The Indian Child Welfare Act:
A National Law Controlling the Welfare of Indigenous Children

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1. Introduction

In the 1970s, the indigenous peoples' self-determination movement in the United States brought attention to a serious crisis within native communities - indigenous children were being taken from their families, territories, and nations. Surveys completed by the Association of American Indian Affairs in 1969 and 1974 indicated that between 25 to 35% of all native children were separated from their homes and living either in foster care, adoptive care,[1] or institutions at the time.

Community advocates and researchers, through anecdotal and empirical studies, exposed two main causes of this problem. One, federal boarding school programs heavily encouraged the separation of native families and enrolled a significant number of indigenous children. Two, culturally insensitive child welfare laws at the regional level were used to remove thousands of native children from their homes, at a rate alarmingly higher than non-native children were being removed.

The affect of the situation to indigenous nations, who were losing children by the thousands, was essentially cultural genocide.[2] Exposure of the problem and its causes imposed strong pressure on the United States government to address native child welfare law. In response, the United States Congress enacted the federal Indian Child Welfare Act ("ICWA").[3]

The ICWA established substantive and procedural legal rules, at the national level, controlling child custody proceedings involving indigenous children. The act strengthens native courts' (the judicial branch of native governments), control over Indian-child custody proceedings. The act also decreases removal of native children from indigenous communities and homes

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[1] Foster care is generally temporary or non-permanent in nature; adoptive care is generally permanent and involves termination of the biological parents' parental rights.

[2] The government role in this destabilization of native communities was also inconsistent with human rights principles agreed to by the United States in the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, which the United States signed in 1977 but has not ratified.

[3] 25 U.S.C. §§ 1901-1963 (1978).

by establishing placement preferences for caregivers within the child's native community.

Most notably, other national governments, including peers to the U.S. with significantly sized indigenous communities, lack similar statutes that specifically relate to custody and child-removal from indigenous communities or establish national indigenous child welfare standards generally. For international indigenous rights groups focused on child welfare, the ICWA is a sample statute, demonstrating that national standards in this area can be created. The ICWA and this paper also illustrate the benefits and problems that such legislation can create.

To help international stakeholders to understand the ICWA, and potentially use it as a resource in their local advocacy efforts, this paper provides an overview of the statute. We begin with the historical events leading to the ICWA's enactment, follow with an overview of the statute, and close with a discussion of indigenous communities and the status of the law, thirty-two years after the ICWA's enactment.

2. Background: Events Leading to Native Child Welfare Reform

In the decades immediately preceding the enactment of the ICWA, the amount of native children living outside of their homes and native lands was staggering. After years of political pressure exerted by native community groups and advocates, Congress began investigating the causes and true severity of the problem in the 1970s. Reports and studies prepared by the Association of American Indian Affairs revealed a dire situation. After traveling throughout native communities to conduct research, collecting empirical and anecdotal evidence, they arrived at startling results: between 25 and 35% of all native children were living outside of their family’s home.

This is an extraordinarily high figure that only seems more startling when compared to figures for non-native children. On average, native children were placed in foster care or adoptive housing at a five times greater rate than non-

natives. In other words, while native children were removed from their homes roughly 25% of the time, non-native children were removed in only 5% of cases.

In the localities where native populations are higher, the rates of removal were also higher, often dramatically. For example, in South Dakota native children were placed in foster homes at a rate 16 times greater than non-natives.

Two things are largely believed to have caused this problem and its startling magnitude: federal boarding school and dormitory programs and culturally prejudiced state child welfare systems.

2.1. Federal Boarding Schools Destabilized Native Families

First, the federal boarding programs - these programs were historically a part of a purposeful effort by the federal government to encourage assimilation of indigenous people into the non-native mainstream, and purposefully destabilize native communities. In 1971, over 34,500 indigenous children attended these types of schools, representing approximately 17% of the native children from federally recognized indigenous nations[4] at the time.

As deconstructive tools, these schools were very effective. The schools were usually located far from tribal communities, so children spent either minimal or no time living at home. The children were in many cases forcefully removed from their homes as early as three years of age and sent to these schools. There the children were prohibited from following an array of native customs under threat of severe corporal punishments. For example, children were not allowed to speak in their native language.

Additionally, faith-based groups often administered the schools. These religious administrations sought to displace native children of native religious beliefs and indoctrinate the children with non-native religious views. In sum, these schools were hostile to native ways of life, and the children who attended

[4] There are currently 564 federally recognized indigenous nations in the United States. More native communities exist in the United States, but may not be recognized by the federal government as sovereigns for a variety of reasons.

them were unable to maintain close cultural ties with their native community, causing harm to the children and the communities.[5]

2.2. Regional Child Welfare Laws Were Culturally and Racially Prejudiced

Second, prejudiced application of local child protective laws significantly contributed to the native-child removal problem. For instance, state child welfare laws typically use criteria like "neglect" as a proper basis for removing a child from his family to foster or adoptive care. The standards used by social workers with narrow conceptions of proper child rearing practices were largely biased towards nuclear families and Anglo-American ideals about family structure. So, these state workers would often interpret “neglect” to include practices widely and traditionally implemented in tribal communities. The result was the large and disproportionate removal of native children from their homes compared to non-native children.

For example, native communities often raise children under extended family systems within which a variety of community members, such as aunts, cousins, and neighbors, bear the responsibility for a child's care. In contrast, within nuclear families, a child’s biological parents predominately bear the responsibility of a child’s care. In many cases, state workers deemed a child neglected if left with non-parent community members for an extended period of time, because this type of care arrangement is inconsistent with normal parenting within a nuclear family. This type of justification for removing native children from their families reflects a prejudice against extended family child rearing in favor of nuclear families, and a racist view towards native family structures. But unfortunately, after examining the problem in historical context, this racist approach seems consistent with a tradition of racism that the country struggled to address in the decades preceding ICWA’s passage.

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[5] For a more in-depth examination of boarding schools on indigenous children, both in the United States and in other nations, see Andrea Smith, Indigenous Peoples and Boarding Schools: A Comparative Study, U.N. Doc. E/C.19/2009/CRP.1 (Jan. 26, 2009).

2.2.1. Historical Context Sheds Light on Racist Application of Local Law

In the 1960s, just a decade previous to the enactment of the ICWA, the United States underwent a period of great social upheaval to address a terrible tradition of racism in America. The civil rights movement swept the country and changed the nation, socially and legally. The Civil Rights Act, prohibiting racial discrimination by government actors, was passed in 1964, a mere five years before the Association of American Indian Affairs began its surveys of native child welfare.

Given the very recent shift in the political climate against government-condoned racism occurring during the years immediately preceding the ICWA, the revelation that racist government policy infected child welfare decisions is unsurprising.

But, however unsurprising the racist element was, the harm it caused was shocking and cannot be over-stated. For example, in North Dakota, a state with a relatively large native population, studies indicated that only 1% of native children were removed from their homes due to physical abuse. The other 99% were removed due to ambiguous findings of "neglect."

2.3. Other Indigenous Rights Work Effected Political Climate Leading to Child Welfare Reform

Civil rights reform specific to native peoples was also building momentum in the late 1960s and 1970s. Native communities and advocates were demanding that the United States honor its trust responsibilities toward native communities by addressing government policies and laws infringing upon native rights. In response, former President Richard Nixon declared a commitment to Indian policy reform in 1970, and the decade produced a host of new federal law addressing Native American issues. For example in 1978, the same year in which the ICWA was enacted, the United States Congress also enacted the American Indian Religious Freedom Act.[6]

[6] 42 U.S.C. § 1996 (1978).

The American Indian Religious Freedom Act's purpose was to address government interference with native peoples' right to religious practice. The American Indian Religious Freedom Act is similar to the ICWA because on its face it addresses government infringement on native peoples' human rights at a national level. The American Indian Religious Freedom Act and the other political-legislative work being done by Congress, under pressure by native communities and advocates, comprised the Indian civil rights movement of the 1960s and 1970s. All of this work coupled with child welfare advocacy efforts created the political climate necessary to effect meaningful child welfare reform.

Under the political pressures created by the civil rights movement; equipped with knowledge of the staggeringly disproportionate number of Indian children living away from home; and forced to recognize the undeniable, dominant, and unjust role of the government and other stakeholders in creating this state of affairs; Congress was finally motivated to act.

3. An Overview of the ICWA Statutory Language

Congress enacted the ICWA[7] in 1978. The ICWA begins with Congressional findings, then includes a declaration of national policy, and ends with substantive and procedural legal rules controlling future child custody cases involving Indian children.

The Congressional findings establish the motivating factors for enacting the statute, specifically addressing the importance this issue has to tribal self-determination by stating "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." Then the statute squarely addresses the prevalence of cultural prejudice among states with regard to tribal child rearing by acknowledging that states, "have often failed to

[7] 25 U.S.C. §§ 1901-1963 (1978). The ICWA can be accessed without fee at Cornell University Law School, Legal Information Institute, http://www.law.cornell.edu/uscode/25/usc_sup_01_25_10_21.html (last visited Feb. 22, 2010).

recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[8]

As a result of these findings, the Congress then declared:

> [I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.[9]

This policy declaration, underpinning the rules set forth in the ICWA, is critical, because it explicitly establishes that the interests of the native community should be considered when evaluating child custody for native children. Prior to the ICWA, these custody proceedings solely focused on the interests of the child, as evaluated by states through a culturally prejudiced lens. The ICWA's policy declaration recognizes that these cases effect more than the child and individual family at hand, but the larger communities that they hail from.

In accordance with its findings and declared policy, Congress used the ICWA rules to create four major changes to existing law. [10]

- One, the ICWA provides for tribal court adjudication in child custody cases where possible, and when tribal court adjudication is precluded, the ICWA provides for native nation involvement in the proceeding.

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[8] 25 U.S.C. §1901(5).

[9] 25 U.S.C. §1902 (emphasis added).

[10] ROBERT T. ANDERSON, ET AL., AMERICAN INDIAN LAW, CASES AND COMMENTARY, 459 (Thomson West 2008).

- Two, the ICWA assists parents in maintaining parental rights by adding procedural rules and raising substantive standards required for removal.
- Three, the ICWA mandates categories of placement preference for children removed from the home to encourage placement within the tribal community.
- And four, the ICWA provides tribal assistance to manage child welfare cases.

These rules empower native communities, tribal courts, and native parents to resist efforts by government actors to remove their children from the native community. However, issues related to compliance, enforcement, and interpretation can dampen any statute's effectiveness. The following section examines how these issues have impacted the ICWA and native-child custody proceedings.

4. The Impact of the ICWA

4.1. Legal Disputes Highlight Problematic Statutory Ambiguities

The major points of legal dispute related to the ICWA center around the circumstances in which the ICWA does not apply despite the involvement of a native child. These cases have significantly arisen under two circumstances: when a native parent has purposely attempted to preclude application of the ICWA and when ICWA application is disputed because the family involved lacks sufficient connection to Indian culture.

4.1.1. Holyfield Case Impedes Indian Parent's Attempt To Avoid ICWA

The first issue has been addressed in the only case the Supreme Court has heard requiring interpretation of the ICWA. In Mississippi Band of Choctaw Indians v. Holyfield,[11] the parents involved were both native nation members and residents of native lands. Their children were accordingly members of the native

[11] 490 U.S. 30 (1989).

nation, and therefore ICWA would generally apply to any custody proceeding involving them. But, the parents wanted the twin children to be adopted at birth by a non-native family. Therefore, they ensured that their children were born off of native lands because they believed that this would bar their native nation's right to interfere with the adoption plans under ICWA. However, the native nation objected, arguing that ICWA reserves tribal court adjudication rights over custody cases involving children eligible for native nation membership and domiciled on native lands. The case turned on whether the children were domiciled on the native lands, where their parents' permanent home remained, or if they were domiciled off native lands, where the mother purposely delivered the children to avoid the ICWA.

The Court found that the native parents had no intent to permanently live off of native lands, but were only residing off of native land for the short-term purpose of delivering the children and avoiding application of the ICWA. Under those circumstances, the Court held that the ICWA applied and could not be avoided despite the parent's efforts.

Holyfield illustrates that while the ICWA attempts to help native communities to retain its children, and provides greater protection for parents in avoiding child removal and parental rights termination, the ICWA also restrains parental decision-making power regarding choice of tribunal and law.

4.1.2. Difficulties Defining Native Identity

Secondly, some courts have narrowed the application of ICWA by judicially created exception. Although the ICWA explicitly defines the children for which the statute applies, some courts have required more before applying ICWA's rules.

4.1.1.1 ICWA's Definition of Indian

The ICWA generally applies to Indian children. Indian is defined to include "any person who is a member of an Indian tribe, or who is an Alaska Native . .

.."[12] This definition is consistent with native nations' right to self-determination; an indigenous peoples' right to determine who their members are is an expression of self-determination. Native community leaders have consistently fought to maintain this right, and ICWA's language describing "Indian" reflects these efforts.

4.1.1.2 Judicial Narrowing of ICWA's Application

Despite ICWA's clear language describing the children for whom it applies, some state courts have required more before applying the statute. These courts have established an exception to the applicability of ICWA, even if parents involved inarguably meet the explicit definition of "indian" in the statute. In these cases, if the court deemed the family's cultural connectedness to be weak, the court held ICWA inapplicable for lack of involvement by an Indian family, despite membership in a native nation.[13] This judicial exception is based on the theory that Congress only intended for the ICWA to protect families with a certain level of cultural connectedness. In light of the plain language of the statute and the political discussions occurring at the time, this exception seems to be a misinterpretation of the law.

First, the statute includes no indication that a native person should be defined by court determined evaluations of cultural connection. Further, the self-determination movement within which the ICWA was drafted and enacted involved a purposeful effort to secure native nations' right to determine their membership. An exception that divests native sovereigns of their right to define themselves and determine their membership seems completely inconsistent with the goals of the statute.

One federal court in California has made a similar but distinguishable decision regarding ICWA, holding that without cultural connectedness, the ICWA becomes a racial preference that violates the United States Constitution.[14] This

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[12] 25 U.S.C. § 1903(3).

[13] E.g., In re Adoption of Baby Boy, L., 643 P.2d 168 (Kan. 1982).

[14] In re Bridget R., 41 Cal. App. 4th 1483 (Cal. Ct. App. 1996).

case also involved a native parent, but held that the ICWA did not apply to the child because the native parent did not have a "significant social, cultural, or political relationship with an Indian community." This case raises concerns about what actions a native person must take to enjoy the protections of the ICWA.

Judicially created exceptions like these are sometimes difficult to identify during the legislative process. But, stakeholders looking to the ICWA as a model for future reform in their region, should be mindful of the ICWA weaknesses identified over the statute's 32 year life, and take as much caution as possible to avoid them.

4.2. Social Impact Studies Indicate Compliance, Enforcement and Tribal Benefit

While legal disputes indicate the importance of carefully drafting statutes like the ICWA, empirical data evaluating the effectiveness of the act indicates that overall, the ICWA is resulting in positive results for native communities and families.[15] A study completed in 2004 by the United States Department of Education concluded that thorough knowledge of the ICWA by staff in child protective agencies, such as social workers, is uneven and in most cases limited. Also, native nations and local government actors perceive the requirements of the ICWA differently.

But, ICWA is a federal law that must be applied to custody proceedings involving native children, and its requirements preempt contrary local laws. Fortunately, the Department of Education study indicates that local government is making reasonable effort to implement ICWA whenever applicable. Native communities reported strong cooperation from government staff in working with native families and meeting the requirements of the ICWA. Also, almost all case files studied reflected efforts to prevent familial break up. Further, in the large

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[15] G.E. LIMB, ET AL., AN EMPIRICAL EXAMINATION OF THE INDIAN CHILD WELFARE ACT AND ITS IMPACT ON CULTURAL AND FAMILIAL PRESERVATION FOR AMERICAN INDIAN CHILDREN (Department of Education 2004) available at http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=EJ698101&ERICExtSearch_SearchType_0=no&accno=EJ698101 (last visited Feb. 22, 2010).

majority of cases reviewed where removal was deemed necessary, placements were made in accordance with the ICWA's preferences for familial or native homes. These results indicate strong compliance and enforcement of the ICWA with the net result that removal is avoided and reunification is emphasized.

4.3. Research Indicates Overall Benefit to Native Communities Although Disagreements About Statute's Full Meaning Remain

The judicial and social studies of ICWA show that despite statutory ambiguities in the ICWA that lead to important and valid disputes regarding the proper application of the law, the ICWA has largely been a benefit for native communities and their families. These results should be positive news to other groups developing statutes similar to the ICWA, because they bolster confidence that such work may result in benefit for the indigenous community, children, and families involved. But, care should be taken when drafting the statute to avoid interpretation issues like those raised by the ICWA. Also, forethought should be given to enforcement and compliance with a focus on educating local authorities about indigenous rights to encourage collaboration between the native community and local authorities. Addressing these issues is important for child welfare reform efforts to be successful, as well as the application of the Declaration of Rights of Indigenous People and the standard of free, prior and informed consent.

5. Conclusion

This discussion reveals that the ICWA is not a perfect solution to child welfare issues facing native communities and indigenous children in the US. But, as one of the only national statutes of its kind, it can be a helpful tool for international indigenous rights groups focused on child advocacy. The ICWA provides a precedent for the creation of national policy and rules in this area of law. It demonstrates that when indigenous communities have a voice in making decisions that affect their members, all stakeholders benefit. It also illustrates that national standards, while imperfect, can be beneficial to indigenous children

and their communities. And, court decisions interpreting the ICWA highlight potential pitfalls to avoid in future legislative efforts.

Because the ICWA provides all of this information, indigenous communities on a regional level can look to the ICWA as a resource. It can be a starting place for discussion at the local level. And ultimately, these discussions can evolve and grow to affect change in child welfare policies at the national, and even international, level.

6. Recommendation

We recommend that the Permanent Forum on Indigenous Issues, at its 9th Session, April 19-30, 2010, include in its final report a reference to the ICWA. Although the ICWA is a solution particular to the United States, it can be a starting point and rich resource for child welfare reform advocates in localities struggling with similar challenges that the native peoples in the United States have and continue to face. Study of the ICWA, including the history leading to and following its enactment, can assist advocates in conducting local discussions related to child welfare reform and developing strategies for future work.