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## What is Measured is What is Done: Methods to Measure Compliance with the Indian Child Welfare Act

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## What is Measured is What is Done: Methods to Measure Compliance with the Indian Child Welfare Act

### Cover Page Footnote

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WHAT IS MEASURED IS WHAT IS DONE: METHODS TO  
MEASURE COMPLIANCE WITH THE INDIAN CHILD  
WELFARE ACT

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*When we remove children from the home or disrupt family life—with families as the basic economic, health care, and educational unit in human life—when you break that up, you impede the ability of the child to grow, to learn, for himself, or herself, to become a good and responsible parent later.*

*—Testimony by William Byler (1974, 6) before United States Senate Select Committee on Indian Affairs<sup>1</sup>*

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<sup>1</sup> *Problems That American Indian Families Face in Raising their Children and how these Problems are Affected by Federal Action or Inaction: Hearing before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs, 93rd Cong, 7 (1974) [hereinafter 1974 Hearings] (statement of William Byler).*

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## INTRODUCTION

Enacted more than three and a half decades ago, the Indian Child Welfare Act (ICWA or “Act”) of 1978<sup>2</sup> is one of the most important pieces of federal legislation concerning Indian children, families, and tribes.<sup>3</sup> Intended to reverse years of federal and state policies and private practices aimed at the acculturation and assimilation of American Indian and Alaska Native (“Indian”)<sup>4</sup> children, ICWA holds the promise of “protect[ing] and preserv[ing] . . . the continued existence and integrity of Indian tribes . . . [by] protecting Indian children who are members of or are eligible for membership in an Indian tribe” from removal and placement in non-Indian homes or institutions.<sup>5</sup>

Critical to the success of any federal initiative, however, is a compliance monitoring and enforcement mechanism. Although ICWA contains numerous references to the responsibilities assigned to the Secretary of the United States Department of Interior,<sup>6</sup> no explicit language requires that Department, or any other federal agency, to monitor compliance or enforce the Act’s provisions. Despite the passage of ICWA, Indian children continue to be disproportionately represented in the United States child welfare system.<sup>7</sup> Because of concerns regarding potential non-

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<sup>2</sup> Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (1978).

<sup>3</sup> see Thalia Gonzalez, *Reclaiming the Promise of the Indian Child Welfare Act: A Study of State Incorporation and Adoption of Legal Protections for Indian Status Offenders*, 42 N.M. L. REV. 131 (2012); Sheri L. Hazeltine, *Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska’s Child in Need of Aid Statutes and their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act*, 19 ALASKA L. REV. 5784 (2002); Justine van Straaten & Paul G. Buchbinder, *The Indian Child Welfare Act: Improving Compliance Through State-Tribal Coordination*, CTR. CT. INNOVATION (2011).

<sup>4</sup> America’s indigenous peoples refer to themselves by many different terms. The term “Indian” is a legal term of art used in treaties, federal statutes (including ICWA, which is part of Title 25 of the U.S. Code, entitled “Indians”), and court opinions and that is why this Article uses this term.

<sup>5</sup> 25 U.S.C. §§ 1901(2)–(4) (2011).

<sup>6</sup> 25 U.S.C. § 1918 (2011).

<sup>7</sup> Alicia Summers, Steve Wood & Jennifer Donovan, *Disproportionality Rates for Children of Color in Foster Care* (Technical Assistance Bulletin), NAT’L COUNCIL OF JUVENILE AND FAMILY CT JUDGES (2013); see also Jill E. Tompkins, *Finding the Indian Child Welfare Act in Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. COLO. L. REV. 1119 (2010).

compliance with the Act's provisions, various measurement tools have been developed by state and county court systems, Indian child welfare advocates, researchers, and judicial membership organizations in an effort to fill the federal enforcement vacuum. These efforts have most often focused on local courts as it is ultimately judges who are most frequently assessing or certifying compliance in the absence of regular accounting of ICWA-related activities.

This Article reviews the significance of ICWA, including its legislative development and enactment in 1978. It first discusses specific provisions of ICWA as well as reviews research on the extent to which these provisions have been met. It next examines factors that may promote or hinder ICWA compliance and compliance measurement. It then presents the most commonly used measurement approaches and associated results from the application of these approaches. Finally, it makes recommendations for the measurement of compliance and enforcement of ICWA with the goal of improving outcomes for children, families, and tribes.

In the interests of improving compliance itself as well as measurement of that compliance, the purpose of this Article is to connect three factors: 1) the history that resulted in the ICWA; 2) the potentially measurable provisions of the law that address that history; and 3) the past and potential measurement efforts to assess compliance with those provisions. In consideration of legal scholars and students who may become involved in such efforts, the Article introduces basic tenets of social science measurement.

### I. HISTORICAL CONTEXT OF ICWA

The evolution of ICWA was anteceded by a number of federal actions and policies in the 19th century that established distrustful and contentious relationships between Indian populations and United States federal and state governments. The United States' official federal policies from the 1830s until the passage of ICWA in 1978 reflected the sentiment articulated by General Richard H. Pratt, who established the first American Indian boarding school in

Carlisle, Pennsylvania: “Kill the Indian, save the man.”<sup>8</sup> It was thought that Indian children would benefit from a better way of life if they were assimilated and acculturated into mainstream society.<sup>9</sup>

Despite the strenuous objections of their parents, hundreds of Indian children were removed from their homes, families, and tribes to attend boarding schools. In these militaristic schools, the children were systematically stripped of their culture, even their names, and often subjected to deprivation and abuse.<sup>10</sup> Beginning in the mid-1930s with the passage of the Indian Reorganization Act, these boarding schools began to close.<sup>11</sup> Although some boarding schools remained open into the 1950s and 1960s, they operated as residential facilities for abused and neglected children, not as educational institutions.

With the closure of the boarding schools, the Bureau of Indian Affairs (BIA) became concerned that Indian children would be returned to their communities and to a supposed life of poverty if substitute homes were not found. Accordingly, the BIA hired social workers to place Indian children with non-Indian families.<sup>12</sup> Needing more assistance to place Indian children, the BIA contracted with the Child Welfare League of America in 1957 to establish what became known as the Indian Adoption Project (“the Project”). The Project operated as a clearinghouse for the interstate placement of Indian children into non-Indian homes.<sup>13</sup> The Project justified its mission by reasoning that they were acting in the best interests of the children, as poverty within Indian families

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<sup>8</sup> PAUL PRUCHA, *AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY “FRIENDS OF THE INDIAN,” 1880–1900* (1973).

<sup>9</sup> See Donna Deyhle & Karen Swisher, *Research in American Indian and Alaska Native Education: From Assimilation to Self-Determination*, 22 REV. RESEARCH EDUC. 113 (1997); Andrea Anne Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY L.J. 45 (2006).

<sup>10</sup> E.g., Ann Piccard, *Death by Boarding School: The Last Acceptable Racism and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137 (2013); see also Hazeltine, *supra* note 3.

<sup>11</sup> L. J. George, *Why the Need for the Indian Child Welfare Act?* 5 J. MULTICULTURAL SOC. WORK 165 (1997); Hazeltine, *supra* note 3.

<sup>12</sup> George, *supra* note 11; Hazeltine, *supra* note 3.

<sup>13</sup> Margaret D. Jacobs, *Remembering the Forgotten Child: The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136 (2013); Hazeltine, *supra* note 3.

was seen as leading to abuse and neglect.<sup>14</sup> Although the Project ended in 1967, it was succeeded by the Adoption Resource Exchange of North America, which continued to promote Indian adoptions by “acceptable” families up until the enactment of ICWA in 1978.<sup>15</sup>

In 1969 and 1974, in response to calls of alarm from tribes, the Association of American Indian Affairs conducted surveys to document the extent to which Indian children had been removed from their homes and placed with or adopted by non-Indians. The survey results revealed that 25 to 35 percent of all Indian children had been removed and placed in non-Indian foster homes, adoptive homes, or institutions, and separated from their families, traditional child-rearing practices, tribes, and culture.<sup>16</sup>

## II. CONGRESS RESPONDS TO ABUSIVE INDIAN CHILD WELFARE PRACTICES

In 1974, the United States Senate Select Committee on Indian Affairs convened oversight hearings to address the child placement concerns described above. In addition to tribal leaders, tribal members, Indian parents and grandparents, Nixon Administration officials, and child welfare groups, the Senate Committee heard testimony from medical and psychiatric professionals regarding the long-term negative mental and emotional effects suffered by Indian children placed in non-Indian homes, outside of their tribal culture.<sup>17</sup>

The Association of American Indian Affairs Executive Director, William Byler, testified,

In Minnesota, Indian children are placed in foster or adoptive homes at the rate five times [that of] non-Indian children. The number of South Dakota Indian children living in foster homes is per capita

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<sup>14</sup> George, *supra* note 11; Hazeltine, *supra* note 3.

<sup>15</sup> Jacobs, *supra* note 13.

<sup>16</sup> Tompkins, *supra* note 7; Gonzalez, *supra* note 3; Cheyanna Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733 (2006).

<sup>17</sup> 1974 Hearings, *supra* note 1.



nearly 1,600 percent greater than the rate of non-Indians. In the State of Washington, the...foster care rate is 1,000 percent greater than it is for non-Indian children.... In our efforts to make Indian children white, I think it's clear that we're destroying them.<sup>18</sup>

A 23-year-old Indian mother, Cheryl DeCoteau, a Sisseton Tribal member from South Dakota, who had two children taken from her custody, provided revealing testimony about the lack of due process in child welfare proceedings. She described how her oldest son had been taken away from her without her permission and her struggle to get him back. Ms. DeCoteau testified about her second experience with the Department of Public Welfare, stating:

I was pregnant with [my son] and the welfare [worker] came there and asked me if I would give him up for adoption . . . I said no . . . They just kept coming over to the house. When I did have [my baby], he came to the hospital. After I came home with the baby, he would come over to the house . . . and ask me if I would give him up for adoption. I said no . . . Then he called me one afternoon and [asked me] if I wanted to give him up, and I said no. The next morning, real early, he came pounding on the door . . . He asked me if I'd come up to the office . . . So, I went up to the office and there were a whole bunch of papers . . . He just asked me if I would sign my name on this top paper and I signed it and he sealed it . . . I didn't know what the paper was. But, then they took the baby and I asked him what he was doing. He said it was too late now, that I gave him up for adoption.<sup>19</sup>

Extensive forced removal had traumatic effects on generations of Indian families. Indian tribes have rich and developed cultures. Several psychiatrists testified before the committee as to the negative effects on identity formation, employment, and marital

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<sup>18</sup> *Id.* at 3–6.

<sup>19</sup> *Id.* at 68 (testimony of Cheryl DeCoteau).

and parental functioning among Indians not immersed in their cultures.<sup>20</sup> One psychiatrist from the Academy of Child Psychiatry Task Force on American Indian Affairs said, “To never have any sense of permanence, never know where they’re going to be next, to never be able to be sure of anything.... There is a pervasive sense of abandonment, a sense of depression, and a sense of having been neglected and anger in regard to that.”<sup>21</sup>

### III. THE INDIAN CHILD WELFARE ACT OF 1978 (25 U.S.C. §§ 1901–1963)

On the basis of such compelling evidence, Congress advanced legislation that established stringent guidelines for states and increased protections for Indian children, parents, and tribes in an attempt to protect Indian children from unnecessary removal from their homes.<sup>22</sup> Congress recognized that the psychological and cultural effects of years of removal, assimilation, and acculturation policies required special standards. This legislation became known as the Indian Child Welfare Act.

The intent of Congress in the enactment of ICWA was to be mindful of not only Indian children, but also Indian tribes.<sup>23</sup> As such, Congress clearly stated that the purpose of ICWA was to:

protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.”<sup>24</sup>

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<sup>20</sup> *Id.* (testimonies of Dr. Alan Gurwitt, Dr. Carl Mindell & Dr. Joseph Westermeyer).

<sup>21</sup> *Id.* at 56 (testimony of Dr. Gurwitt).

<sup>22</sup> Indian Child Welfare Act of 1978, H.R. 12533, 95th Cong. (2nd sess. 1978).

<sup>23</sup> *see* Cheyanna Jaffke, *Judicial Indifference: Why Does the “Existing Indian Family” Exception to The Indian Child Welfare Act Continue to Endure?* 38 W. ST. U. L. REV. 2 (2011); Ann E. MacEachron, Nora S. Gustavsson, Suzanne Cross & Allison Lewis, *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERV. REV. 451 (1996); Jaffke, *supra* note 16 (interpreting 25 U.S.C. §§ 1901–63).

<sup>24</sup> 25 U.S.C. § 1902 (2011).

Thus, states would now need to consider “the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties” when determining the best interests of the child.<sup>25</sup>

Further, Congress acknowledged that there is a special and unique trust relationship between the United States and Indian tribes and their members. This “trustee relationship” emphasizes that Congress has a “direct interest . . . in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”<sup>26</sup> Congress also recognized a federal responsibility to protect and preserve Indian tribes and their resources,<sup>27</sup> and that state courts had, in the past, failed to protect important tribal relationships and respect Indian cultural and social traditions.<sup>28</sup> Thus, ICWA was, and continues to be, in part, an attempt to strengthen intergovernmental relations. The Act made it clear that it would now be our nation’s policy to promote the stability and security of Indian tribes and families.<sup>29</sup>

#### IV. PROVISIONS OF ICWA AND STUDIES EXAMINING COMPLIANCE

This Section briefly outlines the provisions of ICWA that are measurable at a local or national level as well as past attempts at measurement. ICWA represents a set of federal procedures that direct state courts as to when they must defer to Indian tribal authority or allow for Indian tribal participation to prevent the removal of Indian children from their families.<sup>30</sup> In this way,

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<sup>25</sup> 25 U.S.C. § 1915(d) (2011). For further discussion of this responsibility to consider Indian culture when determining the best interests of an Indian child, see Jaffke, *supra* note 16; Jaffke, *supra* note 23; Alicia Summers & Steve Wood, *Measuring Compliance with the Indian Child Welfare Act: An Assessment Toolkit*, NAT’L COUNCIL OF JUVENILE AND FAMILY CT. JUDGES (2014).

<sup>26</sup> 25 U.S.C. § 1901(3) (2011); see also Jaffke, *supra* note 16.

<sup>27</sup> See Jaffke, *supra* note 16; Jaffke, *supra* note 23; Gonzalez, *supra* note 3.

<sup>28</sup> 25 U.S.C. §§ 1901(4)–(5) (2011).

<sup>29</sup> Gonzalez, *supra* note 3; Jaffke, *supra* note 23; MacEachron, Gustavsson, Cross & Lewis, *supra* note 23.

<sup>30</sup> Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA L. REV. 529 (2011); Jaffke, *supra* note 23; Van Straaten & Buchbinder, *supra* note 3.

ICWA affirms tribal jurisdiction in relevant matters involving all Indian children.<sup>31</sup> In cases where exclusive authority by tribal courts is not available, ICWA establishes minimal safeguards to prevent unnecessary disruption of Indian families and promote reunification. Such protections include: higher standards of proof than in usual child welfare proceedings for terminating parental rights and for removing Indian children, higher standards for active efforts by social service agencies to keep Indian families together or return removed children to family members, introduction of qualified expert witness (QEW) testimony before making out-of-home placements or terminating parental rights, and attentiveness to placement preferences that will preserve tribal heritage.<sup>32</sup> Furthermore, ICWA affirms the status of tribal interests on par with parental interests.<sup>33</sup> For example, states must first notify the tribe if an Indian child is taken into foster care, regardless of whether the child lives off of the reservation and, second, that the tribe maintains the right to intervene and request that the case be transferred to a tribal court. Given growing tribal enrollments and the frequency of custodial action cases before the courts, it is of pressing importance for the court system to become familiar with the required safeguards embodied in ICWA and when to apply them.<sup>34</sup>

While familiarity with the law is one necessary condition of enforcement, proper implementation and enforcement also requires monitoring and measuring of compliance. Over 35 years after the enactment of ICWA, there remains neither a funding mechanism to ensure ICWA compliance, nor assigned federal oversight

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<sup>31</sup> 25 U.S.C. § 1911 (2011); *see also* Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 128 (2008); MacEachron, Gustavsson, Cross & Lewis, *supra* note 23; Van Straaten & Buchbinder, *supra* note 3.

<sup>32</sup> 25 U.S.C. §§ 1912, 1915 (2011); *see also* Tompkins, *supra* note 7; Eddie F. Brown, Gordon E. Limb, Toni Chance, & Ric Munoz, *The Indian Child Welfare Act: A Study of State Compliance in Arizona*, WASH. U., KATHRYN M. BUDER CTR. FOR AM. INDIAN STUDIES (2002) (reviewing ICWA provisions).

<sup>33</sup> *Mississippi Choctaw Band of Indians v. Holyfield*, 490 U.S. 30, 52 (1989); *see also* Fort, *supra* note 30.

<sup>34</sup> Tompkins, *supra* note 7.

responsibility for it.<sup>35</sup> The BIA has developed non-binding guidelines for state courts,<sup>36</sup> which it recently updated in February 2015,<sup>37</sup> and proposed turning into rules the following month (after having previously refused to institute regulations that would formalize compliance).<sup>38</sup> As such, individual courts are supposed to give extra weight to the BIA's legal opinions as expressed in the Guidelines, but are currently free to interpret ICWA differently.<sup>39</sup> While a number of studies have attempted to examine ICWA compliance, no widely recognized operational definitions of ICWA compliance exist at present. Instead, different studies have examined aspects of ICWA via study-specific measures. The reader will note that almost all of the focus here is on courts. While family preservation efforts (i.e., active efforts) and placement of children removed from their homes (i.e., placement preferences) are under the purview of the child welfare agency, it is ultimately in court that these efforts are evaluated.

#### *A. Definition of Children Subject to ICWA*

One of the most important, and often neglected, duties of a state agency and court is to determine if the subject of the child custody proceeding is an Indian child.<sup>40</sup> ICWA defines an "Indian child" as a minor who "is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the

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<sup>35</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES (2005) [hereinafter GAO].

<sup>36</sup> Department of the Interior Bureau of Indian Affairs Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (Nov. 26, 1979) [hereinafter Original BIA Guidelines].

<sup>37</sup> Department of the Interior Bureau of Indian Affairs Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 10146 (Feb. 25, 2015) [hereinafter Updated BIA Guidelines].

<sup>38</sup> Proposed Regulations for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. 14880 (Mar. 20, 2015) (to be codified at 25 C.F.R. pt. 23) [hereinafter Proposed BIA regulations]. As of this writing the comment period regarding the regulations had ended, but the regulations had not been finalized and instituted and remain proposed rules.

<sup>39</sup> *United States v. American Trucking Assoc.*, 310 U.S. 534, 549 (1940); *Mitchell v. Burgess*, 239 F.2d 484, 487 (8th Cir. 1956); *see also* Brown, Limb, Chance & Munoz, *supra* note 32.

<sup>40</sup> Tompkins, *supra* note 7.

biological child of a member of an Indian tribe.”<sup>41</sup> As sovereign entities, however, individual tribes establish their own membership requirements that can differ significantly.<sup>42</sup> For example, to be enrolled in the Navajo Nation, individuals must have at least  $\frac{1}{4}$  Navajo tribal blood (i.e. blood quantum), while the Pawnee Nation, after lowering its blood quantum, requires only  $\frac{1}{8}$ .<sup>43</sup> Other tribes establish enrollment requirements based on lineal descendancy from tribal base rolls, including the Cherokee Nation of Oklahoma (1899–1906 base rolls) and the Narragansett Indian Tribe of Rhode Island (1880–84 base rolls). Still others have a secondary membership category with less stringent requirements than the enrolled member category.<sup>44</sup>

Because methods of tribal enrollment vary widely, tribally enrolled, and therefore ICWA-eligible, children can be difficult to quantify and identify. The General Accountability Office asked state child welfare officials across all 50 states and the District of Columbia to use their automated systems to supply data identifying ICWA-eligible children in fiscal year 2003. Only five states (Oklahoma, Oregon, Rhode Island, South Dakota, and Washington) were able to do so.<sup>45</sup> A separate study of ICWA compliance in South Dakota found that in 15 percent of the case records reviewed, no documentation existed of how the court or state child protection department determined that the child was Indian.<sup>46</sup> Further, many of the files contained completed tribal enrollment applications, but no indication that the application was ever notarized, filed with the tribe, or whether the tribe responded by issuing a tribal enrollment identification card or denying

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<sup>41</sup> 25 U.S.C. § 1903(4) (2011).

<sup>42</sup> Original BIA Guidelines, *supra* note 36; GAO, *supra* note 35, at 1; Limb, Chance & Brown *infra* note 51, at 1282; *see also* Van Straaten & Buchbinder, *supra* note 3, at 4.

<sup>43</sup> GAO, *supra* note 35, at 1; *see also* Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, 3 AM. INDIAN L.J. 323 (2014).

<sup>44</sup> *Id.*

<sup>45</sup> GAO, *supra* note 35, at 1.

<sup>46</sup> Brenda J. Bellonger & Dawn Marie Rubio, *An Analysis of Compliance with the Indian Child Welfare Act in South Dakota: Final Report*, NAT’L CTR. FOR ST. CTS. AND N. AM. INDIAN LEGAL SERV. (2004).

enrollment; instead, the court often relied on non-documented evidence of ICWA applicability.

*B. Active Efforts*

Many of ICWA's provisions apply to proceedings in which Indian children remain in the custody of the state<sup>47</sup> child protection system. In these instances, the state must engage in "active efforts" to preserve the Indian family.<sup>48</sup> Specifically:

ICWA mandates the state to make active efforts in every ICWA case in two areas: 1) Provide services to the family to prevent removal of an Indian child from his or her parent or Indian custodian, and 2) Reunify an Indian child with his or her parent or Indian custodian after removal.<sup>49</sup>

This higher standard for family preservation and reunification efforts was intended to counter institutionalized child welfare system practices that had contributed to disproportional placement rates for Indian children.<sup>50</sup>

Three studies of compliance have addressed the active efforts provision. One examination of state child protection court records in Arizona found that among 48 identified cases involving foster care or pre-adoptive placement of Indian children, the court ruled in 94 percent of them that the "state demonstrated active efforts to provide remedial and rehabilitative programming designed to prevent the break-up of the family prior to removal."<sup>51</sup> In 19 cases involving involuntary termination of parental rights, the court found that the state had applied active efforts in all but one case

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<sup>47</sup> In some states child protection authority is devolved to the county level. For simplicity the authors refer to the state system to imply the public child welfare authority.

<sup>48</sup> Fort, *supra* note 30 at 4.

<sup>49</sup> *Frequently Asked Questions about ICWA*, NAT'L INDIAN CHILD WELFARE ASSOC. (NICWA), [http://www.nicwa.org/indian\\_child\\_welfare\\_act/faq/](http://www.nicwa.org/indian_child_welfare_act/faq/) (2014) (interpreting 25 U.S.C. § 1912(d)) (last visited May 18, 2016).

<sup>50</sup> See Updated BIA Guidelines, *supra* note 37 at 10147.

<sup>51</sup> Gordon. E. Limb, Toni Chance & Eddie F. Brown, *An Empirical Examination of the Indian Child Welfare Act and its Impact on Cultural and Familial Preservation for American Indian Children*. 28 CHILD ABUSE & NEGLECT 1279, 1285 (2004).

through the provision of appropriate programming.<sup>52</sup> A study in South Dakota similarly relied on the judge's findings, recorded in the case files, that the active efforts provision had been met in 42 of 62 cases, while in 13 cases, the child returned home or the case was transferred to another agency before active efforts began.<sup>53</sup>

In contrast, researchers in North Dakota concluded that 66 percent of relevant cases had documentation (not simply a judge's finding as in the above studies) of active efforts to avoid out-of-home placement.<sup>54</sup> This apparent cross-state variation in meeting the active efforts provision may be due to differences in the operational definitions used by researchers or, as we discuss further below, varying subjective interpretations of the provision itself and the meaning of "active efforts."

### C. *Qualified Expert Witnesses (QEW)*

ICWA also requires the use of qualified expert witnesses (QEWs) in child custody proceedings involving Indian children. In particular, when a court considers placing an Indian child in substitute care or terminating an Indian parent's parental rights, such actions must be supported by a QEW.<sup>55</sup> A QEW's testimony is necessary because Congress found that Indian tribes have unique, culturally-specific child-rearing practices that many non-Indian social workers and judges may not understand or appreciate.<sup>56</sup> The BIA specifies clear guidelines for the use of QEWs and the need for testimony beyond that of most non-Indian social workers in order to protect Indian families, ranking potential witnesses as follows:

1. A member of the Indian child's tribe recognized by the tribal community as knowledgeable in tribal customs as

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<sup>52</sup> *See Id.*

<sup>53</sup> Bellonger & Rubio, *supra* note 46.

<sup>54</sup> B.J. Jones, Jodi A. Gillette, Deborah Painte & Susan Paulson, *Indian Child Welfare Act: A Pilot Study of Compliance in North Dakota*, CASEY FAMILY PROGRAMS (2000).

<sup>55</sup> 25 U.S.C. §§ 1912(e)–(f) (2011); *see also* Limb, Chance & Brown, *supra* note 51 (discussing QEW requirements).

<sup>56</sup> *See* 25 U.S.C. § 1901(5) (2011).



they pertain to family organization and child rearing practices.

2. A member of another tribe who is recognized to be a qualified expert witness by the Indian child's tribe based on their knowledge of the delivery of child and family services to Indians and the Indian child's tribe.

3. A layperson who is recognized by the Indian child's tribe as having substantial experience in the delivery of child and family services to Indians, and knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.

4. A professional person having substantial education and experience in the area of his or her specialty who can demonstrate knowledge of the prevailing social and cultural standards and childrearing practices within the Indian child's tribe<sup>57</sup>.

The compliance measurement effort in Arizona examined 49 public child protection case records regarding the use of QEWs. In cases that required QEW testimony, such testimony occurred in 71 percent of the cases involving foster care placement. The majority of the expert witness testimony (56 percent) was from a member of the child's tribe, followed by a professional person with significant, specialized experience (26 percent), or another person identified by the court as a qualified expert witness (18 percent).<sup>58</sup> In the 19 cases that involved involuntary termination of parental rights, 89 percent included testimony from one or more QEWs supporting a finding that continued custody with the Indian parent or guardian would result in serious harm to the child.<sup>59</sup> The expert testimony in these cases was given by a member of the child's tribe (59 percent), a professional person with significant, specialized experience (29 percent), a lay expert with considerable experience in delivering child and family services to Indians including

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<sup>57</sup> Updated BIA Guidelines, *supra* note 37 at 10157; the insertion of preference 2 is the only substantive change from the 1979 Guidelines. See Original BIA Guidelines *supra* note 36.

<sup>58</sup> Limb, Chance & Brown, *supra* note 51.

<sup>59</sup> *Id.*

knowledge of traditions (18 percent), or some other person recognized by the court as a qualified expert witness (18 percent).<sup>60</sup> A study in South Dakota concluded that, across all cases reviewed, professional persons were used as the QEW almost twice as often as a lay expert with knowledge of social and cultural standards of the child's tribe.<sup>61</sup>

#### *D. Placement Types and Preferences*

According to ICWA, "an American Indian child placed in foster care or a pre-adoptive placement shall be placed in the least restrictive, most family-like setting in which the child's special needs, if any, may be met."<sup>62</sup> Preference should be given, in order, to a placement with:

a member of the Indian child's extended family; a foster home licensed, approved, or specified by the Indian child's tribe; an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or 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.<sup>63</sup>

Additionally, the BIA Guidelines describe considerations for establishing good cause to diverge from this order of preference, which is intended to maximize cultural ties even among children removed from their families.<sup>64</sup>

In the Arizona study of child protection case records, 48 of the 49 case records reviewed involved children who had been placed in foster or pre-adoptive homes. The authors concluded that 83 percent of the children in those 48 cases had been placed in homes within the preferences set forth by ICWA.<sup>65</sup> Specifically, 55 percent of the children were placed with extended family members,

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<sup>60</sup> *Id.*

<sup>61</sup> Bellonger & Rubio, *supra* note 46.

<sup>62</sup> 25 U.S.C. § 1915(b) (2016).

<sup>63</sup> *Id.* at (b).

<sup>64</sup> GAO, *supra* note 35; Updated BIA Guidelines, *supra* note 37.

<sup>65</sup> Limb, Chance & Brown, *supra* note 51.

33 percent were placed in a setting that had been decided upon by the child's tribe, and 13 percent were placed in Indian foster homes licensed, approved, or specified by the child's tribe.<sup>66</sup>

*E. Summary: Prior Research on Compliance with ICWA Provisions*

As evidenced in the above Sections, research on ICWA compliance has been scant, and is typically based on a small sample within a single state. This research has shown varying degrees of compliance to ICWA's provisions. Part of this variation is likely due to differences in definitions and methods across compliance measurement efforts, as in the choice of using researcher judgment versus a judge's finding of compliance with the active efforts requirement. Additionally, part of the variation may simply be due to the instability of estimates from small samples. The Government Accountability Office (GAO) study, the only research cited here not conducted at the court level, pointed to the lack of administrative data on ICWA compliance hindering cross-state studies or more generalizable findings.<sup>67</sup> Finally, some of the inconsistent findings are due to variation in interpretation and practice across jurisdictions, which requires a discussion of some barriers to compliance.

V. BARRIERS TO COMPLIANCE

The administration of any new legislation has its difficulties, but ongoing difficulties with interpretation and application have served to continuously hamper the visions of tribal integrity and Indian child welfare underlying ICWA. Common barriers to ICWA compliance include: (a) lack of knowledge of ICWA requirements (i.e., some state courts focus exclusively on the best interests of the child while overlooking the interests of the tribe),<sup>68</sup> (b) challenges in identifying children who may be eligible for ICWA (i.e., judges may not realize that they have Indian children

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<sup>66</sup> *Id.*

<sup>67</sup> GAO, *supra* note 35, at 21.

<sup>68</sup> Jill E. Adams, *The Indian Child Welfare Act of 1978: Protecting Tribal Interests in a Land of Individual Rights*, 19 AM. INDIAN L. REV. 301 (1994); Jaffke, *supra* note 23, at 6.

in their state if there are no federally recognized tribes in the state and, thus, may not ask about ICWA applicability),<sup>69</sup> and (c) lack of education and training for social workers, attorneys, judges, and other key actors regarding ICWA.<sup>70</sup> Many of these barriers are due in part to a lack of central guidance, or federal oversight.

#### *A. Lack of Federal Oversight*

In 1994, the Office of the Inspector General (OIG) undertook a study “to identify opportunities for the Administration for Children and Families to strengthen the provision of child welfare services and protections to American Indian and Alaska Native children.”<sup>71</sup> This study was conducted in response to concerns raised by tribal, state, and federal child-welfare administrators, as well as child welfare experts, regarding serious gaps in the provision of child welfare services and federally legislated child welfare protections to Indian children. The OIG report recognized that ICWA does not assign any federal agency the responsibility of ensuring state compliance with ICWA requirements. Further, the OIG found that no agency has stepped forward to ensure that compliance. Consequently, the OIG emphasized that federal responsibility for funding Indian child welfare services and safeguarding child welfare protections rests with the BIA in the Department of the Interior and the Administration for Children and Families (ACF) in the Department of Health and Human Services.

Pursuant to Section 1933 of ICWA, the Secretary of the Interior is permitted to enter into agreements with the Secretary of Health and Human Services, and is “authorized for such purposes to use funds appropriated for similar programs of the Department of Health and Human Services.”<sup>72</sup> However, the OIG noted that the Departments had not implemented Section 1933 to form any

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<sup>69</sup> Summers & Wood, *supra* note 25, at 9.

<sup>70</sup> GAO, *supra* note 35, at 1; Limb, Chance & Brown, *supra* note 51, at 1282; Van Straaten & Buchbinder, *supra* note 3, at 4.

<sup>71</sup> *Opportunities for ACF to Improve Child Welfare Services and Protections for Native American Children*, DEP’T OF HUMAN & HEALTH SERV., OFFICE OF INSPECTOR GENERAL i (1994) [hereinafter OIG], <https://oig.hhs.gov/oei/reports/oei-01-93-00110.pdf> (last visited May 16, 2014).

<sup>72</sup> 25 U.S.C. § 1933(a) (2016).

agreements. Because the OIG did not wish to unilaterally impose requirements for how states address the minimal requirements of ICWA, the OIG encouraged BIA and ACF to work together with “Tribal and State representatives to ensure that Federal requirements provide adequate protections for Native American children in either State or Tribal custody.”<sup>73</sup>

Unfortunately, by 2005, both agencies had disclaimed the responsibility or authority to provide ICWA compliance oversight.<sup>74</sup> In its written comments to the GAO report, Health and Human Services disagreed with both the conclusions and recommendations, claiming that the ACF did “not have the authority, resources, or expertise to provide the level of effort to address the recommendations GAO identified.”<sup>75</sup> In its response, the BIA stated that it was only responsible for making grants—not for enforcing ICWA’s provisions.<sup>76</sup> Thus, at present, there remains no formal mechanism that addresses ICWA compliance. ACF, for example, has not included provisions under the control of child welfare agencies, such as documenting placement types in a manner that readily allows assessment of compliance with the placement preferences outlined in ICWA, in regular data collection systems (e.g., Statewide Automated Child Welfare Information System or Child and Family Service Reviews). Although the ACF has failed to properly address compliance thus far, the agency did recently reverse its course and publish an intent to add Adoption and Foster Care Analysis and Reporting System (AFCARS) data elements to support assessing compliance with ICWA.<sup>77</sup> Furthermore, there remains no required administrative data reporting system for courts that might readily document compliance.

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<sup>73</sup> OIG, *supra* note 71, at vi.

<sup>74</sup> GAO, *supra* note 35, at 80; *see also* Attorney General’s Advisory Committee on American Indian/Alaska Native Children Exposed to Violence, *Ending Violence so Children Can Thrive*, U.S. DEP’T OF JUSTICE (2014) [hereinafter “AG ADVISORY COMMITTEE”], [https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachment\\_s/2014/11/18/finalaianreport.pdf](https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachment_s/2014/11/18/finalaianreport.pdf).

<sup>75</sup> GAO, *supra* note 35, at 80 (Appendix III).

<sup>76</sup> *Id.* at 82 (Appendix IV).

<sup>77</sup> Adoption and Foster Care Analysis and Reporting System, 80 Fed. Reg. 17713 (Apr. 2, 2015) (to be codified at 45 C.F.R. pt. 1355).

*B. State Attempts to Interpret and Apply ICWA*

The OIG report recommended that ACF strengthen its technical assistance to state child welfare agencies and state courts to improve their understanding of ICWA's requirements, moving beyond the 1979 Guidelines.<sup>78</sup> Years later, the GAO provided similar advice, recommending that ACF utilize their Child and Family Services Reviews to investigate ICWA implementation issues and target technical assistance.<sup>79</sup> However, BIA did not respond to such requests until 2014 when it incorporated feedback from a series of Listening Sessions and advice from the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence,<sup>80</sup> into updated Guidelines<sup>81</sup> and proposed rules.<sup>82</sup> As of this writing, they remain merely guidelines, and further technical assistance and review remains lacking.<sup>83</sup> This devolution of oversight leaves state legislatures, public child welfare authorities, and courts to interpret the provisions of ICWA on their own. One result of this lack of properly structured oversight has been two Supreme Court cases that both dealt with states' varying interpretations of ICWA.<sup>84</sup> One of these cases, *Mississippi Choctaw Band of Indians v. Holyfield*, clarified that there should be a uniform definition of the term "domicile" as used in ICWA, and that the term had been misinterpreted by the state court.<sup>85</sup> Although the ruling concerns specific terminology, it has been argued that the framework used in this ruling should be applied more broadly to create uniform nationwide interpretation of other terms in the law.<sup>86</sup>

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<sup>78</sup> OIG, *supra* note 71, at 5.

<sup>79</sup> GAO, *supra* note 35, at 58.

<sup>80</sup> AG ADVISORY COMMITTEE, *supra* note 74, at 4.

<sup>81</sup> Updated BIA Guidelines, *supra* note 37, at 1.

<sup>82</sup> Proposed BIA Regulations, *supra* note 38.

<sup>83</sup> *Id.* The proposed rules have not yet been enacted at the time of this writing. A "final action" is currently scheduled for March 2016.

<sup>84</sup> *Mississippi Choctaw Band of Indians v. Holyfield*, 490 U.S. 30, 43–44 (1989); *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

<sup>85</sup> *Holyfield*, 490 U.S. 30 at 43.

<sup>86</sup> Megan Scanlon, Comment, *From Theory to Practice: Incorporating the "Active Efforts" Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L.J. 629 (2011).

In the absence of federal initiative, other groups have attempted to fill the void. For example, in order to assist state courts in achieving full compliance with ICWA, the National Council of Juvenile and Family Court Judges (NCJFCJ) created a judicial checklist,<sup>87</sup> and the Mississippi Administrative Office of Courts Court Improvement Program developed a widely used training video.<sup>88</sup> Such efforts, as well as compliance measurement efforts discussed below, complement the BIA Guidelines and proposed regulations.

In addition to the efforts of the groups described above, at least 33 states have incorporated into code all, or portions, of ICWA's mandates, with some adopting additional requirements, such as imposing a continuing duty to inquire as to whether the child who is subject to the proceeding is an Indian child.<sup>89</sup> A recent legal comment explored the varying ways in which state courts have interpreted ICWA and found that, at times, state courts reached different conclusions regarding terms in the statute and consequently produced divergent outcomes.<sup>90</sup> The most frequent area of variation is the determination of what is required to satisfy ICWA's active efforts provision.

### C. Interpreting Active Efforts

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<sup>87</sup> *Indian Child Welfare Act Checklists for Juvenile and Family Court Judges*, NAT'L COUNCIL OF JUVENILE AND FAMILY CT. JUDGES (2003), [hereinafter NCJFCJ], <http://www.ncjfcj.org/resource-library/publications/indian-child-welfare-act-checklists-juvenile-and-family-court-judges> (last visited May 18, 2016).

<sup>88</sup> *Youth Court: Youth Court Videos*, MISS., ADMIN. OFFICE OF CTS., [http://courts.ms.gov/trialcourts/youthcourt/youthcourt\\_ycvideos.html](http://courts.ms.gov/trialcourts/youthcourt/youthcourt_ycvideos.html) (last visited May 16, 2016).

<sup>89</sup> *The U.S. Supreme Court and the Indian Child Welfare Act*, NAT'L CONFERENCE OF ST. LEGISLATURES (Aug. 5, 2013), <http://www.ncsl.org/research/state-tribal-institute/the-supreme-court-and-the-indian-child-welfare-act.aspx> (last visited May 18, 2016); *State Statutes Related to Indian Child Welfare*, NAT'L CONFERENCE OF ST. LEGISLATURES (last updated Dec. 1, 2015), <http://www.ncsl.org/research/human-services/state-statutes-related-to-indian-child-welfare.aspx> (last visited May 18, 2016).

<sup>90</sup> Kelsey Vujnich, Comment, *A Brief Overview of the Indian Child Welfare Act, State Court Responses, and Actions Taken in the Past Decade to Improve Implementation Outcomes*, 26 J. AM. ACAD. MATRIM. LAW. 183 (2013); Scanlon, *supra* note 86, at 656.

While ICWA requires states to provide active efforts to keep Indian families together, a definition of what constitutes “active efforts” varies across states.<sup>91</sup> For example, the Minnesota Tribal State Agreement defines active efforts and provides examples of active efforts for social workers (e.g., requesting tribal-designated representatives, providing concrete services and access to tribal services to families, arranging visitation in the homes of Indian parents, custodians, or extended family members).<sup>92</sup> In contrast, active efforts “elude definition” in Oklahoma and are now determined on a case by case basis by the courts.<sup>93</sup>

One major issue complicating interpretation for child welfare courts and practitioners are distinctions between the Adoption and Safe Families Act (ASFA) and ICWA relative to the application of family preservation and reunification efforts.<sup>94</sup> ASFA attempts to quickly advance permanency in child welfare proceedings by foreshortening or waiving the requirement to engage in reasonable efforts to reunify a family under certain circumstances. Conversely, ICWA was enacted to keep Indian families together and accordingly suggests a broad placement standard that takes into account the best interests of the entire family and tribe, which is in contrast to ASFA’s narrower “best interest of the child” standard.<sup>95</sup>

When interpreting ICWA, some states, including California and Maryland, equate “active efforts” with the “reasonable efforts”

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<sup>91</sup> Scanlon, *supra* note 86, at 630; Vujnich, *supra* note 90, at 191.

<sup>92</sup> *Tribal/State Indian Child Welfare Agreement*, MINN. DEP’T OF HUMAN SERV. (2007), <https://edocs.dhs.state.mn.us/lfserver/Legacy/DHS-5022-ENG> (last visited May 16, 2016).

<sup>93</sup> Scanlon, *supra* note 86, at 651.

<sup>94</sup> Specifically, ICWA specifies a standard of “active efforts.” See 25 U.S.C. § 1912(d) (2011). ASFA clarifies the usual “reasonable efforts” standard. See Adoption and Safe Families Act of 1997, Pub. L. 105–89 § 101, 111 Stat. 2115, 2116–17 (1997).

<sup>95</sup> Van Straaten & Buchbinder, *supra* note 3, at 5. (contrasting Pub. L. 105–89 with 25 U.S.C. §§ 1901–63); *Mississippi Choctaw Band of Indians v. Holyfield*, 490 U.S. 30, 52 (1989) (“The protection of this tribal interest is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from, but on a parity with, the interest of the parents.” (quoting the Utah Supreme Court, *In re Adoption of Halloway*, 732 P.2d 962, 969–70 (1986))).



included in ASFA.<sup>96</sup> However, in Utah and Oklahoma, active efforts require more than reasonable efforts. In 2008, the Utah Court of Appeals addressed whether active efforts required more than reasonable efforts and determined that the state must show that it had made active efforts, not merely reasonable efforts, to prevent Indian children from being removed from their current parent or Indian guardian.<sup>97</sup> Any attempt to measure compliance with the active efforts provision of ICWA in these states would have to account for this state-specific interpretation, as nominal compliance in California or Maryland would not be compliance in Utah or Oklahoma.

This reliance on local interpretation challenges development of broadly applicable operational definitions and measurements of compliance. Only recently did BIA recognize that these inconsistent and often conflicting interpretations contributed to “different minimal standards . . . arbitrary outcomes, and certain interpretations and applications [that] threaten the rights that ICWA was intended to protect,”<sup>98</sup> including specifying that active efforts require more than reasonable efforts.<sup>99</sup>

## VI. METHODS FOR MEASURING COMPLIANCE

As illustrated above, the abdication of federal oversight has left stakeholders concerned about implementation of and adherence to ICWA to take on the oversight role. In response, several state- or site-specific efforts have attempted to measure compliance. Whether ICWA can accomplish its goals depends in part upon the extent to which the standards, preferences, and efforts that it mandates are actually being implemented. Accordingly, documenting the extent of implementation is paramount in reaching those goals. While compliance measurement can also assess best practices to facilitate compliance or outcomes

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<sup>96</sup> Scanlon, *supra* note 86, at 648; Vujnich, *supra* note 90, at 193.

<sup>97</sup> Scanlon, *supra* note 86, at 651.

<sup>98</sup> Proposed BIA Regulations, *supra* note 38, at 14881.

<sup>99</sup> Updated BIA Guidelines, *supra* note 37, at 10147. The phrase “active efforts” has been inconsistently interpreted. *Id.* The guidelines’ definition is intended to provide clarity—particularly in establishing that “active efforts” require a level of effort beyond “reasonable efforts.” *Id.*

associated with compliance, this section focuses on measurement specific to ICWA provisions, or what might be called fidelity, and processes promoting or limiting compliance.

The choice of measurement tool should be driven by the question of interest and the purpose of the effort. For example, is the goal to get ideas about areas of strength and weakness in implementation of the law? To monitor progress towards implementation? To evaluate an intervention designed to improve compliance? To document compliance—or non-compliance—for legal action or federal review? As described in NCJFCJ's recent compliance assessment toolkit,<sup>100</sup> careful consideration of what aspects of compliance are of interest will drive the choice of method. For example, to understand barriers to compliance or how compliance could be improved might warrant a rich, qualitative approach to assessing perceptions of current practice. In order to understand the extent to which compliance is being achieved, a quantitative research project focusing on frequency of particular ICWA-defined steps or outcomes in specific cases might be recommended instead. Often, mixed-methods approaches are the most comprehensive and informative, as any one method may be insufficient to answer all relevant questions and each has its own weaknesses and challenges.

This section discusses current methods and tools for gathering evidence about compliance. First, this section covers more quantitative, court-focused measures that assess proceedings and activities via observation or case record review. Then, it addresses perception-oriented methods involving key informants.

### *A. Observational Methods*

#### 1. Strengths and Applications

With careful attention to operational definitions of compliance as well as observer training and instrument design, observation of a judicial proceeding can be a useful, direct measure of local performance in adhering to the requirements of ICWA. Courtroom

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<sup>100</sup> Summers & Wood, *supra* note 25, at 19.

observation involves a trained monitor filling out a structured form comprised of checkboxes and limited text fields that encode components of the operational definitions being implemented. Documenting what is said and by whom, and who is present or absent, may address research questions regarding the extent to which tribal representatives are involved in placement decisions in court. Observations may be in person or via audio or video recording of court proceedings. The latter allow more time for processing and coding of events, but may miss key information such as non-verbal cues or the silent presence of key players, particularly if observation is of audio only. Additionally, in-person coding requires a concise and simple observation instrument and excellent training, as hearings are often speedy and confusing to an outsider.<sup>101</sup>

Observations by a court insider or expert can have a number of benefits. Court proceedings involving Indian child welfare cases essentially require knowledge of three specialized areas: family courts, ICWA itself, and child welfare agency practice. Knowledge of the technical terms and concepts from all three will aid in the swift coding of events.<sup>102</sup> In addition, to the extent the compliance monitor is known and recognized, such monitoring can inherently change behavior of key actors—the judge, court clerk, state or county attorney. These key actors, least in the short term, may pay more attention to ICWA adherence if they recognize the compliance monitor. For some compliance efforts, this changed behavior may be a goal. For others, however, having a less obvious monitor, such as a well-trained data collector less versed in courtroom practice, may provide a perspective closer to that of the family (even if such a monitor may have difficulty divining details not formally announced in court).<sup>103</sup>

Observational methods can be used to sample compliance within a case (compliance in a randomly selected hearing), or to follow a case (all hearings for a sampled case). Taking a hearing-

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<sup>101</sup> The term “hearing,” for purposes of this Article, refers to any court proceeding, whether petition review, formal hearing, etc.

<sup>102</sup> The authors collectively have years of training and experience; this represents that expertise applied to these types of measurement efforts.

<sup>103</sup> *Id.*

centric view of compliance in sampled hearings creates a different picture of compliance than following an entire case from beginning to end. Sampling a hearing provides a single snapshot within a larger process—were the components of ICWA compliance present *in this hearing*? If one's operational definition of compliance includes elements—notice of petition, tribal intervention or waiver, or receiving QEW testimony—that in one's jurisdiction are not required at every hearing or occur outside of the courtroom setting, then the absence of those elements in the observation may reflect not a lack of compliance but rather a legitimate structure—for example, QEW testimony given via affidavit—intended to facilitate case-level compliance.

One example of such an in-person observational tool is the QUICWA Performance Checklist that grew out of the extensive court monitoring experience of the Minneapolis American Indian Center.<sup>104</sup> Like any good data collection effort, the QUICWA Compliance Collaborative focuses on consistency of data collection and reliability of results. Revision of the instrument and the training to use it is ongoing. The QUICWA Collaborative includes a multidisciplinary National Advisory Council with representatives from national organizations (including NCJFCJ and NICWA), courts, academia, and tribes. Together, this Council developed best practices for ICWA implementation to be used by the Collaborative. The monitoring project samples hearings with the goal of providing information on adherence to those best practices, as well as overall ICWA compliance across and within sites over time. The QUICWA Performance Checklist is applicable to any hearing type, capturing ICWA applicability and jurisdiction issues—who was present at the hearing, tribal engagement and tribal court issues, and what was queried during the hearing related to permanency and placement—all on a three-page instrument. To date, QUICWA has collected over 4,000 checklists from 25 sites across the United States.<sup>105</sup>

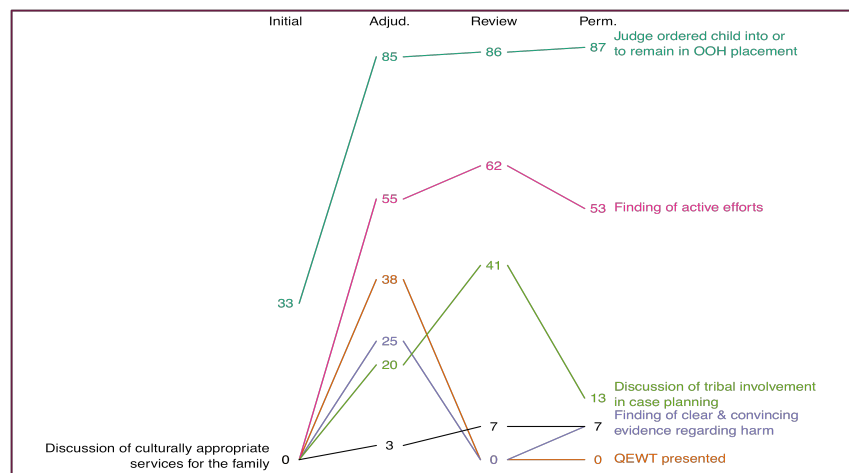
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<sup>104</sup> MINNEAPOLIS AM. INDIAN CTR, <http://www.maicnet.org/programs/indian-child-welfare/quicwa/> (last visited May 18, 2016).

<sup>105</sup> Though not formally documented, the authors are reporting on their own activity: Many of the authors are or were involved in the Collaborative via

The NCJFCJ toolkit summarizes findings from another observational effort that coded 90 sampled hearings in a single jurisdiction.<sup>106</sup> The data presented for illustration captured the presence of five basic definitions of compliance:

1. There was qualified expert witness testimony presented at this hearing.
2. The judge made a finding of clear and convincing evidence that the child was likely to suffer emotional or physical damage if continued in the custody of the parent.
3. The judge made an active efforts finding.
4. There was discussion of how the tribe has been involved in case planning.
5. There was discussion of culturally appropriate services for the family.<sup>107</sup>



**Figure 1: Frequency of compliance by hearing type (percent): Observational measurement example.**

As seen in Figure 1, the results illustrate that some key elements are more likely to be present—at least on the record—in some, but not all, hearing types. For example, verbal findings of

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current or past affiliations with the Minneapolis American Indian Center, NCJFCJ, and Casey Family Programs.

<sup>106</sup> Summers & Wood, *supra* note 25, at 25.

<sup>107</sup> *Id.*

active efforts may be unlikely at the initial hearing, but more likely at adjudication, review, and permanency hearings. This may be because initial hearings are often emergency and perfunctory in nature, and ICWA applicability may often be an open question at that point.<sup>108</sup> Testimony from QEWs was identified most in adjudication hearings, but never in the other hearing types. The absence of QEW testimony in review and permanency hearings would appear to indicate low compliance or perhaps state interpretation that QEW testimony is only necessary during adjudication.

## 2. Weaknesses

Conducting any kind of structured observation is difficult to accomplish, and the technical language of ICWA cases and the speed of courtroom proceedings further complicate the use of observational methods to measure ICWA compliance. Accordingly, developing an observational measurement effort requires much refinement and staff time.

While there are inherent difficulties, some of the weaknesses of hearing observation methods can be addressed through careful improvement of the observation tool and training procedures. For instance, rating scales might be useful to address some research questions, but concentrating on simple yes/no questions such as whether or not key elements occurred or key actors were present will facilitate the observer's accuracy and objectivity. In fact, given the speed of a typical hearing, it may be easier on the monitor to simply note components that were present and assume any component not checked was not indeed accomplished or covered at the hearing. Accuracy could be improved by including real courtroom observations in the training, via video or in person, followed by a certification that tests a monitor's knowledge of and ability to observe the fast-paced proceedings. Additionally, greater facility with the language of placement types or findings on the record could increase reliability across monitors and across

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<sup>108</sup> There were only 6 initial hearings identified as ICWA cases in this sample.

hearings, as could careful specification of relevant indicators of compliance on the form.

One important measure of instrument quality is the extent to which two coders observing the same event are able to code the event in the same way, known as inter-rater reliability. The version of the QUICWA instrument used in the inter-rater reliability analysis of that project,<sup>109</sup> for example, exhibited 93 percent agreement for whether the judge made “a finding orally on the record that ICWA” does or does not apply, 91 percent for whether the child had a legal advocate or guardian appointed, and 98 percent for whether the child’s father is deceased.

In contrast, the QUICWA inter-rater analysis found low levels of agreement (less than 60 percent) for items measuring whether there was QEW testimony supporting out-of-home placement and orders for permanency, or any dispute over the qualifications of the expert witness. Such low reliability may have been because the monitor did not understand that the discussion involved QEW testimony, or did not distinguishing between discussions of placement versus permanency. These low levels of agreement illustrate how a lack of familiarity with the often interchangeable terms describing different placement types and permanency statuses may make it difficult to judge what a QEW was testifying to or how closely the court adhered to the ICWA placement preferences in its decision.

Monitoring efforts should also pay attention to issues of active versus passive data gathering and verbal versus visual information. Active data gathering occurs when the monitor actively seeks out information, and may therefore introduce idiosyncrasies into the data that reflect her relationships, inquisitiveness, etc., and not the presence of key compliance components. That is, moving beyond a structured, passive observation focus (one which utilizes simple present/not present questions as described above) may introduce more subjectivity into the data collection. For example, instructions for some sections of the QUICWA Performance

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<sup>109</sup> Linda Harris, *Preliminary Findings: A Study of the Inter-Reliability of Data from the QUICWA Performance Checklist*. MINNEAPOLIS AM. INDIAN CTR. (2013).

Checklist invite subjectivity when they state: “If you know the answer based upon information you have that was not presented during the hearing, answer the question based upon that information.” The relevant questions received a high proportion of “unable to determine” responses in the inter-rater analysis sample despite this advice.

This type of active observation, where the monitor seeks out sources of information, may be more likely with court insiders. In the interest of keeping measurements objective, maintaining focus on what could be passively observed in the courtroom may better represent the perspective of inexperienced families or other outsiders. At the same time, a complex observation form that requires almost constant looking down to complete may cause observers to miss visual information, such as of whom the judge is asking a particular question. This issue is evidenced by the relatively low levels of agreement in the QUICWA inter-rater analysis for the presence of different attorneys, for example, which ranged from 71 to 88 percent, which may imply issues with identifying players and/or verbal versus visual information.

### 3. The Fluidity of ICWA Applicability

Best practices guidelines—for example, the NCJFCJ guidance described above—advise that judges ask out loud and on the record about Indian heritage at every hearing if that heritage is not already established.<sup>110</sup> In practice, ICWA applicability is often addressed at the first hearing and then only again if new information arises. This raises two possible scenarios with ramifications for compliance data collection and analysis, particularly concerning the question of which cases to include.

First, a family member may become available to speak to a judge about a child’s (potential) tribal affiliation after initial reluctance to speak to state child welfare staff. If the family member indeed offers new information, a case initially not identified as ICWA-applicable becomes an ICWA case at a stage when any number of hearings and placements have occurred

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<sup>110</sup> NCJFCJ, *supra* note 87, at 5.



without the application of ICWA. A compliance effort focusing only on identified ICWA cases would miss such a case if it were checked before the tribal affiliation was revised.

Second, there may be the opposite flow of applicability, in which a child has her tribal membership decision come back negative after initially having been thought to be affiliated. Monitoring all cases in the relevant court (versus only cases that are identified as ICWA cases) allows for identification of cases that are ICWA-applicable at some point, but also means expending compliance measurement resources on cases for which ICWA compliance is not relevant. These two scenarios inherently imply two kinds of ICWA cases that will likely have different levels of compliance over the life of the case: (1) those for which ICWA applied throughout, and (2) those for which ICWA was not applied over the life of the case.

### *B. Judicial Case Record Reviews*

#### 1. Strengths and Applications

While case-encompassing court monitoring can be accomplished by attending all hearings relevant to a case, information from all such hearings should already be gathered into a central place. Dependency court case files, typically paper file records, include some combination of legal logistics, such as notice to parties and summons, and courtroom products, such as minute orders, judicial orders, and legal findings. As illustrated above, the latter may include documentation of the judge's assessments of active efforts and application of higher standards of proof for terminating parental rights. Case files also usually include social information from the child welfare agency, including case plans and required reports to the court, in addition to the legal record.

Like observational methods, good case record reviews (CRRs) involve trained reviewers using polished instruments that maximize objectivity and reliability. They are commonly used in research regarding social and legal practice. The GAO study,<sup>111</sup>

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<sup>111</sup> GAO, *supra* note 35, at 57.

and the efforts in Arizona,<sup>112</sup> South Dakota,<sup>113</sup> and North Dakota,<sup>114</sup> discussed above relied on CRRs. The NCJFCJ toolkit provides an example of a CRR process that resulted in agreement in an inter-rater reliability analysis ranging from 61 to 94 percent.<sup>115</sup>

Because CRRs focus on single, entire cases, they can provide a cumulative snapshot of the presence of key indicators of compliance at any selected time up to case closure. This method makes it relatively easy to follow cases longitudinally and address questions such as how compliance may vary over time. CRRs can also provide easy identification of ever-eligible cases, as well as data on outcomes that can be linked to compliance.<sup>116</sup> Finally, a CRR can be employed to address hearing-specific questions, such as the proportion of initial hearings or termination hearings that included some key ingredient of compliance.

An example of this method can be found in the NCJFCJ toolkit,<sup>117</sup> which reported on a CRR effort that involved statewide sampling of closed ICWA cases, and captured compliance information on all hearings for those cases. The authors report findings of active efforts for illustration. This component of compliance may be more reliably gathered in CRRs than in hearing observations because (at least in the state studied) active efforts findings must be on the record. The research found that 32 percent of shelter care hearings had findings of active efforts on the record, which rose to 67 percent for pre-trial or adjudication hearings and decreased to 21 percent for disposition, 23 percent for review, and 30 percent for permanency hearings.<sup>118</sup> Note that the latter two rates were lower than those found via hearing observations in the illustration in Figure 1, which was in a different jurisdiction.<sup>119</sup> As

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<sup>112</sup> Limb, Chance & Brown, *supra* note 51, at 1280.

<sup>113</sup> Bellonger & Rubio, *supra* note 46, at 2.

<sup>114</sup> Jones, Gillette, Painte & Paulson, *supra* note 54, at 13.

<sup>115</sup> Summers & Wood, *supra* note 25, at 10.

<sup>116</sup> See *infra* Part VI.A.3.

<sup>117</sup> Summers & Wood, *supra*, note 25, at 26.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

noted above, definitions of active efforts may vary by jurisdiction and by monitoring effort.

## 2. Weaknesses

Many of the same weaknesses described for hearing observational methods apply to case record reviews, but there are also unique challenges to consider. The consistency and depth of information incorporated in case files vary by jurisdiction, court, and clerk. Court files rarely include transcripts of all that was said during a hearing, as transcription entails notable expense. Thus, while case files provide a useful central repository of proceedings, completeness depends on what is actually included in the individual case file. Further, a CRR may be unable to capture what could be observed at a hearing, such as the unannounced presence of a key player, or tribal contributions to a case planning decision vocalized in the courtroom but recorded only cursorily in the case file. Indeed, placements are often documented in court files only by the name of the caregiver. While the social services portion of the file may have more information about the caregiver's affiliation or relationship to the child, the case file may offer little insight as to the extent to which tribal preferences varied from the standard ICWA preferences and the extent to which tribes were involved in placement decisions.<sup>120</sup>

Similar to observational methods, CRRs are labor intensive and require refinement. To improve the method, attention should be paid to reviewer training/testing and the data collection instrument in order to maximize reliability and help data collectors navigate the technical language of ICWA cases. However, because CRRs can be conducted at a more leisurely pace than in-person observations, reviewers can use reference materials to help properly categorize placements or testimony that represents active efforts. The instrument will also need to be flexible enough to account for multiple adjudication hearings, multiple termination hearings, and so on. Extra pages for coding hearings should be available for longer case files.

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<sup>120</sup> Bellonger & Rubio, *supra* note 46, at 5; Summers & Wood, *supra* note 25, at 21.

*C. Summary: Court-Focused Measures*

Observational and case record methods of measuring compliance are excellent choices for addressing questions of how often certain elements of compliance occur, although either could certainly be used to address questions of why compliance or non-compliance is happening.<sup>121</sup> Both methods rely on extensive training and careful instrument development to maximize usability, validity, and reliability. As described further in the NCJFCJ toolkit,<sup>122</sup> both can create a rich quantitative dataset, and both are resource intensive. Although there is some overlap, observation may be better for questions addressing the extent to which specific requirements are present in an average hearing, while CRRs are better for questions addressing the extent to which specific requirements are ever present over the life of an average case due to the consolidation of records in one place.

The varying interpretations of ICWA's requirements discussed in the sections above cause some difficulty in measuring compliance. Since application of ICWA may be jurisdiction-specific, and aspects of the judicial process also vary, training and instruments for both observation and CRR may result in a process that cannot be used as a whole across jurisdictions, making cross-site comparisons difficult. Therefore, careful consideration of cross-site meaning of items and how they are gathered will be necessary to facilitate comparisons. In this way, observation may be more beneficial, as its flexibility allows observers to be trained to translate local terminology and proceedings into general categories.

By comparison, CRRs represent a less direct method in which information goes through multiple filters—those of child welfare staff, judges, court clerks, etc.—before it is recorded in the court file. Therefore, translating this already translated information into general, cross-jurisdiction categories may be difficult.

In order to remedy the difficulty, local knowledge of jurisdictional practice is essential to development of the research

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<sup>121</sup> Summers & Wood, *supra* note 25, at 12.

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

questions, operational definitions, and instrument to be implemented. For example, tribes may automatically be a party to any case known to be ICWA-applicable, making formal tribal intervention difficult to note, while in other jurisdictions intervention may be required via written motion or verbal request. Such information could be used to guide instrument development or decisions about how tribal intervention fits into overall conclusions regarding ICWA compliance for individual jurisdictions. The QUICWA Compliance Collaborative is an example of the infrastructure—memoranda of agreement, partner capacity assessment, training and technical assistance, data sharing agreements, etc.—often necessary for multi-site data collection and comparison.

Sampling certain hearings rather than observing all hearings for sampled cases makes longitudinal analysis at the child level impossible. The QUICWA project, for example, implements a quasi-random child selection procedure to reduce having a set of siblings contribute multiple observations of what may a single instance of non-compliance. This benefit should be balanced against the inability to track outcomes for a given child. By contrast, CRRs may facilitate tracking children through time and associating outcomes to ICWA compliance because all hearings will be included in the child's case file.

Two remaining commonalities between the methods are worthy of note. First, both methods might benefit from electronic data collection; an electronic form could ease coding, reduce mistakes, and perhaps even take advantage of survey-style branching in which portions of the form become visible depending upon responses elsewhere. An electronic form would allow for guided selection of pre-loaded options that are often preferable to text boxes. For example, pre-loaded options could assign hearing results to a particular judge, court or tribe, facilitating matching of monitoring results for inter-rater reliability or case-level longitudinal analysis, or even separating out results by hearing type. Further, site- or jurisdiction-specific electronic data collection could create forced choice on judge names, proper formatting of case identifiers, etc. The QUICWA Compliance Collaborative has recently begun implementing similar web-based

data collection. The second commonality is that research that specifically assesses presence of best practices in addition to provisions specifically outlined in ICWA should be clear about this distinction in reporting results to judges and other court staff. Regardless of methodology used, rates of compliance from court-focused measurement provide context for further conversations between tribes, state courts, child protection systems, and other advocacy groups aimed at improving Indian child and family welfare and preserving Native traditions and heritage.

*D. Perception Measures: Surveys and Focus Groups*

Perception measures are defined as approaches that ask stakeholders and key informants, such as child protection workers, attorneys, or judges, about aspects of ICWA compliance in their jurisdiction. This can be accomplished via focus groups, one-on-one interviews, paper surveys, or electronic (i.e., web-based) surveys. Gathering data via these methods is relatively inexpensive, and the questions used will often be general enough to apply across jurisdictions. However, the trade-off to the many benefits is the subjective nature of this type of data, which will not be the same kind of data as one of the court-focused measures described above. In compliance studies, as in other areas, this type of data can be useful as a complement to more objective (i.e., court-focused) data. As an example, the NCJFCJ toolkit strongly recommends developing a compliance measurement program that incorporates multiple methods of data collection.<sup>123</sup> Additionally, the GAO report relied on multiple surveys and interviews, and analyzed existing data,<sup>124</sup> and the studies cited above in South Dakota,<sup>125</sup> North Dakota,<sup>126</sup> and Arizona<sup>127</sup>—all mixed perception measures with CRRs.

This type of paper or web survey might combine forced choice items, including rating scales, “check all” items, and yes/no questions, with open-ended (text box) questions allowing the

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<sup>123</sup> Summers & Wood, *supra* note 25, at 8.

<sup>124</sup> GAO, *supra* note 35, at 19.

<sup>125</sup> Bellonger & Rubio, *supra* note 46, at 2.

<sup>126</sup> Jones, Gillette, Painte & Paulson, *supra* note 54, at 13.

<sup>127</sup> Brown, Limb, Chance & Munoz, *supra* note 32, at 46.

respondent to provide information in their own words. By contrast, in-person interviews, particularly focus groups, are usually far less directive, allowing the respondent to highlight and describe what he or she feels is important in ways the researcher might not have considered previously.<sup>128</sup> Open-ended questions, where responses may inspire new, unanticipated questions, allow investigators to find out what they do not know, not just more about anticipated concepts.

Regardless of format, these methods are useful to assess the perceptions of key informants, and one of these methods could be implemented to quickly and inexpensively gather information about perceived rates of compliance in a jurisdiction. Such methods are perhaps more appropriate for gathering information about why compliance is or is not happening. For example, while you could ask a sample of court judges “When Indian custodians are involved, how often are they represented by counsel in hearings?” The resulting answers would represent a subjective perception of the rate of occurrence of an event, a fact that could be more accurately gathered by one of the court-focused measures above. Like all perceptions, this judgment would be subject to various cognitive biases, such as basing an answer on a memorable example that may or may not be directly applicable to the question.<sup>129</sup> On the other hand, the perception measures can be used as a preferable method for gathering informed opinions about barriers to representation that may be difficult to uncover in hearing observations or case record reviews. Summarily, perceptions of stakeholders in and of themselves may be an outcome of interest.

As such, these methods can be useful as a low-cost enhancement to a compliance measurement effort that also employs a court-focused measure, in three ways. First, they can be used to investigate areas of concern and thus inform the development of a concise monitoring or case record review tool that directly addresses a refined set of research questions. Second,

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<sup>128</sup> RICHARD A. KRUEGER & MARY ANNE CASEY, *FOCUS GROUPS: A PRACTICAL GUIDE FOR APPLIED RESEARCH* (3d ed. 2000).

<sup>129</sup> DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

as described in the NCJFCJ toolkit,<sup>130</sup> surveys or focus group results can shed light on *why* the more difficult aspects of compliance uncovered in a monitoring or case review effort might be occurring. Finally, focus groups in particular can be used as the method for initially presenting and discussing results from court-focused measures, talking with judges or child welfare caseworkers about strengths and barriers they see that might explain the findings, and exploring practices to overcome those barriers.

Some issues remain regarding data collection instrument design and careful training for implementing perception-based methods, as well as rigor in summarizing and analyzing the results. Overall, paying attention to details such as avoiding double-barreled questions, ease and swiftness of encoding responses, pilot testing methods, and other standards of research (quantitative or qualitative) will maximize the utility of results.

### CONCLUSION

The beginning of this Article outlined the historical imperative of the Indian Child Welfare Act, passed in 1978 in response to the alarming number of Indian children being removed from their homes and the resulting damage to the cultural integrity of tribes. With ICWA, Congress recognized a special responsibility to counteract this history, and a special intergovernmental relationship with Indian tribes. This landmark legislation, which aimed to repair over a century of damaging child welfare policies by the United States federal government, lays out standards and provisions designed to change the institutions and practices around removal and placement of Indian children. The result is a set of procedures that overlap with usual child welfare practice among courts, attorneys, and public child welfare agencies, but with important and sometimes complex contrasts. These procedures place emphasis on tribal involvement (if not transfer to tribal court), delineation of the need and preferred source for QEW testimony in removal or placement change discussions,

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<sup>130</sup> Summers & Wood, *supra* note 25, at 15–18.



specification of placement preferences, and a requirement for active family preservation and support efforts, which are all designed to maintain Indian children with Indian parents. Despite the legislation, several states currently have high disproportionality of rates of child removal among Indian children versus non-Indian children—some higher than 10 years prior to the implementation of the ICWA—reflecting a problem in ICWA compliance, lack of federal oversight, and/or limited ability to measure compliance. Without reliable data on performance indicators of compliance and publicly shared results, progress towards improvement will be slow to come.

This Article aims to promote the adoption and development of measurement strategies to identify gaps in compliance, and to measure progress towards compliance. Furthermore, it aims to make an argument in support of the need for ongoing oversight to safely reduce the disproportionate number of Indian children in out-of-home care, or at least to keep those children connected to their communities and culture when out-of-home placement is needed. Prior efforts at measuring ICWA compliance have generally been small in scale and reliant on measures developed by the Project itself. However, by advancing discussion of operational definitions and highlighting measurement strategies that can be replicated, this Article holds the hope of advancing the field into more consistent definitions with larger samples in order to produce increasingly stable estimates of ICWA compliance.

Measurement approaches, each with inherent strengths and weaknesses, fall primarily into three categories: observational methods, case record reviews, and perception-based measures with key informants. The choice of method should be based on the intended purpose and an informed awareness of the strengths and limitations of each approach. It is also important to note that no single operational definition of ICWA compliance represented in a single measurement methodology can hope to fully measure all aspects of compliance. Accordingly, a combination of methods is recommended to provide the most holistic approach to understanding compliance with such complex legislation as ICWA. The use of multiple methods helps overcome the limitations of any single approach and strengthens the conclusions that can be drawn.

In general, ICWA is intended to improve outcomes for Indian children in the child welfare system. The special responsibilities to Indian children placed upon this system by ICWA include both aspirational outcomes specific to Indian families and children—maintenance of tribal ties, protecting Indian families, preserving Indian culture—and more traditional child welfare outcomes, such as family preservation. Therefore, concentrating on removal rates provides a simple way to assess both kinds of outcomes. Although out-of-home placement patterns of Indian children are often tracked and reported at the county, state, and federal jurisdiction levels using mandatory data reported to ACF, without accurate measurement of ICWA compliance, changes in these trends for Indian children cannot be associated with the legislative intent. This means that to fully achieve the outcomes that the law intended, not only do resources need to be devoted to implementation of the law, but also devoted to ongoing monitoring of that implementation.

This Article presents some options for measuring compliance, as well as some of the early empirical findings. The existing research is scarce, limited, scattered, and in its infancy. Given the scope of the disparity, the sheer number of Indian children in out-of-home placement, the negative impact on child well-being, and the resulting long-term consequences of disrupting Indian families, dedicating resources devoted to ensuring ICWA implementation and measuring compliance should be a national priority. This Article concludes with some recommendations for achieving these goals.

#### *A. Recommendations*

Based on this Article's review of the strengths and limitations of existing approaches to measuring compliance, several recommendations surrounding resources, training, standardized data and documentation requirements, and enforcement arise. First, ICWA's active efforts provisions promote family preservation and reunification efforts beyond the normal scope of child welfare work, and therefore logically require additional financial and human resources. Child welfare funding, however, is not appropriated relative to the disproportionate representation of

Indian children in care or at risk of going into care in a given jurisdiction, and therefore does not increase the budget for the additional work inherent in the ICWA active efforts requirement. Augmenting the cultural competence of the workforce and increasing collaboration between state and tribal welfare agencies may enhance efficiency and help meet increased demands under ICWA regulations without additional budget outlays. Organizations such as the National Council of Juvenile and Family Court Judges, National Indian Child Welfare Association and National American Indian Court Judges Association are dedicating resources to facilitate state collaborations and improve ICWA-related practices efficiently.

Second, the additional efforts and provisions involved with ICWA, and the relative lack of evidence of compliance to date, emphasize the importance of training. Many of the professions involved in potential ICWA cases—social workers, attorneys, and judges—have existing training mechanisms that can be leveraged to improve cultural relevance and understanding of and adherence to ICWA. These training opportunities include initial education (e.g., Title IV-E training funds), as well as continuing education (Continuing Education Units or Continuing Legal Education). Incorporating ICWA importance and compliance into existing trainings would increase the ability of the child welfare system at large to “speak ICWA” and would also serve the purpose of integrating ICWA into general child welfare practice rather than relegating it to the category of a separate undertaking. For example, ICWA-related continuing education could be open to guardians ad litem and court-appointed special advocates. Furthermore, Title IV-E could have double the effect if it encouraged ICWA-relevant training to involve compliance monitoring, as is being done through a partnership between the Minneapolis American Indian Center and the University of Minnesota, Duluth. Such collaborations are necessary to increase not only the collection of compliance measurement data but also its use. Collaborative data collection efforts can be used for training practitioners and researchers, and for discussing compliance with students, attorneys, judges, and child welfare workers. Continuing

these efforts can only benefit compliance measurement and, in turn, benefit compliance, Indian children and families, and tribes.

Third, in order for ICWA to be fully enforced, measurement tools, such as those outlined here, are needed to measure progress. Ultimately, it would be an excellent advancement to have a standardized way to measure compliance across jurisdictions to track progress nationally, while still identifying ways that compliance might be measured uniquely in complementary ways to meet specific jurisdictional needs. A major next step in compliance, therefore, would be development of national compliance measurement standards for certain provisions of ICWA, as well as differentiating factors that can be measured across site versus those that can only be measured within one jurisdiction.

Further, adding ICWA performance measures to Statewide Automated Child Welfare Information System and Tribal Automated Child Welfare Information Systems or Child and Family Service Reviews would be a tangible advancement for the field and would enable cost-effective monitoring and reporting. Implementation of such advances would require development of key ICWA compliance measures that could be used by social workers, as well as requiring relevant indicators in case files and administrative records. Training and support around appropriate use of these measures would need to accompany this change along with a validation study to ensure these fields are being used correctly and accurately by workers in the field. Courts could also be required to report on a limited set of compliance measures or assessments in all judicial records.

To this end, designation of ACF, BIA, or joint responsibility as official oversight agency would certainly promote advancement of compliance measurement standards and data collection.<sup>131</sup> In fact, the Attorney General's Advisory Committee on American Indian/Alaska Native Children Exposed to Violence recently came to the same conclusion,<sup>132</sup> and recommended assigning explicit responsibility to federal agencies for collecting data on and

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<sup>131</sup> GAO, *supra* note 35, at 46; OIG, *supra* note 71, at 9.

<sup>132</sup> AG ADVISORY COMMITTEE, *supra* note 74, at 79.

ensuring state court compliance with the law. This responsibility might include elements in the Adoption and Foster Care Analysis and Reporting System data collection system specifically for ICWA-eligible children (which ACF recently announced its intent to include).<sup>133</sup> Whether at the local or national level, such data is necessary to ensure fulfillment of Congressional intent and to investigate implications of ICWA non-compliance for Indian child, family, and tribal welfare.

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<sup>133</sup> Adoption and Foster Care Analysis and Reporting System, 80 Fed. Reg. 17713 (Apr. 2, 2015) (to be codified at 45 C.F.R. pt. 1355).