

# THE VOICE OF THE INDIAN CHILD: STRENGTHENING THE INDIAN CHILD WELFARE ACT THROUGH CHILDREN'S PARTICIPATION

Barbara Atwood\*

*This Article explores the potential benefits and challenges of giving more prominence to the voice of the Indian child in ICWA proceedings, a topic that has received scant attention from scholars and courts. The Act itself authorizes the appointment of counsel for children and provides that state courts may consider the child's wishes as to placement. Moreover, international law and the laws of many Indian tribes within the United States recognize the child's right of participation. By including the perspectives of Indian children in the judicial calculus, state courts could affirm the dignity of each child through more individuated decision-making.*

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*"I draw all the time. I draw cartoons of my mother and father; my sister and grandmother; my best friend, Rowdy; and everybody else on the rez. I draw because words are too unpredictable. I draw because words are too limited. . . . So I draw because I want to talk to the world. And I want the world to pay attention to me."<sup>1</sup>*

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\* Mary Anne Richey Professor of Law, University of Arizona James E. Rogers College of Law. I am grateful to Rebecca Stahl and Izetta Chambers, both members of the graduating class of 2008, for skillful research assistance. I presented earlier versions of this Essay at a 2007 Summer Works in Progress colloquium at the James E. Rogers College of Law and at the North American Regional Conference of the International Society of Family Law in Vancouver, British Columbia, in June 2007, and received helpful comments in both of those venues.

1. SHERMAN ALEXIE, *THE ABSOLUTELY TRUE DIARY OF A PART-TIME INDIAN* 5–6 (2007). In Alexie's novel, the narrator is a Spokane teenager whose speech impediment makes him the brunt of jokes on the Spokane Indian Reservation. He has a fierce desire to

## INTRODUCTION

The Indian Child Welfare Act (“ICWA” or “Act”),<sup>2</sup> a response to the wide-scale separation of American Indian children from their families and tribes, has now been on the books for thirty years.<sup>3</sup> The positive results of the Act are many, including greater respect for tribal authority over the placement of Indian children and an expansion of tribal family preservation programs.<sup>4</sup> Moreover, while Indian children are still removed from their homes in disproportionately higher numbers than non-Indian children,<sup>5</sup> the rate of removal has decreased as has the rate of placement with non-Indian caregivers.<sup>6</sup> Nevertheless, the policies underlying the Act remain deeply controversial.<sup>7</sup>

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find a better life, but when he finally does leave to attend a private school, the reservation continues to tug at him emotionally and spiritually.

2. Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901–1934 (2000)). This Essay uses the term “Indian child” as it is defined in the Act, *see infra* note 31, but the concept of Indian tribal identity is much more fluid for indigenous peoples than the federal definitions. From the indigenous perspective, identity as a nation or tribe may derive from shared language or religion, custom and rituals, kinship or clan, and ties to specific land. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 136 (Nell Jessup Newton ed., 2005); Margo S. Brownell, Note, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275 (2001). Despite its colonialist origins, I prefer the term “Indian” rather than “Native American” because it is the nomenclature, along with tribal affiliation, most commonly used by Indian people themselves.

3. Numerous proposals to amend the Act have been introduced in Congress over the years, but none has been enacted to date. For the most recent bill, see Indian Child Welfare Act Amendments of 2003, H.R. 2750, 108th Cong. (2003) (expanding application of Act, clarifying notice rights of tribes and Indian parents, requiring compliance reviews, and otherwise strengthening enforcement tools of Act).

4. *See* B.J. JONES, THE INDIAN CHILD WELFARE ACT HANDBOOK: A LEGAL GUIDE TO THE CUSTODY AND ADOPTION OF NATIVE AMERICAN CHILDREN 109–11 (1995) (reporting that ICWA has strengthened tribal courts, fostered state-tribal cooperation, and led to greater use of traditional forms of dispute resolution); Terry A. Cross, Kathleen A. Earle & David Simmons, *Child Abuse and Neglect in Indian Country: Policy Issues*, 81 FAM. SOC’Y 49, 53–58 (2000) (lauding ICWA for having returned responsibility for child welfare to tribes but emphasizing need for greater funding).

5. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 1 (2005) (reporting that in 2003, American Indian children represented about 3% of total number of children in foster care in United States but only 1.8% of total population under age of 18). The GAO Study also revealed that in five states, at least one-quarter of the foster care population was American Indian. *Id.* at 13 tbl.3.

6. *See* Gordon E. Limb, Toni Chance & Eddie F. Brown, *An Empirical Examination of the Indian Child Welfare Act and Its Impact on Cultural and Familial Preservation for American Indian Children*, 28 CHILD ABUSE & NEGLECT 1279, 1285 (2004) (noting in study of open ICWA cases in Arizona in 2001 that 83% of children in foster care or pre-adoptive homes were placed within ICWA preferences); Ann E. MacEachron, Nora S. Gustavsson, Suzanne Cross & Allison Lewis, *The Effectiveness of the Indian Child Welfare Act of 1978*, 70 SOC. SERV. REV. 451, 457 (1996) (finding that average adoption rate of American Indian children decreased 93% between 1975 and 1986, and foster care placement decreased 31% nationally). According to the GAO Study, Indian

One of the key criticisms of the Act is that it objectifies Indian children as tribal “resources” and mandates certain jurisdictional and placement outcomes that benefit tribes without regard to children’s interests. Critics argue that Congress ignored the socio-economic ills that continue to ravage American Indian communities and instead fashioned a cheap fix by increasing tribal power over child welfare matters and providing placement criteria for the adoption and foster care of Indian children that serve tribal goals.<sup>8</sup> Similarly, the view that the Act requires wooden preferences for tribal placements that disregard children’s unique circumstances seems to drive state court resistance. As a result, some courts have relied on ill-founded doctrines that permit them to avoid the Act altogether<sup>9</sup> or to refuse transfers of ICWA proceedings to tribal courts by prematurely assessing children’s interests.<sup>10</sup>

I agree that the federal government needs to devote significantly more resources to reservations and tribal communities, both for family preservation services and tribal child welfare programs. A shortage of Indian foster homes is the result, in part, of inadequate or non-existent federal funding.<sup>11</sup> Although their

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children are now more likely to leave foster care for permanent guardianships than are other population groups. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 5, at 4. Few empirical studies on the effectiveness of ICWA are available, in part because many states fail to maintain accurate records tracking cases to which ICWA applies. See *id.* at 4–5.

7. For a discussion of state court responses to ICWA, see Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002); B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. Rev. 395 (1997); Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419 (1998).

8. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 497–99 (2004); Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 NOTRE DAME J.L. ETHICS & PUB. POL’Y 543, 546–47 (1996). Even supporters of ICWA have noted that the Act does little to remedy the underlying causes of poverty, family violence, and substance abuse within Indian communities. See, e.g., JONES, *supra* note 4, at 111–12.

9. The “existing Indian family exception,” for example, is a judge-made exception to the Act that has no statutory basis and is contradicted by the Act’s legislative history. For an excellent review of this doctrine, see *In re Vincent M.*, 59 Cal. Rptr. 3d 321 (Ct. App. 2007) (rejecting arguments that existing Indian family exception is required as matter of constitutional law or policy). Several highly publicized adoption cases have prompted proposals to limit the scope of the Act. See, e.g., H.R. 3275, 104th Cong. (1996) (providing that ICWA would not apply to child whose Indian parent did not maintain social, cultural, or political affiliation with tribe).

10. See, e.g., *In re Maricopa County Juvenile Action No. JS-8287*, 828 P.2d 1245 (Ariz. Ct. App. 1991). The use of a “best interests” standard for denying transfer to tribal court has been soundly criticized. See JONES, *supra* note 4, at 40–41.

11. Cross et al., *supra* note 4, at 53–58 (criticizing failure of Congress to authorize funding for tribal juvenile courts and child welfare infrastructure). The National Indian Child Welfare Association (“NICWA”) has been a consistent advocate for greater funding to support tribal child welfare programs. For a description of NICWA’s support for increases in tribal foster care funding, see Nat’l Indian Child Welfare Ass’n, *Legislation – Government Affairs and Advocacy*, <http://nicwa.org/legislation/> (last visited Nov. 20, 2007)

economic status is improving, most reservations and Indian communities still show markedly high rates of poverty, unemployment, crime, and substance abuse.<sup>12</sup> At the same time, I disagree with those who condemn ICWA as a misguided use of children to serve tribal ends. When an Indian tribe achieves vitality and respect as a sovereign, the tribe's members, including children, stand to benefit. The Act is an essential piece of the overall federal policy of tribal self-determination, and growth in de facto tribal sovereignty correlates strongly with a tribe's economic well-being.<sup>13</sup> Moreover, I have argued elsewhere that the Act's procedural and substantive provisions should be read to permit state courts to bring "a multidimensional, situated interpretation to the goal of advancing the interests of individual Indian children."<sup>14</sup>

This Essay focuses on a related question: to what extent Indian children themselves should have a voice in ICWA proceedings.<sup>15</sup> The Act and the non-binding Bureau of Indian Affairs Guidelines ("BIA Guidelines")<sup>16</sup> acknowledge a role for children's wishes, but the reported case law often either ignores the child's views or accepts a one-dimensional representation of the child's perspective.<sup>17</sup> Likewise, scholars have not explored the possible advantages of giving children a meaningful role in ICWA dispute resolution.<sup>18</sup> A robust literature already exists on children's voice, and a focus on the voice of the Indian child implicates familiar

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(promoting the Tribal Foster Care and Adoption Access Act of 2007, S. 1956, 110th Cong. (2007)).

12. See generally HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE STATE OF THE NATIVE NATIONS: CONDITIONS UNDER U.S. POLICIES OF SELF-DETERMINATION 220–22, 238–40 (2008) [hereinafter HARVARD PROJECT] (reporting stark socio-economic problems among American Indian populations, including high rates of domestic violence, infant mortality, suicide, alcoholism, homicide, and deep poverty); Cross et al., *supra* note 4, at 52–53 (same).

13. See HARVARD PROJECT, *supra* note 12, at 121–39 (presenting evidence that improvements in de facto tribal sovereignty correlate strongly with successful economic development); Charles Wilkinson, "Peoples Distinct from Others": *The Making of Modern Indian Law*, 2006 UTAH L. REV. 379, 380 (describing "stunning" achievements by Indian tribes in expanding tribal legal institutions and political power since advent of federal policy of tribal self-determination).

14. Atwood, *supra* note 7, at 663. In that article, I suggest that courts impose a heightened but not impossible burden of proof on parties seeking to show good cause to diverge from the Act's placement preferences, proposing a "clear and convincing evidence" standard. *Id.* at 661–67. At least one court has adopted that suggestion. See *In re Adoption of Baby Girl B.*, 67 P.3d 359, 374 (Okla. Civ. App. 2003).

15. Although tribal court decision-making may also benefit from providing greater prominence to the child's views in disputes over the child's placement, the decision to involve children in court proceedings should be made by individual tribes according to each tribe's cultural values. Significantly, several American Indian tribes have embraced a child's right of participation. See *infra* notes 88–99 and accompanying text.

16. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979) [hereinafter BIA Guidelines].

17. See cases discussed *infra* at notes 68–72, 109–112, 144–150.

18. For the leading practitioner's guide to ICWA, see JONES, *supra* note 4. That comprehensive text focuses on the congressional goals underlying the Act and technical questions of statutory construction but does not explore the participation rights of Indian children in any depth.

questions of children's capacity, dignity, and vulnerability.<sup>19</sup> The Indian child's voice, however, also raises unique issues deriving from the child's status as a member of a sovereign tribe and indigenous cultural community. In offering some beginning thoughts on the voice of the Indian child, I emphasize that the "Indian child" is not a monolithic symbol but a young person who has an affiliation, sometimes unrealized, with a particular tribe and who has an evolving perspective on his or her own identity.<sup>20</sup>

Recognizing a right of participation, either directly or through a representative, for Indian children has potential far-reaching benefits. Many of the children whose placements are governed by the Act are old enough to formulate and express a viewpoint on issues impacting their well-being.<sup>21</sup> Giving more deference to the child's experience might diffuse the tensions within an ICWA placement dispute or clarify a path to resolution for the participants and the judge. Courts might be less likely to frame the disposition as an all-or-nothing proposition in terms of placement options and be more open to compromises that serve multiple interests. At the very least, a judge would act with greater awareness of the Indian child's worldview and the impact of his or her rulings on the child's reality. Moreover, a growing body of empirical work suggests not only that

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19. See, e.g., HEARING THE VOICES OF CHILDREN: SOCIAL POLICY FOR A NEW CENTURY (C. Hallett & A. Prout eds., 2003) (examining value of greater voice for children in wide array of contexts); Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895 (1999) (exploring child's limited capacity to understand lawyer-client relationship); Carol Smart, *From Children's Shoes to Children's Voices*, 40 FAM. CT. REV. 307 (2002) (arguing that adults must stand in children's shoes and understand their diverse perspectives in order to hear their voices); Barbara Bennett Woodhouse, *Talking About Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105 (2002) (advocating ways of shaping decision-making processes to include children and accommodate their special needs). For divergent views on children's rights, compare MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS (2005), urging caution in children's rights movements because of danger that "rights" may disserve children's interests, with JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006), recommending greater recognition of children's rights in connection with state decision-making about their personal relationships.

20. For a collection of childhood stories, poems, and narratives from various North American tribes that depict the struggles of displaced Indian children, see CHILDREN OF THE DRAGONFLY: NATIVE AMERICAN VOICES ON CHILD CUSTODY AND EDUCATION (Robert Bensen ed., 2001). In the Zuni story that forms the central metaphor of the book, a mythical Dragonfly helps two abandoned children reclaim a culture that had been taken from them. The children, in turn, are a renewed source of strength for their people and "bring the spirit and present world together again in growth and harmony." *Id.* at 4.

21. According to an ICWA compliance study in the state of Arizona, for example, the mean age of children involved in ICWA proceedings was 11.6 years, and a majority of the children were teenagers. EDDIE F. BROWN ET AL., CASEY FAMILY PROGRAMS & NAT'L INDIAN CHILD WELFARE ASS'N, THE INDIAN CHILD WELFARE ACT: AN EXAMINATION OF STATE COMPLIANCE IN ARIZONA 57 (2002), available at [http://www.casey.org/NR/rdonlyres/F44CFF66-68F3-45C1-B0DF-83504D689B65/116/casey\\_nicwa\\_icwa\\_arizona.pdf](http://www.casey.org/NR/rdonlyres/F44CFF66-68F3-45C1-B0DF-83504D689B65/116/casey_nicwa_icwa_arizona.pdf). Nationally, the mean age of all children entering out of home care in 2005 was 8.2 years of age. U.S. DEP'T OF HEALTH & HUM. SERV'S, ADMIN. FOR CHILD. & FAMS., AFCARS REP. FOR FY 2005 (2006), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report13.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.htm).

children in child welfare proceedings want their perspectives to be considered by the decision-maker, but that they suffer a loss of self-esteem when their views are never taken into account.<sup>22</sup> Individuated decision-making that takes account of the unique voice of each child might affirm the child's sense of dignity and hope.<sup>23</sup>

Part I begins with a brief overview of ICWA's substantive and procedural framework. It then identifies specific textual provisions in ICWA or accompanying BIA Guidelines that recognize the potential for children's participation. Because children typically can participate only through a representative, I also discuss statutory and constitutional foundations for a child's right to representation in child protective proceedings. Part II describes a child's right of participation under the United Nations Convention on the Rights of the Child ("CRC")<sup>24</sup> and explores selected tribal approaches to children's participation in court proceedings and family preservation programs. Although this Essay focuses on state court proceedings, Part II shows that a norm of children's participation is consistent with international law as well as tribal practices. Finally, Part III addresses the potential consequences of expanded participation by children in ICWA cases, including the challenges faced by children's representatives. A representative must ascertain and convey the child's perspective—a complex task that may be compounded by cultural differences—while avoiding the very biases that triggered ICWA itself.<sup>25</sup>

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22. See, e.g., PEW COMM'N ON CHILDREN IN FOSTER CARE, *FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE* 42 (2004), available at <http://pewfostercare.org/research/docs/FinalReport.pdf> (encouraging greater participation by foster children in court proceedings); Judy Cashmore, *Promoting the Participation of Children and Young People in Care*, 26 CHILD ABUSE & NEGLECT 837 (2002) (reporting on studies of foster children from Britain, the United States, Australia, and New Zealand); Catherine J. Ross, *A Place at the Table: Creating Presence and Voice for Teenagers in Dependency Proceedings*, 6 NEV. L.J. 1362, 1372–73 (2006) (describing studies showing that foster children want voice in court). Cashmore emphasizes that “[p]articipation does not mean having the right to make the decision or determine the outcome, but it does mean being listened to and having one’s views taken seriously and treated with respect.” Cashmore, *supra*, at 838. Research indicates that children care more about their views being considered by decision-makers than whether their views are ultimately followed. See Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 660–62 (2003).

23. See, e.g., Kathryn Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CAL. L. REV. 319 (2007) (describing individuation of poor or oppressed children through filmed story-telling as a means of imbuing the children with hope).

24. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/Res/44/25 (Nov. 20, 1989) [hereinafter Convention].

25. In reported ICWA cases in which children are represented by guardians ad litem or attorneys, the representatives frequently resist transfer to tribal court. See, e.g., *In re M.M.*, 65 Cal. Rptr. 3d 273 (Ct. App. 2007); *In re Welfare of Children of R.M.B.*, 735 N.W.2d 348 (Minn. Ct. App. 2007); *People ex rel. T.I.*, 707 N.W.2d 826 (S.D. 2005). Similarly, children's representatives often argue against ICWA's preferred placements. See, e.g., *Seminole Tribe of Fla. v. Dep't of Children & Families*, 959 So. 2d 761 (Fla. Dist. Ct. App. 2007); *C.L. v. P.C.S.*, 17 P.3d 769 (Alaska 2001). Indian children themselves, moreover, sometimes seek a placement that is at odds with ICWA's goals. See, e.g., *In re Barbara R.*, 40 Cal. Rptr. 3d 687 (Ct. App. 2006); *infra* notes 144–50 and accompanying text.

Nevertheless, I suggest that giving Indian youths a greater voice in disputes about their placements for the future would enrich the decision-makers' understanding of the competing interests involved and produce greater respect among participants for the decisions themselves. In effect, the Indian child could be transformed from object to subject.

### I. THE CHILD'S RIGHT OF PARTICIPATION UNDER ICWA AND OTHER FEDERAL LAW

Through ICWA, Congress addressed a long history of destructive federal and state governmental practices that decimated the American Indian family and threatened the very existence of Indian tribes.<sup>26</sup> Hearings before Congress leading up to the 1978 Act told a tragic picture of the forcible removal of Indian children from their families to non-Indian homes and institutions.<sup>27</sup> From the BIA-run boarding schools beginning in the nineteenth century<sup>28</sup> to the Indian Adoption Project of the mid-twentieth century,<sup>29</sup> the history is replete with practices of misguided paternalism, ethnocentrism, and outright racism. In the findings that introduce ICWA, Congress recognized not only that Indian children themselves were being harmed by these practices, but also that the survival of Indian tribes was at stake.<sup>30</sup>

Due to the nature of the problem being addressed, Congress's approach was multi-pronged. The Act contains jurisdictional, procedural, and substantive provisions designed to strengthen the role of tribal courts in child welfare and adoption matters and to protect the rights of Indian parents, tribes, and children. In brief, ICWA provides for exclusive tribal jurisdiction over child welfare and adoption proceedings involving Indian children<sup>31</sup> domiciled or residing on their

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26. As the House Report noted, "[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today." H.R. Rep. No. 95-1386, at 9 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.

27. *Id.* Surveys presented to Congress reported striking disparities in placement rates for Indian and non-Indian children, and the Association on American Indian Affairs reported that about 25–35% of all Indian children were separated from their families and placed in foster homes, adoptive homes, or institutions. *Id.*

28. The BIA's network of off-reservation boarding schools was designed to "civilize" Indian children and eliminate the "barbarism" of their tribal communities, including the speaking of their Native languages. *See* COHEN, *supra* note 2, at 1356–57; VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 240–44 (1983).

29. Beginning in 1958, the Child Welfare League of America and the BIA collaborated to facilitate the adoption of Indian children by non-Indian families. *See* Joan Heifetz Hollinger, *Beyond the Best Interests of the Tribe: The Indian Child Welfare Act and the Adoption of Indian Children*, 66 U. DET. MERCY L. REV. 451, 454–56 (1989); Judith Graham, *Adoption Apology Too Late for Indians*, CHI. TRIB., May 7, 2001, at 1.

30. *See* 25 U.S.C. § 1901 (2000) (findings by Congress that Indian children are "vital to the continued existence and integrity of Indian tribes," that an "alarmingly high percentage of Indian families are broken up by . . . removal . . . of their children," and that "States . . . have often failed to recognize the essential tribal relations of Indian people").

31. The Act defines "Indian child" as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an

tribal reservation or who are wards of tribal court.<sup>32</sup> While the exclusive jurisdiction provision is an important affirmation of tribal authority over the domestic relations of reservation Indians,<sup>33</sup> a majority of Indian people today do not live on reservation or trust lands.<sup>34</sup> With levels of intermarriage between Indians and non-Indians exceeding fifty percent, it is not surprising that many ICWA cases concern children who claim Indian heritage through only one parent.<sup>35</sup> Of great practical significance, then, is the Act's provision for concurrent state court jurisdiction in cases involving Indian children with more attenuated reservation contacts.<sup>36</sup> Under 25 U.S.C. § 1911(b), a parent or tribe may request transfer to tribal court of a proceeding for foster care placement or termination of parental rights, and the court must grant the transfer unless the tribal court declines, a parent objects, or the court finds good cause to the contrary. Despite this "presumptive" tribal jurisdiction,<sup>37</sup> state courts continue to exercise

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Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4). This definition incorporates by reference tribal membership criteria, which vary considerably from tribe to tribe. Many tribes require a one-quarter blood quantum to be eligible for membership, but other degrees of required ancestry are common, and some have rejected blood quantum criteria altogether. See COHEN, *supra* note 2, at 173–75. The concept of Indian identity and the underlying tensions between a racial and political characterization are beyond the scope of this Essay. See Carole Goldberg, *Descent Into Race*, 49 U.C.L.A. L. REV. 1373 (2002); L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702 (2001).

32. 25 U.S.C. § 1911(a). In its only ICWA decision to date, the United States Supreme Court held that an Indian mother domiciled on a reservation could not defeat the Act's exclusive jurisdiction provision by leaving the reservation to give birth and placing her infants for adoption. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 52–53 (1989).

33. Shortly before the enactment of ICWA, the Supreme Court recognized the exclusive jurisdiction of tribal courts over family disputes of reservation members. *Fisher v. Dist. Court*, 424 U.S. 382, 389 (1976) (per curiam).

34. According to the 2000 Census, which for the first time permitted respondents to select more than one race, 4.3 million people self-identified as American Indian or Alaska Native, either exclusively or in combination with one or more other races. STELLA U. OGUNWOLE, U.S. CENSUS BUREAU, *WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES 1* (2006), available at <http://www.census.gov/prod/2006pubs/censr-28.pdf>. Of that group, almost two-thirds lived outside reservations, Alaska Native villages, or other trust lands. *Id.* at 14. Similarly, in 2000, only 29% of all American Indian and Alaska Native children lived on Indian lands. C. MATTHEW SNIPP, POPULATION REFERENCE BUREAU, *AMERICAN INDIAN AND ALASKA NATIVE CHILDREN: RESULTS FROM THE 2000 CENSUS 9* (2005), available at <http://www.prb.org/pdf05/AmericanIndianAlaskaChildren.pdf>.

35. See SNIPP, *supra* note 34, at 7. Snipp reports that 840,000 children were identified as exclusively American Indian or Alaska Native in the 2000 Census, but "1.4 million children . . . were identified as American Indian or Alaska Native alone or in combination with some other race." *Id.*

36. 25 U.S.C. § 1911(b).

37. The Supreme Court characterized this provision as giving rise to "presumptive tribal jurisdiction" in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. at 36, but the absolute parental veto means that the presumptive nature of tribal jurisdiction operates only if neither parent objects. See, e.g., *In re Larissa G.*, 51 Cal. Rptr. 2d 16, 22 (Ct. App. 1996) (holding parent has unconditional veto in light of congressional



jurisdiction in high numbers.<sup>38</sup> In so doing, they often must resolve heated battles over the placement of Indian children, battles in which a child's tribal identity, physical and emotional well-being, and sense of family seemingly hang in the balance.

The Act provides a range of procedural protections for tribes, parents, and Indian custodians, including a right to notice of involuntary proceedings,<sup>39</sup> a right to intervene in such proceedings,<sup>40</sup> and a right to court-appointed counsel.<sup>41</sup> In an effort to stem the abuses of state child welfare workers and courts, Congress imposed heightened burdens of proof before state courts can order the removal of Indian children from their homes. Foster care placements must be based on "clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."<sup>42</sup> For parental rights terminations, the Act requires the same showing of serious harm to the child but imposes the highest burden of proof—beyond a reasonable doubt.<sup>43</sup> Finally, in 25 U.S.C. § 1915, the key substantive provision of the Act, Congress provided mandatory placement preferences that state tribunals must follow absent good cause to the contrary. For adoptions, state courts must give preference to a member of the child's extended family, other members of the child's tribe, or other Indian families;<sup>44</sup> a similar but slightly different set of preferences is mandated for foster placements.<sup>45</sup>

The Act explicitly addresses the participation of the Indian child—either directly or through a representative—in two separate contexts. First, under § 1912(b), governing removal, placement, or termination proceedings, the judge

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policy of balancing tribe's interest with parents' interests when child is not domiciled on reservation).

38. Although the one-way transfer provision is an important avenue for tribal court authority in cases involving non-domiciliary children, studies suggest that tribes often prefer to intervene in concurrent jurisdiction cases rather than seek a transfer to their own courts. See B.J. JONES ET AL., CASEY FAMILY PROGRAMS & NAT'L INDIAN CHILD WELFARE ASS'N, INDIAN CHILD WELFARE ACT: A PILOT STUDY OF COMPLIANCE IN NORTH DAKOTA 42–44 (2000).

39. 25 U.S.C. § 1912(a) (parent or Indian custodian and tribe entitled to notice at least ten days before foster care placement or termination of parental rights).

40. 25 U.S.C. § 1911(c) (Indian custodian and tribe have right to intervene at any time in any state court proceeding for foster care placement or termination of parental rights).

41. 25 U.S.C. § 1912(b) (parent or Indian custodian has right to counsel in any "removal, placement, or termination proceeding").

42. 25 U.S.C. § 1912(e).

43. 25 U.S.C. § 1912(f).

44. 25 U.S.C. § 1915(a).

45. For foster care placements, the Act requires state courts to follow the following preferences absent good cause to the contrary: extended family members, a foster home approved by the tribe, an Indian foster home approved by an authorized non-Indian licensing authority, or an institution approved by a tribe. *Id.* § 1915(b). The Act also specifies that foster care placements shall be in the least restrictive setting that most approximates a family and in which the child's special needs, if any, can be met, and that the child shall be placed in close proximity to his or her home. *Id.*

may appoint a separate lawyer for the Indian child as a matter of discretion, presumably to be paid for from public funds, “upon a finding that such appointment is in the best interest of the child.”<sup>46</sup> While the BIA Guidelines devote significant attention to the parents’ right to counsel, they unfortunately do not provide any guidance on when the judge should appoint counsel for the child or on the role of a child’s counsel, once appointed.<sup>47</sup> As explained below, Indian children in state court abuse and neglect proceedings fall within the ambit of another federal law mandating the appointment of guardians ad litem, without regard to § 1912(b).<sup>48</sup>

The Guidelines, however, do acknowledge the child’s possible participation in another context. According to the Guidelines, good cause not to transfer a case from state to tribal court exists if any of several specified circumstances exist, including when the “*Indian child is over twelve years of age and objects to the transfer.*”<sup>49</sup> The Guidelines explain that teenagers’ “judgment has developed to the extent that their views ought to be taken into account in making decisions about their lives,”<sup>50</sup> but few cases have relied on a child’s objection to deny transfer.<sup>51</sup>

Significantly, the Act also acknowledges the child’s voice in conjunction with the placement preferences established under § 1915. Although the Act prioritizes family and tribal placements for Indian children and requires state courts to find good cause to diverge from the preferences, it recognizes a role for individual choice: section 1915(c) expressly states that “[w]here appropriate, the preference of the Indian child or parent shall be considered.”<sup>52</sup> Although the statute uses the mandatory “shall,” the conditional “where appropriate” renders the provision highly discretionary. Congressional intent is not clear from the statutory phrasing, but the BIA Guidelines treat the child’s wishes as a potential basis for finding good cause to diverge from the statutory placement preferences.<sup>53</sup> The Guidelines explain that “use of the term ‘good cause’ was designed to provide state courts with flexibility in determining the disposition of a placement

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46. 25 U.S.C. § 1912(b).

47. See BIA Guidelines, *supra* note 16, at 67,588 (explaining requirements of notice to parents or Indian custodians).

48. See *infra* notes 57–63.

49. BIA Guidelines, *supra* note 16, at 67,591 (emphasis added). Interestingly, before enactment of ICWA, the BIA proposed that the Act itself should expressly provide that the objection of an Indian child over the age of twelve would be good cause not to transfer, but Congress chose not to include that language in the black letter of § 1912. See H.R. Rep. No. 95-1386, at 32 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530, 7554.

50. BIA Guidelines, *supra* note 16, at 67,591.

51. See, e.g., *In re D.A.C.*, 933 P.2d 993, 997 (Utah Ct. App. 1997) (denying transfer based on various factors, including objection of teenaged children); *In re Cody S.*, No. 99-2936, 2000 WL 1184586, at \*6–7 (Wis. Ct. App. Aug. 22, 2000) (taking into account child’s wishes in denying motion to transfer, but child seemed not to understand concept of transfer jurisdiction).

52. 25 U.S.C. §1915(c) (2000) (also providing that Indian child’s tribe may establish different order of preference by resolution).

53. BIA Guidelines, *supra* note 16, at 67,594.

proceeding.”<sup>54</sup> Under the Guidelines, relevant considerations include, among others, “[t]he request of the biological parents *or the child when the child is of sufficient age*.”<sup>55</sup> The Guidelines do not expand on the requirement that the child be of “sufficient age” but do note the practicality of considering the child’s viewpoint.<sup>56</sup> The opaque statutory reference and the Guidelines together leave courts to decide on a case-by-case basis whether a particular Indian child’s request should be a significant factor in the placement decision.

A separate federal statute mandates child representation in involuntary child welfare proceedings under ICWA. The Child Abuse Prevention and Treatment Act (“CAPTA”),<sup>57</sup> enacted in 1974 as an amendment to the Social Security Act,<sup>58</sup> has driven state law reform by requiring states to provide certain procedural protections for children as a condition of receiving federal funding for child abuse prevention and treatment programs. Under CAPTA, as it currently reads, every child in an abuse and neglect proceeding in state court is entitled to a court-appointed “guardian ad litem.”<sup>59</sup> The guardian ad litem, “who may be an attorney or court appointed special advocate,” must receive appropriate training and has a statutorily-assigned duty to investigate the case and “make recommendations to the court concerning the best interests of the child.”<sup>60</sup> Indian children in state court abuse and neglect proceedings, like other similarly situated children across the United States, receive the benefit of this federal requirement wholly apart from the provisions of ICWA.<sup>61</sup> Thus, in involuntary child welfare proceedings triggered by allegations of parental misconduct, Indian children are entitled to a court-appointed guardian under CAPTA.<sup>62</sup> Evincing a growing

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54. *Id.* at 67,584.

55. *Id.* (emphasis added).

56. The BIA Guidelines state that “[t]he wishes of an older child are important in making an effective placement.” *Id.*

57. 42 U.S.C. §§ 5101–5107 (2000 & Supp. 2005).

58. Pub. L. No. 93-247, § 4(B)(3), 88 Stat. 4 (1974).

59. 42 U.S.C. § 5106a(b)(2)(A)(xiii).

60. *Id.* § 5106a(b)(2)(A)(xiii), (xiii)(II). The statutory language provides in part:

[T]hat in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings . . .

*Id.* § 5106a(b)(2)(A)(xiii).

61. All fifty states now receive CAPTA funding, with Indiana having been the last to come into compliance with the Act in 2005. *See Administration For Children and Families Child Abuse Prevention and Treatment Funds to be Available for Indiana*, US FED. NEWS, Oct. 5, 2005, available at 2005 WLNR 16395609. Whether compliance with the CAPTA mandate is actually occurring is a separate question. *See* Gerard F. Glynn, *The Child’s Representation Under CAPTA: It is Time for Enforcement*, 6 NEV. L.J. 1250, 1253–57 (2006) (reporting that many states fail to provide adequate representation for children).

62. In addition to federal law, state law also may require courts to consider children’s perspectives in child protective proceedings, including those involving Indian children. *See, e.g.*, CAL. WELF. & INST. CODE § 366.26(h)(1) (West 2007) (requiring court to consider child’s wishes before ordering termination of parental rights); OHIO REV. CODE

consensus that children in out-of-home care should have the chance to express their views, a new federal law has independently imposed a requirement on states, as a condition of federal funding, to consult “in an age-appropriate manner” with foster children who are the subject of permanency hearings.<sup>63</sup> Voluntary proceedings under ICWA, on the other hand, such as the voluntary relinquishment of an Indian child for adoption, fall outside these conditional spending mandates. In those cases, the appointment of a representative for the child remains a matter of judicial discretion unless otherwise mandated by state law.<sup>64</sup>

Constitutional law may provide a distinct source of representational rights for Indian children involved in abuse and neglect proceedings. Building on the *Mathews v. Eldridge*<sup>65</sup> framework for assessing procedural due process rights, child advocates have argued that children in abuse and neglect cases have a right to participate and be represented by counsel.<sup>66</sup> Children have profound liberty interests in their own safety, health, and well-being as well as interests in maintaining the integrity of the family unit and protecting their family relationships. An erroneous decision to place a child in foster care will harm the child by the removal itself, the out-of-home living experience, and the consequent disruption in family relationships. An erroneous decision to terminate parental rights may unnecessarily sever the child’s ties with his or her parents and birth families. Conversely, an erroneous decision not to remove a child may place the child at risk of harm from ongoing abuse or neglect. Similarly, an erroneous

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ANN. § 2151.414(D)(2) (West 2007) (requiring court to consider child’s wishes before issuing permanent custody order in child protection proceeding).

63. See Child and Family Services Improvement Act of 2006, Pub. L. No. 109-288, § 10, 120 Stat. 1233, 1255 (codified as amended at 42 U.S.C. § 675(5)(C)).

64. Although a few states require the appointment of an attorney or guardian ad litem for a child in contested adoptions and paternity proceedings, most states leave the matter to judicial discretion. See generally Barbara Ann Atwood, *Representing Children: The Ongoing Search for Clear and Workable Standards*, 19 J. AM. ACAD. MATRIM. LAW. 183, 191–92 (2005).

65. 424 U.S. 319 (1976). In *Mathews*, the Supreme Court announced a three-part balancing test for resolving due process claims that takes into account the private interests at stake, the risk of error and value of additional safeguards, and the government’s interest. *Id.* at 334–35.

66. See Kenny A. *ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (holding that foster children have right to counsel under state statutory law and state constitution’s due process guarantee). The ABA has long supported a requirement for the appointment of counsel for children in dependency cases. See Am. Bar Ass’n, *Proposed Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*, 29 FAM. L.Q. 375, 375 (1995) (“All children subject to court proceedings involving allegations of child abuse and neglect should have legal representation as long as the court’s jurisdiction continues.”); INST. OF JUD. ADMIN. & AM. BAR ASS’N, JUVENILE JUSTICE 74 (Robert E. Shepherd, Jr., ed. 1996) (calling for independent representation for children in proceedings affecting their status or custody). Professor Guggenheim, on the other hand, questions the benefits of children’s rights advocacy and argues that children’s attorneys too often serve the interests of the State rather than their clients. See GUGGENHEIM, *supra* note 19, at 174–212. For a defense of children’s rights advocacy, see Howard Davidson, *Children’s Rights and American Law: A Response to What’s Wrong with Children’s Rights*, 20 EMORY INT’L L. REV. 69 (2006).

decision not to terminate parental rights may expose the child to extended impermanency in foster care.<sup>67</sup>

The due process claim to a right to counsel has great power in the context of ICWA placements. A foster care placement, termination of parental rights, or adoption may determine not only a child's geographic location and day-to-day care but also the child's cultural identity and whether the child will have ongoing contact with extended family members and his or her tribe. In *In re Adoption of Sara J.*, for example, the Alaska Supreme Court affirmed a trial court order granting the adoption of three Alaskan Native children by a non-Native foster mother who lived outside the children's Yup'ik village.<sup>68</sup> The children's interests favoring adoption included the emotional benefits of remaining with a stable caregiver and the advantages of receiving medical care and educational services for their special needs. On the other hand, adoption would separate the children "from the life blood of their culture."<sup>69</sup> Placement with extended family members in the children's Native village would sustain the children's Yup'ik heritage and allow them to grow up in the supportive environment of their home and village community.<sup>70</sup> Despite the potential value of the children's perspectives, the children in *Sara J.* were not represented on appeal, and in its lengthy opinion, the state supreme court referred only once to testimony about the children's wishes.<sup>71</sup> In cases such as these, the stakes could not be higher for the Indian child, and the due process arguments for a right to counsel seem particularly compelling.<sup>72</sup>

## II. CHILDREN'S RIGHT OF PARTICIPATION UNDER INTERNATIONAL AND TRIBAL LAW

In international law, the Indian or indigenous child's right of participation finds its strongest support in the United Nations Convention on the Rights of the Child ("CRC").<sup>73</sup> While not binding within the United States, the CRC reflects a

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67. In light of the child's interests and the dynamics within the child welfare system, the federal court in *Kenny A.* concluded that "only the appointment of counsel can effectively mitigate the risk of significant errors in deprivation and [parental rights termination] proceedings." 356 F. Supp. 2d at 1361.

68. 123 P.3d 1017, 1020 (Alaska 2005).

69. *Id.* at 1029 (quoting the argument of the children's Tribe).

70. The court affirmed the adoption decree, finding that there was good cause to deviate from the placement preferences of ICWA in light of the children's special needs, the established bonds with their foster mother, and the foster mother's willingness to maintain regular contact with the tribe. *Id.* at 1029–33.

71. *Id.* at 1029 (noting that foster mother testified that one child told her he wanted to be adopted by her).

72. Interestingly, William Byler, Executive Director of the Association on American Indian Affairs and a prominent supporter of ICWA, testified in 1974 that Congress should "[s]trengthen due process by extending to Indian children and their parents the right to counsel in custody cases." *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 29 (1974). A later version of ICWA would have required the appointment of counsel for the child. See S. 1214, 95th Cong. § 101(d) (1977).

73. See Convention, *supra* note 24. Among the UN member states, only two hold-outs remain—Somalia and the United States. Somalia signed the Convention in May

consensus of world opinion regarding children's rights, and at least a few American courts have declared it to contain core principles of customary international law.<sup>74</sup> The Convention extends several key human rights to children: the right of participation,<sup>75</sup> the right to be free from discrimination,<sup>76</sup> and the right to cultural identity.<sup>77</sup> The CRC also recognizes the unique dependency of children on the adult world for protection and guidance, and it imposes duties on States to protect the best interests of the child<sup>78</sup> and to ensure the child's security, survival, and development.<sup>79</sup>

Article 12 of the Convention is the central provision protecting the child's right of participation. That Article requires states to provide children who are capable of forming their own views "the right to express those views freely in all matters affecting the child, the views . . . being given due weight in accordance with the age and maturity of the child." The Article goes on to require that a child be provided "the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative."<sup>80</sup>

The almost universal ratification of the CRC by the nations of the world signifies a powerful consensus that children have a recognized human right to express their views freely in custody and child welfare proceedings and to have their views considered by the decision-maker.<sup>81</sup> Where a child's right to personal

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2002 but has not yet ratified it. Former President Clinton signed the Convention on behalf of the United States in 1995, but the Senate has not yet ratified it. For a current listing of signatories and States Parties to the CRC, along with a comprehensive explanation of the CRC and its background, see <http://www.unicef.org/crc>.

74. The United States Supreme Court cited the CRC in *Roper v. Simmons* to show the strength of world opinion against the juvenile death penalty. 543 U.S. 552, 623 (2005). A few lower courts have held that particular norms within the CRC have become so accepted worldwide as to be considered customary international law and therefore binding on American courts. *See, e.g.,* Beharry v. Reno, 183 F. Supp. 2d 584, 600-03 (E.D.N.Y. 2002); *cf.* Batista v. Batista, No. FA 92 0059661, 1992 WL 156171, at \*6-7 (Conn. Super. Ct. June 18, 1992) (urging Spanish court in international custody dispute to give adolescent child right to be heard, in accordance with Article 12).

75. Convention, *supra* note 24, at Art. 12.

76. *Id.* at art. 2.

77. *Id.* at art. 30 (protecting right of indigenous children to cultural identity).

78. *Id.* at art. 3 ("In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.").

79. *Id.* at art. 6.

80. *Id.* at art. 12. Article 13 complements Article 12 by directing that children have the right to freedom of expression, including the right to seek, receive, and impart information. *See id.* at art. 13.

81. Efforts to monitor implementation of the CRC's participation principle have revealed a range of problems. Even in countries that have resources to meet the basic needs of children, there may be traditional or cultural attitudes that are hostile to children's rights. *See generally* Rebecca M. Stahl, Note, "Don't Forget About Me": Implementing Article 12 of the United Nations Convention on the Rights of the Child, 24 ARIZ. J. INT'L & COMP. LAW 803 (2008); Jean Koh Peters, *How Children are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 NEV. L.J. 966, 968-69 (2006) (noting that almost three-quarters

security is in apparent conflict with the right to be raised within the child's indigenous community, the individual right of participation in the decision-making process may provide a path to resolution.<sup>82</sup> In New Zealand, for example, advocates have argued that Maori children, who comprise almost half of the children in state care, should have a voice in child protection proceedings.<sup>83</sup> Former foster children in that country, as elsewhere, have complained that their voices were never included in the resolution of their cases.<sup>84</sup> Observers concerned with the plight of Maori children have hypothesized that if children were consulted and their views respected, "cultural dislocation" might be avoided.<sup>85</sup> Thus, even if children do not understand a particular culture's vision of family systems, a child's expression of a preference for family and familiar caregivers might influence authorities to affirmatively seek out placements within the indigenous community.<sup>86</sup> Moreover, while no other nation has taken the approach of ICWA in child welfare matters, there is growing support for the right of indigenous groups to resolve questions autonomously regarding the welfare of their children.<sup>87</sup>

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of children worldwide live in countries where CRC is not observed or evidence is inconclusive, despite CRC's widespread ratification).

82. Dr. Cynthia Cohen, who participated in the drafting of the CRC, cautions that international law, in its growing focus on the rights of indigenous peoples, must not lose sight of the need to protect individual human rights of indigenous children. Cynthia Price Cohen, *International Protection of the Rights of Indigenous Children*, in HUMAN RIGHTS OF INDIGENOUS PEOPLES 37-62 (Cynthia Price Cohen ed., 1998). Cohen fears that "in the rush to protect the rights of the indigenous group, the declarations [on the rights of indigenous peoples] will inadvertently treat indigenous children as tribal property." *Id.* at 38.

83. Nicola Atwool, *Participation in Decision-making: The Experience of New Zealand Children in Care*, 12 CHILD CARE IN PRAC. 259 (2006) (urging greater participation by Maori children in state care, including providing children with information about their cases and the means of expressing their viewpoints). According to Atwool, 45% of children in care in New Zealand are Maori, while only 21% of the general population of children identify as Maori. *Id.* at 260.

84. Cashmore, *supra* note 22, at 839. Children in care want to be informed and involved in processes that decide placements but they do not necessarily want to determine outcome. *See id.* at 838-39.

85. Atwool, *supra* note 83, at 265.

86. *See id.* at 265-66.

87. The autonomous tribal court systems of American Indian tribes, an essential foundation for ICWA, are not found in indigenous groups elsewhere. Nevertheless, indigenous peoples across the globe are being recognized as possessing a right of self-determination that includes responsibility for child welfare matters. *See, e.g.*, Australian Children and Young Persons Care and Protection Act of 1998, § 11-14 (Austl.) (affirming right of Aboriginal and Torres Strait Islander people to participate in protection and placement of their children and announcing placement preferences favoring family or kinship groups); Marie Connolly, *An Act of Empowerment: The Children, Young Persons and their Families Act (1989)*, 24 BRIT. J. SOC. WORK 87 (1994) (describing 1989 New Zealand law that emphasizes extended family responsibility for children and draws heavily from Maori traditions and kinship structure). The recently approved United Nations Declaration on the Rights of Indigenous Peoples recognizes "the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child . . ." G.A.

The right of participation embodied in Article 12 has surfaced in tribal law within the United States. The Supreme Court of the Navajo Nation, for example, drew upon both tribal common law and principles from the CRC to strengthen its conclusions regarding the child's role in an interparental custody contest. In *In re Custody of T.M.*, a teenaged child petitioned to intervene through counsel in a protracted and bitter custody dispute.<sup>88</sup> In the underlying action, the trial court had transferred primary custody of the boy to the father after finding that the mother had not complied with prior court orders. The child sought to intervene as a party to compel the court to conduct a full custody hearing and to return custody temporarily to the mother.<sup>89</sup> On appeal, while the Navajo Supreme Court affirmed the lower court's denial of the request to intervene, it held that the child had a right to be heard through other mechanisms.<sup>90</sup>

The court emphasized Article 12 of the CRC in its opinion, noting that even though the Navajo Nation was not a state party to the Convention, Article 12 reflected "customary international human rights norms which . . . are consistent with Navajo common law."<sup>91</sup> While agreeing with the lower court that intervention by the child was unwarranted, the court emphasized that the child nevertheless had a right to be heard under Navajo common law:

[T]he provisions of Article 12 of the Convention on the Rights of the Child mirror Navajo common law. The Appellant correctly states that everyone has a right to be heard at a meaningful time and in a meaningful way. The Appellant also correctly notes that Navajos have a right to speak for themselves. The applicable maxim is, "it's up to him," meaning that the individual must be consulted before action affecting his interest can be taken.

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Res. 61/295, at 2, U.N. Doc. A/RES/61/295 (Oct. 2, 2007). Unfortunately, the four negative votes in the U.N. General Assembly came from the four countries with a common colonial history and significant indigenous populations: Canada, Australia, New Zealand, and the United States. See Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Doc. GA/10612 (Sept. 13, 2007).

88. No. SC-CV-58-98, 2001 NANN 0000013, ¶ 10 (Navajo Mar. 5, 2001) (VersusLaw). The custody battle originated in the 1980s, and in the ensuing years generated multiple decisions from the Navajo Supreme Court. Throughout the proceedings, the child's mother took the position that her former husband was not the father of her child, but she refused to cooperate in having paternity definitively resolved through testing. In *Davis v. Davis*, No. A-CV-24-85, 1987 NANN 0000018, ¶ 25 (Navajo July 22, 1987) (VersusLaw), the Navajo Supreme Court ruled that the mother had the burden of establishing nonpaternity. In a later decision, the same court held that the parties had to submit to blood or chromosome testing to confirm paternity. *Davis v. Means*, No. A-CV-23-93, 1994 NANN 0000006, ¶ 47 (Navajo Sept. 27, 1994) (VersusLaw). In that case, the court reasoned that even though paternity had been judicially declared, the judgment should be reopened because of the fundamental importance of establishing biological paternity. In the court's view, "[k]nowing one's point of origination (meaning the parents) is extremely important to the Navajo people, because only then will a person know which adoon'e (clan) and dine'e (people) the person is. Those precepts are essential to a Navajo's identity . . ." *Id.* at ¶ 36.

89. *In re Custody of T.M.*, 2001 NANN 0000013, at ¶ 10.

90. *Id.* at ¶¶ 23, 30.

91. *Id.* at ¶ 16.



There is no question that Navajo common law grants a child . . . a right to be heard, considering his maturity, in a case involving that child's custody.<sup>92</sup>

Thus, according to the Navajo Supreme Court, the right of participation reflected in Article 12 of the Convention is also embedded in Navajo common law. In the court's view, the child's participation could come through an informal interview with the trial judge in the presence of parties' counsel, the appointment of a guardian ad litem who would investigate the case and report to the court, or a "spokesperson" for the child who, while not legal counsel, would offer comments during the proceeding.<sup>93</sup>

The Navajo court's opinion and comparable decisions from other tribal courts<sup>94</sup> evince a respect for a child's right to speak on matters directly affecting his or her welfare. Similarly, tribal codes often provide that guardians ad litem, lay advocates, or attorneys should be appointed to represent children in child protection proceedings in tribal court and that the representatives should communicate the child's views to the court.<sup>95</sup> A growing number of tribes have

92. *Id.* at ¶¶ 25–26 (citations omitted).

93. The court strongly endorsed the use of guardians ad litem for every child involved in a child custody or child welfare case. Without attempting to clearly define the role of guardian ad litem, the court noted the "Navajo Nation's need for a system that can be used to appoint an independent, competent, and well-trained person to do an independent investigation of what is in a child's best interests and to do a thorough report with recommendations to the court." *Id.* at ¶ 34. In a later decision, the court clarified that a child's guardian ad litem is a best interests advocate and does not function as a traditional lawyer. *See* *Seaton v. Greyeyes*, No. SC-CV-04-06, 2006 NANN 0000005, ¶ 30 (Navajo Mar. 28, 2006) (VersusLaw).

94. In *T.C. v. L.C.*, 4 Okla. Trib. 90 (Sac & Fox Dist. Ct. 1994), for example, the tribal code required the court to consider the child's preference in custody disputes if the child was of sufficient age to form an independent preference. In the case before it, the child told the judge in chambers, "I just hate having to choose and this fighting over me is driving me crazy." *Id.* at 99. The court awarded temporary custody to the child's paternal grandmother in order to place him in an environment free of his parents' animosity. *Id.*; *see also In re T.D.W.*, 7 Okla. Trib. 300 (Ponca Dist. Ct. 2001) (child testified and was represented by guardian ad litem in custody dispute; although child's wishes were not dispositive, court's resolution was consistent with child's desires); *In re Custody of M.M.*, No. 336, 2000 NAFP 0000008, ¶ 27 (Fort Peck Ct. App. Aug. 11, 2000) (VersusLaw) (holding child's desires are relevant factor in resolution of custody dispute).

95. *See, e.g.*, ABSENTEE SHAWNEE OF OKLAHOMA JUVENILE CODE § 110 (2007) (parent and child have right to court-appointed counsel in juvenile court proceedings); *id.* § 201 (child's preference as to custody is relevant factor for court in child protective proceeding); *id.* § 221 (court may appoint guardian ad litem for child where in child's interest); FT. PECK COMPREHENSIVE CODE OF JUSTICE, TITLE IX, YOUTH CODE, § 504 (2000) (guardian ad litem must be appointed for child in abuse and neglect proceedings, and duties include determining views of child and communicating those to court); *id.* § 506 (court shall consider desires of youth in determining placement); MASHANTUCKET PEQUOT TRIBAL LAWS, Title V, Chapter 3, § 5 (2007) (child shall be represented by guardian ad litem to speak on behalf of child's best interests; child may testify unless will cause harm); CHITIMACHA COMPREHENSIVE CODES OF JUSTICE, Title V CHILDREN'S CODE § 304 (2007) (guardian ad litem may be appointed for child, and duties include communicating to court "views of child with respect to placement").

established tribal Court Appointed Special Advocate (“CASA”) programs to provide volunteer advocacy for abused or neglected Indian children.<sup>96</sup> These explicit protections of the child’s right of participation reflect the central place that children commonly occupy in tribal cultures.<sup>97</sup>

Moreover, within the customs of some North American tribes, the child may be viewed as a wholly formed person almost on a par with adults in terms of decision-making capacity. According to Inuit custom, for example, children are thought to possess considerable volition; an older child wishing to change his or her living arrangements traditionally could do so by simply taking up residence with another family.<sup>98</sup> Other tribes have developed family preservation programs that are consistent with a cultural respect for the child’s voice. On the Fort Berthold Reservation, a tribally-created family preservation program carries forward the “Sacred Child Project” in which the child plays an integral role in constructing a plan to strengthen family relations.<sup>99</sup> Thus, recognition of a right of children’s participation that is taking hold worldwide is compatible with the customary beliefs and practices of many Indian tribes.

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96. The goal of the tribal CASA program is “to increase the number of Indian children who are receiving culturally sensitive representation through indigenous CASA programs in Tribal court proceedings.” Nat’l Tribal Justice Res. Ctr., Tribal CASA, <http://www.tribalresourcecenter.org/courts/details.asp?37> (last visited Mar. 29, 2007).

97. A proposed model tribal children’s code recommends the appointment of a “child advocate” for children subject to tribal child welfare proceedings. Julian D. Pinkham, *Speaking to Tribal Judges on Improving Children’s Court Practice in Child Abuse and Neglect Cases in Our Country: A Proposal for a Uniform Children’s Code*, 31 U. MICH. J.L. REFORM 159, 188–89 (1997). Judge Pinkham of the Yakama Tribal Children’s Court suggests that the advocate for older adolescents should represent the children’s wishes and that advocates for younger children should represent their best interests, informed by the children’s wishes. *Id.*

98. For a description of this child-initiated “adoption,” see ERNEST S. BURCH, JR., *ESKIMO KINSMEN: CHANGING FAMILY RELATIONSHIPS IN NORTHWEST ALASKA* 131 (1975); Andrea V. W. Wan, *The Indian Child Welfare Act and Iñupiat Customs: A Case Study of Conflicting Values, with Suggestions for Change*, 21 ALASKA L. REV. 43, 61–62 (2004).

99. In that program, serving the Three Consolidated Tribes, the child picks a team of people, a majority of whom must be family members, to participate in talking circles and other periodic meetings to strengthen the family system. The child decides which “life domains” (such as spiritual, financial, or educational) should be emphasized in the plan to prevent a family break-up. The Sacred Child Project gives the child not only a right to participate in a plan for the future but imparts a sense of self-determination because children are making choices that affect the adults around them. *See* Lorinda Mall, *Keeping It In the Family: The Legal and Social Evolution of the ICWA in State and Tribal Jurisprudence* 75–78 (Feb. 2, 2007) (unpublished Master’s Thesis, American Indian Studies, The University of Arizona) (on file with author). The development of culturally appropriate family preservation programs has been a longtime focus of the National Indian Child Welfare Association. *See generally* JOHN G. RED HORSE ET AL., *CASEY FAMILY PROGRAMS & NAT’L INDIAN CHILD WELFARE ASS’N, FAMILY PRESERVATION: CONCEPTS IN AMERICAN INDIAN COMMUNITIES* (2000), available at <http://www.nicwa.org/research/01.FamilyPreservation.pdf>.

### III. PROMISE AND PERIL OF INCREASING CHILDREN'S PARTICIPATION UNDER ICWA

Whether grounded in domestic, international, or tribal law, an Indian child's right to participate in child welfare proceedings is a right to be heard, to have one's views and perspectives taken seriously by the decision-maker, and to have a say. With a right to participate, a child becomes a stakeholder in the decision rather than merely an object of concern.<sup>100</sup> The right to be heard—distinct from the right to decide—is the focus here.<sup>101</sup> While the decision-making surely will be enhanced with the child's participation, the judge and other adult participants retain the duty to resolve the dispute within the constraints of the law.<sup>102</sup> Still, the right of participation may be beneficial to a child even when the ultimate decision goes against the child's wishes. Research shows that children resent their exclusion from decision-making involving their welfare and suffer low self-esteem and feelings of powerlessness when they are not consulted or informed

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100. See John Eekelaar, *The Importance of Thinking That Children Have Rights*, in CHILDREN, RIGHTS, AND THE LAW 221 (Philip Alston et al. eds., 1992); Cashmore, *supra* note 22, at 838. As noted child advocate Ann Haralambie observes,

Children have their own worldview. They alone know what is of greatest subjective importance to them. They know what relationships matter to them. They know what activities with which they want to remain involved. . . . If we really listen to them, we may be surprised at the insights they have about what does and does not work in their families.

Ann H. Haralambie, *Recognizing the Expertise of Children and Families*, 6 NEV. L.J. 1277, 1282 (2006).

101. With the exception of older adolescents, most children have not yet attained the psychological and emotional maturity to appreciate the consequences of their decisions. Contemporary understandings of brain development and child psychology suggest that maturation is a complex and fluid process, and that "brain functions governing impulse control, judgment, and the ability to resist coercion are not fully operational until early adulthood." See Atwood, *supra* note 22, at 658. The Supreme Court's decision striking down the juvenile death penalty relied heavily on the current science of brain development. See *Roper v. Simmons*, 543 U.S. 551, 569–71 (2005). Moreover, enhancing children's autonomy in one context might lead to a diminution of their legal protections in other circumstances. See generally GUGGENHEIM, *supra* note 19, at 249–66.

102. For a case where a court considered a child's viewpoint in an ICWA proceeding without deferring to the child's wishes, see *In re S.L.*, No. H029041, 2006 WL 477772 (Cal. Ct. App. Feb. 28, 2006). The appellate court conditionally reversed an order terminating parental rights because of the state child protective agency's failure to comply with the notice provisions of the Indian Child Welfare Act. *Id.* at \*15. The court held that the biological mother's ambiguous references to possible Cherokee heritage triggered a duty under the Act to notify the Cherokee tribe of the pending adoption. *Id.* at \*14. The subject of the proceeding was a 15-year-old girl who participated through counsel. *Id.* at \*4. Interestingly, the girl, who wanted to be adopted by her maternal great-aunt, opposed the ICWA-based contentions of her biological mother, arguing that under the circumstances the failure to notify the tribe was not prejudicial error. *Id.* at \*12. Although the girl's legal arguments were unsuccessful, the girl's desire to be adopted was at least acknowledged by the court. See *id.* at \*14 (recognizing that court's conditional reversal will "further delay S.L.'s bid for greater permanency").

about actions taken that affect them.<sup>103</sup> Not surprisingly, when children do participate and feel that their views have been taken seriously, they are more likely to be satisfied with the outcome.<sup>104</sup>

In placement disputes under § 1915 of the Act, courts often seek to protect the Indian child's tribal identity and cultural heritage while also promoting the child's interest in living in a stable, safe, and nurturing home. Some courts view the determination of children's best interests as a core responsibility in any child welfare proceeding, including ICWA cases.<sup>105</sup> In contrast, other courts have taken the position that the best interests standard—a concept widely condemned for its inherent subjectivity and susceptibility to bias—has no place in the placement decision under § 1915 unless the evidence shows extraordinary particularized need, in keeping with the BIA Guidelines.<sup>106</sup> Under this latter view, for example, “ordinary” emotional bonding between an Indian child and a de facto care-giver and the harm that is likely to ensue from disrupting those bonds would not constitute good cause.<sup>107</sup> By obtaining a fuller understanding of the child's

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103. See generally Cashmore, *supra* note 22; Miriam Aroni Krinsky & Jennifer Rodriguez, *Giving a Voice to the Voiceless: Enhancing Youth Participation in Court Proceedings*, 6 NEV. L.J. 1302 (2006) (describing foster youths' first-hand reports on their desire to be listened to and included in the processes that impact their lives); PEW COMM'N ON CHILDREN IN FOSTER CARE, *supra* note 22, at 41–44 (noting that foster children often have no role in court proceedings about their welfare and recommending that children have direct voice in court through effective representation).

104. Cashmore, *supra* note 22, at 840–41. Indeed, there is evidence that children in out-of-home care are more satisfied and therefore more cooperative when their voiced needs are taken into account. ALEXANDRA OSBORN & LEAH BROMFIELD, PARTICIPATION OF CHILDREN AND YOUNG PEOPLE IN CARE IN DECISIONS AFFECTING THEIR LIVES 4 (2007), available at <http://www.aifs.gov.au/nch/pubs/brief/rb6/rb6.pdf> (reviewing studies of impact of foster children's participation in decision-making while in care).

105. Several courts have insisted that the good cause standard necessarily includes broad discretion—not limited by the BIA factors—to determine an Indian child's best interests. See, e.g., *In re Adoption of Bernard A.*, 77 P.3d 4, 10 (Alaska 2003) (holding court can properly consider impact of bonding and child's need for continuity of care in finding good cause to deviate from ICWA placement preferences); *In re Appeal in Maricopa County Juvenile Action No. A-25525*, 667 P.2d 228, 234 (Ariz. Ct. App. 1983) (interpreting “good cause” to allow for consideration of child's best interests and possibility that child's interest may sometimes “override” tribal interest in affirming adoption of Indian child by non-Indian woman); *In re A.E.*, 572 N.W.2d 579, 585 (Iowa 1997) (holding BIA Guidelines' reference to need for state court “flexibility” in determining placement was implicit endorsement of best interests standard); *In re Adoption of M.*, 832 P.2d 518, 522 (Wash. Ct. App. 1992) (holding good cause is matter of discretion that must be exercised in light of many factors, including best interests of child, wishes of biological parents, suitability of persons preferred for placement, child's ties to tribe, and child's ability to make necessary cultural adjustments).

106. See, e.g., *In re Custody of S.E.G.*, 521 N.W.2d 357, 361–62 (Minn. 1994); *In re Adoption of Riffle*, 922 P.2d 510, 514 (Mont. 1996).

107. See, e.g., *In re C.H.*, 997 P.2d 776, 784 (Mont. 2000) (“To allow emotional bonding—a normal and desirable outcome when, as here, a child lives with a foster family for several years—to constitute an ‘extraordinary’ emotional need would essentially negate the ICWA presumption.”). Interestingly, in *In re Custody of S.E.G.*, the Minnesota court

perspective, courts might be more inclined to avoid the all or nothing character of many judicial decrees and provide a more nuanced resolution to the placement issue.<sup>108</sup>

Despite the existence of ample authority for children's participation in ICWA proceedings, the children themselves remain invisible in many reported decisions under the Act.<sup>109</sup> In a recent Arkansas case, for example, a trial court's placement of twin girls outside the ICWA guidelines was set aside for lack of good cause.<sup>110</sup> By the time of the appeal, the Tohono O'odham girls were ten years old and had been in the custody of the same caregivers for almost four years.<sup>111</sup> Although a psychologist testified that the girls would suffer harm if removed from their established home, the court found no evidence of extraordinary needs that could not be met by the tribe's recommended placement—a placement where the girls' siblings were residing.<sup>112</sup>

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found that an Indian child's need for permanence could be met through attachment to the tribe as an ongoing part of the child's life. 521 N.W.2d at 363–65.

108. Tribal courts have explicitly recognized the significance of continuity in a child's care and have tried to minimize the trauma a child will suffer when established bonds are severed. In *In re C.W.*, for example, the court explicitly endorsed "a fundamental proposition that children placed in adoptive care become integrated into the family within a very short period of time." 23 Indian L. Rep. 6213, 6213 (N.W. Reg. Tr. Sup. Ct. for Tulalip Tr. Ct. App. 1996). "The severance of a parent-child relationship of the quality enjoyed by [the child] in [his de facto parents'] household was a sad and tragic consequence." *Id.* The court explained, "[B]ecause of the unfortunate placement of the child with the [would-be adoptive parents] and its tragic consequence resulting in the heartbreaking severance of family ties, a . . . guardian ad litem shall be appointed . . . and make an independent evaluation to the court on behalf of the child." *Id.*; see also Solangel Maldonado, *The Story of the Holyfield Twins: Mississippi Band of Choctaw Indians v. Holyfield*, in *FAMILY LAW STORIES* 113, 121–22 (Carol Sanger ed., 2007) (discussing Choctaw tribal court's decree permitting adoption of Choctaw twins by non-Indian woman with whom children had lived from birth but also ordering that twins maintain contact with extended family and other tribal members).

109. *State of Alaska, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs. v. M.L.L.*, 61 P.3d 438 (Alaska 2002), is illustrative. There, the Alaska Supreme Court agreed with the lower court that the state child protection agency had failed to sustain the statutory burden of proof to terminate parental rights. *Id.* at 445. The children had been placed with a non-native foster parent for five years, and the state introduced expert testimony that the children would be harmed by severing the bonds between them and the foster mother. *Id.* On the other hand, the children's birth mother, who suffered from mild mental retardation and various emotional disorders, had made improvements over the years. *Id.* at 441. Expert testimony indicated that supervised visitation probably would not harm and might benefit the children over time. *Id.* at 445. Significantly, the court did not allude to the children's views.

110. *Cutright v. State*, 97 Ark. App. 70 (2006).

111. *Id.*

112. *Id.* Noting that the trial court's best interests determination would probably have been affirmed in a non-ICWA case, the court explained that "[t]he test is somewhat different when applied to children covered by the ICWA. . . . The theory is that the 'best interest test' should be weighed against the standard of maintaining the integrity of the Nation, its culture, its children, and its progression through time not to become extinct." *Id.*

Remarkably, the court opinion does not allude to the views of the girls. Had such evidence been offered in the trial court, the decision-making would have been informed by the children's experiences. Had the twins voiced a preference to be with their siblings in the tribe's designated placement, the trial court might have reached a different result. Conversely, had the twins expressed a desire to remain in their established home, their preference should have been given weight under section 1915(c). The absence of children's perspectives from the judicial calculus results in case law that ignores the real-world impact of the decision-making. In many ICWA cases, the Indian children remain submerged beneath the surface battles among parents, caregivers, caseworkers, extended family members, and tribes.

As a practical matter, a child's voice may not be meaningful except through the efforts of the child's representative, but the representative's role is challenging, in part because of the flawed nature of the child welfare system.<sup>113</sup> Despite the improvements in Indian child welfare practices since 1978, American Indian children are still more likely to be removed from their homes than white children, and once removed they are less likely to be reunited with their families.<sup>114</sup> While bias in the child welfare system itself is a factor,<sup>115</sup> the persistence of socio-economic ills within American Indian communities and the inadequacy of funding for tribal foster care and family preservation programs inevitably undermine the goals of the Act.<sup>116</sup> Moreover, current federal policy that prioritizes permanency planning for children may impose time constraints that are incompatible with tribal cultural values.<sup>117</sup> Ideally, children's representatives can work not only to ensure compliance with ICWA and other applicable law in their individual cases but also advocate more broadly for systemic reforms.<sup>118</sup>

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113. See generally, Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21 (2005).

114. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 5, at 1–4, 75–78 (reporting higher rates of foster care placements for ICWA-covered children than for Caucasian children and lower rates of family reunification for ICWA-covered children).

115. The problem of racial disproportionality in the child welfare system is complex, but most studies indicate that racial bias or cultural misunderstanding continues to play a role in the reporting of abuse or neglect, the rate of foster care placement, and the rate of reunification with family. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 1* (2007) (reporting over-representation of African American and American Indian children in foster care).

116. See *supra* notes 11–13 and accompanying text. In particular, rates of substance abuse, family violence, and suicide among Indian youth exceed those for other populations by a wide margin. See Sarah Kersha, *Crisis of Indian Children Intensifies as Families Fail*, N.Y. TIMES, Apr. 5, 2005, at A14.

117. See, e.g., B.J. Jones, *Differing Concepts of "Permanency": The Adoption and Safe Families Act and the Indian Child Welfare Act*, in THE INDIAN CHILD WELFARE ACT AT 30: FACING THE FUTURE (forthcoming 2008) (manuscript on file with author).

118. In *People ex rel. J.S.B.*, B.J. Jones successfully advocated the position that the Adoption and Safe Families Act did not supersede the requirements of ICWA. 691

While the appointment of an attorney for the child can enable the child to more meaningfully participate in the proceeding, the professional role of children's attorneys is ambiguous.<sup>119</sup> Counsel may advocate the child's expressed wishes, the child's best interests, or some combination.<sup>120</sup> Moreover, as a result of CAPTA,<sup>121</sup> state courts routinely appoint guardians ad litem, or lawyers who function as guardians ad litem, rather than client-directed attorneys who will advocate the child's preferences.<sup>122</sup> Thus, even where an Indian child is mature enough to formulate and express an objective in a legal dispute affecting her interests, she may be represented by a lawyer/guardian ad litem who is committed to protecting her interests but not necessarily to advocating her expressed goals.

Based on the express language of § 1915(c) and the growing acceptance of the child's right to be heard in domestic and international law, courts should require the child's representative to ascertain and present the child's views to the decision-maker if the child so desires.<sup>123</sup> A clear mandate that a child's

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N.W.2d 611, 620 (S.D. 2005). Although in that case Jones was representing a tribal court and not a child, similar advocacy could occur on behalf of children.

119. The confusion surrounding children's representatives was apparent in *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 516 (Ct. App. 1996) (applying "existing Indian family doctrine"). The children who were the subject of the ICWA proceeding had been represented by three different lawyers, and the court of appeals noted that the children's position in the litigation "shifted sides in the controversy with each change of attorney." *Id.* at 515 n.2.

120. See generally JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (2d ed. 2001) (stating child's lawyer should develop relationship with child over time and interpret child's wishes in context of child's individualized circumstances); Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 FORDHAM L. REV. 1399, 1420–21 (1996) (stating child's lawyer should enforce child's legal rights and should not be bound by child's expressed objectives). To address the confusion about the role of lawyers for children in child protective proceedings, the American Bar Association has recommended detailed guidelines. See Am. Bar Ass'n, *supra* note 66, at 376–84 (stating child's lawyer should act as client-directed lawyer for child capable of directing lawyer, and otherwise as lawyer guardian ad litem). In addition, the National Conference of Commissioners on Uniform State Laws has approved a new Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (2007). The Act requires the appointment of either a child's attorney or best interests attorney for every child in an abuse or neglect proceeding. *Id.* § 4. Significantly, either category of lawyer must inform the court of the child's expressed objectives if the child so desires. *Id.* §§ 12(c), 13(d).

121. For a discussion of CAPTA's guardian ad litem requirement, see *supra* notes 59–62 and accompanying text.

122. See Peters, *supra* note 81, at 1074–81 (reporting that in the majority of states children's representatives in child protection proceedings adhere to guardian ad litem model).

123. The debate among child advocates about the appropriate role for children's lawyers is beyond the scope of this Essay. At least as to older children capable of directing counsel, a consensus is emerging that such lawyers should function as traditional attorneys whose professional duty is to provide advice and counsel and to advocate their clients' wishes. See generally Annette R. Appell, *Children's Voice and Justice: Lawyering for Children in the Twenty-First Century*, 6 NEV. L.J. 692 (2006); Symposium, *Proceedings of*

representative—whether an attorney or guardian ad litem—communicate the child’s perspective and wishes to the decision-maker might diffuse tensions surrounding some of the more intractable issues under the Act. In a range of cases, a child’s representative could sharpen the court’s understanding of the child in context. The child might have strong feelings about a temporary placement, foster care plan, proposed adoption, or possible reunification with a parent. By ensuring that the child’s voice is a part of the ICWA proceeding, the child’s representative can bring the child to life for the decision-maker. Moreover, with the growing popularity of models of dispute resolution in juvenile courts that emphasize a family’s strengths rather than its failings, children can participate in the development of their case plans with their caregivers and members of their extended family and community.<sup>124</sup> “Family group conferencing,” for example, is a non-adversarial process originally developed in New Zealand as part of an effort to reduce the over-representation of Maori children in the child welfare system.<sup>125</sup> Building on Maori customs, the process engages family members, including children,<sup>126</sup> in developing a plan to address the alleged abuse or neglect. It may offer a uniquely appropriate method for ICWA proceedings because of its recognition of shared responsibility for children among extended family and community and its emphasis on self-determination.<sup>127</sup> These sorts of collaborative processes afford children “the dignity of participation” and also recognize the value of children’s contributions.<sup>128</sup>

The need for representatives to be sensitive to their clients’ cultural backgrounds is axiomatic, but that principle is particularly relevant to ICWA cases. Some children may be fully integrated into tribal culture, and if the representative is not a member of the child’s tribe, cultural differences and language barriers may intensify the challenges that already exist in adult–child communication. Cultural understanding is especially challenging because of the

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*the UNLV Conference on Representing Children in Families: Children’s Advocacy and Justice Ten Years after Fordham*, 6 NEV. L.J. 571 (2006).

124. Clare Huntington, *Rights Myopia in Child Welfare*, 53 U.C.L.A. L. REV. 637 (2006) (criticizing rights-based theories in child welfare law and urging adoption of problem-solving models that emphasize families’ strengths).

125. See generally MARK HARDIN ET AL., *FAMILY GROUP CONFERENCES IN CHILD ABUSE AND NEGLECT CASES: LEARNING FROM THE EXPERIENCE OF NEW ZEALAND* (1996); Huntington, *supra* note 124, at 672–87.

126. Under New Zealand law, the child has a right to attend the family group conference unless the coordinator decides otherwise, and coordinator guidelines provide that children age 12 and older have a right to “have a say” in group decisionmaking. See *Children, Young Persons, and Their Families Act 1989*, 1989 S.N.Z. No. 24, § 22; HARDIN ET AL., *supra* note 125, at 35. Significantly, amendments to the Act are pending before the New Zealand Parliament to strengthen children’s participation in the processes and decisions that affect them, including family group conferencing. See *Children, Young Persons, and Their Families Amendment Bill (No. 6) 2007*: Bills Digest No. 1602, available at <http://www.parliament.nz/en-NZ/PubRes/Research/BillsDigests>.

127. See Laverne F. Hill, Comment, *Family Group Conferencing: An Alternative Approach to the Placement of Alaska Native Children Under the Indian Child Welfare Act*, 22 ALASKA L. REV. 89, 96–97 (2005).

128. Haralambie, *supra* note 100, at 1280.



enormous diversity among tribes and Indian communities, both urban and rural.<sup>129</sup> A child's representative should learn about the child's tribe and its traditions relating to childrearing, family relations, lineage and clans, spiritual practices, and other relevant dimensions. Cultural sensitivity on the part of the decision-maker is also essential, particularly in light of the history of bias in the state courts that led to the enactment of ICWA, but a judge's understanding of a case is shaped largely by the advocates who frame the issues and shape the evidentiary presentations.<sup>130</sup> Ideally, cultural understanding is a dynamic concept in which the lawyer or guardian is aware of some basic attributes of the culture to which the child client belongs but is also open to individual variation, learning from the client as the relationship develops.<sup>131</sup> In other words, cultural understanding means both an awareness of cultural differences as well as the avoidance of stereotyping of the minority culture.<sup>132</sup>

Those trained in socio-linguistics—the study of ways that languages are used in social contexts<sup>133</sup>—have suggested that for some indigenous groups,

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129. See generally JAMES W. GREEN, CULTURAL AWARENESS IN THE HUMAN SERVICES: A MULTI-ETHNIC APPROACH 221–52 (3d ed. 1999) (summarizing contrasts between Indian and majoritarian cultures as well as differences among Indian tribes and communities); HARVARD PROJECT, *supra* note 12, at 278–80 (exploring diverse economic, social, political, and cultural realities on Indian reservations).

130. Indeed, ICWA requires that state courts follow the cultural standards of a child's tribe in meeting the placement preferences of the Act. See 25 U.S.C. § 1915(d) (2000) (in meeting preference requirements, state courts must apply “prevailing social and cultural standards” of specific Indian community). Similarly, the Act's requirement that foster care placements and terminations of parental rights be supported by “testimony of qualified expert witnesses,” emphasizes the importance of witnesses who are knowledgeable about tribal culture. 25 U.S.C. § 1912(e), (f). See also *In re Baby Doe*, 902 P.2d 477 (Idaho 1995) (explaining need in parental rights termination case for expert witness with knowledge of tribal traditions and practices related to childrearing).

131. See generally Paul R. Tremblay, *Interviewing and Counseling Across Cultures: Heuristics and Biases*, 9 CLINICAL L. REV. 373 (2002); Hilary N. Weaver & Barry J. White, *The Native American Family Circle: Roots of Resiliency*, in CROSS-CULTURAL PRACTICE WITH COUPLES AND FAMILIES 67 (Philip M. Brown & John S. Shalett eds., 1997) (describing cultural characteristics of Native families that impact social workers and human service practitioners).

132. As social scientist James Green writes,  
The culturally sensitive care provider need only be aware that powerful and complex beliefs about what a person is, what causes things to go wrong, and the agency of things unknown and unseen may be embedded in narratives of distress. Each community and each client will shape and present his or her understandings as he or she sees fit and may occasionally offer them to us, . . . if we are open to taking them seriously.

GREEN, *supra* note 129, at 222–23.

133. For two classic studies of American Indian styles of communication, see WILLIAM L. LEAP, AMERICAN INDIAN ENGLISH (1993), and SUSAN URMSTON PHILIPS, THE INVISIBLE CULTURE: COMMUNICATION IN CLASSROOM AND COMMUNITY ON THE WARM SPRINGS INDIAN RESERVATION (1983).

relationships often precede communication.<sup>134</sup> When dealing with a child, whether Indian or not, the need to establish a relationship of confidence and trust is paramount. Abrupt questioning may not elicit frank disclosures from the child, while a slower, more patient approach to communication may be more consistent with the child's comfort level.<sup>135</sup> Moreover, within many American Indian tribes, silence can be productive and meaningful and may be far from a refusal to communicate. Values of harmony and self-effacement may be expressed linguistically in ways that obscure meaning: seeming to agree in order to defer to authority or not to offend, smiling to cover embarrassment or shame.<sup>136</sup> Direct questioning may be threatening and perceived as a sign of aggression rather than sincere interest.<sup>137</sup> In the ICWA context, for example, the child's representative who anticipates what the child is going to communicate by misconstruing silence or hesitancy may not be accurately interpreting the child's signals. Similarly, the expression of ambivalence from a child as to a particular placement option may or may not signal true ambivalence in the child's mind. Indeed, a child who voices ambivalence may be manifesting acute discomfort in the situation and a desire to remain neutral and avoid loyalty conflicts. Finally, lawyers in child protective proceedings should take into account the possibility that their clients may have language delays. Many children in foster care, whether tribal members or not, exhibit an impaired ability to communicate, resulting in a diminished expressive vocabulary and ability to respond to abstract questions.<sup>138</sup>

An illustrative case is *Adoption of N.P.S.*,<sup>139</sup> where the court deviated from ICWA's placement preferences in part because of the child's perceived desires. In that case an eleven-year-old Yup'ik child whose mother had recently died was the subject of an adoption dispute between his maternal Yup'ik grandmother and his *de facto* father, a non-Indian with whom the child had lived for most of his life. The Alaska Supreme Court upheld the trial court's granting of the *de facto* father's adoption petition, agreeing that there was good cause to deviate from the statutory placement preferences even though there was evidence supporting either placement. Among the factors supporting adoption by the grandmother was that the boy's sibling, with whom he had a positive relationship, was already living with the grandmother. During the proceedings, the trial court ascertained the child's wishes by interviewing the boy in camera and by appointing a guardian ad litem. Although the court expressly found that the boy preferred to

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134. See Diana Eades, "I Don't Think the Lawyers Were Communicating with Me": *Misunderstanding Cultural Differences in Communicative Style*, 52 EMORY L.J. 1109 (2003) (examining Aboriginal communication styles within a Western legal context).

135. See PETERS, *supra* note 120, at 99-105 (discussing contextual nature of children's communication and need for lawyer to gain trust of child).

136. ANNE GRAFFAM WALKER, HANDBOOK ON QUESTIONING CHILDREN: A LINGUISTIC PERSPECTIVE 72-73 (2d ed.1999).

137. See Phyllis Morrow, *A Sociolinguistic Mismatch: Central Alaskan Yup'iks and the Legal System*, 10 ALASKA JUST. F. 1 (1993) (describing ways in which European American judges may misread speech conventions and social interactions of Yup'ik people).

138. See Carol D. Stock & Philip A. Fisher, *Language Delays Among Foster Children: Implications for Policy and Practice*, 85 CHILD WELFARE 445 (2006).

139. 868 P.2d 934 (Alaska 1994).

live with his *de facto* father, there was considerable ambiguity on the record. Several of his responses during the in camera interview were transcribed as “inaudible.” The child also wrote two letters, stating in one that he wanted to live with his grandmother and in a second that he wanted to live with both the grandmother and his mother’s friend.<sup>140</sup> He also reportedly told members of the tribal council that he wanted to remain with his grandmother and his sibling. On the record, the supreme court held that the trial court’s finding as to the child’s wishes was not clearly erroneous.

The boy’s plaintive voice in *N.P.S.* evokes the image of a child struggling with conflicting loyalties and competing pressures. The boy, who had just undergone the devastating loss of his mother, was being asked to make a choice with long-term consequences. The guardian ad litem’s task was daunting—to interpret the inconsistent statements, the inaudible answers, the silences. In her ultimate report to the court, she found that the boy’s *cultural* needs would be best met by residing with the grandmother in their Alaskan Native village but his *emotional* needs might not be met there. Importantly, while she recommended that the adoption petition be granted, she also recommended that the child have regular contact with his extended family in his village. Through her recommendation, the guardian seemed to recognize that the child’s desires pointed in different directions, and she wanted a disposition that would respect his multiple interests.

Whether or not the guardian in *N.P.S.* accurately interpreted the boy’s mixed messages, the case highlights the need for patience and sensitivity to cultural and emotional nuance in ascertaining an Indian child’s voice. The guardian’s own cultural moorings may have shaded the messages from the child by projecting on to the child the representative’s values. Moreover, the child in *N.P.S.* seemed to be telling the grown-ups in his life that the decision was too painful for him to make. The case thus reveals the risks of pressing a child for a choice when the child indicates resistance through language, hesitancy, inconsistency, and silence. Imposing the burden of decision-making on a child who may be mired in conflicted loyalties can be traumatic and guilt-inducing in itself.<sup>141</sup>

Another challenge facing the child’s representative is the dynamic nature of children’s personalities, a function of their evolving sense of self. Once a representative has elicited a child’s views, those views may change over time as the child matures and develops new understandings of her own identity. Thus, an Indian child might wish to remain in a non-Indian placement for the time being but eventually seek out greater affiliation with her tribal relatives and tribal cultural heritage. As one scholar has argued in another context, the child can be seen as possessing a right of “dynamic self-determinism.”<sup>142</sup> Under that concept, the child formulates preferences and expresses opinions incrementally as a part of the process of self-realization. To accommodate dynamic self-determinism, placement

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140. *Id.* at 937. In the second letter, the child apparently wrote, “I can only live with one and I wont [sic] to live with both ove [sic] them.” *Id.*

141. See Robert E. Emery, *Children’s Voices: Listening—and Deciding—is an Adult Responsibility*, 45 ARIZ. L. REV. 621, 622 (2003).

142. John Eekelaar, *The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self-Determinism*, 8 INT’L J. L. & FAM. 42, 54 (1994).

decrees in ICWA proceedings might be fashioned in a more open or fluid manner than is commonly found in Anglo-American law so that links between the child and her tribe or extended family are not irrevocably severed.<sup>143</sup>

Among the few reported court opinions where courts have mentioned children's views in ICWA proceedings, most children opposed the position of the tribe.<sup>144</sup> A recent case from California illustrates the challenge for children's representatives in such a circumstance. In *In re Barbara R.*,<sup>145</sup> the adoptive placement of two half-siblings was before the California state courts. While one of the children, a girl named Jade, was an enrolled member of the Sycuan Band of the Kumeyaay Nation through her father, the other sibling had a different father and no Indian heritage. Because of domestic violence in the home, both children were removed from their mother's custody in 2002 and placed with the paternal grandparents of the non-Indian sibling. Although Jade's placement with a nonrelative did not comply with ICWA's placement preferences, the Sycuan Band did not object. Over the ensuing three years, the girls continued to live in the same placement while the mother made erratic efforts to achieve reunification.<sup>146</sup> Jade initially voiced a desire to return to her mother but by 2005, when she was ten years old, began referring to her sister's grandparents as "mom" and "dad" and was expressing a strong desire to be adopted.<sup>147</sup> Based on a finding that beyond a reasonable doubt returning the children to the mother's custody would create a substantial risk of harm and that the children were likely to be adopted, the trial court terminated the mother's parental rights.

The mother appealed, raising various alleged errors under ICWA.<sup>148</sup> In particular, the mother contended that Jade's counsel failed to adequately protect the child's right to future tribal benefits. Although the Sycuan Band never intervened in the proceedings, it objected to Jade's potential adoption on the ground that the child might lose not only tribal membership and financial benefits but all ties to her Native culture. The Sycuan Band maintained that permanent guardianship would be appropriate because that status would protect the security of the child's placement without jeopardizing the child's tribal identity. Despite

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143. I have explored elsewhere the different approaches to adoption and parenting among various American Indian tribes. See Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577 (2000).

144. See, e.g., *In re Adoption of Sara J.*, 123 P.3d 1017, 1029 (Alaska 2005) (child reportedly favored adoption by non-Indian foster mother); *In re Adoption of S.K.A.*, 17 P.3d 769, 773 (Alaska 2001) (child expressed desire to be adopted by foster mother). But see *In re A.R.*, No. 04-0745, 2004 WL 2002834, at \*6 (Iowa Ct. App. Sept. 9, 2004) (child expressed desire not to be adopted and to remain with biological Indian mother).

145. 40 Cal. Rptr. 3d 687 (Ct. App. 2006).

146. The mother initially made progress in a court-ordered drug-treatment program but eventually stopped attending after testing positive for opiates. *Id.* at 690–91.

147. *Id.* at 691. Jade resisted her mother's visits, told social workers that her mother scared her, and insisted on testifying against her mother in court. *Id.* at 692.

148. The irony of the ICWA-based appeal by the mother, who herself had no Indian ancestry, is not unique to this case. See, e.g., *In re J.J.G.*, 83 P.3d 1264 (Kan. Ct. App. 2004) (appeal under ICWA by non-Indian father from order terminating his parental rights).

compelling arguments from a dissenting judge, the appeals court affirmed the trial court, finding that Jade's counsel adequately represented the child's interests.

Significantly, the child's attorney in *Barbara R.* affirmatively resisted the introduction of evidence about the potential tribal benefits that Jade might lose if she were adopted, objecting on grounds that such evidence was irrelevant and speculative. As noted by the dissent, the attorney erroneously assumed that "Jade's interest in being adopted is inconsistent with and thus irrelevant to her tribal rights and benefits."<sup>149</sup> In so doing, the lawyer failed to take action to preserve the child's tribal interests before they might be lost. The case illustrates the power and concomitant responsibility of a child's representative in ICWA proceedings. If Jade's lawyer had sought out information on the child's enrollment status in the event of adoption, the court would have been better informed on a matter of vital importance, and the outcome might have been different. The lawyer advocated Jade's desire to be adopted, but he disregarded the child's inchoate interest in maintaining her tribal identity—an interest the child might not appreciate until she had matured. Where the Indian child's position may irrevocably sever the child's tribal relations, the lawyer should consider taking steps to avoid an all-or-nothing disposition.<sup>150</sup>

### CONCLUSION

ICWA is only a beginning step toward the goals of promoting tribal survival and protecting the interests of Indian children. Three decades after ICWA's enactment, Congress has still failed to devote adequate resources to address the needs of Indian families and children. The Act's ultimate success will require dramatic increases in funding for tribal child welfare programs, tribal foster homes, and social services. At the same time, the perplexing problems faced by state courts in adjudicating child welfare cases involving Indian children demand attention. The Indian child at the center of an ICWA controversy in state court often encounters a barrage of authority figures and confusing judicial proceedings. The experience that brought the child into the child welfare system in the first place will have left its mark on the child's psyche, and if the child has been removed from his or her home, the emotional trauma may be even more severe. Drawing on norms of international and tribal law as well as ICWA itself, this Essay has explored ways in which the interests of the Indian child might be advanced by strengthening the child's right of participation.

So long as child welfare proceedings involving Indian children continue to be heard in state courts, efforts must be made to ensure that the children are afforded a voice through representation informed by cultural awareness and respect, and advocates as well as courts must guard against ignoring or misunderstanding cultural signals from the children they represent.

If children meaningfully participate in proceedings to determine their future placements, judges will be compelled to acknowledge the full humanity of

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149. *Barbara R.*, 40 Cal. Rptr. 3d at 700.

150. In *Barbara R.*, this might have included consideration of permanent guardianship rather than adoption, so as to maintain the child's eligibility for tribal membership.

the children before them. By heeding the story of each Indian child, decision-makers may be able to minimize the risk of judicial bias and stereotype. One child might need to stay with an existing *de facto* family for emotional security, while another might seek the embrace of extended family and the strength that flows from residing within a tribal community. In this regard, state courts could learn from tribal courts in their willingness to fashion decrees that protect a child's need for personal security while ensuring ongoing contact with biological relatives and the child's tribe.<sup>151</sup> Listening to the voices of these children might diffuse the tensions that often complicate ICWA cases. Moreover, by listening to the children who are at the center of these cases, courts might restore to them a sense of dignity that their life experience has eroded.

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151. For a discussion of the fluid nature of customary adoption that is recognized in several tribes, see Atwood, *supra* note 143, at 615–21; see also Cindy L. Baldassi, *The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts, and Convergences*, 39 U.B.C. L. REV. 63, 70–76 (2006) (describing flexible, open nature of customary adoption among First Nations, including cultural norm of children having great influence in decision-making process).