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Killing the Policy to Save the Child: Comparing the Historical Removal of Indigenous Children in Australia to the United States and How the Countries Can Learn From Each Other

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Cover Page Footnote

* 2015 JD, Seattle University School of Law. I want to thank my family, my partner Shayna Daitch, and my friends for their unwavering support throughout my time in law school. I want to thank my friend, Jocelyn McCurtain, for convincing me to do the NNALSA moot court competition. I would not have found my passion in Indian law without this encouragement. I want to thank my fellow Indian law scholars Chase Velasquez, Tamera Begay, Stephen Raslich, Antonio Solorzano, and Tommy Miller for welcoming me into Indian Country with open arms. Finally, I want to thank my law professors Eric Eberhard, Catherine O'Neill, Charlotte Garden, and Denis Stearns.

KILLING THE POLICY TO SAVE THE CHILD: COMPARING
THE HISTORICAL REMOVAL OF INDIGENOUS CHILDREN IN
AUSTRALIA TO THE UNITED STATES AND HOW THE
COUNTRIES CAN LEARN FROM EACH OTHER

Drew Pollom*

From the very moment the general government came into existence to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and to save them if possible from the consequences of their own vices.¹

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¹ *United States v. Rogers*, 45 U.S. 567, 572 (1846). *See also* Bethany Berger, "Power over this Unfortunate Race": *Race, Politics and Indian Law in United States v. Rogers*, 45 WM. & MARY L. REV. 1957, 1959 (2004).

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INTRODUCTION

Chief Justice Taney’s words, straight from his opinion in *United States v. Rogers* set the tone for federal policy involving Indians and Indian tribes (particularly his view that Native Americans were an unfortunate race), which reflected the overall views of the race at the time, and the role that the U.S. government

placed itself when legislating Indian issues.² Taney's view on race was not exclusive to Native Americans as he would espouse a similar opinion toward African Americans in *Dred Scott v. Sandford*, less than a year later.³ However, his legal views were not isolated beliefs and instead reflected language from the proclamations of colonial powers when indigenous populations were considered subjects under the dominion and control of their European Captors.⁴ Great Britain, for example, addressed Indian tribes as "several Nations or Tribes of Indians with whom we are connected, and who live under our protection" when their country issued the Royal Proclamation of 1763.⁵ This belief carried over into the legal analysis for many American jurists. In fact, it became so entrenched that Chief Justice Taney declared it was a "useless endeavor" to revisit whether subjugation of Native Americans was justified.⁶ Indeed, by the time he wrote the decision in *United States v. Rogers*, Chief Justice Marshall's words describing the relationship of the U.S. to the tribe as "guardian to a ward" had been on the books for a little over a decade.⁷ The lineage of these opinions reinforced a commonly held view in America: Native Americans were part of an inferior race who needed protection from civilized guardians.

At first, those guardians were the colonial powers such as Great Britain and France. Following the guardianship under established colonial powers like Great Britain and France, the United States assumed the role of warden over Indian communities. This legal principle, that the colonial power was the guardian of the indigenous populations, also treated the indigenous native populations as individuals, not bound together by a sovereign government, but instead bounded by a shared ethnicity.⁸ The United States took their racial viewpoint of the tribes and devised legislation to break their traditional communal bounds. As a result,

² *Rogers*, 45 U.S. at 572.

³ *Dred Scott v. Sandford*, 60 U.S. 393, 422 (1856) *superseded* (1868).

⁴ *Rogers*, 45 U.S. at 572.

⁵ The Royal Proclamation - October 7, 1763, THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/proc1763.asp.

⁶ *Rogers*, 45 U.S. at 572.

⁷ *See Cherokee Nation v. Georgia*, 30 U.S. 1, 10 (1831).

⁸ Berger, *supra* note 1.

millions of Native American children were removed from their homes and placed in boarding schools.

Thousands of miles away, Australia began its history of systematic removal of its indigenous populations. Although Australia only had one colonial power, Great Britain, the policy towards the Aboriginals ultimately led to similar removal policies that were witnessed in the United States. When Europeans first occupied Australia, brutal battles over land, water, and food were typical of the race relations between the White European settlers and the indigenous Aboriginals.⁹ Throughout the decades, Aboriginal children were kidnapped by the settlers and used for labor.¹⁰ Additionally, to instill European work habits, the Australian government and missionaries forced the removal of indigenous children from their homes and delivered them to the homes of settlers and other groups.¹¹ The Australian governments eventually decided to assign total control of the indigenous populations (hereafter referred to as “Aborigines” or “Aboriginal”) to the Chief Protector.¹² This made the Chief Protector the legal guardian of all Aboriginal children within Australia.¹³ Under the auspices of the Chief Protector, the practice of removing Aboriginal children from their homes reigned for decades until 1969.¹⁴ The children that were removed from their Aboriginal communities became collectively known as the “Stolen Generations.”

In addition to sharing a common colonial history, the United States and Australia have a shared understanding of the difficulties now facing government-native relations. Specifically, each government has struggled to address the historical treatment of the indigenous populations. Particularly difficult is addressing the historical removal of native children.

⁹ Gina Bonica, *Current Development: The Destruction of Australian Aboriginals: From Breach of Duty to Cultural Genocide*, 7 NEW ENG. INT'L & COMP. L. ANN. 227, 227 (2001).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

The United States has attempted to combat the removal of Native American children from their homes through the Indian Child Welfare Act.¹⁵ This important piece of legislation was developed and passed in the 1970s, was a product of the rising concerns of the separation of a large number (one out of three) of Native American children from their families, often without justification.¹⁶ Like many cases in Australia, the removal of native children in the United States was all too often unwarranted.¹⁷ Congress, compelled to address the problem, passed the Indian Child Welfare Act (ICWA).¹⁸ ICWA set the federal requirements used in cases of adoption of Native American children.¹⁹ For ICWA to apply to a Native American child, the child must be a member, or eligible to be a member, of a federally recognized tribe.²⁰ However, the law itself is not perfect, and new case law has further undermined its application in certain cases. The recent United States Supreme Court decision, *Adoptive Couple v. Baby Girl*²¹, displays some of the issues where courts have narrowed the scope of ICWA, thus potentially leaving certain indigenous children outside of its protections. Specifically, in that case, the court held that ICWA only applied to children as part of an existing Indian family,²² which would dramatically narrow the applicability of ICWA. Understanding the challenges that cases like *Adoptive Couple* present, ICWA advocates both inside and outside of the government have worked together to produce new guidelines that clarify the law and counteract rulings like *Adoptive Couple* that will make sure ICWA encompasses all child custody involving Native American children.

While the advocates in the U.S. fight for ICWA, a different battle is being waged in Australia. The primary issue facing the

¹⁵ 25 U.S.C.A. §§ 1901–63 (West 1978).

¹⁶ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2557 (2013).

¹⁷ Bonica, *supra* note 9, at 277.

¹⁸ *Id.*

¹⁹ *Indian Child Welfare Act of 1978*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, http://www.nicwa.org/indian_child_welfare_act (last visited May 12, 2016).

²⁰ *Id.*

²¹ *Baby Girl*, 133 S. Ct. at 2557 (2013).

²² *Id.*

Australian government is how to address appropriately the mounting claims and litigation related to the country's "Stolen Generations." The Stolen Generations included countless Aborigines whom the government removed from their homes as children.²³ Australia was tasked with determining the appropriate redress for the acts committed by their government. *Cubillo v. Commonwealth* and *Trevorrow v. South Australia*, demonstrate the difficulty facing Australian courts from litigants claiming damages stemming from the systemic removal of Aboriginal children from their homes, as well as frame the difficulties obtaining redress.

Although each country has their distinct set of problems, both countries can learn from each other and can address their problems through new legislation. Australia, having dealt with high-level litigation into compensation for Stolen Generation members, would benefit from new laws that address compensation claims for historical Aboriginal removal. Similarly, new Aboriginal adoption laws that take into account Aboriginal culture and customs, with an emphasis on keeping Aboriginal children in their traditional communities, would curb the needless removal of children from their communities. For the United States, the best path forward is to amend ICWA to address directly recent Supreme Court cases that have narrowed its application. Relying on the unique powers that Congress has over Indian Affairs, these amendments will be able to supersede the narrowing case law.

This Article addresses both the historical removal of indigenous children and the contemporary issues that now face each country in addressing that history. Part I of this Article traces the historical developments that led to the removal of Aboriginal children in Australia and Native American children in the United States; including how the United States' policy of being a "guardian" to the tribes extended to removing Indian children and placing them in boarding schools. This Part also includes how Australia's policy towards its Aboriginal population led to the mass removal of Aboriginal children to non-Aboriginal homes and institutions. Part II of this Article then explores the Indian Child Welfare Act in the United States and decisions of the Australian

²³ Bonica, *supra* note 9, at 227.

courts in *Cubillo and Trevorrow*. Part III identifies lessons that each nation can learn from the other when devising methods to address adequately the issues regarding Indian child removal. Specifically, Australia needs to adopt uniform laws that not only address the compensation issues highlighted by *Cubillo* and *Trevorrow*, but also adopt its ICWA-style scheme for future Aboriginal adoptions. For the United States, direct amendments to ICWA represent the best solution, clarifying the scope of the act as superseding decisions such as *Adoptive Couple*.

I. HISTORICAL DEVELOPMENT: HOW THE USA AND AUSTRALIA REMOVED INDIGENOUS CHILDREN

The United States and Australia came to the conclusion, independent of one another, that assimilation of their native populations into their contemporary society was necessary. In each country, the policy of assimilation included the forced and complete removal of indigenous children from their tribal communities. The United States commissioned boarding schools that taught Indian children western values and divorced them from their traditional community values as part of the assimilation process. Australia, on the other hand, took a different approach to removing children from their communities and traditional values by placing them in the hands of missionary groups. Regardless of the methodology, both countries' tactics attempted to reach the same goal: stripping indigenous children of their traditional cultural identity and assimilating them into the mainstream culture.

A. United States of America

The relationship between Native Americans and the United States government has always been complicated, but it has undergone multiple transformations. Each transformation and respective era is defined by either a court case, such as the era of the *Rogers*' decision, or legislative action, such as the General Allotment Act of 1887²⁴ (denoting the allotment and assimilation

²⁴ The General Allotment Act of 1887 (codified as 25 U.S.C. 9 §§ 331–58 (1887)).

era of Federal Indian policy). In the “formative years,”²⁵ Congress dealt with the Indian tribes using both treaties and statutes.²⁶ Through the treaties, the United States meant to deal with tribes honestly. Secretary of War Henry Knox, who led the first negotiations for early treaties, declared:

[T]he United States have pledged themselves for the protection of the said [I]ndians within the boundaries described by the said treaty and that the principles of good Faith and sound policy and every respect which a nation, owes to its own reputation and dignity require if the union possess sufficient power that it be exerted to enforce a due observance with the treaty.²⁷

The formative years of treaty making gave way in 1871 to what is known as the Allotment and Assimilation Era.²⁸ During this Era, the United States adopted the policy of removing Native American children from their homes and placing them in boarding schools. The United States was, in effect, attempting to integrate Native American children into contemporary society. This policy lasted through two subsequent eras, the Indian Reorganization Era,²⁹ and the Termination Era.³⁰ The practice of taking children from their indigenous homes did not end until the current era of Self-Determination.³¹ Starting in 1961, federal policy focused on self-governance allowing each tribe to create policy and govern themselves.³² Each era of federal policy guides the treatment of Native Americans. For example, it was the policies of the Assimilation and Allotment Era that made the Indian boarding schools possible, just as the policies underlying the Self-Determination Era helped spur Congress to pass ICWA.

²⁵ FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW §1.03 (2012 ed.).

²⁶ *Id.*

²⁷ DOCUMENTS OF UNITED STATES INDIAN POLICY 12–13 (Francis Paul Prucha ed., 3d 2000).

²⁸ COHEN, *supra* note 25, §1.04

²⁹ *Id.* §1.05.

³⁰ *Id.* §1.06.

³¹ *Id.* §1.07.

³² *Id.*

1. The *Rogers* Court-Backdrop for Discriminatory Policies

The United States Supreme Court's decision in *United States v. Rogers* centered on the federal government's invasion into tribal sovereignty.³³ The *Rogers* decision rested upon the premise that Native Americans were racially inferior to their Caucasian counterparts.

In 1844, William Rogers allegedly stabbed his brother-in-law, Jacob Nicholson, to death.³⁴ Although both men were white, each married members of the Cherokee Nation.³⁵ By Tribal law, Rogers was a citizen of the Cherokee Nation through his marriage.³⁶ Moreover, the crime was allegedly committed in Cherokee territory, West of Arkansas.³⁷ Rogers was charged with the murder of his brother. When the case came to trial, Rogers claimed the United States district court did not have jurisdiction over him because he was a member of the Cherokee Nation.³⁸ Rogers had the power of a treaty on his side: The 1835 Treaty of New Echota ("the Treaty") between the Cherokee and the United States. The Treaty established tribal jurisdiction over non-Indians on Cherokee Lands.³⁹ The Treaty also protected tribal jurisdiction under federal law.⁴⁰ Pursuant to the Treaty, the federal government lacked the authority to interfere with Cherokee law.⁴¹ Nevertheless, the Court rejected Rogers' argument and held that Rogers did not become an Indian when he married into the Cherokee tribe.⁴² In this opinion, Taney wrote that the Indian tribes were an "unfortunate race," reflecting the evolution of the treatment of tribes by the law.⁴³

³³ See Generally, *United States v. Rogers*, 45 U.S. 567, 576 (1846).

³⁴ Berger, *supra* note 1, at 1960.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Rogers*, 45 U.S. at 570.

³⁹ Berger, *supra* note 1, at 1971.

⁴⁰ *Id.* at 1972.

⁴¹ *Id.*

⁴² *Rogers*, 45 U.S. at 572.

⁴³ *Id.* at 572.

From the Great Proclamation of 1763 to Justice Marshall's statement "ward to guardian"⁴⁴ in *Cherokee Nation* to Taney's words in *Rogers*, treatment of individual Native Americans was based on race and the treatment of each tribe was based on a racial bond. This legal analysis provides a backdrop into why three decades later, U.S. policymakers decided to assimilate Native Americans into the contemporary society. Their engine of change was the Dawes Act, beginning the Allotment and Assimilation Era.

2. The Dawes Act & the Legacy of Boarding Schools

In the decades following the *Rogers* decision, the federal government turned to a policy of assimilating Native Americans into American society. This assimilation policy manifested into two actions: individual allotment of reservation land and removal of native children into boarding schools.⁴⁵ In search of ways to use what much of the United States considered to be "unused" lands, Congress established the General Allotment Act of 1887.⁴⁶

The General Allotment Act of 1887, also known as the Dawes Act, dealt with what the United States considered to be "unused lands."⁴⁷ The Dawes Act effectively broke up reservation lands into 160-acre and 80-acre parcels. The title of each parcel of land was given to the head of the Indian household.⁴⁸ The purpose of the Dawes Act was to provide American Indians with their own parcel of land rather than having the tribe own the land collectively.⁴⁹ Tribal members could then keep the land or sell the individual parcels to Indians or non-Indians. The Dawes Act was another attempt to assimilate Native Americans into the American mainstream culture by breaking the link between individual Native Americans and their traditional communal culture.

⁴⁴ *Cherokee Nation v. Georgia*, 30 U.S. 1, 11 (1831).

⁴⁵ *Id.*

⁴⁶ The General Allotment Act of 1887 (codified as 25 U.S.C. 9 §§ 331–58 (1887)).

⁴⁷ *Rogers*, 45 U.S. at 572.

⁴⁸ *Id.*

⁴⁹ *Id.*

The second major policy decision adopted by the United States government was the reformation of Indian education.⁵⁰ The educational reforms for Native American children led to the formation of boarding schools built specifically for Native American children. The purpose of these schools was to teach Native American children capitalistic values in order to accelerate the assimilation process.⁵¹ Richard Pratt, the founder of the influential Carlisle Indian Industrial School, was responsible for the curriculum taught to all Native American children throughout the country during this era.⁵² Pratt based his policy on a simple mantra “Kill the Indian, save the man.”⁵³ This philosophy represented a dramatic and extreme example of assimilation.⁵⁴ In Pratt’s view, the only way to educate and civilize a Native American child was to remove them from their “primitive” family settings.⁵⁵ Through removal, the children could assimilate into the American society, and therefore would be considered civilized individuals.

The United States authorized the Commissioner of Indian Affairs to institute rules regarding attendance in Indian schools, and to provide funds to transport the children from the reservations to the schools.⁵⁶ To implement these policies, the Commissioner employed unsavory methods to coerce Indian parents into sending their children away.⁵⁷ For example, government rations were intentionally withheld from families, forcing the Indian parent to choose between starving their children or sending them to boarding schools where they would be fed.⁵⁸ Often parents would choose the latter.

Once at the schools, the goal of ridding Native American children of their culture and replacing it with Euro-American

⁵⁰ .Ann Haag, *The Indian Boarding School Era and its Continuing Impact on Tribal Families and the Provision of Government Services*, 43 TULSA L. REV. 149, 151 (2007).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 153.

⁵⁷ *Id.*

⁵⁸ *Id.*

culture was realized.⁵⁹ Boarding schools required English-only instruction, demanding that Native American children speak English, and effectively purging Native American populations of their traditional languages. The impact of English-only education on traditional languages was catastrophic. When European settlers first arrived in North America, there were over 300 known languages spoken by tribal communities. By 1997, nearly half of the native languages in the United States ceased to exist.⁶⁰

The catalyst behind each assimilation measure can be traced back to the main point espoused by Chief Justice Taney in *Rogers*: The belief that tribal policies and cultural beliefs were antiquated, and therefore, inferior to the European-based society created in the United States. The government's goal to separate Native Americans from their cultural identity and absorb them into the greater American society had a dramatic impact on tribal communities across the United States.

B. Australia

The history of Australian-Aboriginal relations follows similar tangents that colored the relationship between the United States and the Native American tribes. It also shows some of the same hallmarks of the complexity of defining race within the Aboriginal group.

Aboriginal-Australian relations can trace back to the very first set of colonies starting in New South Wales. Authorities' version of reaching out to the Aboriginal population, began with the capturing of individual Aboriginals. In the very first year of the New South Wales colony, Governor Arthur Phillips ordered the capture and imprisonment of two Aboriginal people.⁶¹ Among Phillips' thoughts, was the hope that keeping the Aboriginal people separate from their "primitive" society could "civilize" the two men.⁶² By attempting to separate these men from their indigenous culture, Phillips hoped the men could become emissaries to the rest

⁵⁹ *Id.* at 155.

⁶⁰ *Id.* at 158.

⁶¹ PETER READ, *A RAPE OF THE SOUL SO PROFOUND: THE RETURN OF THE STOLEN GENERATIONS* 17 (Allen & Unwin 1982).

⁶² *Id.*

of the Aboriginal people and help bring about the same change that occurred to the two original Aboriginals that he had imprisoned.⁶³ This behavior, and others like it, set the stage for the systemic taking of Aboriginal children.

Massive intervention by the Australian government in the lives of Aboriginal families reached its zenith in the twentieth-century Aboriginal Australia.⁶⁴ The legal engine driving the intervention was the ironically named Aboriginal Protection Acts.⁶⁵ By 1911, the Acts were passed by all of the Australian mainland state governments.⁶⁶ The series of laws allowed for the permanent removal of children from their homes.⁶⁷ Similar to the policies instituted in the United States, the Australian officials believed that the separation of the children was for their betterment. A 1911 report produced by the New South Wales (NSW) Aboriginal Protection Board exemplified the Australian policy of “separation-for-their-own-good,” claiming that: “The only chance these children have is to be taken away from their present environment and properly trained by earnest workers before being apprenticed out, and having once left the aborigines’ reserves they should never be allowed to return to them permanently.”⁶⁸

By 1950, the removal of Aboriginal children from their homes had reached its apex.⁶⁹ One in three or four Aboriginal children was removed from their homes in New South Wales.⁷⁰ All Australian states and territories, except Tasmania possessed a number of well-known, and now notorious institutions of church and state in which Aboriginal children had been taken and incarcerated for decades.⁷¹ Often, these institutions would commit terrible deeds toward Aboriginal children.⁷² One example of the mistreatment of the Aboriginal children is the tale of a fifteen-year-

⁶³ *Id.*

⁶⁴ *Id.* at 23.

⁶⁵ *Id.* at 22.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 24.

⁶⁹ *Id.* at 23.

⁷⁰ *Id.*

⁷¹ *Id.* at 23.

⁷² *Id.*

old girl at Moor River in Western Australia.⁷³ She was imprisoned in a miniature cell for 67 days during 1918–1919 for repeatedly attempting to run away to rejoin her family.⁷⁴ The story of the fifteen-year-old girl at Moor River is a brief window into the treatment that typified the era and life of members of the Stolen Generations. Through the Aboriginal Protection Boards, thousands of children were forcibly removed from their homes and brought to these institutions. Although the institutions themselves were privately-run, it is the argument that they operated with the blessing of the Australian government that would later form the basis of the tort claims in *Cubillo* and *Trevorrow*.

II. RECONCILIATION, LEGISLATION, AND LITIGATION: AUSTRALIA AND THE UNITED STATES MOVE AWAY FROM ASSIMILATION

In the decades after the dismantling of policies that predicated the removal of children, the governments of the United States and Australia have grappled with the unanticipated aftermath. While the United States focused on stopping future harm while attempting to emphasize the cultural integrity of the tribes, Australia focused more on issues pertaining to litigation, specifically on handling claims from Aboriginals who were taken from their homes as children. Although the root of the problems that each country face are similar, the solutions and difficulties that they face have diverged.

A. United States

For the United States government, the issue of child removal now surrounds the ICWA.⁷⁵ Since its passage, the statute has set the standards for adoptions and child placement of Native Americans. Recent litigation has sought to narrow, and even dismantle, the framework set for in the statute. The recent case of *Adoptive Couple* represents the best high-profile decision that has narrowed the scope of ICWA.

⁷³ *Id.*

⁷⁴ *Id.* at 23–24.

⁷⁵ 25 U.S.C. § 1901 (2016).

1. Indian Child Welfare Act

Congress passed the ICWA in response to the mass displacement of Native American children.⁷⁶ During the 1970s, the U.S. government started a new federal policy that became known as the Self-Determination Era.⁷⁷ In the 1970s, the federal policy of self-determination in social welfare and education became important aims as part of the new policy. Native American tribes and organizations and the extent of the Indian child welfare crisis had to be assessed before responsive legislation could be drafted.⁷⁸ The Association of American Indian Affairs began to document the removal of Indian children from the homes, along with the impacts of removal on the children themselves.⁷⁹ Conservative estimates at the time suggested that one-third of all Indian children had been removed from their homes and placed in foster homes, adoptive care, or educational institutions.⁸⁰ Furthermore, at least 85 percent of the placements were in non-Indian homes and institutions, with a high proportion of the children residing out of state.⁸¹ For instance, in 1971, the Bureau of Indian Affairs (BIA) school census showed that 34,538 American Indian children lived in institutional facilities rather than at home.⁸²

Once the Indian child welfare crisis was brought forward, Congress, along with numerous Native tribes, was tasked with developing legislation to tackle the issue.⁸³ In 1978, Congress passed the Indian Child Welfare Act, declaring:

It is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster

⁷⁶ Lorie Graham, *"The Past Never Vanishes": A Contextual Critique of The Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 2 (1998/1999).

⁷⁷ COHEN, *supra* note 25, §1.07.

⁷⁸ Graham, *supra* note 76. at 2.

⁷⁹ *Id.*

⁸⁰ *Id.* at 24.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

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.⁸⁴

ICWA had several goals, including the reversal of historical practices and policies that led to the massive removal of Indian children and subsequent placement in institutions.⁸⁵ ICWA mainly combats this problem in two ways. First, under ICWA, tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child.⁸⁶ If the Indian child does not reside on the reservation of their tribe, and the custody proceeding is in state court, then the state court has to transfer the proceeding to the tribal court of the tribe in which the Indian child is enrolled.⁸⁷ ICWA achieves this goal through the use of placement preferences separated into two categories: adoptive placement preferences and foster care preferences.⁸⁸ For adoptive place preferences, an Indian child is preferably adopted by 1) a member of the child's extended family; 2) other members of the Indian child's tribe; or 3) other Indian families. For foster care, the placement preferences are 1) a member of the Indian child's extended family; 2) a foster home licensed, approved, or specified by the Indian child's tribe; 3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or 4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.⁸⁹

A resulting consequence of the implementation of ICWA was the difficulty of determining custody of American Indian children. ICWA defines child custody hearings as any proceeding involving

⁸⁴ *Id.* at 32.

⁸⁵ *Id.* at 18.

⁸⁶ 15 U.S.C. § 1911(a) *repealed by* Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (July 5, 1994).

⁸⁷ 15 U.S.C. § 1911(b) *repealed by* Pub. L. No. 103-272, § 7(b), 108 Stat. 1379 (July 5, 1994).

⁸⁸ *Id.*

⁸⁹ 25 U.S.C. § 1915(B), *invalidated by In re Santos Y.*, 112 Cal. Rptr. 2d 692 (Cal. Ct.App. 2001).

foster care placements.⁹⁰ The *American Law Reports* have attempted to analyze the ICWA and its application in child custody hearings.⁹¹ Courts have determined that for the ICWA to apply, the child at the center of the custody proceedings must meet the criteria of an “Indian child.”⁹² From there it gets complicated: “Some courts have found that the ICWA applies to the parental rights of unmarried fathers (2[a]); another authority has held that the statute is inapplicable in the absence of acknowledgment of paternity (§ 12[b]).”⁹³

Once a child has been determined to be an Indian Child, the tribe can assert its exclusive jurisdiction and have the proceeding transferred to tribal court.⁹⁴ There, the defined preferences for placement of an Indian child become apparent.⁹⁵ If an Indian child is placed in foster care or a predictive placement, preference should first be given to the members of the Indian child's extended family, followed by a foster home approved by the tribe, subsequently by an Indian foster home licensed by a non-Indian licensing authority. If none of these options are available, the child should be placed at an institution for children that has either been approved by the tribe or operated by an Indian organization that has a program to meet the child's needs.⁹⁶

In addition to placement preferences, the Act also gives detailed instructions in the event that a Native American intends to forfeit their rights to their child. An Indian parent can consent to termination of the parental rights; the consent must be in writing, made before the judge in the competent jurisdiction, and accompanied by a certificate from that judge that gives a full explanation of the consequences of the consent and comprehension

⁹⁰ Honorable Maurice Portley, *The Indian Child Welfare Act: A Primer*, 36 ARIZ. ATT'Y 24, 24 n.1 (Feb. 2000).

⁹¹ 25 U.S.C.A. §§1901–1963 (West 2016). See also, Carol Schultz Vento, Annotation, *Construction and Application of Indian Child Welfare Act of 1978 (ICWA)* (25 U.S.C.A. §§ 1901 et seq.) *Upon Child Custody Determinations*, 89 A.L.R. 5th 195 (2013).

⁹² 25 U.S.C. § 1903(4) (2016).

⁹³ Vento, *supra* note 91, at 82.

⁹⁴ Portley, *supra* note 90.

⁹⁵ *Id.*

⁹⁶ *Id.*

by the parent.⁹⁷ Whether a tribal member consented to forfeiture of their rights to the child, and whether the tribal court had jurisdiction became part of the key legal facts in the latest case involving ICWA and child custody hearings: *Adoptive Couple v. Baby Girl*.

2. *Adoptive Couple* and the Existing Family Doctrine

In *Adoptive Couple*, the child was born to Birth Mother (Mother) who was Hispanic, and Biological Father (Father), a member of the Cherokee Nation.⁹⁸ Father and Mother were engaged in December 2008; one month later Mother informed Father that she was pregnant.⁹⁹ By May of 2009, the relationship between Mother and Father deteriorated to the point that the engagement was called off.¹⁰⁰ Eventually, the mother decided to put Baby Girl up for adoption.¹⁰¹ Because the father was a member of the Cherokee Indian Tribe, the mother of the child contacted the Cherokee nation through her attorney.¹⁰² When providing the information to the Cherokee Nation, the Mother misspelled the Father's name in addition to providing an incorrect birthdate.¹⁰³ Based on the information she provided, the Cherokee Nation could not verify whether Father was an enrolled member of the Tribe.¹⁰⁴

At the same time, the mother met the Adoptive Couple, located in South Carolina, through a private adoption agency.¹⁰⁵ The relationship progressed to the point that the Adoptive Couple supported Mother both financially and emotionally throughout her pregnancy.¹⁰⁶ On September 15, 2009, the child was born, and the mother signed a notice terminating her parenting rights.¹⁰⁷

⁹⁷ *Id.*

⁹⁸ *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2558 (2013).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Adoptive Couple took Baby Girl from the hospital to their home in South Carolina.¹⁰⁸

Approximately four months after the adoption, the Adoptive Couple notified the father of the pending adoption.¹⁰⁹ The father signed papers saying he was not contesting the adoption but later claimed that he thought he was relinquishing his rights to Mother, not the Adoptive Couple.¹¹⁰ After consulting with an attorney, Father filed a motion in South Carolina to stay the adoption.¹¹¹ A trial took place in South Carolina Family Court in 2011, by which time Baby Girl was two years old.¹¹² The family court denied the adoption and on December 27, 2011, Baby Girl was handed over to her biological father.¹¹³ When reviewing the facts of the case, Justice Alito, writing the majority opinion for the United States Supreme Court, noted that Baby Girl had never met her biological father until she was handed over to her father.¹¹⁴

At the state level, the South Carolina State Supreme Court affirmed the family court's decision and the Indian child remained with her father.¹¹⁵ In doing so, the court held that two different provisions of the ICWA barred the termination of father's parental rights.¹¹⁶ First, the court held that the Adoptive Couple had not complied with § 1913(d) of the ICWA, which requires a showing of "active efforts . . . were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family."¹¹⁷ Second, the court concluded that that Adoptive Couple had not met § 1912(f) requirements that Biological Father's "custody of Baby Girl would result in serious emotional or physical harm to her beyond a reasonable doubt."¹¹⁸ When the case eventually reached the U.S. Supreme Court, Justice Alito

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 2559.

¹¹¹ *Baby Girl*, 133 S.Ct. at 2559.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

rejected these arguments in his majority opinion.¹¹⁹ Going directly to § 1912(f), Justice Alito tackled the issue of an involuntary termination of an Indian parental right. Justice Alito emphasized that the statute focuses on the language of continued custody.¹²⁰ The reading of “continued custody” is important to deconstructing Justice Alito’s opinion:

“[t]he ICWA was designed to counteract was the unwarranted removal of Indian children from Indian families due to the cultural insensitivity and biases of social workers and state courts. The statutory text expressly highlights the primary problem that the statute was intended to solve: “an alarmingly high percentage of Indian families [were being] broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.”¹²¹

In essence, Justice Alito did not believe that an Indian family was being broken up, instead, he noted “[h]ere, the adoption of an Indian child is voluntarily and lawfully initiated by a non-Indian parent with sole custodial rights.”¹²² Justice Alito further remarked that it was not disputed that Father did not have physical custody nor legal custody at the time of the adoption.¹²³ Therefore, Father could not invoke § 1912(f) to bar the adoption, since “ICWA’s primary goal of preventing the unwarranted removal of Indian children and the dissolution of Indian families is not implicated.”¹²⁴ Justice Alito applied this same analysis to the second ICWA provision implicated, section § 1912(d). The opinion indicated that the law “applies only in cases where an Indian family’s ‘breakup’ would be precipitated by the termination of the parent’s rights.”¹²⁵ Again, Alito focused on the fact that an

¹¹⁹ *Id.* at 2557.

¹²⁰ *Id.*

¹²¹ *Id.* at 2561.

¹²² *Id.* at 2561.

¹²³ *Id.* at 2555.

¹²⁴ *Id.* at 2561.

¹²⁵ *Id.* at 2562.

Indian family is not currently being broken up.¹²⁶ Alito's decision in the case led to Baby Girl's return to Adoptive Couple.

In her dissent, Justice Sotomayor pointed out that the majority had used a single clause, continued custody, to render the entirety of the statute inapplicable.¹²⁷ She pointed out that it was undisputed that Father was the biological father of Baby Girl, and as a result Baby Girl was an Indian child under ICWA.¹²⁸ The language of the statute holds that the ICWA applies in *any* child custody hearing involving an American Indian child.¹²⁹ Justices Alito and Sotomayor set up a future dilemma for the Court. On one hand there is Alito's substantive argument, resting on the foundation that the ICWA was intended to stop breakup of Indian families, not assert noncustodial rights over custodial rights. On the other is Justice Sotomayor's procedurally-based opinion. In Sotomayor's world, the ICWA *always* applies to a child custody hearing *regardless* of whether the Indian parent originally had custody of the child.

3. ICWA Guidelines and constitutional challenges: ICWA Post-Adoptive Couple developments

Since the Supreme Court decision in *Adoptive Couple*, it's been unclear how Justice Alito's "Existing Indian Family" doctrine, was unclear would impact the child custody proceedings. The ruling cases arising in Washington,¹³⁰ Michigan,¹³¹ Wyoming,¹³² Alaska,¹³³ California,¹³⁴ Montana,¹³⁵ Nebraska,¹³⁶ North Carolina,¹³⁷ and Oklahoma¹³⁸ have all cited back to the *Adoptive Couple* decision. However, the central premise of the *Adoptive*

¹²⁶ *Id.*

¹²⁷ *Baby Girl*, 133 S. Ct. at 2574 (Sotomayor, J., dissenting).

¹²⁸ *Id.* at 2573.

¹²⁹ *Id.*

¹³⁰ *In re Taw*, 354 P.3d 46 (Wash. Ct. App. 2015).

¹³¹ *In re K.M.N.*, 870 N.W.2d 75 (Mich. Ct. App. 2015).

¹³² *In re ARW*, 2015 WY 25, 343 P.3d 407 (Wyo. 2015).

¹³³ *Ebert v. Bruce L.*, 340 P.3d 1048 (Alaska 2014).

¹³⁴ *In re Elise W.*, A136845, 2014 WL 98674 (Cal. Ct. App. Jan. 10, 2014).

¹³⁵ *In re S.B.C.*, 2014 MT 345, 340 P.3d 534.

¹³⁶ *In re Shayla*, 846 N.W. 2d 668 (Neb. Ct. App. 2014).

¹³⁷ *In re E.G.M.*, 750 S.E.2d 857 (N.C. Ct. App. 2013).

¹³⁸ *In Re T.S.*, 2013 OK CIV APP 108, 315 P.3d 1030.

Couple decision is being challenged right now through new guidelines promulgated by the BIA.

On February 25, 2015, the BIA issued new guidelines for state courts and agencies in Indian country proceedings.¹³⁹ Assistant Secretary of the Interior Kevin Washburn pointed to cases like *Adoptive Couple v. Baby Girl* as the impetus for finding a better way to ensure compliance with the ICWA guidelines.¹⁴⁰ Secretary Washburn acknowledged that while they are unable to overturn the decision in *Adoptive Couple* via new rules and guidelines, the new guidelines provide a means to strengthen the original intent of ICWA.¹⁴¹ Under the proposed guidelines, the BIA specifically states, “[t]here is no exception to application of ICWA based on the so-called ‘existing Indian family doctrine.’”¹⁴² As a result, the guidelines treat factors such as whether the Indian child participates in or observes tribal customs as part of the non-exhaustive list of factors that courts need to use to determine whether ICWA application is appropriate.¹⁴³ These factors, in turn, impact the level of involvement that the tribe would have during state court proceedings.¹⁴⁴ The guidelines also dictate that state courts and agencies must always ask, and investigate, if the child in the middle of an adoption proceeding qualifies as an Indian child.¹⁴⁵

The proposed guidelines appear to address directly the existing family doctrine from the *Adoptive Couple* decision without attempting to overthrow the decision itself. However, the guidelines have not been without controversy. In May 2015, the National Council for Adoption sued the Department of Interior

¹³⁹ Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10,149 (Feb. 25, 2015).

¹⁴⁰ Suzette Brewer, *BIA Releases New ICWA Guidelines to Protect Native Families and Children*, INDIAN COUNTRY MEDIA NETWORK (Feb. 26, 2015), <http://indiancountrytodaymedianetwork.com/2015/02/26/bia-releases-new-icwa-guidelines-protect-native-families-and-children-159392>.

¹⁴¹ *Id.*

¹⁴² Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10,152.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 10153.

over the guidelines.¹⁴⁶ The National Council for Adoption's complaint focused on whether the 2015 ICWA guidelines violated the Administrative Procedure Act (APA).¹⁴⁷ Specifically, whether the rules violated the notice and comment sections of the APA.¹⁴⁸ Under the APA, any new rules or regulations by any government agency have to go through a specific process that puts the public on notice of the new rules or regulations and allows the public to comment on those changes.¹⁴⁹ The National Council for Adoption asserted that the BIA did not follow these rules because the actual rulemaking process for the guidelines was never made public.¹⁵⁰

However, the complaint went beyond attacking the new rules under APA to attacking ICWA on constitutional grounds. The complaint also alleged that the "2015 Guidelines self-consciously violate[d] . . . the United States Constitution by instructing state courts to violate the due process and equal protection rights of 'Indian Children' and the birth parents of such children, and by commandeering the resources of state child-welfare agencies and state courts."¹⁵¹ This constitutional attack is also being raised by a separate lawsuit filed by the Goldwater Institute.¹⁵² The Goldwater Institute has used similar language concerning due process rights in another lawsuit.¹⁵³ In that lawsuit, the plaintiffs alleged that the entire scheme of ICWA was unconstitutional because ICWA includes the ancestry of Indian children.¹⁵⁴ According to the plaintiffs, this means that:

¹⁴⁶ Complaint, National Council for Adoption v. Jewell, 15-CV-00675-GBL-MSN (E.D. Va. May 27, 2015).

¹⁴⁷ *Id.* at 2 (Administrative Procedure Act is codified as 5 U.S.C. §§ 551–706).

¹⁴⁸ *Id.*

¹⁴⁹ Rule Making, 5 U.S.C. §553 (2016).

¹⁵⁰ Complaint, National Council for Adoption v. Jewell, 15-CV-00675-GBL-MSN (E.D. Va. May 27, 2015).

¹⁵¹ *Id.* at 3.

¹⁵² Starlee Coleman, *Goldwater Institute Files Class Action Lawsuit Against Parts of Indian Child Welfare Act*. GOLDWATER INSTITUTE (July 7, 2015), <http://goldwaterinstitute.org/en/work/topics/constitutional-rights/equal-protection/goldwater-institute-files-class-action-lawsuit-aga/>.

¹⁵³ Complaint, A.D. v. Washburn, No. 2:15CV-01259-PHX-NVW (D. Ariz. 2015).

¹⁵⁴ *Id.*

Children with Indian ancestry, however, are still living in the era of *Plessy v. Ferguson*. Alone among American children, their adoption and foster care placements are determined not in accord with their best interests but by their ethnicity, as a result of a well-intentioned but profoundly flawed and unconstitutional federal law, the Indian Child Welfare Act (“ICWA”), codified at 25 U.S.C. §§ 1901–1963.¹⁵⁵

Litigation like *A.D. v. Washburn* is ongoing and unresolved. ICWA advocates need to keep an eye on these cases as they have potential consequences for the statute as a whole. If a case like *A.D.* were to strike down the entire ICWA framework on constitutional grounds, then any discussion of improving ICWA will strictly be academic.

4. Takeaway

In many ways, ICWA is both a reactive and proactive measure. It is reactive because its passage was meant to stop the practice of the removal of Indian Children. It is proactive because its provisions are designed to prohibit the future removal of Indian children. However, as the decision in *Adoptive Couple v. Baby Girl* shows, the statute in its current state is under attack, where courts interpret provisions in a way that deprives tribal jurisdiction in situations where an Indian Child is involved. Attempts to narrow the scope of the statute are under way, and the existing family doctrine is just one avenue in which that strategy is being carried out. The new ICWA guidelines show a concerted effort by the BIA to counter-act the “existing Family doctrine.” However, *National Council for Adoption v. Jewell* and *A.D. v. Washburn* point out that in its current state, ICWA will remain under constant attack from litigation that will try to narrow the scope of the statute or strike the statute down. Advocates for the law will need to take a more stringent role in improving and strengthening the law from this point forward.

¹⁵⁵ *Id.*

B. Australia

Unlike in the United States, the reaction to the Stolen Generations in Australia has not been to pass proactive legislation stopping future removals. Instead, what has emerged is complex litigation arising out of the policies of Aboriginal removal. Two cases in particular, *Trevorrow v. South Australia*, and *Cubillo v. Commonwealth* stand out as landmark decisions that have affected Stolen Generation litigants' ability to sue in court.

1. *Cubillo*: a Foot in the Door for the "Stolen Generations"

Cubillo v. Commonwealth represented one of the first cases involving members of the Stolen Generations against the Commonwealth.¹⁵⁶ Two Stolen Generation members, Lorna Cubillo and Peter Gunner, sued for wrongful imprisonment, breach of statutory duty, negligence, and breach of fiduciary duty arising out of their removal from their central Australian Aboriginal mothers.¹⁵⁷ The Commonwealth of Australia was the only defendant in their suit.¹⁵⁸ The goal of the suit was to make Australia accountable for their backing of the taking of Aboriginal children by third parties. By holding the government liable, the plaintiffs of *Cubillo* hoped to open the door for other members of the Stolen Generations to also bring claims against the government.

a. *Lorna Cubillo: A Background*

Lorna Cubillo's story starts out like many members of the Stolen Generation, removal from her home as a child. Lorna was taken from her community at the Phillip Creek Native Settlement in 1947.¹⁵⁹ She was only eight years old.¹⁶⁰ At the time, the Phillip Creek Settlement was run by the religious organization, the Aborigines Inland Mission (AIM) on behalf of the Commonwealth's Native Affairs Department.¹⁶¹ Lorna, along with 15 other Aboriginal children, was removed under the auspices of

¹⁵⁶ Jennifer Clarke, *Cubillo v. Commonwealth*, 25 MELB. U. L. REV. 218, 220 (2001).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 228.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 228–29.

Amelia Shankelton who led the mission.¹⁶² She was then detained at AIM's Retta Dixon Home in Darwin, also run by Shankelton.¹⁶³ Lorna, along with the others, alleged that she suffered harshness, physical abuse, and lack of affection at the Retta Dixon home until the age of eighteen.¹⁶⁴ She finally left the home in October of 1956.¹⁶⁵

b. Peter Gunner: A Background

In 1956, when seven-year-old Peter Gunner was removed from his home, he was living in the "native" camp on the Utopia Pastoral Station in Central Australia.¹⁶⁶ At the time, he was in the care of his mother, Topsy Kundriba.¹⁶⁷ Peter Gunner claimed that patrol officers forcibly removed him from his mother,¹⁶⁸ which Judge O'Laughlin found almost certainly true.¹⁶⁹ However, O'Laughlin found evidence that Peter's mother, Topsy, might have consented to the removal in order for him to get a "European" education.¹⁷⁰ The patrol officer assured Topsy that Peter would be "home for the holidays."¹⁷¹ Peter was placed in St. Mary's Hostel, a home for part-Aboriginal children administered by the Australian board of missions.¹⁷² Peter stayed at St. Mary's until 1962 when he left at the age of 14.¹⁷³

c. Cubillo: The Arguments

The plaintiffs Lorna Cubillo and Peter Gunner alleged that their removal and detention by the Director of Native Affairs, also known as Chief Protector, constituted wrongful imprisonment and deprivation of liberty.¹⁷⁴ Their case ultimately failed on all

¹⁶² *Id.* at 229.

¹⁶³ *Id.*

¹⁶⁴ Bonica, *supra* note 9, at 227.

¹⁶⁵ Clarke, *supra* note 156, at 229–30.

¹⁶⁶ *Id.* at 230.

¹⁶⁷ *Id.*

¹⁶⁸ Bonica, *supra* note 9, at 230.

¹⁶⁹ Clarke, *supra* note 156, at 220.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Bonica, *supra* note 9, at 227.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

accounts. They brought, among other things, a claim of false imprisonment, a breach of statutory duty by the Australian officials, and negligence by those officials. Judge O'Laughlin, who wrote the opinion, dismissed each of these claims one by one.

i. False Imprisonment

Cubillo and Gunner alleged that the Commonwealth promoted or caused their detention.¹⁷⁵ The policy of Aboriginal removal, they argued, was carried out without regard to the children's individual circumstances.¹⁷⁶ Remarkably, on these claims, O'Laughlin found two separate points. First, he found that the powers vested to the Director Native Affairs under the 1918 Ordinance to remove children were broad enough that the detention of Peter Gunner and Lorna Cubillo could not be impeached.¹⁷⁷ Second, O'Laughlin found that the Commonwealth failed to prove that Lorna Cubillo's detention was a lawful exercise of the Director's power under § 6 of the 1918 ordinance.¹⁷⁸ This distinction led O'Laughlin to conclude:

Mrs. Cubillo has established, *prima facie*, . . . a cause of action against the estate of [former Director of Native Affairs] Mr. Moy, [former Native Affairs patrol officer] Mr. Penhall, the estate of [former Retta Dixon Home Superintendent] Miss Shankelton and the Aborigines Inland Mission for false imprisonment based on her removal.¹⁷⁹

The finding that Lorna Cubillo had a *prima facie* case against the individuals that led to her imprisonment did not amount to a cause of action against the Commonwealth.¹⁸⁰ If Cubillo had raised a lawsuit against the actual parties involved with her removal, she would have likely prevailed. However, the court held she did not

¹⁷⁵ Clarke, *supra* note 156, at 220.

¹⁷⁶ *Id.* at 220.

¹⁷⁷ *Id.* at 270.

¹⁷⁸ *Id.* at 220.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

have a claim against the Commonwealth itself.¹⁸¹ Instead, a more appropriate claim would be against the Retta Dixon Home or the former superintendents of the home.

ii. Breach of Statutory Duty

The Commonwealth had argued, *inter alia*, that Cubillo and Gunner's claims for breach of statutory duty should not be sustained.¹⁸² According to the Commonwealth, the evidence showed that the plaintiffs could not prove that the Commonwealth was directly involved in the removal or detention of either plaintiff.¹⁸³ O'Laughlin rejected the Commonwealth's summary judgment motion.¹⁸⁴ Judge O'Laughlin stated:

I have come to the conclusion that the circumstances of both these cases are such that it would be appropriate to make a prima facie finding that Mrs. Cubillo and Mr. Gunner have private rights of action for breach of statutory duty available to them. I am persuaded to reach that preliminary conclusion as a result of the following factors: on the assumption that the applicants are able to prove an abuse or misuse of power on the part of the Commonwealth (or on the part of its servants or agents for whom it is vicariously responsible) the legislation provides no other remedy; the powers of the Director and (in the case of Mr. Gunner) the powers of the Director of Native Affairs are exceptionally wide and far-reaching in their affect [*sic*] upon the liberty and freedom of the individual — a feature that, in isolation, calls out for some form of review or supervision Next, the class of people who were affected by the legislation were [*sic*] clearly defined. It was limited in its application to Aboriginal persons and, later, with the advent of the *Welfare Ordinance*, to those persons who had been declared wards. Finally, it could not be said that one can describe, from a

¹⁸¹ *Id.*

¹⁸² *Id.* at 271.

¹⁸³ *Id.*

¹⁸⁴ *Cubillo v. Commonwealth* (1999) 89 FCR 528 (Austl.).

reading of either the *1918 Ordinance* or the *Welfare Ordinance*, a clear intention on the part of Parliament to take away a private right to seek redress from the courts.¹⁸⁵

Although the court rejected the Commonwealth's summary judgment motion, O'Laughlin reasoned that the Commonwealth breached a duty but did not grant the plaintiffs relief under this claim.¹⁸⁶ Part of the court's reasoning stemmed from the plaintiffs' argument that the Commonwealth's breach of duty was in relation to its guardianship powers. The plaintiffs did not argue that the Director had breached his "public" duties to oversee and regulate the institutions where they were sent.¹⁸⁷ For O'Laughlin, these actions disposed of the breach of statutory duty by the Commonwealth.¹⁸⁸

iii. The Negligence Claim

O'Laughlin separated the questions concerning duty of care into two categories: 1) those directly concerning duty of the Commonwealth, and 2) those vicariously concerning duty of the Directors.¹⁸⁹ O'Laughlin declared that the Commonwealth did not owe the plaintiffs a duty of care. As well, O'Laughlin noted that no act or omission by the Commonwealth resulted in injury to the applicants as it did not enjoy the power of removal or detention, and, although the plaintiffs were vulnerable, it had not been established that the Commonwealth knew of the risk of harm.¹⁹⁰

iv. Take Away from *Cubillo*

Cubillo illustrates one of the first instances where an Aboriginal plaintiff brought a claim against the Commonwealth and emphasizes two important takeaways.¹⁹¹ First, was the difficulty of proving the claims against the government. At each

¹⁸⁵ Clarke, *supra* note 156, at 271.

¹⁸⁶ *Id.* at 271.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 150.

¹⁸⁹ *Id.* at 150.

¹⁹⁰ *Id.* at 273.

¹⁹¹ *Id.* at 274.

turn of the litigation, Judge O’Laughlin drew a distinction between the actions of the AIM and St. Mary’s hostel and that of the Director for Native Affairs. When distilled, his reasoning for stopping the suit was to suggest that the real defendants in the case should have been the homes and institutions who housed Lorna Cubillo and Peter Gunner. Under Australian law, the Australian government could not be held liable even though these institutions acted with the government’s blessing and endorsement.

The second takeaway from *Cubillo* was a path forward for future litigation. Although the litigants were ultimately unsuccessful in their litigation, the court was willing to explore the possibility that other members of the Stolen Generations could file their own suits. Eventually, the courts would have to compensate members of the Stolen Generations. That opportunity came to fruition in the 2007 case of *Lampard-Trevorrow v. South Australia*.

2. *Trevorrow*: Walking Across the Threshold

The *Lampard-Trevorrow* case was decided seven years after *Cubillo*. The impact of the decision in *Lampard-Trevorrow* has not yet been fully explored by Aboriginal advocates, but it is clear that *Lampard-Trevorrow* represents one of the first cases where a member of the Stolen Generations successfully made a claim against the Australian government, albeit the South Australian State Government. If the decision in *Cubillo* represented the opening of a door to bring claims against the Australian government, *Trevorrow* represented a hallway behind the door for stolen generation members to successfully litigate against Australian state governments for abuses stemming from Aboriginal removal.

a. *Background of Bruce Allen Trevorrow*

Bruce Trevorrow was born on November 20, 1956 to Joseph Trevorrow and Thora Karpany.¹⁹² The family, which included three other children, lived in a fringe dwelling outside of Melanie

¹⁹² Antonio Buti, *The Stolen Generations and Litigation Revisited*, 32 MELB. U. L. REV. 382, 388 (2008).

in South Australia.¹⁹³ In 1957, Bruce became ill, and his parents took him to the hospital.¹⁹⁴ Despite the lack of evidence of malnourishment or neglect, Bruce was subsequently fostered into the custody of Frank and Martha Davis without the consent of his parents.¹⁹⁵ Judge Gray, who oversaw Trevorrow's suit against South Australia, noted that an officer of the Aboriginal Protection Board (AFB) authorized the transfer of Bruce from his parents to his foster parents.¹⁹⁶ Thora's requests for contact with Bruce were consistently ignored, even though, as Gray discovered established protocol at that time was for Bruce to have contact with his natural family.¹⁹⁷ The judge also found that the AFB determined Thora was not to have contact with Bruce.¹⁹⁸

Ten years after Bruce was removed from his family, in May of 1967, Trevorrow returned to his birth mother¹⁹⁹ because Bruce's foster parents would not take him back after he had visited his mother on school vacations.²⁰⁰ Bruce was not even given the opportunity to say goodbye to his foster family.²⁰¹ In time, Bruce started to have run-ins with the law, including a charge of larceny within 12 months of returning to his mother.²⁰² Ample evidence suggests that Bruce suffered serious depression throughout his adult life, leading to alcohol abuse.²⁰³ When Judge Gray had an opportunity to hear the case, Bruce Trevorrow was living a generally unhappy life with his wife and four kids.²⁰⁴

b. Trevorrow's Suit Against South Australia

Trevorrow sued the state of South Australia for misfeasance in public office, false imprisonment, breach of duty of care, and

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 389.

¹⁹⁶ *Id.* at 389.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 390.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 391.

²⁰³ *Id.* at 410.

²⁰⁴ *Id.* at 391.

breach of fiduciary and statutory duty of care.²⁰⁵ As a threshold question, the court had to determine if the state could be held responsible for the unlawful actions of its related entities and officials.²⁰⁶ This very question had defeated the lawsuit in *Cubillo*. However, this time, Judge Gray held that the statutory corporations in charge of the plaintiff were emanations of the state or acted as instruments of the state.²⁰⁷ Therefore, the court held that South Australia was vicariously liable for the actions and conduct of the department officers as a result of breach of the duty of care.²⁰⁸

i. Misfeasance in Public Office

Trevorrow's assertion of misfeasance in public office represented the first time that the cause of action was raised by a Stolen Generations litigant.²⁰⁹ Judge Gray had already found that because of the widely disseminated advice of the Crown Solicitor, the state, through its ministers and officers, was well aware that it was condoning unlawful acts by permitting the APB to remove Aboriginal children from their natural families.²¹⁰ Hence, the reason why Trevorrow was entitled "to damages for misfeasance in public office by those concerned with his removal and placement and more particularly the State as the body ultimately responsible."²¹¹

ii. Wrongful Imprisonment

Trevorrow asserted that the AFB, effectively imprisoning the plaintiff and robbing him the freedom of movement, removed him from his parents without their consent.²¹² The court agreed, and held that the state, through its agents and emanations, caused the imprisonment by signing off on the transfer that led to Trevorrow's separation from his parents.²¹³ The ruling in *Trevorrow*, that a

²⁰⁵ *Id.* at 388.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 397.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 400.

²¹¹ Buti, *supra* note 192, at 400.

²¹² *Id.* at 389.

²¹³ *Id.*

litigant could successfully assert a wrongful imprisonment action against the government, represented a significant change from the ruling in *Cubillo*. In *Cubillo*, Lorna Cubillo was able to prove she had a case, but not against the Commonwealth. In *Trevorrow*, the court instead held the state liable for the actions of the department officials.²¹⁴

iii. Fiduciary Duty

Trevorrow then claimed that, because the state government, acting through the AFB, had guardianship over him, this gave rise to a fiduciary relationship between himself and the AFB.²¹⁵ The removal of an Aboriginal child from his family created a classic guardianship relationship between the state and Aboriginal children.²¹⁶ Judge Gray had held previously that the AFB was acting as the legal guardian of Trevorrow.²¹⁷ The Judge then found that this established a fiduciary duty and that AFB breached that duty.²¹⁸ This relationship stands in stark contrast to *Cubillo* where Judge O'Laughlin focused on a breach of duty for regulating the institutions, instead of the guardian relationship between the state and Mr. Trevorrow as an Aboriginal child.

iv. Negligence

Like *Cubillo*, the court needed to assess whether the state owed any common law duties to the plaintiff.²¹⁹ Ultimately, the court found that South Australia not only had a common law duty of care to Trevorrow but that duty had been breached.²²⁰ This represented a very clear break from Judge Laughlin's opinion in *Cubillo*. Through the theory of vicarious liability, Judge Gray connected South Australia through its AFP to the actions taken by the foster parents and other individuals who neglected Mr. Trevorrow. *This would make South Australia liable for damages.*

²¹⁴ *Id.* at 397.

²¹⁵ *Id.*

²¹⁶ *Id.* at 401.

²¹⁷ *Id.*

²¹⁸ *Id.* at 404.

²¹⁹ *Id.* at 408.

²²⁰ *Id.*

v. Damages

The court held that Trevorrow was entitled to damages. However, according to Judge Gray, assessing those damages was difficult.²²¹ The court decided to take a holistic approach to administering damages.²²² Judge Gray awarded Trevorrow a sum of \$525,000 in damages with respect to his injuries and losses.²²³ Additionally, Trevorrow was also awarded \$75,000 in exemplary damages for his wrongful removal and detention.²²⁴

vi. Takeaway in *Trevorrow*

The critical takeaway from *Trevorrow* was the successful litigation of a claim by a member of the Stolen Generation. At the time of the decision, the outcome was hailed as a landmark case.²²⁵ Numerous commentators placed the decision in the same classification as the famous *Mabo v. Queensland* case, in terms of its expansion of rights for the Aboriginal population.²²⁶ If *Mabo* had ignited legislative action on native title, perhaps *Trevorrow* could do the same with compensation for members of the Stolen Generation.²²⁷

However, comparing these two cases results in a fundamentally flawed analysis.²²⁸ In *Mabo*, the High Court of Australia had accepted, as truth, one version of history.²²⁹ The court in *Trevorrow* followed a different version of the history of the removal of Aboriginal children.²³⁰ The *Trevorrow* decision overturned a history of courtroom failures by Stolen Generations litigants.²³¹ Although Trevorrow arrested a string of failures as it pertains to members of the Stolen Generation, its systemic value as precedent is still unclear.²³²

²²¹ *Id.* at 411.

²²² *Id.*

²²³ *Id.* at 412.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 414.

III. THE ROAD AHEAD: NEXT STEPS FOR AUSTRALIA AND THE UNITED STATES

Despite the largely similar treatment of indigenous children, Australia and the United States have chartered largely different paths in addressing the historical ramifications of the removal of indigenous children. The paths ultimately show two schools of thought: forward-thinking preemptive legislative action and historical reconciliation of past grievances.

The United States adopted the forward-thinking preemptive legislative action thought when it passed ICWA. ICWA was an attempt to stop future takings of Native American children by making it harder to remove Indian children from their homes. However, the *Adoptive Girl v. Baby Girl* decision represents the limitation of ICWA when it comes to the removal of Indian children. With the “existing Indian family” exception now a component of ICWA, how tribes and tribal members utilize the law will have to adapt to address the *Adoptive Couple* decision. The 2015 ICWA guidelines represent a start, but might not represent the best path forward.

Australia’s path has been purely litigation. Members of the Stolen Generation, without a particular set of remedies, have pushed common law negligence claims with mixed results. Taken chronologically, the *Cubillo* and *Trevorrow* decisions can be viewed as evolution within the Australian courts that recognize cognizable claims on negligence grounds. However, within this string of cases, it is unclear whether *Trevorrow* will lead to more litigation by other members of the Stolen Generations. Further, Australia’s actions towards acknowledging and rectifying the past have culminated in a National Sorry Day,²³³ but no legislation similar to ICWA to respond to the near century-long of removal of Aboriginal children from their homes. The focus on litigation by Aboriginal citizens, instead of promoting legislative action like the tribes when passing ICWA, offers insight into how Aboriginal groups have not advocated for significant legislative reform. The

²³³ *Sorry Day and the Stolen Generations*, AUSTRALIA.GOV, <http://www.australia.gov.au/about-australia/australian-story/sorry-day-stolen-generations> (last visited May 12, 2016).

Cubillo and *Trevorrow* decisions also reveal something else: Aboriginal communities want past transgressions recognized, just as much as tribal communities in the United States want to recognize that even though the boarding school era is over, the removal of an Indian child from an Indian home echoes that historical narrative. Within this narrative, Australia and America can learn from one another. What appears to be clear is that for each country, the next logical step is new legislation addressing this specific issue.

A. Australia: Evolving Legislation Towards an ICWA-like Solution

Australia should, like the United States, pass legislation that addresses the Stolen Generations. The focal point of the *Cubillo* and *Trevorrow* litigation was to provide monetary compensation for the abuses suffered by Aboriginals at the hands of state-sanctioned entities. But, the lessons of *Cubillo* and *Trevorrow* should note that prevailing in the litigation is not guaranteed. Therefore, Australia should pass legislation creating a uniform system to handling claims and paying out compensation. Such a move has precedent as the State of Tasmania already enacted the Stolen Generations of Aboriginal Children Act of 2006.²³⁴ Under the Act's scheme, members of the Stolen Generations would be eligible for *ex gratia* payments from the Tasman government if they meet specific criteria.²³⁵ Qualifying criteria include admittance to the State under the Infants' Welfare Act 1935 prior to December 31, 1975,²³⁶ since the Act is designed to compensate the Stolen Generations specifically. If the applicant meets the requirements of the statute, then they would receive their payment.²³⁷ Other states such as New South Wales and the Commonwealth itself could replicate the Tasmanian law. Focusing on a contrastive structure system where members of the Stolen Generations can be compensated for past atrocities could help the government avoid costly litigation.

²³⁴ *Stolen Generations of Aboriginal Act 2006 (Tas) (Austl)*.

²³⁵ *Id.* §4.

²³⁶ *Id.* §5.

²³⁷ *Id.* §12.

But that might not be enough to completely rectify past transgressions. The lack of ICWA-type legislation causes problems within the family court system in handling current adoptions of Aboriginal children. The Australian Law Reform Commission is a federal agency that reviews Australia's laws to improve access to justice.²³⁸ The Commission in the 1980s noted that there was a need for a child placement principle²³⁹ similar to that of ICWA. Part of the complexity goes to deep cultural differences: traditional Aboriginal custom does not recognize adoption.²⁴⁰ On top of the cultural problems, "[a]ny remedy proposed for problems of Aboriginal child custody and adoption will have to cope with the variety of forms placement or custody decisions can take in Australia, and with the complexity of the judicial and administrative arrangements for making such decisions."²⁴¹

Therefore, the next step in rectifying the historical removal of Aboriginal children is to prevent unnecessary removals in the future. This could mean developing an Australian version of ICWA. Efforts to do just that have already begun on a state by state basis. In 1997, a report titled *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families*²⁴² by the Australian Human Rights Commission looked into the implementation of the Aboriginal Child Placement Principle (ACPP). The reasoning behind the ACPP was to develop a set of policies and legislation that meets both the needs of the child and the needs of the indigenous community.²⁴³ They found that the implementation of the Aboriginal Child Placement Principle fell into three categories.²⁴⁴ New South Wales, Tasmania, Western Australia and Queensland fell into the first category: the

²³⁸ AUSTRALIAN LAW REFORM COMMISSION. <http://www.alrc.gov.au/> (last visited May 12, 2016).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² HUMAN RIGHTS AND EQUAL OPPORTUNITIES COMMISSION, NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN AND THEIR FAMILIES, *available at* https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf (last visited on May 12, 2016).

²⁴³ *Id.*

²⁴⁴ *Id.* at ch. 22.

ACPP is only recognized in policy.²⁴⁵ The policy directs officers of the respective state departments to follow the principles in the case of Aboriginal adoption,²⁴⁶ but it is nonbinding on non-state adoption agencies.²⁴⁷ Tasmania, South Australia, the Northern Territory and the Australian Capital Territory fall into the second category: ACPP has been adopted by legislation and is now law.²⁴⁸ A highlight of the ACPP in these states: adoption is considered a last resort and instead efforts are made to place the Aboriginal children with another family member or within their community.²⁴⁹ Finally, the state of Victoria is alone in the third category: in addition to applying the ACPP, the state has taken it a step further by mandating additional steps in the adoption process such as the relinquishing parent receiving counseling and requiring that the proposed adoptive parents be members of the same Aboriginal community.²⁵⁰ The Human Rights Commission fully supported the efforts of Victoria, and believes they should be adopted universally.²⁵¹

These three groups represent each stage in the evolution of Australian legislation concerning Aboriginal adoption. It would seem the obvious first step for states such as New South Wales and Queensland is to take the ACPP from policy to paper: full legislative implementation. For the states that have implemented the ACPP, the next step is to implement legislation that has similar features to the law in Victoria. While these are all good steps, the Australian government should look to ICWA as a model for a uniform set of laws. Although ICWA does create some discretion through the placement preferences, it creates series of clear steps when applying the statute.

The uniformity of ICWA should be the primary takeaway for legislators and advocates in Australia. The call for uniformity is not new for Australia, as the Human Rights Commission called for national standards legislation as part of their recommendations for

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

Aboriginal adoption in 1997.²⁵² Uniformity, whether it is compensation for the Stolen Generations members or a new set of rules concerning Aboriginal adoption, would allow Australia to streamline the adoption process and mitigate litigation. By passing compensatory legislation, members of the Aboriginal community would have a better opportunity to gain compensation. That way, members can avoid unsuccessful litigation such as *Cubillo*. By enacting legislation that helps keep Aboriginal children within their communities, with adoption outside of the community as a last resort, these laws respect the cultural customs of the Aboriginal people.

B. United States: Strengthening ICWA through an Act of Congress

ICWA and the accompanying regulations are currently inadequate to address the lingering cultural impacts of the boarding school era. *Adoptive Couple v. Baby Girl* shows that even with robust legislation designed to keep Native American children within their tribal community, the ICWA is not always able to accomplish its goal. Justice Alito's "existing family doctrine" creates a loophole in the law, which allows for more Native American children to be removed out of their communities, albeit in a less sinister fashion. *Adoptive Couple* should prompt Congressional action to tweak the ICWA to make it a more effective tool to keep Native American children within their Tribal community.

The United States appears to have already begun addressing the issues created by *Adoptive Couple* and the "existing Indian family" exception. Assistant Secretary for Indian Affairs Kevin Washburn announced that the BIA was creating new ICWA regulations.²⁵³ As already stated among the many changes, the proposed BIA changes include clarifying that ICWA has no "Existing Indian Family" exception.²⁵⁴ The new proposed rules

²⁵² *Id.*

²⁵³ Brewer, *supra* note 140.

²⁵⁴ Regulations for State Courts and Agencies in Indian Child, 80 Fed. Reg. 14,880 (Mar. 20, 2015) (to be codified as 25 C.F.R §23), *available at* <https://www.federalregister.gov/articles/2015/03/20/2015-06371/regulations-for-state-courts-and-agencies-in-indian-child-custody-proceedings>.

appear to address the problems created by *Adoptive Couple v. Baby Girl*. But, the proposed rules fall short in two respects. First, as Secretary Washburn has stated, the rules do not overrule *Adoptive Couple*.²⁵⁵ It is possible that, in future litigation, the U.S. Supreme Court would overrule the new regulations as being inconsistent with their ruling in *Adoptive Couple*. Second, the *National Council for Adoption* litigation indicates that strategic legislation to either defeat or chip away at ICWA's protections is in effect. The lesson that advocates can draw from the experiences of Australia and the *Cubillo/Trevorrow* litigation is that without strong legislative action, litigation will continue.

Therefore, the next step forward for ICWA advocates is new legislation that amends ICWA to strengthen it. Relying on Congress' plenary jurisdiction,²⁵⁶ new sections should be written that address and eliminate the existing family doctrine and other defects in the law. By creating these new sections, the new rules and guidelines would rest on more solid ground because they would have specific legislative authority.

More importantly, the new legislation would overcome and supersede the *Adoptive Couple* decision. Due to the unique nature of Indian law, an act of Congress, when directly on point, can directly overturn a Supreme Court ruling. This has already happened in regards to criminal jurisdiction. Generally, tribal criminal jurisdiction does not extend over non-members of the tribe as ruled in the *Oliphant* decision.²⁵⁷ Congress expanded criminal jurisdiction after the decision in *Duro v. Reina*²⁵⁸ stated that the principles of *Oliphant* extended to non-member Indians.²⁵⁹ Congress responded by amending the Indian Civil Rights Act²⁶⁰ (ICRA) to affirmatively state that tribes have criminal jurisdiction over Indians even if they are not enrolled members of that tribe.²⁶¹

²⁵⁵ Brewer *supra* note 140.

²⁵⁶ Through the Indian Commerce Clause, Congress has plenary or total jurisdiction over the tribes. That power allows Congress to create laws like ICWA. See *Lone Wolf v. Hitchcock*, 187 U.S. 533 (1903).

²⁵⁷ See generally *Oliphant v. Suquamish*, 435 U.S. 191 (1978).

²⁵⁸ *Duro v. Reina*, 485 U.S. 676 (2001).

²⁵⁹ *Id.*

²⁶⁰ 25 U.S.C. § 1301(4) (2015).

²⁶¹ *Id.*

This is known as the “Duro Fix”²⁶² because the ICRA amendments were created in direct response to the *Duro* decision. When the Supreme Court addressed Congress’ attempt to extend jurisdiction, they affirmed that the law could expand the criminal jurisdiction and subsequently superseded their decision in *Duro*.²⁶³ This experience creates a precedent for ICWA advocates and would address Secretary Washburn’s concerns about the new rules and their ability to overrule *Adoptive Couple*. New additions to the ICWA legislation would be able to supersede the *Adoptive Couple* decision and eliminate the “existing family doctrine” entirely.

However, this legislation would not be able to cure all of the litigation. The first point of *National Council for Adoptive Couple* is based on the APA, not the specific language and powers under ICWA. The second point of the *National Council for Adoption* and the main point of *A.D. v. Washburn* are far more insidious. By going directly for a constitutional challenge, the plaintiffs in both of these cases hope to dismantle ICWA entirely. Even with a fix similar to *Duro*, it would be moot if the entire statute were struck down on 14th Amendment grounds. For advocates trying to strengthen ICWA and eliminate the “existing family doctrine,” the constitutional challenges are beyond their control. For instance, the U.S. Government filed a motion to dismiss in the *National Council for Adoption* litigation.²⁶⁴ While ICWA advocates cannot ignore the threat that *National Council for Adoption* and *A.D.* poses to ICWA, when addressing the specific issues created by *Adoptive Couple*, the best step forward is to continue to push for strong legislative action.

²⁶² United States v. Lara, 541 U.S. 193 (2004).

²⁶³ *Id.*

²⁶⁴ Federal Defendant’s Motion to Dismiss and Memorandum of Points and Authorities, *A.D. v. Washburn*, 2:15-cv-01259-NVW (D. Ariz. 2015) The current motion to dismiss rest on two grounds: lack of standing and failure to state a claim. On the second argument, the failure to state the claim, the Government launches a direct attack on the plaintiffs claim that ICWA violates the 14th amendment for being an impermissible racial classification. The Government relies on the *Morton v. Mandarin* where the U.S. Supreme Court held that employment preferences for Indians was not based on racial classification but rather based on membership in the sovereign tribal entities. *See also* *Morton v. Mancari*, 417 U.S. 535 (1974).

Like Australia, the United States is evolving with its legislation. While ICWA provides the next steps for Australia, the *Adoptive Couple* litigation provides an opportunity to strengthen the statute. The proposed 2015 ICWA guidelines provide a robust start to strengthening, but it might not be enough. Litigation based on the APA, as well as potential threats from the U.S. Supreme Court show that new language to ICWA provides the best way forward.

There is an underlying issue with the legislative solution: the political will to see these changes through. It is unclear whether a coalition exists in either the U.S. Congress or the Australian Parliament that would want to see changes to ICWA or to codify the ACPP. For both countries, it makes sense to look at how the Association of American Indian Affairs was able to push through ICWA in the 1970s. That experience provides some framework proponents can use when crafting a strategy to pass legislation advocated in this Article.

CONCLUSION

The past policies of the United States and Australia had closely mirrored one another when it came to treatment of their respective indigenous populations. The separation of Native American and Aboriginal children was part of greater attempt to assimilate each group into the larger colonial society. The methodology used schools and other tools to separate thousands of native children, not only from their families, but from their culture as well. As some of the facts in the cases of litigants like Peter Gunner or Bruce Trevorrow demonstrate, the experience of separation from families and traditional communities was nothing short of abhorrent.

After the abandonment of the removal policies, Australia, and the United States now walk divergent paths. The U.S., desperate not to repeat the problems of the past, has used the ICWA as a means to keep families and communities whole. In many ways, this proactive approach attempts to shut the door on the removal policies for good. Australia, trying to reconcile its past with members of the Stolen Generations, is currently dealing with the legal ramifications of suits from those Generations. As *Trevorrow* shows, the country is moving toward allowing for compensation

for victims of the Aboriginal Protection Boards. However, there is resistance still to a full-fledged understanding of what happened to Aboriginal children during the time of the Stolen Generations.

How can Australia and the United States benefit from each other's experience? For these countries, whether it is the case of *Adoptive Couple* or *Cubillo*, a fundamental issue is when the law applies. In both instances, it appears legislative action would be prudent to strengthened the protections, and rights, of the indigenous populations of these countries. Legislative action is the next step for both Australia and America. Through legislation, both countries can better recognize and acknowledge historical atrocities by a) compensating for past transgression and b) ensuring future transgressions do not occur. For both countries, how to best accomplish these goals is found in the other's experience addressing the issue.

Australia's next step in legislation is establishing a system similar to ICWA. Each state has addressed Aboriginal compensation and adoption in its own way. But going from Victoria to Tasmania to New South Wales, the current patchwork of laws is too inconsistent. Aboriginals in Tasmania have the opportunity to file for compensation for past transgressions while at the same time the ACPP has not signed into law. Across the water in Victoria, Aboriginals in that state do not have the ability to file for compensation for past transgressions, but they have the best laws in regards to Aboriginal adoption. Widespread adoption of Tasmania's compensation law and Victoria's Aboriginal adoption law would not only allow for a streamlined path to compensation for Stolen Generations but also address future removal of Aboriginal children in a culturally sensitive process.

The United States is farther along than Australia in terms of legislative protections for Native American children. ICWA has served as a proven adoption model for four decades. The decision in *Adoptive Couple* and the litigation in *National Council for Adoption* and *A.D.* reveal the concerted efforts to limit the scope of ICWA as well as attempts to dismantle its entire regulatory scheme. Like *Cubillo* and *Trevorrow*, litigation in the United States shows that indigenous advocates are not consistently winning in the courts under the current regulatory scheme. Instead, legislative

action is required in strengthen the statutes under which they litigate. The plenary jurisdiction of Congress creates the path necessary to close loopholes within the current ICWA statute, like the existing family doctrine established in *Adoptive Couple*.

What is certain is that both countries are trying to acknowledge and overcome their past. Both countries acknowledge the detrimental impacts that removing indigenous children from their homes has caused on both the indigenous communities and the children themselves. For Australia, the Stolen Generations remain an important part of the Aboriginal community, and they are not going away. For the United States, the path from Chief Justice Taney to ICWA was paved with racist attitudes, broken families, and broken communities. ICWA acts as a barrier from broken families and broken communities, but it is not a perfect statute. ICWA advocates can look to the lessons learned by Aboriginal advocates in Australia about the current perils of taking Aboriginal claims into court. Ultimately, both countries still need to improve their respective laws regarding Aboriginal children, but the path to a better future is in front of them. It's now up to those countries to take the next step forward.

The irony should not be lost on indigenous advocates that the best chance for a stronger system is going through Congress and the Australian Parliament. The boarding schools would not have happened without the blessing of Congress. The menagerie of missions and schools that took Aboriginal children operated under the auspices of the Aborigine Protection Boards, set up by the Australian government. That now the very institutions that set up the systematic removal of indigenous children represents the best chance of strengthening the current system of reparations and adoption gives pause. It makes one wonder aloud if the relationship of "a guardian to a ward" from Marshall's words in *Cherokee* has actually changed.

However, the world has changed. Chief Justice Taney's words, describing the indigenous peoples as "inferior," ring hollow in today's world. Richard Pratt's declaration that we must "kill the savage, save the man" no longer has a place as a serious policy position. Every single year, Australians are reminded of the government-sponsored systematic removal of Aboriginals from

their homes and communities. This should give advocates hope that while the path to getting these changes, to ICWA and the ACPP, will be difficult, it will not be a Sisyphean endeavor.