

# AMERICAN INDIAN CHILDREN AND U.S. INDIAN POLICY

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*Where there is a home with children in it,  
there is hope for the future.*

## Introduction: The Tribal Perspective on Children

Traditional teachings and wisdom of many Tribal Nations in mid-North America honor children as sacred. In the Dakota tribal tradition, for example, children are called *wakanyeza* which translates to “sacred new life” or “something sacred growing.” The concept is based upon the idea that children are a gift from the Creator and are part of the sacred life force. In accord with this idea, children are to be treated with respect, never hit or insulted, and regarded as important future members of tribal society. This concept of respect for children is shared by the Tribal Nations across North America.

Betty Laverdure of the Ojibway states that, children are “living treasures, gifts from the Great Spirit” and “[y]ou treat them as if they didn’t belong to you; they belonged to the Creator.”<sup>1</sup> Respect and caring for children is deeply ingrained in the daily thoughts of tribal leaders. In many prayers offered by Indigenous peoples in North America, all children are remembered and acknowledged. These prayers also extend to those children not yet born who belong to the next seven generations. Taking the future generations into account is expected when tribal leadership contemplates important decisions that will impact the future.

In Part I this article will present the major impacts on the lives of American Indian children through the implementation of U.S. Indian policies. First, the article discusses U.S. policies of the boarding school era, which focused on re-socializing American Indians through imposition of

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<sup>1</sup> STEVE WALL & HARVEY ARDEN, WISDOM’S DAUGHTERS: CONVERSATIONS WITH WOMEN ELDERS OF NATIVE AMERICA 130 (1994).

external language, culture, and beliefs through a system of government mandated education. With the goal of territorial expansion, the U.S. government set a course for military control over American Indian peoples in the late 1700s through the 1800s. Re-socialization as an assimilation policy was then implemented in order to compel a profound change in lifestyle and culture aimed directly at American Indian children through mandatory Indian boarding schools. After decades of resistance, educational reform was achieved in many tribal communities. Another aspect of the assimilation policy was to displace tribal self-identification with formal U.S. citizenship and required U.S. recognition of tribal enrollment status. The consequences of this shift in recognized nationality to U.S. standards resulted in the inability for some American Indian children to be recognized as formal tribal members, thereby decreasing the tribally-enrolled American Indian population over time.

In Part II, the health and welfare of American Indian children and families are discussed. Contemporary statistics continue to illustrate a high rate of poverty for Indian children and consequent health issues. Even more devastating has been the loss of American Indian children through overzealous foster care and adoption practices by state social workers. With the passage and implementation of the Indian Child Welfare Act of 1978,<sup>2</sup> many of the most egregious removals of American Indian children from their tribal families and communities have been reversed. However, this law has only been introduced as a remedy. Due to inconsistent enforcement by U.S. courts, the law has not completely alleviated the problem of removal of Indian children from their families for placement into non-Indian homes.

In the final section of the paper, the strides tribal communities have taken to return to positive childhood environments for American Indian children will be examined. By proactive measures, tribal governments have established child protection programs, chartered tribal elementary schools and organized youth programs based on tribal values to protect the childhood experiences of American Indian children. The future of Tribal Nations in the United States rests in the hearts and minds of the children.

## **I. THE U.S. POLICY OF MILITARY CONTROL AND ASSIMILATION**

As Tribal Nations defended their lands and peoples against the encroachment of European settlers and, then the United States' military forces in the 1700s, 1800s, and 1900s, tribal children were exposed to disease, warfare, genocide, forced removals and relocations, and the

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<sup>2</sup> 25 U.S.C. §§ 1901-1963 (1978).

suppression and destruction of the tribal way of life.<sup>3</sup> Smallpox epidemics, one of the early forms of germ warfare,<sup>4</sup> ravaged many Tribal Nations, including the Omaha who were afraid that “future children would inherit the smallpox and disfigurements of their parents.”<sup>5</sup> During the 1838 removal of the Cherokee from their homelands in the eastern part of the United States to the Indian Territory, Rebecca Neugin, a very young Cherokee child at the time of the removal, recalled that “there was much sickness among the emigrants and a great many little children died of whooping cough.”<sup>6</sup> In the massacre of the Hunkpapa Lakota at Wounded Knee on December 29, 1890, around 300 total Indians were killed and “most were women and children: their bodies were found scattered along a distance of two miles from the scene of the encounter” according to an official report by the U.S. Indian Commissioner.<sup>7</sup> These are but a few examples of the devastation American Indian children encountered in their young lives as Tribal Nations attempted to survive attacks by the military forces of the United States.

Once the United States forcibly achieved almost complete domination over all areas of Indian life, the federal policies of forced assimilation and cultural genocide began to focus in part on Indian children. The federal government subsidized Indian mission schools operated by churches and other religious entities from 1810-1917, even though the Constitution of the United States flatly prohibits the making of a federal law respecting an establishment of religion.<sup>8</sup> Christian missionaries carried forth these policies, sanctioned by the federal government, and set up mission boarding schools for Indian children “designed to physically, ideologically, and emotionally remove Indian children from their families, homes and tribal affiliations.”<sup>9</sup>

#### **a. The Rise of the Indian Boarding Schools**

In 1879, the U.S. Indian Office opened the Carlisle Indian Industrial School. This first federal Indian boarding school was modeled after military organizations, such as army training camps, with Army Lieutenant Richard Henry Pratt as superintendent. Pratt has been quoted as stating his philosophy

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<sup>3</sup> RUSSELL THORNTON, *AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION SINCE 1492* 91 (1987).

<sup>4</sup> *Id.* at 78. (“It is also during the eighteenth century that we find written reports of American Indians being intentionally exposed to smallpox by European.”).

<sup>5</sup> *Id.* at 92.

<sup>6</sup> *Id.* at 117.

<sup>7</sup> *Id.* at 152.

<sup>8</sup> Margaret L. Archuleta et al., Introduction, in *AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCE 1879-2000* 14, 16 (Margaret L. Archuleta et al. eds., 2000)

<sup>9</sup> *Id.* at 19.

for educating Indian students as “Kill the Indian, save the man.”<sup>10</sup> Additional government boarding schools soon followed with Congress funding twenty-three institutions over the next twenty years.<sup>11</sup> The forced removal of Indian children from their homes, parents, relatives, and communities, often at great physical distances from their Tribal Nations, is one of the most traumatic experiences continuing to impact the family fabric of contemporary American Indian families today.

Christian and government boarding schools subjected Indian children to treatment at the polar opposite from the concept of respect and caring in Indigenous tribal society. For example, early Jesuit missionaries expressed exasperation with new Indian converts for not beating their children and otherwise coercing their children to their will.<sup>12</sup> At most boarding schools, Indian children were routinely subjected to violence, physical and sexual abuse, neglect, and rigid forms of psychological and physical discipline.

Not only were children removed from their parents, often forcibly, but they had their mouths washed out with lye soap when they spoke their Native languages; they could be locked up in the guardhouse with only bread and water for other rule violations; and they faced corporal punishment and other rigid discipline on a daily basis.<sup>13</sup>

Illness and death were associated with attendance at these Indian boarding schools. In 1903, the United States' Commissioner of Indian Affairs requested Indian service physicians to investigate the disease rates among Indian children in boarding schools due to public criticism of the boarding school system. The physicians, in 1904, confirmed “high rates of tuberculosis and other lung afflictions among Indians, as well as trachoma.”<sup>14</sup> By 1915, four school sanatoriums for Indian students with tuberculosis were opened. Cemeteries were also maintained at the government boarding schools for Indian children who died while in attendance.<sup>15</sup> Between 1885

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<sup>10</sup> *Id.* at 16.

<sup>11</sup> JON REYHNER & JEANNE EDER, *AMERICAN ELDER EDUCATION: A HISTORY* 149 (2006).

<sup>12</sup> John Mohawk, *Three Indian Contributions to Western Civilization*, in *AMERICA IS INDIAN COUNTRY: THE BEST OF INDIAN COUNTRY TODAY* 16, 18 (José Barreiro & Tim Johnson eds., 2005).

<sup>13</sup> Margaret L. Archuleta et al., “*Don't You Suppose It's Best for Him to Come Home?*”: *Health and Homesickness*, in *AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCE 1879-2000* 38, 42 (Margaret L. Archuleta et al. eds., 2000).

<sup>14</sup> BRENDA J. CHILD, *BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES 1900-1940* 62 (1998).

<sup>15</sup> See Marc Dadigan, *Chemawa Indian School Unmarked Graves*, *ALJAZEERA HUMAN RIGHTS* (Jan. 26, 2016), <http://www.aljazeera.com/indepth/features/2016/01/unearthing-dark-native-boarding-school-160103072842972.html>. (“While it was common boarding school

and 1913, for example, approximately one hundred Indian students were buried in the Haskell Indian Boarding School cemetery.<sup>16</sup>

Often very young children were forced to attend the boarding schools. Cecilia Defoe, now an elder of the Lac du Flambeau Chippewa, recalls,

[t]hen when I was about six, one day the police came and said I got to go to school. So they took me to the government school. [My mother] cried, she didn't want me to go. She thought I was too young. But they said no, you have to go. I was six.<sup>17</sup>

Both the Haskell and the Flandreau Indian boarding schools contained kindergarten classrooms and separate rooms in the dormitories designated for children ages five to eight years old.<sup>18</sup> At Flandreau, this room was referred to as the "baby room."<sup>19</sup> Haskell records and photographs confirm that very young children were in attendance. They were nicknamed "Haskell Babies."<sup>20</sup> By 1924, the policy at Flandreau changed and the school eliminated these first grade and kindergarten programs.

By the 1920s, criticisms had been leveled at the Indian boarding school policies. At the request of Secretary of the Interior Hubert Work, Lewis Meriam put together a team of social scientists and others to conduct an investigation on the conditions in the schools.<sup>21</sup> In the 1928 Meriam Report, government boarding schools were criticized for subjecting Indian students to inadequate medical care, slow starvation diets, labor intensive chores which were viewed as necessary to run the schools, overcrowding, harsh discipline, and focused primarily on vocational training.<sup>22</sup> The Meriam Report took issue with the enrollment of students who were pre-adolescent and recommended that such students remain close to their communities in

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practice to send near death children home before they died, most schools did and still do have cemeteries.").

<sup>16</sup> CHILD, *supra* note 14 at 66.

<sup>17</sup> MEMORIES OF LAC DU FLAMBEAU ELDERS 183 (Elizabeth M. Tornes ed., 2004).

<sup>18</sup> See CHILD, *supra* note 14, at 7. (In 1893, the Flandreau Indian Boarding School in South Dakota opened as one of the earliest in the United States and was operated for primarily Dakota and Ojibwe students).

<sup>19</sup> Rayna Green and John Troutman, "By the Waters of the Minnehaha": Music and Dance, Pageants and Princesses, in AWAY FROM HOME: AMERICAN INDIAN BOARDING SCHOOL EXPERIENCE 1879-2000 60, 72 (Margaret L. Archuleta et al. eds., 2000).

<sup>20</sup> *Id.*

<sup>21</sup> See FRANCIS PAUL PRUCHA, DOCUMENTS OF UNITED STATES INDIAN POLICY 219 (2000).

<sup>22</sup> INSTITUTE FOR GOVERNMENT RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 1-8 (1928).

day schools.<sup>23</sup> After the Meriam Report, the Bureau of Indian Affairs' policy finally shifted to building community day schools. From 1928 to 1933, twelve government boarding schools were closed. By 1941, forty-nine of the government boarding schools were still operating with a total enrollment of approximately 14,000 Indian students. A majority of Indian children were enrolled in day schools on their reservations, rather than attending off-reservation boarding schools, for the first time.<sup>24</sup>

#### **b. Asserting Indian Self-Determination in Education**

Notwithstanding the problems created by the boarding school experience, a well-rounded locally obtained education has long been viewed as an asset for Indian children by most of their parents and Tribes. After the return of the World War II tribal veterans to their reservations, Indian parents and tribal leadership began to demand changes to Bureau of Indian Affairs (BIA)-operated schools, and pushed for greater control of federal funding earmarked for the education of Indian children. In the late 1960s to early 1970s, Indian education organizations emerged and individual schools were established under tribal or community administration. Parents became increasingly vocal in their criticisms of BIA schools. American Indians became more participatory in public school and federal-aid programs. During this time, Tribes began to practice their cultural activities in a more public manner without fear of reproach.<sup>25</sup>

With the Indian Self-Determination and Education Assistance Act of 1975,<sup>26</sup> tribal governments entered into contracts with the BIA to establish tribally-controlled contract schools operated by the Tribe and funded by the United States federal government. Some Tribes have additional tribal resources which are used to provide additional funding to their schools. These tribal schools opened the doors to integrate Indian language, culture, thought, and philosophy into the curriculum for students in kindergarten through twelfth grade.

By the late 1900s and into the 2000s, most educational facilities attended by American Indian children were either local facilities controlled by the Tribes or the Bureau of Indian Affairs, or they were local non-Indian schools attended by Indian students. By the turn of the twentieth century, the BIA continues to play a large role in fulfilling the treaty obligations to

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<sup>23</sup> MARGARET C. SZASZ, *EDUCATION AND THE AMERICAN INDIAN: THE ROAD TO SELF-DETERMINATION SINCE 1928* 23-24 (3d ed. 1999).

<sup>24</sup> *Id.* at 60-61.

<sup>25</sup> *Id.* at 156.

<sup>26</sup> Indian Self-Determination and Education Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (1975) (Codified at 25 U.S.C §§450-450ddd-2 (2015)).

educate Indian people. A subdivision of the Bureau of Indian Affairs, the Bureau of Indian Education (BIE) provides funding for one hundred eighty-three (183) elementary and secondary schools located on or near 64 reservations in 23 different states.<sup>27</sup> The BIE also provides funding for seven (7) off-reservation boarding schools.<sup>28</sup> “The BIE directly serves approximately 48,700 students in grades K-12 and indirectly serves over 400,000 students through various educational programs such as . . . [Johnson O'Malley programs].”<sup>29</sup> The Johnson O'Malley Act of 1934 provides funding for public schools to support the costs of educating American Indian students and for extracurricular activities involving “culture, language, academics, and dropout prevention.”<sup>30</sup>

Finding a need to provide greater educational access to younger children, many Tribal Nations have contracted with the federal government to provide American Indian Head Start and Early Head Start programs.<sup>31</sup> Early Head Start serves Indian children who are low income and under the age of three years. American Indian Head Start programs provide low income pre-school aged children from three to five years old with training in the basic skills necessary for success in the first years of elementary school. In 1965, the Office of Head Start under its American Indian-Alaska Native Program Branch (AI-ANPB) first funded forty-three grantees in fourteen states.<sup>32</sup> Within five years, the number of tribal government grantees increased to sixty-nine Head Start programs located in nineteen states.<sup>33</sup> A further expansion occurred in 1978 with the Early Head Start program, for toddlers, added by 1995.<sup>34</sup> As of 2008, federal funding supports forty-three American Indian/Alaska Native Early Head Start within nineteen states.<sup>35</sup>

In 2003, the Administration for Children and Families overseeing the Office of Head Start released a report synthesizing current research on Early Childhood Education of American Indian/Alaska Native children.<sup>36</sup> The

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<sup>27</sup> BUREAU OF INDIAN EDUCATION, <http://www.bie.edu/Schools/index.htm>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Johnson O'Malley*, BUREAU OF INDIAN EDUCATION, <http://www.bie.edu/JOM/>.

<sup>31</sup> See NIHSDA Zones and Grantees, National Indian Head Start Directors Association, <http://www.nihstda.org/-!nihstda-zones-and-grantees/c17qv> (last visited January 26, 2016) (For a list of Tribally-Controlled Head Start Programs).

<sup>32</sup> Early Head Start National Resource Center @ ZERO TO THREE, *Honoring Cultural Traditions: Early Head Start Programs in American Indian and Alaska Native Communities*, TECHNICAL ASSISTANCE PAPER No. 12, 1, 7 (2007), <http://goo.gl/PUHA85>.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> ELLEN L. MARKS ET AL., U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, A SUMMARY OF RESEARCH AND PUBLICATION ON EARLY CHILDHOOD FOR AMERICAN INDIAN AND ALASKA

report detailed the creation of a special region, Region XI, for American Indian and Alaska Native children within the Head Start Bureau. In 2003, Region XI provided direct funding to 153 tribal grantees located in twenty-seven states.<sup>37</sup> The report recognized “... a strong consensus that American Indian and Alaska Native children bring unique aspects of their culture and background into Head Start.”<sup>38</sup>

In New Mexico, one tribal community is leading the way and realizing the benefit of recent efforts to provide culturally appropriate educational institutions. In 2015, the Isleta Pueblo tribal government became the first to assume full tribal control of the tribal elementary school from the Bureau of Indian Education.<sup>39</sup> “As a Tribally Controlled Grant School, the Pueblo will now run all operations, while the Bureau will honor its trust responsibilities and continue to fund the school,” said U.S. Assistant Secretary for Indian Affairs Kevin Washburn in the press release from the U.S. Department of the Interior on August 1, 2015.<sup>40</sup> Isleta Pueblo Governor E. Paul Torres stated that the goal was to have control over their own destiny by “hiring educators who are committed to our students and developing a curriculum that places an emphasis on teaching our native language.”<sup>41</sup> The Isleta Pueblo Tribal Council has taken a step forward in reclaiming the ability to educate its own children. This trend will likely continue as other Tribal Nations follow in their footsteps.

### c. U.S. Citizenship and the Issue of Tribal Enrollment

To further complicate matters for American Indian families, the classification of American Indians has been central to U.S. Indian policy since the formation of the United States. U.S. Bureau of Indian Affairs officials or U.S. Congress appointed commissions would at times designate

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NATIVE CHILDREN 1, 4 (Mar. 2003),

[http://www.acf.hhs.gov/sites/default/files/opre/aian\\_sum.pdf](http://www.acf.hhs.gov/sites/default/files/opre/aian_sum.pdf).

<sup>37</sup> *Id.* at 1.

<sup>38</sup> *Id.* at 7.

<sup>39</sup> See THE BUREAU OF INDIAN EDUCATION (BIE),

<http://www.bia.gov/WhatWeDo/ServiceOverview/IndianEducation/> (last visited January 26, 2016). See also, 25 C.F.R. § 32.3 (2013) (Mission statement of the Bureau of Indian Education).

<sup>40</sup> Kevin Thompson, *Secretary Jewell Lauds Isleta Pueblo's Landmark Transition to Full Operation and Management of Tribal Elementary School: First BIE-funded school to transition to full tribal control under Blueprint for Reform*, U.S. DEPARTMENT OF THE INTERIOR, <http://www.doi.gov/news/pressreleases/secretary-jewell-lauds-isleta-pueblos-landmark-transition-to-full-operation-and-management-of-tribal-elementary-school.cfm>.

<sup>41</sup> *Isleta Pueblo Begins Operating Its Own Elementary School*, NATIVE NEWS ONLINE.NET, <http://nativenewsonline.net/currents/isleta-pueblo-begins-operating-its-own-elementary-school/>.



which tribal individuals would be considered “full-bloods” and others as “half-breeds” or “mixed bloods.”<sup>42</sup> By bringing over Anglo-Saxon views on bloodline and patrimony, the U.S. officials began early on to designate American Indians intermarried with non-Indians as less “Indian”. As early as 1705, the colony of Virginia forbid “mulatto” people from holding public office and defined those in the group as a person who had an American Indian parent or a “negro” parent, grandparent or great-grandparent.<sup>43</sup>

During the assimilation era of U.S. Indian policy, government officials encouraged tribal individuals to sever their ties to Tribal Nations and adopt the lifestyle of White citizens through treaty provisions and in federal laws.<sup>44</sup> A major effort in this direction was the passage of the General Allotment Act of 1887 permitting the parceling of the reserved homelands of Tribal Nations into individual plots.<sup>45</sup> One of the stated purposes for the allotment of the reserved lands was to transform American Indian families into Christian farmers modeled on White settlers.<sup>46</sup> Tied to receiving an allotment was the designation of U.S. citizenship for the tribal individual. Thus, dual citizenship resulted from individuals belonging to Tribal Nations (prerequisite for receiving an allotment) and receipt of the allotment with its attendant U.S. citizenship, as evidence of the transformation from “a savage and primitive, tribal way of life to a settled, agrarian, and civilized one.”<sup>47</sup>

To implement the federal allotment process, U.S. officials created federal tribal rolls and determined what individuals would be considered legitimate citizens of a Tribal Nation to receive property and other federal benefits.<sup>48</sup> Alterations, purposeful exclusions, and outright mistakes were made by the outsiders attempting to document American Indian heritage and

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<sup>42</sup> See Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. Rev. 1, 20-22 (2006).

<sup>43</sup> *Id.* at 5.

<sup>44</sup> See e.g. Treaty with the Sioux June 19, 1858, 12 Stat. 1037, <http://digital.library.okstate.edu/kappler/Vol2/treaties/sio0785.htm>. (“Article 8. Any members of said Sisseton [sic] and Wahpaton [sic] bands who may be desirous of dissolving their tribal connection and obligations, and of locating beyond the limits of the reservation provided for said bands, shall have the privilege of so doing, by notifying the United States agent of such intention, and making an actual settlement beyond the limits of said reservation; shall be vested with all the rights, privileges, and immunities, and be subject to all the laws, obligations, and duties, of citizens of the United States; but such procedure shall work no forfeiture on their part of the right to share in the annuities of said bands.”).

<sup>45</sup> 25 U.S.C. § 331 (repealed).

<sup>46</sup> See Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 9 (1995).

<sup>47</sup> *Id.*

<sup>48</sup> See COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.03[4] 180-181 (Nell Jessup Newton ed., 2012).

ancestry. Severe consequences continue to be suffered by those excluded from the tribal rolls.<sup>49</sup>

In the 1920s, federal law furthered the U.S. policy goal of diminishing the existence of American Indians by assimilating the Indigenous population into the general U.S. population. In 1924, the U.S. Congress passed the Indian Citizenship Act naturalizing all American Indians born in the United States.<sup>50</sup> With this federal law, American Indian children born in the United States are full U.S. citizens. For some, this Act has been viewed as an act of assimilation by the U.S. government to which Tribes have not consented.<sup>51</sup>

A decade later in the 1934 Indian Reorganization Act (IRA),<sup>52</sup> minimum blood quantum standards to determine tribal membership became embedded in Bureau of Indian Affairs boilerplate tribal constitutions.<sup>53</sup> BIA officials strongly pressured tribal leaders to adopt boilerplate constitutions including tribal enrollment criterion based upon blood quantum.<sup>54</sup> The adoption and amendment of tribal constitutions are subject to approval by the U.S. Secretary of the Interior.<sup>55</sup> The IRA itself contained a definition of American Indians based partially on a blood quantum standard. In the federal law, persons of Indian descent with membership status in federally-recognized Tribal Nations as of June 1, 1934 or descendants of such a member resident on an Indian reservation or "all other persons of one-half or more Indian blood" are considered legally American Indian.<sup>56</sup> Further, the Bureau of Indian Affairs issues "Certificates of Indian Blood" as a formal document detailing blood quantum and tribal affiliation.<sup>57</sup>

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<sup>49</sup> See Nicole J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 20 Hamline L. Rev. 97, 104-106 (2007).

<sup>50</sup> 8 U.S.C. § 1401(b) (1994).

<sup>51</sup> See Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 Harv. BlackLetter L.J. 107, 137-138 (1999). ("In short, it does not require consent to either individual or collective incorporation into the citizenry of the United States as a precondition to naturalization.").

<sup>52</sup> 25 U.S.C. § 461 et seq.

<sup>53</sup> See Kevin K. Washburn, *Felix Cohen, Anti-Semitism, and American Indian Law*, 33 Am. Indian L. Rev. 583, 592, 598 (2009). ("The irony here is striking. Even though Congress has amended federal laws to make those laws less paternalistic, paternalism nevertheless continues to be mandated by tribal constitutions.").

<sup>54</sup> See Gabriel S. Galanda and Ryan D. Dreveskracht, *Curing the Tribal Disenrollment Epidemic: In Search of a Remedy*, 57 Ariz. L. Rev. 383, 403 (2015).

<sup>55</sup> 25 U.S.C. § 476(a)(2).

<sup>56</sup> *Id.* at §479

<sup>57</sup> See *Genealogy*, U.S. DEPARTMENT OF THE INTERIOR INDIAN AFFAIRS, <http://www.bia.gov/FOIA/Genealogy/>. See e.g., *OMB Control #1076-0153 Bureau of Indian Affairs Certificate of Degree of Indian or Alaska Native Blood Instructions*, BUREAU OF

At present, American Indian children must apply for membership to be recognized as tribal citizens under the standards in tribal constitutions or through the BIA under federal regulations.<sup>58</sup> The result for American Indian children is automatic U.S. citizenship and the requirement of an application to obtain tribal citizenship and federal recognition as a legal American Indian. The U.S. Supreme Court has upheld the right of tribal governments to set their own membership requirements as part of the political status of Tribal Nations.<sup>59</sup> The legacy of blood quantum and the U.S. Department of the Interior process for approval of tribal constitutions continue to stand as barriers to reforming tribal enrollment standards.<sup>60</sup> Known as the Tribal Nation with the highest enrollment, the Navajo Nation bases its enrollment on the requirement of one-fourth degree of Indian blood.<sup>61</sup> The second largest population is the Cherokee Nation of Oklahoma which requires that a person seeking enrollment "must provide documents connecting them to an enrolled direct ancestor who is listed on the Dawes Roll<sup>62</sup> with a blood degree."<sup>63</sup> Further, the rates of intermarriage between American Indians and other races has led to dilution and decline in documented blood quantum rates for American Indian children born as a result. The grandchild of a full blood American Indian grandmother may only be listed as one-quarter blood if the grandmother married a non-Indian and the child's one-half blood parent also married a non-Indian.

Without legal status as an American Indian, those ineligible for tribal enrollment do not receive the tribal trust benefits guaranteed by the U.S.

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INDIAN AFFAIRS, <http://www.bia.gov/cs/groups/public/documents/text/idc-001805.pdf> (Expiration date July 31, 2011).

<sup>58</sup> See Tribal Government 25 C.F.R. Part 61-63 (1987) (Preparation of rolls of Indians and Enrollment Appeals).

<sup>59</sup> See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55 and 72 (1978).

<sup>60</sup> See Jason P. Hipp, *Rethinking Rewriting: Tribal Constitutional Amendment and Reform*, 4 Colum. J. Race & L. 73, 92 (2013) ("Nonetheless, common issues facing tribal reformers have been identified, including the role of existing tribal government officials in the reform process, the scale of reform, and the tendency for contentious issues - especially blood quantum and membership requirements-to derail reform projects.").

<sup>61</sup> See *How can I become an enrolled member of the Navajo Nation?*, NAVAJO NATION, <http://www.navajo-nsn.gov/contact.htm#roots>.

<sup>62</sup> See *About the Dawes Rolls*, OKLAHOMA HISTORICAL SOCIETY, <http://www.okhistory.org/research/dawes>. (last visited January 26, 2016) (Officially known as The Final Rolls of the Citizens and Freedmen of the Five Civilized Tribes in Indian Territory, the Dawes Rolls list individuals who chose to enroll and were approved for membership in the Five Civilized Tribes [Cherokee, Chickasaw, Choctaw, Creek, and Seminole]. Enrollment for the Dawes Rolls began in 1898 and ended in 1906).

<sup>63</sup> See *About Citizenship*, CHEROKEE NATION, available at, <http://www.cherokee.org/Services/TribalCitizenship.aspx>.

government.<sup>64</sup> These include access to the Indian Health Service (healthcare), tuition benefits at tribal educational facilities, tribal and federal educational scholarship opportunities, tribal voting rights, tribal treaty hunting and fishing rights, and many other rights and privileges associated with tribal membership.<sup>65</sup> The primary barrier to tribal enrollment is not meeting the required quantum of tribal blood.<sup>66</sup> One scholar, Dwanna L. Robertson, has "pointed out that of 4.7 million who identified as American Indian in the 2009 census, only 1.9 million are enrolled members of federally recognized Tribes and the numbers indicate there are 2.8 million who identify ethnically as American Indian but who are not citizens of federally recognized Tribes."<sup>67</sup> The consequences for mixed-heritage American Indian families are the loss of federal and tribal recognition for their children through a lack of documented Indian blood quantum, although the children may be raised in the tribal community and/or be active participants in their tribal culture.

## II. HEALTH AND WELFARE FOR AMERICAN INDIAN FAMILIES

As one of the smallest populations in present-day United States, American Indians have often been referred to as the invisible minority. The U.S. Commission on Civil Rights has documented the socio-economic conditions of American Indians in the July 2003 Report, "A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country."<sup>68</sup> In this report, the dire consequences for Indian families and individuals was linked to the failure of federal agencies to provide services guaranteed through treaty agreements and the trust relationship developed between the United States and Tribal Nations.

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<sup>64</sup> See Suzianne D. Painter-Thorne, *A Strange Kind of Identity Theft: How Competing Definitions of "Indian" May Deny Individual Identity*, 14 Conn. Pub. Int. L.J. 29, 35-36 (2014).

<sup>65</sup> *Id.*

<sup>66</sup> See Nicholas J. Laughlin, *Identity Crisis: An Examination of Federal Infringement on Tribal Autonomy to Determine Membership*, 30 HAMLIN L.J. 97, 112 ("Additionally, this method [blood quantum standard] precludes individuals with legitimate cultural ties from membership simply because they cannot meet the blood quantum threshold. As one commentator has noted, this policy directly conflicts with the goal of gaining culturally affiliated members, and the result is a diminishing number of Indians eligible for membership.").

<sup>67</sup> See Carol Berry, *Dwanna L. Robertson: Indian Identity Still Controversial*, INDIAN COUNTRY TODAY MEDIA NETWORK.COM (Aug. 12, 2012), <http://indiancountrytodaymedianetwork.com/2012/08/21/dwanna-l-robertson-indian-identity-still-controversial-130176>.

<sup>68</sup> U.S. COMM'N ON CIV. RIGHTS, *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* 7 (July 2003).

The socioeconomic condition of the Native American population in the United States reveals a dire need for increased national attention. Native Americans rank at or near the bottom of nearly every social, health, and economic indicator. For example, the national poverty rate in the United States for the period between 1999 and 2001 was 11.6 percent. For Native Americans nationally, the average annual poverty rate was 24.5 percent. That is, nearly a quarter of Native Americans—more than twice the national average—live in poverty. Nearly one in three (31.2 percent) of those residing on reservations live in poverty. The unemployment rate in the Native American population nationwide is 12.4 percent, more than twice the general unemployment rate.<sup>69</sup>

In this section, the consequences of these quality of life statistics will be examined. These statistics are indicative of the health and welfare of many Indian families.

**a. Healthcare and Poverty Issues for American Indian Children**

Significant quality of life challenges are experienced by American Indian families in the United States. In 2002, an estimated 40% of American Indian children lived in households below the U.S. poverty level in comparison to 20% of all other children in the country.<sup>70</sup> According to Dr. Vincent Biggs on behalf of the American Academy of Pediatrics, “[t]he serious health problems associated with poverty and rural isolation are compounded in the Native community by limited access to pediatric health care.” Despite significant improvements in Indian health care during the last quarter of the twentieth century, the American Academy of Pediatrics presented the following statistics to the United States Senate Committee on Indian Affairs regarding health statistics for American Indian and Alaska Native (AI/AN) children at an oversight hearing held on August 1, 2002:

- AI/AN infant mortality rates are 22% higher than the general population, and 60% higher than whites;

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<sup>69</sup> *Id.* at 8.

<sup>70</sup> *Problems Facing Native American Youths: Oversight Hearing on Problems Facing Native American Youths Before the S. Comm. on Indian Affairs*, 107th Cong. 38-43 S. Hrg. 107-758 (2002) (statement of Vincent M. Biggs, Comm. on Native Am. Child Health Member, Am. Acad. of Pediatrics).

- The rate of Sudden Infant Death Syndrome (SIDS) among AI/AN children is more than twice that of all United States races, despite a growing understanding of SIDS and how to prevent it;
- “The AI/AN youth suicide rate is twice as great among 14-24 year olds and three times as great among 5-14 year olds;
- The AI/AN youth death rate from alcoholism among 15-24 year olds is more than ten times as great as the rate for the same-aged population of the United States as a whole; and
- Overall, AI/AN children and youth are more than twice as likely to die in first four years of life than the general population, and remain twice as likely to die through the age of 24<sup>71</sup>
- “Death rates for AI/AN children as a result of pedestrian-motor vehicle collisions are nearly four times greater than the rate for all United States races combined;
- AI/AN children are three times more likely to die as a result of a motor vehicle occupant injuries than white or black children;
- Fire and burn injuries cause the death of nearly three times more AI/AN children and youth than among the white population; and;
- Nearly twice as many AI/AN children drown than children of other races<sup>72</sup>
- “IHS data indicate that the prevalence of diagnosed diabetes (all types) among youth 15-19 has increased 54% since 1996<sup>73</sup>

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<sup>71</sup> *Id.* at 40.

<sup>72</sup> *Id.* at 41.

Among the many factors contributing to these startling statistics according to the report are “poverty, alcohol abuse, substandard housing, limited access to emergency care, and rural residences.”<sup>74</sup> But for some improvements in Indian health care in the last quarter century, these numbers would be even more shocking. As with the educational system, some Tribes have led the way to new health care standards and mechanisms by operating their own clinics or hospitals through contracts with the federal government, and sometimes supplementing federal resources with available tribal funds.

**b. The Impact of the U.S. Juvenile Justice System on Indian Families**

Another important factor impacting Indigenous Indian children in the United States is the juvenile justice system. In the late 1800s and early 1900s, the U.S. legal system generally accepted the theory of the social sciences that the sociological and psychological problems associated with child abuse, child neglect, child abandonment, children deprived of the necessities of life, and behavioral problems in juveniles could be treated by social science professionals instead of punished by legal professionals. Thus, there developed a system standardizing - at least at the local state levels - accepted parental behaviors, necessary financial resource levels, and acceptable child rearing practices.<sup>75</sup> Coupled with these standards grew a legal system designed to determine when these standards were not met, to place children outside their families for the own protection when such placements were “in the child’s best interest,”<sup>76</sup> to provide “treatment” to parents who did not meet the accepted parenting standards as a precondition to reunification with their children, and, ultimately, for the termination of the parental rights of parents who did not successfully complete their treatment plan and the corresponding adoption of their children by strangers.<sup>77</sup> For White families,

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<sup>73</sup> *Id.* at 42.

<sup>74</sup> *Id.* at 41.

<sup>75</sup> See Terrence P. Thornberry, *Delinquency Prevention*, JUV. JUSTICE, May 1998 (“Social support for parents and parent training strategies can help prevent maltreatment. Providing social services to maltreated children may also decrease the risk of later delinquency.”).

<sup>76</sup> B.J. JONES, MARK TILDEN & KELLY GAINES-STONER, *THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN* 12 (2008) (explaining the theory of “best interest of the child” as created from the non-native social work community).

<sup>77</sup> See Michael J. Dale, *State Court Jurisdiction under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 365-370 (1992) (describing the Anglo standard of the best interest of the child to place children in adoptive homes with parents considered fit and to protect children in those adoptive homes from their natural parents as one example).

this new system constituted a significant improvement over the prior system where the result of serious family problems generally resulted in either no action or the parent(s) went to jail and the surviving children went to orphanages.

For Indigenous people, however, this new system constituted a significant threat.<sup>78</sup> As Tribes lost their ability to resist the military force of the United States, the federal government shifted from imposing its will through military action to imposing its will through administrative, police, and legal action. The standards adopted by the legal systems to govern child-rearing practices were based on non-Indian culture, experience, and family values and were in large part antithetical to Indian culture, experience, and family values.

Even in recent years, although some progress has been made in changing this society's narrow-minded view of Indian people, Indian children have been systematically separated from their families and tribal communities. Through largely unwritten policies that have given automatic preference to middle class, non-Indian homes and institutions in adoption, foster care, and child custody proceedings, state courts and social service agencies have severed the ties of many Indian children from their families, clans and tribal communities.<sup>79</sup>

Indian concepts of extended family were ignored or rejected in favor of the nuclear family concept considered "correct" by mainstream White society.

In some Tribes, those who would be considered distant cousins in White society are considered brothers and sisters, and the cousin of the biological grandparent is considered as close a relative as the biological grandparents. For example, Painter-Thorne states, "[in the Choctaw family, the mother's brother was the source of family authority, and it was he who was generally responsible for the family's welfare. For instance, the mother's brother was the primary influence in marriage arrangements and in educating

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<sup>78</sup> See Jon K. Matsuoka, Paula T. Morelli, and Hamilton McCubbin, *Indigenizing Research for Culturally Relevant Social Work Practice*, in *DECOLONIZING SOCIAL WORK*, 272 (describing the attitudinal differences between Euro-American migrants to the U.S. based on economic motivations as very different from the experience of Indigenous populations "who were involuntarily marginalized and subordinated in their ancestral homelands").

<sup>79</sup> See James P. Abourezk, *Foreword*, in *INDIAN CHILD WELFARE ACT OF 1978: A LAW FOR OUR CHILDREN* (The American Indian Lawyer Training Program, Inc. 1979).



his sister's children."<sup>80</sup> In some Tribes, the disciplinary agent for children was not the parents, but an uncle or aunt or grandparent.

Leaving your child for extended periods with these persons who were "strangers" in the eyes of White social workers, although close relatives within Indian cultural norms, would often result in charges of child abandonment or endangerment in state administrative and court systems. Further, the crushing poverty imposed upon Tribes and reservations in order to guarantee the Tribe's dependency upon the United States for the basic necessities of life<sup>81</sup> also guaranteed that almost every Indian child would be considered as living in a deprived household unable to satisfy their basic needs – and these children thus needed to be saved by the conscientious social worker.<sup>82</sup>

Once this system went into full force either by direct application to Indian families who lived off the reservations, by federal law granting states authority to impose these systems within some reservations, or by adoption of these tendencies and policies by the federal agencies which dominated life in the Indian country, the large majority of those children who were not sent away to boarding schools were usually caught up in either a state or Bureau of Indian Affairs social services system and placed outside their family. To many state social workers and private agencies, Indian children were considered deprived, neglected, and abused by definition. As to those who made their living supplying adoptive children to childless couples desiring to adopt, Indian children were more desirable than some others,<sup>83</sup> and more available than White children.<sup>84</sup> As stated by Byler,

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<sup>80</sup> Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo-American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 336 (2009).

<sup>81</sup> See JONES, ET. AL., *supra* note 76 at 3. ("Compounding the removal problem, in many states Native American children were taken from their families without a modicum of due process. Many of the children were removed from families dependent on the federal and state governments for financial support. Congress documented instances of state welfare agencies pressuring Native American families into signing away custody of their children to the state under threat of the termination of welfare benefits. State welfare departments often controlled the everyday lives of Native American people, and endearing oneself to non-Native American social workers was critical to financial survival.").

<sup>82</sup> *Id.* at 364.

<sup>83</sup> See Nancy E. Riley & Krista E. Van Vleet, MAKING FAMILIES THROUGH ADOPTION 45-46 (2012) ("Unlike religion, race could not as easily be hidden from outside parties, and given the interest in forming adoptive families that looked like biological families, white families did not adopt black children.").

<sup>84</sup> *Id.* at 81 ("In other words, if adoption were truly color-blind, if people could not choose the racial or gendered category to which their child belongs, then a black couple would be just as likely to adopt a white infant as a white couple. The high demand for white infants by white couples and the economics of the adoption process make the generalized adoption of white

I think one of the primary reasons for this extraordinary high rate of placing Indian children with non-Indian families rather than in Indian homes is that the standards are based upon middle-class values; the amount of floor space available in the home, plumbing, income levels. Most of the Indian families cannot meet these standards and the only people that can meet them are non-Indians.<sup>85</sup>

Not surprisingly, large numbers of Indian children were swallowed up by this system. Through the 1950s to the 1970s, thousands upon thousands of Indian children were torn from their families by social services personnel and missionaries, generally without the consent of tribal leaders, the Indian community, or the families concerned. Most of these children were placed with non-Indian adoptive parents or foster homes. During this period, the federal government, through the Indian Adoption Project of the Bureau of Indian Affairs, also provided funding for missionaries and social workers to separate Indian children from their families and provide them with non-Indian adoptive parents.<sup>86</sup> Studies have shown that between 25% and 35% of all Indian children were removed from their homes and placed in orphanages or White foster homes, or were adopted into White families according to the Association of American Indians studies conducted in 1969 and 1974.<sup>87</sup> It should be noted that while the Child Welfare League of America collaborated with the Bureau of Indian Affairs during approximately ten years of the Indian Adoption Project, it formally expressed its sincere regret for doing so to the Indian community in 2001<sup>88</sup>.

**c. A Remedial Measure: The Indian Child Welfare Act of 1978**

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infants by black, Latino or Asian families simply a thought experiment, as Hawley Fogg-Davis (2002) points out in *The Ethics of Transracial Adoption*.”)

<sup>85</sup> *Problems That American Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction. Hearing Before the Sub Comm. On Indian Affairs of the S. Comm on Interior and Insular Affairs, 99<sup>th</sup> Cong. (1974)* (Statement of William Byler, Executive Director, Association of American Indian Affairs), <http://liftingtheveil.org/byler.htm>.

<sup>86</sup> See, Angelique Townsend EagleWoman & Stacy Leeds, *MASTERING AMERICAN INDIAN LAW* 95-96 (2013).

<sup>87</sup> *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32-33 (1989).

<sup>88</sup> *Apology of Shay Bilchik, Executive Director of the Child Welfare League of America*, Keynote Speech delivered at National Indian Child Welfare Association Conference, 2001, available at: <https://tlpi.wordpress.com/2011/08/11/apology-from-child-welfare-league-of-america/>.

During the 1970s, tribal leaders, Indian communities, and Indian activists demanded change, and by 1978 had convinced the United States Congress that change was warranted. The "Background" portion of the legislative history of the congressional bill which would become the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq., ("ICWA") states:

The wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.

Surveys of states with large Indian populations, as you point out, conducted by the Association of American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25-35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some states the problem is getting worse: in 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 Indians 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's 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. Just as Indian children are exposed to these great hazardous, their parents are too.

The federal boarding school and dormitory programs also contribute to the destruction of Indian family and

community life. The Bureau of Indian Affairs (BIA), in its school census for 1971, indicates that 34,538 children live in its 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 at boarding schools. A number of Indian children are also institutionalized in mission schools, training schools, etc.

In addition to the trauma of separation from their families, most Indian children in placement or in institutions have to cope with the problems of adjusting to a social and cultural environment much different than their own. In 16 states surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in Non-Indian homes. In Minnesota today, according to state figures, more than 90 percent of non-related adoptions of Indian children are made by Non-Indian couples. Few states keep as careful or complete child welfare statistics as Minnesota does, but informed estimates by welfare officials elsewhere suggest that this rate is the norm. In most federal and mission boarding schools, a majority of the personnel is Non-Indian.

It is clear then that the Indian child welfare crisis is of massive proportions and that Indian families face vastly greater risks of involuntary separation than are typical of our society as a whole.<sup>89</sup>

And the House Committee's conclusion was that:

[T]he committee has noted a growing crisis with respect to the breakup of Indian families and the placement of Indian children, at an alarming rate, with non-Indian foster or adoptive homes. Contributing to this problem has been the failure of state officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe

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<sup>89</sup> H.R. REP. NO. 95-1386, at 9 (1978).

in preserving and protecting the Indian family as the wellspring of its own future.

While the committee does not feel that it is necessary or desirable to oust the states of their traditional jurisdiction over Indian children falling within their geographic limits, it does feel the need to establish minimum federal standards and procedural safeguards in state Indian child custody proceedings designed to protect the rights of the child as an Indian, the Indian family and the Indian tribe.<sup>90</sup>

The Indian Child Welfare Act (“ICWA”), then, was intended as a congressional fix for what it perceived as abusive state practice and procedure with respect to Indian children, and to provide federal standards that would determine whether Indian children could be subjected to foster care or adoptive placement under state law. While the ICWA provides support for tribal child welfare systems, and authorizes tribal monitoring and decision making with respect to Indian child custody proceedings in state court, most of the standards and procedural safeguards imposed apply only to state courts, leaving each Tribe free to set such internal standards as it deems appropriate. Congress declared that the future policy of the United States would be 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.<sup>91</sup>

In the definitional section of the ICWA, Congress provided that the Act would apply to “child custody proceedings” which included most legal processes by which an Indian child could be subjected to non-voluntary foster care or adoptive placement, although the definition excluded placements made due to conduct of the child which would constitute a crime if committed by an adult, and placements made in actions to dissolve a marriage where custody of the Indian child would be vested in one of the

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<sup>90</sup> H.R. NO. REP. 95-1386, at 19 (1978).

<sup>91</sup> INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1902.

parents.<sup>92</sup> The definitions also gave formal recognition to the extended family concept which is prevalent in many tribal social structures, and the role of Indian custodians of Indian children under tribal law, practice, and social traditions.

As summarized by legal scholar Melissa Murray, the ICWA formalized the tribal caregiving network through federal law placement preferences.

At its core, the ICWA reflects acceptance of a cultural tradition in which networked caregiving, rather than autonomous parental caregiving, is the norm. By giving tribal courts jurisdiction in proceedings involving Indian children domiciled on the reservation, and mandating adoptive placements within the tribal caregiving network for those children not under tribal jurisdiction, the ICWA privileges communitarian caregiving norms that pervade many tribal cultures<sup>93</sup>

In the first operative provision of the ICWA, Congress confirmed exclusive jurisdiction in the tribal courts in cases where the Indian child was domiciled within the territory of the Tribe, unless there was a federal law which had expressly authorized the exercise of state authority within that territory. The operation of Public Law 280 has been interpreted to allow state authority within California tribal communities and as a result the state and impacted Tribes share concurrent authority.<sup>94</sup> Because Public Law 280 delegated federal criminal authority to state governments, Tribes have contested this application of the federal delegation into the child placement context.<sup>95</sup>

The exclusive tribal jurisdiction provision was upheld by the United States Supreme Court in the case of *Mississippi Band of Choctaw Indians v. Holyfield*,<sup>96</sup> where the Court confirmed exclusive tribal jurisdiction over

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<sup>92</sup> *Id.* at § 1903.

<sup>93</sup> Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 422 (2008).

<sup>94</sup> 18 U.S.C. § 1162 and 28 U.S.C. § 1360 are the Public Law 280 statutes passed in 1953 as part of the Termination era of U.S. Indian policy.

<sup>95</sup> *See Doe v. Mann*, 415 F.3d 1038 (9th Cir. 2005)(holding that Public Law 280 should be read into 25 U.S.C. § 1911 to allow state concurrent jurisdiction over a child dependency action involving an Indian child). *See also*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.04 [3][b][iii] n.107, at 547(Nell Jessup Newton, ed., 2012)(reviewing the holding by the Ninth Circuit in *Doe v. Mann*) ("The Ninth Circuit's reading of ICWA is questionable.").

<sup>96</sup> *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

Indian children whose parents were domiciled on the reservation even though they had physically left the reservation for the birth of their child.

A child who is made a ward of a tribal court would continue to be subject to that Tribe's exclusive jurisdiction regardless of any change in domicile.<sup>97</sup> This section also provided for transfer of Indian child custody proceedings from state courts to tribal courts. In most cases this was to be done at the request of the child's Tribe, parent, or Indian custodian.<sup>98</sup> Further, the Indian child's Tribe and Indian custodian now have the right to intervene in any Indian child custody proceedings in state courts.<sup>99</sup> The ICWA further required that the states, the federal government, and all Indian Tribes give full faith and credit to "the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity."<sup>100</sup>

The second operative provision of the ICWA establishes minimal procedures applicable to state child custody proceedings involving Indian children.<sup>101</sup> Such basic human rights as notice of the proceedings, time to adequately prepare for the proceedings, an opportunity to be heard, and the right to professional counsel were finally confirmed to Indian parents, custodians, and Tribes by domestic law. This section of the ICWA also authorizes the parties to have access to all documents and reports, which the judge will use in deciding the case. It also requires the party seeking the placement or termination of parental rights to make active efforts to preserve the family, and sets evidentiary standards and burdens of proof which are to be applicable in such proceedings involving Indian children.

The third operative provision of the ICWA sets standards to govern the validity of "voluntary" placements of Indian children through non-Indian placement services (whether state or private placement agencies are involved) and sets the minimum standards for the withdrawal of consent in voluntary placements.<sup>102</sup>

Other provisions of the ICWA: (1) authorize petitions to invalidate proceedings conducted in violation of the Act, (2) provide a list of placement preferences in state cases, (3) authorize the Tribes to change those preferences with respect to their own children by tribal law, and (4) provide for return of custody to the parent(s) or Indian custodians upon the vacation of improper decrees and in certain other circumstances.<sup>103</sup> Additional

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<sup>97</sup> Indian Child Welfare Act, 25 U.S.C. § 1911(a).

<sup>98</sup> *Id.* at § 1911 (b).

<sup>99</sup> *Id.* at § 1911 (c).

<sup>100</sup> *Id.* at § 1911 (d).

<sup>101</sup> *Id.* at § 1912.

<sup>102</sup> *Id.* at § 1913.

<sup>103</sup> *See Id.* at §§ 1914, 1915, 1916

provisions of the Act were intended to protect the link between the child and the child's Tribe. Section 107 of the Act required state courts making adoptive placements to allow Indian adults who were adopted as children to have access to the records necessary to confirm their eligibility for tribal enrollment while Section 108 provided a mechanism by which a Tribe whose territory had been subjected to state court jurisdiction could petition the Secretary of the Interior to reassume jurisdiction over child custody proceedings, and thereafter exercise that jurisdiction to the exclusion of state law.<sup>104</sup> Finally, the ICWA authorizes tribal-state agreements concerning children's cases, grants and programs to support the Tribes and child welfare systems in implementing the ICWA, directs the Secretary of the Interior to report on the feasibility of providing Indian children with schools located near their homes, and addresses other miscellaneous matters relating to Indian child custody proceedings.

**d. Implementation of the Indian Child Welfare Act:  
Supporting American Indian Families**

Initial reactions to the ICWA were mixed. While most Tribes embraced the opportunity to take greater control over the future of their children, some Tribes hesitated to do so from lack of self-confidence, money, or other resources.<sup>105</sup> State court judges also reacted in various ways. Some welcomed the Act as confirmation of their own personal conclusions derived from years of working in areas with large Indian populations. Others saw the Act as a challenge to their jurisdiction, their integrity, or the "rights of non-Indians." The majority, perhaps, simply viewed the ICWA as another federal law that had to be accommodated within the context of doing their job. It was not at all unusual to see all these positions being expressed within the walls of one state courthouse. Thus, some states resisted the implementation of the ICWA and attempted to create judicial exceptions to limit its application. Some jurisdictions simply applied the ICWA more or less rigorously to the extent it was brought to the judges' attention and demanded by the parties. Others embraced the ICWA and its policies even to the extent of adopting supplemental state legislation intended to provide additional safeguards for

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<sup>104</sup> See *Id.* at §§ 1917, 1918.

<sup>105</sup> See Andrea Wilkins, *State-Tribal Cooperation and the Indian Child Welfare Act* (2008), <https://www.ncsl.org/print/statetribe/ICWABrief08.pdf> ("Tribes do not have equal access to this [federal Title IV E] funding stream...the funding allocation does not put the tribe on equal footing with the states, and can serve as a barrier to providing effective services to children under a tribe's jurisdiction--despite the fact that the program was intended to serve all eligible children. Given the fact that one impediment to the successful implementation of ICWA is the lack of tribal resources and tribal institutional capacity, the nature of this funding allocation--and the barriers it produces--pose a significant problem.").



Indian children and assure complete compliance and support by the various state agencies which could be involved in such cases.

Today, most Tribes have embraced the ICWA. There is a National Indian Child Welfare Association, and other national support groups and professional associations that provide training and support for tribal children's professionals, advocates, and the victims of prior state and federal placements.<sup>106</sup> While data from state courts is often unavailable or untrustworthy as most states do not maintain adequate records of which children's cases fall under the ICWA, anecdotal evidence from attorneys and Indian children's advocates working in the field indicate that progress is being made in eliminating the worst forms of discriminatory Indian child placements in state court systems.<sup>107</sup> It is also generally perceived that federal funding in support of tribal child welfare programs remains woefully inadequate to the need,<sup>108</sup> and state and federal taxation within the territorial area of the Tribes prevents the Tribes from being able to complement federal program monies with tribal tax monies. Nevertheless, the Indian Child Welfare Programs conducted by the Tribes have made a significant impact in strengthening Indian family life and protecting the relationship of Indian children with their extended families and their Tribes.

Recently, however, familiar forces are attempting to diminish the protections Indian children, Indian families, and Indian Tribes were receiving under the ICWA from those who would traffic in Indian children. In *Adoptive Couple v. Baby Girl* the Supreme Court of the United States, over the strong dissent of Justice Sotomayor, held in a formalistic opinion that an unwed Indian biological father could not invoke the protections of the ICWA as a noncustodial parent who had never had custody, and had not paid child support to the mother, who was intent on adopting their child through a private adoption agency.<sup>109</sup> The opinion also held that the adoptive placement preferences in the ICWA applied only where more than one prospective adoptive party had petitioned to adopt the child. Reading the ICWA in this way is especially problematic in that it places every Indian father at risk of

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<sup>106</sup> See generally NATIONAL INDIAN CHILD WELFARE ASSOCIATION, <http://www.nicwa.org>.

<sup>107</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 33-51 (2005).

<sup>108</sup> See *Testimony of the National Congress of American Indians*, U.S. DEPT. OF HHS 2013 ANNUAL BUDGET AND POLICY CONSULTATION 5 (March 8 2013), [http://www.ncai.org/attachments/Testimonial\\_UUvZAHwyPsdSeAYFzZTTKQCnMKGetjihOaDrZGSiuYGqlogSyd\\_HHS\\_Budget\\_Testimony%20-%20final.pdf](http://www.ncai.org/attachments/Testimonial_UUvZAHwyPsdSeAYFzZTTKQCnMKGetjihOaDrZGSiuYGqlogSyd_HHS_Budget_Testimony%20-%20final.pdf) (last visited January 27, 2016) ("Upon passage of the Indian Child Welfare Act (ICWA) in 1978, Congress estimated that \$35 million was needed to fully fund tribal programs under the Act. Despite this historic estimate, the program has never been funded at more than \$17 million in any given year.")

<sup>109</sup> *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 186 L.Ed.2d 729 (2013).

losing his child if the mother cuts ties with him prior to the birth and puts his child up for adoption without his knowledge.

Similar actions are being litigated around the country by private persons, groups, and agencies attempting to diminish the protections of the ICWA and its state counterparts piecemeal.<sup>110</sup> A counterweight to these actions may be the commitment of the United States to implement the terms of the United Nations Declaration on the Rights of Indigenous Peoples that contain several significant provisions protecting the rights of Indigenous children and their communities, including the right to maintain their children's ties to their communities.<sup>111</sup> It remains to be determined how the pending litigation challenging significant sections of the ICWA, and administrative attempts to implement the Declaration on the Rights of Indigenous Peoples will impact the legal rights of Indian children, families, and Tribes within the United States.

### III. THE TRIBAL CONTEMPORARY EXPERIENCE FOR NATIVE CHILDREN

Not all Indian children are experiencing the positive effects of these programs. The breakdown of the American Indian family as a result of the government boarding school era, the drug and alcohol abuse which have plagued boarding school victims, child placement, and adoption survivors,<sup>112</sup> and the poverty and deprivation which still exists within most tribal territories continue to endanger the lives of many Indian children today. In 2003, studies indicated that suicide rates for American Indian youth were three times greater than the national average, Indian children between the ages of five and fourteen had alcoholism death rates ten times greater than the national average, and 47% of Indian children between the ages of twelve to seventeen reported using illicit drugs.<sup>113</sup>

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<sup>110</sup> National Council For Adoption, et al. v. Jewell, Case 1:15-cv-00675-GBL-MSN, Eastern District of Virginia, Alexandria Division, filed 08/20/2015; A.D., et al. v. Washburn, et al., Case No. 2:15-cv-01259-DKD, District of Arizona, filed 07/06/2015; Doe v. Jesson, Case 0:15-cv-02639, District of Minnesota, filed 06/03/2015 (The Minnesota Indian Family Preservation Act); Doe v. Pruitt, Case 4:15-cv-00471-JED-FHM, Northern District of Oklahoma, filed 08.18.2015 (The Oklahoma Indian Child Welfare Act).

<sup>111</sup> See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

<sup>112</sup> Delores Subia Bigfoot, HISTORY OF VICTIMIZATION IN NATIVE COMMUNITIES 4-7 (Delores Subia BigFoot ed., 2000).

<sup>113</sup> Ben Nighthorse Campbell, *Campbell: Working Together for Healthy Youth, Healthy Tribes*, Indian Country Today Media Network (Sept. 29, 2003), <http://indiancountrytodaymedianetwork.com/2003/09/29/campbell-working-together-healthy-youth-healthy-tribes-89362>.

The American Indian population has recovered in recent decades from its lowest point of about 250,000 in the years between 1890 and 1900.<sup>114</sup> It was estimated that by 1980 the American Indian population had reached 1.37 million and was on the increase.<sup>115</sup> In 2002, the population of American Indians and Alaskan Natives under the age of fifteen comprised one-third of the total tribal population; the tribal birth rate was 63% higher than for all other races in the United States, and there were almost twice as many Indian children aged five to fourteen years old than White children in the United States as a percentage of the relevant population.<sup>116</sup>

As the population of American Indian children rises and educational facilities and social programs are located within Indian communities, the traditional beliefs on the raising of children are coming full circle. In a 1985 study conducted by surveying American Indian preschool teachers, findings showed that “contemporary American Indian preschool children are being guided by adults who, knowingly or unknowingly, still subscribe to their ancestral views.”<sup>117</sup> These views were identified as respect for elders, showing love for the children, blending firm gentle discipline and patience guided by understanding to protect development during pivotal childhood years. By incorporating tribal values into the method and substance of lessons for Indian children, tribal culture is being strengthened for the next generations. “We know through academic studies that Indian children flourish when their classroom experiences are built on our tradition, language and our culture,” stated National Congress of American Indians President Joe Garcia in his 2006 State of the Indian Nations address.<sup>118</sup>

Vickie Downey, an elder of the Tewa Tesuque Pueblo, explains that,

[I]t’s very difficult to help our children. It’s very difficult because it’s like two cultures clashing and there’s no connection between the two. The best we can do is instill in the children the pride of who they are and what they have and where they come from. We give them that; we continue through legends, through love, and through food, and just being an example by the way we live.<sup>119</sup>

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<sup>114</sup> THORNTON, *supra* note 3 at 43.

<sup>115</sup> *Id.* at 159.

<sup>116</sup> S. Hrg. 107-758, *supra* note 71 at 9.

<sup>117</sup> Harriet K. Light & Ruth E. Martin, *Guidance of American Indian Children: Their Heritage and Some Contemporary Views*, 25 J. Am. Indian Educ., 45 (1985).

<sup>118</sup> Jerry Reynolds, *Garcia Delivers the State of Indian Nations Address*, Indian Country Today Media Network, (Feb. 15, 2006), <http://indiancountrytodaymedianetwork.com/2006/02/15/garcia-delivers-state-indian-nations-address-105346>.

<sup>119</sup> WALL & ARDEN, *supra* note 1 at 19.

In celebrating tribal culture, Indian adults serve as role models for children. One of the most well-known celebrations of tribal culture is the pow wow. The pow wow is a gathering open to dancers and spectators often sponsored by a group to celebrate an event. Children old enough to walk, toddlers and children up to the age of six or seven are encouraged to dance during special songs in the “tiny tots” category.<sup>120</sup> As tiny tots, Indian children begin to learn dance steps and become part of the pow wow circle.

As they grow and become more proficient at dancing, children between the ages of six or seven and twelve are able to compete in the various styles of pow wow dancing. The categories for males are: southern straight dancer, northern traditional dancer, grass dancer, and fancy dancer. The female categories are: southern buckskin dancer, southern cloth dancer, northern traditional dancer, jingle dress dance, and fancy shawl style. After the age of twelve, the dancer graduates to the teen (or junior) category, and will enter the adult categories as they grow older.

Healthy activities designed for Indian children and teens are sponsored by tribal community initiatives all across Indian country. For example, the Cheyenne River Sioux Tribe in 2004 dedicated a new youth activity center named, The Main.<sup>121</sup> “On a daily basis up to 75 youths will use The Main, and there are 350 students in high school, and a middle school adds more students that could potentially take advantage of the new center.”<sup>122</sup> Native youth are also taking part in competitions ranging from traditional sports to the most contemporary. As Matias reported, “[s]kateboarding has not become just a sport for American Indian youth to channel their energy, but a canvas for Native artists to create breathtaking works on the backs of boards.”<sup>123</sup>

As Tribal Nations are rebuilding and reclaiming balance and harmony, the lives of American Indian children are being positively impacted. With the advent of healthier tribal economies, tribal funding for education and community centers are improving the lives of American Indian children. One of the major economic developments in the last few decades

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<sup>120</sup> See Patti Jo King, *Life on the Powwow Highway: A Family Affair*, Indian Country Today Media Network, (Mar. 24, 2009), <http://indiancountrytodaymedianetwork.com/2009/03/24/life-powwow-highway-family-affair-84433>.

<sup>121</sup> David Melmer, *Youth Center Stimulates Community*, Indian Country Today Media Network, (Nov. 17, 2004), <http://indiancountrytodaymedianetwork.com/2004/11/17/youth-center-stimulates-community-94223>.

<sup>122</sup> *Id.*

<sup>123</sup> Cliff Matias, *Skate Jam Promotes Healthy Message*, Indian Country Today Media Network, (May 19, 2008), <http://indiancountrytodaymedianetwork.com/2008/05/19/skate-jam-promotes-healthy-message-92857>.

has been the growth of the American Indian gaming industry and the reinvestment of tribal profits into services and educational institutions serving tribal children, thereby “helping provide important services necessary for American Indian youth to succeed.”<sup>124</sup>

American Indian traditions honor children as sacred, important, and the future of all Tribal Nations. As the great leader, Sitting Bull said, “Let us put our minds together to see what we can build for our children.”<sup>125</sup> By creating tribal centered pre-schools, early education programs, tribal schools and tribal colleges, American Indian youth are being nurtured in tribal environments to continue on as strong and proud indigenous people. While obstacles and challenges exist for many American Indian children, tribal communities are prioritizing youth activities, the teaching of native languages, and instilling a sense of belonging in the tribal circle for the next generations. American Indian children are thriving, enjoying being part of the tribal circle, and are being recognized as the hope and future of all Tribal Nations.

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<sup>124</sup> Thaddieus W. Connor & William A. Taggart, *The Impact of Indian Gaming on Indian Education in New Mexico*, 20 *INDIGENOUS POL’Y J.* 1, 14 (2009).

<sup>125</sup> Sitting Bull College, *Vision Statement*, <http://sittingbull.edu/sitting-bull-college/community/vision-mission/>.