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Do We Have It Right This Time? An Analysis of the Accomplishments and Shortcomings of Washington's Indian Child Welfare Act

Karen Gray Young*

I. INTRODUCTION

Jessie Scheibner's eyes cloud with tears and her voice trembles as she talks about the day, almost 70 years ago, when a stranger's car pulled up to her parents' home on the Port Gamble S'Klallam Reservation and took her and her two sisters away.

The memories of that car ride when she was three and the years spent in one foster home after another are hazy. Foster care was difficult enough, but Scheibner, now 72, clearly recalls being ashamed of her dark hair, brown skin, and Indian American roots as she bounced from home to home off the reservation.¹

Governmental removal of Indian² children from their families has had devastating results for native tribes across the nation. Washington State is no exception. The federal Indian Child Welfare Act (ICWA) was passed in 1978 as a mechanism to prevent this long-standing practice, and the success

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¹ Jennifer Sullivan, *Tribe Takes Control of Child Welfare From State*, SEATTLE TIMES, Mar. 28, 2012, http://seattletimes.com/html/localnews/2017861071_portgamble29m.html.

² This article will utilize the term "Indian" when referring to Native Americans and first-nation people because this is the specific legal term utilized in both the ICWA and WICWA. See Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 (1993); WASH. REV. CODE § 13.38 (2011).

(or failure) of the ICWA has been evaluated and discussed on a national level since coming into effect.³ However, it is at the state level where the success of the ICWA can be most directly evaluated and, conversely, its failure most concretely demonstrated.

In 1993, Kim Laree Schnuelle addressed the application and implications of the ICWA on Washington's child removal policies and procedures in her article titled "When the Bough Breaks: Federal and Washington State Indian Child Welfare Law and Its Application."⁴ Schnuelle argued, "both the federal [ICWA] and the Washington [ICWA] law suffer from incomplete, vague language and serious problems of noncompliance in the field."⁵ In the end, she concluded "the Washington State Indian Child Welfare Manual [the most current guidance on the ICWA at the time] has attempted to clarify the law in this area, but more is needed to enforce compliance and to fully protect Indian children."⁶

In May 2011, in response to similar demands for greater ICWA compliance from scholars and Washington child welfare advocates, the Washington legislature adopted the provisions of the ICWA as state law by passing the Washington Indian Child Welfare Act (WICWA).⁷ Through passage of this act, the legislature attempted to create better understanding about, and adherence to, the federal ICWA.⁸ Whether the WICWA will actually generate such compliance and address Schnuelle's call for clarification and improvement is the central question of this article.

The WICWA is generally intended to do the following:

³ Indian Child Welfare Act (ICWA), 25 U.S.C. § 1901 (1993); *Legislative History of the Indian Child Welfare Act of 1978*, NATIVE AM. RIGHTS FUND, <http://www.narf.org/icwa/federal/lh.htm> (last visited Feb. 4, 2013).

⁴ Kim Larree Schnuelle, *When the Bough Breaks: Federal and Washington State Indian Child Welfare Law and its Application*, 17 U. PUGET SOUND L. REV. 101(1993).

⁵ *Id.* at 138.

⁶ *Id.*

⁷ WASH. REV. CODE §13.38 (2011); S.B. 5656, 62nd Leg., Reg. Sess. (Wash. 2011).

⁸ WASH. REV. CODE §13.38 (2011); S.B. 5656, 62nd Leg., Reg. Sess. (Wash. 2011).

1. Clarify Washington's interpretation of the federal Indian Child Welfare Act;
2. Assure quicker, more accurate identification of Indian children in the child welfare system;
3. Assure consistent application and enforcement of the federal ICWA;
4. Assure that existing policies, practices, and agreements, developed over the last thirty years between the State and the tribal nations of Washington are the benchmarks against which federal ICWA compliance is measured; and
5. Better define the types of "child custody" cases affected by federal and [s]tate Indian child welfare laws.⁹

Specifically, the language of the WICWA, which includes the "active efforts" standard for agencies and agency social workers," states that Washington is "committed to protecting the essential tribal relations and best interests of Indian children by promoting practices designed to prevent out-of-home placement of Indian children that is inconsistent with the rights of the parents, the health, safety, or welfare of the children, or the interests of their tribe."¹⁰ WICWA advocates and supporters hope that education on the Act's provisions, as well as "its vigorous enforcement will help substantially reduce the persistent disproportiona[tly] high presence of Indian children in all levels and aspects of Washington's child welfare system."¹¹

The need for clear and applicable ICWA provisions at the state and federal level has never been greater. The application and implementation of the ICWA and its unique provisions and specifications on the child welfare system is particularly relevant due to the correlation between child welfare

⁹ *New Indian Child Welfare Act*, NW. JUSTICE PROJECT, <http://nwjustice.org/new-indian-child-welfare-act> (last visited Feb. 4, 2013).

¹⁰ WASH. REV. CODE § 13.38.030 (2011).

¹¹ NW. JUSTICE PROJECT, *supra* note 9.

issues and the economic health of families and communities.¹² As the national and regional economy “continues to downward spiral, more and more families will face economic hardship and more will fall into poverty.”¹³ In particular, several studies have demonstrated children living in poverty are more likely to become involved with Child Protective Services (CPS).¹⁴

This article will attempt to address several questions about this issue. First, will Washington’s adoption of the ICWA into state law accomplish its goal? Second, have the problems with the ICWA’s implementation in Washington, as specifically outlined by Schnuelle in her article, been addressed? Third, will the recent passage of WICWA fill the current compliance gaps, move Washington toward greater ICWA adherence, and ultimately protect Indian children? Last, will the definitional clarifications in the WICWA, particularly regarding the “active efforts” standard that agency social workers must meet in order to remove an Indian child from their home, bring actual clarity to the government’s heightened duty in ICWA proceedings? If not, what further action is needed?

It is my assertion that while the new statutory language in the WICWA is somewhat helpful for statutory interpretation, in that it provides *some* definitional clarity, particularly in the “best interests of the child,” many terms remain ambiguous. In particular, it is unclear what actions would fulfill the “active efforts” requirement by governmental social workers. Without this critical clarification from the legislature, the WICWA still runs

¹² See Amanda Tucker, *The Indian Child Welfare Act’s Unconstitutional Impact on the Welfare of the Indian Child*, 9 WHITTIER J. CHILD. & FAM. ADVOC. 87 (2009).

¹³ *Id.* (quoting JANE BURSTAIN, THE CTR. FOR PUB. POLICY, THE 2010-11 BUDGET AND CHILD PROTECTIVE SERVICES: TESTIMONY BEFORE THE HOUSE APPROPRIATIONS SUBCOMMITTEE ON HEALTH AND HUMAN SERVICES, 81ST LEGIS. 2 (Tex. 2009), available at <http://library.cppp.org/files/4/burstainCPS.pdf>).

¹⁴ *Id.*

a great risk of widespread non-compliance, ultimately harming the very population the Act is designed to protect—Indian children.

This comment will analyze the accomplishments and shortcomings of the WICWA by first reviewing the history and national policy for the original ICWA, focusing in particular on Washington’s application and interpretation of this federal statute. Next, the reasons for the initial passage of the ICWA will be addressed, particularly as a response to the long-standing and evasive government policy of removing Indian children from their families. Then, this comment will discuss how the ICWA has been applied and complied with, generally, by various states since its passage, focusing specifically on Washington State. This comment will then explore the recently enacted WICWA, including Washington’s legislative intent, and the statute’s new definitions. Finally, this comment will discuss whether these definitions are adequate, for the purpose of keeping Indian children with their families to the greatest extent possible.

II. BACKGROUND

A. Foundations of Federal Indian Law

Legislation relating to Indians must adhere to the basic legal principles that make up the canon of federal Indian law, as articulated in the US Constitution and various nineteenth century US Supreme Court cases explaining the US government’s relationship with Indian tribes.¹⁵ Therefore, a brief discussion of these fundamental principles is necessary.

In the original US Constitution, Indians are mentioned twice: (1) where Indians are excluded from federal representation figures, and (2) under the Commerce Clause, where Congress has the power to “regulate Commerce

¹⁵ U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV § 2; U.S. CONST. art. I, § 8, cl. 3; *Mortin v. Mancari*, 417 U.S. 535, 551 (1974); *Worcester v. Georgia*, 31 U.S. 515, 595 (1832); *The Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

with foreign Nations, and among the several states, and with the Indian Tribes.”¹⁶ This last provision has been the foundation for Congressional power over Indian affairs, and it forms the legal basis for Congress’ plenary power over matters involving Indians.¹⁷ Additionally, tribal sovereignty is an important concept in this discussion, and is imperative to understanding the ICWA. Tribal sovereignty is based on the inherent authority of Indian tribes to self-govern.¹⁸ This authority is subordinate only to the federal, not state, government.¹⁹

Two of the most important US Supreme Court cases outlining federal power over the Indian tribes are *Worcester v. Georgia*²⁰ and *Cherokee Nation v. Georgia*.²¹ In *Worcester*, the question before the Court was the validity of a prison sentence imposed on a non-Indian individual by the state of Georgia for entering Cherokee land without state permission.²² The Court found the state law, which extended state jurisdiction to Indian land, to be invalid.²³ Chief Justice John Marshall articulated several core tenants of federal law as it relates to the Indian tribes.²⁴ He reasoned that the US Constitution delegates power over Indian affairs to the federal government and withholds this power from the individual states.²⁵ Furthermore, Justice

¹⁶ U.S. CONST. art. I, § 2, cl. 3, *amended by* U.S. CONST. amend. XIV § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.”); U.S. CONST. art. I, § 8, cl. 3.

¹⁷ The phrase “plenary power” comes from the US Supreme Court’s opinion in *Morton v. Mancari*: there exists “a plenary power of congress, based on a history of treaties and the assumption of a ‘guardian-ward’ status, to legislate on behalf of federally recognized Indian tribes.” *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

¹⁸ *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

¹⁹ *Id.*, at 595.

²⁰ *Id.*

²¹ *The Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

²² *Worcester*, 31 U.S. at 515.

²³ *Id.* at 595.

²⁴ *Id.*

²⁵ *Id.* at 535.

Marshall reasoned that that the tribes retain their sovereign powers unless, and until, Congress chooses to take these powers away.²⁶ Under this rationale, the tribe's power is derived from inherent sovereign power as "distinct, independent political communities" that predate the federal government.²⁷ However, the federal government, as the ultimate authority over the tribes, retains the sole power to erode this tribal sovereign authority.²⁸

In *Cherokee Nation*, Justice Marshall further described the dynamic of the Indian tribes and their sovereignty dynamic in the United States.²⁹ Justice Marshall defined the Indian tribes as "domestic dependent nations."³⁰ Additionally, he described the "guardian-ward" relationship between the federal government and Indian tribes in which the government has the duty to act as a "guardian" for the tribes.³¹ In this manner, Justice Marshall articulated the specific role of the federal government in protecting tribes from encroaching on state government power. These dueling concepts create a unique and complicated legal landscape for tribes. On the one hand, tribes are recognized as "nations" and have areas of authority and sovereignty, such as forming a government, determining tribal membership, regulating domestic relations, and participating in commerce and trade.³² On the other hand, Congress, through its plenary power in the

²⁶ *Id.* at 538.

²⁷ *Id.* at 559.

²⁸ *Id.* at 595.

²⁹ *See Cherokee Nation*, 30 U.S. at 1.

³⁰ *Id.* at 2.

³¹ *Id.* at 17.

³² *See Worcester*, 31 U.S. at 515; *Cherokee Nation*, 30 U.S. at 1; *see also Frequently asked questions*, US DEP'T INTERIOR, BUREAU OF INDIAN AFFAIRS, <http://www.bia.gov/FAQs> ("Tribes possess all powers of self-government except those relinquished under treaty with the United States, those that Congress has expressly extinguished, and those that federal courts have ruled are subject to existing federal law or are inconsistent with overriding national policies. Tribes, therefore, possess the right to form their own governments; to make and enforce laws, both civil and criminal; to tax; to establish and determine membership (i.e., tribal citizenship); to license and regulate

Constitution, has been given the right to protect and preserve Indian tribes and their resources, including Indian children.³³

Therefore, a strong tension exists between the inherent sovereignty of the Indian tribes and the encroaching sovereignty and power of the federal and state governments. In this tension, tribal authority is often enhanced by federal Congressional Acts. The ICWA is an example of such an enhancement.

B. Indian Children Removal

In order to understand the intended impact of the ICWA and the WICWA on dependency proceedings, it is important to understand the history and conditions that led to the 1978 passage of the ICWA. Predominately, the United States has a long and painful history of attempted Indian assimilation into Anglo-Christian culture.³⁴ Of particular focus in this pursuit has been the systematic separation of Indian children from their families.³⁵

This trend of separation and removal began in the nineteenth century during a time period many academics refer to as the “Removal Era” because government agencies implemented devastating policies intended to quash tribal culture.³⁶ The first recorded instances of Indian child removal from Indian communities date back to the Creek Wars, fought from 1813 to 1815, when future US President Andrew Jackson housed and cared for an

activities within their jurisdiction; to zone; and to exclude persons from tribal lands.”) (last visited Apr. 21, 2013).

³³ 25 U.S.C. § 1901 (1993).

³⁴ See MARILYN IRVIN HOLT, INDIAN ORPHANAGES 2 (2001).

³⁵ *Id.*

³⁶ See Dewi Ioan Ball, *Williams v. Lee 50 Years Later: A Reassessment of One of the Most Important Cases in the Modern-Era of Federal Indian Law*, 2010 MICH. ST. L. REV. 391, 412 (2010); Addie C. Rolnick, *The Promise of Mancari: Indian Political Rights As Racial Remedy*, 86 N.Y.U. L. REV. 958, 1045 (2011).

Indian toddler whose parents had been killed by American troops.³⁷ The young boy lived with the Jackson family and was intended to be a playmate for Jackson's son.³⁸ The Indian boy received an education and learned a trade before dying at sixteen.³⁹ Jackson's Secretary of War also "adopted" an Indian child who had been orphaned during the Creek Wars; however, after three years in the home, the boy escaped.⁴⁰ The Secretary's wife wrote to a friend stating that "I never saw him afterwards; but we heard of him. . . . [He] had found his own people."⁴¹

During the late 1800s and early 1900s, the fields of sociology and social work emerged in social science academia and quickly inserted their familial values on Indian families and communities. Within these professional disciplines, an increasingly hostile worldview developed towards communities, including Indian tribes, who "failed to function within the parameters of white, middle-class expectations."⁴² Social workers, backed by state and local governments, felt compelled to invade families out of a "scared obligation" to intercede in non-white, non-middle-class families.⁴³ Out of this "sacred obligation," physical removal of children from these families to government institutions became increasingly popular.⁴⁴ In 1890, there were 60,981 children under the age of sixteen in government institutions; in 1923, the number rose to 204,888.⁴⁵ The majority of these children had at least one living parent.⁴⁶

³⁷ MARILYN IRVIN HOLT, *INDIAN ORPHANAGES 2* (2001).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 3.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 4.

⁴⁶ *Id.*

As part of Removal Era policy, many states also sent thousands of Indian children to “boarding schools” in an attempt to educate and transform Indian children “into productive members of the dominant white culture.”⁴⁷ These schools served as a core tenant of the US assimilation policy to “destroy” the children’s ties to their tribal identities.⁴⁸ Indian children were thus “harshly treated, punished for speaking their own language, and consistently instructed to purge themselves of all traces of Indian culture.”⁴⁹

An army officer by the name of Richard Pratt founded many of these boarding schools in the nineteenth century, basing the education curriculum on a program he had developed for Indian prisons.⁵⁰ Pratt described his philosophy for these schools in a speech when he stated, “a great general has said that the only good Indian is a dead one. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.”⁵¹

The legacy of this destructionist sentiment continued for decades. In a case from 1945, Bill Wright, a Pattwin Indian, was sent to the Stewart Indian School in Nevada when he was just six years old.⁵² Wright recalls, “students at [the] boarding schools were forbidden to express their culture—everything from wearing long hair to speaking even a single Indian word.”⁵³ In fact, Wright lost both his language and his Indian name.⁵⁴ He stated:

⁴⁷ *Id.* at 14.

⁴⁸ *Id.*

⁴⁹ Schnuelle, *supra* note 4.

⁵⁰ Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR, May 12, 2008, <http://www.npr.org/templates/story/story.php?storyId=16516865>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

I can remember coming home and my grandma asked me to talk Indian to her. I said, “Grandma, I don’t understand you,” and she said, “Then who are you?”

I told her my name is Billy. “Your name’s not Billy. Your name’s ‘TAH-rruhm,’” she said. And I went, “That’s not what they told me.”⁵⁵

Wright’s experiences demonstrate the boarding schools’ singular goal—assimilating Indian children into white, Anglo-Christian culture.

While boarding schools greatly contributed to the disconnection between Indian children and their families and culture, an even larger component of this assimilation policy was the placement of Indian children with non-Indian adoptive families or in non-Indian foster homes.⁵⁶ In particular, Indian women who gave birth out of wedlock were targeted by government social workers as candidates for child removal out of moral judgment.⁵⁷ This policy focused on the following notion:

[A] woman who chose not to marry and keep her child was considered flawed and weak because she rejected society’s willingness to “rehabilitate” her by lettering her put the child up for adoption and ‘start over’ as if nothing had happened. In the 1950s, sociologists began to survey and analyze women who were unwed and pregnant. After administering a battery of tests to residents at homes for unwed mothers, one sociologist used his ‘interpretive impressions’ to declare that women who kept children, when they were unwed, were emotionally and mentally immature. It was a white, middle-class interpretative impression that permeated the social worker mind-set. When social pressure combined with poverty and limited economic prospects, a young woman was primed for placing her child up for adoption.⁵⁸

⁵⁵ *Id.*

⁵⁶ HOLT, *supra* note 34, at 5.

⁵⁷ *Id.* at 5–6.

⁵⁸ *Id.* at 5.

Such removal, through adoption, was largely based on the idea held by both public and private child welfare agencies that “Indian children would be better off growing up non-Indian.”⁵⁹

Social workers were also able to remove Indian children from Indian families “based on something as dubious as ‘immoral conduct,’ which included actions like illicit co-habitation” and other Indian cultural markers.⁶⁰ During the 1968 ICWA hearings, William Byler, the Executive Director of the Association of American Indian Affairs, explained the practice of removing Indian children from “co-habitation” environments.⁶¹ Byler explained that on one reservation, more than 50 percent of the people lived in these common-law situations,⁶² with unions lasting five to fifteen years.⁶³ Police sometimes made a sweep of an entire reservation, arresting those living in illicit cohabitation environments,⁶⁴ and removing their children.⁶⁵

Additionally, social workers often cited problems, such as insufficient housing space and caretaking of an Indian child by a “distant relative,” as examples of child abuse.⁶⁶ However, the size of a particular home or the caretaking role by other members of the tribe is largely based on cultural custom and not issues of neglect.⁶⁷

Overall, Mr. Byler’s example illustrates how people tasked with making child neglect determinations, such as state social workers, commonly viewed Indian child cases through the lens of Anglo American middle-class

⁵⁹ Megan Scanlon, Comment, *From Theory to Practice: Incorporating the “Active Efforts” Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L.J. 629, 631 (Summer 2011).

⁶⁰ *Id.* at 632.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

values and ignored Indian culture and familial structures.⁶⁸ This viewpoint was terribly destructive to Indian tribes.

In the 1960s, tribes began to fight back against removal of Indian children from their communities as statistics about the pervasive and widespread nature of this practice began to emerge. In 1969 and 1974, the Association on American Indian Affairs (AAIA) “estimated that between 25 and 35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions.”⁶⁹ On a national level, “one out of every four children of Indian American heritage was separated from family by the mid-1970s, and Indian children were twenty times more likely than non-Indian children to be placed in foster care.”⁷⁰ In the 1977 congressional hearings before the Senate Committee on Indian Affairs, it was confirmed that 25 percent of all Indian children were being raised in non-Indian homes or institutions.⁷¹ In fact, when adoption placements were created for these Indian children, between 75 and 93 percent were placed with non-Indian families.⁷²

The extent of child removal varied from state to state. In Minnesota, from 1971 to 1972, one in every eight Indian children under eighteen years of age lived in a non-Indian adoptive home, while one in every four Indian children under one year of age had been adopted by non-Indian families.⁷³ Similarly, in Montana, “Indian children were thirteen times more likely to be put into foster care and adoptive placements than non-Indians.”⁷⁴ In South Dakota, “Indian children were sixteen times more likely than non-

⁶⁸ HOLT, *supra* note 34, at 5.

⁶⁹ *Id.* at 4–5.

⁷⁰ *Id.*

⁷¹ John Robert Renner, *The Indian Child Welfare Act and Equal Protection Limitations on the Federal Power Indian Affairs*, 17 AM. INDIAN L. REV. 129, 142 (1992).

⁷² *Id.* at 142–43.

⁷³ Marcia Yablon, *The Indian Child Welfare Act Amendments of 2003*, 38 FAM. L. Q. 689, 691 (2004).

⁷⁴ *Id.*

Indians” to be living in foster care.⁷⁵ Furthermore, it was determined that, while the South Dakota Indian population in 1960 was 3.6 percent of the total population, 50 percent of all children in South Dakota foster care were Indian.⁷⁶

In Washington, in the 1960s and 1970s, *nineteen times* as many Indian children were in adoptive homes than non-Indian children, and Indian children were placed in foster care *ten times* more regularly than non-Indian children.⁷⁷ In response to these staggering numbers, the congressional report on Indian child welfare during the passage of the ICWA stated, “the whole separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”⁷⁸

The removal of Indian children from Indian families had a direct and profound impact on the tribes themselves. Indian tribes publically addressed these tragic separations in the years leading up to the enactment of the ICWA, contributing to the eventual passage of the ICWA. In the late 1960s, the Devils Lake Sioux in North Dakota brought their concerns about child removal policies to the AAIA.⁷⁹ Other North Dakota tribes, the Standing Rock Sioux and the Three Affiliated Tribes (Mandan, Hidatsa, and Arikara Nation), joined this effort in the early 1970s.⁸⁰ The Chief of the Mississippi Band of Choctaw Indians testified in the 1978 ICWA Senate hearings that “culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are

⁷⁵ *Id.*

⁷⁶ HOLT, *supra* note 34, at 5.

⁷⁷ Schnuelle, *supra* note 4, at 104.

⁷⁸ Yablon, *supra* note 73.

⁷⁹ B.J. JONES ET AL., INDIAN CHILD WELFARE ACT: A PILOT STUDY OF COMPLIANCE IN NORTH DAKOTA 9 (2000), available at <http://www.nicwa.org/research/04.ICWA.pdf> [hereinafter, JONES ET AL., A PILOT STUDY]; *Indian Child Welfare Act in California*, CAL. DEP'T OF SOC. SERVICES, <http://www.childsworld.ca.gov/pg1322.htm> (last visited Feb. 11, 2013).

⁸⁰ JONES ET AL., A PILOT STUDY, *supra* note 79, at 9.

raised in non-Indian homes and denied exposure to the ways of their People.”⁸¹ With 25 to 35 percent of Indian children placed with non-Indian families between 1969 and 1974, this practice was termed by some as a form of “cultural genocide.”⁸²

III. THE ICWA’S PASSAGE, TERMS, AND COMPLIANCE

When Congress passed the ICWA in 1978, the national political climate was ripe for societal change and social justice. In accordance with society’s changes, the values of self-determination and preservation began to influence Congressional interactions with the Indian nations.⁸³ Congress enacted the ICWA in hopes that its specific provisions would sufficiently alter the relationship between the government and Indian tribes so that, while Indian children would still be adequately protected through CPS and dependency proceedings, these children would no longer be needlessly removed from their families, tribes, and native culture in the pursuit of assimilation.⁸⁴

After its passage, the US Supreme Court clarified ICWA’s goals and its corresponding provisions in only one case—*Mississippi v. Holyfield*.⁸⁵ Because of this minimal history of interpretation, agency understanding of the ICWA and its provisions has continued to be problematic as child protective agencies struggle to clarify its terms, particularly the mandate of

⁸¹ Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 5 (2008).

⁸² ANDREA WILKINS, STATE-TRIBAL COOPERATION AND THE INDIAN CHILD WELFARE ACT (July 2008), available at <http://www.ncsl.org/print/statetribes/ICWABrief08.pdf>.

⁸³ HOLT, *supra* note 34, at 2.

⁸⁴ *Id.*

⁸⁵ Indian Children Welfare Act of 1978 (ICWA), 25 U.S.C. §§ 1901–1963 (2012).

⁸⁶ 490 U.S. 30 (1989).

“active efforts” by social workers.⁸⁶ Therefore, ICWA compliance has continued to significantly hinder Congress’ original ICWA aspirations.⁸⁷

In order to combat these problems and provide useful, workable guidelines for agencies to follow, the terms of the ICWA and WICWA must be concrete, tangible, and quantifiably measured.

A. The Theory Behind ICWA: A Season of Self-Determination

Throughout US history, the federal government has implemented various policies and philosophies regarding the relationship between the Indian tribes and the US government. From 1945 to 1961, prior to the passage of the ICWA, and during the time period when the most significant Indian child removal transpired, the federal government was operating under its “termination theory.”⁸⁸ Under this theory, the government had a policy of eroding tribal culture, structure, and sovereignty with the ultimate goal of terminating the tribes.⁸⁹ During this period, 109 Indian tribes were removed from federal recognition and 1.3 million acres of Indian land were lost.⁹⁰

However, as a result of several shifts in the US governmental and political landscape, including the increasingly popular and important civil rights movements of the 1960s, the US government’s policy towards Indian tribes moved from termination to self-determination.⁹¹ Under this new philosophy, the federal government would theoretically have less control

⁸⁶ Scanlon, *supra* note 59, at 631–33.

⁸⁷ B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 398 (1997) [hereinafter Jones, *In Search of a Federal Forum*].

⁸⁸ DAVID H. GETCHES, CHARLES F. WILKINSON & ROBERT A. WILLIAMS, *CASES AND MATERIALS OF FEDERAL INDIAN LAW* (2004).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ S. Bobo Dean & Joseph H. Webster, *Contract Support Funding and the Federal Policy of Indian Tribal Self-Determination*, 36 Tulsa L.J. 349 (2000).

and less intervention in Indian affairs.⁹² However, at the same time, the federal government still maintained its “guardian-ward” trust relationship to the tribes as outlined in the *Marshall* cases from the nineteenth century.⁹³

The ICWA was enacted in 1978 as a result of this tension.⁹⁴ The Act “wove itself around the fundamental question of a culture’s right to its own children and the ways in which the dominant culture enforced its child welfare and parental custodial statutes.”⁹⁵ The ICWA is a paramount example of the tension between Congress’s intent and responsibility to treat Indian tribes as independent, self-governing bodies, and the dependency the tribes have on the federal government’s economic, political, and legal support.⁹⁶

B. Goals of the ICWA

In response to alarming rates of Indian children being removed from their families, Congress passed the ICWA in 1978 with the goal of implementing “a national policy to protect the best interest of Indian children and to promote the stability and security of Indian tribes and families.”⁹⁷ To achieve these goals, the ICWA established a series of minimum federal standards for situations involving the removal of an Indian child from his or her family, and regulations for the placement of such a child in foster or adoptive homes.⁹⁸ Additionally, Indian tribes were made parties to the dependency proceedings and given standing.⁹⁹ As a result, when a state

⁹² *Id.*

⁹³ See *Worcester v. Georgia*, 31 U.S. 515 (1832); *The Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

⁹⁴ *Id.*

⁹⁵ See HOLT, *supra* note 34, at 1.

⁹⁶ See Tucker, *supra* note 12, at 95.

⁹⁷ Indian Children Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2012); Schnuelle, *supra* note 4, at 106.

⁹⁸ Schnuelle, *supra* note 4, at 107–08.

⁹⁹ 25 U.S.C. § 1903 (2012).

agency removes an Indian child from his or her biological family, the potential for loss of cultural ties to the Indian community must be taken into account. In totality, the ICWA seeks to preserve, whenever possible, Indian culture by both limiting state jurisdiction over dependency proceedings and bolstering tribal authority.¹⁰⁰ The Act pursues these goals through both procedural requirements on parties in state courts, and substantive requirements on social service agencies and courts.¹⁰¹ Despite these efforts, ambiguities still linger at the state level.

C. US Supreme Court Clarification of the ICWA: Mississippi v. Holyfield

Only once has the US Supreme Court specifically addressed the ICWA. In the 1988 case of *Mississippi v. Holyfield*, the Court attempted to clarify some ambiguities in the 1978 version of the ICWA.¹⁰² The Court affirmed the scope of tribal jurisdiction under the ICWA, holding that tribal courts have default and exclusive jurisdiction over child custody proceedings involving Indian children who are either domiciled, or reside, on a reservation.¹⁰³ This case arose out of definitional ambiguity, as the ICWA did not initially define “domicile.”¹⁰⁴ The Court in *Holyfield*, therefore, set forth a narrow definition of “domicile” under the ICWA in an attempt to address the application of the Act across the nation.¹⁰⁵

Holyfield involved Jennie Bell, a member of the federally recognized Mississippi Band of Choctaw Indians, and her biological children.¹⁰⁶ Ms. Bell was a “twenty-four year old single mother of two, and she was pregnant with twins by a man who was married to another woman and [had]

¹⁰⁰ *See id.*

¹⁰¹ *See Jones, In Search of a Federal Forum, supra* note 87, at 397.

¹⁰² *See Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

¹⁰³ *Id.* at 42.

¹⁰⁴ *Id.* at 36, 40, 42–43.

¹⁰⁵ *Id.* at 46–53.

¹⁰⁶ *Id.* at 37–38.

two children of his own.”¹⁰⁷ Due to these circumstances, Ms. Bell sought to relinquish her twins for adoption to Orrey and Vivian Joan Holyfield, a non-Indian couple living on non-Indian land.¹⁰⁸ Ms. Bell gave birth to the twins in a hospital 200 miles from the Choctaw reservation and executed a consent form to relinquish her parental rights to the Holyfields.¹⁰⁹ The ICWA was not applied.¹¹⁰ However, the Choctaw Tribe filed suit against the Holyfields four years later stating that, although the children were born off of Indian land, the tribe should have had jurisdiction under the ICWA.¹¹¹

The US Supreme Court granted certiorari in this matter and addressed the questions of whether the twins were ever “domiciled” on the Choctaw reservation, and whether the ICWA provisions should have applied.¹¹² The Court held the twins shared the domicile of their mother, despite the fact that they were born off-reservation.¹¹³ Thus, the Court granted the tribe jurisdiction.¹¹⁴

In reaching this determination, the Court focused on the congressional intent for enacting the ICWA. In particular, the Court relied on the ICWA’s purpose to “establish a federal policy that, where possible, an Indian child should remain in the Indian community” and ensure that “Indian child welfare determinations are not based on a white, middle-class standard which, in many cases, forecloses placement with an Indian family.”¹¹⁵ Additionally, the Court articulated an aversion to non-Indian involvement in Indian child custody proceedings, stating that “the very text of the ICWA” along with “its legislative history and the hearings that led to its

¹⁰⁷ Maldonado, *supra* note 81, at 1.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 30.

¹¹⁰ *See id.* at 53.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 37.

enactment” illustrated that “Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities.”¹¹⁶ In this manner, the Court emphasized the need for national compliance, and adherence to the ICWA provisions, in individual states to ensure deference to tribal protection of heritage and family connections. While the Court has not granted certiorari to any other case involving the ICWA since *Holyfield*, in that case, it unequivocally acknowledged the federal government’s recognition of tribal sovereignty and authority in Indian child welfare matters.

D. Specific ICWA Provisions

The specific provisions of the ICWA are only triggered if two conditions are met.¹¹⁷ First, the state action must be under the scope of the ICWA’s definition of a “child custody proceeding.”¹¹⁸ Under the ICWA, this definition includes voluntary and involuntary foster care placement, pre-adoptive and adoptive placement, and any other state action that results in the termination of parental rights.¹¹⁹ Excluded from this ICWA provision are matters of juvenile delinquency and divorce custody actions.¹²⁰ Second, the provisions of the ICWA only apply to a particular proceeding if that proceeding involves an Indian child.¹²¹ Under the ICWA, an “Indian child” is defined as “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”¹²² To meet this requirement, one must show proof of membership in an Indian

¹¹⁶ *Id.* at 44–45.

¹¹⁷ 25 U.S.C. § 1913 (2012).

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ 25 U.S.C. § 1903(1).

¹²¹ 25 U.S.C. § 1903 (2012).

¹²² *Id.* § 1903(4).

tribe.¹²³ The ICWA, similar to other federal statutes involving tribes, defines an “Indian tribe” as “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided by Indians by the Secretary [of the Interior] because of their status as Indians.”¹²⁴ From these definitions, only federally recognized tribes and their members are protected under the ICWA.

In order to accomplish the dual goals of limiting state jurisdiction and strengthening tribal jurisdiction over Indian child custody proceedings, the ICWA has several main provisions:

- Indian tribes have exclusive jurisdiction over any Indian child custody proceeding when that child either resides or is domiciled on an Indian reservation. If the Indian child resides off the reservation, “the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe.” Absent an objection by the parents or the Indian tribe, both the tribal and state courts have concurrent jurisdiction. However, there is a preference in these cases for tribal jurisdiction.¹²⁵
- Notice must be given to both the Indian child’s birth parent(s) or custodian(s) as well as the Indian child’s tribe before an involuntary custody proceeding can begin in state court.¹²⁶
- A strong preference is articulated for matters involving ICWA children to be resolved in tribal court. State courts must transfer cases involving Indian children to a tribal court if either the parent, the Indian custodian, or the Indian child’s tribe petitions such a transfer. A state court is only able to overcome this petition if there is a “good cause to the contrary,” or if either parent objects.¹²⁷

¹²³ *See id.* § 1903(5).

¹²⁴ *Id.* § 1903(8).

¹²⁵ *Id.* § 1911.

¹²⁶ *Id.* § 1912(a).

¹²⁷ *Id.* § 1911.

- If jurisdiction is not transferred to tribal court, a state court is held to high standards regarding both foster care placement and the termination of parental rights. For a state court to place an Indian child into non-Indian foster care, the state must submit clear and convincing evidence that failure to remove the child from his or her environment is likely to result in serious physical or emotional damage to the child.¹²⁸ For a state court to terminate the parental right of an Indian child, the state must show proof beyond a reasonable doubt that failure to do so will result in serious physical or emotional harm to the child.¹²⁹ Additionally, any party, such as a state agency, seeking foster care placement or termination of parental rights must provide proof of active efforts to prevent the breakup of the Indian family.¹³⁰
- Voluntary termination of parental rights by an Indian parent requires court certification that the parent fully understands the consequence of such a procedure. The parent can withdraw this consent to termination at any time.¹³¹
- Regarding placement of an Indian child after parental rights have been terminated, particular preferences must be adhered to. In “absence of good cause to the contrary,” the state’s placement for an Indian child must be in accordance with these priorities: (a) a member of the child’s extended family, (b) other members of the Indian child’s tribe, and then, (c) other Indian families.¹³² Furthermore, if a child is placed in foster care or preadoptive placement, the Indian child must be placed within “a reasonable proximity” to the child’s home in the “least restrictive setting” that most approximates a family.¹³³

¹²⁸ *Id.* § 1912(e).

¹²⁹ *Id.* § 1912(f).

¹³⁰ *Id.* § 1912(d).

¹³¹ *Id.* § 1913(a).

¹³² *Id.* § 1915(a).

¹³³ *Id.* § 1915(b).

- If the state court violates any of the ICWA provisions, a petition from the child's parents, custodian, or tribe can invalidate the child's placement.¹³⁴

Therefore, in light of these provisions, if a child is deemed Indian under the definitional terms of the statute, the state must take additional steps before removing the child by determining proper jurisdiction, including the child's tribe as a party in the case, and meeting a higher burden. These provisions were enacted with the goals of protecting Indian children and Indian tribes from needless state action regarding child removal.

E. The "Active Efforts" Standard in the ICWA

Including the general provisions outlined above, the ICWA outlines an additional standard state agencies must meet in order to remove an ICWA child from his or her home. This additional standard is set forth in Section 1912(d), which states the following:

[A]ny party seeking to effect a foster care placement of, or termination of parental rights to, any Indian child under State law shall satisfy the court that *active efforts* [emphasis added] have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.¹³⁵

In this provision of the ICWA, states have adopted a wide range of interpretations as they struggle to define the standard that applicable state agencies must meet in order to prove that adequate "active efforts" have been made to keep the child with his or her birth family. In other words, states have continued to wrestle with the following question: how much work, or effort, must a state social worker do or put in to preserve the Indian child's existing family structure?

¹³⁴ *Id.* §§1914, 1916, 1913(d).

¹³⁵ *Id.* §1912(d).

Since there is no statutory clarification in the ICWA as to the definition of “active efforts,” or instruction of how a state can meet the standard of sufficient “active efforts,” this portion of the ICWA has proven particularly problematic. In California and Colorado, courts have stated that “active efforts” are equivalent to “reasonable efforts”—the same standard used for non-ICWA child custody proceedings.¹³⁶ Conversely, courts in Utah and Oklahoma have interpreted “active efforts” to mean more than “reasonable efforts.”¹³⁷ Thus far, no national clarification or consensus exists on exactly what “active efforts” means for a social worker or a similarly situated state official involved in an Indian child custody proceeding.

In 2002, the National Indian Child Welfare Association released a detailed and comprehensive report highlighting the state of Arizona’s compliance to the ICWA, which illustrated the continued confusion over the definition of “active efforts.”¹³⁸ The report included a “focus group” component where state agency child welfare professionals discussed the difference between “active efforts” and “reasonable efforts.”¹³⁹ The results of this professional group discussion indicated the following:

[N]o general consensus was reached as to whether or not “active efforts” require[s] a different standard of proof. [S]ome believed that “active” and “reasonable” are equivalent, but others indicated that active efforts require a higher legal standard. Most agreed that no clear definition exists for either active or reasonable efforts.¹⁴⁰

Ultimately, the report concluded the following:

¹³⁶ Scanlon, *supra* note 59, at 630.

¹³⁷ *Id.*

¹³⁸ See EDDIE F. BROWN ET AL., NAT’L INDIAN CHILD WELFARE ASS’N, THE INDIAN CHILD WELFARE ACT: AN EXAMINATION OF STATE COMPLIANCE IN ARIZONA 77 (2002), available at <http://www.nicwa.org/research/01.ICWAAriz02.Rpt.pdf>.

¹³⁹ *See id.* at 17–18.

¹⁴⁰ *Id.*

[A]mong state and tribal representatives, no agreement exists as to the meaning of active efforts. . . . Workers have no clear guidelines for active efforts to develop and implement case plans, and the state court has no systematic way of ruling on the application of active efforts with Indian families.¹⁴¹

In other words, the agency professionals tasked with adhering to the ICWA’s “active efforts” standard were not collectively able to determine what this standard meant.

The problem of defining “active efforts” extends to other states beyond Arizona. In 2000, North Dakota published a study regarding its own ICWA compliance.¹⁴² This study revealed that only 66 percent of its ICWA child custody cases contained documentation of “active efforts.”¹⁴³ The most egregious finding was the wide disparity between ICWA and “active efforts” compliance across different county and regional lines—there was simply no uniform implementation whatsoever.¹⁴⁴ Similar to Arizona, state agencies and their legal teams in North Dakota are left to decide for themselves what constitutes an “active effort” without a clear national definition of what this entails. Therefore, significant differences and deviations exist in implementing the ICWA across the states.

F. Compliance with the ICWA: Does the Act Really Accomplish its Goals?

The application and implementation of the ICWA in state courts on a national level has been uneven and problematic, due in part to the uncertain meaning of “active efforts.” In fact, some argue the goals of ICWA—to bolster tribal sovereignty and preserve Indian culture through Indian children—“[have] proven to be illusory and the goal of uniformity a

¹⁴¹ *Id.* at 19.

¹⁴² JONES ET AL., A PILOT STUDY, *supra* note 79.

¹⁴³ *Id.* at 44.

¹⁴⁴ *Id.* at 34, 38, 53.

farce.”¹⁴⁵ In an attempt to circumnavigate the ICWA provisions, some states have created exceptions and loopholes to the ICWA that “have render[ed] many of its provisions superfluous.”¹⁴⁶

In particular, states have eroded the strength of the ICWA and tribal sovereignty in these proceedings by expanding the “existing Indian family” exception and refusing to comply with the strict standards articulated in the ICWA.¹⁴⁷ In the “existing Indian family” doctrine, an exception is created to the application of ICWA and its provisions when an Indian child, “has never resided with an Indian family.”¹⁴⁸ While the Supreme Court in *Holyfield* seemed to discredit this doctrine and its ruling, several state courts have found ways to continue to implement this exception. Through this exception, these states are, “able to question the ability of tribal courts and social service agencies to effectively provide for the best interests of Indian children,” and in doing so, turn “the congressional presumption in favor of tribal court decision-making on its head.”¹⁴⁹

These concerns about ICWA compliance have manifested in numerous states, but in particular, South Dakota.¹⁵⁰ In South Dakota, according to a 2011 study, Indian children make up less than 15 percent of the child population, yet make up more than half of the children in foster care.¹⁵¹ In fact, in 2010 alone, more than 700 Indian children were removed from their

¹⁴⁵ Jones, *In Search of a Federal Forum*, *supra* note 87, at 396.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 397.

¹⁴⁸ *Id.* at 400.

¹⁴⁹ *Id.* at 398.

¹⁵⁰ Laura Sullivan & Amy Walters, *Indian Foster Care: Lost Children, Shattered Families. American Indian Boarding Schools Haunt Many*, NPR, Oct. 25, 2011, <http://www.npr.org/2011/10/25/141672992/native-foster-care-lost-children-shattered-families>.

¹⁵¹ Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011, 12:00 p.m.), <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>.

homes.¹⁵² In one particular tribe—the Crow Creek with only 1,400 members—thirty-three children have been removed over the last couple years.¹⁵³ In light of these numbers, it is questionable whether the goal of preserving Indian culture and heritage by keeping Indian children in Indian families is being met on a national level.

IV. THE ICWA AND WASHINGTON STATE: 1978 TO 2011

The ICWA's application in Washington is unique and interesting due to several factors. First, Washington has addressed, and continues to default, state and tribal jurisdictional issues in a distinctive and different legal framework called "Public Law 280."¹⁵⁴ Second, Washington courts have specifically rejected an interpretation of an ICWA provision, called the "existing family exception," that other state courts have adopted.¹⁵⁵ Nonetheless, despite Washington's general policy of upholding tribal rights and culture, ICWA compliance in Washington has been lacking, and the racial disproportion of Indian children in the foster care system has continued.¹⁵⁶

A. Washington as a "Public Law 280" State

The application and adherence to the ICWA is complicated in Washington because it is categorized as a "Public Law 280" state.¹⁵⁷ In a Public Law 280 state, the state government has jurisdictional authority over

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See Memorandum from Robert T. Anderson, Professor, Univ. of Wash. Sch. of Law, Dir., Native Am. Law Ctr., Criminal & Civil Jurisdiction & P.L. 280 (Mar. 3, 2011), available at <http://www.leg.wa.gov/JointCommittees/JELWGTR/Documents/2011-07-18/PL280%20Washington3%203%2011.pdf>.

¹⁵⁵ *In Re Crews*, 825 P.2d 305, 310 (Wash. 1992).

¹⁵⁶ WASH. STATE INST. ON PUB. POLICY, RACIAL DISPROPORTIONALITY IN WASHINGTON STATE'S CHILD WELFARE SYSTEM 1 (2008), available at <http://www.wsipp.wa.gov/rptfiles/08-06-3901.pdf>.

¹⁵⁷ See Anderson, *supra* note 154.

the tribes in certain areas, despite the nineteenth century cases in the federal Indian law canon.¹⁵⁸

In the 1950s, the national Indian policy was centered on the goals of termination and destruction of tribal sovereignty.¹⁵⁹ In line with this viewpoint, Congress enacted Public Law 280 in 1953¹⁶⁰ to “deal with the problem of lawlessness on certain Indian reservations and the absence of adequate tribal institutions for law enforcement.”¹⁶¹ Concretely, Public Law 280 declared that in six states, state jurisdiction extended over Indian reservations.¹⁶²

At the time of Public Law 280’s enactment, Washington had a specific disclaimer in its state constitution that Indians “shall remain under the absolute jurisdiction and control of the Congress of the United States.”¹⁶³ Although Public Law 280’s extension of state jurisdiction over Indian territory was in direct conflict with this language, Public Law 280 was enacted in Washington. From this enactment, Washington took over civil and criminal jurisdiction on Indian land via laws passed in 1957 and 1963.¹⁶⁴

The effects of this take over were mitigated in March 2012 when the Washington legislature approved House Bill 2233, which provides an avenue for Indian tribes to assume jurisdiction over their lands that are currently held by the state under Public Law 280.¹⁶⁵ While this brand new law has yet to be fully tested in practice, it appears Indian tribes may, through a variety of procedural maneuvers, be able to petition the state

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.*, 25 U.S.C §§ 1321–1326 (2012).

¹⁶⁰ Schnuelle, *supra* note 4, at 125.

¹⁶¹ *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 471 (1979) (quoting *Bryan v. Itasca Cnty.* 426 U.S. 373, 379 (1953)).

¹⁶² 18 U.S.C. § 1162 (2012).

¹⁶³ Schnuelle, *supra* note 4, at 126.

¹⁶⁴ *See Anderson*, *supra* note 154, at 3.

¹⁶⁵ H.B. 2233, 62nd Leg., Reg. Sess. (Wash. 2012).

government for “retrocede” jurisdiction on tribal land.¹⁶⁶ Nevertheless, Washington enacted a state ICWA, not only because of its issues in adhering to the federal ICWA, but also because it wanted to retain some jurisdiction over tribal land and affairs under Public Law 280.¹⁶⁷

B. Rejection of “Existing Indian Family” Doctrine by the Washington Legislature

Another issue regarding the ICWA in Washington has been the application and subsequent rejection of the “existing Indian family” doctrine. The “existing Indian family” doctrine is an exception to the provisions in the ICWA.¹⁶⁸ Some states have used this exception as a loophole to avoid applying the ICWA provisions and standards to particular child custody proceedings.¹⁶⁹ This exception applies when the state finds that the child in question is not a part of an “existing Indian family” and, therefore, ICWA’s provisions do not apply.¹⁷⁰

The “existing Indian family” exception arose from *Baby Boy L.*, a famous Kansas Supreme Court decision.¹⁷¹ In that case, the Kansas court found the provisions of the ICWA did not apply to an adoption proceeding of a child who had a non-Indian birth mother and an Indian birth father.¹⁷² In *Baby Boy L.*, the child had never lived with his Indian birth father.¹⁷³ The non-Indian birth mother sought to voluntarily place her child for adoption with a non-Indian couple.¹⁷⁴ The Kansas court found that the legislative intent of ICWA was to prevent the breakup of Indian families; because the child had

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *In re Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982).

¹⁶⁹ Yablon, *supra* note 73, at 702.

¹⁷⁰ *Id.* at 701.

¹⁷¹ *In re Adoption of Baby Boy L.*, 643 P.2d at 175.

¹⁷² *Id.* at 172.

¹⁷³ *Id.* at 174.

¹⁷⁴ *Id.*

never lived in an Indian home, an Indian family would not be broken up and, therefore, the ICWA did not apply.¹⁷⁵ *Baby Boy L.* was a seminal case for ICWA litigation because the Kansas court relied entirely on an interpretation of the legislative intent of the ICWA and ignored the literal application—that the adoption placement was a “child custody proceeding” under the Act’s terms, and the child in question was an “Indian” child under the Act’s definitions.¹⁷⁶ Many argue that the “existing Indian family” exception is an attempt to erode the authority and sovereignty given to tribes through the ICWA.¹⁷⁷

Ten years after *Baby Boy L.* was decided, the Washington Supreme Court adopted the “existing Indian family” exception in its first ICWA case.¹⁷⁸ In deciding *In re Crews*, the Court was faced with a situation where a tribe was contesting the adoption of a baby boy who was born to parents who, at the time of adoption, claimed to have no Indian heritage.¹⁷⁹ However, after the boy was placed in the custody of the adoptive parents, the mother attempted to regain parental custody through the ICWA by stating that the boy was, in fact, an “Indian child.”¹⁸⁰ She claimed that the boy was considered an “Indian child” due to the fact that the Choctaw Nation in Oklahoma now verified that she was a member of that tribe.¹⁸¹ In its holding, the *In re Crews* Court found the child was not an “Indian child” under the definitional terms of the ICWA because the case fell within the “existing Indian family” exception.¹⁸² The Court reasoned that, since neither the mother nor the father were culturally Indian, the child would not

¹⁷⁵ *Id.* at 175–76.

¹⁷⁶ *Id.*

¹⁷⁷ Yablon, *supra* note 73, at 702.

¹⁷⁸ See *In Re Crews*, 825 P.2d 305, 310 (Wash. 1992).

¹⁷⁹ *Id.* at 307.

¹⁸⁰ *Id.* at 310.

¹⁸¹ *Id.* at 311.

¹⁸² *Id.*

be raised culturally Indian if he were to return to his biological parents, and that this situation fell outside the intended scope of the ICWA.¹⁸³ Specifically, the court found that:

[T]here is no allegation by [the mother] or the Choctaw Nation that, if custody were returned to [the mother], [the child] would grow up in an Indian environment. To the contrary, [the mother] has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future. While [the child] may be an “Indian child” based on the Choctaw Constitution, we do not find an existing Indian family unit or environment from which [the child] was removed or to which he would be returned. To apply ICWA in this specific situation would not further the policies and purposes of ICWA.¹⁸⁴

In this manner, the Washington Supreme Court, in its first case concerning the ICWA, limited and quantified the scope of the ICWA, as well as made specific determinations about the required character and form of tribal membership.

While many courts—most predominantly two appellate divisions in California—have upheld the “existing Indian family” exception doctrine in ICWA cases, the Washington legislature statutorily invalidated the holding of *In re Crews* in 2004.¹⁸⁵ Washington is now among the vast majority of states who have, either by case law or statute, explicitly rejected the “existing Indian family” exception as a means to circumnavigate the application of the ICWA provisions.¹⁸⁶ However, this exception is still followed in Kentucky, Missouri, and Tennessee.¹⁸⁷ In this manner,

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 310.

¹⁸⁵ WASH. REV. CODE § 13.34.040 (2011).

¹⁸⁶ See Yablon, *supra* note 73, at 706.

¹⁸⁷ *Id.*

Washington has demonstrated its ability and willingness to move toward greater adherence to the intent of the ICWA.

C. Continued Racial Disproportionality in Washington's Child Welfare System

Despite progressive efforts by Washington courts to enforce the ICWA in rejecting the “existing family doctrine,” a disproportional number of Indian children still remain in Washington’s child welfare system.¹⁸⁸ This disproportion was outlined in a study published by the Washington State Institute for Public Policy in June 2008 that followed 58,005 children from 2004 to 2007.¹⁸⁹ The study found that, in Washington, Indian children were three times more likely to be referred to CPS than white children.¹⁹⁰ This rate is higher than black children (twice as likely as white children), Hispanic children (1.3 times as likely as white children), and Asian children (less likely than white children).¹⁹¹ In reference to removal from the family, Indian children were 1.6 times more likely to be removed from their home than white children, and were twice as likely to remain in foster care for over two years.¹⁹² These numbers are also higher than black, Hispanic, and Asian children.¹⁹³

In addition to these shocking figures, the report also discussed contributing factors to these statistics and general conclusions by racial grouping. First, the Third National Incidence Study of Child Abuse and Neglect found that there was a strong correlation between family poverty and child maltreatment.¹⁹⁴ In 2004, 332,100 Washington children lived in

¹⁸⁸ WASH. STATE INST. ON PUB. POLICY, *supra* note 156.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 8.

¹⁹² *Id.* at 9.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 21.

households receiving food stamps, representing 24 percent of all the children in Washington.¹⁹⁵ Furthermore, children with CPS referrals represent 7 percent of all children receiving food stamps in that year.¹⁹⁶ Second, family structure has a positive correlation to CPS referrals in Washington. For example, while only 18 percent of white children in Washington live in a single parent home, 74 percent of white children in foster care lived in a single parent home at the time of removal.¹⁹⁷

Finally, the study stated key findings for each racial group in Washington's child welfare system. In comparison with white children, Indian children referred to CPS contained the following characteristics: (1) they were less likely to have a referral accepted; (2) they were more likely to have a high risk tag at intake; (3) they were more likely to be removed from home if they had a high risk tag at intake; (4) they were as likely to remain in care for over sixty days if removed from the home; and (5) they were more likely to remain in care for two years.¹⁹⁸

In December of 2008, the Statewide Racial Disproportionality Advisory Committee published its action plan in response to the above report—the Racial Disproportionality and Disparity in Washington State Child Welfare Remediation Plan.¹⁹⁹ In this plan, the committee recommended to the Department of Social and Health Services (DSHS) Secretary several provisions to combat this extreme disproportionality.²⁰⁰ One of the two recommendations articulated by this committee is stated as follows:

¹⁹⁵ *Id.* at 19.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 23.

¹⁹⁹ WASH. STATE RACIAL DISPROPORTIONALITY ADVISORY COMM., RACIAL DISPROPORTIONALITY IN WASHINGTON STATE CHILD WELFARE- REMEDIATION PLAN, 0 (2008) available at <http://www.goia.wa.gov/Links-Resources/RacialDisproportionalityRemediationPlan.pdf>.

²⁰⁰ *Id.*

[S]ubstantial amounts of racial disproportionality exist within the Washington State American Indian population. *Emphasis on Indian Child Welfare compliance will be a priority* [emphasis added]. Also, in-depth look at how racial disproportionality varies between Reservation Indians, Rural Indians, and Urban Indians.²⁰¹

In 2010, the Washington State Racial Disproportionality Advisory Committee published another report to the legislature concerning the findings from the 2008 Washington State Institute for Public Policy report.²⁰² This publication also included historical data on the removal of Indian children from their families in Washington.²⁰³ In 1975, prior to the passage of the ICWA, the American Indian foster care placement rate to Non-Indian families was 34.92 per 1,000 children in Washington.²⁰⁴ After the ICWA was enacted, the rate dropped to 18.24 per 1,000 children in 1979.²⁰⁵ Similarly, the rate for Indian adoptions in 1975, before the ICWA, was 3.0 per 1,000 children.²⁰⁶ After the passage of the ICWA, in 1986, this rate dropped to 0.11 per 1,000 children.²⁰⁷ As a result, the committee recommended that further compliance with the ICWA was needed to continue to address the high rate of Indian children in Washington's child welfare system.²⁰⁸

²⁰¹ *Id.* at 7.

²⁰² WASH. STATE RACIAL DISPROPORTIONALITY ADVISORY COMM., RACIAL DISPROPORTIONALITY IN WASHINGTON STATE 17 (2d ed. 2010), available at <http://www.dshs.wa.gov/pdf/main/legrep/Leg0110/Racial%20Disproportionality%20in%20WA%20State.pdf>.

²⁰³ *Id.*

²⁰⁴ *Id.* at 50.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 8.

In particular, the committee specifically recommended an enactment of a Washington State Indian Child Welfare Act.²⁰⁹ This report stated the following:

DSHS should study the impact that state-level Indian Child Welfare Acts have had in states that have implemented such state ICW legislation [and] if the study finds that implementation of state-level legislation increases compliance with the core tenants of ICW [Indian Child Welfare] and reduces racial disproportionality, DSHS should support enactment of a Washington State ICWA.²¹⁰

V. WASHINGTON'S INDIAN CHILD WELFARE (WICWA)

In response to these reports and recommendations, in April 2011, the Washington legislature passed Senate Bill 5656—WICWA.²¹¹ In May 2011, Washington Governor Christine Gregoire signed this bill into law, which was later codified as RCW 13.38.²¹² WICWA is designed to apply specifically to RCW 13.34—child custody proceedings involving the state.²¹³ The WICWA is intended to provide the following: (1) clarify Washington's interpretation of the federal ICWA;²¹⁴ (2) assure quicker, more accurate identification of Indian children in the child welfare system; (3) assure consistent application and enforcement of the federal ICWA; (4) assure existing policies, practices, and agreements developed over the last several years between the state and the tribes of Washington are the benchmarks against which federal ICWA compliance is measured;

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ S.B. 5656, 62nd Leg., Reg. Sess. (Wash. 2011); *2011 Senate Bill 5656: Creating a State Indian Child Welfare Act*, WASH. VOTES, <http://washingtonvotes.org/2011-SB-5656> (last visited Feb. 10, 2013).

²¹² Wash. S.B. 5656; WASH. REV. CODE §13.38 (2011).

²¹³ WASH. REV. CODE §13.38 (2011).

²¹⁴ 25 U.S.C §§1901 et seq.

and (5) better define the types of “child custody” cases affected by federal and state Indian child welfare laws.²¹⁵

By adopting the federal ICWA as state law, the Washington legislature attempted to bring greater clarification and, therefore, greater adherence to the application of the ICWA. By attempting to execute these goals, the legislature has failed to clarify a key provision of the federal statute—“active efforts.” However, it has succeeded in defining another key provision: “the best interest of the child” in adherence to tribal sovereignty.²¹⁶

A. Clarification of “Active Efforts”

Under the WICWA, the ICWA term, “active efforts,” is given some definitional clarity; however, this clarification is not enough. The “active efforts” standard refers to the minimum amount of work that a state agency or its employees, such as social workers, must do in attempting to prevent the removal of an Indian child from an Indian home.²¹⁷ As discussed above, there has been widespread confusion about heightened standards in the ICWA, and the difference, if any, between the non-ICWA standard of “reasonable efforts” and the ICWA standard of “active efforts.” The Washington legislature attempted to address this confusion by defining “active efforts” in RCW 13.38.040(1).²¹⁸ However, this standard is still ambiguous and difficult for state agents to navigate.

Under RCW 13.38.040(1), at a minimum, “active efforts” must include the following:

- In any dependency proceeding under chapter 13.34 RCW seeking out-of-home placement of an Indian child in which the department or supervising agency provided voluntary services to

²¹⁵ WASH. REV. CODE §13.38.030 (2011).

²¹⁶ WASH. REV. CODE §13.38.040(2) (2011).

²¹⁷ See Scalon, *supra* note 59.

²¹⁸ WASH. REV. CODE §§13.38.040(1)(i)–13.38.040(1)(iii) (2011).

the parent, parents, or Indian custodian prior to filing the dependency petition, a showing to the court that the department or supervising agency social workers actively worked with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs to prevent the breakup of the family *beyond simply providing referrals to such services* [emphasis added].

- In any dependency proceeding under chapter 13.34 RCW, in which the petitioner is seeking the continued out-of-home placement of an Indian child, the department or supervising agency must show to the court that it has actively worked with the parent, parents, or Indian custodian in accordance with existing court orders and the individual service plan to engage them in remedial services and rehabilitative programs to prevent the breakup of the family *beyond simply providing referrals to such services* [emphasis added].
- In any termination of parental rights proceeding regarding an Indian child under chapter 13.34 RCW in which the department or supervising agency provided services to the parent, parents, or Indian custodian, a showing to the court that the department or supervising agency social workers actively worked with the parent, parents, or Indian custodian to engage them in remedial services and rehabilitation programs ordered by the court or identified in the department or supervising agency's individual service and safety plan *beyond simply providing referrals to such services* [emphasis added].²¹⁹

In comparison to the ICWA of 1978, which provided no guidance as to the specific actions required to meet the “active efforts” burden of proof standard, the WICWA does clarify that “active efforts” must constitute something more than “simply providing referrals to such services.”²²⁰ However, this vague definition does not provide enough clarity for social work professionals. The range of possible functions “beyond simply

²¹⁹ *Id.*

²²⁰ *Id.*

providing referrals to such services” is endless. Is it enough for a social worker to simply spend more time on an ICWA case? If so, how much time? Must the social worker physically drive a family member to the service provider? Must the social worker attend a particular appointment? How much follow up, if any, is required? These are questions social workers confront each day as they attempt to adhere to the WICWA in their work.

Although stating that “active efforts” means something beyond a referral is a step in the right direction, this action is still not sufficient to fill the gap of understanding and clarity that currently exists among state agencies and associated personnel. In order to sufficiently clarify “active efforts,” Washington must provide *tangible examples* of these efforts. Jurisdictions such as California have provided such tangible examples in their training materials of how active efforts differ from reasonable efforts.²²¹ These training tools include several pages of concrete, practical hypotheticals in which the distinctions between “active efforts” and “reasonable efforts” are clarified for social workers.²²² For instance, giving contact information to a parent for parenting classes would satisfy the social worker’s obligation for under “reasonable efforts” while, in order to meet the “active efforts” standard, the social worker would need to actually sign the parents up for parenting classes at a local Native American health center and arrange transportation to the classes.²²³ In another concrete example, giving a family TANF (Temporary Assistance for Needy Family) sign-up materials would meet “reasonable efforts”, while actually signing up the family for TANF and staying in regular contact with TANF providers meets “active

²²¹ THE ADMIN. OFFICE OF THE COURTS, CTR. FOR FAMILIES, CHILDREN & THE COURTS, ADVANCED INDIAN CHILD WELFARE CURRICULUM: TRAINEE’S GUIDE 23, *available at* <http://www.courts.ca.gov/documents/TribalTraineesGuide.pdf> (last visited Apr. 15, 2013).

²²² *Id.* at 23-25

²²³ *Id.*

efforts.”²²⁴ Washington courts must provide similar training materials, but more importantly, include such examples in the statutory language. Without this clarification, definitions and standards of the required “active efforts” are left to agency committees and trainers’ discretion, not the legislature.

Additionally, and perhaps more importantly, the intent of the ICWA and the WICWA is to preserve tribal culture and heritage.²²⁵ Therefore, any “active efforts” by state social workers must fit within this framework. Social workers must be required to utilize services and resources that are culturally sensitive to the tribal member. The Washington legislature should expand the “active efforts” clarification in the WICWA to include both tangible examples of these “active efforts” and preferential language for services and resources with Indian cultural focuses.

B. The “Best Interests of the Child”

While the Washington legislature did not provide sufficiently helpful language in its definition of “active efforts” in the WICWA, it did provide clarification and guidance for culturally-related resources regarding “the best interests of the child.”²²⁶ The recent passage of the WICWA, in addition to the ICWA, must be understood through the complicated and intersected role of race and power. Therefore, clarifying vague definitional terms, like the “best interests of the child,” with culturally-focused terminology through the WICWA is a step in the right direction. In this pursuit, it is also important to address and understand the role race plays in these proceedings and how issues of race, culture, and privilege are infused in this debate.²²⁷ To ignore these larger contextual issues is to ignore the

²²⁴ *Id.*

²²⁵ WASH. REV. CODE §13.38.030 (2011).

²²⁶ WASH. REV. CODE §13.38.040(2) (2011).

²²⁷ Maldonado, *supra* note 81, at 2.

root of the problem. In particular, the “best interest of the child” standard in the ICWA is a pivotal topic in this discussion.

The “best interest of the child” is a core doctrine in American legal theory, especially relating to family matters. In essence, the “best interest of the child” test has the dual goal of “avoiding placement of a child with an individual who is unfit” and also “seeking to choose otherwise fit individuals.”²²⁸ This Anglo-American test can be distilled to

essentially middle class values to determine what setting will serve to protect the child from physical and emotional injury on the one hand and to better the child physically, emotionally, and educationally on the other. While racial, ethnic, and religious factors may play a role in determining placements [for children], they are secondary in importance.²²⁹

Under the WICWA, it is clear that the legislature is concerned with the best interest of the individual child in question as it utilizes this standard family law test.²³⁰ However, WICWA proceedings are unique from other child custody proceedings in that the best interests of the child are also intertwined with the best interests of the tribe, culture, and family.²³¹ The WICWA rejects the Anglo middle-class standard of the best interest of the child present in non-ICWA child custody proceedings and instead considers this standard along with other tribal and community health concerns.²³²

Since the very intent of the ICWA and the WICWA is to reduce the destruction of Indian heritage through the removal of Indian children, Indian heritage and culture must be brought into the discussion when considering what the best interests of the child actually are. The

²²⁸ 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, 367 (1992).

²²⁹ *Id.* at 368.

²³⁰ WASH. REV. CODE §13.38.030 (2011).

²³¹ Dale, *supra* note 228, at 370.

²³² WASH. REV. CODE §§13.38.030;13.38.180; 13.38.040(2) (2011).

Washington legislature was relatively successful in bringing these considerations into the law's construction.

All too often in ICWA cases, the middle-class, Anglo-Christian viewpoint of what is best for the child dictates the outcome of the case. In these cases, the standard applied by the courts is what individuals or context will provide the child with the closest adherence to a middle-class, Anglo-Christian life. This judicial reasoning in child custody proceedings is contradictory to the legislative intent and purpose of the federal and state ICWA provisions. However, under new statutory language in the WICWA, the best interests of the child standard is defined as follows:

[T]he use of practices in accordance with the federal Indian child welfare act...that are designed to accomplish the following: (a) protect the safety, well-being, development, and stability of the Indian child; (b) prevent the unnecessary out-of-home placement of the Indian child; (c) acknowledge the right of Indian tribes to maintain their existence and integrity which will promote the stability and security of their children and families; (d) recognize the value to the Indian child of establishing, developing, or maintaining a political, cultural, social, and spiritual relationship with the Indian child's tribe and tribal community; and (e) in a proceeding under this chapter where out-of-home placement is necessary, to prioritize placement of the Indian child in accordance with the placement preferences of this chapter.²³³

Through this statutory language, the legislature has clearly articulated the central goal of the WICWA—to preserve Indian culture. Therefore, Washington courts, when applying the WICWA, must also consider and adhere to this goal. In order for the WICWA to be truly effective in the Washington court system and protect Indian children from removal from their families, Washington courts must embrace and adhere to the specific language and legislative intent of the WICWA.

²³³ WASH. REV. CODE §13.38.040(2) (2011).

VI. CONCLUSION

Washington's recent adoption of the ICWA as state law is an important step towards strengthening tribal authority and sovereignty in child custody proceedings of Indian children. Previously, the specific provisions of the ICWA, including the "active efforts" standard and the "best interest of the child" philosophy, were not entirely understood or followed in Washington.

The WICWA has the opportunity to correct these issues. Under the WICWA, the legislature did a relatively good job of adopting a clear definition of the "best interest of the child" that bolsters the core policy of the ICWA. However, the legislature failed to adequately define in concrete terms and tangible examples the "active efforts" standard.

In order to ensure state agencies and their employees adhere to the intent of the WICWA in both its substantive and procedural provisions, the language of this statute must be more clear, concrete, and useful to the average social worker. Only with tangible examples of the standards can ICWA's goals be realized in Washington through the WICWA. Non-legal professionals must be given concrete and culturally sensitive resources and education about the history of Indian child removal in the United States, as well as easily implementable standards, to prevent similar harm to ensure Indian children in Washington are not needlessly removed from their families.