

COMMENT

GOODBYE TO GOOD BIRD: CONSIDERING THE USE OF CONTACT AGREEMENTS TO SETTLE CONTESTED ADOPTIONS ARISING UNDER THE INDIAN CHILD WELFARE ACT

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I. INTRODUCTION

After two years of heated litigation, settling Christian Good Bird's contested adoption outside of the courtroom must have relieved his biological mother, tribe and adoptive parents, but the decision almost certainly generated feelings of uncertainty about what long-term effects the compromise would have on Christian as well.² Indeed, Christian's long-term success will be of great significance for those concerned with Indian³ child

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2. I first learned about Christian's case while volunteering at the ICWA Law Center in Minneapolis and working on a separate but very similar contested adoption. It seems fitting to begin with Christian's story mostly because his case eventually settled with the aid of a contact agreement, but also because his case received national media exposure. Christian's adoptive parents appeared on Dr. Phil after a judge had ordered them to return Christian to his mother in 45 days. *Dr. Phil: Adoption Controversy* (CBS television broadcast Jan. 28, 2005) (transcript on file with the author). While the Hofers were still expecting that they would have to return Christian, Dr. Phil suggested that the situation might best be resolved extrajudicially. *Id.* at 20. The litigation settled soon thereafter.

3. Different terms are used throughout this paper to represent the peoples that populated North America, Australia, and New Zealand before European colonization. In order to minimize confusion, I have largely deferred to the terms used by the authors I have cited. For example, I use the word "Indian" in the third sentence because, in this context, it refers indirectly to the Indian Child Welfare Act. Otherwise, when the words "aboriginal" and "indigenous" are used without capitalization, they refer to pre-colonial peoples generally. When the word "Aboriginal" is capitalized, it refers to pre-colonial peoples from Australia, New Zealand, and Canada. The terms "Native American" and "Indian" are used interchangeably in reference to pre-colonial people from what is now called the United States. I realize that not everyone believes that these two words are equivalent in terms of the values they connote, and I apologize in advance to anyone who would take issue with my use of either of them. Whenever possible, I try to use the name of the particular tribe being discussed. Additionally, the U.S. Census includes the separate term "Alaska Native" in its racial classification of Native Americans; this term has been incorporated where appropriate.

welfare issues because the settlement of his case was facilitated by a recent development in adoption law whose efficacy has yet to be fully determined.

Christian's mother, Juanita Good Bird, is an enrolled member of the federally-recognized⁴ Three Affiliated Tribes of the Berthold Reservation in northwestern North Dakota.⁵ She met Shannon and Bonnie Hofer, a white couple from Hendricks, Minnesota, through mutual friends from her church.⁶ When Juanita decided that she could no longer take care of Christian, she met with the Hofers and asked them to raise her son.⁷ The Hofers accepted and Juanita signed paperwork with an attorney, believing that she was terminating her parental rights to Christian.⁸ The adoption was still pending when, after two years of living without her son, Juanita attempted to regain custody.⁹ Unsurprisingly, the Hofers did not want to let Christian go.¹⁰ The conflict soon escalated into a tense legal battle. Because of Christian's relationship with the Three Affiliated Tribes, the Indian Child Welfare Act (hereinafter "ICWA" or "the Act"), a federal law governing "Indian child custody proceedings,"¹¹ applied to and shaped, but did not ultimately control, the results of the litigation.¹²

The Indian Child Welfare Act effectively barred the Hofers from adopting Christian. ICWA requires that when a parent voluntarily terminates his or her rights to their Indian child, such "consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction."¹³ Because Juanita signed the termination papers in an attorney's office rather than before a judge, her parental rights remained intact. Moreover, ICWA prohibits, apart from "good cause to the contrary," adoptions of Indian children by non-Indians.¹⁴ "Good cause" has been interpreted differently in different states, but guidelines issued by the Bureau of

4. Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46,331 (July 12, 2002).

5. Cultural Connectedness Agreement, Three Affiliated Tribes, (Dec. 27, 2005) (on file with the ICWA Law Center, Minneapolis, MN).

6. Letter from Bonnie Hofer to Christian Alliance for Indian Child Welfare (Jan. 10, 2006), available at <http://www.caicw.org/hope.html#Hofer>.

7. *Id.*

8. *Id.*

9. Dr. Phil, *supra* note 2, at 16.

10. *Id.*

11. 25 U.S.C. § 1901(5) (1978).

12. 25 U.S.C. §§ 1901–1963 (1978). ICWA's authority is derived from Indian tribes' status as "distinct sovereign nations." See Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 3 (1993). ICWA is premised on the belief that "there is no resource that is more vital to the continued existence and integrity of *Indian tribes* than their children." 25 U.S.C. § 1901(3) (1978) (emphasis added). While ICWA has been attacked for being racially-based, this criticism gives insufficient weight to the history and complexity of Indian identity. See generally Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373 (2002).

13. 25 U.S.C. § 1913(a) (1978).

14. 25 U.S.C. § 1915(a) (1978) ("In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with

Indian Affairs (BIA) suggest departing from the ICWA's preference for Indian families only in accordance with the request of the biological parents, the child's extraordinary needs, or a lack of suitable families.¹⁵ In Minnesota, where Christian's adoption was filed, the courts have adopted the BIA's suggestions for defining "good cause."¹⁶ Because Christian's mother opposed adoption by the Hofers, and because Christian had no extraordinary needs and his Tribe had other placements available, the Hofers were not eligible to adopt Christian under ICWA. Despite the fact that the law was not on their side, the Hofers pressed on, in hopes of keeping Christian.

After the Three Affiliated Tribes intervened on Christian's behalf¹⁷ and after two years of fighting, the parties settled out of court by signing a "Cultural Connectedness Agreement."¹⁸ In return for Juanita and the Tribes' consent to adoption outside ICWA's preferences, the Agreement obligated the Hofers "to establish and maintain contact with [Christian's] Tribal culture and his extended family."¹⁹ Similar agreements (generally termed "post-adoption contact agreements") have typically been used to regulate cooperative parenting between biological family members and adoptive parents within open adoption scenarios.²⁰

This paper attempts to answer whether using such agreements to settle disputed, non-ICWA-compliant adoptions of Indian children will have sufficiently comparable effects to adoptions within ICWA's preferences. Can contact agreements offer sufficient protection to the two interests Congress intended the Act to defend: "the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its

(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.").

15. See *id.* The guidelines issued by the Bureau of Indian Affairs offer further interpretation of ICWA and serve as a guide to state courts in settling Indian child-custody matters. See *Guidelines for State Courts: Indian Child Custody Proceedings*, 44 Fed. Reg. 67,584, 67,595 (Nov. 26, 1979) (stating that "good cause" to depart from the ICWA placement preferences will be based on at least one of the following three considerations: either (1) "the request of the biological parents or the child when the child is of sufficient age"; (2) "the extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness"; or (3) "the unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria"). Other states have defined "good cause" differently. See Erik W. Aamot-Snapp, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1178-93 (1995).

16. *In re S.E.G.*, 521 N.W.2d 357, 363 (Minn. 1994).

17. ICWA also grants Indian tribes the right to intervene "[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child." 25 U.S.C. § 1911(c) (1978).

18. Three Affiliated Tribes, *supra* note 5.

19. *Id.*

20. See Annette R. Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, 18 CHILD. LEGAL RTS. J. 24, n.2 (1998) (defining open adoption as "a broad and flexible concept encompassing a spectrum of relationships that range from preadoption exchange of information among the birth and adoptive parents to ongoing post-adoption contact between the birth family and the adoptive family.").

society”?²¹ When viewed in light of the historical record regarding colonial and indigenous relations and the research regarding the development of indigenous identity, contact agreements are generally an inadequate substitute for adoption within ICWA’s preferences. Furthermore, endorsement of their use could create an undesirable method for avoiding enforcement of the Act.

This paper addresses three groups of people: (1) Indian tribes considering the use of contact agreements to settle contested adoptions under ICWA; (2) lawyers who counsel and advise those tribes; and (3) well-intending foster parents who seek to adopt Native American children and are perplexed by ICWA’s determination that they are usually ineligible.²² First, this paper will contextualize the use of contact agreements under ICWA within the history of assimilationist policies towards indigenous peoples. Second, this paper will discuss ICWA and modern trends in enforcing the Act. Third, this paper will analyze the use of contact agreements in light of the first two sections. Lastly, this paper will conclude by identifying several principles that should foster successful contact agreements and by recommending to increase the education of child welfare workers about the importance of ICWA in order to increase compliance with the Act.

II. BACKGROUND

Early Attempts to Promote the Best Interests of Indigenous Children

Most legal opinions and academic articles written about ICWA fail to contextualize the Act within broader historical trends in indigenous-colonial relations and limit their introduction of the law and the reasons for its passage to citing the congressional findings laid out in the opening lines of the Act.²³ Part of this tendency can be attributed to Congress’s shortsightedness

21. H.R. REP. NO. 95-1386, at 23 (1978).

22. While I am an ardent ICWA supporter, I also recognize that to those would-be adoptive parents who find their efforts to adopt Indian children frustrated, ICWA can seem like a bizarre legal loophole or an outdated race-based policy that unfairly discriminates against whites. A recent editorial expressed this common aggravation this way: “The Indian Child Welfare Act’s original goal was to combat abusive practices that took Indian children from tribal communities and put them in unfamiliar environments with strangers But today, the reverse is happening. Children who never have been near a reservation are being removed from environments they love and forced to live with strangers chosen by tribes.” Lisa Morris, Editorial, *Law Could Tear Children from a “Tribe” They Love*, GRAND FORKS HERALD, Mar. 27, 2007. Ms. Morris is the administrator of the Christian Alliance for Indian Child Welfare, a group whose website compiles “letters from families [sic] hurt by ICWA,” many of whom have very understandable grievances. See Letters from Families Hurt by ICWA, <http://www.caicw.org/familystories.html>. It is my hope that this article will help shed some light on why the ICWA is still relevant and necessary in order to relieve some of that frustration.

23. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32, 35 (1989); *Matter of Adoption of Halloway*, 732 P.2d 962, 965 (Utah 1986). See generally *In re A.W.*, 741 N.W.2d 793 (Iowa 2007); Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419 (1998); Alan J. DeGarmo, *The Indian*

when it was investigating the child welfare abuses that gave rise to ICWA. The hearings that preceded the passage of ICWA are replete with statistics and stories about then-current abuses, but they contain little history of the government-sponsored assimilationist policies that laid the foundation for future problems.²⁴ Congress's emphasis on statistical evidence of problems within the Indian child welfare system became codified in the text of the Act and few legal authorities have attempted to expand justification for ICWA beyond these relatively narrow, circumstantial grounds.²⁵

Ignoring ICWA's historical context creates several problems. First, it encourages resistance to ICWA by preventing the public from understanding how extensive the abuse of indigenous children has been and the repercussions it has had on Indian tribes.²⁶ Second, it ignores the fact that much of the abuse of Native American children has been done with their "best interests" at heart and thereby misleads people into believing that a traditional "best interests" analysis is the best tool for making decisions about Indian child welfare.²⁷ Third, it does little to allow for important new justifications for enforcing ICWA.²⁸ Since these issues contribute to contested adoptions of Native American children, it is worth going into some detail about this aspect of history.

Child Welfare Act: Its Impact on Unknowing Adoptive Parents, 17 J. Juv. L. 32 (1996); Hon. Maurice Portley, *The Indian Child Welfare Act: A Primer*, 36 ARIZ. ATT'Y 24 (2000).

24. See *Indian Child Welfare Program, Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 1 (1974) [hereinafter "ICWA Hearing"] (statement of Sen. James Abourezk, Member, Comm. on Interior and Insular Affairs).

25. 25 U.S.C. § 1901 (1978) ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds . . . that an *alarmingly high percentage* of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an *alarmingly high percentage* of such children are placed in non-Indian foster and adoptive homes and institutions." (emphasis added)).

26. In fact, taking ICWA's legislative history out of context allowed the creation of one of ICWA's greatest threats—the "existing Indian family" doctrine—which will be discussed in more detail below. When the Kansas Supreme Court first created the doctrine and determined that it was free to limit application of ICWA without mention of such limitations anywhere in the Act's plain language, it did so based on "[a] careful study of the legislative history behind the Act." *Matter of Adoption of Baby Boy L.*, 643 P.2d 168, 175 (Kan. 1982).

27. See Aamot-Snapp, *supra* note 15, at 1181–82 ("The child's best interests . . . and the parent's placement preferences frequently comprise part of the good cause analysis of state courts in ICWA adoptive placement proceedings State courts persistently evaluate Native American children's best interests by considering what courts perceive as their needs for permanent placement and psychological attachment. Majority culture values, however, permeate these good cause factors."). Though the ICWA itself presumes that following its preferences is in "the best interests of Indian children," the language in the Act is not so unequivocal as to prevent state courts from employing traditional "best interests" analyses. See 25 U.S.C. § 1902 (1978).

28. For example, because many indigenous languages, "unique tool[s] for analyzing and synthesizing the world [and] incorporating the knowledge and values of a speech community," are in rapid rates of decline, preserving cultural distinctiveness may become even more important to Indian tribes. James Crawford, *Endangered Native American Languages: What Is to be Done, and Why?* 19 BILINGUAL RES. J. 17, 33 (1995).

England provides a viable starting point for understanding the Indian history in America, not only because it dominated the most “New World” territory among European colonial powers, but also because its methodology for doing so featured two phenomena also seen in America: the use of boarding schools to assimilate Indians into the mainstream, and the belief that doing so was for their own good.²⁹ As the British Empire continued to expand, the 1837 House of Commons Select Committee on Aborigines was charged with “establishing an appropriate social policy for the continuing process of contact and consolidation [with indigenous people].”³⁰ In crafting its policies regarding aboriginal peoples in Canada, Australia, and eventually New Zealand, the English government drew from the newest ideas and methods employed with its domestic indigent population.³¹ The report of the Select Committee on Aborigines included an “assumption that the purpose of the policy was to bring ‘outsiders,’ whether the poor or aboriginals, within the established institutions of British society and, particularly, the wage economy.”³² Also noted was the “special recognition for the situation of children, who were considered particularly open to change, education, and salvation.”³³

In order to prepare them for “the responsibilities of Christianity, civilization, and British citizenship,” Australian and Canadian aboriginal children were separated from their parents and placed in large specialized institutions.³⁴

These institutions, in the form of dormitories (Australia) and residential schools (Canada), segregated the children from their parents, from their peers of opposite gender, and from their younger and older siblings. The use of English was enforced, and aboriginal languages were suppressed through the extensive use of corporal punishment and various forms of humiliation. The institutions were expected to use the labour of the children to reduce their operating expenses to the lowest possible level. This objective was given precedence over the educational objective, with the result that the children spent most of their time providing manual farm labour, cutting wood, baking bread, cooking, and making clothes. The level of educational achievement was

29. ANDREW ARMITAGE, *COMPARING THE POLICY OF ABORIGINAL ASSIMILATION: AUSTRALIA, CANADA AND NEW ZEALAND* 3 (1995).

30. *Id.* at 4. The Select Committee was “appointed to consider what measures ought to be adopted with regard to the Native Inhabitants of Countries where British Settlements are made, and to the neighbouring Tribes, in order to secure for them the due observance of Justice and the protection of their Rights: to promote the spread of civilization among them, and to lead them to the peaceable and voluntary reception of the Christian religion.” *Id.* at 243 n.2.

31. *Id.*

32. *Id.*

33. ARMITAGE, *supra* note 29, at 243.

34. *Id.* at 204.

low . . . [and] the children were deprived of the opportunity to learn their own aboriginal culture and its technologies.³⁵

These schools were based on a “paternalistic ‘save the child’ philosophy” aimed at rescuing Aboriginal children from less-civilized and non-white cultures.³⁶ They were not shut down until the 1970s, after the conclusion that these deliberate social engineering projects failed to produce expected results and new strategies of integrating Aboriginal social policy within mainstream policy arose.³⁷ Though the objective was still assimilation, Canadian and Australian Aboriginals were finally granted citizenship and the right to vote, and mainstream services were expanded to include Aboriginal peoples.³⁸

Assimilationist Policies Come to the United States

The history of the United States’ relationship with its indigenous peoples, and in particular, their children, is frighteningly similar to the histories of Canada, Australia, and New Zealand. In the United States, as in the other English colonies, “education offered the perfect opportunity to completely indoctrinate the Indian children in the white man’s ways.”³⁹ The differences in Indian family structure, gender roles, sexual and romantic mores, systems of property ownership, work ethic, housekeeping, and religion conflicted with white ideals and gave rise to policies that “reflected a determined effort to reshape the Native American family into the nineteenth-century Anglo-American model.”⁴⁰ Just as English policy on aboriginal people was derived from policies focused on dealing with a poor population “outside the accepted economic structure [who were,] or could become[,] a source of disorder,”⁴¹ American assimilation efforts were especially preoccupied with combating the Indians’ “lacking in industry,”⁴² and “dearth of capital.”⁴³

Assimilationist policies took several forms, all aimed at changing the Native American: divestment of community-held tribal land and redistribution to individual tribal members, religious conversion, regulation of familial behaviors and gender roles, and perhaps most importantly to child

35. *Id.* at 205, 208.

36. *Id.* at 209.

37. *Id.* at 191, 192. See also Ian Austen, *Canada Offers an Apology for Native Students’ Abuse*, N.Y. TIMES, June 12, 2008, available at http://www.nytimes.com/2008/06/12/world/americas/12canada.html?_r=1&oref=login; Tim Johnston, *Australia Says ‘Sorry’ to Aborigines for Mistreatment*, N.Y. TIMES, Feb. 13, 2008, available at <http://www.nytimes.com/2008/02/13/world/asia/13aborigine.html>.

38. ARMITAGE, *supra* note 29, at 191–92.

39. Linda J. Lacey, *The White Man’s Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 356 (1986).

40. *Id.* at 329.

41. ARMITAGE, *supra* note 29, at 4.

42. FREDERICK E. HOXIE, *A FINAL PROMISE: THE CAMPAIGN TO ASSIMILATE THE INDIANS* 240 (1984).

43. *Id.*

welfare policies, the establishment of schools for the indoctrination of Indian children into mainstream culture.⁴⁴ Deyhle and Swisher argue,

[P]erhaps the most visible symbol of the assimilatory strategies and goals of the dominant society was the development of the boarding school system. The idea was that the best way for Indians to become Americans was to remove their children as far as possible from the influences of their homes, families, and culture.⁴⁵

Captain Richard Pratt, who founded the Carlisle Indian Boarding School, distilled this philosophy into a concise slogan dripping with cultural conceit: “Kill the Indian to Save the Man.”⁴⁶

The first Indian boarding schools were established by missionaries in the 1600s.⁴⁷ The boarding school approach to assimilation through education, “gained wide support during the 1700s and flourished in the 1800s when the federal government increased its involvement and responsibility by developing an educational system for American Indians.”⁴⁸ By 1895, the federal government was supporting over two hundred schools serving more than eighteen thousand Indian students.⁴⁹ Like their Australian and Canadian counterparts, boarding schools were hoped to be “the solution to the Indian problem” since they attempted to facilitate “rapid assimilation of the race into American life.”⁵⁰ The children at these boarding schools were only allowed to speak English and could be severely punished for speaking in their native tongue.⁵¹ The students “were also required to wear white man’s clothing, cut their hair short, and pay strict attention to personal cleanliness.”⁵² The schools taught white gender roles: boys farmed, worked with tools, and learned trades; girls cleaned, sewed, and ironed.⁵³ In many schools, the passage of the Dawes Act,⁵⁴ a piece of legislation that divested tribes of community-held land and redistributed it to individual tribal mem-

44. HOXIE, *supra* note 42, at 241–42.

45. Donna Deyhle & Karen Swisher, *Research in American Indian and Alaska Native Education: From Assimilation to Self-Determination*, 22 REV. RES. EDUC. 113, 115 (1997).

46. Lacey, *supra* note 39, at 356 (“Pratt’s vision of Indian education was simple and unyielding: the Indian child had to be completely separated from tribal ways and totally assimilated into Anglo-American culture.”). See also DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* 19 (1995) (“Where Indians were concerned, ‘a good school may thus bridge over for them the dreary chasm of a thousand years of tedious evolution.’ Thus, schools could not only civilize, they could civilize in record time.”).

47. Deyhle & Swisher, *supra* note 45, at 114.

48. *Id.*

49. HOXIE, *supra* note 42, at 189, 190.

50. ADAMS, *supra* note 46, at 52.

51. Lacey, *supra* note 39, at 357.

52. *Id.*

53. *Id.* at 357–58.

54. Indian General Allotment Act (Dawes Act (Indians)) (General Allotment Act) (GAA), ch. 119, 24 Stat. 388 (1887) (codified at 25 U.S.C.A. §§ 331–334, 339, 341, 342, 348, 349, 354, and 381 (2000)).

bers in hopes of encouraging Indians to forsake communal tribal life and embrace individualism,⁵⁵ was celebrated as a national holiday.⁵⁶ According to Linda Lacey, “[p]hysical conditions in many boarding schools were deplorable. . . . Indian children were constantly taught that their way of life was savage and barbaric, resulting in severe loss of esteem.”⁵⁷

By the early 1900s, even the champions of the boarding school movement were ready to acknowledge that “the nation’s Indian policy was a miserable failure. . . . [R]eformers had clearly expected too much of the off-reservation school.”⁵⁸ The boarding schools began to be replaced by on-reservation day schools, though some continued until the 1950s with a changed purpose.⁵⁹ The remaining boarding schools “became residential facilities for Native American children found to be dependent and/or neglected.”⁶⁰ The end of the boarding school movement, however, was not nearly the end of policies designed to assimilate the Indians.

A Limited Number of Adoptable Children Increases Demand for Native American Children

After the boarding schools closed, the Bureau of Indian Affairs “became concerned about the number of [Indian] children that would be returned to a life of poverty if placements were not found.”⁶¹ Still hoping that an immersion in white culture could transform Indian children, “the BIA hired social workers to place Native American children in long-term care with non-Native families.”⁶² The Indian Adoption Project, which ran between 1958 and 1967, signaled an important new era in Indian child welfare policy. The project was a collaboration between the BIA and the Child Welfare League of America and was designed to remove Indian children from

55. Lacey, *supra* note 39, at 350. (“The most important aspect of the assimilationist strategy was the divestment of community-held tribal land and the corresponding allotment of a parcel land to each tribal member. Reformers believed that land allotment would accomplish a number of desirable goals. First, it would completely destroy the tribal system by reducing tribal power of individual Indians. Second, policy-makers believed that individual ownership of land would instill the proper respect for property, both real and personal, in the Indian. This respect would encourage him to work harder, accept Christianity, and become a family man in every way. Third, once he became a landowner, the Indian would no longer lead a nomadic life, but would build a permanent residence on his property. He would become a farmer, his wife would learn the skills necessary to support this new way of life, and he would happily educate his children in the white man’s ways.”).

56. *Id.* at 358.

57. *Id.* at 360–61.

58. ADAMS, *supra* note 46, at 307.

59. Lacey, *supra* note 39, at 360–61; LILA J. GEORGE, *Why the Need for the Indian Child Welfare Act?*, in *THE CHALLENGE OF PERMANENCY PLANNING IN A MULTICULTURAL SOCIETY* 165, 168 (Gary R. Anderson, Angela Shen Ryan, & Bogart R. Leashore eds., 1997).

60. *Id.* at 168.

61. *Id.* at 168–69.

62. *Id.* at 169.

their families in an effort to integrate them into mainstream society.⁶³ Though the Indian Adoption Project was a continuation of assimilationist policy, it was also symptomatic of an emergent interest of white couples in transracial adoptees.⁶⁴ The availability of reliable birth control, legal abortion, and increased social acceptability of parenting outside marriage resulted in significantly fewer healthy, white children available for adoption.⁶⁵ Along with the Indian Adoption Project, the decrease in the number of adoptable white children also encouraged an increase in the adoption of African American children by white families. The practice was once looked down upon, but “the number of such adoptions grew in the 1960s and 1970s, initiated by the decline in the number of White babies available for adoption and the Civil Rights Movement’s call for integration. . . .”⁶⁶ Since the Indian Adoption Project, assimilationist policies have coexisted with an elevated demand for adoptable children in a convoluted and often inseparable fashion.

Congress Responds to the Problems Facing Native American Children

Even after the Indian Adoption Project ended,⁶⁷ “most public and private welfare agencies seem to have operated on the premise that most Indian children would really be better growing up non-Indian.”⁶⁸ During the early 1970s, Indian children were removed from their homes at rates varying from five to twenty-five times higher than non-Indians.⁶⁹ Yvette Melanson’s story is similar to many from this period: as one of two newborn Navajo twins born on the reservation, she was taken to a hospital when she suddenly became ill.⁷⁰ The hospital staff presumed that her family was inca-

63. *Id.*

64. See Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 *ADOPTION* 104, 107 (1993) (“In 1967, a national survey disclosed that of 696 Native American children who had been adopted, 84% (584) had been adopted by white families.”).

65. Harold D. Grotevant, Nora Dunbar, Julie K. Kohler, & Amy M. Lash Esau, *Adoptive Identity: How Contexts Within and Beyond the Family Shape Developmental Pathways*, 49 *FAMILY RELATIONS* 379, 380 (2000); see Kathy P. Zamostny, Karen M. O’Brien, Amanda L. Baden & Mary O’Leary Wiley, *The Practice of Adoption: History, Trends, and Social Context*, 31 *COUNSELING PSYCHOLOGIST* 651, 653 (2003).

66. Grotevant et al., *supra* note 65, at 381.

67. In 2001, Shay Bilchik, current President and CEO of the Child Welfare League, offered an official apology for the Indian Adoption Project, calling it “narrow-minded thinking” and something “very hurtful to those children and their families.” Associated Press, *Indian Adoption Project Seeks ‘Lost Birds’; Tough Choices: Years Later, Apologies Are Finally Coming to Tribes*, *TELEGRAPH-HERALD* (Dubuque, Iowa), July 1, 2001, at A5.

68. ICWA Hearing, *supra* note 24, at 1–2 (1974).

69. *Id.* at 1.

70. See YVETTE MELANSON WITH CLAIRE SAFRAN, *LOOKING FOR LOST BIRD: A JEWISH WOMAN DISCOVERS HER NAVAJO ROOTS* (1999).

pable of caring for her, and stole her and her perfectly healthy twin brother away to be adopted by a rich, Jewish family.⁷¹

By 1974, the latest phase of the Indian child welfare crisis came to the attention of Congress through a freshman senator from South Dakota. Senator James Abourezk was one of only fourteen Lebanese-Americans in South Dakota at that time.⁷² His sympathy for the plight of Indian children may have come from his birth on a Sioux reservation as well his involvement as a spokesman for another disenfranchised people: Arabs in Israel.⁷³ Whatever the case, this unlikely champion of Indian child welfare persuaded Congress to hold hearings in 1974 that uncovered gross injustices in the child welfare system. During two days in April, Congress heard from officials from the BIA, tribal leaders, child psychologists, heads of Indian service providers (including the Indian Health Service and the Association on American Indian Affairs) and mothers who had been personally affected by the Indian child welfare crisis.⁷⁴ Their testimony centered on appalling statistics regarding the overrepresentation of Indian children in foster and adoptive care and first-hand accounts of child theft by misguided social workers.⁷⁵ Ultimately, in passing the Indian Child Welfare Act, Congress determined that “nontribal public and private agencies” were responsible for the breakup of the Indian family, and that state authorities, “through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”⁷⁶

The Act granted numerous procedural and substantive protections to Native American families that were designed “to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.”⁷⁷ ICWA has been called “a success with regard to its goal of giving Indian tribes more power over their members in general [and] over their children in particular.”⁷⁸ There is good reason, however, to qualify statements about ICWA’s success. Thirty years after the passage of ICWA, overrepresentation of Indian children in foster care—one of the principal

71. See *id.* When Yvette discovered her Navajo heritage as an adult, she underwent a difficult but rewarding journey towards reconnecting with her family and tribe. Her book is the story of the struggle and rewards that came from moving her family back to the Navajo reservation in order to regain her identity.

72. *200 Faces for the Future*, TIME, Jul. 15, 1974, available at <http://www.time.com/time/magazine/article/0,9171,879402-2,00.html>.

73. See JAMES G. ABOUREZK, *ADVISE AND DISSENT: MEMOIRS OF SOUTH DAKOTA AND THE U.S. SENATE* 9–10, 243–58 (1989).

74. ICWA Hearing, *supra* note 24, at 1–2.

75. *Id.*

76. 25 U.S.C. § 1901(4), (5) (1978).

77. 25 U.S.C. § 1902 (1978).

78. Christine Basic, *An Overview of the Indian Child Welfare Act of 1978*, 16 J. CONTEMP. LEGAL ISSUES 345, 349 (2007).

impetuses for passing the Act—remains a huge problem.⁷⁹In Alaska and South Dakota, for example, over sixty percent of Native American children are in foster care.⁸⁰ Unfortunately, there is a recent trend towards subverting the Act through a judicially-made exception to its application and abuse of one of the Act's discretionary provisions.⁸¹This will be discussed in more detail below.

Towards a Theory of Transracial Adoption of Indigenous Children

At the same time as the interest in transracial adoption was increasing in the United States, a similar phenomenon arose in Canada. Now termed the “Sixties Scoop,” Canada experienced the same disproportionate representation of indigenous children in foster care,⁸² as well as “notable increases in Aboriginal child apprehensions” leading to adoption.⁸³ Also similar to the scenario in the United States, the “Sixties Scoop” was not a specific child welfare program or policy.⁸⁴ Yet, the Canadian experience differs from the American experience in three important respects: official response to the problem came later, was more progressive, and suggested new explanations for problems with transracial adoption among indigenous children.

Canada's response to the indigenous child welfare crisis commenced ten years after Senator Abourezk initiated the hearings that preceded ICWA in the United States and occurred on a provincial (as opposed to national) basis. In 1985, Justice E. Kimmelman led a judicial review of Aboriginal adoption in the province of Manitoba that resulted in a moratorium on Aboriginal adoption.⁸⁵Afterwards, “other Canadian provinces followed suit and long-term foster care has been the norm in most provinces since that time.”⁸⁶

Canada's response to the “Sixties Scoop” has also been more progressive than that of the United States. Canada's government officially apologized for their treatment of indigenous children.⁸⁷Additionally, provinces such as Manitoba have instituted repatriation programs intended to recon-

79. See UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 13 tbl.3 (Apr. 2005) [hereinafter “GAO”] (reporting that 62% of children served by the Alaska foster care system, 61% of the children served by the South Dakota foster care system, and 35% of the children served by the Montana foster care system are Native American).

80. *Id.*

81. See Aamot-Snapp, *supra* note 15, at 1170; Metteer, *supra* note 23, at 420–21.

82. ARMITAGE, *supra* note 29, at 118.

83. Raven Sinclair, *Identity Lost and Found: Lessons from the Sixties Scoop*, 3 FIRST PEOPLES CHILD & FAM. REV. 65, 66 (2007).

84. *Id.* at 66–67.

85. *Id.* at 68.

86. *Id.*

87. Austen, *supra* note 37.

nect children lost in the “Sixties Scoop” with their indigenous communities.⁸⁸

Lastly, and most importantly, a group of Canadian scholars have begun to offer findings that complicate the previously existing consensus that transracial adoption leads to consistently positive outcomes. Scholars in the U.S., including Richard M. Lee from the University of Minnesota, have concluded that transracial adoption generally does not place adoptees at a higher risk for emotional and behavior problems.⁸⁹ However, that finding has been challenged by a small but growing body of empirical evidence showing that transracial adoption has surprisingly negative effects upon indigenous children.⁹⁰ Canadian scholars found that transracial adoption produces negative outcomes for indigenous children and based these findings on two sources: studies showing that adjustment to adoption in Aboriginal children deteriorates as the children get older⁹¹ and case studies revealing frequent and similar types of identity problems among groups of indigenous adoptees.

In what could be called the seminal hypothesis of the Canadian case studies, Carol Locust’s pilot study of twenty Aboriginal Canadian adoptees posited that “the cluster of long-term psychological liabilities exhibited by American Indian adults who experienced non-Indian placement as children may be recognized as a syndrome.”⁹² Locust coined the term “Split Feather Syndrome” to represent the psychological problems experienced by nineteen of the twenty subjects she interviewed. The subjects of Locust’s study identified the loss of Indian identity, family, culture, heritage, language, spiritual beliefs, tribal affiliation, and tribal ceremonial experiences as major contributors to the development of their problems.⁹³

While the small sample size of Locust’s study and dearth of empirical studies on this subject are not enough to prove Locust’s hypothesis outright, her argument finds support from a host of theoretical sources.⁹⁴ Contemporary literature on social sciences, psychology and race theory suggests that

88. See generally BENNETT & CYR RESEARCH AND CONSULTING, FINAL REPORT: EVALUATION OF THE MANITOBA FIRST NATIONS REPATRIATION PROGRAM (Jan. 11, 2001) (on file with author).

89. Richard M. Lee, *The Transracial Adoption Paradox: History, Research, and Counseling Implications of Cultural Socialization*, 31 COUNSELING PSYCHOLOGIST 711, 716 (2003).

90. Though the research suggesting that indigenous children experience unique problems in adoption is substantial, almost all of the reviewed sources note that more research is needed.

91. Sinclair, *supra* note 83, at 65. Statistics referenced indicate the rate is as high as 95% for adoptees in their mid-teens.

92. Carol Locust, *Split Feathers . . . Adult American Indians Who Were Placed in Non-Indian Families as Children*, 44 ONTARIO ASS’N OF CHILD. AID SOC. J. 11, 11 (2000).

93. *Id.*

94. Sinclair, *supra* note 83, at 71 (“The lack of literature in the area of Aboriginal adoption means that to this point we rely largely on common knowledge in order to influence policy and develop programs for adoptees. There are some answers to be gleaned from contemporary literature in the social sciences, particularly psychology and race theory, as to why transracial adoption of Aboriginal children, in particular, is problematic.”).

growing up racially Native American in white culture inhibits the development of a Native American identity to a degree that prohibits adults from ever recovering it—much to their detriment. Moreover, the literature shows that the methods usually employed to overcome this problem are incapable of working.

Though the U.S. Census now recognizes American Indians and Alaska Natives as a distinct racial group,⁹⁵ “racial identity is a new construct for American Indians, who have historically identified as distinct tribes.”⁹⁶ Indian identity was complex even before an inclusive racial identity was available.⁹⁷ A Native American may have various levels of identity to choose from: “sub-tribal (clan, lineage, traditional), tribal (ethnographic or linguistic, reservation-based, official), regional (Oklahoma, California, Alaska, Plains), supra-tribal or pan-Indian (Native American, Indian, American Indian).”⁹⁸ The ability of a Native American to successfully embrace any of these identities is contingent upon the “extent to which the individual uses the signs, symbols, and language of the culture associated with that particular membership group.”⁹⁹ These signs, or “minimum membership credentials,” are acquired by birth and a long period of socialization.¹⁰⁰ This poses a real obstacle for racial Native Americans without meaningful ties to other Native Americans, and who often encounter social resistance to their membership in both groups.¹⁰¹ Looking Caucasian or having little knowledge of tribal culture may prevent one from being accepted by the Indian community he or she wishes to be a part of.¹⁰² At the same time, appearing Indian can prevent participation in mainstream white culture due to resistance on the part of white people.¹⁰³ This conflict among transracial

95. U.S. Census Bureau, *Racial and Ethnic Classifications Used in Census 2000 and Beyond*, <http://www.census.gov/population/www/socdemo/race/racefactcb.html> (last visited Aug. 31, 2008).

96. Alexandra R. Pierce, *American Indian Identity Formation: The Importance of Tribe and Culture* (unpublished manuscript, on file with author).

97. See Nicholas C. Peroff, *Indian Identity*, 34 *SOC. SCI. J.* 485, 486 (1997) (“Indianness means different things to different people. And, of course, at the most elementary level, Indianness is something only experienced by people who are Indians. It is how Indians think about themselves and is internal, intangible, and metaphysical. From this perspective, studying Indianness is like trying to study the innermost mysteries of the human mind itself.”).

98. Joane Nagel, *Constructing Ethnicity: Creating and Recreating Ethnic Identity and Culture*, 41 *SOC. PROBLEMS (SPECIAL ISSUE ON IMMIGRATION, RACE, AND ETHNICITY IN AMERICA)* 152, 155 (1994).

99. Elsie J. Smith, *Ethnic Identity Development: Toward the Development of a Theory Within the Context of Majority/Minority Status*, 70 *J. COUNSELING & DEV.* 181, 182 (1991).

100. *Id.* at 185 (“[E]ach ethnic group establishes minimal signs, symbols, and guidelines that indicate an allegiance to that ethnic group.”); see also Hilary N. Weaver, *Indigenous Identity: What Is It and Who Really Has It?*, 25 *AM. INDIAN Q.* 240, 245 (2001) (“[I]dentity can only be confirmed by those who share that identity.”).

101. Devon A. Mihesuah, *American Indian Identities: Issues of Individual Choices and Development*, 22 *AM. INDIAN CULTURE & RES. J.* 193, 207–08 (1998).

102. *Id.*

103. *Id.*

adoptees originates in “the apparent and immutable racial and ethnic differences between parents and children,” and has been appropriately termed the “transracial adoption paradox.”¹⁰⁴

Those Native American youth, who grow up off-reservation with limited connection to their cultural past, often express their indigenous identity and cultural pride through resistance to the white community.¹⁰⁵ For example, because academic achievement is important to the white community, Native American youth often drop out of school as a way of defying the dominant society.¹⁰⁶ According to Pierce, “in American Indian societies, which are collectively oriented . . . rather than individually oriented . . . to ‘not belong’ is a powerfully isolating experience.”¹⁰⁷ Feelings of isolation have been identified as a major predictor of shyness, increased feelings of alienation, lower social acceptance, anger, and depression among adolescents.¹⁰⁸ Thus, the inherent danger to indigenous children from transracial adoption that was identified by Locust may be partially attributed to the inability of those children to engage tribal life due to inadequate socialization with other tribal members.

Another problem facing indigenous adoptees is that even if their adoptive parents seek to introduce their children to Indian culture, methods typically employed for doing so are flawed. Ten years ago, Devon Mihesuah employed David Cross’s work on the process of becoming black (termed “Cycles of Nigresence”) to identify various elements that influence identity formation of those claiming to be racially and/or ethnically Native American.¹⁰⁹ Mihesuah’s work identified a key component for understanding why

104. Lee, *supra* note 89, at 721; *see also* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 n.1 (1989) (“[T]hey were raised with a white cultural and social identity. They are raised in a white home. They attended predominantly white schools, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. They can recall such things as seeing cowboys and Indians on TV and feeling that Indians were a historical figure but were not a viable contemporary social group. Then during adolescence, they found that society was not to grant them the white identity that they had For example, a universal experience was that when they began to date white children, the parents of the white youngsters were against this, and there were pressures among white children from the parents not to date these Indian children The other experience was derogatory name calling in relation to their racial identity [T]hey were finding that society was putting on them an identity which they didn’t possess and taking from them an identity that they did possess.” (quoting *Indian Child Welfare Program: Hearing Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93d Cong. 46 (1974) (statement of Dr. Joseph Westermeyer))).

105. Weaver, *supra* note 100, at 245.

106. *Id.*; *see also* Martin D. Topper, “Mormon Placement”: *The Effects of Missionary Foster Families on Navajo Adolescents*, 7 *ETHOS* 142 (1979). Topper describes other methods that youth with conflicted ethnic identities resort to in resistance of white enculturation—drinking, hysterics, pregnancy—which also hinder success within white society.

107. Pierce, *supra* note 96, at 3.

108. *Id.*

109. *See generally* Mihesuah, *supra* note 101.

transracial adoption is problematic for indigenous people. In discussing Cross's "encounter" stage of identity formation, Mihesuah noted:

Some white parents may attempt to educate the adopted child about his Indian heritage, but if they know nothing about Indians they may take the child to general events such as powwows and movies dealing with Indians, and read them books with Indian characters. The lack of depth in any of these activities usually proves to be unsatisfactory to the child.¹¹⁰

Mihesuah's suspicion was confirmed by Locust's pilot study of Indians who grew up in non-Indian homes. One of her study's twenty participants wrote:

Somebody said we could learn all we needed to learn about our culture and heritage from books and videos from our school. What a laugh! What we got was watered down, Indian-style-Sesame-Street version of what some white person thought all Indians were like."¹¹¹

The tendency for whites to oversimplify indigenous culture is not new. Historically, whites have mistakenly viewed Native American cultures as static and unchanging. As a result, they believe that Native American culture can be taught like a history lesson.¹¹² For example, whites may assume that kin-based sharing and reciprocity among Native Americans are ancient practices existing uninterrupted since the buffalo days, while at least one scholar claims that the continuing presence of these traits in modern reservation life is actually better attributed to recent adaptations to rural poverty.¹¹³ Thus, those adoptive parents who attempt to acculturate their Indian children by way of textbook or pan-Indian cultural events miss the ever-changing social aspect of Indianness that is "a property of interaction between tribal members, tribal resources, community organizations, tribal land and all the other 'parts' of a tribe."¹¹⁴ Without genuine socialization, Native American children will inevitably be isolated from those biological kin who might provide the only reasonably accessible reentry points into

110. *Id.* at 203.

111. Locust, *supra* note 92, at 12.

112. See ANNE MCCLINTOCK, *IMPERIAL LEATHER: RACE, GENDER, AND SEXUALITY IN THE COLONIAL CONTEXT* 40 (1995) (calling this trope of colonial psychology the "invention of anachronistic space" in which "imperial progress across the space of empire is figured as a journey backward in time"); see also Peroff, *supra* note 97, at 485 ("Today, most popular notions of American Indians and "Indianness" remain locked in the past and stereotyped They seem frozen in time in enduring treaty-based relationships to the federal government, as perpetual citizens of 'domestic dependent nations,' and as permanent wards of the Bureau of Indian Affairs (BIA) and other agencies of the federal government. In television, the movies, and elsewhere in the media, Indianness seems permanently associated with the American Indian of the old American frontier.").

113. Thomas Belosi, *Review: The American Indian and the Problem of Culture*, 13 *AM. INDIAN Q.* 261, 264 (1989).

114. Peroff, *supra* note 97, at 487.

tribal culture and identity. While they may have good intentions for doing so, adoptive parents who employ such two-dimensional acculturation techniques sometimes fail to remedy the damage done by transracial adoption.

III. THE INDIAN CHILD WELFARE ACT

What ICWA Does

When ICWA language was passed in October of 1978, the Act established “a variety of procedural and substantive protections in a child custody proceeding involving an American-Indian child.”¹¹⁵ The Act established three separate policies:

(1) [E]stablishment of and adherence to minimum standards in order to remove Indian children from their families; (2) placement of Indian children in homes that reflect the unique values of Indian culture; and (3) government assistance for child and family service programs. Through the ICWA, Congress ‘has expressed its clear preference for keeping Indian children with their families, deferring to tribal judgment on matters concerning the custody of tribal children, and placing Indian children . . . within their own families or tribe.’¹¹⁶

In order to carry out these policies, tribes are granted exclusive jurisdiction over custody proceedings involving Indian children domiciled on a reservation¹¹⁷ and the right to intervene in any foster care placement or termination of parental rights proceeding.¹¹⁸ State authorities are also required to satisfy a higher evidentiary standard before terminating an Indian’s parental rights.¹¹⁹ ICWA even mandated that foster care placements prefer Indian homes over non-Indian homes.¹²⁰ The Act’s adoptive placement preferences have been called “the real bite of ICWA” and are especially worth highlighting for the purposes of this paper.¹²¹ ICWA requires that “[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian

115. Thomas R. Myers & Jonathan J. Siebers, *The Indian Child Welfare Act: Myths and Mistaken Application*, MICH. B.J., July 2004, at 19, 19–20; see also 25 U.S.C. §§ 1901–63 (1978). Much has already been written about the specific requirements of ICWA and there is no need to go into great detail here. For a more thorough examination of ICWA’s provisions, see generally Michael C. Snyder, *An Overview of the Indian Child Welfare Act*, 7 ST. THOMAS L. REV. 815 (1995).

116. Sloan Philips, *The Indian Child Welfare Act in the Face of Extinction*, 21 AM. INDIAN L. REV. 351, 354 (1997).

117. 25 U.S.C. § 1911(a) (1978).

118. 25 U.S.C. § 1911(b) (1978).

119. 25 U.S.C. § 1912(f) (1978).

120. 25 U.S.C. § 1915(b) (1978).

121. Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21, 26 (1997).

child's tribe; or (3) other Indian families."¹²² As a result of the heightened levels of protection, at a 1980 oversight hearing, the Acting Deputy Commissioner of the BIA called ICWA “. . . truly a landmark piece of Indian legislation.”¹²³

What ICWA Fails To Do

Despite the Act's success, serious problems remain. One of the largest remaining problems is created by non-ICWA-compliant child placements resulting from both voluntary and involuntary proceedings. These placements are brought to light by petitions to finalize the placements through adoption or other more informal means and are subsequently opposed by tribal authorities.¹²⁴ Most often, these cases arise as a result of ignorance of the law, outright fraud on the part of private adoption agencies and adoption

122. 25 U.S.C. § 1915(a) (1978).

123. *Oversight of the Indian Child Welfare Act: Hearings Before the S. Comm. on Indian Affairs*, 96th Cong. 34 (1980) (statement of Theodore Krenzke, Acting Deputy Comm'r, Bureau of Indian Affairs).

124. Among its procedural safeguards, ICWA explicitly grants Indian tribes the right to notice whenever an Indian child is subject to an involuntary proceeding regarding foster care or the termination of parental rights. 25 U.S.C. § 1912(a) (1978). It also grants tribes the right to intervene in any proceeding, voluntary or involuntary, regarding foster care or the termination of parental rights. 25 U.S.C. § 1911(c) (1978). Because ICWA does not specifically grant a right of notice for voluntary placements in foster care and voluntary terminations of parental rights, this creates a problematic “notice gap” in which tribes cannot come to learn about illegal placements until after they happen. This gap in the notice provision has been partially addressed by state laws requiring notice in voluntary proceedings—the same method employed by proposed amendments to ICWA. See generally Minnesota Indian Family Preservation Act, MINN. STAT. §§ 260.761–835; Marcia Yablon, *The Indian Child Welfare Act Amendments of 2003*, 38 FAM. L. Q. 689 (2004). For examples of voluntary placements outside of the Act's preferences, see generally *In re Adoption of B.G.J.*, 133 P.3d 1, 3 (2006) (finding “good cause” to depart from ICWA's placement preferences. Biological mother placed child with adoption agency after informing the agency that child was eligible for enrollment in Prairie Band Potawatomie Nation. Adoption agency placed child with non-native foster family who then sought to adopt child against the wishes of the Tribe.); *In re Baby Boy Doe*, 902 P.2d 477, 480 (1995) (finding “good cause” to depart from ICWA's placement preferences. Non-native biological mother placed child with adoptive parents shortly after birth. Adoptive parents initiated proceedings to terminate the father's parental rights, but the father's Indian tribe intervened and sought application of ICWA.); *In re Adoption of T.R.M.*, 525 N.E.2d 298 (1988) (finding ICWA was inapplicable when biological mother placed child with non-native friends who had previously visited reservation. Tribe sought to have court proceedings transferred to tribal court.); and *In re Baby Boy Doe*, 849 P.2d 925 (1993) (finding ICWA was applicable when biological mother had no contact with Native biological father during pregnancy and placed child for adoption shortly after birth. Biological mother informed agency of father's native ancestry but chose a non-native family for adoption. Adoptive parents sought termination of father's parental rights and father's tribe intervened.). For an example of government-sponsored placement outside of the ICWA preferences after involuntary termination of parental rights, see *In re Adoption of Sara J.*, 123 P.3d 1017 (Alaska 2005) (finding “good cause” to depart from ICWA's placement preferences. Following termination of parental rights, Alaska Office of Children's Services placed child with non-native woman who lived in close proximity to the hospital where child needed regular medical attention. The woman sought to adopt the child, as did the maternal aunt and uncle. The child's tribe intervened and opposed the woman's petition to adopt.).

attorneys, or as a result of informal arrangements between a Native parent and non-Native foster parents of which the tribe has no knowledge.¹²⁵ Even worse, state courts often sign off on these illegal adoptions and “fail to realize that the voluntary acts of the Indian parents cannot unilaterally determine application of the Act and/or placement of the Indian children, to the exclusion of the right of the tribe to have a voice in child custody proceedings involving its children.”¹²⁶ As a result, tribes appeal these decisions and custody of Indian children remains in question for an uncomfortably long period of time. The children subjected to these actions become increasingly bonded to their foster parents, and a court-ordered separation becomes all the more painful for everyone involved.¹²⁷

State Court Resistance to ICWA

Appellate court judges, hesitant to remove a child from the adoptive parents the child has become attached to, have devised ways to avoid enforcement of the Act. Often, judges exploit the “good cause” provision within the adoptive placement preferences to avoid separating children from their adoptive families. The term “good cause” is undefined in ICWA—leaving state courts to define it as they see fit.¹²⁸ While ICWA was designed to limit the abuses of state courts, the “good cause” provision gives judges in most states plenty of room to avoid enforcement of the Act’s preferences.¹²⁹ In fact, within six years of ICWA’s passage, complaints were already being made to the Senate’s ICWA oversight committee claiming that “[s]tate court judges are having a field day with the language ‘good cause to the contrary’ Out of 200 cases that we have handled in the last fifteen months, this has been an issue in over half.”¹³⁰ Unfortunately, this trend of abusing “good cause” has continued and, more often than not, judges find “good cause” not to enforce the Act.¹³¹

125. Because of the problems with dishonest behavior on the part of adoption workers and attorneys, proposed amendments to ICWA would have made it a criminal offense to fraudulently or knowingly misrepresent the Native American status of any child. *See* S. 569 & H.R. 1082, 105th Cong. (1997).

126. Metteer, *supra* note 23, at 461 (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 (1989)).

127. 143 CONG. REC. S3120 (daily ed. Apr. 14, 1997) (statement of Sen. John McCain) (“Nonetheless, particularly in the voluntary adoption context, there have been occasional high-profile cases which have resulted in lengthy, protracted litigation causing great anguish for children, their adoptive families, their birth families, and their Indian tribes.”).

128. *See* Aamot-Snapp, *supra* note 15, at 1178–79.

129. *See* 25 U.S.C. § 1901 (1978) (“[Congress finds] that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”).

130. *Oversight of the Indian Child Welfare Act of 1978: Hearing Before the Select Comm. on Indian Affairs*, 98th Cong. 158, 162 (1984) (statement of Eric Eberhard).

131. For recent cases finding “good cause,” *see In re Adoption of F.H.*, 851 P.2d 1361 (Alaska 1993); *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz.

On top of “good cause” abuses, ICWA has been subverted by a judicially-made exception to the Act—the “existing Indian family” doctrine. The “existing Indian family” doctrine was first created in 1982 when the Kansas Supreme Court refused to apply ICWA to an illegitimate Indian child who was placed for adoption immediately after birth by his non-Native mother.¹³² The court based its reasoning upon a section of the expressed policy of the Act, but took it out of context. Where Congress stated that “it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families . . .”¹³³, the Kansas Supreme Court concluded that those children who were never part of an “existing Indian family” did not fit the definition of “Indian child” and therefore the Act did not apply to them.¹³⁴

Courts that employ the “existing Indian family” doctrine generally employ a “minimum contacts” analysis to determine whether or not the child has sufficient ties to his or her tribe for the Act to apply.¹³⁵ Of course, the great irony of the “existing Indian family” doctrine is that ICWA was designed to ensure the continuation of threatened Native American culture. By withholding the Act’s application from those whose Indian identity is marginal, the doctrine denies protection to those who need it most. Although the “existing Indian family” doctrine puts power back into the hands of state court judges, seven states currently embrace the doctrine: Alabama, Indiana, Kentucky, Kansas, Louisiana, Missouri, and Tennessee.¹³⁶ Seventeen states have rejected the “existing Indian family” doctrine by statute or case law¹³⁷ and the last state to embrace the doctrine was

1983); *Fresno County Dep’t of Children and Family Serv. v. Super. Ct.*, 19 Cal. Rptr. 3d 155 (2004); *Seminole Tribe of Florida v. Dep’t of Children and Families*, 959 So.2d 761, 764 (Fla. 2007); *In re Baby Boy Doe*, 902 P.2d 477 (Idaho 1995); *In re Adoption of T.R.M.*, 525 N.E.2d 298, 311 (Ind. 1988); *In re Adoption of B.G.J.*, 111 P.3d 651, (Kan. 2005); and *In re Adoption of M.*, 832 P.2d 518 (Wash. 1992). For appellate cases finding insufficient “good cause,” see *In re Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994) and *In re Adoption of Riffle*, 922 P.2d 510 (Mont. 1996).

132. *In re Adoption of Baby Boy L.*, 643 P.2d 168, 172 (Kan. 1982).

133. 25 U.S.C. § 1902 (1978).

134. *Baby Boy L.*, 643 P.2d at 175.

135. Metteer, *supra* note 23, at 430.

136. Memorandum from Meika Vogel, Summer Associate, Faegre and Benson LLP, to Betsy Schmiesing, Partner, Faegre and Benson LLP, *Existing Indian Family Exception 3* (July 3, 2008) (on file with ICWA Law Center) (citing *S.A. v. E.J.P.*, 571 So.2d 1187 (Ala. 1990); *In re Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988); *Rye v. Weasel*, 934 S.W.2d 257 (Ky. 1996); *Hampton v. J.A.L.*, 658 So.2d 331 (La. 1995); *In re S.A.M.*, 703 S.W.2d 603 (Mo. 1986); *In re Morgan*, No. 02A01-9608-CH-00206, 1997 Tenn. App. LEXIS 818 (Tenn. 1997)).

137. *Id.* at 4–5 (citing *D.S. v. County Dep’t of Pub. Welfare*, 577 N.E.2d 572 (Ind. 1991); *In re Adoption of T.N.F.*, 781 P.2d 973 (Alaska 1989); *Michael J., Jr. v. Michael J., Sr.*, 7 P.3d 960 (Ariz. 2000); *In re N.B.*, No. 06CA1325, 2007 Colo. App. LEXIS 1758 (Colo. Ct. App. 2007); *Indian Tribe v. Doe (In re Baby Boy Doe)*, 849 P.2d 925 (Idaho 1993); *Tubridy v. Iron Bear (In re Adoption of S.S.)*, 622 N.E.2d 832 (Ill. 1993); *In re R.E.K.F.*, 698 N.W.2d 147 (Iowa 2005); Iowa

Tennessee in 1997.¹³⁸ While it is comforting that the spread of the “existing Indian family” doctrine appears to have stalled, its continued existence, combined with the prevalence of “good cause” determinations, is dangerous for Indian families—especially in states where the doctrine is viable.

IV. CONTACT AGREEMENTS

Contact agreements were developed to help facilitate an increasing interest in open adoption.¹³⁹ While adoption was once viewed as “a discrete legal event dissolving one family and creating another, [it] is now recognized as a dynamic lifelong process affecting those involved in different ways.”¹⁴⁰ State legislatures have responded to this change by modifying adoption law so that it “increasingly provides for a continuum of adoption, with closed adoption on one end and ongoing contact between adoptive and birth families, usually in the form of cooperative adoption, on the other.”¹⁴¹ In order to facilitate the ongoing contact, many states now recognize post-adoption contact agreements as legally binding which gives signatories continuing rights to contact with adoptees.¹⁴²

Contact agreements have only recently begun to be incorporated into Indian child welfare situations. In fact, two of the most famous ICWA cases to date resulted in continuing contact between Native American adoptees and their biological family after adoption. *In re Adoption of Holloway*,¹⁴³ which the Supreme Court called “a leading case on the ICWA,”¹⁴⁴ was resolved in tribal court when a Mormon couple who had had custody of an Indian child for over five years were awarded permanent guardianship.¹⁴⁵ In return, the couple agreed to maintain contact between the child and his Navajo mother at least until the child reached the age of thirteen.¹⁴⁶ At that point, the child could decide for himself whether to maintain contact with his mother and tribe.¹⁴⁷ Likewise, *Holyfield*, the only ICWA case the U.S. Supreme Court has heard, resulted in a Choctaw tribal court arrangement

CODE § 232B.5(2) (2007); *In re Elliott*, 554 N.W.2d 32 (Mich. 1996); MINN. STAT. § 260.771(2) (2007); *In re Adoption of Riffle*, 922 P.2d 510 (Mont. 1996); *In re Adoption of a Child of Indian Heritage*, 543 A.2d 925 (N.J. 1988); *In re Baby Boy C.*, 805 N.Y.S.2d 313 (N.Y. App. Div. 2005); *Hoots v. R.B. (In re A.B.)*, 663 N.W.2d 625 (N.D. 2003); *In re Baby Boy L.*, 103 P.3d 1099 (Okla. 2004); *Quinn v. Walters*, 845 P.2d 206 (Or. 1994); *In re Adoption of Baade*, 462 N.W.2d 485 (S.D. 1990); *State ex rel. D.A.C.*, 933 P.2d 993 (Utah 1997); WASH. REV. CODE §§ 13.34.040(3), 26.10.034(1), 26.33.040(1) (2004)).

138. *In re Morgan*, No. 02A01-9608-CH-00206, 1997 Tenn. App. LEXIS 818 (Tenn. 1997).

139. Appell, *supra* note 20, at 24.

140. *Id.*

141. *Id.*

142. *Id.*

143. *In re Adoption of Holloway*, 732 P.2d 962 (Utah 1986).

144. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52 (1989).

145. Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 664, n.311 (2002).

146. *Id.*

147. *Id.*

under which the twins subject to the dispute were ordered to reside permanently with their adoptive parent but were to maintain regular contact with their birth family and tribe.¹⁴⁸ Arrangements like these were also contemplated in a set of proposed amendments to ICWA in 2001, which, if they had been passed, would have authorized state courts to approve post-adoption visitation agreements as part of an adoption decree if such an agreement was in the best interests of the child.¹⁴⁹

Proponents of open adoption believe that it can benefit adoptees in their identity development by allowing adoptees to integrate birth relationships or knowledge about those relationships into their developmental process.¹⁵⁰ This claim has been supported by a study of 1,396 adoptions of children from infants to sixteen-year-olds, which found that children in open adoptions had significantly better behavior scores than children in adoptions with no access to birthparents, and that the adoptive parents of children who were in contact with birthparents had more positive impressions of those birthparents.¹⁵¹ Yet, as applied to the settlement of contested adoptions arising under ICWA, there are several reasons to doubt the touted benefits of open adoption as enforced by contact agreements.

The Case Against Contact Agreements

Empirical evidence suggests that the specific circumstances of contested ICWA adoptions would curtail any benefits derived from contact agreements that might be otherwise available in open adoption scenarios. Marianne Berry found that the key predictor of adoptive parents' comfort with open adoption was whether parents had planned for openness from the beginning of the placement.¹⁵² Where biological and adoptive parents are litigating for complete control over a child's custody, this essential factor is missing.¹⁵³

148. *Id.* at 664.

149. *Id.* at 668 (citing Indian Child Welfare Act Amendments of 2001, H.R. Res. 2644, 107th Cong. (2001)).

150. Appell, *supra* note 20, at 24.

151. Marianne Berry, *Risks and Benefits of Open Adoption*, FUTURE OF CHILDREN, Spring 1993, at 125, 133.

152. *Id.* at 132 (citing Marianne Berry, *Adoptive Parents' Perceptions of, and Comfort with, Open Adoption*, 72 CHILD WELFARE 231 (1993)).

153. It is also true that mediating custody disputes can result in more frequent contact between non-custodial parents and their biological children and greater involvement in the decision-making process from both of them; however, research evidencing these benefits is based on procedural norms distinct from contested ICWA adoptions. When University of Virginia researchers discovered that parties to a custody battle experienced better long-term results when they mediated rather than litigated their disputes, the researchers assigned the parties to a mediation or litigation research group as soon as they had petitioned a Virginia court for a child custody hearing. It is likely that these benefits would not extend to situations where hostility and bitterness had already accumulated from litigation before negotiating with Indian tribes had begun. See generally Robert E. Emery et al., *Child Custody Mediation and Litigation: Custody, Contact, and Coparenting 12 Years After Initial Dispute Resolution*, 69 J. COUNSELING & CLINICAL PSYCHOL. 323 (2001).

Whatever the empirical and theoretical evidence says about the utility of contact agreements, conditions are ripe for continued abuse of ICWA and allowing contact agreements to supplant adoption within the Act's preferences creates another venue in which that abuse can occur. The number of parents interested in adoption grossly outnumbers the number of children available for adoption. Approximately fifty-one thousand children born in the United States each year are placed for adoption.¹⁵⁴ However, there are approximately one million parents in the United States strongly interested in adoption and over two hundred fifty thousand prospective parents that have taken concrete steps towards adoption.¹⁵⁵ The elevated levels of demand for adoptable children create a considerable financial incentive for adoption agencies to satisfy couples' desire to adopt, even if that means violating ICWA's preferences.¹⁵⁶ Native American children continue to be grossly overrepresented in the foster care system.¹⁵⁷ The combination of these factors forces Native American children into a perilous position within the economy of adoption. Both demand and supply for these children is high, and the only obstacle to equilibrium is one significantly disfavored federal law. At this point, one must recognize that "power is at its peak when it is least visible, when it shapes preferences . . ."¹⁵⁸ Until the demand for adoptable children decreases, and so long as state courts have the tendency to "reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation," Native American children are in danger of losing their cultural heritage to market pressures.¹⁵⁹

There are several reasons to believe that assimilationist attitudes are still alive and affecting Native American children, which, if nothing else, should arouse skepticism about any policy that facilitates avoidance of the Act's adoptive preferences. While government-sponsored assimilationist policies have ended, the United States recently refused to sign the United Nations' Declaration on the Rights of Indigenous Peoples—a document declaring in part that "indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."¹⁶⁰ This should not be surprising given the continued "otherness" of Indian cultures within mainstream America. Assimilationist policies were founded on,

154. Neil Terry, Nancy Turner, & Jennifer Falkner, *Comparing the Efficacy of Domestic Versus International Child Adoption*, 33 SW. ECON. REV. 95, 99 (2006).

155. *Id.*

156. See Robert Lindsey, *Adoption Market: Big Demand, Tight Supply*, N.Y. TIMES, Apr. 5, 1987, available at <http://query.nytimes.com/gst/fullpage.html?res=9B0DE6D61F30F936A35757C0A961948260>.

157. GAO, *supra* note 79.

158. Martha Minow, *The Supreme Court, 1986 Term-Foreward: Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987).

159. *In re Adoption of Halloway*, 732 P.2d 962, 972 (Utah 1986).

160. U.N. Human Rights Council, *United Nations Declaration on the Rights of Indigenous Peoples*, art. 8, ¶ 1, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

among other things, the desire to bring Native Americans within the accepted, capitalist economic structure of the white majority.¹⁶¹ Many Native Americans remain outside that model today. American Indians and Alaska Natives participate in the labor force at a substantially lower rate than the total population.¹⁶² In 1999, more than twice as many American Indians and Alaska Natives lived below the official poverty level as the rest of the population.¹⁶³ This is especially troubling given that several states base a determination of “good cause” to depart from the Act’s adoptive preferences upon a judicially-determined, “best interests” analysis,¹⁶⁴ which “requires a subjective evaluation of a multitude of factors, many, if not all of which are imbued with the values of majority culture.”¹⁶⁵ It is critical to note two overarching principles: paternalism inspired the Indian boarding school movement and the misguided social workers who damaged so many lives, and paternalism can be just as damaging when it is done in hopes of giving an Indian child “greater opportunities” in a white home.

Lastly, it is highly unlikely that contact agreements will facilitate the kind of intensive socialization with the biological family and other tribal members necessary for Indian children to develop a healthy and integrated sense of their bicultural identity. A long-term study of 231 foster care adoptions revealed that the mean number of contacts between biological and adoptive families within open adoptions (including telephone calls and letters) was only three per year.¹⁶⁶ It is very doubtful that this kind of limited contact can achieve proper socialization among Native American adoptees. Even if parties were to negotiate for more frequent contact, adoptive families within mainstream culture may have little appreciation for their child’s dire need for bicultural socialization and thereby lack the motivation necessary to ensure that contact happens. As one scholar notes, “Anglo Americans feel no corresponding urgency to safeguard and cultivate their children’s bonds with their culture because the traditions of Anglo culture permeate majoritarian society in a way that Native values and traditions clearly do not.”¹⁶⁷ If adoptive parents fail to keep their obligations under a contact agreement, enforcement can be a real problem.¹⁶⁸ In Minnesota, for

161. HOXIE, *supra* note 42, at 240.

162. *Id.* at 11.

163. STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, *WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES* 14 (2006).

164. *See In re Interest of Bird Head*, 331 N.W.2d 785 (Neb. 1983); *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228 (Ariz. 1983); *In re N.L.*, 754 P.2d 863 (Okla. 1988).

165. *In re Custody of S.E.G.*, 521 N.W.2d 357, 363 (1994).

166. Karie M. Frasch, Devon Brooks, & Richard P. Barth, *Openness and Contact in Foster Care Adoptions: An Eight-Year Follow-Up*, 49 *FAM. REL.* 435, 439 (Oct. 2000).

167. Aamot-Snapp, *supra* note 15, at 1179.

168. Appell, *supra* note 20, at 35 (“One of the most difficult issues implicating adoption with contact is the proper response when the agreement is no longer working for one or more of the parties.”).

example, Indian tribes and extended family members—who are an essential part of Indian family relations—have no statutory authority to enter into or enforce contact agreements.¹⁶⁹In light of the foregoing reasons, it appears that any benefits from open adoption enforced by contact agreements would fail to help Native American children in contested adoptions.

V. CONCLUSION

It is difficult to imagine a situation in which an open adoption enforced by a contact agreement could supplant adoption within the preferences of ICWA without threatening an Indian child's wellbeing. Although risky to do so considering the already precarious position of Indian children, in the interests of facilitating compromise, there are five principles that should make for a successful contact agreement. First and most important, any discussions about contact agreements and deviation from ICWA's preferences should be initiated well before litigation is even considered and should be as inclusive and hospitable to extended family and other tribal members as possible. Second, the custody and visitation terms of the contact agreement should not be depended upon to initiate new relationships. A functional contact agreement would have no grand pretensions of generating communication between an Indian child and the relatives when his adoptive parents had never made an effort to contact him or her in the years before an agreement was reached. Third, the adoptive family should live within an easy commute from the adoptee's relatives and tribe. Bridging the divide between mainstream and Native culture will not be easy, and a fourteen-hour drive to see relatives will not make it any easier. Fourth, contact agreements should only be entered into in jurisdictions in which they are legally enforceable. Lastly, while pan-Indian cultural events like powwows are important, adoptive parents must recognize that these events can never replace intimate relationships with other Native Americans in developing a child's Indian identity.

Indeed, it would be far better if ICWA were enforced in the first place. By requiring foster care placements to conform with preferences very simi-

169. This is true unless the extended family members have lived with the child previously or have adopted the child previously. See *In re Adoption of Halloway*, 732 P.2d 962, 972 (Utah 1986); see also MINN. STAT. § 259.58 (1997) (“Adoptive parents and a birth relative or foster parents may enter an agreement regarding communication with or contact between an adopted minor, adoptive parents, and a birth relative or foster parents under this section. An agreement may be entered between: (1) adoptive parents and a birth parent; (2) adoptive parents and any other birth relative or foster parent with whom the child resided before being adopted; or (3) adoptive parents and any other birth relative if the child is adopted by a birth relative upon the death of both birth parents. For purposes of this section, ‘birth relative’ means a parent, stepparent, grandparent, brother, sister, uncle, or aunt of a minor adoptee. This relationship may be by blood, adoption, or marriage. For an Indian child, birth relative includes members of the extended family as defined by the law or custom of the Indian child's tribe or, in the absence of laws or custom, nieces, nephews, or first or second cousins, as provided in the Indian Child Welfare Act, United States Code, title 25, section 1903.”).

lar to adoptive preferences, ICWA lends itself toward desirable outcomes from the outset.¹⁷⁰ However, when adoption agencies and social workers fail to appreciate the ICWA, or worse yet, intentionally suppress the Indian identity of a child in hopes of avoiding the Act, ICWA also grants tribes substantial power to fight illicit placements. It is unfair to ask tribes to refrain from opposing adoptions outside of ICWA's preferences when their survival depends on the cultural awareness of their children. It is also unrealistic to expect judges to put a stop to such adoptions when doing so would mean that a judge is the one to pull children away from recognizable families within their own communities and deliver them to people with whom the judge is unfamiliar and maybe even hostile. If Indian foster children are going to survive the heightened demand for adoptees, ICWA must be followed early on in a child's life and applied consistently across jurisdictions. In order for this to happen, child welfare workers must be educated to understand that ICWA is a narrowly-tailored law that makes a thoughtful, well-reasoned determination of what is in the best interests of Indian children.

It is too early to know how Christian Good Bird will adjust to growing up in rural Minnesota, five hundred miles from his tribe's reservation. Christian's adoptive parents promised "to establish and maintain contact with [Christian's] Tribal culture and his extended family."¹⁷¹ Hopefully, the Hofers understand that Christian's "Tribal culture" and his extended family are one and the same and that real socialization with fellow tribal members is far and away the best tool to help him overcome the challenges he will face in developing his cultural identity. Since the Three Affiliated Tribes have no standing to enforce such a contract in Minnesota,¹⁷² it is up to the Hofers to determine whether conceding to Christian's adoption meant saying goodbye for now or goodbye forever.

170. 25 U.S.C. § 1915(b) (1978) ("Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with (i) a member of the Indian child's extended family; (ii) a foster home licensed, approved, or specified by the Indian child's tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.")

171. Cultural Connectedness Agreement, *supra* note 5.

172. MINN. STAT. § 259.58 (1997).

