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Extraction of Personal Data: A New Form of Colonialism or Continuation of a Colonial Practice? Adult Native American Adoptees Resist Assimilation and Rebuild Erased Identities

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EXTRACTION OF PERSONAL DATA A "NEW" FORM OF COLONIALISM OR CONTINUATION OF A COLONIAL PRACTICE? ADULT NATIVE AMERICAN ADOPTEES RESIST ASSIMILATION AND REBUILD ERASED IDENTITIES.

By Leonard Mukosi[1]

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I. INTRODUCTION

A new form of colonialism, distinctive of the twenty-first century is reported to be taking

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shape: data colonialism. Data colonialism interprets the contemporary capture and processing of personal data by governments or data corporations as an evolution of historic colonialism. Scholars behind the movement to resist 'new data colonialism' do not juxtapose the contents, form, and physical violence which characterized historic colonialism with the contemporary practices of appropriating personal data. Instead, the proponents of data colonialism merely refer to historic colonialism in the context of its function within the development of economies on a global scale. The overall argument made in this paper is that, to properly construe contemporary data relations through the lens of colonialism, it is worth revisiting and examining the contents of historical colonialism as a preliminary step. A comprehensive review of the practices within historic colonialism unveils how the collection, alteration, and destruction of personal records was instrumental to the advancement of agendas inimical to Indigenous Peoples by colonial regimes. Such evidence of data extraction practices that predate the digital era, renders contemporary extraction of personal data a continuation of colonial tradition rather than a "new" form of colonialism. This paper highlights how colonial governments collected and managed Indigenous identity records to erase Indigenous Peoples' identity and facilitate their assimilation into White culture. To epitomize this theory, I refer to the plight of adult Indigenous American adoptees, particularly those adopted under the Indian Adoption Project (IAP), 1958-67, as an example of the content of historic colonialism that data colonialism discourse needs to acknowledge. Despite facing impediments from the legacy of colonialism, adult Indigenous American adoptees have resisted assimilation through retracing their Indigenous origins, and reconnecting with their Indigenous culture, families, and traditional lands. Retracing Indigenous roots is supported by Article 8 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognizes Indigenous Peoples right not to be subjected to forced assimilation. The lived experiences of Indigenous Peoples embedded in resurgence represent and define the proper form of decolonization that Indigenous communities envisage. Thus, the emerging discourse on data de-colonization needs to be responsive to Indigenous Peoples data-related needs by listening to the voices of Indigenous Peoples—the people who bear the scars of harms caused by colonial control over Indigenous personal records.

II. WHAT IS DATA COLONIALISM AND WHY ITS MATTERS

Entities and individuals globally are gravely concerned about the threat to their sovereignty over data posed by the insidious collection of sensitive and personal data by governments or companies like Facebook, Google, and Amazon. Through the instrumentality of internet technology, the physical and geographical barriers to accessing or sharing information have been curtailed, exposing private information to external parties who may in turn misuse it. In May 2021, sensitive and personal information belonging to over 100 million Android users was reported to have been exposed due to several misconfigurations of cloud services.[2]

[2] Maria Henriquez, *The Top 10 Data Breaches of 2021,* SEC. MAG., Dec. 9 2021, available at https://www.securitymagazine.com/articles/96667-the-top-data-breaches-of-2021.

Personal information collected by the government or external entities can be used for non-personal purposes, that includes being sold to third parties. In 2020, the American Civil Liberties Union filed a lawsuit against the Department of Homeland Security and other federal immigration agencies for secretly purchasing and using cell phone location information to locate and track people, including for immigration enforcement.[3]

In response to this major—and sudden—shift in the social, legal, and economic order, triggered by the massive extraction and processing of personal data by data corporations and governments, scholars across disciplines are advancing theories to either diagnose or remedy the situation.[4] Two concepts have prominently associated data extraction with colonialism: "Data colonialism" and "Digital colonialism."[5] Data colonialism is defined as "the startling new social order based on continuous tracking of our devices and online lives that has created unprecedented opportunities for social discrimination and behavioral influence by corporations."[6] Meanwhile, digital colonialism is defined as "the decentralized extraction and control of data from citizens with or without their explicit consent through communication networks developed and owned by Western tech companies."[7] While both theories have gained notoriety among data scholars, the remainder of this paper focuses on data colonialism.

A. How Data Colonialism Perpetuates Colonial Power Dynamics

While the definition of data colonialism is widely used, scholars have differed in opinion as to the implications of data colonialism. My argument uses Couldry's theory which says that the extraction of personal data is the latest evolution in a long history of territorial colonialism, which "combines the predatory extractive practices of historical colonialism with the abstract quantification methods of computing" as a starting point.[8] This theory further forecasts a wave of

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[3] Raymond G. Lahoud, *ACLU Sues DHS Over Purchase of Cellphone Location Data to Track Immigrants*, NAT'L L.REV. (Dec. 17, 2020), https://www.natlawreview.com/article/aclu-sues-dhs-over-purchase- cellphone-location-data-to-track-immigrants.,

[4] Ulises Ali Mejias & Nick Couldry, *Resistance to the new data colonialism must start now,* ALJAZEERA (Apr. 28, 2020), https://www.aljazeera.com/opinions/2020/4/28/resistance-to-the-new-data-colonialism-must-start-now.

[5] *Id.; See also* Daniel Colleman, *Digital Colonialism: The 21st Century Scramble for Africa through the Extraction and Control of User Data and the Limitations of Data Protection Laws*, 24 MICH. J. RACE & L. 417, 422 (2019).

[6] *See* Meijas & Couldry, *supra* note 4.

[7] *See* Colleman, *supra* note 5, at 422. "[T]his structure has four fundamental actors: (1) The Western tech companies who create and provide the technology and infrastructure that harvest the data for ad targeting and ad distribution, (2) the advertising and consulting firms who use the technology provided by (1) to target various groups with highly personalized ads and messages aimed at increasing profits, (3) the "local" companies, parties, and organizations who pay (2) to help them impose their different agendas for the respective countries, and (4) the citizens who knowingly and unknowingly act as data sources for (1) and as target groups for (2) and (3)."

[8] Nick Couldry & Ulises Mejias, *Data Colonialism: rethinking big data's relation to the contemporary subject*, 20 TELEVISION AND NEWS 336, 336 (2022), available at https://thelivinglib.org/data-colonialism-rethinking-big- datas-relation-to-the-contemporary-subject/.

data colonialism that could provide the preconditions for a new stage of capitalism where the appropriation of human life through data is central.[9] Under these circumstances, appropriation of human life through data would emulate the socioeconomic reconfigurations that came with historic colonialism laying the groundwork for industrial capitalism.[10]

Sadowski advances a compelling theory on how data colonialism is fueling 'informational capitalism' characterizing the 21st century political economy.[11] Drawing on Marx's theory which conceptualizes capital as a relationship between money and commodities, Sadowski describes data as both a digital raw material necessary in the production of commodities, and as a product of digital labor of people equivalent to the role of financial and human capital in the capitalist world.[12] The theory of data as a digital raw material, is plausibly exemplified in the way companies like Apen rely on human labor from disaster stricken countries like Colombia to carry out the data labeling necessary for enhancing the profit making capabilities of artificial intelligence devices.[13]

From a capitalist theoretical perspective, in the same way buildings and physical assets can have long term value, recorded information necessary to produce a good or service is also being used as 'data capital.'[14] The unique economic identity of data capital is what makes it distinct from other forms of capital.[15] Data capital is: (1) non-rivalrous-it can be used by multiple users at a time; (2) non-fungible—it cannot be substituted; and (3) an experience good—it's value can only be realized through experience.[16]

B. Comparison of Data Colonialism and Historic Colonialism

Couldry and Mejias refer to the development of capitalism as a common outcome shared by both data colonialism and historical colonialism.[17] However, there is a shift in the resources available for economic exploitation in the two processes.[18] Historic colonialism exploited natural resources that generated profits and socioeconomic reconfigurations that made way for industrial

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[9] Humboldt Inst. for Internet and Soc'y, *In a nutshell: Nick Couldry on Data Colonialism*, YOUTUBE (Nov. 4, 2019), https://www.youtube.com/watch?v=5tcK-XIMQqE.
[10] *See id.*
[11] Jathan Sadowski, *When data is capital: datafication, accumulation, and extraction*, 6 BIG DATA & SOCIETY 1 (2019).
[12] *Id.* at 1-5.
[13] Karen Hao & Andrea Paola Hernandez, *How the AI Industry Profits from Catastrophe,* MIT TECH. REV, Apr. 20, 2022, available at https://www.technologyreview.com/2022/04/20/1050392/ai-industry-appen-scale-data-labels/.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Nick Couldry & Ulises Mejias, *Making data colonialism liveable: how might data's social order be regulated,* 8 INTERNET POL'Y REV. 1 (2019).
[18] *Id.* at 2.

capitalism.[19] Data colonialism, on the other hand, exploits human life through extracting information that is fed into capitalist enterprises in a manner that has implications for capitalism's future.[20]

While historical colonialism is associated with appropriations that necessitated industrial capitalism, the implications of data colonialism on capitalism are yet to be established. Couldry describes the two main similarities linking data colonialism to historic colonialism as:

> "The *subjugation* of human beings that is necessary to a resource appropriation on this scale (relations of subjection to external powers were central to historic colonialism), and grounding of this entire transformation in a general *rationality* which imposes upon the world a very singular vision of *Big Data's* superior claim on knowledge (just as colonizers justified their appropriation on the West's superior rationality)."[21]

The above thesis situates the extraction of personal data into the colonial framing by comparing two main characteristics of historic colonialism to the way in which personal data is extracted by corporations in the contemporary.[22] First, the subjugation of human beings that is necessary for the appropriation of personal data on a larger scale is synonymous to how Indigenous Peoples were subjected to settler dominion as a necessary step in the appropriation of territories and resources.[23] Secondly, the rationalization of the extraction of personal data through the imposition on the world of a homogenous view of Big Data as an indispensable source of knowledge, reproduces how the colonizers justified their appropriation of land and resources on the West as source of civilization that the world needed.[24]

C. How Data Colonialism Impacts Indigenous Peoples

Equating the contemporary extraction of personal data to historical colonialism requires a thorough inventory of the contents of the latter, to assess how practices within historic colonialism are being reproduced in contemporary data relations.[25] Data colonization compares the appropriation of territories and natural resources during historic colonialism to the

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[19] *Id.*
[20] *Id.* at 5.
[21] *Id.* at 2.
[22] *Id.* at 3.
[23] *See* id. at 3.
[24] *Id.* at 9.
[25] *Id.* at 3-5.

appropriation of personal data in today's world.[26] This connection is arguably tenuous considering that colonial governments extracted personal information belonging to Indigenous Peoples in pursuit of various colonial agendas.[27] Indigenous Peoples are adversely impacted by the omission, alteration or destroying of their personal records by the settler governments to erase Indigenous identities.[28] The same extractive practices deployed against Indigenous Peoples personal records are being utilized in the contemporary extraction of personal data, albeit different modes of extraction and motive.

D. The Differences Between Data Colonialism and Historic Colonialism

While it is agreeable that the predatory extractive practices of territorial colonialism exist in the way data is collected today, there are certain elements unique to historic colonialism. Historic colonialism pathologized certain races and cultures to justify appropriation of their resources and territories.[29] This system thrived on the intentional differentiation of the colonized from the colonizers, with the latter being ordained a higher-ranking status to justify asymmetry that subsequently defined the relations between the two.[30] Meanwhile, data colonialism is expansive and indiscriminate; "the new data colonialism works both externally—on a global scale —and internally on its own home populations."[31] In turn, Facebook, Twitter—the elites of data colonialism—"benefit from colonization in both dimensions, and North-South, East-West divisions no longer matter in the same way."[32]

Historic colonization relied heavily on the racial formation process: the transformation of preexisting ethnographic notions of cultural differences into immutable, inheritable racial differences.[33] Biological inferiority was a major factor that the Europeans used to rationalize the extraction of the land and natural resources belonging to the Indigenous Peoples.[34] Within that

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[26] *Id.; see also* Meijas & Couldry, *supra* note 4.
[27] *See infra-Part VII*. My argument is that if there is evidence of extraction of personal information as a practice during colonialism, then there is no need to equate the current data extraction with the extraction of territories or natural resources.
[28] Amanda Dodge, *An Introduction to the Indigenous Data Sovereignty Movement,,* EPIC PRESENCE, https://epicpresence.com/indigenous-data-sovereignty-movement/ (last visited, Feb. 23, 2022); Sid Davis, *Indigenous Data Sovereignty and Breaking the Cycle of History*, GRANT STATION (last visited Feb. 23, 2022), https://grantstation.com/tracks-to-success/Indigenous-Data-Sovereignty-and-Breaking-the-Cycle-of-History.
[29] MARY-ELLEN KELM, COLONIZING BODIES: ABORIGINAL HEALTH AND HEALING IN BRITISH COLUMBIA, 1900-50, 222 (Univ. British Columbia Press, 1999).
[30] Jennifer Spear, *Race Matters in the Colonial South*, 73 J. S. HIST. 579 (2007).
[31] Couldry & Mejias, *supra* note 8, at 336.
[32] *Id.*
[33] *Id.*
[34] *Id.*

same colonial framework, data belonging to Indigenous Peoples was collected, destroyed, sealed or misused to facilitate the assimilation of Indigenous Peoples into White culture.[35]

Colonial governments collected person-related records like birth, adoption, marriage, divorce, or deceased estates belonging to the Indigenous Peoples.[36] These records are still vital for confirming Indigenous rights, privileges, and identities—and necessary for the preservation of Indigenous Peoples' genealogical heritage.[37] Despite these records' vitality for Indigenous Peoples, historic colonialisms' usurpation of their records produced lasting effects. In what is currently considered the postcolonial era, some affected Indigenous survivors of these practices still do not have access to their records because they were destroyed, are still being regulated by settler laws which limit access, are housed in colonial repositories and archives. In some instances, records were digitized, making access by Indigenous people even harder.[38]

The devastating effects of the deliberate appropriation, mishandling, and altering of Indigenous personal data are seen in the United States, Australia and Canada where colonial control over Indigenous records played an instrumental role in facilitating the assimilation of Indigenous Peoples.[39] Indigenous children were adopted into White families and, in an effort to erase their Indigenous identities, their birth and adoption records were collected, altered, sealed, or destroyed by the settler governments.[40] Comparably, formerly colonized African territories are experiencing the adverse impacts of colonialism on Indigenous records.[41] Namhila reveals alarming gaps in the national archives of post-colonial Namibia owing to the latter's failure to meet requests by Black Namibians for their person related records (records that supply official and legally valid information about life).[42] Namibia's National archives has maintained the structural divisions used by the colonial government to facilitate the discrimination of persons classified as "non-whites."[43]

III. ADOPTION AND ERASURE AND ASSAULT OF NATIVE IDENTITY

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[35] Ellen Namhila, *Content and use of colonial archives: an under-researched Issue*, 16 ARCH. SCI. 111, 117 (2016).
[36] *Id.* at 121.
[37] *Id.* at 113.
[38] *Id.*
[39] *See e.g.,* STEPHANIE CARROLL RAINIE ET AL., ISSUES IN OPEN DATA - INDIGENOUS DATA SOVEREIGNTY (T. Davies, S. Walker, M. Rubinsstein, & F. Perini eds., 2019), available at https://www.stateofopendata.od4d.net/chpaters/issues/indigenous-data.html.
[40] Namhila, *supra* note 35, at 121.
[41] *Id.*
[42] *Id.*
[43] *Id.* at 111.

Indigenous children have been the primary target of the United States government's assimilative programs.[44] During the late Twentieth Century, adoption became a conveniently insidious way of destroying Indian families through separation of children from their parents.[45] Margaret Jacobs argues that very little research has been done historically on Indigenous children who were fostered or adopted outside their communities.[46] Historians tend to conflate Indigenous adoptions with transracial adoptions of the twentieth century.[47]

While the Bureau of Indian Affairs (BIA) generally oversaw the promulgation of regulation involving Indigenous Peoples, the administration of the IAP fell beyond the administrative capacity of the organization.[48] Accordingly, the BIA contractually delegated the Child Welfare League of America (CWLA) and other related groups to oversee the IAP which ran from 1958 to 1967.[49] The IAP may have overcame barriers preventing Indigenous children from being adopted into non-Indigenous families, it's overall success remains subject to mixed reviews.[50]

At the time of its implementation, the IAP was glorified and perceived as an example of enlightened adoption practices by non-Indigenous folks.[51] Conversely, many Indigenous activists and leaders condemned the IAP as one of the "genocidal policies toward native communities and cultures."[52]

Proponents of the IAP indicated the dire living conditions of Native Americans as the main reason why the children had to be rescued.[53] In 1968, President Lyndon B. Johnson issued a message to Congress alleging that "[f]ifty thousand Indian families live[d] in unsanitary dilapidated dwellings: many in huts, shanties, even abandoned automobiles."[54]

Yet these allegations pale in comparison to objective truth; it cannot be disputed that the IAP's main aim was to prevent the population of Indigenous Peoples from increasing.[55] The IAP

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[44] Margaret D. Jacobs, *Remembering the Forgotten Child: The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 136 (2013).
[45] *Id.*
[46] *Id.* at 137.
[47] *Id.*
[48] Stephanie Woodard, *Native Americans Expose the Adoption Era and Repair Its Devastation,* INDIAN COUNTRY TODAY, available at https://newsmaven.io/indiancountrytoday/archive/native-americans-expose-the-adoption-era-and-repair- its-devastation-Uinpv-VkFka0KeFfoMD4eQ/ (last visited Jan. 1, 2022).
[49] *Id.*
[50] *Id.*
[51] *The Indian Adoption Project,* U. OREGON, https://pages.uoregon.edu/adoption/topics/IAP.html (last visited Dec. 16, 2021).
[52] *Id.* Sovereignty is the internationally recognized right of a nation to govern itself, and Indigenous Tribes as sovereign governments long before European settled in—and colonized—the Americas.
[53] *Id.*
[54] Lyndon B. Johnson, Special Message to the Congress on the Problems of the American Indian: The Forgotten American, 1 PUB. PAPERS 335 (Mar. 6, 1968).
[55] *See* Jacobs, *supra* note 44, at 136.

focused its extraction of Indigenous children on those who had at least a quarter of Indigenous blood—which is the amount necessary for tribal enrollment—so that Indigenous populations would dwindle under state supervision.[56] The general conclusion from this theory is that; adult adoptees who were sent into non- Indigenous families were deprived of their sense of identity, belonging—and of any connection with their Indigenous culture and heritage.[57]

These heinous deprivations hindered numerous Indigenous children to an extent surpassing even the IAPs contractual intent. The official terms of the contract between the BIA and the CWLA indicate that 395 Indian children from sixteen states were adopted.[58] However, the demand by adoptive families for Indian adoptees exceeded the capacity of the IAP, prompting the extension of referrals to state and county departments of social services.[59] It has been estimated that this extension resulted in the adoption of nearly 12,500 Indigenous children between 1961 and 1976 outside the scope of what was contractually mandated through the IAP.

As this paper will address, the failure of official records to reflect accurate statistical data relating to Indigenous adoptions is a microcosm of the bigger challenges Indigenous Peoples still face from the undercounting and assimilation of relevant data into general statistics.

American liberalism, which became a post-World War II state of affairs, provided fertile ground for the civil rights movement, where racial ideologies were liberalized while gender roles shifted.[60] Interracial adoption became acceptable, paving way for the popularity of Indian children as the preferred adoptees, thus increasing the number of the families interested in adopting Indian children.[61] The separation of Indigenous children from their families through adoption was rationalized by three separate yet interwoven narratives: A) the forgotten Indigenous child; B) the unmarried Indigenous mother; and C) the destitute Indigenous family.

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[56] Lila George, *Why the Need for the Indian Child Welfare Act*, 5 J. MULTICULT'L SOC. WORK 165 (1997).

[57] *Id.* at 166. While this paper relies on the IAP to illuminate colonial reliance on Indigenous Peoples personal data, an account of the IAP would be incomplete without highlighting the causal link it shared with the Boarding School era which preceded it. The Boarding School era was one of the main assimilationist programs involving the separation of Indigenous children from their families as a way of "Saving God's forgotten children." Indigenous children were taken from their families and "were placed in either government boarding schools or Mission catholic schools so that they could be away from a life of poverty, ignorance, and dirt associated with Indian families."; George, *supra*, at 171. While in boarding schools, Indigenous children were required to adopt a "white" name in place of their actual name, and the male children had to cut their long hair, of which is sacred to Indigenous peoples. If rules were not followed, common punishments included failure to assure any "rule breaker's" attendance until age sixteen, commitment to reformatory schools, excommunication from the church, and standing still by the bedside for hours at night.; George, *supra*, at 166. Psychologists have traced parenting struggles faced by some Indigenous parents whose children became the target of social workers during the IAP to the psychological trauma experienced in boarding schools.

[58] Woodward, *supra* note 48.

[59] *Id.*

[60] *See* Jacobs, *supra* note 44, at 141. The sexual revolution caused gender norms to shift as paid opportunities for women increased and contraceptives became available. In turn, fewer white middle-class women were having unintended pregnancies and those who did were deciding to keep their babies at high rates.

[61] *Id.*

A. The Forgotten Indian Child

From the late nineteenth Century, policy makers and reformers expressed concern about how Indigenous children were raised and condemned the Indigenous women's mothering and home-making skills.[62] Between 1880 and 1930, an unknown number of Indigenous children were removed from their families and placed into boarding schools.[63] After the boarding school system grew unpopular, the IAP served as the federal government's "modern" approach to addressing the growing concern relating to the living conditions of Indian children on the reservation.[64]

Narrative of the suffering Indigenous child were promoted by key players in the federal government, including Arnold Lyslo, who headed the IAP, and Joseph Reid, the executive director of CWLA.[65] According to Reid, the IAP originated out of a growing concern for "the numbers of homeless Indian children living on reservations who were being deprived of homes of their own because Indian families were unable to absorb these children through adoption."[66] In addition, President Lyndon B. Johnson bemoaned the high levels of illiteracy among Indian Americans.[67] In a 1968 report to the Congress, the president referred to the high rate of high school dropouts, the language barriers faced by Indigenous Peoples, the isolation of Indigenous Peoples in remote areas, as well as Indigenous children's lacking tradition of academic achievement.[68]

B. The Destitute Indian Family

Prior to the imposition of assimilationist policies by the federal government, Indigenous families were based on the kinship system, which depended on familial relationships as a convenient source of caregiving and imparting traditional values of respect, reciprocity, and balance.[69] Kinship is still at the core of the Indigenous Peoples ways of being.[70] And for Indigenous children today, the household remains an important space for learning the traditions from their parents, grandparents, siblings, and other relatives.[71]

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] Johnson, *supra* note 54.
[68] *Id.*
[69] Leo Killsback, A nation of families: traditional indigenous kinship, the foundation for Cheyenne sovereignty, 15 ALTERNATIVE: INT. J. INDIGENOUS PEOPLES 34 (2019).
[70] Stephen Sachs, *Remembering the Traditional Meaning & Role of Kinship in American Indian Societies, To Overcome Problems of Favoritism In Contemporary Tribal Government,* 22 INDIGENOUS POL'Y J. 1 (2011).
[71] Killsback, *supra* note 69, at 36; *see also* Jacobs, *supra* note 44, at 140.

Due to its unique nature and difference to colonial concepts of family, Indigenous American kinship was regarded as chronically dysfunctional.[72] The CLWA argued that the Indigenous American extended family was a significant threat to a child's physical, emotional, and intellectual development.[73] Thus, the priority became removing Indigenous children from their kinship.

C. The Unmarried Indian Mother.

During the period between 19391958, psychoanalytic theories found that unmarried mothers "have serious personality disturbances," and "were incapable of providing sustained care and security for their babies."[74] Giving birth out of the wedlock was medicalized: unwed mothers were deemed psychologically unfit to take care of their children.[75] Social workers and parents sought to salvage the reputation of these "wayward" daughters by hiding their pregnancies, having them delivered in special maternity homes, and giving their babies up for adoption.[76] A societal need to contain sex within the confines of marriage also compounded sentiments against unmarried mothers in general.[77]

For most Indigenous American tribes, raising children born out of wedlock did not present a formidable challenge as extended family or clan members would always be an invaluable source of support.[78] Some Indigenous tribes, like the Ute Indians, did not even formalize marriages or divorces; in essence, it was not an anomaly for mothers to have sole custody of children following a break-up.[79]

Additional factors fueling adoption of Indigenous children are the shifting of gender norms. An increase in paid opportunities for women, heightened infertility, and the introduction of advanced methods of contraception contributed to a decrease in pregnancies among White middle-class American women.[80] The typical functional family remained the White middle-class nuclear family, yet it was hit hard by a shortage of children. Undue influence, intimidation, and deceit under the guise of adoption became the common circumstances under which Indigenous mothers had to give up their children.[81]

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[72] Killsback, *supra* note 69, at 36.
[73] *Id.*
[74] E. Wayne Carp, *The Sealed Adoption Records Controversy in Historical Perspective: The Case of the Children's Home Society of Washington, 1895-1988,* 19 J. SOCIO. & SOC. WELFARE 27, 44 (1992).
[75] *Id.*
[76] *Id.*
[77] Jacobs, *supra* note 44, at 141.
[78] *Id.* at 147.
[79] *Id.* at 146.
[80] *Id.* at 142.
[81] *Id.* at 145-6. Evidence indicates that some Indigenous women were subject to pressure from social workers to surrender their children for adoption. In certain instances, the Indigenous mothers were forced to sign adoption papers without knowing that they were giving away their children by doing so. More so, these unmarried mothers

IV. ACCESSING ADOPTION RECORDS IN THE UNITED STATES

Members of the adoption triad (adoptive parents, birth parents and the adoptee) usually seek access to adoption records for different reasons.[82] Adopted persons usually initiate contact with their biological families through adoption agencies by obtaining copies of birth certificates or searching for their background and genetic information for various reasons that shall be given below.[83]

Birth mothers seek adoption records to know about their children's welfare, and adoptive parents may contact adoption agencies to get information on the child's background and medical history.[84] Adoption records include: the adoption decree, information gathered during pre-placement interviews about birth parents and their families, and the Original Birth Certificate (OBC).[85]

Historians, social workers, and adoption rights activists are said to often erroneously assume that adoption records have always been sealed and adoption agencies have always been unwilling to disclose adoption records.[86] Highlighting the lack of comprehensive literature that accurately unpacks the history of sealed adoption records in America, Carp Wayne says:

> Adoption rights activists, in their quest for their biological families, incorrectly assume that they are demanding the opening of records that have always been sealed and fail to understand the multiple factors responsible for sealing adoption records. A longer historical perspective reveals instead a more complicated—but more usable—past.[87]

Adoption laws in the United States evolved through three phases. Since English common law did not recognize the practice of adoption, statute law has always been the primary

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were denied information about due process, their right to an attorney, and their legal rights more broadly. Even though non-Indigenous single mothers were subject to such pressures, it was particularly excessive for the unmarried Indigenous unwed mother.

[82] Carp, *supra* note 74, at 29.

[83] *Id.* at 31.

[84] *Id.* at 32.

[85] *A blog for and by American Indian And First Nations adoptees who are called a STOLEN GENERATION #WhoTellsTheStoryMatters #WhyICWAMatters*, AM. INDIAN ADOPTEES (last visited July 8, 2022), http://blog.americanindianadoptees.com/p/about-indian-adoption-%20projects.html [hereinafter *STOLEN GENERATION*]

[86] Carp, *supra* note 74, at 28. "These assumptions are so deeply rooted, so unquestioned, that adoption rights advocates have not even asked the question, "Have adoption records always been sealed?" because they begin with the ahistorical presumption that what is has always been so, and proceed accordingly."

[87] *Id.* at 52.

instrument for the regulation of adoptions.[88] The first legislation on adoption was passed by the state of Massachusetts, and just like the adoption laws that were enacted in other states during this time, it did not bar access to adoption records as confidentiality was not a matter of concern.[89] From 1895 to the mid 1950s, adoption policies and laws allowed adult adoptees access to both identifying and non-identifying information—provided it was in their "best interests."[90]

The second evolutionary phase for adoption laws in the United States developed from 1955 to 1968 and was characterized by policies that placed restrictions—especially on disclosing identifying information to adult adoptees.[91] The basis of the restrictive stance was the prevailing belief that adoptees who sought reunion with birth families "were irrational or emotionally disturbed."[92] There was also the need to protect the privacy of the adoptive families.[93]

The third and prevailing era of adoption policies started in the 1970s, when many states began enacting laws that do not allow the disclosure of adoption records without a court order.[94] In *Juman v. Louise Wise Services*, the New York supreme court said that confidentiality of adoption records safeguards the privacy interests of natural parents, adoptees, and adoptive parents.[95] Confidentiality, the court continued, was imposed to further the state's broader sociological plan to provide a child with a substitute family through the adoption process.[96]

While many states' adoption policies mirror New York's, others do not. Some state laws allow unrestricted access to adoption records, which means the adult adoptee can access original birth certificate without any restrictions.[97] Some state's allow partial access to adoption records or access with restrictions.[98] Typically, under this classification, access to non-identifying information is unrestricted while there are conditions to releasing identifying information.[99] These conditions include mutual consent registries requiring the biological parents and the adoptee to indicate their willingness to meet.[100]

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[88] Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U. L. REV. 259, 260 (1994).
[89] *Id.* at 260-61.
[90] *Id.* at 260.
[91] Carp, *supra* note 74, at 29.
[92] *Id.*
[93] *Id.*
[94] Kuhns, *supra* note 88, at 263.
[95] Juman v. Louise Wise Servs., 159 Misc. 2d 314, 321, 608 N.Y.S.2d 612 (1994).
[96] *Id.*
[97] *Unrestricted*, ADOPTEE RTS. L. CTR., https://adopteerightslaw.com/focus/unrestricted-access/(last visited June 15, 2022).
[98] *Id.*
[99] *Id.*
[100] *Id.*

The last classification is sealed (i.e., restricted) records which means an adult adoptee cannot access their adoption records absent a court order.[101] Lately, state legislation on accessing adoption records is increasingly inspired by what is known as "clean" adoption reform.[102] The clean adoption movement has grown to become a widely accepted best practice in adoption, and advocates for granting unrestricted access to adoption records.[103]

The chart below shows the percentage of the states that have legislation allowing either, unrestricted, partial access or restricted access (sealed) to adoption records. The specific state by name, and the corresponding classifications are listed subsequently in Table 1.1.

Figure 1.0

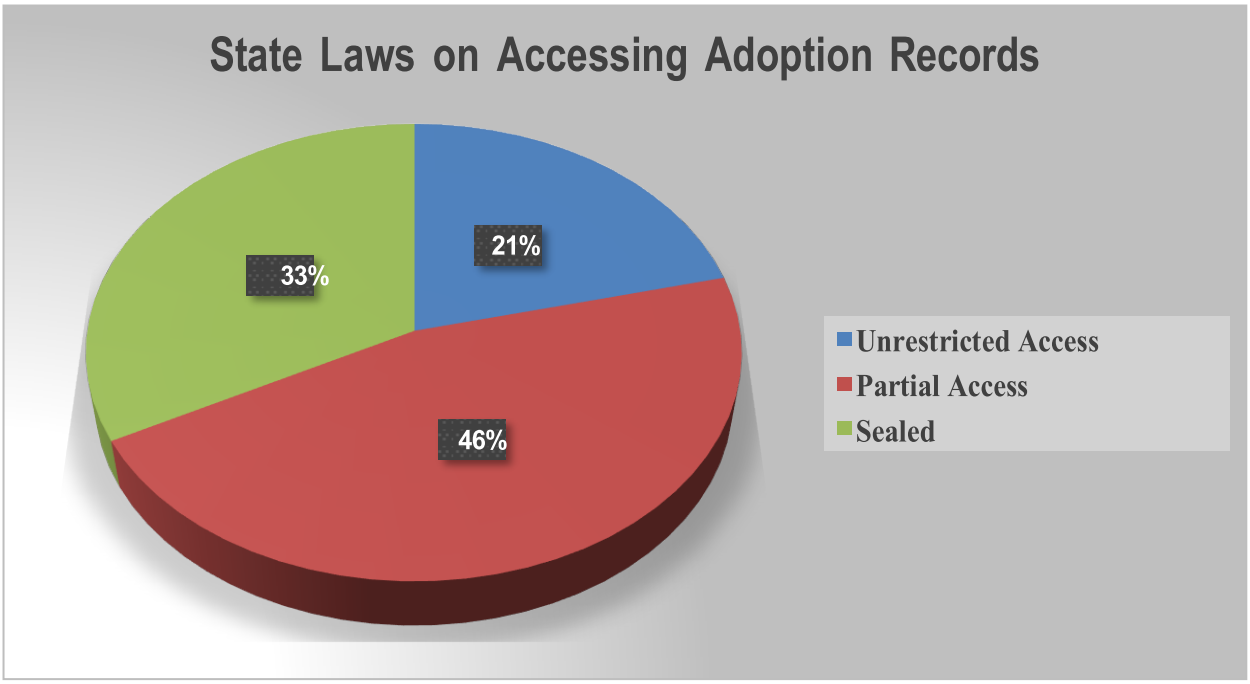

Table 1.1

STATE	LEGISLATION	STATE	LEGISLATION
ALABAMA	Unrestricted Access	**MISSOURI**	Access with Restrictions

[101] *Id.*

[102] Kristen Shaughnessy, *Report Could Push Clean Adoption Reform Bill Vote In New York*, SPECTRUM NEWS (May 1, 2018, 12:21 PM), https://www.ny1.com/nyc/all-boroughs/news/2018/05/01/state-health-department-weighs-in-on-clean- adoption-reform-bill-.

[103] *Id.*

ALASKA	Unrestricted Access	**MONTANA**	Partial with Restrictions
ARIZONA	Sealed	**NEBRASKA**	Partial with Restrictions
ARKANSAS	Access with Restrictions	**NEVADA**	Sealed
CALIFORNIA	Sealed	**NEW HAMPSHIRE**	Unrestricted Access
COLORADO	Unrestricted Access	**NEW JERSEY**	Access with Restrictions
CONNECTICUT	Partial Access	**NEW MEXICO**	Sealed
DELAWARE	Access with Restrictions	**NEW YORK**	Unrestricted
DISTRICT OF COLUMBIA (DC)	Sealed	**NORTH CAROLINA**	Sealed
FLORIDA	Sealed	**NORTH DAKOTA**	Sealed
GEORGIA	Sealed	**OHIO**	Access with Restrictions
HAWAII	Unrestricted Access	**OKLAHOMA**	Partial with Restrictions
IDAHO	Sealed	**PENNSYLVANIA**	Access with Restrictions
ILLINOIS	Access with restrictions	**RHODE ISLAND**	Unrestricted Access
INDIANA	Access with restrictions	**SOUTH CAROLINA**	Partial with Restrictions
IOWA	Sealed	**SOUTH DAKOTA**	Sealed
KANSAS	Unrestricted Access	**TENNESSEE**	Access with Restrictions
KENTUCKY	Sealed	**TEXAS**	Sealed
LOUISIANA	Sealed	**UTAH**	Sealed

Currently, only eleven states in the United States have legislation granting unlimited access to adoption records.[104] Meanwhile, a total of twenty-four states allow partial access or

[104] *Id.*

access with restrictions to adoption records.[105] And seventeen states, as well as the District of Columbia, have completely sealed their adoption records.[106]

Where adoption records are completely sealed, identifying information can only be released upon a judicial finding of good cause.[107] Courts in good cause jurisdictions have not reached a consensus on the specific set of factors to be considered when deciding what amounts to good cause.[108] Such state courts have shifted the burden on the state legislatures to provide required guidance on what interests to balance when considering good cause.[109]

When confronted with the task to decide on the interests to balance when making a determination of good cause, some courts have avoided the issue completely, and denied adult adoptees access to records.[110] Meanwhile, other courts have implicitly formulated a good cause standard through a constitutional lens, noting that privacy is a constitutionally guaranteed right which cannot be outweighed by a right to access information unavailable to the general public.[111] Typically, courts that adopt the preceding approach utilize a balancing test. For example, a Missouri juvenile court listed the following as the conflicting interests that need to be balanced when determining good cause: 1) the nature of the circumstances dictating the need for release of the identity of the parents; 2) the circumstances and the desire of the adoptive parents; 3) the circumstances of the birth parents and their desire or at least the desire of the birth mother not to be identified; and 4) the interest of the state in maintaining a viable system of adoption by guaranteeing confidentiality.[112]

The mental health of the adoptee has also been considered elsewhere as a factor that may suffice as good cause. In *re Maples,* the court indicated that the public has an interest in the mental health of children who have been adopted, especially their psychological need to know

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[105] Kuhns, *supra* note 88, at 263-64. Non-identifying information generally consists of date and place of adoptees birth, age of biological parents at the time of adoption and any other information that does not reveal the identity of the birth parents. Identifying information includes any information that may lead to the positive identification of birth parents, the adult adoptee, or other birth relatives.

[106] *State Adoption Laws*, AM. ADOPTION CONG., (last visited July 8, 2022), https://www.americanadoptioncongress.org/state.php .

[107] *Id.*

[108] Christopher Loriot, *Good Cause is Bad News: How the Good Cause Standard for Record Access Impacts Adult Adoptees Seeking Personal Information and a Proposal for Reform*, 11 U. MASS. L. REV. 100, 112 (2016).

[109] *Id.*

[110] *Id.*; *see e.g.,* Jo Backes v. Cath. Fam. & Cmty. Servs., 210 N.J.Super. 186, 509 A.2d 283 (Ch. Div. 1985) (trial court refused to appoint an intermediary that would allow an adult adoptee to contact his birth parents because there was no express authority for the court to do so, despite the presence of statutory 'good cause' language.)

[111] Loriot, *supra* note 108, at 112.

[112] *In re* George, 625 S.W.2d 151, 156 (Mo. Ct. App. 1981).

who their birth parents are.[113] Similarly, in *re Dixon*, the Michigan Court of Appeals included "compelling medical reasons and psychological reasons" as possible grounds for good cause.[114]

Despite some courts acknowledging an adoptee's psychological need to know as good cause for unsealing adoption records, they remain mute on what *precisely constitutes* a judicially sufficient psychological need.[115] In *Mills v. Atl. City Dep't of Vital Stat's.,* the court concluded an adoptee must be "impelled by the need to know which is far deeper than 'mere curiosity,'" without further clarification.[116] Adding to this ambiguity, the court in *in re Maples* concluded—also absent any explanation—that an adoptee cannot be given access to adoption records when "little more than a thinly supported claim of a psychological need to know is put forth. . ."[117]

In addition, even when courts find psychological need sufficient to show good cause, the ambiguous, undefined term is often outweighed by other considerations. In one case, the Supreme Court of Missouri concluded that, despite the adoptee having a psychological need to know, because the individual had prospered socially, intellectually, and financially as the child of her adoptive parents, there was no compelling psychological need emanating from the secrecy of the adoption that would render the adoptee a "burden to the society."[118] In another unclear yet comparable ruling, the court in *Dixon* did not qualify the existence of psychological illness as good cause—reasoning that since the psychological illness arose from treatment in the adoptive home, it could not be directly attributable to the lack of information about biological parents.[119]

As a result of this judicial hodge-podge, the constitutionality of statutes sealing adoption records has been subject to scrutiny from adoption rights activists. This scrutiny rests on the premise that denying access to adoption information infringes upon the rights to equal protection, privacy, and access to important information.

In *Alma Soc. Inc., v Mellon,* the court was asked whether adopted persons are constitutionally entitled to obtain their sealed adoption records upon reaching adulthood, including the names of their natural parents, without a showing of good cause.[120] The adult adoptees argued the legislation sealing adoption records discriminated against them based on their adoption status because non adoptees had unlimited access to their birth records.[121] It was further argued that status imposes burdensome characteristics that are indistinguishable from those imposed by illegitimacy—which was declared a quasi-suspect class for equal protection

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[113] *In re* Maples, 563 S.W.2d 760, 764 (Mo. 1978). The court included the state's interest to protect and foster an effective scheme for adoption, and the public's interest in preserving the confidential non-public nature of the process.
[114] *In re* Dixon, 116 Mich. App. 763, 770, 323 N.W.2d 549, 552 (1982).
[115] Loriot, *supra* note 108, at 114-15.
[116] Mills v. Atl. City Dep't of Vital Stat.'s, 148 N.J.Super. 302, 318, 372 A.2d 646 (N.J. Ch. 1977)
[117] Maples, supra note 112, at 766.
[118] *Id.* at 764.
[119] Dixon, *supra* note 114, at 771.
[120] Alma Soc. Inc. v. Mellon, 601 F.2d 1225, (2d Cir. 1979), *cert. denied*, 444 U.S. 995, 62 L.Ed.2d 426 (1979).
[121] *Id.* at 1234.

purposes—should be subject to heightened scrutiny.[122] The court rejected the adult adoptees' argument stating that "[s]imply because most adult adoptees are allegedly illegitimates, it does not follow that adoptees are subject to the same level of constitutional scrutiny as illegitimates, much less a greater level.".[123]

Similarly, in *Mills*, adult adoptees argued that placing a shield of secrecy over the identity of their natural parents abridges both their right to privacy and to receive important information.[124] Rejecting this claim, the court said that the right to privacy asserted by adoptees was in direct conflict with the right to privacy of the natural parent whose identity was assuredly shielded from public disclosure.[125] It held that, "[the sealing statutes] abridge no fundamental right protected by the Constitution, nor do they create a suspect classification, but rather protect a rational state interest by placing reasonable limitations upon the adoptee's access to their birth records."[126]

The above uncertainty has divided the sealed adoption record controversy in two ideological camps. On one hand, proponents of sealing adoption records argue that doing so protects the identity of birth parents, the privacy of adoptive parents and their family—and shields the child from unpleasant knowledge regarding their illegitimacy. On the other hand, there are those who believe that sealing adoption records is a serious violation, particularly of the rights of the adult adoptee to know their biological family.

A. ICWA and Adult Native Adoptees' Access to Adoption Records

In 1978, the United States Congress—with the intention to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families,"—passed the Indian Child Welfare Act (ICWA).[127] Recognizing that children are vital to the continued existence and integrity of Indigenous tribes, ICWA gave federally recognized tribes exclusive jurisdiction over Indigenous child custody proceedings, in effect, restoring tribes' custodianship of the Indigenous child, at long last.[128]

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[122] *Id.* at 1233.
[123] *Id.* at 1234. The court further stated the adopted are not generally subject to extensive legal disabilities and thus have less of a claim to judicial protection than illegitimates.
[124] Mills, *supra* note 116, at 306. Plaintiffs were challenging the constitutionality of N.J.S.A. 26:8—40.1 and 9:3—31, which require the state registrar to place under seal the original birth certificate of any child who is adopted.
[125] *Id*. at 316.
[126] *Id.*
[127] Indian Child Welfare Act of 1978, Pub. L. No. 95–608, 92 Stat. 3069 (1978).
[128] *Id.* at §§ 1903(1), 1911(1). To safeguard Indigenous families, ICWA authorizes the secretary of the Interior make grants directly to Indigenous Tribes and organizations that establish family development programs for Indigenous families on and off the reservation.

Three ICWA provisions are of relevance to this paper: § 1917,§ 1951, and § 1923.[129] The former says:

> Upon application by an Indian individual who has reached the age of eighteen and who was the subject of an adoptive placement, the court which entered the final decree shall inform such individual of the tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship.[130]

While § 1917 justifies its function to protect any tribal rights adult adoptee's have not been afforded, § 1951(b) extends the same right to adult adoptees for enrollment purposes:

> Upon the request of the adopted Indian child over the age of eighteen, the adoptive or foster parents of an Indian child, or an Indian tribe, the Secretary shall disclose such information as may be necessary for the enrollment of an Indian child in the tribe in which the child may be eligible for enrollment or for determining any rights or benefits associated with that membership. Where the documents relating to such child contain an affidavit from the biological parent or parents requesting anonymity, the Secretary shall certify to the Indian child's tribe, where the information warrants, that the child's parentage and other circumstances of birth entitle the child to enrollment under the criteria established by such tribe.[131]

However, § 1923 provides that the aforementioned provisions shall not "affect a proceeding under State law for foster care, placement, termination of parental rights, preadoptive placement, or adoptive placement . . . initiated or completed prior to one hundred and eighty days," subsequent to the ICWAs enactment unless it is a "subsequent proceeding affecting the custody or placement of the same child."[132] Since this article focuses mostly on adoptions that

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[129] *Id.* at §§ 1917, 1951.
[130] *Id.* at § 1917.
[131] *Id.* at § 1951(b).
[132] *Id.* at § 1923.

took place prior to the enactment of ICWA, it is important to clarify how the IAP era adoptions fall under ICWA provisions.

In *In re Hanson,* the court said that a petition to open the records of an adoption that happened in 1969 qualifies as "both a 'subsequent proceeding' and a proceeding under State law for foster care placement, termination of parental rights, preadoptive placement, or adoptive placement."[133] The executive branch agreed; the Bureau of Indian Affairs (BIA) clarified that § 1917 "applies regardless of whether or not the original adoption was subject to the provisions of the Act."[134] Meaning, ICWA applies to adoptions that took place prior to its enactment—and provides a vehicle to supersede state privacy laws that limit access to adoption records.[135]

B. Pre-ICWA Struggles for Indigenous Adoptee's to Access Records

> People don't seem to understand why this piece of paper is so important, that it has the power to unlock a life, an identity, that until now has been inaccessible because of sealed record. They, with their full lives, genealogies, and unquestioned documentation, don't understand that my life book begins on chapter 3. Chapters 1 and 2 are located in various bureau drawers and file cabinets, three-ring binders, and other people's memories.[136]

These are the words of Suzan Harness, a member of the Confederated Salish and Kootenai Tribes who was removed from her tribe at eighteen months old to be placed in a White adoptive family.[137] Susan's adoption happened under the IAP, and social workers cited "neglect" as the reason for her adoption.[138] Susan did not meet her biological family at the age of thirty-four—and only after a social worker in Montana violated the policy and showed Susan her adoption file.[139]

Susan's words resonate with several other Indigenous adults who were placed in White families pursuant to the IAP and other United States' assimilationist policies. Many of these

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[133] *In re* Hanson, 188 Mich.App. 392, 396, 470 N.W.2d 669 (1991).
[134] Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,595 (Nov. 26, 1979) [hereinafter Guidelines for State Courts].
[135] *See In re* Mellinger, 288 N.J.Super. 191, 195, 672 A.2d 197 (1996). The New Jersey trial court concluded that "Congress intended that the ICWA override the State's interest in confidentiality of adoption records."; *see Id.* "Where state law prohibits revelation of the identity of the biological parent, assistance of the [BIA] shall be sought where necessary to help an adoptee who is eligible for membership in a tribe establish that right without breaching the confidentiality of the record."
[136] SUSAN HARNESS, BITTEROOT: A SALISH MEMOIR OF TRANSRACIAL ADOPTION (Univ. of Nebraska Press 2018) (ebook) (the online edition did not contain any page numbers; the author is unable to provide pincites for this source.)
[137] *Id.*
[138] *Id.*
[139] *Id.*

adult adoptees do not know anything regarding their biological families or tribes, as most adoptive parents are unwilling to share this information with them.[140]

Indeed, § 1917 and § 1951(b) of ICWA give Native American adult adoptees the right to secure necessary information from the court which entered the decree, to enable them to enroll into a tribe and/or access rights they may have from the tribal affiliation.[137] In situations where the adult adoptee does not have knowledge about the court that entered the adoption decree, that individual can contact the BIA, which "supposedly maintains the records of adopted Indian children since November of 1978.[141]

Most Indigenous adult adoptees do not have any additional information linking them to a tribe or to prove if they are Indigenous at all because this information was deliberately concealed from them by their adoptive parents. The BIA registry primarily carries records for adoptions that took place after November of 1978 and is unable to provide records for those adopted prior to the ICWAs enactment.[142]

And these challenges are also faced by the descendants of pre-ICWA Indigenous adult adoptees. In custody proceedings, courts have refused descendants of pre-ICWA adoptees' access to their family's adoption records if they do not have information linking them to a specific tribe or at least knowledge of the court which entered the adoption decree.[143] In certain instances, even where adult adoptees know who their blood Native relatives are, some tribes still require their original birth certificates, to enroll them and their children as tribal members.[144] This practice has—and can potentially still—sustain the separation of Indigenous families through the judicial system as exemplified in two dependency cases in California : *In re C.Y.*,[145] and *In re N.C.*[146]

In *In re C.Y.,* a mother who was adopted as a child knew that she was Indigenous but did not have any way to prove her Indigenous ancestry.[147] The court acknowledged that the Department of Health and Human Services (DHHS) has an affirmative and continuing duty to inquire if a child may be an Indigenous, but stressed that "neither the DHHS nor the court is required to conduct a comprehensive investigation into the minors' Indian status."[148] Due to the mother's inability to provide supporting documentation of her Indigenous heritage, the court affirmed the trial court's ruling and terminated her parental rights.[149]

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[140] *Id.*
[141] NAT'L INDIAN L. LIBR., *Topic 15: Access to records for tribal enrollment purposes* (last visited Feb. 27, 2022), available at https://narf.org/nill/documents/icwa/faq/access.html#Q4%20.
[142] *Id.*
[143] *STOLEN GENERATION*, *supra* note 85.
[144] *Id.*
[145] *In re* C.Y., 208 Cal. App. 4th 34, 144 Cal. Rptr. 3d 516 (2012)
[146] *In re* N.C., No. 2D JUV. B240029, 2012 WL 5936671 (Cal. Ct. App. Nov. 28, 2012).
[147] *In re* C.Y., *supra* note 145, at 37-38.
[148] *Id.* at 39.
[149] *Id.* at 43.

Similarly, in *In re N.C.,* a woman knew that she was of Indigenous heritage through her father, who was adopted into a White family as a child.[150] And like the mother in C.Y., the women's father was unable to provide any additional information regarding his Indigenous heritage.[151] Guided by the decision in C.Y., the court terminated her parental rights upon ruling that ICWA did not apply because the local Child Welfare Services (CWS) "was not required to seek the unsealing," of her father's birth records when inquiring into the child's Indigenous heritage.[152]

Fortunately, the federal government has responded to these heinous judicial outcomes. In 2016, the BIA issued guidelines for implementing the ICWA, wherein state courts are now required to determine at the outset of any child custody proceeding whether the Act applies ('the inquiry').[153] The guidelines stipulate that, after a court conducts 'the inquiry,' a court "has reason to know" that a child involved in a proceeding is Indigenous if:

> (1) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that the child is an Indian child;
> (2) Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child;
> (3) The child who is the subject of the proceeding gives the court reason to know he or she is an Indian child;
> (4) The court is informed that the domicile or residence of the child, the child's parent, or the child's Indian custodian is on a reservation or in an Alaska Native village;
> (5) The court is informed that the child is or has been a ward of a Tribal court; or
> (6) The court is informed that either parent or the child possesses an identification card indicating membership in an Indian Tribe.[154]

Where the court does not have sufficient evidence to determine that the child is or is not an Indigenous, it is required to:

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[150] *In re* N.C., *supra* note 146, at 1*.
[151] *Id.*
[152] *Id.* at 2*.
[153] 25 C.F.R. § 23.107 (2022).
[154] 25 C.F.R. at § 23.107(c)(1)-(6).

> (1) Confirm, by way of a report, declaration, or testimony included in the record that the agency or other party used due diligence to identify and work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member (or a biological parent is a member, and the child is eligible for membership); and
> (2) Treat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian Child" in this part.[155]

Whether "reason to know if a child is Indian" warrants unsealing closed adoption records, however, remains unclear. But one can argue that "working with all of the tribes of which there is reason to know the child may be a member" entails contacting other relatives to verify—a process which was previously denied in *In re* C.Y. which was decided before the issuance of the guidelines.[147]

Notably, following release of the guidelines, the state of California created a policy recognizing that information which suggests a child is or might be Indigenous can come from the "child's extended family."[156] This implies that, today, a court in a child custody proceeding has sufficient latitude to entertain claims by the family members of Indigenous adult adoptees regarding their child's Indigenous heritage.

The introduction of 'the inquiry' may be an opportunity for unsealing adoption records or obtaining information about the relatives of an adult Native adoptee from their tribe through the assistance of the court. However, one drawback remains hard to ignore: the inquiry avenue is only available in a custody proceeding; it is not available to many of the adoptees whose descendants may not be involved in a custody proceeding.

C. ICWA offers Limited Reasons for Accessing Adoption Records

Despite the ICWA providing adult adoptees *legitimate* avenues to secure previously sealed adoption records, it provides *limited* avenues for an individual to do so. In granting the right to secure necessary information about tribal affiliation to adult adoptees, Congress sought to protect their right to tribal enrollment.[157]

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[155] 25 C.F.R. at § 23.107(b)(1)-(2).
[156] *Judicial Council of California*, *California Family Code Provisions Implementing the Indian Child Welfare Act*, OPS. & PROGRAMS DIV. CTR. FAM., CHILD., & CT.'S (Sept. 21, 2020), available at https://www.courts.ca.gov/documents/ICWAFamilyCode.pdf.
[157] H.R. Res. 95—1386, at 7 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.

Even with revelations surrounding an adopted individual's inherent right to be informed of their genealogical background, Congress did not enact the ICWA with that in mind.[158] Instead, Congress' primary aim was to protect: a.) the right an "individual has as a member or potential member of an Indian tribe, and any collateral benefits which may flow from the Federal Government because of such membership," and b) the right of "an Indian tribe in having its children remain part of or become a part of the tribe."[159]An additional reason Congress did not provide a broad range of reasons that permit Indigenous adult adoptees to access their adoption records was to avoid conflict with state laws: The ICWA "was not intended to supersede the decision of state legislatures on whether adult adoptees may be told the names of their biological parents. *The intent is simply to assure the protection of rights deriving from tribal membership*."[160]:

This issue was left unaddressed in subsequent ICWA guidelines and rules promulgated by the BIA in 2015 and 2016 respectively.[161] Limiting access to adoption records for the sole purpose of tribal membership denies adult adoptees access to records for reasons beyond tribal membership, or for those who are not members of federally recognized.[162] Adult adoptees and their descendants may not present as "Indigenous" or fit neatly into the existing tribal membership criteria. As a result, being unenrolled is not adult adoptees cause for concern due to the intricacies associated with Indigenous identity—including the need to meet a certain blood requirement to be enrolled in a tribe.[163]

In order to be enrolled as a tribal member, one must meet the requirements for membership to a specific tribe which are usually enshrined in tribal constitutions approved by the BIA.[164] Tribes determine membership using patrilineal or matrilineal ancestry; this means one needs to have descended from someone named on the tribe's base roll or be related to a tribal

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[158] *Id.*

[159] *Id.* at 24.

[160] Guidelines for State Courts, *supra* note 134, at 67,595.

[161] Indian Child Welfare Act, 25 C.F.R. § 23 (2022). The BIA issued non-binding guidelines and binding rules in 2015 and 2016 respectively. The non-binding 2015 guidelines provide that in State's where adoption records remain closed, the relevant agency should, at a minimum, communicate directly with the tribe's enrollment office and provide the information necessary to facilitate the establishment of the adoptee's tribal membership. Meanwhile, the 2016 rule relating to §§ 1917 and 1951 clarified that it deals with certain specific rights of adult adoptees to information on tribal affiliation, in accordance with the statute, rather than all rights of adult adoptees.

[162] Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 5 (2006). Unrecognized tribes are usually made up of two groups of humans: people whose ancestors were denied recognition by early government agents or died before registration was complete, or people whose tribes, in the face of the federal government's efforts to extinguish them, did not maintain the cohesion required for recognition.

[163] *Id.*

[164] Russel Thornton, *Tribal Membership Requirements and the Demography of "Old" and "New" Native Americans in* CHANGING NUMBERS, CHANGING NEEDS 105 (Nat'l Acad. Press 1996).

member who descended from someone named on the base roll.[165] Another commonly used criteria tribes use to enroll their members is blood quantum—despite the method having deep roots in colonial practices.[166] Since the enactment of the Indian Reorganization Act (IRA) in 1934,[167] tribes have the right to determine criteria for their membership.[168] Nonetheless, methods used by tribes to determine tribal membership may still be influenced by the colonial objectives of dispossessing, excluding, and exterminating Indigenous Americans.[169]

Many tribes were influenced by the IRA to formalize their governmental structures and adopt their tribal constitutions, including the blood quantum as criteria for membership.[170] In fact, the very language used by the IRA to define ''Indian'' adopts the blood quantum as part of its definition; "all persons of Indian descent who are members of any" federally recognized tribe, "and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood."[171] It has been argued that the United States government supported blood quantum requirements for tribal membership with the expectation that tribes would be watered down through intermarriages, to the extent that earlier treaties would not have to be honored.[172]

To worsen the issue, the BIA is generally not supportive of the expansion of tribal membership.[173] As a result, to prevent alienation by the department—which may hinder a tribes' ability to achieve its political goals—many tribes utilize strict membership rules, particularly the blood quantum rule.[174] Further, some tribes generally don't prefer expanding membership out of fear that it may put a strain on the overburdened federal benefits system.[175]

The factors outlined above set the stage for many states to adopt blood quantum laws for determine membership into the tribe. While some tribal constitutions require that blood quantum

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[165] *Id.* at 106-107.
[166] Spruhan, *supra* note 162, at 4.
[167] Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-494.
[168] Thornton, *supra* note 164, at 106.
[169] *Id.* Language, residence, cultural affiliation, recognition by a community, degree of "blood," genealogical lines of descent, and self-identification have all been used at some point in the past to define both the total Native American population and specific tribal populations. Prior to contact with the settlers, tribal boundaries were generally fluid; intermarriages and alliances were common.
[170] Tommy Miller, *Beyond Blood Quantum, The Legal and Political Implications of Expanding Tribal Enrollment,* 3 AM. INDIAN L. J. 323, 325 (2014), available at https://digitalcommons.law.seattleu.edu/ailj/vol3/iss1/8/.
[171] Indian Reorganization Act of 1934, *supra* note 167, at § 479.
[172] Miller, *supra* note 170, at 325. It is also said that blood quantum laws were enacted to prevent mixed race people from holding public office or intermarrying with Europeans. Many tribes now require their members to have a certain blood percentage, or blood quantum that matches that of a specific tribe or simply of Indian descent.
[173] *Id.*
[174] *Id.* at 343.
[175] *Id.*

match the specific tribe to be enrolled as a member, others require mere blood quantum of Indigenous descent.[176] For example, the Navajo Nation requires a minimum of twenty-five percent "Navajo blood," whereas others "have no minimum blood quantum requirement but require only a documented tribal lineage."[177]

Yet, despite the issues with tribal membership being dictated by blood quantum laws, any silver lining produced is left irredeemable for certain Indigenous adult adoptees. Namely, adult adoptee's who have enough Indigenous blood to qualify for enrollment in their tribe's, but do not have documentation to prove their Indigenous heritage pursuant to the ICWA.[178] And while the ICWA provides that "states may provide additional rights to adoptees," necessary to access adoption records, the outcome is often the same; adult adoptees who seek adoption records for reasons outside enrollment will have to deal with, generally, more restrictive state laws which seal adoption records in defiance of the ICWA.[179] However, there are those mixed blood relatives of adult adoptees who, for various reasons, do not necessarily need to be enrolled into a tribe, but want to reconnect with their relatives and learn about their Indigenous heritage.[180] As will be discussed, there are many reasons beyond tribal membership as to why it is important for adult adoptees and their descendants to reunite with their families and tribes.

Before moving on, however, it is important to briefly discuss and acknowledge international law's nearly analogous response to restore Indigenous adoptees' access to their birth records.

V. INTERNATIONAL LAW AND ACCESS TO ADOPTION RECORDS

International law recognizes and purportedly bolsters the rights of children to access their birth records. Firstly, the United Nations' Convention on the Rights of the Child (UNCRC) recognizes the importance for a child to be registered immediately after birth, to have the right from birth to a name, and to acquire a nationality.[181] Regarding both national and inter-country adoptions, international law provides for conditional access to adoption records by the adopted children. Regionally, the Inter-American Convention on Conflict of Laws Concerning the

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[176] Thornton, *supra* note 164, at 107.
[177] *Id.*
[178] PATRICIA BUSBEE & TRACE HENTZ, CALLED HOME: THE ROADMAP (VOL 2): LOST CHILDREN OF THE INDIAN ADOPTION PROJECTS (2nd ed. 2016).
[179] 25 C.F.R. §23.134.
[180] This section of the paper is neither arguing for or against expansion of tribal membership; rather, it demonstrates that the intention to become a tribal member and enjoy the rights flowing from such membership are not the only grounds on which sealed adoption records should be released.
[181] U.N. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S 3 [hereinafter UNCRC].

Adoption of Minors promotes the secrecy of the adoption while only providing non-identifying records of the minor's parents to a "legally appropriate person."[182]

Another international law instrument covering adoptions is the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally.[183] Regarding access to adoption records Article 9 of the Declaration says: "The need of a foster or an adopted child to know about his or her background should be recognized by persons responsible for the child's care unless this is contrary to the child's best interests."[184]

However, the best interest of the child is just now being exalted. In 2013, the Committee on the Rights of a Child concluded the right of the child to preserve his, her, or their identity needs to be respected and taken into consideration when assessing the child's best interests.[185] According to the Committee, the identity of the child includes cultural identity, personality, sex, sexual orientation, national origin, as well as the child's religion and belief system.[186] Whether the right of a child to identity places a duty on State Parties to allow adopted children the right to have access to adoption records remains unclear. The Hague Convention on the Protection of Children and Co-operation requires, in respect of Inter-Country Adoption, contracting parties to ensure the adopted child has access to information concerning the identity of his or her parents, as well as the medical history, "in so far as is permitted by the law of that State."[187]

It is clear based on its wording that the above international legislation on adoption envisages access to adoption records by or on behalf of the 'child' or 'minor' adoptee. While nothing is explicitly said in international law about access to records by adult adoptees, it can be inferred that international law leaves it up to a country to determine whether adult adoptees should gain access to adoption records access or not, which largely mirrors how the United States' government has handled the crisis.

VI. ADULT NATIVE ADOPTEES NEED TO RECONNECT FOR "NON-ICWA" REASONS

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[182] Organization of American States, Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, O.A.S.T.S Art 7. "Medical background information on the minor and on the birth parents, if it is known, shall be communicated to the legally appropriate person, without mention of their names or of other data whereby they may be identified."

[183] U.N.G.A. Res 41/85, Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally: resolution / adopted by the General Assembly, (Feb. 6, 1987).

[184] *Id.* at art. 9.

[185] Comm. on the Rights of the Child, GC/14, On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (May 29, 2013).

[186] *Id.*

[187] Hauge Conference on Private International Law, Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption (May 29, 1993).

Despite both International and domestic law producing additional barriers for Indigenous adoptees to reclaim their identities, Indigenous Peoples—as only they can—have persisted. Through participation in acts of resurgence, Indigenous Peoples have restored their intimate connection with their homelands, languages, and spirituality, as well as Indigenous traditions of agency, leadership, decision-making, and diplomacy.[188]

Indigenous resurgence is a branch of Indigenous political theory that responds to the problems of colonial rule.[189] Franz Fanon describes the colonial rule as coercive, violent, and blatantly oppressive in nature.[190] In practice, Indigenous resurgence counters the colonial legal, political, and material structures that create a system of domination and subordination.[191]

The resurgence of Indigenous political cultures and governances include daily actions undertaken by Indigenous persons, families, and communities vital to the de-colonial processes.[192] Despite the vital role Indigenous persons and communities have in the process of resurgence, their daily actions often go unnoticed or unacknowledged.[193]

Here, my argument relies on a rarely acknowledged relationship between decolonization and acts of Indigenous resurgence to demonstrate how Indigenous driven resistance to colonial practices define what de-colonialism means for Indigenous Peoples.[194] Conversely, other state sponsored programs traditionally associated with decolonization continue to push Indigenous Peoples "towards a state agenda of co-optation and assimilation."[195] For instance, reconciliation often lacks relevance to Indigenous communities, and does not adequately support meaningful restitution to Indigenous Peoples; instead, it simply reinstates the status quo, and assigns little to no culpability upon the custodians of colonialism.[196] Indigenous resurgence combats state-sponsored programs by facilitating the implementation of a meaningful and substantive

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[188] Leanne Betasamosake Simpson, Land as pedagogy: Nishnaabeg intelligence & rebellious transformation, 3 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 1 (2014), available at https://jps.library.utoronto.ca/index.php/des/article/view/22170/17985.

[189] Sharyl R. Lightfoot, *The Pessimism Traps of Indigenous Resurgence, in Pessimism in International Relations: Provocations, Possibilities, Politics, in* PALGRAVE STUDS. IN INT'L RELATIONS., at 156 (Tim Stevens & Nicholas Michelsen eds., 2020) (ebook).

[190] *Id.*

[191] Michael Elliot, *Indigenous Resurgence: The Drive for Renewed Engagement and Reciprocity in the Turn Away from the State,* 51 CAN. J. POL. SCI. 61, 67 (2017).

[192] Suzanne von der Porten et al., *The Role of Indigenous Resurgence in Marine Conservation,* 47 COASTAL MGMT. 527, 527-47 (2019). In this article, Indigenous resurgence is discussed in the context of restoration and conservation of both marine and coastal ecosystems.

[193] *Id.*

[194] *See* Jeff Corntassel, *Re-envisioning resurgence: Indigenous pathways to decolonization & sustainable self-determination*, 1 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y 86, 86 (2012).

[195] *Id.* at 91.

[196] *Id.*

community decolonization process by disrupting physical, social, and political boundaries designed to impede Indigenous Peoples from restoring their nationhood.[197]

Naturally, Indigenous resurgence has many forms; however, chief among them is a method called "ethnic renewal." Ethnic renewal is a form of resurgence that takes place at both the individual and collective level.[198] "*Individual ethnic renewal* happens when an individual acquires or asserts a new ethnic identity by reclaiming a discarded identity, replacing or amending an identity in an existing ethnic repertoire, or filling a personal ethnic void."[199] Collective ethnic renewal refers to the process of rebuilding an "ethnic community by current or new community members who build or rebuild institutions, culture, history, and traditions."[200]

The concept, while briefly discussed, provides an important lens to better understand why access to adoption records for Indigenous adult adoptees is justified outside of reasoning in the ICWA. When Indigenous adult adoptees' seek connection with their Indigenous family, tribe, homeland, and culture, it is individual ethnic renewal, a form of Indigenous resurgence, which is no less vital to the de-colonial process.[201] The renewal of a lost ethnicity by Indigenous Peoples involve movement from a dominant ethnic identity (White) to a non-dominant ethnic identity (Indigenous).[202] This makes Indigenous resurgence distinct from the conventional form of resurgence, as the latter denotes the assimilation of the minority into a majority ethnic group.[203]

Over the past four decades, there has been an increase in the number of people who identify as Indigenous Americans.[204] Nagel links the increase in the Indigenous population to individuals who may have 'passed' into the "non-Indian" race categories and later laid new claims to their Indian ancestry.[205] According to this theory, federal Indian policy, American ethnic politics, and Indigenous American political activism are responsible for encouraging individuals to claim or reclaim both their ethnic consciousness and their Indigenous American heritage (individual ethnic renewal).[206]

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[197] Pauline Wakeman, *Key Terms: Reconciliation, Indigenization, Decolonization, & Resurgence*, 1, 4 (last visited Dec. 31, 2021), https://indigenous.uwo.ca/docs/Indigenous-Initiatives-Key-Terms.pdf.
[198] Joane Nagel, *American Indian Ethnic Renewal: Politics & the Resurgence of Identity*, 60 AM. SOCIO. R. 947, 948 (1995).
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* at 949.
[203] *Id.* at 948.
[204] *Id.* at 950.
[205] *Id.* The Census Bureau introduced a system of racial choice which permitted individual, racial self-identification. This move signaled a departure from the previous system of ascription, which allowed enumerators to ascribe race, and allowed individuals to pick a race that they believed best suited them. The number is even said to have gone from five million in 2010, to nine million in 2020.
[206] *Id.*

The above analysis fits into the current discussion as adult Indigenous adoptees are some of those informally laying claim to their Indigenous heritage and resisting assimilation.[207] There are psychological, existential, and sociological factors which potentially trigger the need for Indigenous adoptees to reconnect with their heritage. These factors plausibly account for the increase in the number of people identifying as Native American in censuses.

A. Psychological Factors Triggering the Need for Reconnection

Developmental psychologists have theorized the transition to the original identity by African and Black Americans, Asian Americans, Mexican Americans, or biracial peoples in general; however, there is very limited scholarship on the same subject in relation to Native Americans.[208]

One scholar, Devon Mihesuah, advanced the "Cycles of Nigrescence" to consider the various elements that influence the identity choices of persons who claim to be racially and/or ethnically American Indian.[209] A psychological approach is relevant to the present analysis as it gives insight into how psychology illuminates the need for reunification by Indigenous American adoptees who grew up in White families.

This table presents the possible psychological processes that Native Americans adoptees go through as they pursue their Indigenous cultural identity.[210]

Table 1.3

Stage	Life Experience	Effects on Building Individuals Identity
Stage 1	**Pre-encounter**	• **Growing up in White adoptive families as Indigenous.** • **Very limited knowledge about tribal history, culture, or politics.**

[207] *See infra-Table* 1.3, at 29-30.
[208] Devon A. Mihesuah, *American Indian Identities: Issues of Individual Choices & Dev.*, 22 AM. INDIAN CULTURE & RSCH. J. 193, 194 (1998).
[209] *Id.*
[210] *Id.*

Stage 2	**Encounter**	• **Develops curiosity upon realizing that they are different from the parents and other white children/ neighbors.** • **Feels unfulfilled by lack of knowledge and connection to their Indigenous culture and becomes increasingly interested in meeting their extended family and learning more about their people.** • **A particular encounter will trigger the adoptee into becoming more Indigenous or rediscover their Indigenous heritage (i.e., learning from an informed teacher or taking a visit to the archives to see cultural objects).** • **Usually, at this stage Indigenous adoptees accept the identity that society assigns to them based on their racial identity.** • **Some Indigenous adoptees may identify as biracial, retain the white culture while also embracing Native cultural practices.**
Stage 3	**Immersion-Emersion**	• **This is a volatile stage for Indigenous adoptees, where they experience feelings of anxiety depression and frustration as they try to become the 'right Indian'** • **May take part in aggressive behavior in protest against racial injustices**
Stage 4	**Internalization**	• **At this stage individual generally develop inner security about their identity and develop the ability to co-exist with other races.** • **However, for Indigenous Americans, being at peace with their identity is usually a case-by-case basis situation, some have reportedly suffered from identity crisis caused by intergenerational trauma.**

B. Existential Factors

When individuals search for their ethnic identity, they become self-aware of their desire or need to find their ethnic identity and must choose whether to engage to engage with their struggle for existential freedom, choice, and authenticity.[211] There are four main existential

[211] Kevin A. Fall & Gail Roaten, An Existential Approach to Adoptive Identity Development in Adulthood, 20 Fam. J. 441 (2012).

concerns that may provide adult adoptees a need to reconnect with their Indigenous heritage: death, isolation, freedom, and feelings of meaninglessness.[212]

Adult adoptees who accept death—and the ambiguity it brings—come to terms with their own mortality and understand the importance of a meaningful life within a general stream of time, temporality, and continuity that concerns human beings.[213] This propels adoptees to pursue self-awareness and identity to demystify the mystery surrounding their origins and find acceptance from their blood relatives.[214]

Existential isolation acknowledges the concept that while human beings are inherently independent, they endeavor to establish connections with others.[215] For adoptees, the original connection is dissolved when they separate from their biological mother, provoking a sense of loss at an early stage.[216] This explains why some adoptees start to show signs of wanting to trace their biological and cultural roots at a young age.[217]

Most adoptees who choose to search for their biological mothers have resigned themselves to the reality that the search may increase the complexity of their situation; the biological parents may not be willing to reunite, are late or if they yield nothing.[218] The search for information about biological parents by adoptees is an attempt to establish meaning in their lives by making sense of their experiences due to anxiety, existential isolation, and inherent freedom.[219]

C. Sociological Factors

Sociological factors may also influence the decision of adult adoptees seeking access to adoption records that connect them with their relatives, chief among these are the revelation of adoptive status and life experiences encountered in the adoptive family.[220] Adoptive parents play a significant role in fulfilling the adoptees desire to know their biological family or obtain information about their birth parents or origins.[221]

Generally, when information regarding an individual's adoption is revealed to adoptive children, it generates the curiosity to find out more about their birth family.[222] For Indigenous

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[212] *See e.g., Id.*
[213] *See e.g., Id.*
[214] *See e.g., Id.*
[215] *See e.g., Id.*
[216] *See e.g., Id.*
[217] *See e.g., Id.*
[218] *See e.g., Id.*
[219] *See e.g., Id.*
[220] Michael Sobol & Jeanette Cardiff, *A Sociopsychological Investigation of Adult Adoptees' Search for Birth Parents*, 32 FAM. REL. 477, 447-83 (1983).
[221] Lee H. Campbell et. al., *Reunions between Adoptees and Birth Parents: The Adoptees' Experience*, 30 SOC. WORK 329, 329 (1991).
[222] *Id.*

American and other transracial adoptees, the racial and other physical differences generate said curiosity at an early stage, even without the disclosure of their adoptive status.[223]

Scholars place adoptive families into three systems contingent on how they respond to the adoptive child's desire to contact their birth parents: (1) closed family system (2) divided family system, and (3) open family system.[224] A closed family system typically prevents the adoptive child from tracing their biological and cultural origins or, in cases where the adoptive child had the slightest knowledge about their heritage, the child is encouraged to renounce it.[225] These parents feel betrayed when the child shows signs of wanting to reunite with their family, and causes adoptees to suppress their urge to find out more about who they are in fear of being perceived as disloyal, or even being disowned by their adoptive parents.[226]

Accounts shared by adult Indigenous adoptees who end up searching for their adoption records reveal that the white families into which they were adopted were closed family systems.[227] For example, one Indigenous American adoptee grew up being told he was French Canadian by his adoptive father, only to learn about his true Indigenous ancestry at thirty-two years old.[228]

The adoptive parents would normally not want to associate the adoptive child with their Indigenous heritage due to its perceived inferiority and insufferable nature.[229] In situations where little information regarding adoption was shared, it would usually be demeaning to either the biological parents or Indigenous relatives of the adoptee, or both.[230]

Adoptees who are adopted into the divided family system experience either one parent who is accepting and supportive of a reunion while the other is apprehensive and rejects the idea or has divided feelings about the child's intentions to reunite.[231] The absence of both adopting parents' support often deter the adoptee from initiating a search for their biological parents, fearful and cognizant of the rift that may produce between their adoptive families.[232] Adoptive parents who held a different view about Native Americans, divergent from the conventional stereotypes associated with Indians were usually open to the idea of reunification.[233]

The last group of adoptees are those in an open family system where adoptive parents are open and supportive to the adoptee's desire to find their birth parents and relatives.[234] In some of these systems, the adoptive family usually develops a close relationship with the birth child's

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[223] *Id.*
[224] *E.g.,* HARNESS, *supra* note 134.
[225] *See* Campbell, *supra* note 221, at 332.
[226] *Id.*
[227] *Id.* at 331.
[228] *E.g.,* HARNESS, *supra* note 134.
[229] *See* Campbell, *supra* note 221, at 332.
[230] *E.g.,* HARNESS, *supra* note 136.
[231] Campbell, *supra* note 221, at 329.
[232] *E.g.,* HARNESS, *supra* note 136.
[233] *E.g., Id.*
[234] Campbell, *supra* note 221, at 331.

birth parents. Adoptive parents in the open family system may admittedly be supportive of their Indigenous adoptive children's need to learn about their heritage and in some instances helped them become enrolled members of their Tribe. Nonetheless, one shared experience by Native adult adoptees across the three adoptive family systems is a sense of alienation and dislocation.[235]

However, there is no clear answer as to why adoptive families fall into one of three systems. The attitudes of an adoptive parent and adoptee toward locating birth parents varies for many reasons. Negative life experiences encountered during childhood often intensify the need for belongingness in some adoptees.[236] For Indigenous American adoptees, racism experienced within the adoptive family, school, or the predominantly White community they grew up are the most common negative experience that triggers the need for belongingness and acceptance from those who look like them.[237]

Some adoptive parents felt that Indigenous adoptees were subservient to the "blonde haired blue eyed" child that they had always fantasized about having and produced feelings of contempt towards the adoptive Indigenous child.[226] Another Indigenous American adult adoptee had the following to say regarding his experience:

> I also know that words cut more deeply than any physical object bruises… I was routinely informed how stupid and worthless I was, and how I would end up in prison. From my genetics to my appearance to my intellect, it was made clear to me how inferior I was. I could do their work, empty their garbage, wash their dishes, and do their manual labor on a roof, but I would never be one of them.[238]

Indigenous American adoptees experience racism in society as well and are subject to both emotional and physical bullying for being 'different.'[239] And for reasons unexplained, but no doubt a result of the trauma faced by Indigenous adoptees, some adoptees fear the risk of entering incestuous relationships or marriages if their family tree is not disclosed to them.[240] Additionally, medical crises create the need for information about biological relatives, such as

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[235] *E.g.,* HARNESS, *supra* note 136.
[236] Sarah Wright Cardinal, *Beyond the Sixties Scoop: Reclaiming Indigenous identity, reconnection to place, and reframing understandings of being Indigenous* (2017) (Ph.D. dissertation, University of Victoria) (on file with the author).
[237] *Id.* at 4; *see also* TEDx Talks, *Susan Devan Harness: Adopting a child of a different race? Let's Talk*, YOUTUBE (July 25, 2019), https://www.youtube.com/watch?v=uORk3TGSCl4.
[238] *See* BUSBEE & HENTZ, *supra* note 178, at 11-15.
[239] *Id.* at 91-97.
[240] Susan E. Simanek, *Adoption Records Reform: Impact on Adoptees*, 67 MARQ. L. REV. 110, 120 (1983).

inheritance proceedings, religion, and the general quest for closure.[241] Allowing adult Indigenous adoptees access to records will address the psychological trauma and genealogical bewilderment caused by an unfulfilled, and often stifled desire to reunite with their birth families.[242]

VII. INDIGENOUS DATA SOVEREIGNTY AND INDIGENOUS RESISTANCE TO ASSIMILATION

However, the difficulties and resulting trauma faced by Indigenous American adoptees during both childhood and adulthood may be remedied, in part, through Indigenous data sovereignty. This idea refers to the right of each tribe to control the collection, ownership, and application of its own data.[243] Indigenous data includes, "any facts, knowledge or information about a Native nation and its tribal citizens, lands, resources, cultures, and communities. Information ranging from demographic profiles to educational attainment rates, maps of sacred lands, songs, and social media activities among others."[244] Of relevance to this discussion, Indigenous data also refers to official records, including "statistics and the registry of personal data—such as identity, education degrees, health records, and property."[245]

Scholars have begun to draw on Indigenous rights enumerated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)[246] to refine the definitions, concepts, theory, and application of Indigenous data sovereignty.[247] So far, fourteen articles of the UNDRIP have been associated with Indigenous data sovereignty.[248] Scholars have invoked these fourteen articles to protect Indigenous People's rights over their DNA samples collected through genomic research,[249] to promote Indigenous nations' control over their data for governance and decision making,[250] and to safeguard Indigenous rights over data for the protection and development of cultural heritage and attending knowledge systems.[251]

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[241] *Id.*
[242] *Id.*
[243] Stephanie Russo Carroll, et al., *Indigenous Data Governance: Strategies from United States Native Nations*, 18 DATA SCI. J. 2019 at 1, 1.
[244] *Id.* at 2.
[245] Joxerramon Bengoetxea, *Data Governance in the Basque Country, Victims & memories of violent conflicts*, *in* INDIGENOUS DATA SOVEREIGNTY & POL'Y 112, 118 (Maggie Walter, et al., eds., 2021).
[246] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].
[247] Leonard Mukosi, *Indigenous Data Sovereignty: Origins and Implications for The United Nations Declaration on the Rights of Indigenous Peoples*, 7 INDIGENOUS PEOPLES' J. LAW, CULTURE, & RESISTANCE (forthcoming Dec. 2022).
[248] *Id.*
[249] Nanibaa' A. Garrison, et al., *Genomic Research Through an Indigenous Lens: Understanding the Expectations,* 20 ANN. REV. GENOMICS & HUMAN GEN. 495, 497 (2019).
[250] *See* Carroll, *supra* note 243, at 2.
[251] *Id.*

The present discussion constitutes a groundbreaking effort to focus on colonial control of Indigenous children adoption records and its implications on Indigenous Peoples right not to be subjected to forced assimilation or destruction of their culture.[252]

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture
2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
(d) Any form of forced assimilation or integration;
(e) Any form of propaganda designed to pro-mote or incite racial or ethnic discrimination directed against them.[253]

Indigenous Peoples right to not be assimilated is also recognized in the American Declaration on the Rights of Indigenous Peoples: "Indigenous peoples have the right to maintain, express, and freely develop their cultural identity in all respects, free from any external attempt at assimilation. States shall not carry out, adopt, support, or favor any policy of assimilation of indigenous peoples or of destruction of their cultures."[254]

However, Indigenous peoples have long fought back against colonial assimilation. As mentioned earlier, the channeling of Indigenous American children through the child welfare system into White families became the convenient, insidious mode of assimilation that replaced sending Native children to boarding schools—and produced many Indigenous movements in resistance.[255] Indigenous Peoples' unrelenting fight against assimilation predates the ICWA, UNDRIP or the American Declaration; in 1894, a group of Hopi men in Arizona refused to send their children to residential schools..[256] The defiance of those Hopi men inevitably spurred the

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[252] *See* UNDRIP, *supra* note 246, at art. 8.
[253] *Id.* at art. 8.
[254] Organization of American States, American Declaration on the Rights of Indigenous Peoples, O.A.S. AG/Res. 2888, art. X (2016).
[255] Erin Blakemore, A Century of Trauma at U.S. Boarding Schools for Native American Children, NAT'L GEO. (July 9, 2021), https://www.nationalgeographic.com/history/article/a-century-of-trauma-at-boarding- schools-for-native-american-children-in-the-united-states.
[256] *Id.*

Red Power Movement in the 1960s which pushed for Indigenous American sovereignty and inspired dismantlement of the residential school system.[257]

Nonetheless, assimilative efforts in the context of data have maintained colonialists' stronghold over Indigenous sovereignty and actualization. Assimilation through the IAP thrived on the sealing, destroying, alteration, or collection of Indigenous birth records.[258] Indigenous birth parents' names were replaced by adoptive parents' names, which resulted in the adoptees' birth names being changed.[259] This was done not only to destroy the adoptive children's past, but to erase Indigenous identity and tear apart Indigenous communities.[260]

However, Bengoetxea posits that the purpose for which data is collected and processed depends on the type of data in question, the techniques used, and who decides about the knowledge and authority issues.[261] Official identity information like Indigenous Americans' birth and family records contain information *on and about* the Individual adoptee which is necessary *for* them to access and make use of.[262]

Regrettably, most Indigenous American adoption records are still being held by non-tribal entities and continue to be regulated under state laws which seal or restrict access thereto.[263] Indigenous data sovereignty challenges such colonial legacies inherent in the ways which data about Indigenous Peoples continue to be handled by non-tribal entities, mostly government agencies today.[264]

A. Personal Narratives from Survivors of the IAP

While legal and administrative barriers have persistently precluded Indigenous American adoptees from regaining access to and control of their adoption records, adult adoptees have not remained idle. Indigenous adoptees are not only rebuilding their identities; they are also creating narratives detailing how they have individually resisted assimilation and reclaimed their Indigenous identities notwithstanding the absence of the vital information linking them to their birth families. Valuing ways Indigenous adoptees have countered assimilation is necessary for building data decolonization strategies that are informed by the experiences of those who bear the scars of data extraction practices which occur in the framework of historic colonialism.

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[257] Ranjani Chakraborty, *How The U.S. Stole Thousands Of Native American Children: The Long And Brutal History Of The U.S. Trying To "Kill The Indian And Save The Man,"* VOX (Oct. 14, 2019), https://www.vox.com/2019/10/14/20913408/us-stole-thousands-of-native-american-children.

[258] *Id.*

[259] *Id.*

[260] *Id.*

[261] Bengoetxea, *supra* note 245, at 118.

[262] *Id.*

[263] *Id.*

[264] *See e.g.,* RAINIE, *supra* note 39.

Mussi argues that Indigenous storytelling serves two transformative purposes: (1) offering healing to Indigenous readers, and (2) promoting social justice by giving the non-Indigenous reader a deeper understanding of the past and ongoing injustices that have affected Indigenous communities.[265] Simply put, healing happens when Indigenous survivors of trauma and intergenerational trauma narrate their experiences either orally or through writing, or both.[266] Currently, Indigenous stories function as a generous reminder to similarly situated Indigenous survivors, who are out of reach, or whose accounts cannot be shared due to different circumstances, that their experiences are true and worth listening to.[267] However, to effectively advance healing through Indigenous narratives, the story must bring the possibility of making connections with the ancestral land which many Indigenous Peoples have lost connection to.[268]

Nonetheless, Indigenous storytelling remains an unacknowledged political tool that is crucial to the advancement of an Indigenous led decolonization.[269] This argument is advanced by Sium and Ritskes who probes into the expectations of Indigenous Peoples with regard to decolonization by listening to Indigenous narratives.[270] The authors make the stunning discovery that, "stories are decolonization theory in its most natural form."[271] Far from the authors' anticipations, Indigenous Peoples are theorizing and enacting decolonization in their communities through storytelling, defying Eurocentric norms of knowledge production.[272] Indigenous storytelling stands up to the dominant imaginations of theory, which dismissed Indigenous communities as a viable "loci of decolonization theory."[273]

Indigenous storytelling further challenges Western academic hegemony and stands at odds with it because stories bear the inherent voices of Indigenous survivors who share their personal experiences.[274] This very fact invalidates the colonial epistemic frame which thrives on the so-called objectivity and homogeneity that work against Indigenous Peoples.[275] For this reason, story-based knowledge imparted by Indigenous Peoples is often expelled from mainstream academia for "not being rigorous enough or as identity politics."[276]

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[265] Francesca Mussi, *Land and Storytelling: Indigenous Pathways Towards Healing, Spiritual Regeneration & Resurgence,* J. COMMONWEALTH LIT. 2017, 1, at 1.
[266] *Id.* at 9.
[267] *Id.* at 12.
[268] *Id*. at 14.
[269] Aman Sium & Eric Ritskes, *Speaking truth to power: Indigenous storytelling as an act of living resistance*, 2 DECOLONIZATION: INDIGENEITY, EDUC. & SOC'Y I, I (2013).
[270] *Id.* at II.
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.* III; *see generally* C. Susan Caxaj, *Indigenous Storytelling & Participatory Action Research: Allies Toward Decolonization? Reflections From the Peoples' International Health Tribunal*, GLOB. QUAL. NURSING RSCH. 2015, 1.
[275] Sium & Ritskes, *supra* note 269, at II.
[276] *Id.*

To an Indigenous storyteller, the unhindered ability to articulate personal experiences with colonialism is empowering. The courage it takes to share the harrowing, and sometimes unknown personal encounters with colonialism empowers the Indigenous storyteller as agentic and a participant in the process of production of knowledge.[277] By reinstating the pre-colonial status of storytellers as knowledge keepers, Indigenous communities reclaim their epistemic ground which the mainstream academy has nullified.[278]

Notably, there are progressive academic movements that embrace the integration of Indigenous storytelling into mainstream academic research, at the same time underlining the positive results it yields. Caxaj argues that "Indigenous storied methodologies can help develop rich, locally relevant insights that may better guide culturally responsive understanding of health experiences."[279] Her hypothesis complements those of Mussi, Sium, and Ritskes, and demonstrates the importance of story-based knowledge to the advancement of social justice and the development of an Indigenous-led decolonial theory.[280]

The underlying theme featured in the testimony shared by Indigenous Peoples individually or collectively is the ongoing struggle with the colonial system, sometimes at a very personal level. This, however, should not justify the unsophisticated relegation to poignant archives of personal pain that Indigenous testimonies have endured at the hands of the mainstream notions of theory.[281] Besides the unimaginably outrageous and emotionally triggering content, Indigenous testimonies embody the genuine accounts of active resistance to settler colonial practices, and a calculated gesture to restore Indigenous connection with the land.[282]

Richard Wagamese, an Indigenous intergenerational trauma survivor, tells a fictional story about the emotional trauma inflicted on generations of Indigenous families by the Indian Residential System (IRS) in Canada.[283] The story goes beyond unearthing the spiritual, emotional, cultural, and physical wounds that survivors of the IRS and their descendants continue to nurse. It casts light on the active resistance by the survivors of the IRS, of which even the Truth and Reconciliation Commission had not focused on.[284] Portraying an Indigenous narrator who, despite being robbed of his opportunity to experience traditional Indigenous ways and connect to the land because of the IRS, resisted the legacy of colonialism and restored his lost connection with his Indigenous communities and land.[285] The resistance portrayed through Indigenous accounts may even be physical and confrontational in nature. For example, the oral testimonies about the active resistance of Indigenous Peoples in the Western highlands of

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[277] *Id.* at V.
[278] *Id.*
[279] Caxaj, *supra* note 274, at 1.
[280] *Id.*
[281] *See e.g.,* Sium & Ritskes, *supra* note 269.
[282] *See e.g., Id.*
[283] Mussi, *supra* note 265, at 2.
[284] *Id.*
[285] *Id.*

Guatemala to mining operations, which rendered them vulnerable to state sponsored brutality, affirms the notion.[286]

It should not come as a surprise therefore that a growing number of adult Indigenous American adoptees and their descendants maintain, perhaps even nurture traditional Indigenous ways of being and living through sharing their personal experiences. Despite being personal, the stories shared by adult adoptees speak to the pain that Indigenous Peoples individually and jointly experienced because of the aggressive separation of Indigenous families carried out through adoption. Using various participatory mediums, adult Native adoptees' have provided first-hand accounts of: 1) the harrowing accounts of racism which extended beyond the walls of adoptive families to the white dominated schools and communities they lived in; 2) the complexities associated with accessing adoption records which continue to preclude adult Native adoptees from reconnecting with their Indigenous families, traditions and land; 3) the psychological trauma adult adoptees have suffered, and continue to suffer as a result of 1 and 2; and 4) success stories about reunification with biological families/tribes and learning their cultures and traditions.

In accordance with Musi's theory, the stories shared by adult adoptees serve to validate accounts by similarly situated adult adoptees who have not had the chance or are not ready to share their stories.[287] Furthermore, these stories advance social justice by divulging to the non-Indigenous reader or listener the little-known details of the IAP and exposes the physical and emotional trauma it inflicted on Indigenous American children and communities.[288]

Sium and Ritskes' hypothesis that "[s]tories are de-colonial theory in its most natural" form is validated by how the personal accounts of Indigenous adult adoptees enshrine their stark resistance to assimilation.[289] This form of resistance counters 'data colonialism' which happened through the extraction, alteration, and destruction of adoptees' records to wipe out Indigenous identities. Today, such appropriation of data has expanded in both scope and purpose through the instrumentality of technology.[290]

I focus on adult Native adoptees' success stories for two reasons: First, calling attention to adult adoptees' courageous reclamation of identity in the face of psychological trauma, as well as administrative, legal, and other barriers, debunks the dominant narrative which often relegates Indigenous Peoples to sheer victims of colonialism.[291] Such resistance to assimilation is rooted in data sovereignty as it resists the very purpose for which birth records were collected, altered destroyed, or sealed; it further empowers Indigenous People to shape their own narrative through story telling. Second, adult Indigenous adoptees' stories respond to the gap in adoption record

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[286] *Id.*
[287] *Id.*
[288] *Id.* at 9.
[289] Sium & Ritskes, *supra* note 269, at II.
[290] Meijas & Couldry, *supra* note 4.
[291] Sium & Ritskes, *supra* note 269, at II.

management, which is mainly affecting adoptions that took place prior to 1978.[292] Most of the personal accounts shared by adult Indigenous adoptees provide not only healing, but also contain information that is useful to similarly situated adult Native adoptees wanting to find their Native families and tribes, which cannot be found on other dominant, non-Indigenous platforms of information.

By virtue of bearing crucial information, success stories by adult Native adoptees reclaim and reenact Indigenous epistemic competence that was denied, minimized, or invalidated by colonial legal principles such as *terra nullius*.[293]

The above argument would be incomplete without stressing that the potential questioning of the validity of adult Native adoptees personal accounts as a reliable source of information would be an intellectually dishonest attempt to undermine Indigenous ways of knowing.

Here, stories by Native adoptees are rendered useful as a culturally responsive way of sharing information relevant to similarly situated Native adoptees, who have been let down by non-Indigenous so-called formal sources of information. I relied on five personal accounts shared by adult Native adoptees' who were adopted prior to the ICWA. The first of these narratives is a more empirical account than the subsequent ones. The first account was shared to me during a telephone interview by an adult Native adoptee who, despite still nursing the psychological wounds inflicted by his adoption, was brave and generous enough to revisit his triggering experiences.

The second is a comprehensive narrative encapsulated in a twenty-six chapter novel by Suzan Harness, who was adopted in 1959 during the height of the IAP.[294] Using first person narrative and flashback, Harness' story evocatively invites the non-Indigenous reader into the chaotic lives into the chaotic lives that most Native adoptees were exposed to in white families during that time.[295] Third, I use three personal accounts shared by adult Indigenous adoptees and published in a compilation authored by Patricia Busbee and Trace L. Hentz.[296]

I refer to adult Indigenous adoptees as Subject Matter Experts (S.M.E.) In table 1.3. Each of the five accounts shared by the S.M.E is broken down into five categories that is: 1) the adoptive family system in which each adoptee was raised; 2) the steps taken by the adoptee in finding their adoption records; 3) the steps taken by the adoptee to reconnect with their birth family; 4) the effort to reconnect with the tribe and its culture; and 5) the psychological effects of separation on each adoptee.

The process of reconnecting with Native families and tribes is not without challenges for most S.M.E.s. It is hard for S.M.E.s to rebuild lasting relationships with their birth families who they never shared memories with. S.M.E.s are also the victims of misconceptions. One such

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[292] *Id.*
[293] Sium & Ritskes, *supra* note 269, at II.
[294] *E.g.,* HARNESS, *supra* note 136.
[295] *E.g., Id.*
[296] *See* BUSBEE & HENTZ, *supra* note 178.

misconception is that Indigenous Americans who were adopted out as children lack an understanding or connection with tribal cultures and history, and only intend to associate with the tribe to benefit from the tribes' already overburdened resources.[297]

S.M.E. Tribal Affiliation	Adoptive Family System	Finding Adoption Records	Reconnecting with the Birth Family	Reconnecting with the Tribe	Effect(s) of Their Separation
SME #1: Adopted from the Cowlitz Indian Tribe.[298]	**Open:** Grew up with knowledge of his adoption.	Contacted the social welfare office to access his adoption records to no avail. However, his son was able to access them.	Tried to contact relatives but was unsuccessful; "the first time I visited, I pulled up on my uncle beating his child and I had a fight with him."[299]	Attended tribal council meetings in his pursuit of tribal enrollment.	Maintains a psychological stress due to his unfulfilled quest to belong.
SME #2: Adopted from the Confederated Salish and Kootenai Tribes.	**Mixed:** Adoptive father concealed details about her birth parents and did not want her to search. However, her adoptive	When left alone in a social worker's office, she opened a file containing extensive details about her adoption and her primary	Wrote a response to a letter she received from the editor in the tribal newspaper which dismissed Indigenous peoples who grew up in White communities	Made attempts to find a job on the reservation and to visit the reservation to look for familiar faces. She attended her first powwow as an adult on	Could not build strong relationships with her birth mother or siblings due to her mother's alcoholism and inability to connect emotionally with her siblings. Her own children, as

[297] *See e.g., Id.*
[298] Telephone Interview with Mr. Dobson, Indigenous Adult who was adopted in 1961 (Oct. 20, 2021).
[299] *Id.*

	mother was supportive.	relatives (i.e., mother, father, full and half siblings).	as not Indigenous enough. The letter got the attention of her biological siblings who have been looking for her since 1993. As a result, she met her biological mother.	Flathead Indian Reservation.	a result, became victims of intergenerational trauma.
SME #3: Adopted from the White Earth Anishinaabe Tribe.	**Open:** Adoptive parents were supportive of her desire to find her birth family.[300]	After failing to locate identifying information from the adoption agency, she contacted a private party to assist her locate her biological family.[301]	She met her birth mother and siblings and was able to build a relationship with them.[302]	Prior to finding her family, she took Ojibwe language classes as an adult, in addition to attending powwows and other traditional Ojibwe events. [303]	She has Post Traumatic Stress Disorder (PTSD) due to the abuse she received growing up in an adoptive family.[304]
SME #4: Adopted from the Koyukon	**Closed:** Adoptive parents never	She took a DNA test and found that she had	She contacted her Koyukon Athabascan family	She visited the river where her birth father	Nothing is known regarding the

[300] BUSBEE & HENTS, *supra* note 179, at 17-25, Elizabeth's Story.
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.*

Athabascan Peoples.	informed her she was adopted.[305]	forty-eight percent Indigenous American heritage. This prompted a multi-month search for her birth mother on the internet.[306]	members and learned about her deceased birth father.[307]	lived and died. Attended a summer potlach and met with Indigenous elders and her cousins.[308]	psychological effects on her.
SME #5: Adopted from the Cherokee tribe, but subsequently found out she had more Choctaw blood.[309]	**Open:** Adoptive parents informed her that she was Cherokee Indian and Irish.[310]	Had partial legal paperwork from her adoption.[311]	She joined a "Yahoo!" group called 'Soaring Angels.' She created an Ancestry.com account and found information about her birth mother.[312]	She makes beads and medicine bags for sale on Indigenous land. She also attends powwows.[313]	She suffers from PTSD because of mental, physical, and sexual abuse she experienced in an adoptive family.[314]

VIII. RECONCILING THE INDIVIDUAL AND THE COLLECTIVE THROUGH REBUILDING LOST INDIGENOUS IDENTITIES

[305] *Id.* at 41-46, Mary's Story.
[306] *Id.*
[307] *Id.*
[308] *Id.*
[309] *Id.* at 145-53, Karen's Story.
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.*
[314] *Id.*

Harmonizing the conflict between Indigenous collective rights and individual human rights is a subject of ongoing debate—a debate which often perpetuates colonialist assumptions. Most of the world's domestic legal systems, including nations like the United States, are focusing efforts on the protection of individual rights. Conversely, International law does not prescribe how the rights of individuals can be negotiated within collective or group interests. The colonial exclusionary and assimilative lens through which contemporary scholarship tends to negotiate Indigenous collective rights and individual human rights often falls short of addressing the conflicting interests that often arise between these two.

Indigenous groups have a shared heritage, history, culture, language, land base, and set of traditions. By virtue of this common identity, claims advanced by Indigenous groups locally or internationally are generally regarded as emanating from collective, shared interests.[315] It is from this premise that the theoretical understanding of Indigenous rights as collectives is formed; Indigenous Peoples share connection to the land, and the corresponding *collective land rights* that flow from it.[316] The collective nature of Indigenous Peoples' interests is often interpreted as contrary to the dominant normative framework supporting the current theory and practice of international human rights.[317] Dating from the post-World War II period, international law has embraced a regime of individual rights as sufficient for attaining a viable international legal order.[318] This explains international human right law's inclination toward individualistic language to protect 'populations' and 'persons' who are 'members' over populations.[319]

The Universal Declaration of Human Rights, the first international human rights instrument which sought to universally protect fundamental human rights, embodies such bias toward an individualized right theory. The Declaration makes no recognition of group rights but recognizes the rights of persons, and 'members' of the society.[320] In the same vein, the International Covenant on Civil and Political Rights (ICCPR) uses individualistic language and accords cultural rights only to 'persons' belonging to minorities, and 'members' of the group, not the group as a whole; States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members

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[315] *First Nations Individual Rights v. Collective Rights,* INDIGENOUS CORP. TRAIN., (Sept. 11, 2015), https://www.ictinc.ca/blog/first-nations-individual-rights-vs-collective-rights (last visited Dec. 31, 2021).
[316] Allen Buchanan, *Role of Collective Rights in the Theory of Indigenous Peoples' Rights,* 3 TRANSNAT'L L. & CONTEMP. PROBS. 89, 108 (1993).
[317] *Id.* at 91.
[318] *Id.*
[319] *See e.g.,* Cindy L. Holder & Jeff Cortassel, *Indigenous Peoples & Multicultural Citizenship: Bridging Collective & Individual Rights*, 24 HUM. RIGHTS Q. 126 (2002).
[320] *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[321]

To remedy the shortcomings of current international human rights law, the United Nations General Assembly adopted UNDRIP.[322] The UNDRIP explicitly recognizes Indigenous Peoples' collective right to protection from state action that could undermine an Indigenous group's ability to remain a culturally distinct people.[323] Despite its recognition of collective rights, the UNDRIP does not prescribe how such group rights can be harmonized with the dominant legal order which is only supportive of individual rights.[324]

A. Scholarly Approaches to Reconciling Individual and Collective Indigenous Interests

Considering the scanty international human rights framework on harmonizing individual and collective rights, contemporary scholars have advanced theoretical approaches, which prescribe how collective rights can be incorporated into the human rights discourse.[325] Holder and Corntassel classify these theoretical accounts in two main categories, which represent extremes on a continuum: the liberal individualist and corporate theories of group rights.[326] Every other school of thought on group rights develops from either of these two categories.[327]

Liberal individualist theories regard fundamental individual interests as the basis for according the status of a right to group claims.[328] Collective claims under liberal individual school of thought are only justifiable in so far as they advance an individual fundamental interest.[329] Applying this line of thinking to the situation of adult Indigenous adoptees, the collective interests of a tribe in welcoming their lost generations or a specific adoptee can only be recognized as a right if reunification with the tribe contributes to the individual adoptee's psychological or moral development.

While the liberal individual approach acknowledges the interest that an individual has in a group, the limitation of this theory lies in its failure to acknowledge the interest that collectives may have in their individual members.[330] While adult Indigenous adoptees have an interest in connecting with their tribes, culture, traditions and land, this individual interest cannot be fully

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[321] G.A. Res. 2200A (XXI), at art. 2, 4, International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR]. Indigenous peoples are distinct from "minority groups" or other "national groups" due to their original occupation of traditional homelands, historical continuity, unique cultural practices, non-dominance, and group awareness.
[322] UNDRIP, *supra* note 246.
[323] *Id.*
[324] *Id.*
[325] *See e.g.,* Holder & Corntassel, *supra* note 319, at 131.
[326] *Id.*
[327] *Id.*
[328] *Id.*
[329] *Id.*
[330] *Id.* at 129.

realized if it is not met by a corresponding group interest in having their stolen generations readmitted back into the group. While such collective interest in welcoming adoptees may be present, technical, and legal barriers rooted in the colonial thinking may derail the individual interest to become a member of the tribe or group.[331]

As self-determining entities, each Native American tribe has a collective right to self-governance which empowers them to govern enrollment and disenrollment of members.[332] For most tribes, such interest is enshrined in tribal constitutions in form of some criteria for enrollment.[333] In order for an adult Native American adoptee's individual interest in becoming a member of a tribe to be successfully realized, it has to meet the tribe's criteria which reflects the tribes' collective interest in governing membership.[334] For instance, one of the stories shared by an adult adoptee, who only knew the tribe he was from, showcased how his independent genealogical research unearthed information to establish lineal descendance, and ultimately enroll in the Cowlitz Indian Tribe because the tribe's effort to welcome lost birds.[335]

The reciprocal interdependence of individual and collective Indigenous rights is also epitomized by the adult Indigenous adoptees' individual interest to learn the traditions and cultures of the tribes they were removed from. Theoretically, in liberal individualist terms, if reunification is successful, the cultural benefits of being part of an Indigenous community, including the restoration of ties to tribal land and family, contribute to the psychological and moral wellbeing of an individual adult Indigenous adoptee.

The corporatist (often termed communal) theory regards the community interests as a point of departure for individual action.[336] In other words, collectives are a fundamental base from which individuality and individual interests are justifiable.[337] For collectives' rights to be realized, they need to be grounded in non-individualistic terms.[338] Indeed, the corporatist approach's recognition of the mutuality of interests between individuals and groups to which they belong has some appeal.[339]

The limitation of the corporatist theory seems to be its acknowledgement of individual interest only if it connects with their primary group membership.[340] Article 9 of the UNDRIP can be said to have originated from this school of thought, as it makes the right of an individual to

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[331] Austin Badger, *Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples,* 26 AM. U. INT'L L. REV. 485, 494 (2003).
[332] *Id.*
[333] *Id.*
[334] *Id.*
[335] Telephone interview with Mr. Dobson, Indigenous Adult Adopted in 1961 (Oct. 20, 2021).
[336] *See* Holder & Corntassel, *supra* note 319, at 131.
[337] *Id.*
[338] *Id.* at 132.
[339] *Id.* at 132.
[340] *Id.* at 133.

self- identify as Indigenous to be accepted by the Indigenous community they self-identify.[341] Aligning individual interests with membership may be problematic in situations where the determination membership is influenced by the colonial agenda to exterminate tribes through controlling membership directly or indirectly.

Tribes have a legitimate collective interest in protecting themselves from invasion by individuals that may not qualify as Indigenous Americans—hence the un-enrollment and disenrollment of those whose individual claims to indigeneity do not meet the tribes' criteria for membership.[342] The UNDRIP recognizes this collective interest in article 33, stating "Indigenous Peoples have the right to determine their own identity or membership in accordance with their customs and traditions."[343]This section was designed to end the practice in many settler states where Indigenous membership is still determined by the government instead of Indigenous peoples themselves.[344]

However, three categories of individuals who, despite having genealogical ties to an Indigenous group, remain unenrolled.[345] First, there are those individuals who have lost their connection to the Indigenous groups through the process of colonization.[346] Next, there are those excluded from their Indigenous groups by state legislation.[347] Lastly, there are former members of an Indigenous group excluded by the rules of the Indigenous community now dis-enrolled.[348]

Adult Native adoptees or their descendants fall in the first category, as they lost connection to their tribes because of a colonial program designed to assimilate them. Most of these adult Native adoptees remain unenrolled in their tribes as they are either unable to meet blood quantum requirement or do not have information (records) about their ancestors who were members of the tribe, for enrollment through patrilineal or matrilineal descendance.

It cannot be ignored that a tribes' collective interest may be distorted manipulated to sustain the colonial intentions to exclude and extinguish Native Americans, thus negating genuine collective tribal goals and individual Indigenous interests.[349] Blood quantum is one such example of colonial impositions, inconsistent with traditional ways of defining tribal

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[341] UNDRIP, *supra* note 246, at art. 9.
[342] EMBRACE RACE, *Identity Crisis: Tribal Non-enrollment & its Consequences for Children* (last visited Dec. 21, 2021), https://www.embracerace.org/resources/identity-crisis-tribal-nonenrollment-its-consequences-for-children.
[343] UNDRIP, *supra* note 246, at art. 33.
[344] Shin Imai & Kathryn Gunn, *Indigenous Belonging: A Commentary on Membership and Identity in the United Nations Declaration on the Rights of Indigenous People, in* OX. COMMENT. ON INTER'L L.: COMM. ON UNDRIP (forthcoming).
[345] *Id.*
[346] *Id.*
[347] *Id.*
[348] *Id.*
[349] EMBRACE RACE, *supra* note 320.

membership.[350] Blood quantum became part of the boiler plate which guided tribes designing their constitutions, as per the IRA.[351]

Given the intricacies surrounding the enrollment of individual adult Native adoptees into their tribes, a question arises: If an adult Native adoptees' individual interest to identify as Native American is not recognized under the tribe's collective interest as reflected in its enrollment criteria, does the former cease to be Native American? It may be argued that Congress addressed this question by passing the Indian Civil Rights Act, whose purpose is to improve tribal members' standing within the tribe, while prohibiting tribal governments from passing laws that violate individual rights.[352]

Despite the ICRA's inclination towards the protection of individual tribal member's interest, courts have deferred to the tribe's collective criteria when disputes concerning membership arise between an individual and the tribe. In the case of *Santa Clara Pueblo v. Martinez*, the tribes' collective interest in controlling membership was discriminatory and adversely impacted an individual's interest in becoming a member, and the Supreme Court deferred to membership rules enforced by the Indigenous group itself.[353] The rationale for the Supreme Court's ruling was to uphold Congress' goal of promoting tribal self-governance and sovereignty.[354] In a similar ruling at international level, the Human Rights Committee (HRC) could not rule out a Canadian legislation which restricted an individual Native person's right to residence.[355] In interpreting whether an individual claim to belong to an Indigenous group in terms of the ICCPR is valid, the HRC said: "Persons who are born and brought up on reserves who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant."[356]

In essence, the position of the HRC did not prevent the denial of right to membership to individual adult Native adoptees who were forced out of their tribes, grew up outside their reservations, and never had ties with their tribes.[357] These two cases are classic examples of the way international and domestic law is ill-equipped to bring harmony between collective Indigenous rights and individual human rights.

The individual interests of many adult adoptees in becoming members of their tribes and learning its culture and traditions may be irreconcilable with the tribes' collective interest in controlling membership. Recognizing the risk of collective self-determination being exercised to the detriment of individual human rights, other scholars have prescribed the establishment of a

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[350] *Id.*
[351] *Id.*
[352] The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304.
[353] 436 U.S. 49 (1978).
[354] *Id.*
[355] Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166 (1981).
[356] *Id.*
[357] *Id.*

state forum within the national judicial system, competent to review tribal membership decisions.[358] Deferring to the state or national judicial system is a fundamentally regressive move that invites the fox to superintend the hen house, which could nullify tribal self-determination.

A national court's competence to adjudicate Indigenous membership is usually pursuant to a national legislation defining such membership and granting the court with jurisdiction over membership disputes. The IRA is not the only example of how state- defined Indigenous membership does not reflect the true intentions and values of Indigenous Peoples.[359] In Canada, the Indian Act defined Indian membership on a patrilineal basis even though Canadian Indigenous Nations are predominantly matrilineal.[360]

The conceptualization the relationship between individual rights of an Indigenous adoptee and the collective rights of a tribe in a reciprocally functional way, requires practical and contextualized thinking which goes beyond the confines of contemporary theoretical or legal discourse. While the UNDRIP's primary purpose is the affirmation of Indigenous collective rights, it also acknowledges the rights of individual Indigenous Peoples in several provisions.[361] It has been argued that these provisions apply to both those individuals who have been accepted into a community and those with a genealogical connection to an indigenous group but are not members of any specific community.[362]

It should not be ignored that the individual rights of adult Native adoptees and the corresponding collective rights of their tribes are mutually interactive rather than mutually exclusive. Successful reunification allows individual adult Native adoptees to reconnect with their families, tribes, cultures, and lands, while making it possible for the tribe as a collective to revive its culture which was interrupted through assimilation projects like adoption.[363]

Indigenous' Peoples collective interest in revitalizing their culture is fortified in Article 13 of the UNDRIP, which recognizes Indigenous Peoples' right to revitalize, use, develop, and transmit to future generations their histories, languages, traditions, philosophies, writing systems and literatures.[364] The stolen generation of children who were removed from their tribes are part of Native American heritage. Therefore, an Indigenous group's interest in cultural revitalization cannot be fully accomplished without its acceptance of those with proven genealogical ties to the tribe who lost connection to their culture through the process of colonialism.

IX. CONCLUSION

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[358] Badger, *supra* note 318, at 506.
[359] Indian Reorganization Act of 1934, 25 U.S.C. § 461(19).
[360] Imai & Gunn, *supra* note 331, at 10.
[361] UNDRIP, *supra* note 246, at art. 2, 7-8, 14, 17, 24, 33, 35, 40, and 44.
[362] *See e.g.,* Imai & Gunn, *supra* note 331.
[363] Holder & Corntassel, *supra* note 306, at 129.
[364] UNDRIP, *supra* note 246, at art. 13.

The central theme in this paper is that contemporary extraction of personal information by governments and corporations using technology is comparable to the extraction of person related information during the colonial era. This juxtaposition illuminates three primary differences: (1) the extraction of person related records during historic colonialism relied on violence, law, and coercion as tools for extraction, while contemporary extraction of personal information uses technology as the primary tool for extracting data; (2) the extraction of person related records during historic colonialism targeted Indigenous Peoples while the use of technology has curtailed the physical and geographical barriers to extraction of personal information hence, it now targets all races; and (3) Indigenous Peoples records were collected primarily by settler governments to control, exterminate, and assimilate Indigenous Peoples, whereas, the collection of personal information broadened in scope to include corporations as players collecting personal data as capital.

Thus, data colonialism's relation to historic colonialism is not in principle only. The appropriation of personal data through the instrumentality of technology is a continuation of a colonial practice, which originally targeted Indigenous Peoples to erase their identities. Adult Indigenous adoptees, particularly, those adopted before the enactment of the ICWA, are locked in a grapple with the legacies of colonialism—fighting relentlessly to reclaim their identities that were obliterated by colonial collection, alteration, and sealing of adoption records. Contemporary theoretical discourse needs to acknowledge that extraction of personal information not only pre-dates the digital era, but also these acts of resistance to assimilation by adult Indigenous adoptees. The reclamation of identity by adult Indigenous adoptees' complements the tribes' collective interest in reclaiming heritage and revitalizing their culture.