The Indian Child Welfare Act as the "Gold Standard"

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Daily, ardent observers of the news can follow the horrors of family separations at the United States/Mexico border. The American government takes terrified children who likely do not speak English away from their families. Even on the orders of the courts, the government is slow to reunite the families, cannot reunite the families because of administrative incompetence, or even simply refuses to reunite families (Jordan, 2019). Massive government-funded, privately operated institutions have sprung up around the nation to house these separated children, but there is little or no education, poor health care, and terrible food. Some children have died, and nobody knows how many because the government refuses to allow independent oversight (Jordan, 2018). American Indian people have experienced all this before.

From the latter half of the 19th century until well into the 20th century, the United States forcibly removed Indian children from their homes and moved them into boarding schools for the purpose of destroying their cultural identity as Indians. Government-funded, and often privately-operated, institutions sprung up all over the nation to take in these children. The school administrators cut Indian children's hair, dressed them in servants' attire or military clothes, forced them to engage in manual labor, and punished them for speaking their Native languages. Indian children had no health care, menial (and often violent) education, and terrible food. Many children died, but nobody knows how many because the institutions were accountable to no one (Jacobs, 2014; Fletcher & Singel, 2017).

Eventually, the boarding school program declined. The federal government began requiring state governments to handle Indian child welfare and education during the 1930s. By the 1950s, states had already failed on this front, so the United States piloted the Indian Adoption Project to initiate the removal of Indian children (again) for adoption out of Indian homes and into non-Indian homes. The states enthusiastically participated in removing Indian children from Indian homes. Some state agencies defined the mere act of living on an Indian reservation as neglect, allowing states to remove Indian children at will. Other state agencies defined Indian child-raising practices (which often differ culturally from non-Indian practices) as neglect, again allowing states to remove Indian children at will. Worse, states offered little or no procedural protections for Indian parents and custodians or tribes to challenge the removals. In far too many cases, Indian parents had no right to counsel, no right to be noticed of an emergency removal or termination hearing, no right to participate in removal hearings, and no right to see or challenge the evidence presented against them. One study concluded that 99% of the removals of Indian children were based on neglect (read: poverty) (H.R. Rep. No. 95-1386, 1978). By the middle of the 1970s, the states and certain nonprofit groups had removed 25 to 35% of all Indian children from their homes. (Jacobs, 2014; Fletcher & Singel, 2017; *Mississippi Band of Choctaw Indians v. Holyfield*, 1989)

The Indian Child Welfare Act of 1978 (ICWA) followed. Congress intended the law to slow and hopefully eliminate the discriminatory removal of Indian children from their homes while ensuring

that children in need of protection still received services (25 U.S.C. § 1901). The key element on the anti-discrimination front was jurisdictional. ICWA instructed state courts to transfer Indian child welfare cases arising off-reservation to the tribe's court system unless there was good cause not to do so (such as when there is no tribal justice system available) (25 U.S.C. § 1911(b)). ICWA mandated that state courts dismiss Indian child welfare matters where the Indian child was domiciled on the reservation (25 U.S.C. § 1911(a)).

In large part, however, ICWA is a procedural statute. At the time Congress passed ICWA, state procedural protections for all parents, not just Indian parents, were informal and weak (Columbia Law Review, 1970). ICWA guaranteed notice, the right to counsel, the right to examine the evidence, and the right to be heard in state courts to Indian parents and custodians (25 U.S.C. §§ 1912(a), (b), (c)). To help enforce this right, ICWA required states to notify the relevant tribes and allow the child's tribe to intervene (25 U.S.C. § 1911(c)). ICWA strengthened burdens of proof before an Indian parent's rights to their child(ren) could be terminated, and imposed an "active efforts" duty on states in support of family reunification efforts (25 U.S.C. § 1912(f)). When a state court did have jurisdiction over an Indian child, ICWA required state judges to give a preference to Indian foster families and adoptive families when possible (25 U.S.C. §§ 1915(a), (b)).

Congress did not intend ICWA to be the last word on Indian child welfare. It is a bare minimum of procedural protections for Indian children and parents. States can do better, and more often in recent years, they do. Since the 1970s, most states have heightened their procedural mandates protecting parents to resemble the regime of protections available to Indian parents. Notice, the right to be heard, the right to counsel, and other procedural protections are now common in state child welfare systems. Sadly, especially in poorer areas of America, those rights are paper rights. Too many state courts and agencies make little effort to reunify families in trouble. For whatever reason, political or otherwise, most states still lag behind in providing services to parents needed to promote the reunification of families. The enormous amount of litigation over ICWA's active efforts requirement shows that states only very grudgingly provide those needed services to parents. Many states' child welfare systems, most notably Texas's, are horribly broken. Patrick Higginbotham, a judge on the Fifth Circuit Court of Appeals recently noted that physical and sexual abuse in the Texas foster care system is an "epidemic," and that sexual violence is the "norm" (Higginbotham, p. 291, 2018). ICWA did yeoman work in encouraging states to update their child welfare laws by example, meriting the "gold standard" label that groups such as Casey Family Programs applied to ICWA (Brief of Casey Family Programs, *Adoptive Couple v. Baby Girl*, 2013).

In very meaningful ways, ICWA and state laws are similar. ICWA was designed "*to protect the best interests of Indian children* and to promote the stability and security of Indian tribes" (25 U.S.C. § 1302) (emphasis added). Like state laws, ICWA requires courts to give preferences to family members in foster and permanent placements. Like state laws, ICWA is intended to reunify families whenever possible. State laws and ICWA contain similar, if occasionally differing in terms of degree, procedural rights for parents.

Any significant conflicts between ICWA and state laws are rooted in the long history of discrimination by states (and the federal government) against Indians. For example, Congress learned in the 1970s from a survey of 16 states that 85% of foster and permanent placements of Indian children were in non-Indian families (H.R. Rep. No. 95-1386, 1978). Congress included ICWA's placement preferences favoring Indian families to push back against state discriminatory practices against Indian foster and adoptive families (25 U.S.C. § 1901(4)).

Despite ICWA being a "gold standard," state child welfare practices continue to favor separation over reunification (Raz, 2019). Perhaps because ICWA forces state courts and agencies to slow down the process of separation, and perhaps because some state judges and agencies harbor ideology-based skepticism of the law, compliance with ICWA has always been very low. For example, ICWA requires state courts in their initial emergency removal

hearings to ask whether anyone has any reason to believe that the child removed from their home is an Indian child (25 C.F.R. § 23.11). ICWA kicks in immediately if anyone answers yes. It is fair to say that nationwide, compliance with that requirement is almost nonexistent. Failure to comply in the first instance could lead to serious delays later on; there are nearly 100 appeals a year on the basis of notice because no one asked that question in the beginning (Fort, 2019b). Lack of knowledge of the statute probably is the reason for the lack of compliance, but ignorance is no excuse.

The case of *Oglala Sioux Tribe v. Fleming* (formerly *Van Hunnik*) exemplifies this failure to comply with ICWA. Imagine the terror of losing your children in a legal proceeding lasting one minute in which you had no opportunity to speak. In 2015, a federal court found that the Rapid City, South Dakota state courts routinely approved the emergency taking of American Indian children from their homes, based solely on a state worker's affidavit, usually for months. This happened before the parents could secure a lawyer or review the evidence. Parents had no right to participate in the hearing. Once the child was under the control of the state, state workers dictated terms to Indian parents, often making those parents choose between their culture and their children, or imposing impossible burdens on the parents (*Oglala Sioux Tribe v. Van Hunnik*, 2015). In short, not much has changed in Rapid City since 1978. A federal appellate court vacated the trial court's order on jurisdictional grounds, but the facts of these cases remain untouched. The tribe is seeking review by the United States Supreme Court.

The irony of the challenges to ICWA is that the avoidance of tribal jurisdiction means that Indian children often will not be able to access culturally and tribally appropriate and creative innovations from tribal governments around the country. In her soon to be published casebook on Indian child welfare, Professor Fort surveys these innovations, writing:

> The specificities of tribal welfare codes differ according to tribal population, economic health, historical practices, and geographic locations. Disproportionate harms that many tribal communities have to deal with, such as domestic violence and drug use, also influence the particulars of a tribe's child welfare codes. Tribes have a unique freedom to design child welfare remedies and procedures that can both work to correct current issues and reflect a tribe's customary child rearing practices. Tribes can also ensure rights of children are guaranteed in their constitutions and codes, a practice not found in most states (Fort, 2019a).

Many Indian people are traditional people who do not take well to one-size-fits-all programs recommended by state social workers. State efforts to reunify families often end after one year when federal funding for foster care runs out; tribes can and often do continue those efforts for many years. State laws terminating parental rights legally end relationships between parents and children; some Indian tribes refuse to seek the termination of parental rights at all, or rarely. Tribes are often opting for traditional and culturally appropriate open adoptions rather than complete separation. Tribes, of course, (and the United States) treat child abuse as a criminal matter.

The leading challenge to ICWA comes from the State of Texas, which argues that the law violates federalism principles, and three individual adoptive couples who argue the law violates the equal protection component of the Due Process Clause of the Fifth Amendment (*Brackeen v. Zinke*, 2018). Oral arguments in the appeal took place in March 2019, and the outcome of the case remains in doubt. However, it is sadly ironic that the state of Texas, with its entire child welfare system in shambles, insists that Native children be forced through the state child welfare system rather than comply with ICWA. The tribes involved in the Brackeen case—the Cherokee Nation of Oklahoma, the Oneida Nation of Wisconsin, the Morongo Band of Mission Indians, the Quinault Indian Nation, and the Navajo Nation—have dedicated enormous resources to their child welfare programs, resources states like Texas withhold.

Professor Fletcher recently participated in a conference at the University of Colorado Law School regarding the status of the implementation of the United Nations Declaration of the Rights of Indigenous Peoples (2007). Implementation of most of the Declaration is very difficult because it is not easily enforceable in

the United States. Fletcher's part in this conference was to compare the Declaration to Indian child welfare laws and practices, along with several others. Multiple articles of the Declaration recognize the right of Indigenous peoples to prevent the removal of their children, and the right to raise and protect their children according to their cultures and traditions. We concluded ICWA is not perfect, but if we had to start from scratch in implementing the Declaration, we would be fairly satisfied with ICWA as a great first step. Federal Indian law and policy is often on the wrong side of history, but ICWA is unusually forward looking and progressive. Luckily for Indian people, we have ICWA. Now we just have to implement it properly, and defend it.

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References

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Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), appeal filed sub nom Brackeen v. Bernhardt (5th Cir. 2018).

Brief of Casey Family Programs et al. as Amici Curiae In Support of Respondent Birth Father, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013). Retrieved from https://turtletalk.files.wordpress.com/2013/03/12-399-bsac-caseyfamilyprograms.pdf

Columbia Law Review. (1970). Child neglect: Due process for the parent. *Columbia Law Review, 70*(3), 465–485.

Fletcher, M.L.M., & Singel, W. (2017). Indian children and the federal-tribal trust relationship. *Nebraska Law Review, 95*(4), 885–964.

Fort, K. (2019a). *American Indian children and the law: Cases and materials*. Durham, NC: Carolina Academic Press.

Fort, K. (2019b, January 15). ICWA by the numbers, Turtle Talk blog. Retrieved from https://turtletalk.blog/2019/01/15/2018-icwa-by-the-numbers/

H. R. Rep. No. 95-1386 (1978).

Indian Child Welfare Act, 25 U.S.C. § 1901-1963 (1978).

Indian Child Welfare Act, 25 C.F.R. § 23 (2016).

Jacobs, Margaret D. (2014). *A generation removed: The fostering & adoption of Indigenous children in the postwar world.* Lincoln and London: University of Nebraska Press.

Jordan, M. (2019, January 17). Family separation may have hit thousands more migrant children than reported. *The New York Times.*

Jordan, M. (2018, December 25). 8-year-old migrant child from Guatemala dies in U.S. custody. *The New York Times.*

Higginbotham, Hon. P. M.D. by Stukenberg v. Abbott, 907 F.3d 237 (5th Cir. 2018).

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

Oglala Sioux Tribe v. Van Hunnik, 100 F. Supp. 3d 749 (D.S.D. 2015), vacated, 904 F.3d 603 (8th Cir. 2018), cert. petition filed, March 2019.

Raz, M. (2019, January 30). Family separation doesn't just happen at the border: Poor families, too, are torn apart by policy that favors separation over aid. *The Washington Post*. Retrieved from http://www.washingtonpost.com

United Nations. (2007). *United Nations Declaration on the Rights of Indigenous Peoples.*