete assimilation. Like the colonists before them, these new assimilationists viewed education as an important tool in realizing their overall aim to erase Native American cultures.

Federal policy began to give way to the demands for forced assimilation by education in 1819 when Congress passed the *Indian Civilization Fund Act*,⁵⁶ which provided financial support to missionary groups willing to provide for the "moral" education of American Indian children.⁵⁷ Teachers in the mission schools were expected to promote U.S. policies of assimilation through curricula that were devoid of any indigenous cultural knowledge.⁵⁸

Native American nations "comprised different cultures and . . . were sovereign entities worthy of respect as autonomous governmental bodies." See COHEN, *supra* note 52, at 105-07. The Supreme Court of the United States affirmed the sovereign status of tribes in 1832 in *Worcester v. Georgia*. Chief Justice Marshall stated that "[t]he Indian nations had always been considered as distinct, independent, political communities, relating their original natural rights . . . from time immemorial." *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832); see also *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) ("Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territories."). Indian tribes represent one of three sovereigns mentioned in the U.S. Constitution, along with states and the federal government. Under the Constitution, Congress has the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. In the exercise of this power, the federal government has a "trust responsibility" to protect and preserve Indian tribes and their resources. See e.g., *Morton v. Mancari*, 417 U.S. 535, 541-42 (1974); Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 LOY. L.A. L. REV. 647 (1997) [hereinafter Metteer, *Existing Indian Family Exception*].

54. COHEN, *supra* note 52, at 128.

55. For instance, in *Worcester*, 31 U.S. (6 Pet.) 515, the State of Georgia refused to recognize the sovereign status of the Cherokee Nation and later refused to comply with the Supreme Court's decision upholding this status.

56. Act of Mar. 4, 1819, ch. 85, 3 Stat. 516.

57. See COHEN, *supra* note 52, at 121. An efficiency argument suggested that "it was less expensive to educate Indians than to kill them . . . it cost nearly a million dollars to kill an Indian in warfare, whereas it cost only \$1,200 to give an Indian child eight years of schooling." DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION* 19-20 (1995). For a discussion regarding the relationship between missionary schools and tribes, see, e.g., MARGARET CONNELL SZASZ, *EDUCATION AND THE AMERICAN INDIAN* 11-12 (1977) [hereinafter SZASZ, *EDUCATION AND THE INDIAN*]; HISTORY OF INDIAN EDUCATION, *supra* note 34, at 64-78.

58. Many were discouraged from teaching students in their Native language, despite the fact

In hopes of transforming Native American children into "near-copies" of Anglo children, these schools taught English and religion, as well as manual labor "appropriate" to gender roles.⁵⁹ While many of these mission schools were located on or near American Indian reservations, they nevertheless strove to keep the children away from the influences of family by denying or limiting parental and familial visitation.⁶⁰ Although Congress ended its direct appropriations to mission schools in the late nineteenth century, assimilation by education was to continue with the advent of the federal boarding school system.

In 1832, the post of Commissioner of Indian Affairs was established for purposes of centralizing the control and management of Indian affairs.⁶¹ Some forty years later, at the behest of the Commissioner, a system of federally operated schools was established under the auspices of the Bureau of Indian Affairs (BIA).⁶² The schools were designed to: (1) provide an academic education that replaced children's Native languages with English, (2) individualize children who had grown up with communal ethics by teaching them manual labor and the value of private property, (3) Christianize the children's "heathen" souls, and (4) supply citizenship training by instructing pupils in American history, democracy, and Manifest Destiny.⁶³ In support of the off-reservation boarding school system, Captain Henry Pratt testified before Congress that the U.S. needed to "immerse the Indians in waters of our civilization and when we get them under water, hold them there until they are thoroughly soaked."⁶⁴ He claimed that this would "eradicate the Indian but make the man."⁶⁵ Friends and foes alike supported the Captain's position. Members of the Indian Reform Movement believed that such schools could mold Indian children into "good American citizens." Others hoped that the

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that the quality of education declined when an English only policy was enforced. However, some missionaries had favored the printing of books and teaching in Native languages for pragmatic reasons — as an initial means of inculcating students in the ethos of Christianity. Ironically, it had the unintended affect of preserving some of those languages for future generations. See HISTORY OF INDIAN EDUCATION, *supra* note 34, at 36.

59. MICHAEL C. COLEMAN, AMERICAN INDIAN CHILDREN AT SCHOOL 40, 105 (1993).

60. For instance, children at the Saint Labre mission schools on the Northern Cheyenne reservation were only allowed to see their parents on Sundays and at Christmas. One Northern Cheyenne leader went as far as to build his home on a hill overlooking the mission school just so he could be closer to his children during the week. HISTORY OF INDIAN EDUCATION, *supra* note 34, at 66-70.

61. For a brief history on the establishment of the Bureau of Indian Affairs, see COHEN, *supra* note 52, at 117-21.

62. *Id.* at 140.

63. ADAMS, *supra* note 57, at 22-24. By the late 1800s, a number of tribes also had been removed from their aboriginal lands to reservations. Removal was followed by the Allotment Act of 1887, a law designed to decentralize control of Indian lands and replace it with individual ownership. COHEN, *supra* note 52, at 130.

64. See DELORES J. HUFF, TO LIVE HEROICALLY 3 (1997); ADAMS, *supra* note 57, at 51-55.

65. HUFF, *supra* note 64, at 3; ADAMS, *supra* note 57, at 51-55.

boarding school system, and other related initiatives such as land allotment, would lead to the ultimate destruction of tribes as distinct political and cultural entities. In 1882, Congress showed its support for the educational aims of the reformers by appropriating substantial funds for the establishment of federal boarding schools for Indian youth. In his book *Man's Rise to Civilization*, Anthropologist Peter Farb summarizes the boarding school experience of many American Indian children:

The children usually were kept at boarding school for eight years, during which time they were not permitted to see their parents, relatives, or friends. Anything Indian — dress, language, religious practices, even outlook on life . . . was uncompromisingly prohibited. Ostensibly educated, articulate in the English language, wearing store-bought clothes, and with their hair short and their emotionalism toned down, the boarding-school graduates were sent out either to make their way in a White world that did not want them, or to return to a reservation to which they were now foreign.⁶⁶

Native American nations, families, and children responded to government and mission schools with a mixture of resistance, adaptation, and accommodation. From the beginning, tribes fought to retain control over the education and upbringing of their children. For instance, in 1791, the Iroquois received treaty-guaranteed federal funds for mission schools on the reservation. Within a decade, they had begun to mold these schools to fit their own political, social, and cultural needs.⁶⁷ The Cherokee Nation, concerned that the mission schools were teaching too much Christianity and not enough academics, developed their own bilingual school system in the early 1800s. Estimates of bilingual literacy for their kindergarten-through-college system run as high as 90% within a decade of establishing the schools.⁶⁸ However,

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66. PETER FARB, *MAN'S RISE TO CIVILIZATION* 257-59 (1968). English only language regulations were promulgated and, for a period of time, federal law permitted the withholding of treaty-based government rations to American Indian families who failed to send their children to government-funded or government-run schools. To learn more about the boarding school experiences, see generally ADAMS, *supra* note 57; COLEMAN, *supra* note 59; ELLIS, *supra* note 39; Jeffery Hamley, *Federal Off-Reservation Boarding Schools for Indians* (Oct. 1986) (unpublished Ed.D. dissertation, Harvard University) (on file with Gutman Library, Harvard University); SZASZ, *EDUCATION AND THE INDIAN*, *supra* note 57.

67. HUFF, *supra* note 64, at 2.

68. *Id.* at 3; ESTELLE FUCHS & ROBERT J. HAVIGHURST, *TO LIVE ON THIS EARTH* 6 (1972) [hereinafter *TO LIVE ON THIS EARTH*]. The Cherokee Nation schools also taught Cherokee, using a syllabary developed by a non-English-speaking Cherokee named Sequoyia, The Choctaw Nation also operated some two hundred schools and academies, which were managed by Indian graduates from eastern colleges.

by the late 1890s, programs such as these were either abolished or taken over by federal officials who saw them as barriers to complete assimilation.⁶⁹

Families of children who were sent to federally supported schools had varied responses to this forced assimilation. In *Me and Mine: The Life Story of Helen Sekaquapetewa*, a Hopi student recounts how the children and parents "became involved . . . in a desperate game of hide-and-seek" with school officials and police: "We lay on our stomachs in the dark, facing a small opening . . . . We saw the feet of the principal and the policeman as they walked by, and heard their big voices as they looked about wondering where the children were. They didn't find us that day."⁷⁰ Not all families, however, resisted government or mission schooling for their children. Some believed that if the next generation of leaders knew and understood the "way the white man thinks," they would be better equipped to defend their own cultural heritages. Albert Yava, a Hopi who attended a government-run school around 1893, summed up the mixed reactions of the Hopi community to this new education:

You have to remember that this school business was new to not only the children but also to most of the people in the villages. There had been a big commotion when the Government gave the order that all the children would have to attend school. There was a lot of resistance . . . . Many people felt that the Government was trying to obliterate our culture by making the children attend school . . . . [T]he schooling the children have been getting . . . has educated them in the white man's ways but made them less knowledgeable about the traditional ways of their own people. A lot of what they have been taught is good. It makes them able to understand the way the white man thinks, and to compete in the outside world. But at the same time, they aren't getting as much of their own traditions as they should. Something important is being gained, but something important is being lost.⁷¹

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69. HUFF, *supra* note 64, at 3.

70. HELEN SEKAQAPTEWA, *ME AND MINE: THE LIFE STORY OF HELEN SEKAQAPTEWA* 8-12 (as told to Louise Udall) (1969), *quoted in* COLEMAN, *supra* note 59, at 62.

71. ALBERT YAVA, *BIG FALLING SNOW: A TEWA-HOPI INDIAN LIFE AND TIMES AND THE HISTORY AND TRADITIONS OF HIS PEOPLE* (1978). In his work on off-reservation boarding schools, Hamley discusses the disorienting effects that off-reservation schools were having on the children. He notes that in response to a request from Pratt to have the children from the Hunkpapa band attend Carlisle, Sitting Bull declared, "I have seen the results of school. The children who return are neither white nor Indian. Nothing is done for them. I love my children too much to let anything like that happen to them. I will not approve the request." Hamley, *supra* note 66, at 47. Hamley states that these children were forced to "find their own niche in the complex reality created by the mixture of tribal and white cultures." "[They] existed, metaphorically speaking, in two worlds." *Id.*

When the federal boarding school system failed to produce a complete "metamorphosis"⁷² in the cultural identities of American Indian children, new forms of assimilation were contrived. Captain Henry Pratt and others who continued to be ideologically and politically tied to notions of assimilation believed that the answer to the dilemma lay in *earlier, longer*, and perhaps even *permanent* removal of American Indian children from their families and communities. If complete assimilation were to be realized, the cohesiveness of the Indian family would need to be destroyed. Toward this end, the "outing" system was created and implemented in federal boarding schools. In the words of one U.S. Superintendent of Indian Schools, "students [would] spend a period of one or more years of their school life away from the school in selected white families, under the supervision of the school . . . , thus gaining experience in practical self-support and an induction into civilized family life not otherwise attainable."⁷³ Captain Pratt's ultimate dream was "to scatter the entire population of Indian children across the nation, with some 70,000 families each taking in one Indian child."⁷⁴ While this dream was not realized during his lifetime, this system of placing American Indian children with Anglo families served as a precursor to the twentieth century massive displacement of American Indian children to non-Indian adoptive homes, foster care, and institutions.

D. The Final Steps Toward a National Crisis

By the 1920s, the dual system of assimilation by education and massive land allotment had taken its toll on Native American communities. John Collier, one of the leading reformers of the Progressive Movement who later became Commissioner of Indian Affairs, maintained that "the administration of Indian affairs was a national disgrace — A policy designed to rob Indians of their property, destroy their culture and eventually exterminate them."⁷⁵ American Indian children, in particular, were feeling the effects of forced assimilation. A 1928 report on the state of Native American Affairs highlighted, among other things, the "dreary existence" of American Indian children living in boarding schools. The report noted that

[t]he philosophy underlying the establishment of Indian boarding schools, that the way to 'civilize' the Indian is to take Indian children, even very young children, as completely as possible

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72. Hamley, *supra* note 66, at 50.

73. COMMISSIONER OF INDIAN AFFAIRS, ANNUAL REPORT 430 (1900); Hamley, *supra* note 66, at 41. As the outing system spread to boarding schools beyond Pratt's Carlisle Indian school, it at times "degenerated into a supply system of cheap menial labor" for white families. COLEMAN, *supra* note 59, at 44.

74. ADAMS, *supra* note 57, at 14.

75. John Collier, *America's Treatment of Her Indians*, 18 CURRENT HIST. 772 (1923), cited in HISTORY OF INDIAN EDUCATION, *supra* note 34, at 101.

away from their home and family life, is at variance with modern views of education and social work, which regard the home and family as essential social institutions from which it is generally undesirable to uproot children.⁷⁶

The report also documented the dire socioeconomic conditions of Indian reservations and criticized federal Indian policy for failing to support American Indian self-sufficiency. While the report still reflected some assimilationist attitudes, it laid the groundwork for a major shift in federal Indian policy toward one of self-government for Native American Nations.⁷⁷

It was during this "Indian Reorganization" era that the Johnson-O'Malley Act (J-O'M) was passed by Congress, which authorized the Secretary of the Interior to contract with states and private institutions "for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians."⁷⁸ While the J-O'M and related policies were aimed

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76. THE PROBLEM OF INDIAN ADMINISTRATION 403 (Lewis Meriam ed., 1928). The "Meriam Report," as it was popularly known, was named after Dr. Louis Meriam, who directed the study for the Brookings Institution. For a more detailed discussion of the report, see generally SZASZ, EDUCATION AND THE INDIAN, *supra* note 57, at 16-36. The Report compared the diet of the children in these educational institutions to that of "slow starvation," and documented the poor medical care, dangerous overcrowding, excessive child labor, harsh discipline, and inadequate curriculum that existed in many of the schools. *Id.* at 18-24.

77. Starting with Commissioner Charles Rhoads, greater respect for Indian cultures was encouraged within the Bureau of Indian Affairs, including "instructing Indian children in their own culture, by their own people." See COHEN, *supra* note 52, at 145 (citing SECRETARY OF THE INTERIOR, ANNUAL REPORT 84 (1931)). With the assistance of Indian Education Director Carson Ryan, the Commissioner sought to develop community-based schools, increase federal-state education contracts, and gradually phase out boarding schools. These initiatives continued under the administration of John Collier who was appointed Commissioner of Indian Affairs in 1933. During his tenure, Collier sought to preserve Native cultures and encourage tribal autonomy. Day schools were to be turned into community centers that were sensitive to the cultural and social needs of tribes, and boarding schools curricula were to emphasize Native life-styles. In 1934, Congress passed several important pieces of legislation. The Indian Reorganization Act (IRA), which was "part of Collier's attempt to encourage economic development, self-determination, cultural plurality, and the revival of tribalism," ended the allotment of American Indian lands and encouraged a limited form of tribal self-government. See *id.* at 147. Opposition to the IRA came from two different schools of thought — assimilationists who believed that the law would lead to greater segregation of Native Americans and supporters of Indian self-determination who believed the law did not go far enough in recognizing the sovereign status of tribes.

78. Ch. 147, 48 Stat. 96 (section 4 repealed and reenacted as amended 1975) (section 5 omitted and reenacted as amended 1975) (codified as amended at 25 U.S.C. §§ 452-454 (1994)); see also COHEN, *supra* note 52, at 146. Under J-O'M, BIA officials worked to establish contracts with states for the public schooling of American Indian children. However, from the beginning, these contracts were fraught with problems. Both the BIA and the states were fighting for ultimate control over public school programs for American Indian children, and neither sought to include American Indian families or communities in the decision-making process. In her book *Education and the American Indian*, Szasz explores these early J-O'M programs, noting such things as the "poor quality of teachers and administrators" (many of whom had very little knowledge about Indian cultures or the needs of Indian children) and the "hostile attitudes of the

at improving the dire socioeconomic conditions on reservations, they had other unforeseen consequences. In addition to public schools, the law encouraged the use of private, state, and local social welfare agencies to meet the needs of Native Americans, opening the door for increased conflict between tribes and states over Indian child welfare issues. The caseworkers in these agencies and the teachers and administrators in the public schools had no basis for evaluating the cultural values and social norms of Native American communities. The cultural misunderstandings that inevitably arose from this lack of knowledge would contribute significantly to the Indian child welfare crisis of the 1970s.⁷⁹

The move toward a policy of self-sufficiency for Native American nations in the 1930s was to be short-lived. A major drawback of the reform movement was that it maintained too much of a paternalistic hold on the lives of American Indian tribes in that they were often not consulted about policy changes nor did they have much control over their own affairs.⁸⁰ Beginning in the 1940s, the pendulum began to swing back toward assimilationist thinking. At the end of World War II, an article appeared in *Reader's Digest* entitled *Set the American Indians Free*.⁸¹ Using the same rhetoric relied on by the reformers of the nineteenth century, the author maintained that American Indians should be "released" from their tribal cultures and excessive land base, and completely assimilated into the mainstream culture.⁸² Those who had opposed Collier's Indian reforms rallied behind this ideology and pushed for significant changes in federal policy. By 1953 Congress had officially adopted a new policy of rapid and coercive assimilation through termination.⁸³ The assimilationist practices of this era were aimed at every facet of Indian life — from the land base, to the community structure, to the individual child.

Congress began passing a number of laws aimed at ending or limiting the historic relationship between certain tribes and the federal government. Federal health and social welfare programs were cut, and state legislatures and courts were given jurisdiction over certain tribes and their members. This meant that state and local entities were obtaining control over "matters basic

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non-Indian communities" in which the schools were located. SZASZ, *EDUCATION AND THE INDIAN*, *supra* note 57, at 105. However, there were a handful of states interested in meeting the educational needs of American Indian children, encouraging their teachers to gain an understanding of Indian cultures and the symbiotic relationship between home and education. *Id.* at 99, 104.

79. See *infra* notes 107-31 and accompanying text.

80. See SZASZ, *EDUCATION AND THE INDIAN*, *supra* note 57.

81. See O.K. Armstrong, *Set the American Indians Free*, *READER'S DIGEST*, August 1945, at 47; SZASZ, *EDUCATION AND THE INDIAN*, *supra* note 57, at 112-13.

82. See O.K. Armstrong, *supra* note 81, at 47; SZASZ, *EDUCATION AND THE INDIAN*, *supra* note 57, at 112-13.

83. See COHEN, *supra* note 52, at 152.

to Indian cultural integrity such as education, adoption, and land use."⁸⁴ Not surprisingly, Indian education once again became the focus of federal attention. A 1944 congressional report condemned the use of community schools and encouraged a return to off-reservation boarding schools, where the children could "progress" much quicker in the "white man's way of life."⁸⁵ As a complement to such schools, the Bureau of Indian Affairs implemented a "Relocation Program" designed to remove American Indians from tribal reservations to urban areas for purposes of work.⁸⁶ Most of those who were relocated to the cities under this program endured tremendous poverty as well as cultural isolation.

By the 1950s, Congress and the BIA were primarily interested in transferring responsibility for Indian education and social welfare programs from the federal government to the states, ignoring the longstanding hostilities between tribes and states.⁸⁷ The BIA initiated programs such as the Navajo Emergency Education Program, designed to provide dormitory facilities in towns bordering the reservation where children were to attend public school.⁸⁸ The public school curricula caused one Cochiti Pueblo student to question whether his "grandmother really care[d] about [his] well-being," since he did not live in "a home with a pitched roof, straight walls, and sidewalks" and did not have a "spotted dog to chase after" as pictured in the Dick and Jane reading series.⁸⁹ Both the curriculum and the isolation from community caused cultural disorientation and loss of self-esteem among many of the students.

At the urging of the BIA and other federal agencies, states also entered the field of Indian child welfare services. Federally guaranteed funds for Indian child welfare services were being distributed to state welfare agencies rather than to tribal governments. Additionally, the BIA was referring "about half of its on-reservation Indian child welfare caseload to state programs."⁹⁰ By the early 1970s, state agencies and state courts were handling most of the Indian child welfare cases.⁹¹ All of these state institutions — public schools,

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84. *Id.* at 175. For a more detailed account of the termination legislation and Public Law 280, see *id.* at 171-77.

85. H.R. REP. NO. 2091, 78th Cong. 9 (1944); see also SZASZ, EDUCATION AND THE INDIAN, *supra* note 57, at 109, 120.

86. See generally COHEN, *supra* note 52, at 169-70.

87. See generally *id.* at 177-80. For a thorough discussion of the J-O'M Act and public schools, see SZASZ, EDUCATION AND THE INDIAN, *supra* note 57, at 89-105, 181-87.

88. See *infra* notes 104-05 and accompanying text; see also HISTORY OF INDIAN EDUCATION, *supra* note 34, at 112-16.

89. Joseph H. Suina, *When I Went to School*, in LINGUISTIC AND CULTURAL INFLUENCES ON LEARNING MATHEMATICS 298 (Rodney Cocking & Jose P. Este eds., 1988), cited in HISTORY OF INDIAN EDUCATION, *supra* note 34, at 119-20.

90. Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1293-94 (1980).

91. See *id.*

welfare agencies, and courts — were ill equipped, and in some cases unwilling, to address the unique cultural interests and social needs of American Indian families.

Also at the urging of the federal government, private institutions took up the cause of assimilating American Indian children into mainstream America. In 1959, the Child Welfare League of America established the *Indian Adoption Project* aimed at placing American Indian children in non-Indian homes where project supporters claimed the children would receive better care.⁹² During its several years of operation, the project placed three hundred and ninety-five American Indian children with non-Indian adoptive families in eastern metropolitan areas.⁹³ In addition, religious groups continued to be actively involved in the placement of American Indian children outside of the tribal community. Before the passage of the ICWA, 5,000 American Indian children were being placed each year in non-Indian homes and church-run educational placement programs by a single religious denomination.⁹⁴

E. American Indian Resurgence

The civil rights movement of the 1960s marked the beginning of a cultural and political renaissance for Native peoples. Pro-Indian organizations were protesting centuries of broken treaties and discriminatory treatment of American Indians by federal and state governments. Others fought the battle for recognition of Indian sovereignty in the courtrooms and on Capitol Hill.⁹⁵ As the federal government began to move away from the policy of assimilation by termination in the 1960s, Native American nations sought to influence policy toward self-determination. As promised in treaties and the Constitution, they wanted to manage their own affairs, including the social welfare and educational programs that had for so long torn at their communities and cultural heritages. President Nixon decreed in 1973 that the "right of self-determination of the Indian will be respected and their participation in planning their own destiny will actively be encouraged."⁹⁶

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92. *Hearings on H.R. 1448 Amendments to the Indian Child Welfare Act Before the Subcommittee on Native American and Insular Affairs*, 103rd Cong. (1995), available in 1995 WL 283199 [hereinafter 1995 *Hearings*] (statement of Terry Cross, Executive Director, National Indian Child Welfare Association); see also Bruce Davies, *Implementing the Indian Child Welfare Act*, 16 CLEARINGHOUSE REV. 179, 181 (1982).

93. See Davies, *supra* note 92, at 181.

94. Joan Smith, *Young Once, Indian Forever*, IMAGE, July 3, 1988, at 9. Other accounts indicate the removal of some 2000 Hopi and Navajo children to the Latter Day Saints Placement Program. See Patrice Kunesch-Hartman, Comment, *The Indian Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 136 (1988) (citing ROBERT WEYLER, BLOOD OF THE LAND, THE GOVERNMENT AND CORPORATE WAR AGAINST THE AMERICAN INDIAN MOVEMENT 149 (1982)).

95. See generally COHEN, *supra* note 52, at 156, 180-88; CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 82-83 (1987).

96. See, e.g., President Richard M. Nixon, Special Message to the Congress on Indian

Following this decree, Congress worked with tribes and Indian organizations to develop legislation, such as the Indian Child Welfare Act of 1978, designed to promote tribal sovereignty and reverse the effects of forced assimilation.⁹⁷

III. The Indian Child Welfare Crisis

I said that the tribe was concerned that if many more of their children were taken, because there's been quite a history of taking these kids . . . that they were afraid that their very survival would be at stake. [T]he codirector of this county welfare office responded to that by shrugging his shoulders and saying, "So What?"⁹⁸

— Counsel, Association of American Indian Affairs, 1974

While self-determination in social welfare and education became an important aim for Native American tribes and organizations during the 1970s, the extent of the Indian child welfare crisis had to be assessed before responsive legislation could be drafted.⁹⁹ Toward this end, the Association

Affairs, 1970 PUB. PAPERS 564 (July 8, 1970). This policy reaffirmed the historic status of Indian tribes as distinct governmental entities with inherent sovereign powers. The move toward self-determination actually began under the Kennedy Administration. COHEN, *supra* note 52, at 180. See generally ALVIN M. JOSEPHY, JR., RED POWER (1971).

97. Pub. L. No. 95-608, 92 Stat. 3069 (codified as 25 U.S.C. §§ 1901-1963 (1994)). Other important legislation passed during this time included the Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified in scattered sections of 25 U.S.C., including § 450a) and the American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (codified in part at 42 U.S.C. § 1996 (1994)).

98. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93rd Cong. 70 (1974) [hereinafter 1974 Hearings] (statement of Betram Hirsch); see also Barsh, *supra* note 90, at 1288.

99. Self-determination in education was to be realized through a number of avenues. Indian organizations, such as the National Indian Education Association, began to fight for community-run schools and culturally relevant curriculum. The first of such schools was the Rough Rock Demonstration School on the Navajo Reservation. With the assistance of the Navajo Curriculum Center, the school developed a bilingual, bicultural program "so students could fend successfully in both cultures and see the Navajo way as part of a universal system of values." John Collier, Jr., *Survival at Rough Rock: A Historical Overview of Rough Rock Demonstration School*, 19 ANTHRO. & EDUC. Q. 253, 259 (1988). The school fostered a close relationship with parents and community, encouraging their involvement in all facets of their children's education. SZASZ, EDUCATION AND THE INDIAN, *supra* note 57, at 173. Other communities followed in their footsteps, working with the BIA to develop their own locally directed schools, as well as tribally controlled colleges. See generally *id.* at 169-80; HISTORY OF INDIAN EDUCATION, *supra* note 34, 12-137; TO LIVE ON THIS EARTH, *supra* note 68; CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, TRIBAL COLLEGES (1989). Leaders of the Indian education movement also fought for reform at the public school level, encouraging more parents to seek positions on the school board and recommending changes in the curriculum. Innovative summer and after school programs were being designed to meet the unique needs of Indian children. SZASZ, EDUCATION AND THE INDIAN, *supra* note 57, at 166-68. For the first time since perhaps the opening of the

of American Indian Affairs (AAIA) began to document the number of American Indian children being removed from their homes, as well as the major causes and effects of this dislocation. The results of AAIA's multiyear study were nothing less than shocking.

The AAIA findings were indicative of massive displacement of American Indian children. Conservative estimates indicated that one-third of all American Indian children were being separated from their families and placed in foster care, adoptive homes, or educational institutions.¹⁰⁰ In some individual states the problem was much worse. Minnesota, Montana, South Dakota, and Washington had American Indian placement rates that were five to nineteen times greater than that of the non-Indian rate.¹⁰¹ In the state of Wisconsin, American Indian children were at risk of being separated from their families at a rate 1600 times greater than non-Indian children.¹⁰² Moreover, many of these children were being completely cut off from their communities and heritages. At least 85% of the placements were in non-Indian homes and institutions, and a high proportion of those placements were out-of-state.¹⁰³ Federal boarding schools, mission schools, private training schools, and BIA dormitory programs all contributed to this massive displacement. For instance, in 1971, The BIA school census showed that 34,538 American Indian children lived in its institutional facilities rather than

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Cherokee-run schools in the 1830s, education was seen as an avenue to self-sufficiency.

100. See *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 1, 12 (Steven Unger ed., 1977) [hereinafter *AMERICAN INDIAN FAMILIES*] (compiling essays examining the Indian child welfare crisis in contemporary, legal and historical perspectives, and distributed by the Association on American Indian Affairs). Several of the essays originated from testimony at Indian Child Welfare oversight hearings held by the Senate Subcommittee on Indian Affairs in April of 1974. For additional data on the crisis, see *1974 Hearings*, *supra* note 98; *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Comm. on Indian Affairs*, 95th Cong. 538, 603; (1977) [hereinafter *1977 Hearings*]; *HOUSE REPORT*, *supra* note 38; Barsh, *supra* note 90, at 1288-90. See generally MARGARET PLANTZ ET. AL., *INDIAN CHILD WELFARE: A STATUS REPORT, FINAL REPORT OF THE SURVEY OF INDIAN CHILD WELFARE AND IMPLEMENTATION OF THE INDIAN CHILD WELFARE ACT OF 1978 AND SECTION 428 OF THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980 ES-1* (1988) [hereinafter *STATUS REPORT*] (prepared by CRS, Inc. and Three Feathers Association for the Administration for Children, Youth and Families, U.S. Department of Health and Human Services and the Bureau of Indian Affairs).

101. In Minnesota, one in every eight Indian children under 18 and one in every four under the age of one were living in adoptive homes. Moreover, Indian children were five times more likely to be placed in foster care than non-Indian children. In Montana, the Indian foster care rate was thirteen times greater than the non-Indian rate and in South Dakota, the rate was sixteen times greater. In Washington, the adoption rate was nineteen times greater and the foster-care rates ten times greater. William Byler, *The Destruction of American Indian Families*, in *AMERICAN INDIAN FAMILIES*, *supra* note 100, at 1; *HOUSE REPORT*, *supra* note 38, at 9.

102. *HOUSE REPORT*, *supra* note 38, at 9.

103. *Id.*; *1974 Hearings*, *supra* note 98, at 17; Barsh, *supra* note 90, at 1290 n.16. The Child Welfare League of America's records showed in 1966 that 93% of its adoptions were by non-Indian families. *Id.*

at home.¹⁰⁴ On the Navajo reservation, 20,000 children in grades K-12 were living in boarding schools at the time of the studies.¹⁰⁵ Missing from these statistics were the generations of Native Americans previously disconnected from their families as a result of BIA "relocation" programs, federal "outing" programs, and mission-run "educational" placement programs. Additionally, no study could completely capture the effects of years of national paternalism and attempted assimilation on the psyches of Native Americans who were taught that, in the words of one former student, "being American Indian meant that you were something less than a complete being, a 'savage' or a 'pagan'."¹⁰⁶

A. Some Causes

The AAIA studies and legislative hearings revealed how deeply ingrained the assimilative attitudes of the past had become in our society. Social welfare agencies, schools, and the legal system all had a role to play in the crisis. The cultural values and social norms of Native American families — particularly indigenous child rearing practices — were viewed institutionally as the antithesis of a modern-day "civilized" society. Indeed, in many of the child welfare cases examined, American Indian communities were shocked to learn that the families they regarded as "excellent care-givers" had been judged "unfit" by caseworkers.¹⁰⁷ This disparity in viewpoint was the result of general disdain for American Indian family life. Sen. James Abourezk (D.-S.D.) remarked in 1977 that, "[p]ublic and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indians."¹⁰⁸

Cultural misunderstandings and biases were often underlying decisions to separate a child from an Indian home or community. The legislative history to the Indian Child Welfare Act noted that many "[s]ocial workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, considered leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental right."¹⁰⁹ In a case involving a Sisseton-Wahpeton Sioux mother, a state welfare department petitioned the court to terminate the rights of the mother to one of her two children on the grounds that she often left him with his sixty-nine-

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104. HOUSE REPORT, *supra* note 38, at 9.

105. *Id.*

106. Conversations with the author. Cf. Joan Smith, *Young Once, Indian Forever*, *supra* note 93; GROWING UP NATIVE AMERICAN, *supra* note 30.

107. HOUSE REPORT, *supra* note 38, at 9; AMERICAN INDIAN FAMILIES, *supra* note 100, at 2.

108. Hon. James Abourezk, *The Role of the Federal Government: A Congressional View*, in AMERICAN INDIAN FAMILIES, *supra* note 100, at 12.

109. *Id.* at 3; HOUSE REPORT, *supra* note 38, at 10.

year-old great grandmother.¹¹⁰ The social worker interpreted this behavior as evidence that the mother was either incapable or unwilling to care for her child, ignoring the traditional role of the extended family in the rearing of a child. Similarly, cultural misunderstandings within the public school system often led to spurious reports of neglect. The following case history involves a young Indian child attending public school in Oregon in the 1970s:

The Indian mother of an eight-year-old boy was temporarily unable to care for her son after she broke her leg. She asked her sister to care for her son until she recovered. At school the boy gave his aunt's address as his own. The teacher asked if his mother had moved. He said "no." The teacher then asked with whom he was staying. The boy replied that he was staying with his mother. The teacher became upset and started yelling at him. The boy held his ears. The teacher decided the boy was disturbed and made an appointment for him to be tested for schizophrenia. The test could not be administered without the mother's permission. A staff member of the Portland Urban Indian Program, at the request of the school, visited the mother's home to obtain her consent. There the staff member learned that in the culture of the boy's tribe, children are raised by the extended family. In the extended family, children regard both their natural mother and her sisters as mothers because they share maternal responsibilities.¹¹¹

Cultural bias and stereotypes were most evident in cases involving alcohol use. Studies revealed that in areas where rates of problem drinking among Indians and non-Indians were the same, the Indian family was more likely to have their children removed from the home.¹¹² Moreover, American Indian families were less likely than non-Indian families with alcohol problems to receive supportive services as an alternative to removal of their children.¹¹³ Caseworkers and teachers also misinterpreted the disciplinary practices of Indian families, claiming that American Indian children lacked close parental supervision and strong discipline. Alternative forms of discipline to physical punishment, including teasing, ostracism, peer pressure, and storytelling, were seen as too permissive.¹¹⁴ Yet, as the legislative history to the ICWA notes, "[w]hat is labeled as 'permissiveness' may often, in fact, simply be a different

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110. AMERICAN INDIAN FAMILIES, *supra* note 100, at 3.

111. *Id.* at 43.

112. HOUSE REPORT, *supra* note 38, at 10; *see also* Joseph Westermeyer, "The Drunken Indian": Myths and Realities, in AMERICAN INDIAN FAMILIES, *supra* note 100, at 22.

113. Barsh, *supra* note 90, at 1295; *see also* HOUSE REPORT, *supra* note 38, at 10.

114. *See* Barsh, *supra* note 90, at 1295; *see also* HOUSE REPORT, *supra* note 38, at 10; SZASZ, EDUCATION AND THE INDIAN, *supra* note 57, at 21.

but effective way of disciplining children. BIA boarding schools are full of children with such spurious 'behavioral problems.'"¹¹⁵

Materialism and middle class notions of what constituted poverty often influenced the removal decision of social welfare agencies.¹¹⁶ In one 1977 California case, a child was removed from the custody of her aunt by a social worker on the sole ground that "an Indian reservation is an unsuitable environment for a child and that the pre-adoptive parents were financially able to provide a home and a way of life superior to the one furnished by the natural mother."¹¹⁷ Additionally, in instances where it was necessary to remove a child from the home, extended family members were often disqualified as foster or adoptive parents for reasons that had nothing to do with their ability to care for the child. Studies revealed that "the standards for being licensed as a foster home [were] based upon middle class values; the amount of floor space available in the home, plumbing, income levels."¹¹⁸ Most Indian families were not able to meet these standards. Interestingly enough, in a study conducted by the North American Indian Women's Association, American Indians who had grown up in foster care indicated that the physical attributes of the home were less important than the presence of "the foster mother at home, firm rules, and a feeling of warmth."¹¹⁹

American Indian children and their families did not fair any better in court before state judges. The House Committee on Interior and Insular Affairs agreed with advocates of the ICWA that "the abusive actions of social service agencies would be largely nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of child abuse and neglect."¹²⁰ The "best interest of the child" standard utilized in many child custody proceedings was being narrowly interpreted by state

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115. HOUSE REPORT, *supra* note 38, at 10. For example, Santee Sioux author Charles Eastman wrote about his grandmother's stories of the "Hinakaga (owl) who swooped down in the darkness" and carried the naughty child up into the trees. See SZASZ, COLONIES, *supra* note 28, at 21. In his study on Native cultures, Clark Wissler also noted that "admonition and mild ridicule" were more predominant forms of discipline than "force and punishment." *Id.* Indeed, very few American Indian children were being removed from their homes on grounds of physical abuse. HOUSE REPORT, *supra* note 38, at 10; see also 1974 Hearings, *supra* note 98, at 4; Barsh, *supra* note 90, at 1295 n.49. See DOROTHY D. LEE, FREEDOM AND CULTURE 59-69 (1959) for a discussion of indigenous child-rearing approaches.

116. HOUSE REPORT, *supra* note 38, at 11; AMERICAN INDIAN FAMILIES, *supra* note 100, at 3, 6; Barsh, *supra* note 90, at 1295.

117. AMERICAN INDIAN FAMILIES, *supra* note 100, at 3. The social worker admitted that there was no evidence that the mother, who within a week had joined her daughter in California, was unfit to care for her child. The child was removed from the aunt's home merely to prevent her from being returned to the reservation. The child was eventually returned to her mother with the assistance of counsel. *Id.*

118. 1974 Hearings, *supra* note 98, at 5 (statement of William Byler); see also HOUSE REPORT, *supra* note 38, at 11; Barsh, *supra* note 90, at 1296-97.

119. *Id.* 1297 (citing 1974 Hearings, *supra* note 98, at 322).

120. HOUSE REPORT, *supra* note 38, at 11.

courts without recognition of or appreciation for the cultural and familial values of Native American nations.¹²¹ In most cases, judges would merely defer to the opinion of state social workers, placing the burden on the parents to prove that they were capable of caring for their child in accordance with Western notions of childcare.¹²² Moreover, extended family members and tribes were rarely, if ever, consulted about the children's welfare. Nor were state courts immune to cultural bias. In a 1979 case involving a Sioux child from the Rosebud reservation, a state court terminated a mother's parental rights on the ground that it would be "detrimental" and "unnatural" to return the child to the mother because of the mother's place of residency on the reservation.¹²³

Other court-related causes of removal included procedural irregularities and lack of due process afforded Indian families and tribes. American Indian parents were often not properly notified of court dates and rarely had legal representation or the supporting testimony of expert witnesses on Indian child-rearing practices available to them. In one such case, a child was held in foster care for seven months under a state *ex parte* emergency removal order before a hearing was scheduled. And even then, the mother was notified of the hearing only by publication despite the fact that she had continuously lived at the same address from which the child had been removed.¹²⁴ Advance notification was further complicated by differences in Indian and non-Indian social systems. This problem was succinctly described in the legislative history to the ICWA:

By sharing the responsibility of child rearing, the extended family tends to strengthen the community's commitment to the child. At the same time, however, it diminishes the possibility that the nuclear family will be able to mobilize itself quickly enough when an outside agency acts to assume custody. Because it is not unusual for Indian children to spend considerable time away with other relatives, there is no immediate realization of what is happening — possibly not until the opportunity for due process has slipped away.¹²⁵

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121. See Barsh, *supra* note 90, at 1297-98.

122. HOUSE REPORT, *supra* note 38, at 10-11.

123. On appeal, a Texas court reversed the lower court decision terminating the mother's parental rights, while upholding the part of the order awarding permanent custody to the grandparents. See *Broken Leg v. Butts*, 559 S.W.2d 853 (Tex. Cir. App. 1977); *Indian Custody*, N.Y. TIMES, June 19, 1979, at 12; cf. Barsh, *supra* note 90, at 1298.

124. *Decoteau v. District County Court*, 87 S.D. 555, 211 N.W.2d 843 (1973), *aff'd* 420 U.S.425 (1975). For additional information on the case, see 1974 *Hearings*, *supra* note 98, at 65-69 (statement of Cheryl DeCoteau). See generally HOUSE REPORT, *supra* note 38, at 11; Barsh, *supra* note 90, at 1300.

125. HOUSE REPORT, *supra* note 38, at 11.

Moreover, although tribes had an obvious interest in these cases, they were often not notified of the proceedings or allowed to intervene. Once again, there was no avenue available for the state courts to be informed of the familial resources available to the children in their own communities. Similarly problematic were the unclear lines of demarcation between state and tribal court jurisdiction over Indian child custody proceedings.¹²⁶

A number of economic factors also were identified as contributing to the crisis. For instance, in "voluntary" waiver of parental rights cases, there was evidence that state welfare agencies were conditioning the availability of social services on parents agreeing to the waiver.¹²⁷ Other families who became aware of these tactics were less inclined to seek services that could have alleviated some of the social conditions ultimately cited as grounds for removal by those same agencies. Moreover, federally subsidized state programs that required able-bodied single parents to work outside the home often made the child more vulnerable to removal on the grounds of "neglect."¹²⁸ Another major economic factor contributing to the crisis was an increase in demand for American Indian children in the private adoption market, which led to an increase in abuses against Indian children and their families.¹²⁹ Recently, the woman referred to in the opening paragraph of this article spoke of her long journey home to the Navajo Nation.¹³⁰ Forty-three years earlier, she and her twin brother had been born on the Navajo reservation. A public health nurse came to take the twins to a hospital in Winslow, Arizona. When the mother went to visit the children, she could not find them. Years later, the family would discover that the twins had been adopted out on the "black market." Although the woman was reunited with her family and tribe, her twin brother has yet to be found. The *Lost Bird Society*, an organization charged with helping American Indian children find

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126. Throughout history, tribes and states had clashed over issues of jurisdiction and family matters are no exception. See *id.* at 1300-03; see also Barbara Ann Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 35 UCLA L. REV. 1051 (1989); Kunesh-Hartman, *supra* note 94, at 141-50.

127. HOUSE REPORT, *supra* note 38, at 11; Barsh, *supra* note 90, at 1299. The legislative history points to one South Dakota entrapment case where an Indian parent was persuaded to sign a waiver granting temporary custody to the State in exchange for benefits, which was later used against her as evidence of neglect.

128. Barsh, *supra* note 90, at 1299. Additionally, AAIA data on the number of Indian children placed in foster care each year supported the claim by Indian tribes that federally subsidized foster programs encouraged some non-Indian families to start "baby farms." Indian children were being placed on farms to work, while foster care payments were being used to supplement the farm income. HOUSE REPORT, *supra* note 38, at 11-12.

129. See Barsh, *supra* note 90, at 1299 (citing 1977 *Hearings*, *supra* note 100, at 157, 359); 1974 *Hearings* *supra* note 98, at 5, 70, 116.

130. Royal Ford, *Identity Retrieved*, BOSTON GLOBE, May 2, 1996, at B1; *A Cyber-Search for Family*, BOSTON GLOBE, May 7, 1996, at A18; Royal Ford, *Reunion Day: At 43, Navajo Native Finally Home*, BOSTON GLOBE, June 2, 1996, at A1.

their families, states that before the ICWA was passed thousands of children were illegally taken from their families and placed up for adoption.¹³¹

B. Some Effects

The massive displacement of American Indian children has had long-lasting effects on the well-being of Native American children, families, and tribes. One of the most devastating consequences has been the unusually high rate of suicide among American Indian children placed in foster care, adoptive homes, and institutions — a rate twice that of the reservation suicide rate and four times that of the general population.¹³² At U.S. congressional hearings on the Indian child welfare crisis, experts testified that Native American children were more likely to face significant social problems in adolescence and adulthood as a result of the displacement. The American Academy of Child Psychiatry agreed, stating in a 1975 report that

[t]here is much clinical evidence to suggest that Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough [the children] are cared for by devoted and well-intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment . . . .¹³³

Other studies have collaborated these findings.¹³⁴ Moreover, children raised

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131. See *Identity Retrieved*, *supra* note 130. The Lost Bird Society also maintains a web page on the Internet. See Marie Fouche, *The Lost Bird* (visited June 27, 1998) <<http://www.montrose.net/users/fouche/zintka.htm>>. For additional information on the Internet, see Aaron Osterby, *Indian Child Welfare Law Center* (visited June 27, 1998) <<http://glrain.cic.net/icwalc/>> and *The National Indian Child Welfare Association* (visited June 27, 1998) <<http://www.itcn.org/icwa/>>.

132. See CONFERENCE PROCEEDINGS, *supra* note 11. See generally AMERICAN INDIAN FAMILIES, *supra* note 100, at 8; CENTER FOR DEMOGRAPHIC POLICY & INST. FOR EDUC. LEADERSHIP, THE DEMOGRAPHICS OF AMERICAN INDIANS: ONE PERCENT OF THE PEOPLE; FIFTY PERCENT OF THE DIVERSITY (1990).

133. 1977 Hearings, *supra* note 100, at 114 (statement of Drs. Carl Mindell and Alan Gurwitt, American Academy of Child Psychiatry); see also 1974 Hearings, *supra* note 98, at 56; Barsh, *supra* note 90, at 1291.

134. See, e.g., Joseph Westermeyer, *The Ravage of Indian Families in Crisis*, in AMERICAN INDIAN FAMILIES, *supra* note 100, at 47; 1974 Hearings, *supra* note 98, at 49 (statement of Dr. Joseph Westermeyer); *id.* at 129 (statement of Dr. Robert Bergman, Indian Health Service). See generally CHRISTOPHER BAGLEY, INTERNATIONAL AND TRANSRACIAL ADOPTIONS 13 (1993); Catherine M. Brooks, *The Indian Child Welfare Act in Nebraska: Fifteen Years: A Foundation for the Future*, 27 CREIGHTON L. REV. 661, 668 (1994) (citing a study by Dr. Carol Locust of the University of Arizona College of Medicine on the adverse effects of being adopted into off-reservation, non-Indian homes). But see DAVID FANSHIEL, FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF AMERICAN INDIAN CHILDREN (1972) (noting that the removal of Indian children from their families and communities may be the "ultimate indignity to endure," but is nevertheless a desirable option). For a critique of Fanshel's study, see BAGLEY, *supra*, note

in boarding schools or other educational institutions knew very little of life in a "family." As parents themselves, they had no patterns to follow in rearing their own children. Many had to learn to live and cope with harsh experiences, such as physical and mental abuse.¹³⁵ In addition, they were being educated in systems that devalued their Native cultures, resulting in further alienation from community and loss of self-esteem. High dropout rates and low employment were the norm for many of these students. The large number of American children raised in foster care similarly perpetuated the destruction of the American Indian family. "Stricken by a 'constant sense of not knowing where they will be or how long they'll be there,'" these children found it difficult in adulthood to establish permanent roots.¹³⁶ Additionally, because society frowned upon their cultures, many American Indians sought to deny their own heritages. This denial caused further distress, often leading to some form of substance abuse.¹³⁷ Some of the consequences of the removal process for the individual child were not easily quantifiable, such as the loss of opportunity to learn about one's heritage from one's elders.

Studies did show that when the child was removed from the home without the benefits of proper cultural, political, and social safeguards, it affected the entire kinship community. AAIA related studies indicated that removal of a child "effectively destroyed the family as an intact unit . . . exacerbat[ing] the problems of alcoholism, unemployment, and emotional duress among parents."¹³⁸ The consistent threat of losing one's child created a sense of hopelessness and powerlessness that made it difficult for the adults to function well as parents. Many feared emotional attachment because of the inevitable loss. One psychologist noted that American Indian parents had become so conditioned to the removal process that they would often place their own children in boarding schools as a matter of course.¹³⁹ Others would place the

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134; RITA J. SIMON ET AL., *THE CASE FOR TRANSRACIAL ADOPTION* (1994); Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503, 543. See also *infra* note 201 and accompanying text.

135. See Patricia Kunesch, *Transcending Frontiers: Indian Child Welfare in the United States*, in *FAMILIES ACROSS FRONTIERS* 347, 357 (Nigel Lowe & Gillian Douglas eds., 1996); see also NATIONAL RESOURCE CTR. ON CHILD SEXUAL ABUSE, THINK TANK REPORT: ENHANCING CHILD SEXUAL ABUSE SERVICES TO MINORITY CULTURES (1990); *Indian Child Protective Services and Family Violence Prevention Act: Hearings Before the Senate Select Committee on Indian Affairs*, 101st Cong. (1990) [hereinafter *1990 Hearings*]; AMERICAN INDIAN FAMILIES, *supra* note 100, at 8.

136. Barsh, *supra* note 90, at 1291 (quoting *1974 Hearings*, *supra* note 98, at 58) (statement of Drs. Carl Mindell and Aland Gurwitt).

137. STATUS REPORT, *supra* note 100; Westermeyer, *supra* note 134.

138. *Id.* at 54; see also Barsh, *supra* note 90, at 1291-92.

139. Carolyn Attneave, *The Wasted Strengths of Indian Families*, in AMERICAN INDIAN FAMILIES, *supra* note 100, at 29, 30.

children with social service agencies and hospitals, rather than entrusting them to the care of extended family members.¹⁴⁰

Moreover, since the community's economic and social well-being were built around kinship networks, the destruction of the family unit perpetuated the dire socioeconomic conditions existing on many reservations.¹⁴¹ The Indian child welfare crisis also chipped away at the cultural heritages of tribes. As Chief Calvin Isaac of the Mississippi Band of Choctaw Indians noted in a 1978 hearing before the Senate:

Culturally, the chances of Indian survival are significantly reduced if our children, the only means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships.¹⁴²

C. Congress' Response

Once the Indian child welfare crisis had been brought to the forefront, Native nations and Congress were faced with the daunting task of developing legislation that would prevent further abuses and help remedy the years of damage that had already been done to Native American children, families, and tribes. In 1978, Congress passed the Indian Child Welfare Act, declaring:

It is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.¹⁴³

The ICWA was designed to achieve a number of interrelated goals. First, the law seeks to reverse the historical policies and practices that led to the

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140. HOUSE REPORT, *supra* note 38, at 12.

141. *See id.* at 12; AMERICAN INDIAN FAMILIES, *supra* note 100, at 7-8. *See generally* Meriam Report, *supra* note 76; SENATE COMM. ON LABOR & PUB. WELFARE, INDIAN EDUCATION: A NATIONAL TRAGEDY — A NATIONAL CHALLENGE, S. REP. NO. 91-501 (1969); Kunesh, *supra* note 135, at 356-57.

142. 1978 Hearings, *supra* note 4, at 193.

143. 25 U.S.C. § 1902 (1994). Congress' power to pass such a law is derived from the special relationship between American Indian tribes, their members, and the U.S. government. *Id.* § 1901.

massive removal of American Indian children to institutions, foster care, and adoptive homes.¹⁴⁴ The law is an official acknowledgment by the federal government that Indian children are not necessarily "better off" far from the influence of family and community. The law similarly recognizes that an Indian child's best interests may be inextricably connected to that of the tribe. While the law could not dictate a change in the attitudes of social workers, educators, and judges, it could establish minimum standards and procedures for the placement of American Indian children outside the home.¹⁴⁵

Second, the ICWA seeks to recognize and respect the familial traditions and responsibilities of Native American nations. When viewed in the context of indigenous family and community, the law recognizes the importance of the traditional kinship system and the role of the extended family in the rearing of children. For instance, it recognizes foster care and adoptive placement preferences with extended family members and other tribal members, and requires state courts to consider the social and cultural standards of tribes when making placement determinations.¹⁴⁶ It also seeks to protect the individual rights of Native American children to be raised, whenever feasible, in their families and communities of origin by mandating that families receive culturally appropriate remedial services before a placement occurs.¹⁴⁷ Prior to the law being passed, American Indian families were less likely to receive any supportive services as an alternative to removal of their children as compared to non-Indian families. Additionally, the Act was designed to be sufficiently flexible to meet the diverse cultural interests and complex social needs of American Indian children. Evidence of this flexibility can be found in the opinions of several state and tribal courts, as well as various tribal and state programs.¹⁴⁸

Third, it seeks to promote Indian self-determination in the area of child welfare. The doctrine of tribal sovereignty holds that the "powers of Indian tribes are . . . inherent powers of a limited sovereignty which has never been extinguished."¹⁴⁹ The ICWA recognizes the sovereign powers of Native American nations to develop indigenous systems of child welfare. This goal is in line with studies indicating a link between the welfare of Native American children and the extent to which tribes are able to control their own political, social, and economic development. The law reaffirms the jurisdiction of tribal courts over certain child custody proceedings, and extends that

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144. See *id.* § 1901(3), (4), (5).

145. See *supra* notes 3-4 and accompanying text. Additionally, it established a mechanism for the development of "locally convenient day schools" to prevent further separation of American Indian children from their families and communities of origin. 25 U.S.C. § 1961 (1994).

146. 25 U.S.C. § 1915 (1994).

147. *Id.* § 1912(d).

148. See *infra* notes 223-34 and accompanying text.

149. *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). These powers are retained unless expressly divested by Congress. See COHEN, *supra* note 52, at 242-44.

jurisdiction to children living away from their communities. It ensures that tribes and extended family members will have an opportunity to be heard through notification provisions and the ability to intervene in the proceedings. Finally, it encourages the development and implementation of tribal child welfare services.¹⁵⁰ These provisions recognize the symbiotic relationship between tribe and child, including the child's right to participate in the "fabric of tribal life" and the tribe's right to exist as a distinct political community.

Despite some limitations in the law, there is a general consensus among Native American nations and organizations that the ICWA provides "vital protection to American Indian children, families and tribes."¹⁵¹ Yet the Act continues to be ignored in many instances.¹⁵² The Existing Indian Family Doctrine is a prime example of how certain state courts are circumventing the mandates of the law. As the next section demonstrates, this judicially created exception to the ICWA, which some politicians have advocated should be incorporated into the Act itself, constitutes a significant retreat from the purposes and goals of the ICWA.

IV. A Return to Assimilationist Thinking?

*The Indian culture is foreign to me, and I don't think it is valid.*¹⁵³

— Adoption Attorney, 1987

A. The Existing Indian Family Doctrine

The current legal and political challenges to the Indian Child Welfare Act pose a number of important questions: Does the judicially recognized "Existing Indian Family" exception represent a return to the assimilationist attitudes of the past? What are the dangers inherent in the "social, cultural, or political affiliation" standard of the "Existing Indian Family" Doctrine? And what are the future implications to Indian children, their families, and their tribes should this Doctrine become settled law?

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150. 25 U.S.C. §§ 1911, 1912(a), 1931-1934 (1994).

151. *Amendments to the Indian Child Welfare Act: Hearings Before the Senate Committee on Indian Affairs*, 104th Cong. 303 (1996) [hereinafter *1996 Hearings*] (statement of Jack F. Trope, for AAIA); see also *id.* at 134 (statement of Ron Allen, President of the National Congress of the American Indian) ("The National Congress has never advocated that the Indian Child Welfare Act be amended. Our tribes have taken the position that ICWA works well and, despite some highly publicized cases, continues to work well.") For a critique of the law as drafted, see Barsh, *supra* note 90.

152. See *Introduction to CONFERENCE PROCEEDINGS*, *supra* note 11; Goldsmith, *Individual vs. Collective Rights*, *supra* note 21, at 4 (noting that in 1990, ICWA was ignored in seventy cases by state courts in New Mexico); Metteer, *Pigs in Heaven*, *supra* note 6, at 592 (documenting the various ways that state courts have avoided the mandates of the ICWA).

153. Thomas B. Rosensteil, *Whites Adopt Navajo: Sovereignty on Trial in Custody Case*, L.A. TIMES, Feb. 11, 1987, at A1, quoted in Metteer, *Pigs in Heaven*, *supra* note 6, at 606.

In 1996, a bill was introduced into the House of Representatives that would have excluded from the coverage of the ICWA any child whose parents did not maintain "significant social, cultural, or political ties with the tribe of which they are a member."¹⁵⁴ This amendment passed through the House of Representatives as part of *The Adoption Promotion and Stability Act* without any input from Native American nations or organizations. Although the amendment was later deleted from the Senate version of the bill, the debate over the ICWA continues in Congress with a series of new amendments being proposed each term.¹⁵⁵ The original House amendment was an attempt to codify a judicially created exception to the ICWA known as the "Existing Indian Family" doctrine. Some state courts have refused to apply the ICWA to any case not involving the "removal" of an Indian child from an "existing Indian family or home."¹⁵⁶ State courts that have adopted this exception contend that Congress never intended ICWA to apply to American Indian children who had not lived in an Indian cultural environment or bonded with an Indian parent, or whose parent has no apparent connection with his or her community.¹⁵⁷

Courts and advocates alike have maintained that the Doctrine violates the plain meaning of the ICWA, which states that the law will apply to "custody proceedings" involving "Indian children" who are either a member of their tribe or eligible for membership.¹⁵⁸ There is no statutory requirement that the child or parent meet any additional test of "Indian-ness" beyond membership. As one judge aptly noted "[w]hen a court ignores the clear provisions [of the Act] . . . in reliance on what the court believes the legislature must have meant to say, the court is improperly engaging in judicial lawmaking."¹⁵⁹

154. H.R. 3275, 104th Cong. (1996). This ICWA amendment was folded into Title III of House Bill 3286, the Adoption Promotion and Stability Act, and passed in the House. After hearings before the Senate Committee on Indian Affairs, Title III was struck from the Act and reported to the Senate Floor without the ICWA amendment.

155. See *infra* notes 189-90 and accompany text.

156. See, e.g., *S.A. v. E.J.P.*, 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re Bridget R.*, 49 Cal. Rptr. 507 (Cal. Ct. App. 1996); *In re Baby Boy L.*, 643 P.2d 168 (Kan. 1982); *Barbry v. Dauzat*, 576 So.2d 1013 (La. Ct. App. 1991); *In re S.A.M.*, 703 S.W.2d 603 (Mo. App. 1986); *In re S.C.*, 833 P.2d 1249 (Okla. 1992); *In re Baby Boy D.*, 742 P.2d 1059 (Okla. 1985); *In re Crews*, 825 P.2d 305 (Wash. 1992). For a list of cases rejecting the Existing Indian Family Doctrine, see *infra* note 239. For articles critiquing the Existing Indian Family Doctrine, see Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465 (1993); C. Steven Hager, *Prodigal Son: The "Existing Indian Family" Exception to the Indian Child Welfare Act*, 27 CLEARINGHOUSE REV. 874 (1993); Metteer, *Existing Indian Family Exception*, *supra* note 53; Michelle L. Lehmann, Comment, *The Indian Child Welfare Act of 1978: Does It Apply to the Adoption of an Illegitimate Indian Child*, 38 CATH. U. L. REV. 511 (1989).

157. See *infra* note 176 and accompanying text.

158. 25 U.S.C. § 1903 (1994). If the child is not currently a member of a tribe, she must be the biological child of a member of a tribe.

159. *In re N.S.*, 474 N.W.2d 96, 100 (S.D. 1991) (Sabers, J., concurring). Other state courts

The Doctrine also violates basic principles of tribal sovereignty. Native American nations, as distinct political communities, have the authority to determine their own membership.¹⁶⁰ Membership in a tribal nation is conceptually equivalent to citizenship, although not always synonymous with "enrollment." Every Indian nation has its own membership or citizenship criteria which may be determined by "written law, custom, intertribal agreement, or treaty with the United States."¹⁶¹ The Existing Indian Family Doctrine, which allows state courts and agencies to substitute their views of what "belonging" to a tribal family means for that of the tribe's views, thwarts this essential function of tribal sovereignty. Tribal membership determinations and issues of domestic relations between tribal members are two areas of American Indian law in which the Supreme Court continues to support the autonomous self-determining status of tribes even as it seems to chip away at other aspects of tribal sovereignty.¹⁶² For instance, in *Santa Clara Pueblo v. Martinez*,¹⁶³ the Court held that there was no federal court review beyond habeas corpus of tribal governmental actions under the Indian Civil Rights Act (ICRA).¹⁶⁴ By construing the provisions of the ICRA narrowly to exclude federal court review of tribal membership determinations, the Court sought to ensure a "proper respect both for tribal sovereignty itself and for the plenary authority of Congress."¹⁶⁵

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have noted that Congress considered and rejected language that would have limited the ICWA to children with "significant contacts" or to "enrolled members." See Metteer, *Existing Indian Family Exception*, *supra* note 53, at 659-60 n.92 and cases cited therein. The Existing Indian Family Doctrine similarly violates canons of construction of American Indian law that federal statutes "should when possible be read as protecting Indian rights and in a manner favorable to Indians." COHEN, *supra* note 52, at 221.

160. See, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); see also COHEN, *supra* note 52, at 248.

161. *Id.* (citing *Delaware Indians v. Cherokee Nation*, 193 U.S. 127 (1904)); see also 1996 *Hearings*, *supra* note 151, at 316 (statement of Trope, AAIA, on "retroactive" membership question). Residency, knowledge of kinship networks, descendants' laws, community ties, and blood quantum are all factors which may be part of a tribe's membership/citizenship determination. An individual tribal member can renounce his or her tribal membership at any time, thereby severing any ties that would subject that person to legislation applying to federally recognized tribes and members. See COHEN, *supra* note 52, at 22; Metteer, *Existing Indian Family Exception*, *supra* note 53, at 686.

162. Compare, e.g., *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (no federal court review under the Indian Civil Rights Act of tribal membership determination beyond habeas corpus) and *Fisher v. District Court*, 424 U.S. 382 (1976) (tribal court had exclusive jurisdiction over child custody proceeding involving members and residents of Northern Cheyenne River Tribe) with *Strate v. A1 Contractors*, 117 S. Ct. 1404 (1997) (no tribal court jurisdiction in case involving automobile accident between non-members occurring within boundaries of reservation but on right-of-way held by the State under the Montana "tribal interest" test).

163. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

164. 25 U.S.C. §§ 1301-1303 (1994).

165. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

These are just two of several arguments advanced against the application and codification of the Existing Indian Family Doctrine. Perhaps the most dangerous aspect of this Doctrine, however, is that it perpetuates, while maybe not consciously so, the very type of assimilationist thinking that led to the crisis in the first place. A review of some court decisions adopting this Doctrine will help demonstrate this point.

In re Bridget R. involved the adoption of twin girls whose father was a member of the Pomo Indian tribe and whose mother was a member of the Mexican Yaqui tribe.¹⁶⁶ The father had been a member of the tribe since his birth when tribal membership was governed "solely by custom and tradition, under which any lineal descendant of a historic tribal member was automatically a member of the Tribe and was recognized as such from birth."¹⁶⁷ Both children were eligible for membership under tribal law. At the time of the births, the mother and father were not married, were in their early twenties, had two other children, and were living in a city one hundred miles from the reservation. When the young parents consulted an attorney about relinquishing the twins for adoption, they were told that the adoption would be "more difficult" if the father revealed his Native American ancestry. The facts indicate that the attorney went so far as to urge the father to remove any reference to his Native American ancestry from the adoption forms.¹⁶⁸ The father revised the form and omitted all such references. The children were relinquished in November of 1993 to a couple in Ohio without any notification to the tribe or reference to the placement preferences in the ICWA.

Within several months of the preadoptive placement, the father told his mother about the twins; the grandmother and father contacted both the adoption attorney and the tribe, expressing their desire to have the children placed within the extended Indian family; and the tribe contacted the adoption agency and court, filing a motion to intervene in the termination of parental rights proceeding pursuant to the ICWA. The tribe argued that the children were members of a Native American tribe and therefore the court needed to apply the provisions of the Act.¹⁶⁹ The trial judge agreed, finding that the relinquishment of the twins to the Ohio couple was invalid. At the June 1995 trial, the judge admonished the attorney handling the case, stating "[the attorney] clearly failed in terms of his responsibility to his clients . . . Had he addressed these issues in the initial interview, we would not be here."¹⁷⁰

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166. 49 Cal. Rptr. 2d 507 (1996). The facts of the case are taken from the opinion and Metteer, *Existing Indian Family Exception*, *supra* note 53, at 656-58. The appeals court stated that the facts of the case were "substantially undisputed."

167. *Bridget R.*, 49 Cal. Rptr. 2d at 516-17.

168. *Id.* at 517; Metteer, *Existing Indian Family Exception*, *supra* note 53, at 657; James Rainey, *Birth Parents to Get Twins, Judge Rules*, L.A. TIMES, June 15, 1995, at A1.

169. *Bridget R.*, 49 Cal. Rptr. 2d at 516-18; Metteer, *Existing Indian Family Exception*, *supra* note 53, at 657-58.

170. Rainey, *supra* note 168, at A36 (quoting Judge John Henning). These facts demonstrate

Relying on the "Existing Indian Family" doctrine, a California appeals court reversed the order of the trial court. Earlier, the court had requested that the parties brief whether the ICWA applied "in the context of the 'Existing Indian Family' where, as here, it appears that neither the children nor their birth parents have a meaningful connection with Indian tribal or family life and where their primary cultural heritage is other than Indian."¹⁷¹ In the end, the court found that regardless of tribal membership, the ICWA only applied if the father had maintained, in the opinion of the state court, a "significant social, cultural, or political relationship" with his tribe.¹⁷² It remanded the case to the trial court, opining that the "events and circumstances . . . strongly suggests that no such relationship existed."¹⁷³ Other state cases have similarly limited the application of the ICWA to children who are part of an "existing Indian family" with "family" being narrowly defined in accordance with Euro-American standards. For instance, in *Claymore v. Serr*, the court found that the ICWA did not apply to an illegitimate child of an Indian father whose parental rights were being terminated, because the child had never lived with the father or resided in an "Indian home or culture."¹⁷⁴ In determining what constituted a "family" for purposes of the ICWA, the court concluded that it should be restricted to the "nuclear family or parents and offspring." Relying on a definition from Black's Law Dictionary, both the *Bridget R.* and *Claymore* courts observed "that ICWA refers in some contexts to 'Indian families' and in others to 'extended Indian families,' suggesting that when the former term is used, the nuclear family, 'the fundamental social unit in civilized society,' is intended."¹⁷⁵

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the devastating impact that either ignorance of or blatant disregard for the ICWA can have on the children, their families and communities of origin, as well as their pre-adoptive or adoptive families. The grandmother perhaps put it best when she stated to a reporter, "I know the pain [the adoptive parents] feel [when faced with the possibility of losing the children], because I felt the same pain when I realized I had two granddaughters I didn't even know." Metteer, *Existing Indian Family Exception*, *supra* note 53, at 657-58.

171. Metteer, *Existing Indian Family Exception*, *supra* note 53, at 658-59 (quoting Unpublished Court Order at 1, *In re Bridget R.*, No. 93520 (July 5, 1995)).

172. The court went as far as to hold that there were "significant constitutional impediments" under the Fifth, Tenth, and Fourteenth Amendments to applying the ICWA to cases involving individuals not living on the reservation absent the application of this doctrine. However, the court's entire reasoning was flawed. See Metteer, *Existing Indian Family Exception*, *supra* note 53, for a thorough critique of the court's constitutional analyses. See also *infra* notes 201-03. As Metteer notes, the *Bridget R.* court is one of the first to use the Existing Indian Family Exception "as a test of the ICWA's constitutionality." Metteer, *Existing Indian Family Exception*, *supra* note 53, at 649 n.8. Other courts that have adopted this doctrine have done so under a straight statutory interpretation. See *supra* note 130.

173. 49 Cal. Rptr. 2d at 536; Metteer, *Existing Indian Family Exception*, *supra* note 53, at 659.

174. *Claymore v. Serr*, 405 N.W.2d 650, 653-54 (S.D. 1987). But see *In re Baade*, 462 N.W.2d 485 (S.D. 1990) (rejecting doctrine in light of U.S. Supreme Court decision in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)).

175. *In re Bridget R.*, 49 Cal. Rptr. 2d at 529 (quoting *Claymore*, 405 N.W.2d at 653-54).

B. Whose "Family" Is It Anyhow?

Simply put, the Existing Indian Family Doctrine is reminiscent of the assimilationist policies of the past. First, it substitutes indigenous views of "family" for that of the individual state. Although the Existing Indian Family Doctrine varies from state to state, all of the cases turn on state court interpretations of "Indian-ness" and "family." Some state courts focus on the relationship of the child to the Indian parent, others on the relationship of the parent to the tribe as in the *Bridget R* case.¹⁷⁶ The potential relationship of the child to the kinship community and the tribes' views of what it means to be "Indian" or part of an "Indian family" are not determinative. In this sense, the Doctrine completely thwarts Congress' goal, codified in the ICWA, "to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."¹⁷⁷ Moreover, rather than viewing the notion of "family" as a "multi-generational complex of people and clan and kinship responsibilities," courts such as *Bridget R*. have chosen to apply a narrower definition of family, which they proclaim is the "fundamental social unit" of any "civilized society."¹⁷⁸ Besides being offensive, this interpretation directly conflicts with Congress' intent to respect "the unique [familial] values of Indian culture[s]."¹⁷⁹ The difficulty of applying state standards to these cases is further evidenced in the *Bridget R*. court's attempt to separate the individual child from the community. As legal scholar Christine Metteer so aptly points out:

[I]n asking both whether the child is 'Indian' enough to be embraced under the Act, and if so, whether the child was part of an existing Indian 'family,' the courts fail to see that from the Indian perspective, the two questions are one. To be an Indian under [the ICWA] requires, at a minimum, eligibility for tribal [membership]. And to be eligible for tribal [membership] means

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It is worth noting here that the *Black's Law Dictionary* has several definitions of family, including "all relations who descend from a common ancestor." It similarly notes that "the meaning of 'family' necessarily depends on the field of law in which the word is used, purpose intended to be accomplished by its use, and the facts and circumstances of each case." BLACK'S LAW DICTIONARY 608 (6th ed. 1990).

176. See, e.g., *In re S.C.*, 833 P.2d 1249 (Okla. 1992) (because children had never lived with American Indian father, there was no "existing Indian family"); *Claymore v. Serr*, 405 N.W.2d 650 (S.D. 1987) (child had never resided with Indian father, thus there was no existing "Indian family"); *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (no "existing Indian family" where parent has not maintained "significant social, cultural, or political relationship" with the tribe). See generally *Davis*, *supra* note 156, at 478-96; *Hager*, *supra* note 156, at 878-81.

177. 25 U.S.C. § 1901(5) (1994).

178. See *supra* notes 19, 175 and accompanying text.

179. 25 U.S.C. § 1902 (1994).

that the tribe has embraced the child as part of the whole, the tribal family.¹⁸⁰

At issue here is the relationship of the individual to the kinship community, discussed earlier in this article in the context of collective responsibilities and individual rights. American Indian children have a unique symbiotic relationship with their tribe that is reflected in the very membership customs and laws that the *Bridget R.* court chose to ignore. In many respects, these laws and customs serve the same overarching goals that family laws of individual states serve in "protecting the best interest of a child." Citizens of those states must abide by state law just as members of American Indian nations are similarly bound by tribal law and custom.

Second, the "Existing Indian Family" Doctrine fails to recognize the important role that extended family members play in the care and upbringing of children. Under the proposed federal legislation and the *Bridget R.* test, state courts could only consider the relationship between the parents and the tribe. The potential relationship of the children to their extended family members, as well as the extended family members' connection to their community, could not be considered. For example, in the *Bridget R.* case, the trial court could not consider the willingness of the children's aunt to step in as primary caregiver or the additional care that would have been provided by the grandmother and other tribal members in deciding whether the children were being removed from an "existing Indian family." Accordingly, one of the main effects of the "social, political, and cultural relationship" test is "to deprive the extended family of the right to be considered as preferred placements for the child."¹⁸¹ Moreover, by failing to acknowledge the validity of the indigenous kinship system, state courts are perpetuating historical notions that American Indian children are really better off growing up in non-Indian households.

Third, when Congress passed the ICWA, it was concerned about the coercive actions of states and their insensitivity to tribal cultural values and social norms. By relying on "some judicially fashioned level of 'Indian-ness'" to try to "manipulate their use of the existing Indian family exception," state courts have established a dangerous precedent that once again opens the door to cultural biases and misunderstandings.¹⁸² For instance, how is a state court to evaluate what constitutes significant "social, political, and cultural" ties to an Indian community? Because there are "no clear lines or demarcations to these notions, . . . stereotypes, prejudices, and biases can quickly enter into the determination."¹⁸³ The Doctrine itself signals a return to the paternalistic

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180. Metteer, *Pigs in Heaven*, *supra* note 6, at 614.

181. 1996 *Hearings*, *supra* 151, at 314 (statement of Jack Trope, AAIA).

182. Davis, *supra* note 156, at 488-89.

183. *Id.* at 489.

notion that states are better equipped than tribes at deciding the future welfare of American Indian children and their families, including deciding who is and who is not "Indian." In the *Bridget R.* case, the state trial court was directed to consider a number of intrusive and, for some tribes, irrelevant factors in determining whether the father belonged to an "Existing Indian Family." The factors listed by the appeals court included "whether the parents privately identified themselves as Indians and privately observed tribal customs and . . . whether, despite their distance from the reservation, they participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to Indian charities, [and] subscribed to tribal newspapers or other periodicals of special interests to Indians . . ."¹⁸⁴ The fact that the tribe considered the father and his children to be members of the Pomo community in accordance with its own customs and laws was, according to the state appeals court, insufficient for purposes of establishing the tribal connection. Such a ruling opens a Pandora's box to future attacks against all tribal membership determinations.

Fourth, state courts have applied the existing Indian family exception without ever seriously considering the impact that almost two centuries of coercive separation and assimilation have had on generations of Indian people. Once again language from the *Bridget R.* case helps to demonstrate this point. The appellate court seemed genuinely surprised by "the fact that in the months preceding the birth of the twins, the parents turned not to the Tribe or even to other family members, but rather to California's legal process for the purpose of securing the adoption of the twins."¹⁸⁵ For the court, this conduct created "a very strong inference" against the application of the ICWA. Perhaps the appellate court overlooked the statement in the legislative history to the ICWA, repeated by the Supreme Court in the *Holyfield* case, that "[o]ne of the effects of our national paternalism has been to so alienate some Indian parents (sic) from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family."¹⁸⁶ That is why there are special provisions in the ICWA to ensure that the parental waiver of rights is indeed voluntary and that parents are made aware of all their options with respect to possible placements.¹⁸⁷ It would be a true mark of injustice if the very abuses that caused so many Indian people to be separated from their homes and

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184. *Bridget R.*, 49 Cal. Rptr. 2d at 531-32.

185. *Id.*

186. HOUSE REPORT, *supra* note 38, at 12; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 50, 51 n.25 (1989). Most Native Americans identify with a particular tribal identity, such as Blackfeet, Cherokee, Lummi or Pomo, rather than "Indian." This is one explanation for what appears to be a "denial" of Indian heritage by parents consulting adoption lawyers and agencies, since there is not box to check for individual tribal identity. See CONFERENCE PROCEEDINGS, *supra* note 11, at 80.

187. 25 U.S.C. §§ 1913, 1915 (1994).

communities could in turn justify denying them or their children the opportunity to reconnect with their family and community. The ICWA itself points to a contrary result in that it seeks to protect "the continued existence and integrity of Indian tribes . . . [by] protecting Indian children who are members of or are eligible for membership in an Indian tribe."¹⁸⁸

Finally, it is worth noting that the current challenges to the ICWA are not limited to a few isolated state court cases. The debate has now moved into the national arena with the introduction of federal legislation designed to essentially codify the Existing Indian Family doctrine.¹⁸⁹ As such, the proposed law is as ill conceived as the doctrine itself. However, the damage such a law could inflict on American Indian children, families, and tribes is much greater, since it would be a law of universal application and one that directly conflicts with the national principles of self-determination and self-government. If the aim of the original proposed amendments was to address a narrow category of disputed cases arising from ambiguities in the law, American Indian nations and organizations have proposed alternative amendments that would "provide more certainty to adoption cases . . . while preserving and protecting tribal sovereignty."¹⁹⁰ However, given the strong

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188. *Id.* § 1901(3).

189. For a detailed history of the proposed ICWA amendments, see Karen Gould, *History of ICWA Battle for 1996* (visited June 27, 1998) <<http://www.montrose.net/users/fouche/zintka.htm>>. Recently introduced into the house by the original sponsor of H.R. 3275, 104th Cong. (1996), is a bill attempting to limit the ICWA to only involuntary removals, thereby thwarting one of the major purposes of the ICWA to protect the unique relationship of the child to the tribe. Additionally, it ignores the economic realities that led Congress to include voluntary relinquishments. See H.R. 1957, 105th Cong. (1997).

190. 1996 *Hearings*, *supra* note 151, at 134 (statement of Ron Allen, President of the National Congress of the American Indians). In response to recent efforts to amend the ICWA, the National Congress of American Indians (NCAI) proposed its own changes to the ICWA. Unlike the proposed changes originally advanced in the House bill, the NCAI proposal is the result of a cooperative effort on the part of tribes from around the country to develop "reasonable [and] appropriate changes" to the law. See *id.* (statements of Jack Trope, AAIA). For instance, in addressing concerns about the timeliness and certainty of tribal intervention in placement proceedings, NCAI proposed "formal notice requirements to the potentially affected tribe [in all cases] and time limits for tribal intervention after such notice is received." *Id.* Prompt notice will enable adoption agencies and prospective adoptive parents to determine in advance whether a member of the child's family or tribe has an interest in adopting the child. Notice also ensures that children are not improperly removed from their families and tribes in cases where homes are available and that young parents are fully informed of the extended family options that are available to them. *Id.* In terms of compliance, the proposal provides for criminal sanctions against any person other than the birth parent who deliberately evades the ICWA and requires attorneys as well as public and private agencies to inform American Indian parents of their rights under the ICWA. Other provisions include time limits on the parents' right to withdraw consent to an adoption, certification from tribes on a child's membership, and allowing for state courts to enter enforceable orders providing for open adoption and extended family and community visitation. *Id.* Many of these proposals were incorporated into a bill introduced by Senator John McCain (R.-Ariz.) and passed by the Senate in 1996. See S. 1962, 104th Cong. (1996). The bill

resistance by some advocacy groups to legislation specifically addressing the misuse of the Existing Indian Family doctrine by state courts, there may be other ideological differences fueling these recent challenges.

C. International and National Debates on the Individual vs. the Group

A child's right to be raised and nurtured in her family and community of origin has been increasingly recognized in international legal discourse. For instance, in 1988, the Hague Conference on private international law expressed concern for the "world-wide phenomenon [of inter-country adoption] involving migration of children over long geographical distance and from one society and culture to another very different environment."¹⁹¹ In 1995, the Hague Inter-Country Adoption Convention came into force. The Preamble to that Convention recognized, among other things that: (1) a "child, for the full and harmonious development of his or her personality, should grow up in a family environment in an atmosphere of happiness, love, and understanding"; (2) "each State should take, as a matter of priority, appropriate measures to enable a child to remain in the care of his or her family of origin," and (3) "measures [should be taken] to ensure the inter-country adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or the traffic in children."¹⁹² Additionally, individual countries that experienced a dramatic increase in the number out-of-country adoptions during recent times, such as Guatemala, El Salvador, and Romania, have begun to enact domestic laws and regulations aimed at curtailing the number of foreign adoptions.¹⁹³ Other international instruments, such as the United Nations Convention on the Rights of the Child, have similarly sought to recognize "the right of the child to preserve his or her identity, including nationality, name, and family relations."¹⁹⁴

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failed to pass the House, however, before the close of the 104th Congress and was reintroduced this year. See S. 569, 105th Cong. (1997). To date, none of the bills have become law. The McCain amendments would help to ensure better compliance with the law and address some existing flaws in the ICWA. Unfortunately, the Senate bill falls short in that it does not address the improper use of the Existing Indian Family doctrine by state courts.

191. See Gonzalo Parra-Aranguren, *An Overview of the 1993 Hague Inter-Country Adoption Convention*, in *FAMILIES ACROSS FRONTIERS*, *supra* note 135, at 565.

192. *Id.* at 567 (quoting Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, pmbl., 32 I.L.M. 1134 (1993)).

193. See, e.g., Edward Hegstrom, *Black Market in Adoptions Described in Guatemala*, BOSTON GLOBE, Sept. 14, 1997, at A17; Steve Fainaru, *El Salvador Searching for a Stolen Past*, July 14, 1996, at A1; Steve Fainaru, *Imelda (Gina) Struggles for Identity*, BOSTON GLOBE, July 15, 1996, at A1; cf. ELIZABETH BARTHOLET, *FAMILY BONDS* 118 (1993).

194. Barbara Bennett Woodhouse, *Protecting Children's Rights of Identity Across Frontiers of Culture, Political Community, and Time* [hereinafter Woodhouse, *Protecting Children's Rights*], in *FAMILIES ACROSS FRONTIERS*, *supra* note 135, at 259 (citing CHILDREN'S RIGHTS IN AMERICA: UN CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW xiv

At the same time, indigenous peoples have been fighting for greater international affirmation of their right to thrive as distinct political and cultural communities.¹⁹⁵ For instance, the *Draft United Nations Declaration on the Rights of Indigenous Peoples* affirms, among other things, the rights of indigenous peoples to self-government, control of lands and resources, and basic human rights, as well as the freedom to develop their identities and cultures without assimilation.¹⁹⁶ Article 6 of the *Declaration* states that indigenous peoples have "the collective right to . . . full guarantees against genocide . . . including removal of indigenous children from their families and communities under any pretext."¹⁹⁷ Studies indicate that abuses similar to those committed in the U.S. against American Indian children have occurred in other countries. For instance, a recent study on Aborigine children in Australia documented "the horror of a regime" that took 100,000 children from their families and communities, and tried to instill in them "a repugnance of all things Aboriginal."¹⁹⁸ In light of these and other abuses, indigenous peoples are pushing for new international procedures and norms beyond existing human rights laws that would address the "historically rooted grievances of indigenous peoples."¹⁹⁹

While there seems to be broad international support for the idea of a declaration on indigenous rights, the process has been hampered by a perceived conflict between individual and group identities. Similarly, while the rights of children vis-à-vis their families and communities of origin have received heightened awareness internationally, they seem to have clashed with national conceptions of individualism. Legal scholar Barbara Bennett Woodhouse states that the "very notion of preserving children's cultural or ethnic identity seems to conflict with liberal conceptions of parents' and children's individual rights, ideals of color-blind equality, and a peculiarly American kind of liberty consisting in the freedom to reinvent oneself as a new citizen of a new world."²⁰⁰ A full discussion of the relevancy of this

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(Cynthia P. Cohen & Howard Davidson eds., 1990) (article 8, identity)).

195. See JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

196. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, reprinted in ANAYA, *supra* note 195, at 207-16.

197. *Id.* at 209.

198. See J.H. WOOTEN, *ROYAL COMM'N INTO ABORIGINAL DEATHS IN CUSTODY, REPORT OF THE INQUIRY INTO THE DEATH OF MALCOLM CHARLES SMITH* 20 (1989); see also AUSTRALIAN HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, *BRINGING THEM HOME* (1996). See generally JOHN PILGER, *A SECRET COUNTRY* 68 (2d ed. 1992); THE LOST CHILDREN (Coral Edwards & Peter Reed eds., 1989); Alan Thornhill, *Australia Rues Removal of Aboriginal Children*, BOSTON GLOBE, May 21, 1997, at A2; *Premier Apologizes to Aborigines*, BOSTON GLOBE, May 27, 1997, at A2.

199. ANAYA, *supra* note 195, at 184.

200. Woodhouse, *Protecting Children's Rights*, *supra* note 194, at 260; see also Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights In Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107 (1995) [hereinafter Woodhouse, "Are

debate to American Indian children as well as the implications of the outcome of this debate on the future of the ICWA are beyond the scope of this article.²⁰¹ On closer examination, it may be that the ideological conflicts over the ICWA are merely a continuation of the cultural misunderstandings that have plagued this country for centuries.

For instance, in the *Bridget R.* case, an amicus brief was filed by one party to express its "concern that children be recognized as individuals possessed of constitutionally protected rights to equal protection . . . and not as mere appendages to an abstract political or quasi-sovereign entity to whom they have, at most, a race-based connection."²⁰² Legal scholar Christine Metteer aptly demonstrates that, from a legal standpoint, this equal protection claim

You My Mother?"].

201. Transracial adoption advocates have been particularly critical of the ICWA. See, e.g., Amicus Curiae Brief for American Academy of Adoption Attorneys, *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Civ. No. B093520); cf. Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 543, 557 (1990). Yet there are important distinctions to be drawn here between "transracial" adoption concerns and the purposes and goals to be served by the ICWA. First, the "American Indian" classification in the ICWA is a political rather than a racial designation. The law only applies to federally recognized tribes and American Indian children who are members of those tribes. The Supreme Court has consistently held that such classifications are not directed towards Indians as members of a "discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Morton v. Mancari*, 417 U.S. 535, 553 (1974); see also *Fisher v. District Court*, 424 U.S. 382 (1976) (stating that "the exclusive jurisdiction of the Tribal Court [over Indian child custody proceedings] does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law"). See generally Metteer, *Existing Indian Family Exception*, *supra* note 53, at 681-87. As was true in the *Mancari* case, not every American Indian who may be "racially" classified as "Indian" is covered by the ICWA. See *Mancari*, 417 U.S. at 553 n.24.

Second, congressional recognition of the distinctions to be drawn between race-based adoption and foster care placements and the purposes and goals of the ICWA can be seen in the Adoption Promotion and Stability Act of 1997. The law expressly prohibits "a person or government that is involved in adoption or foster care placement" from delaying or denying "the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child." 42 U.S.C. § 1996b(1)(B) (Supp. IV 1998). However, it also states that the "subsection shall not be construed to affect the application of the Indian Child Welfare Act of 1978." *Id.* § 1996(b)(3).

Finally, this author agrees with Barbara Bennett Woodhouse that there is "no easy empirical answer" to the much-debated question of whether "transcultural" adoptions (or "transracial" and "transnational" adoptions for that matter) are "'good' or 'bad' for children." Woodhouse, *Are You My Mother?*, *supra* note 200, at 113. Nor does this article attempt to address such a question. The important question for purposes of the ICWA is whether the historical and cultural realities of Native American children, families, and tribes as outlined in Sections Two and Three of this article are being ignored in current debates over amendments to or proper application of the law. As Simon and Alstein so aptly note, "Native Americans have been subjected to a singularly tragic fate, and their children have been particularly vulnerable." RITA J. SIMON & HOWARD ALSTEIN, *ADOPTION, RACE, AND IDENTITY* 18 (1992); see also Howard, *supra* note 134, at 522.

202. Amicus Curiae Brief for American Academy of Adoption Attorneys at 3, *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Civ. No. B093520).

is flawed in that it, among other things, fails to fully recognize the unique legal status of federally recognized tribes in this country.²⁰³ This author further questions whether the ICWA conflicts with the rights of children "to be recognized as individuals" or just with Euro-American conceptions of such rights. The ICWA seeks to recognize indigenous views of children, family, and community. Many American Indian cultures recognize that children have rights to their heritage that not even the parents can readily deny. Along the same vein, tribes have "an interest in the child which is distinct from but on parity with the interest of the parents."²⁰⁴ Indeed, "[f]or centuries before contact with non-Indian society, most American Indian cultures had a built-in natural foster care system where children were viewed as the responsibility of the tribe or clan, rather than a possession of their parents."²⁰⁵ Moreover, for American Indian nations, individual and group identities are not necessarily dichotomous concepts. It is the community's responsibility to nurture and develop the child's individuality and as the child matures, to teach the child how to harmonize that individuality with the needs of the community.²⁰⁶ It is in this way that the child becomes a responsible member of society. If we are unable to incorporate these differences in viewpoint into our legal jurisprudence are we not saying that "equality before the law means cultural homogeneity"?²⁰⁷

The ICWA does seek to protect what Woodhouse refers to as a child's "identity of origin."²⁰⁸ Yet it does so within the "the generally accepted premise that the first and best choice is to preserve and protect the child's . . . family and community of origin from disruption."²⁰⁹ The reason the ICWA was necessary in the first place was to counter the abusive practices aimed at destroying American Indian families and stripping children of their indigenous

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203. Metteer, *Existing Indian Family Exception*, *supra* note 53, at 681. Other state courts have consistently upheld the application of the ICWA under an equal protection challenge on the grounds "the provisions of the ICWA were deemed by Congress to be essential for the protection of Indian culture and to assure the very existence of Indian tribes . . . [This protection] is a permissible goal that is rationally tied to the fulfillment of Congress's unique guardianship obligation toward Indians." *Id.* at 685 (quoting *In re Armell*, 550 N.E.2d 1060, 1068 (Ill. App. Ct. 1990)). See generally *infra* note 239 and cases cited therein. Even under the more stringent strict scrutiny test of *Adarand Constr. v. Pena*, 115 S. Ct. 2097 (1995), the ICWA would pass constitutional muster, since the law is narrowly tailored to promote and protect the stability of federally recognized tribes in this country. See Metteer, *Existing Indian Family Exception*, *supra* note 53, at 684-87.

204. *In re Halloway*, 732 P.2d 962, 969-70 (Utah 1986); see also *supra* note 21 and accompanying text.

205. See Goldsmith, *Individual vs. Collective Rights*, *supra* note 21 at 446. See generally *supra* notes 23-27 and accompanying text.

206. See *supra* notes 29-31 and accompanying text.

207. See VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 51 (1983).

208. Woodhouse, *Protecting Children's Rights*, *supra* note 194, at 269.

209. *Id.* at 262.

identities and heritages. In fulfilling its trust responsibility to Native American nations, Congress sought to promote the stability and security of tribes and families by providing them with greater control over Indian child placement decisions. The Existing Indian Family Doctrine, on the other hand, seeks to disrupt American Indian families and tribes by failing to recognize a child's ties to the kinship community and the tribe's notion of what it means to be part of an "Indian family."

Woodhouse aptly demonstrates that missing from the debate over individual versus group identity "is a coherent schema for articulating children's rights to preservation of their identity" in placement determinations.²¹⁰ She offers a compelling case for looking at issues of identity and kinship through the children's eyes. "Drawing upon stories from children's lives, as well as stories about children and for children," she demonstrates how a child develops her identity from "individual caregivers" as well as from "family and group membership."²¹¹ She sees the first relationship as constituting the child's "personal identity rights," defined as a right to "a safe and secure caregiving relationship in order to survive infancy and to begin forming any identity at all."²¹² The second relationship is the child's "identity of origin," defined as a right to "explore her identity as a member of the family and group into which she was born."²¹³ Woodhouse states that from these dual needs "a theory of children's rights, including rights to protection of identity," can be developed.²¹⁴ She further advocates for the development of "a full array of flexible tools" beyond the "traditional" nuclear family adoption to meet the complex needs of children and their caregivers, including open adoption, kinship adoption, kinship foster care, foster care with tenure, and visitations with biological siblings, extended family, and community.²¹⁵

From this author's perspective, the provisions of the ICWA, and the indigenous concepts they embody, are consistent with Woodhouse's "child-centered perspective" on identity. The ICWA is not a law of absolutes. It does not seek to protect the rights of the group at the expense of the rights of the individual. Indeed, Native American communities do not view issues of childcare and custody in such stark terms. The law does recognize that it is

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210. Woodhouse, "Are You My Mother?," *supra* note 200, at 108.

211. *Id.* at 114-29; see also Woodhouse, *Protecting Children's Rights*, *supra* note 194; Barbara Bennett Woodhouse, *Hatching The Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993); Barbara Bennett Woodhouse, *Out of Children's Needs, Children's Rights": The Child's Voice in Defining Family*, BYU J. PUB. L. 321 (1994) [hereinafter Woodhouse, *Children's Rights*]; cf. Metteer, *Pigs in Heaven*, *supra* note 6.

212. Woodhouse, *Protecting Children's Rights*, *supra* note 194, at 273-74.

213. *Id.*

214. Woodhouse, "Are You My Mother?," *supra* note 200, at 120; Woodhouse, *Children's Rights*, *supra* note 211, at 321.

215. Woodhouse, *Protecting Children's Rights*, *supra* note 194, at 275.

in the best interest of American Indian children to maintain ties with their extended families and tribes whenever feasible. Moreover, it does so in a way that acknowledges the unique political status of tribes in this country and their ability to either to make child custody determinations in the first instance or be involved in those determinations through a right of intervention. In either case, the child may end up being removed from the home and even perhaps permanently placed outside the kinship community.²¹⁶ However, the law ensures that this does not happen because of a court or agency's unwillingness to "recognize either the vitality or validity of contemporary American Indian cultures and values."²¹⁷ Nor does the law threaten the "personal identity" or immediate survival needs of the children. Indeed, by its very terms, it is designed to prevent improper removals, strengthen Indian families and tribes, and ensure that when placement is necessary the child's familial and tribal options are considered and explored. Cases such as *Bridget R.*, which arguably do threaten a child's personal identity, result from a failure to comply with law, not the law itself. The ICWA protects the "identity rights" of American Indian children within the context of their own historical and cultural realities and therefore should not be lightly disregarded.

D. Understanding and Respecting Difference

It is the belief of the Iroquois that "while different nations have different conceptions of things," this "distinctiveness" should be a foundation for mutual respect and exchange.²¹⁸ Perhaps the recent challenges to the ICWA are the result of larger societal failures to understand and respect what legal scholar Frank Pommersheim refers to as a "pride of difference."²¹⁹ For instance, a recent move in Congress beyond the ICWA amendments to limit the sovereign immunity of tribes as well as basic governmental aid signals a retreat from the policy of self-determination for Native American nations.²²⁰ In the end such proposals should fail, since both are, in the words of Congressman Ben Nighthorse Campbell, "a result of solemn promises made by the United States to tribal governments in exchange for Indian lands."²²¹ Nevertheless, when tribes have to fight such drastic measures on Capitol Hill it takes away from the important business of improving the lives of their

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216. See *infra* notes 227-29 and accompanying text.

217. See Goldsmith, *Individual vs. Collective Rights*, *supra* note 21, at 10.

218. See *supra* note 40 and accompanying text; OREN LYONS, *The American Indian in the Past, in EXILED IN THE LAND OF THE FREE* 15, 42 (1992).

219. FRANK POMMERSEIM, *BRAID OF FEATHERS* 199 (1997).

220. See generally Ben Nighthorse Campbell & John McCain, *Keeping Our Word to the Indians*, *INSIDE WASH. POST*, Sept. 10, 1997, at A21; Jerry Gray, *Senate Shelves Proposal to Restrict Indian Legal Protections*, *N.Y. TIMES*, Sept. 17, 1997, at 20A.

221. Timothy Egan, *Senate Measures Would Deal Blow to Indian Rights*, *N.Y. TIMES*, Aug. 27, 1997, at A20.

constituency through economic and social development. As one economist recently noted:

The effort to undermine tribal sovereignty is dangerous and misguided. If it is successful, it will perpetuate reservation poverty, poison further the already tense relations between tribes and the states, deepen the bitterness of reservation populations, and squander human resources on a massive scale. It also will reverse the first truly sustainable economic development that Indian reservations have seen in this country.²²²

A review of some state and tribal court cases that have remained true to the original purposes and goals of the ICWA might be useful in demonstrating the importance of respecting differences in the area of Indian child welfare. In the case of *In re Adoption of Halloway*, the Utah Supreme Court was faced with the issue of whether a parent could circumvent the provisions of the ICWA by recognizing the tribal court's exclusive jurisdiction over children domiciled or residing on the reservation by simply changing the child's domicile.²²³ The Navajo Nation had intervened in the case and moved to dismiss on the grounds that it had exclusive jurisdiction to decide the placement of the child. In a decision considered to be one of the leading opinions on the ICWA, the court vacated the adoption of the child and transferred the case to the tribal court. In interpreting the jurisdictional provisions of the ICWA, the court stated that "few matters are of more central interest to a tribe seeking to preserve its identity and traditions than the determination of who will have the care and custody of its children."²²⁴ It further stated that

[t]he protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on parity with the interest of the parents. This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States. It is a relationship that many non-Indians find difficult to understand and that non-Indian courts are slow to recognize. It is precisely in recognition of this relationship, however, that the ICWA designates the tribal court as the exclusive forum for the determination of custody and adoption matters for reservation-domiciled Indian children, and the preferred forum for non-domiciliary Indian children.²²⁵

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222. Joseph P. Kalt & Stephen Cornell, *The Misguided Attack on Tribal Sovereignty* 3 (n.d.) (unpublished editorial, on file with author).

223. *In re Halloway*, 732 P.2d 962 (Utah 1986).

224. *Id.* at 966; see Metteer, *Pigs in Heaven*, *supra* note 6, at 599.

225. *Halloway*, *supra* note 223, at 969-70.

In a case factually similar to *Halloway*, the U.S. Supreme Court found in *Mississippi Band of Choctaw Indians v. Holyfield* that "removal of Indian children from their cultural setting seriously impacts long-term tribal survival."²²⁶ Like *Halloway*, the state court adoption was vacated and the case transferred to tribal court.

In both cases, the children had been living with the adoptive parents for a number of years by the time their cases were decided. Upon transfer to the tribal courts, neither court removed the children from their adoptive homes. Instead, the courts fashioned appropriate remedies that would protect the children's rights to their cultural heritage as well as their relationship with their adoptive parents with whom they had bonded. In *Halloway*, the Navajo tribal court decided that the child would be the permanent ward of his adoptive parents, but would be the legal son of his biological mother and would have visitation rights with his extended family and the Navajo community.²²⁷ In *Holyfield*, the Choctaw tribal court granted the adoption, but allowed for visitation to the community.²²⁸ Indeed, tribal courts seem to be particularly open to the idea of multiple sets of visitation as a means of limiting the kinds of harsh results obtained in other highly publicized cases such as "Baby Jessica" and "Baby Richard."²²⁹

Like their state counterparts, tribal courts face difficult jurisdictional and placement decisions everyday. And as one might expect, tribal court judges are guided by their "experience" with issues of children and family, their "wisdom" of tribal law and custom, and their "compassion" for these children and their caregivers.²³⁰ For example, in the case of *In re K.A.W.*, the Comanche Children's court found that the paternal aunt, with whom the child had been living for five years, had temporary legal custody of that child under Comanche custom. Under this custom, the parental aunt is to assume, if possible, the immediate role of the mother when the child's mother is unavailable.²³¹ In the case of *In re J.E.*, the Rosebud Sioux Tribal Court held that the temporary custodian had a right to participate in the proceedings concerning a three year old child for whom she had cared for since the child was four months old.²³² The Rosebud Sioux Tribal Court of Appeals relied on tribal custom and the provisions of the ICWA to support the custodian's

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226. *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 (1989) (quoting S. REP. NO. 597, 95th Cong. 52 (1977)).

227. See Metteer, *Pigs in Heaven*, *supra* note 6, at 609.

228. *Id.*

229. Compare *In re Halloway*, 732 P.2d 962 (Utah 1986) and *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989) with *In re B.G.C.*, 496 N.W.2d 239 (1992) and *In re Kirchner*, 649 N.E.2d 324 (Ill. 1995).

230. *Id.* (quoting *Holyfield*, 490 U.S. at 54).

231. *In re K.A.W.*, 19 Indian L. Rep. 6119 (Comanche Children's Ct., Feb. 5, 1992).

232. *In re J.E.*, 19 Indian L. Rep. 6114 (Rosebud Sioux Tribal Ct. App., June 4, 1992).

right to intervene in the case.²³³ Other tribal courts have similarly relied on tribal codes, the Uniform Child Custody Jurisdiction Act, the ICWA, and tribal law to guide their decisions on issues of jurisdiction, as well as whether to place a child outside of the home and, when necessary, outside of the community.²³⁴

As a complement to the tribal court system, tribes and urban Indian organizations have relied on provisions of the ICWA to develop early intervention and family preservation programs. For instance, "Project HOMEBASE" was implemented by the Ute Mountain Ute Tribe of Colorado to deal with the high rate of foster care placement on the reservation. The project consisted of four major components: "1) family support workers assisting family units in need, 2) strong collaboration with the local school system to identify school-related problems quickly and maintain the children in school, 3) use of curriculum on how to be effective parents, and 4) a reward system for parent and child accomplishments."²³⁵ This is just one of many reservation- and urban-based programs being implemented around the country.²³⁶

Additionally, several states are cooperating with tribes and urban Indian organizations to address the continuing Indian child welfare crisis through state aid, Indian child welfare statutes, and tribal-state agreements.²³⁷ A handful of state courts have developed training programs for judges and child welfare workers, and have begun to forge positive relationships with neighboring tribal courts.²³⁸ Others have rejected the Existing Indian Family

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233. *In re J.E.*, 19 Indian L. Rep. 6114 (Rosebud Sioux Tribal Ct. App., June 4, 1992).

234. See, e.g., *Red Bear v. South Dakota Dep't of Social Servs.*, 16 Indian L. Rep. 6166 (Cheyenne River Sioux Tribal Ct. App. Sept. 22, 1989); *Wike v. Tarasiewicz*, 14 Indian L. Rep. 6020 (Rosebud Sioux Tribal Ct., Apr. 7, 1987).

235. CONFERENCE PROCEEDINGS, *supra* note 11, at 53.

236. Several urban-based programs for Native Americans who have relocated to the cities are currently in operation. For example, The Denver Indian Health and Family Services, Inc. identifies at-risk children and families to try to prevent substitute care by fostering coordination among diverse service providers that can provide assistance to the families. When placement is necessary, the project provides services aimed at reunification of the family. See *id.* at 52-55. Other tribes are developing innovative community-based group homes for children that are staffed by community members. For example, the Mashantucket Pequot Nation has established a group home called "Ohomowauke," which provides "extensive care and assistance to children and their families." Kunes, *supra* note 135, at 359. Additionally, practitioners and scholars alike are discovering that holistic programs require a "continuum of services to all members of the community." *Id.* at 358-59. These services would include "basic living skills (such as health and nutrition classes, maintaining regular schedules, parenting and discipline classes, financial management, vocational programs and training in employment skills), health education (such as drug and alcohol treatment, mental health counseling), and tribal education (such as courses in the tribe's culture, history, language, and family life)." *Id.*

237. See CONFERENCE PROCEEDINGS, *supra* note 11, at 54, 253.

238. For instance, the State of Utah is providing tribal juvenile courts with the same services it provides state courts. *Id.* at 252. Another good example is the work of the National Center for

Doctrine out of hand, making appropriate placement determinations without circumventing the ICWA safeguards.²³⁹

Despite these advances in collaboration and cooperation, legal scholar Christine Metteer recently documented the many problems that state courts are still having in transferring jurisdiction to tribal courts, following the Act's placement preference, and finding the Act applicable in the first instance.²⁴⁰ The refusal to transfer a case to tribal court or to apply the provisions of the ICWA may indeed be a continuing "act of paternalism" on the part of state courts.²⁴¹ Moreover, this "paternalism" may actually be the result of continued misunderstandings on the part of individuals. For example, after the Utah Supreme Court handed down its decision in *Halloway*, the adoptive mother stated, "I don't think it's good for any of them to live on the reservation. You've got drug abuse, alcoholism, [and] teenage suicide down there."²⁴² The adoptive parent's attorney appeared to agree with her opinion, stating that "[t]he Indian culture is foreign to me, and I don't think it is valid."²⁴³ Whatever their reasons, the reluctance on the part of courts, agencies, and individuals to abide by the letter and spirit of the ICWA has contributed to a continuing crisis in the area of Indian child welfare. Some preliminary studies indicate that 20% to 30% of all American Indian children are still being placed outside of their families and tribes.²⁴⁴ In fact, the rate of placement of Indian children in substitute care actually increased in the 1980s.²⁴⁵ This crisis will continue until we can break our knee jerk reaction

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State Courts, which has set up three demonstration forums in the states of Washington, Arizona and Oklahoma designed to look at issues of civil jurisdiction and other disputes between state and tribal courts. *Id.* at 253. While not all of these programs have been successful, they are a step in the right direction.

239. See, e.g., *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989); *In re Adoption of Lindsay C.*, 280 Cal. Rptr. 194 (Ct. App. 1991); *In re J.R.H.*, 358 N.W.2d 311 (Iowa 1984); *In re M.E.M.*, 679 P.2d 1241 (Mont. 1984); *In re Adoption of a Child of Indian Heritage*, 543 A.2d. 925 (N.J. 1988); *In re Adoption of Badde*, 462 N.W.2d 485 (S.D. 1990); see also Hager, *supra* note 156.

240. Metteer, *Pigs in Heaven*, *supra* note 6.

241. *Id.* at 606.

242. *Id.* (citing Rosensteil, *supra* note 153, at A1).

243. *Id.*

244. See *Introduction to CONFERENCE PROCEEDINGS*, *supra* note 11. Studies also showed a 25% increase in the rate of placement of Indian children from 1980 to 1986. STATUS REPORT, *supra* note 100, at 3-2; see also 1990 Hearings, *supra* note 135; Goldsmith, *Individual vs. Collective Rights*, *supra* note 21, at 4-5; Kunesh, *supra* note 135, at 355.

245. In response to this continuing crisis, tribes and child welfare organizations are exploring the intergenerational effects of separation on the individual, family, and community, and are developing community-based programs aimed at addressing those effects. See *supra* notes 235-36 and accompanying text. The 1988 Status Report on the ICWA indicated that tribal ICWA programs were outperforming BIA and state programs in terms of length of time in substitute care and placement. Children being served by tribal programs had shorter stays in substitute care and higher rates of permanency. See *Hearings on the FY98 Interior Appropriations Before the*

to embrace familiar assimilative ethos of "family" and "culture," as opposed to taking the more difficult route of trying to understand, respect, and even support difference.

Conclusion

*Let us put our minds together and see what kind of future we can build for our children.*²⁴⁶

— Hunkpapa Lakota Leader, 1876

In closing, there are countless stories that demonstrate the success of the ICWA in "protect[ing] the best interests of Indian children and promot[ing] the stability and security of Indian tribes and families." This is one of those stories:

Recently an Indian woman in San Francisco rediscovered her Indian heritage. She was the child of a Navajo mother and a Mandan-Hidatsa father. When the woman . . . was 18 months her mother became . . . ill. She was placed out with a foster family and was never returned to her biological mother. She had no knowledge of her Indian family, and, while she knew she was Indian, her non-Indian adoptive family forbid her to speak of her Indian heritage and passed it off as something that was not important. Later, after battling depression and anxiety about her lost identity, she developed a substance abuse problem and her own children were placed in substitute care. But this time there was the Indian Child Welfare Act and a social worker that knew how to implement it. Even though the mother was never enrolled in her tribe because of her placement in a non-Indian family and thus her children were never enrolled, the social worker notified the Navajo Nation who willingly enrolled the mother and children. But there is more. The Navajo Nation found the mother's maternal aunt who asked that the children be placed with her while the mother sought treatment for her substance abuse problem. Upon visiting the aunt's home to do a home study, the social worker found pictures of the mother at eighteen months of age still on the wall. The aunt told of the grief of the family who could not find the child whom they had helped raise. They told of not being able to get information to even know where she was

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Subcommittee on House Interior Appropriations, 105th Cong. 209 (statement of Terry Cross, Executive Director of the National Indian Child Welfare Association) (citing STATUS REPORT, *supra* note 100).

246. Statement of Sitting Bull following the victory of the Lakota people over the U.S. Army at the Battle of Little Big Horn, *quoted in* Kunesh, *supra* note 135, at 347.

or if she was all right. Today the mother has over two years of sobriety and has been reunited with her Navajo family. She has found her identity and her children have found a loving home with their extended family.²⁴⁷

Since the mother in this story had been separated from her kinship community at a very young age as a result of past abusive child welfare practices, she would not have had the "substantial" ties to her tribe that the Existing Indian Family doctrine mandates. Accordingly, the social worker would not have had the guidance of the ICWA, the mother and children would not have found the support and care of their extended family, and the Navajo Nation would not have had the opportunity to reconnect with their lost loved ones. This outcome demonstrates in "human terms" the extent to which this Doctrine marks a return to the assimilative practices of the past, when American Indian children were denied the right to grow up in their families and communities of origin and American Indian tribes were denied the freedom to maintain their distinct heritages without assimilation. Accordingly, the Doctrine should not be condoned either by the courts or Congress.

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247. 1995 Hearings, *supra* note 92 (statement of Terry Cross, Director of the National Indian Child Welfare Association, recounting story of a Navajo woman and her children).