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INDIAN CHILD WELFARE ACT OF 1978: A RESPONSE TO THE THREAT TO INDIAN CULTURE CAUSED BY FOSTER AND ADOPTIVE PLACEMENTS OF INDIAN CHILDREN

*Manuel P. Guerrero**

On June 17, 1744, the commissioners from Maryland and Virginia negotiated a treaty with the Indians of the Six Nations at Lancaster, Pennsylvania. The Indians were invited to send boys to William and Mary College. The next day they declined the offer as follows:

We know that you highly esteem the kind of learning taught in those Colleges, and the Maintenance of our young Men, while with you, would be very expensive to you. We are convinced, that you mean to do us Good by your Proposal; and we thank you heartily. But you, who are wise must know that different Nations have different Conceptions of things and you will therefore not take it amiss, if our Ideas of this kind of Education happen not to be the same as 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 your Sciences; but, when they came back to us, they were bad Runners, ignorant of every means of living in the woods . . . neither fit for Hunters, Warriors, nor Counsellors, they were totally good for nothing. 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 us a Dozen of their Sons, we will take Care of their Education, instruct them in all we know, and make Men of them.¹

Introduction

Even before this country was a nation, the insensitive precedent had been cast to destroy Indian culture and tribal integrity by removing Indian children from their families and tribal settings.²

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1. DRAKE, 1 BIOGRAPHY AND HISTORY OF THE INDIANS OF NORTH AMERICA, ch. 35, at 27 (3d ed. 1834).

2. The courts, in defining the term "Indian," have followed the test laid down in *United States v. Rogers*, 45 U.S. (4 How.) 567 (1846), which is that to be considered an

As the writing of the Indians to the Territorial Commissioners illustrates, the removals were justified under the guise of "civilizing" and educating the Indians.³

By the end of the nineteenth century, the practice of sending Indian children to distant boarding schools had become customary among the various tribes.⁴ Indeed, because of forced removals by agents of the Department for Indian Affairs, Congress deemed it necessary to enact legislation making it a crime to induce Indian parents by compulsory means to consent to their children's removal from the reservation.⁵ Unfortunately, no record exists as to that law ever being enforced.

The incredible tales of brutality and abuse inflicted upon Indian children in those boarding schools belies any semblance of decency or civility.⁶ Today, the widespread separation of Indian children from their homes continues by the use of boarding schools,⁷ but more significantly in terms of numbers, by removal

Indian an individual must not only have some degree of Indian blood, but must, in addition, be recognized as an Indian by a tribe or society of Indians and recognition as expressed in treaty or statute. F. COHEN, *FEDERAL INDIAN LAW* 3 (1942).

3. *United States v. Nice*, 241 U.S. 591, 600 (1916).

4. There are today 287 tribal entities and at least ten major cultural-linguistic groupings of Indians: Inupiat-lupik Eskimo and interior Athabascan; the Northwest tribes, which include Tlingit, Haide, Tsimshian, Northwest Coast, and Aleuto; California tribes; Southwest tribes; Northern Plains tribes; Southern Plains tribes; Great Lakes tribes; tribes of the Eastern Seaboard; tribes of the Northeast; and tribes of the Southeast. There are still 252 living languages, which suggests that Indians are not a homogeneous culture. —

5. Act of Mar. 2, 1895, ch. 188, 28 Stat. 906, provided: "Hereafter no Indian child shall be sent from any Indian reservation to a school beyond the state or territory in which said reservation is situated without the voluntary consent of the father or mother of such child, if either of them are living, and if neither are living without the voluntary consent of the next of kin of such child. . . . And it shall be unlawful for any Indian agent or other employee of the government to induce, or seek to induce, by withholding rations or by other improper means, the parents or next of kin of any Indians to consent to the removal of any Indian child beyond the limits of any reservation."

6. See Testimony of Peter MacDonald, Chairman of the Navajo Nation, in Transcript of Hearings Before the U.S. Commission on Civil Rights, Window Rock, Ariz., at 18 (Oct. 22-24, 1973).

7. The Bureau of Indian Affairs (BIA) in its school census for 1971, indicates that 34,538 children live in its 74 institutional facilities rather than at home. This represents more than 17 percent of the Indian school-age population of federally recognized reservations and 60 percent of the children enrolled in BIA schools. On the Navajo Reservation, about 20,000 children, or 90 percent of the BIA school population in grades K-12, live in boarding schools. A number of Indian children are also reinstitutionalized in mission schools and training schools. Report on Bottle Hollow, Utah Conference on Supportive Care, Custody, Placement and Adoption of American Indian Children, American Academy of Child Psychiatry, 62 (1977).

for foster care and adoption purposes. Surveys of states with large Indian populations conducted by the Association on American Indian Affairs in 1969 and 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes or other institutions.⁸

This wholesale separation of Indian children from their families ranks among the most tragic and destructive aspect of contemporary Indian life. State intrusion in parent-child relationships within the Indian culture impedes the ability of the tribe to perpetuate itself and is ultimately an unjustified coerced assimilation into the larger society.

This article advances the proposition that the Indian way of life is a unique expression of an identifiable but highly complex culture apart from the non-Indian world. It is a culture which has at its core a persistent talent for preservation and survival. Among other aspects, it is inculcated with the concept known as the extended family,⁹ which is largely misunderstood by white

8. The Association on American Indian Affairs (AAIA) is a national nonprofit organization, founded in 1923, to assist American Indian and Alaska Native communities in their efforts to achieve full economic and social equality. At a Senate Subcommittee hearing, the AAIA Executive Director said: "[I]n Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and, in 1971-72, nearly one in every four Indian children under 1 year of age was adopted. . . .

"The disparity in placement rates for Indian and non-Indians is shocking. In Minnesota, Indian children are placed in foster care or in adoptive homes at a per capita rate five times greater than non-Indian children. In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State Department of Public Welfare since 1967-68 are of Indian children, yet Indians make up only 7 percent of the juvenile population. The number of South Dakota Indian children living in foster homes is per capita, nearly 16 times greater than the non-Indian rate. In the state of Washington, the Indian adoption rate is 19 times greater and the foster care rate 10 times greater. In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children. . . . In 16 States surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes." *Indian Child Welfare Program Hearings before the Subcomm. on Indian Affairs*, U.S. Senate, 93rd Cong., 2d Sess. 15 (Apr. 8, 1974), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7530, 7531 (Statement of William Byler, Executive Director of the AAIA).

9. The extended family among American Indians was first described by the American anthropologist Lewis Morgan in 1871. These were people not primitive in other respects, but retaining a primitive breeding system. Morgan pointed out that within these families all members of the same generation knew one another as brothers and sisters while the parental generation were seen as mothers and fathers. This kind of classification system, or treatment by classes as opposed to individuals, corresponds to a feeling of unity within lineages which is characteristic of relatively inbred societies at all states of evolution. It has the great selective advantage in the hazardous life of a primitive com-

America. Cases dealing with the extended family concept will be examined in order to validate its continued utilization in child rearing practices.

The sovereignty of Indian tribes generally and their jurisdiction over their children will be demonstrated. This will be followed by a critical analysis of the Indian Child Welfare Act of 1978¹⁰ as a legislative means to obviate the unjustified placement of Indian children outside of their natural homes and to prevent the breakup of Indian families. Finally, the Act will be examined as to the constitutionality of its application to state courts and nonreservation Indian children.

Indian Culture

Even today, it is apparent that the lifestyles of Indians differ markedly from those of the non-Indian world. Those differences are significant and intersect areas of heritage, geographical location, race, religion, language, historical background, and family practices. This distinctiveness is also apparent in their world view and symbols of group identity.

Court opinions have long contained dicta illustrating the separation of the Indian from the non-Indian culture. Two recent court decisions in Alaska enumerated the factors distinguishing Indian culture.¹¹ In *Alvarado v. State*, the court identified those factors as including an Indian economic structure which relies on hunting, fishing, and gathering activities, and a limited participation in a cash economy. Isolation from those parts of Alaska that approximate mainstream society resulted in different seasonal activity patterns, concepts of time, and scheduling.¹² Also mentioned as being distinct were sexual mores of the Indian community, childhood exposure to different languages, strong kinship bonds, family structures, attitudes toward religion, and a cultural heritage unlike those in urban centers.¹³

In *Carle v. Carle* the issue was whether to award custody of an Indian child to his father who lived in an Indian culture or to his

munity in that it makes the care of children a corporate rather than an individual responsibility. DARLINGTON, *THE EVOLUTION OF MAN SOCIETY* 51 (1975).

10. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963.

11. *Carle v. Carle*, 503 P.2d 1050 (Alas. 1972); *Alvarado v. State*, 486 P.2d 891 (Alas. 1971).

12. 486 P.2d 891, 894 (Alas. 1971).

13. *Id.* at 899.

mother in an non-Indian culture.¹⁴ The trial court had concluded that the child would be emotionally and economically more secure in an urban setting. The Alaska Supreme Court reversed the trial judge who had awarded custody of the child to the mother because the judge stated that the Indian village way of life was succumbing to the predominantly Caucasian, urban society. On that matter, recognizing the possible bias of trial judges in child-placement cases, the Alaska Supreme Court wrote:

Both judicial decision and statutory provision mandate that the paramount consideration in any custody determination is "what appears to be for the best interests of the child." We think it is not permissible, in a bicultural context, to decide a child's custody on the hypothesis that it is necessary to facilitate the child's adjustment to what is believed to be the dominant culture. Such judgments are, in our view, not relevant to the determination of custody issues. . . . It is not the function of our courts to homogenize Alaskan society.¹⁵

These differences in culture must be considered in attempting to evaluate and judge the courts' actions or their failure to act to protect the stability of Indian families. The motivations, methods, and perceptions of Indians, while appropriate for that culture, may not fit patterns of expected behavior in non-Indian culture, particularly in child rearing.¹⁶ In *Arizona Department of Economic Security v. Mahoney*,¹⁷ parental rights were severed between an Indian mother and her children on grounds of abandonment, neglect, and insufficient support. Six months later, the mother petitioned to have the order set aside because she had maintained contact with her children and had not understood that her children were being taken from her forever. A social worker testified at the rehearing that severance of parental rights was unknown to the cultural tradition of these Indian parents and that the mother was hampered by her lack of knowledge of the English language. The social worker, herself a Papago Indian, testified:

14. 503 P.2d 1050 (Alas. 1972).

15. *Id.* at 1055.

16. "Studies also suggest that social workers of middle-class backgrounds, perhaps unconsciously, incline to favor continued placement in foster care with a generally higher-status family rather than return the child to his natural family, thus reflecting a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child." Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 834 (1977).

17. 540 P.2d 153 (Ariz. 1975).

Even though they [Indians] live in a non-Indian environment, they are not part of the world of non-Indians and only exist through a variety of methods of accommodations. In both the Papago and Pima tradition, a severance of parental rights is unknown and [the natural mother] has found it extremely difficult to understand her present situation.¹⁸

The watershed case of *Wisconsin Potawatomes v. Houston*¹⁹ can also be interpreted within the context of Indian law and custom and emphasizes the differences in culture. The case involved a suit brought by an Indian tribe to establish the right of the tribe to determine custody of three orphaned Indian children living off the reservation. The children had been made temporary wards of the state court.

The state court, at trial, inquired as to the tribe's customs regarding the care, custody, and control of orphaned Indian children.²⁰ Expert testimony disclosed that in the social life the Potawatomes, the traditional and contemporary problems of child care do not arise. Since the communities are fundamentally kinship communities, when a child is left parentless, close relatives automatically assume responsibility for his care. The closest relatives are those on the patrilineal side. In Potawatomie culture, responsibility for the day-to-day care of the children is with the grandparents, even when the parents are living. The term "grandfather" also includes paternal great-uncles. The tribal traditions and customs do not recognize adoption in the legal sense,²¹ and a child is not adopted by an adult but is considered to adopt a substitute parent. The discretion of a child to make his own choice upon reaching a certain age is also recognized.²²

Accordingly, the Indian way of life is a separate and distinguishable culture entitled to constitutional protection and preservation.²³ The system of values employed by Indian people is not compatible with white middle-class attitudes which are

18. *Id.* at 155.

19. 393 F. Supp. 719 (N.D. Mich. 1973).

20. *Id.* at 724.

21. The words "orphan," "illegitimate," and "adoption" do not exist in any Indian language. Report on Bottle Hollow, Utah Conference on Supportive Care, Custody, Placement and Adoption of American Indian Children, American Academy of Child Psychiatry, 19 (1977).

22. *Wisconsin Potawatomes v. Houston*, 393 F. Supp. 719, 724 (N.D. Mich. 1973).

23. For a discussion of first amendment rights to preservation of Indian culture, see McCartney, *The American Indian Child Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 COLUM. HUMAN RIGHTS L. REV. 529-51 (1975-76).

usually expressed by courts and social agencies in their determinations of Indian children's welfare.

Extended Family

The unwarranted separation of Indian children from their families has often been brought about by social workers who, untrained in Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of the family patterns of Indian life.²⁴ In judging the fitness of an Indian family, using white middle-class values, they frequently discover neglect or abandonment where none exists. The dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of relatives who are counted as close, responsible members of one family.

The courts have recognized the concept of the extended family, although some courts persist in finding abandonment or dependency where the Indian child has no living parents or is living with relatives.²⁵ In a matter involving a state petition to review a federal decision regarding certain public assistance plans in Arizona, a Ninth Circuit opinion said that the evidence revealed that, "a common, if not the predominant cultural pattern among Mexican-Americans and Indians in Arizona is the extended family."²⁶ Under this cultural system, it is common for children to be sent to live for short periods of time with relatives.²⁷

The case of *Moore v. East Cleveland*²⁸ has significance for the protection of the extended family lifestyle from unwarranted intrusions by social workers and other public officials. In striking down a zoning ordinance, the Supreme Court held that the strong constitutional protection of the sanctity of the family established in earlier Supreme Court decisions extends to the multi-generation extended family that is common in Indian communities.²⁹

24. INDIAN FAMILY DEFENSE 9 (Winter 1974), a publication of A.A.A.I., New York.

25. *In re Greybull*, 543 P.2d 1079 (Ore. 1975).

26. *Arizona Dep't Public Welfare v. H.E.W.*, 449 F.2d 456 (9th Cir. 1971).

27. *Id.* at 477.

28. 431 U.S. 494 (1977).

29. *Cleveland Bd. Educ. v. LaFleur*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

The case involved the conviction of a grandmother, sharing a home with her son and two grandsons, due to her violation of an ordinance that permitted only one family per dwelling unit.³⁰ One family was defined as the basic nuclear family consisting of a couple and their dependent children. The Court, in a five-to-four decision, reversed the conviction which had been upheld by the Court of Appeals of Ohio, and held that the ordinance violated the due process clause of the fourteenth amendment.³¹

The Court compared the question before it in *Moore* to those involved in previous cases in which it had upheld freedom of choice with respect to child bearing,³² rights of parents to the custody and companionship of their own children,³³ and traditional parental authority in matters of child rearing and education.³⁴

Justice Powell, writing for the majority, held that while those cases did not expressly consider the choice of family relationship presented, "unless we close our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause, we cannot avoid applying the force and rationale of those precedents to the family choice involved in this case."³⁵ He continued his strong support of the family by adding: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."³⁶

The Court took the firm position that our tradition has recognized extended families as well as nuclear families and that both are equally deserving of constitutional recognition. While modern society has seen a decline of extended households, the

30. East Cleveland Ohio, Housing Code § 1341.08 (1966).

31. U.S. CONST. amend. 14, § 1, provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

32. *Cleveland Bd. Educ. v. LaFleur*, 414 U.S. 632 (1974); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

33. *Stanley v. Illinois*, 405 U.S. 645 (1972).

34. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

35. *Moore v. East Cleveland*, 431 U.S. 494, 501 (1977).

36. *Id.* at 503-504.

Court noted that wisdom, necessity, and history support a larger concept of the family. The state may not lightly deny to relatives of this degree of kinship the choice of living together, regardless of whether such a household is established because of personal tragedy.³⁷

Justice Brennan, joined by Justice Marshall in a concurring opinion, referred to the cultural myopia of the majority society as demonstrated by the East Cleveland ordinance, given "the tradition of the American home that has been a feature of our society since our beginning as a Nation."³⁸ "In today's America," Justice Brennan continued, "the nuclear family is the pattern so often found in much of white suburbia. The Constitution cannot be interpreted, however, to tolerate the imposition by government upon the rest of us of white suburbia's preference in patterns of family living."³⁹

While *Moore* did not make specific reference to Indians, it did extend the constitutional protection over family integrity. It can at least be argued that the practice among Indian families of placing custody of their children outside the nuclear family is sanctioned. A new standard would be created for social agencies in their consideration of the issue of neglect and abandonment involving Indian children. It would also force governmental units, including courts, to become more sensitive to different cultural values and norms operating in our pluralistic society.

The federal courts, as well some state courts, have generally recognized the crucial importance the issue of child custody holds from the standpoint of tribal self-determination. In *Wisconsin Potawatomies v. Houston*,⁴⁰ the federal court held that the children, who were enrolled members of a tribe, are to be considered Indians whose custody should be determined by the Indian tribal court and not by the state court. Recognizing the importance of tribal sovereignty over its children, the court wrote: "If tribal sovereignty is to have any meaning at all at this juncture of history, it must necessarily include the right, within its own boundaries and membership, to provide for the care and upbringing of its young, a sine qua non to the preservation of its identity."⁴¹

37. *Id.* at 505, 506.

38. *Id.* at 507.

39. *Id.* at 508.

40. 393 F. Supp. 719 (N.D. Mich. 1973).

41. *Id.* at 730.

A recent expression⁴² of Indian sovereignty by the Supreme Court involved a delegation of congressional authority to an Indian tribe over the introduction of alcoholic beverages into Indian lands.⁴³ Justice Rehnquist, delivering the opinion for a unanimous Court wrote:

Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory . . . , they are "a separate people" possessing "the power of regulating their internal and social relations." . . .⁴⁴

[W]hen Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. . . .⁴⁵

State Versus Tribal Jurisdiction

Prior to the organization of the Northern Cheyenne Tribe in 1935, Montana courts possessed jurisdiction over adoptions involving tribal members residing on the reservation. This jurisdiction could not be unilaterally diverted by tribal ordinance.⁴⁶ In its recent decision on the subject of Indian child custody,⁴⁷ the United States Supreme Court reversed the Montana Supreme Court and upheld the exclusive jurisdiction of the Tribal Court.

The High Court relied primarily on *Williams v. Lee*, which held that jurisdiction depended on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."⁴⁸ The Court noted that "the right of the Northern Cheyenne Tribe to govern itself . . . has been consistently protected by federal statute."⁴⁹ In 1935, the tribe adopted its own constitution which established a Tribal Court and granted jurisdiction over adoptions among members of the tribe.⁵⁰ The unanimous opinion concluded:

42. *United States v. Mazurie*, 419 U.S. 544 (1975).

43. 18 U.S.C. § 1154 (1970).

44. *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

45. *Id.*

46. *Fisher v. District Ct.*, 424 U.S. 382, 385 (1976).

47. *Id.*

48. *Williams v. Lee*, 358 U.S. 217, 220 (1959).

49. *Fisher v. District Ct.*, 424 U.S. 382, 386 (1976).

50. Pursuant to Section 16 of the Indian Reorganization Act, 48 Stat. 987, 25 U.S.C. § 476 (a statute specifically intended to encourage Indian tribes to revitalize their self-government). *Id.* at 387.

State court jurisdiction plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court. It would subject a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves. As the present record illustrates, it would create a substantial risk of conflicting adjudications affecting the custody of the child and would cause a corresponding decline in the authority of the Tribal Court. . . . Since the adoption proceeding is appropriately characterized as litigation arising on the Indian reservation, the jurisdiction of the Tribal Court is exclusive.⁵¹

The matter involved in *Fisher* arose on the reservation.⁵² Indians, however, frequently move in and out of reservations in pursuit of employment and education or for reasons similar to those that motivate non-Indians to move into urban areas. Still others, although belonging to an Indian tribe, never reside on reservations yet retain their Indian cultural identity. Therefore, many Indian child placement issues do not arise in such clear form as found in *Fisher*. As a general proposition, Indians who find themselves outside the reservation have the same rights and responsibilities and are subject to the jurisdiction of state courts in the same manner and extent as other state citizens.⁵³ In fact, the Supreme Court went even further in *Mescalero Apache Tribe v. Jones* by adding that, "even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. . . ."⁵⁴

Aside from the issue of tribal membership, the physical location of the child has been instrumental in determining whether the Tribal Court has jurisdiction. The first reported case where a state court assumed custody jurisdiction over an Indian child was *In re Cantrell*.⁵⁵ The Montana Supreme Court upheld state jurisdiction of an Indian child who had been abandoned off the reservation by its parents. At the time jurisdiction was assumed, the mother was domiciled on the reservation. The Montana court

51. *Id.* at 387-89.

52. 424 U.S. 382 (1976).

53. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

54. *Id.* at 147-48.

55. *In re Cantrell*, 495 P.2d 179 (Mont. 1972).

distinguished *Williams*⁵⁶ and other Supreme Court cases on the ground that the abandonment had occurred off the reservation and had continued for over a year before the petition was filed.⁵⁷

In a case involving the placement of two Indian children in foster homes by the South Dakota state courts,⁵⁸ the Supreme Court decided that the state court had civil and criminal jurisdiction over the Indian children because the reservation had been terminated by congressional act and the land returned to the public domain.⁵⁹ The Court did not deal with the issue of the children's domicile and its relevance to jurisdiction since the parties had agreed that the state courts did not have jurisdiction if the lands in question were "Indian country."⁶⁰ The central issue in *DeCoteau v. District County Court* was whether the lands upon which half of the acts of parental neglect took place were nonreservation lands.

More important than the geographical location or the domicile of Indian children when determining child welfare jurisdiction is the concept of tribal status or membership. This concept of court jurisdiction is based upon the theory of *parens patriae* in relation to all its minor tribal members. This is a more practical formulation because Indian children are in reality culturally and tribally terminated by placement in non-Indian homes when subjected to the jurisdiction of state courts.

In an Oregon case, *In re Greybull*,⁶¹ the state court was held to have jurisdiction over six Indian children who had never lived on the reservation. This case involved a proceeding for termination of parental rights. The Indian mother relied on *Wisconsin Potawatomes v. Houston*,⁶² which the Oregon Court of Appeals rejected because the Indian children in that case, although living

56. *Williams v. Lee*, 358 U.S. 217 (1959).

57. *In re Cantrell*, 495 P.2d 179, 182 (Mont. 1972).

58. *De Coteau v. District County Ct.*, 420 U.S. 425 (1975).

59. Act of Mar. 3, 1891, ch. 543, 26 Stat. 1035.

60. *De Coteau v. District County Ct.*, 420 U.S. 425-27 (1975). 18 U.S.C. § 1151 provides in pertinent part: "Except as otherwise provided in sections 1154 and 1156 of this title, the term 'Indian country' as used in this chapter, means (a) all land within the limits of an Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including right-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including right-of-way running through the same."

61. *In re Greybull*, 543 P.2d 1079 (Ore. 1975).

62. *Wisconsin Potawatomes v. Houston*, 393 F. Supp. 719 (N.D. Mich. 1973).

off the reservation, were still domiciled on the reservation and therefore subject to the exclusive jurisdiction of the Tribal Court.⁶³

The court of appeals reasoned that since the children in *Greybull* were domiciled off the reservation, the state juvenile court had statutory jurisdiction over them.⁶⁴ The court failed to address the contention that Indian children would be best reared by an Indian family, particularly by their grandparents.⁶⁵ It appears that absent a well-defined operating system for effectuating tribal jurisdiction, or unless the Indian child is geographically situated near a tribal court, the *parens patriae* construction will not be accepted by the state courts.

The latter situation also limits an Indian family's mobility by subjecting the children to state court jurisdiction. This poses another problem for those Indian children who have been determined to be subject to tribal jurisdiction. Should circumstances arise which create a need for a state court to intervene and determine custody, the issue of jurisdiction is then relitigated in a non-tribal court. It is possible for that nontribal court to accord "full faith and credit"⁶⁶ to the determination of the Tribal Court. This standard of comity governs the method by which one state court will treat the decisions of another state.⁶⁷ It is not required of state courts with respect to the judgments of tribal courts,⁶⁸ although some courts have held to the contrary.⁶⁹

63. See also *Kennerly v. District Ct.*, 400 U.S. 423 (1971) (state did not have concurrent jurisdiction with Tribal Court because state had taken affirmative legislative action pursuant to Act of Aug. 15, 1953); *Blackwolf v. District Ct.*, 493 P.2d 1293 (Mont. 1972) (state did not have concurrent jurisdiction over Indian children residing on Indian reservation); 67 Stat. 590 § 7, 18 U.S.C. § 1162 (1970); *Crow Tribe v. Deernose*, Mont., 487 P.2d 1133 (Mont. 1968); *In re Whiteshield*, 124 N.W.2d 694 (N.D. 1963).

64. ORE. REV. STAT. § 419.476 (1977).

65. *In re Greybull*, 543 P.2d 1079, 1081 (Ore. 1975).

66. U.S. CONST. art. 1, § 1 provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . ." Federal law provides: "Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section." 25 U.S.C. § 1322(c) (1970).

67. *Darr v. Burford*, 339 U.S. 200, 204 (1950).

68. *Cf. Mehlin v. Ice*, 56 F. 1219 (8th Cir. 1893).

69. *In re Buehl*, 555 P.2d 1334, 1342 (Wash. 1976) (state court must accord full faith and credit to tribal court where child was a ward of tribal court).

In 1975, in *Wakefield v. Little Light*,⁷⁰ a Maryland Court of Appeals refused to allow a state court to award custody of an Indian child to non-Indian parents over the objection of the child's mother and Indian tribe to which they belonged. The Wakefields, as VISTA volunteers assigned to the Crow reservation in Montana, had been appointed legal guardians of the Indian child by the Crow Tribal Court which retained the wardship. Less than a year later, the Wakefields filed for permanent custody of the child in the state of Maryland. In the meantime, the Crow Tribal Court in Montana terminated the guardianship over the child and returned legal custody to the Indian mother.⁷¹

When the Wakefields' custody petition was heard in Maryland state court, the mother moved to dismiss the petition for want of jurisdiction. This motion was granted. The Wakefields appealed and the Maryland Court of Appeals affirmed the lower court's judgment holding that the dismissal of the petition for permanent custody was proper for want of jurisdiction.⁷² The court of appeals noted that the United States Constitution⁷³ and early court decisions⁷⁴ reinforced the principle of Indian sovereignty. It cited Chief Justice Marshall who wrote in *Worcester v. Georgia* that: "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial. . . . The very term 'nation', so generally applied to them, means 'a people distinct from others'."⁷⁵

This principle, the Maryland Court of Appeals stated, is no longer absolute because Indians have increasingly participated in American society outside the reservations.⁷⁶ The court of appeals adopted the more recent rule enunciated by Supreme Court Justice Black, when he wrote in *Williams v. Lee* that states may only act: "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized. . . ."⁷⁷

70. 347 A.2d 228 (Md. 1975).

71. *Id.* at 230.

72. *Id.* at 238.

73. U.S. CONST. art. 1, § 8, cl. 3 provides that: "The Congress shall have power . . . To regulate Commerce within foreign Nations, and among several States, and with the Indian Tribes; . . ."

74. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

75. *Id.*

76. *Id.* at 558.

77. *Wakefield v. Little Light*, 347 A.2d 228, 233 (Md. 1975), citing *Williams v. Lee*, 358 U.S. 217 (1959). See also *Wisconsin Potawatomes v. Houston*, 393 F. Supp. 719, 731 (W.D. Mich. 1973). "It is apparent from this case, as it must be to anyone aware of In-

Therefore, the court ruled that under the *Williams* doctrine, child rearing is an "essential tribal relation" and that the Crow Tribe possessed the requisite judicial authority to protect this "essential tribal relation."⁷⁸ The court acknowledged that Maryland had a cognizable jurisdictional interest in the case but that the essential tribal relations of child rearing and tribal identity prohibited the guardian's wishes of shifting the domicile of the Indian child to another state.⁷⁹

There is little case authority bearing directly on the matter of state jurisdictions over the domestic relations of tribal members.⁸⁰ The earliest case concerned an Indian child whose non-Indian guardian had been appointed by an Iowa court.⁸¹ A writ of habeas corpus was brought on the child's behalf because she was allegedly being forced to attend an off-reservation Indian training school against her wishes. The court found the state court had no authority to appoint guardians for Indian children living on the reservation. Basing its decision on the doctrine of federal preeminence, the court wrote: "As I understand it, the purpose of the cession by the state to the national government of the jurisdiction over the reservation and the Indians living thereon was to center in the one government the duty of taking charge of these Indians, and thereby to avoid the evils that would necessarily arise from a divided control over them. . . ."⁸² The court made it clear that its holding was not intended to apply to "individuals who may have severed their tribal relations, or who have become incorporated into the citizenship of the state in which they reside."⁸³

In two cases decided the same day,⁸⁴ a divided Supreme Court of Washington held that state juvenile courts had no jurisdiction to declare as "dependent" Indian children residing on allotted lands or on the reservation.⁸⁵ But in 1974, the same court decided that state courts had jurisdiction to decide whether Indian parents

dians and Indian Tribes in the 20th century that their way of life has, in fact, taken on many of the aspects of other citizens of the United States in habits, language and dress. . . ."

78. 358 U.S. 217, 219 (1959).

79. *Wakefield v. Little Light*, 347 A.2d 228, 237, 238 (Md. 1975).

80. *Id.* at 238.

81. *In re Lelah-Puc-Ka-Chee*, 98 F. 429 (N.D. Iowa 1899).

82. *Id.* at 432.

83. *Id.* at 433.

84. *State v. Superior Ct.*, 356 P.2d 985 (Wash. 1960); *In re Colwash*, 356 P.2d 994 (Wash. 1960).

85. *State v. Superior Ct.*, 356 P.2d 985, 990 (Wash. 1960).

should be deprived of their parental rights.⁸⁶ This assumption of civil jurisdiction was predicated on tribal consent pursuant to congressional authority.⁸⁷ In a New Mexico case where a habeas corpus petition was filed by an Indian grandfather seeking custody of his grandchild,⁸⁸ the court of appeals rejected the claim of exclusive jurisdiction by the Indian tribe, asserted to be necessary to maintain the child's Indian heritage and customs. The court, applying the best interests of the child standard, reasoned that the determining factor was that the child was living with his mother off the reservation.⁸⁹

In sum, it appears that both judicial decisions and statutory provisions hold that tribal courts have jurisdiction over domestic proceedings in cases arising on Indian lands or where the Indian child is an enrolled member of a tribe and is geographically located near a reservation. State courts exercise jurisdiction over civil proceedings involving Indians when they do not live in or near Indian country and are not enrolled members of a tribe. The exceptions arise when both tribal and state courts exercise concurrent jurisdiction pursuant to congressional authority.⁹⁰

Indian Child Welfare Act of 1978

On November 8, 1978, the President signed into law the Indian Child Welfare Act of 1978,⁹¹ after nearly four years of hearings and investigations conducted by Congress. The Act was based on oversight hearings in the United States Senate during 1974. A number of studies conducted in the interim have documented that an alarmingly high percentage of Indians are being separated from their families and placed in non-Indian adoptive and foster homes. This practice by social agencies and state courts has continued with little or no consideration for the preservation of Indian culture.⁹² The Act declares:

[I]t 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

86. *Comenout v. Burdman*, 525 P.2d 217 (Wash. 1974).

87. Pub. L. 83-280, Act of Aug. 15, 1953, 67 Stat. 590.

88. *Adoption of Doe*, 555 P.2d 906 (N.M. 1976).

89. *Id.* at 916-17.

90. Pub. L. Law 280, Act of Aug. 15, 1953, 67 Stat. 588-90, or the Indian Civil Rights Act, Act of Apr. 11, 1968, Pub. L. No. 90-284, 82 Stat. 78, 25 U.S.C. §§ 1321-1326 (1970).

91. Indian Child Welfare Act of 1978, Pub. L. 95-608, 25 U.S.C. § 1901.

92. *Id.*, 25 U.S.C. § 1901(4).

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.⁹³

The underlying premise of the Act is that Indian tribes, as sovereign governments, have a vital interest in any decision as to whether Indian children should be separated from their families. Subchapter I is designed to clarify the issue of jurisdiction over Indian child placements and to establish standards for child-placement proceedings. It provides that an Indian tribe shall have exclusive jurisdiction over child custody proceedings where the Indian child is residing or domiciled on the reservation, unless federal law has vested jurisdiction in the state.⁹⁴ The domicile of an Indian child who is a ward of a tribal court is deemed to be that of the tribal court. This is consistent with existing case law holding that the tribe has exclusive jurisdiction when the child is residing or domiciled on an Indian reservation.⁹⁵

The Act also directs a state court having jurisdiction over an Indian child custody proceeding to transfer such proceeding, absent good cause to the contrary, to the appropriate tribal court upon petition of the parents or the Indian tribe.⁹⁶ Either parent is given the right to veto such transfer. This is intended to permit a state court to insure that the rights of the child, the parents, and the tribe are fully protected. In the case of state proceedings for foster care placement or termination of parental rights, a right of intervention is given to the Indian custodian and to the tribe.⁹⁷ The parents are given a right of intervention by reason of the nature of their relationship. The public acts, records, and judicial proceedings of a tribal court in child custody cases shall be given full faith and credit by other jurisdictions to the same extent that

93. Indian Child Welfare Act of 1978, 25 U.S.C. § 1902. The best interest test should be rejected as a basis for removal of children from their homes and replaced by a standard which permits removal only where there is likelihood of serious emotional or physical harm with the burden being on the State to prove by "clear and convincing proof." See Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from their Homes*, 28 STAN. L. REV. 628, 649-60 (1976).

94. 25 U.S.C. § 1911(a).

95. *Wisconsin Potawatomies v. Houston*, 393 F. Supp. 719 (W.D. Mich. 1973); *Wakefield v. Little Light*, 347 A.2d 228 (Md. 1975); *In re Greybull*, 543 P.2d 1079 (Ore. 1975).

96. Indian Child Welfare Act of 1978, 25 U.S.C. § 1911(b).

97. *Id.* at § 1911(c).

such jurisdictions extend full faith and credit to sister state courts.⁹⁸

In an involuntary proceeding in state court involving Indian children, the moving party must provide notice by registered mail with return receipt requested to the parent or Indian custodian and the tribe. Notice to the Secretary of the Interior is required where the location of the individual or tribe cannot be reasonably determined. The Secretary of the Interior must relay such notice to the parent, the custodian, and the tribe. All proceedings are delayed for at least ten days after receipt of notice. An additional twenty days may be requested to allow adequate preparation.⁹⁹

An indigent parent or the Indian custodian has the right to a court-appointed lawyer in any involuntary proceeding for foster care placement or termination of parental rights.¹⁰⁰ If state statutes do not provide for court-appointed counsel in this type of proceeding, the secretary is authorized, subject to the availability of funds, to pay legal expenses.¹⁰¹ Parties are also given a right to examine relevant documents filed with the court.¹⁰²

A party seeking foster care placement or termination of parental rights over an Indian child must satisfy the court that positive efforts have been made to provide assistance designed to prevent the breakup of Indian families.¹⁰³

The legislative history notes "most State laws require public or private agencies involved in child placements to resort to remedial measures prior to initiating placement or termination proceedings, but that these services are rarely provided. This section imposes a Federal requirement in that with respect to Indian children and families."¹⁰⁴

Evidentiary standards in foster care hearings require "clear and convincing"¹⁰⁵ evidence by qualified expert witnesses of the likelihood of serious emotional or physical damage to the child before placement can be ordered.¹⁰⁶ In hearings involving the ter-

98. *Id.* at § 1911(d).

99. *Id.* at § 1912(a).

100. *Id.* at § 1912(b).

101. *Id.* See *Davis v. Page*, 442 F. Supp. 258 (S.D. Fla. 1977).

102. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(c).

103. *Id.*, § 1912(d). See *Arizona Dep't Economic Security v. Mahoney*, 540 P.2d 153, 156 (1975).

104. H.R. REP. No. 1386, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7530, 7545.

105. See text accompanying note 93, *supra*.

106. Indian Child Welfare Act of 1978, 25 U.S.C. § 1912(e).

mination of parental rights, Congress provided that the standard involved should be higher and required a "beyond a reasonable doubt" standard.¹⁰⁷ This is consistent with the notion that permanent severance of parental rights is as great, if not greater, than a criminal penalty.¹⁰⁸

The next sections of the Act deal with parental rights and the voluntary termination of parental rights. Consent to foster care placement or termination of parental rights must be "executed in writing. . . . before a judge of a court of competent jurisdiction and accompanied by the presiding judges' certificate. . . . that the consequences . . . were fully explained . . . and . . . fully understood by the parent or Indian Custodian."¹⁰⁹ The judge must also certify that the consent and explanation were understood in "English or that it was interpreted into a language that the parent or Indian custodian understood."¹¹⁰ Subsection (b) provides: "Any parent or Indian Custodian may withdraw consent to a foster care placement under State law at any time. . . ."¹¹¹ In cases of termination of rights or adoption, consent may be withdrawn at any time prior to the entry of the final decree.¹¹² Subsection (d) further provides that, within two years of entry of the final decree, unless a longer period is provided by state law, "the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud and duress and may petition the court to vacate such decree."¹¹³ The Act provides a remedy for procedural or other violations and creates a right in any affected Indian child, parent, or Indian custodian to petition the court to invalidate such action upon a showing that the action for foster care placement or termination of parental rights violated any provision of the above mentioned sections.¹¹⁴

Section 1915 of the Act deals with the adoptive placement of Indian children subsequent to the termination of parental rights. This section states that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the

107. *Id.*, § 1912(f).

108. H.R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7530, 7545.

109. Indian Child Welfare Act of 1978, 25 U.S.C. § 1913(a).

110. *Id.*

111. *Id.*, § 1913(b).

112. *Id.*, § 1913(c).

113. *Id.*, § 1913(d).

114. *Id.*, § 1914.

Indian child's tribe; or (3) other Indian families."¹¹⁵ This section is to be read, where possible, as keeping the child in the Indian tribe and not as precluding the placement of an Indian child with a non-Indian family.¹¹⁶ Subsection (b) creates similar preferences for foster care or preadoptive placements, with the addition of licensed Indian foster homes and institutions approved by the tribe. It also dictates that the child "shall be placed in the least restrictive setting which most approximates a family. . . . The child shall also be placed within reasonable proximity to his or her home. . . ."¹¹⁷ Subsection (c) allows for other preferences. The legislative history notes that:

The tribe may establish a different order of preference which will be followed in lieu of the Federal standards as long as such order is consistent with the least restrictive setting standard in subsection (b). Where appropriate, the preference of the child or parent shall be considered and a request for anonymity of a consenting parent shall be given weight in applying the preferences. While the request for anonymity should be given weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian.¹¹⁸

The standards to be used in meeting the preference shall be those prevailing in the relevant community.¹¹⁹ Unfortunately, state agencies usually apply white, middle-class standards in determining whether an Indian family is fit for foster care or adoptive placement of an Indian child.¹²⁰ This effectively forecloses placement with Indian families.¹²¹ Now, however, records of any placements of Indian children by state courts must be maintained showing what efforts have been made to comply with the preference standards. These records are available to the tribe.¹²²

Whenever a previous adoption of an Indian child fails, a biological parent may petition for the return of such child unless

115. *Id.*, § 1915(a).

116. *Id.*, § 1915(c).

117. *Id.*, § 1915(b).

118. H.R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7530, 7545.

119. Indian Child Welfare Act of 1978, 25 U.S.C. § 1915(d).

120. H.R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7530, 7532, 7533.

121. *Id.* at 7533.

122. Indian Child Welfare Act of 1978, 25 U.S.C. § 1915(e).

such return would not be in the best interests of the child.¹²³ Also, when an Indian child is being removed from a foster home for purposes of further foster care placement, preadoptive, or adoptive placement, such further placement is subject to all the provisions of the Act.¹²⁴

Congress has noted the popular trend in state law to acknowledge an inherent right of an individual to know his genealogical background.¹²⁵ Therefore, any Indian person who was the subject of an adoption proceeding may, upon attaining the age of majority, request any information concerning the individual's biological parents, tribal affiliation, and any other information which may protect any rights under tribal membership.¹²⁶ This provision also protects the correlative right of the tribe to have its children remain or resume as a part of the tribe.

Under the Act, an Indian tribe that became subject to state jurisdiction under federal law may reassume jurisdiction over child custody proceedings upon petition that includes a suitable plan.¹²⁷ If the petition is approved, the tribe shall reassume jurisdiction sixty days after publication.

The Act authorizes Indian tribes and states to enter into mutual agreements or compacts with respect to jurisdiction over Indian child custody proceedings and related matters. It also provides for revocation of such agreements by the parties.¹²⁸

Section 1920 deals with situations in which an Indian child was improperly removed from the custody of his parents or other custodian.¹²⁹ Congress intended a clean hands doctrine to apply to petitions in state courts for custody of Indian children.

It is aimed at those persons who improperly secure or improperly retain custody of the child without the consent of the parent or Indian custodian and without the sanction of law. It is intended to bar such person from taking advantage of their wrongful conduct in a subsequent petition for custody. The child is to be returned to the parent or Indian custodian by the court unless such return would result in substantial and im-

123. *Id.* at § 1916(a).

124. *Id.* at § 1916(b).

125. H.R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), reprinted in [1978] U.S. CODE CONG. & AD. NEWS 7530, 7547.

126. Indian Child Welfare Act of 1978, 25 U.S.C. § 1917.

127. *Id.* at § 1918.

128. *Id.* at § 1919.

129. *Id.* at § 1920.

mediate physical danger or threat of physical danger to the child. It is not intended that any such showing be by or on behalf of the wrongful petitioner.¹³⁰

Where State law affords a higher degree of protection to the rights of the parent or custodian, such standard shall be applied by the state court in lieu of the related provisions of the Act.¹³¹

An Indian child may be removed, under applicable state law, for emergency placement to prevent imminent physical harm. Such emergency removal may continue for a reasonable time only.¹³² Most of the provisions of subchapter I do not apply to state action for foster care, preadoptive, adoptive placements, or for termination of parental rights which were commenced prior to six months of its enactment.¹³³ The provisions would apply to any subsequent discrete phase of the same matter or with respect to the same child after enactment. For example, if the foster care placement of an Indian child was initiated or completed prior to enactment and then subsequent to enactment the child was replaced for foster care, the provisions of the Act would be applicable to those subsequent actions.

Subchapter II of the Act authorizes the Secretary of the Interior to make grants directly to Indian tribes and organizations for the purpose of establishing Indian family development programs both off and on the reservation.¹³⁴ Program funds may be used for such purposes as hiring child-welfare staffs, construction of child-welfare facilities, providing counsel and legal representation to Indian children and families involved in child custody proceedings. Significantly, it also provides for the expenditure of funds for developing and licensing Indian foster and adoptive homes.¹³⁵ It is estimated that the projected costs of these programs will be \$125 million over the next five years.¹³⁶

Subchapter III authorizes and directs the Secretary of the Interior to collect and maintain records of all Indian child

130. H.R. REP. No. 1386, 96th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7530, 7548.

131. Indian Child Welfare Act of 1978, 25 U.S.C. § 1921.

132. *Id.* at § 1922.

133. *Id.* at § 1923. There are three exceptions to this effective date; § 1911(a) (Exclusive tribal jurisdiction over Indian child custody proceedings); § 1918 (Resumption of jurisdiction); and § 1919 (Agreements between States and Indian tribes).

134. *Id.* at § 1931(a).

135. *Id.* at § 1931(b).

136. H.R. REP. No. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 7530, 7551.

placements from its enactment forward. It also provides timetables for implementation of the Act.¹³⁷

Subchapter IV directs the Secretary of the Interior to do an impact study on what effect the absence of locally convenient day school facilities has on Indian children. It requires the Secretary to give particular consideration in the report to the provision of schools for children in the elementary grades.¹³⁸

Congressional Versus State Powers over Nonreservation Indian Children

The most serious constitutional question that might be raised to the Act are those provisions which generally deal with the procedural handling of custody matters involving Indian children by state courts. Section 1912(a) provides that in any involuntary proceedings in a state court seeking to place or terminate parental rights over an Indian child, the moving party must provide certain notices to the parents or Indian custodian and the tribe. Where the location or the identity of the parent cannot be found, notice is to be provided to the Secretary of the Interior, who shall have fifteen days to provide notice to the parent or Indian custodian.¹³⁹ The latter requirement assumes that the state court has actual or constructive knowledge of the Indian affiliation of the child sought to be placed.

This fairly detailed set of procedures providing for notice, right to court-appointed counsel for both Indian parent and child, examination of all court reports and documents, and the provision of remedial services and rehabilitative programs may be seen as an unreasonable imposition of federal procedural and substantive standards upon state courts. This exercise of federal power over what has been traditionally an exclusive state matter becomes extremely significant when the state court proceeding is constitutionally adequate and the Indian is not living on a reservation. For example, may the procedural mandates of Section 1912(a) of Subchapter I of the Act be imposed upon a juvenile court in the state of Montana where that court is adjudicating the custody of an Indian child in disregard of its own adequate procedures? At first glance, it would seem that the federal interest, in the off-reservation context, would be so attenuated that the tenth amend-

137. Indian Child Welfare Act of 1978, 25 U.S.C. § 1951, 1952.

138. *Id.* at §§ 1961-1963.

139. *Id.* at § 1912(a).

ment and general principles of federalism would preclude the legislative invasion of state power contemplated by this section.¹⁴⁰

It should be said that the Act does not circumscribe the exercise of the state's jurisdiction in domestic matters unless a petition is filed by either of the Indian child's parents, the Indian custodian or the Indian child's tribe for transfer to the jurisdiction of the tribe.¹⁴¹ The Tribal Court may decline jurisdiction over the matter.¹⁴² Further, the state court may refuse to transfer jurisdiction to the Tribal Court where there is "good cause" or where the parents object to such transfer.¹⁴³ But, the Act clearly controls the procedural incidents of the court litigation where nonreservation Indian children are involved by requiring certain procedural and substantive standards for foster care placements and termination of parental rights.

It is plain that Congress does have the power to control the incidents of child custody litigation involving nonreservation Indian children. The United States Constitution gives Congress the exclusive power to regulate commerce with the Indian tribes.¹⁴⁴ Early court decisions have unanimously upheld this principle,¹⁴⁵ which was last reiterated in *United States v. Wheeler*, by Justice Stewart: "Congress has plenary power authority to legislate for the Indian tribes in all matters, including their form of government."¹⁴⁶ It follows that commerce with the Indian tribes includes commerce with the individual members of a tribe.¹⁴⁷ Also, unless limited by treaty or statute, a tribe has the power to determine tribal membership.¹⁴⁸

In an action¹⁴⁹ that arose in a state court for damages under the Federal Employer's Liability Act,¹⁵⁰ the court dismissed the action and barred recovery in any future state proceeding. The state

140. U.S. CONST. amend. 10 provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively, or to the people."

141. Indian Child Welfare Act of 1978, 25 U.S.C. § 1911(b).

142. *Id.*

143. *Id.*

144. U.S. CONST. art. 1, § 8, cl. 3.

145. *Joplin Mercantile Co. v. United States*, 236 U.S. 531 (1915); *Dick v. United States*, 208 U.S. 340 (1908); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

146. 435 U.S. 313, 319 (1978).

147. *United States v. Holliday*, 70 U.S. 407, 417 (1865).

148. *Cherokee Intermarriage Cases*, 203 U.S. 76, 94 (1906).

149. *Brown v. Western R.R. of Ala.*, 338 U.S. 294 (1949).

150. 35 Stat. 65, 45 U.S.C. § 51 (1970).

court of appeals affirmed on the basis of a state rule of practice to construe pleadings "most strongly against the pleader." The Supreme Court of the United States granted certiorari because the implications of the dismissal were considered important to a correct and uniform application of the Federal Act in the state and federal courts. In reversing the state court, Justice Black wrote:

The argument is that while State courts are without power to detract from "substantive rights" granted by Congress . . . they are free to follow their own rules of "practice" and "procedure". . . . A long series of cases previously decided, from which we see no reason to depart, makes it our duty to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress. This Federal right cannot be defeated by forms of local practice. . . . Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by Federal laws.¹⁵¹

Three years later, the Supreme Court held in a similar case which involved a claim under the Federal Employer's Liability Act in a state court, that: "Congress . . . granted petitioner a right. . . . State laws are not controlling in determining what the incidents of this Federal right shall be."¹⁵² Accordingly, there is ample authority that Congress can impose upon state courts the procedural and substantive standards provided for in the Act.¹⁵³ Congress may legislate certain procedural burdens upon state courts to protect the substantive rights of Indian children, parents, and tribes even when the state court proceedings are constitutionally adequate.¹⁵⁴

While the Act does not completely deprive the states of their traditional jurisdiction over Indian children coming within their venues, it does establish minimum federal standards and procedural safeguards designed to protect the rights of the child as an Indian and the integrity of the Indian family. Nor does it ap-

151. *Brown v. Western R.R. of Ala.*, 338 U.S. 294, 296-97 (1949).

152. *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 361 (1951).

153. *See also American Ry. Exp. Co. v. Levee*, 263 U.S. 19 (1923).

154. *See Second Employer's Liability Cases*, 223 U.S. 1 (1912) (held rights arising under [federal] act may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local law, is adequate to the occasion. Courts are not at liberty to decline cognizance of cases merely because the rules of law to be applied in the adjudication are unlike those applied in other cases.).

pear that any imposition of these federal standards would constitute a substantial administrative burden on state courts. If they did, the overriding interest of protecting the rights of Indian families would far outweigh any additional fiscal or administrative burden. The United States Constitution recognizes higher values than speed and efficiency.¹⁵⁵

Conclusion

For American Indians, the extended family is the primary means by which their culture is maintained and developed. The policy of the state eschewing this concept of family works against Indian self-government and cultural preservation. The Indians' long-standing insistence on remaining a people distinct and apart from the mainstream of society must be protected from the onslaught against Indian child-parent and tribe associations.

By its enactment of the Indian Child Welfare Act of 1978, Congress endeavored to meet its fiduciary responsibilities of guardianship and protection of American Indians.¹⁵⁶ It was recognized that there exists "no resource that is more vital to the continued existence and integrity of Indian tribes than their children."¹⁵⁷ During the course of this nation's history, far too many Indian families have been broken up by the often unwarranted removal of their children through the insensitive actions of private and public agencies. The removal of Indian children has resulted, by and large, in their placement in non-Indian foster and adoptive homes and institutions. The states, exercising their traditional jurisdiction over Indian child custody proceedings have consistently failed to recognize the essential tribal relations of Indian people and the Indians' right to preserve their cultural identity.

The Act properly addresses this crisis of Indian child welfare by imposing minimum standards for the placement of Indian children in foster or adoptive homes. These standards, together with the development of programs to preserve family relationships, both on and off the reservations, should alleviate the widespread placement of children in non-Indian settings. The Act *should* have included the repeal of Public Law 280, since those states coming within the purview of Public Law 280 include large

155. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972).

156. *De Coteau v. District County Ct.*, 420 U.S. 425, 467 (1974).

157. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901(3).

numbers of Indians within their populations.¹⁵⁸ The repeal of Public Law 280 would have enlarged the scope of application of the Act. This would have restored tribal jurisdiction of civil and criminal matters and minimized state intrusions into Indian parent-child relationships. Despite its shortcomings, the Act constitutes a ray of hope and promise to Indian people striving to retain their heritage and pride in a pluralistic society.

158. 28 U.S.C. § 1360 (1970). This section confers jurisdiction on the states of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal and civil causes of action committed or arising on Indian reservations within such states and gives United States consent to other states not having jurisdiction with respect to criminal or civil causes of action to assume jurisdiction by affirmative legislative action. *See* Title I, § 101(a) of the Act which gives Indian tribes exclusive jurisdiction "except where such jurisdiction is otherwise vested in the State by existing Federal law." *But see* § 108(a)(b)(d) which provides a method by which an Indian tribe may reassume jurisdiction.