Rhetoric Versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination

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RHETORIC VERSUS REALITY: THE JURISDICTION OF RAPE, THE INDIAN CHILD WELFARE ACT, AND THE STRUGGLE FOR TRIBAL SELF-DETERMINATION

ABSTRACT

This note examines the rape crisis affecting Native American women today and the jurisdictional issues that affect how and whether tribes may prosecute and punish rapists. This note also examines the efficacy of the Indian Child Welfare Act (ICWA) in preventing inappropriate removal of Native children from their tribal environment. A comparison of these two subjects reveals that, although tribes are theoretically experiencing an era of tribal “self-determination,” federal Indian law and policy, both old and new, continue to prevent tribes from achieving health and independence. Ultimately, the note concludes that a true solution to the problems affecting tribes can arise only from tailoring legal solutions to the individual tribes themselves, rather than relying on blanket federal policies that fail to consider the diversity of tribal cultures and conditions.

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INTRODUCTION

Since the late 1960s, with President Lyndon Johnson’s affirmation of tribal “freedom of choice and self-determination,” federal Indian policy has been, at least nominally, exactly that: a policy of

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tribal self-determination. How one defines the concept of self-determination is somewhat tricky. On the simplest level, one might look to the Indian Self-Determination and Education Assistance Act of 1975, under which “[t]ribes assumed greater control over how their federal resources could be used” and which permitted tribes to develop their own social, educational, and governmental departments and offices. Historians note, however, that the concept of self-determination can take on more murky meanings, especially when repeatedly used in more general, rhetorical senses. Indeed, some politicians might see self-determination as a “magical incantation” that can distance them from the paternalistic era of the past, when Justice Marshall considered tribes’ relationship to the federal government as “that of a ward to his guardian.” Regardless of how one pinpoints self-determination, historians and scholars generally recognize that the current era of federal Indian policy is one in which the federal government is presumably acting in favor of tribal sovereignty and independence. The Indian Self-Determination Act Amendments of 1994 established that the purpose of the Act was for “tribal Self-Governance,” clearly a step beyond the intent of the original Act. In 2006, President Bush announced that November would be National Native American Indian Heritage Month and that the U.S. government “will continue to work on a government-to-government basis with tribal governments, [and] honor the principles of tribal sovereignty and the right to self-determination.” Given the bandying about of terms like “self-determination” and “self-governance,” it might be easy to assume that tribes truly have reached an apex of independence and self-sufficiency. This assumption can quickly prove erroneous, however, considering some of the headier social issues afflicting tribes today; issues like rape. One may also come to question the idea that the government is focused on tribal self-determination when considering the Indian Child Welfare Act of 1978 (ICWA), an act that was designed to

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5. Id.
7. PEVAR, supra note 1, at 12.
protect Indian families and give tribes greater control over the welfare of Indian children, but which, arguably, has significantly failed to achieve its stated goals.

In terms of issues like rape, the era of tribal self-determination has done little to improve this problem in Indian communities. Amnesty International published a report in 2007 detailing the rape crisis amongst Native American tribes and Alaska Natives. The report indicates that one out of three Native women will become a victim of rape during her lifetime, compared to one out of every five American women. Additionally, Alaska has the highest rape rate per capita of any state in the union, with Native women in Anchorage 9.7 times more likely to fall victim to rape than non-native women. These statistics, which are likely not surprising to those familiar with Indian issues, clearly illustrate the overwhelming problem of rape within Indian country.

Given the degree to which rape is affecting Native communities, one might wonder what tribes are doing to alleviate the crisis. Tragically, in terms of prosecuting and punishing sexual predators and offenders, tribes can do very little, as the federal government has effectively stripped them of jurisdiction over felonies, including rape. Federal legislation such as the Major Crimes Act of 1885, and the Indian Civil Rights Act of 1968 have limited the extent to which tribes can prosecute and punish felonies; tribes in Public Law 280 (P.L. 280) states are forced to submit to state jurisdiction when it comes to prosecuting criminal and civil matters. Thus every rape committed on tribal land is subject to either state or federal government jurisdiction.

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11. See PEVAR, supra note 1, at 333-34.
14. Id. at ii-iii.
15. Id. at 2.
16. Id. at 36 (citing rape statistics for Anchorage women from years 2000 and 2003).
18. See, e.g., id. at 125-28 (indicating that the passage of certain laws limited tribal actions on felonies, although none of the laws explicitly divested jurisdiction from tribal governments).
19. PEVAR, supra note 1, at 144.
22. See Deer, supra note 17, at 122.
The Indian Child Welfare Act (ICWA) also raises questions about the degree to which tribes are experiencing an era of self-determination. In 1978, Congress passed ICWA to address the fact that "one-third of all Native American children were being separated from their families and communities and placed in non-Indian adoptive homes, foster care, and educational institutions by federal, state and private child welfare authorities." ICWA protects the breaking up of Indian families by giving tribal courts exclusive jurisdiction in Indian child custody cases, provided that the child in question lives on the reservation. ICWA also establishes specific hierarchies of preferred adoptive and foster care placement for Indian children, placing them first with family or tribal members. These protective measures are designed to remedy the placement of Indian children outside of their familial and cultural surroundings.

ICWA does, however, provide states and courts with a fair amount of discretion in their implementation of the statute. Indian children not living on tribal land can have custody proceedings transferred to tribal court if either the child's parents or tribe petitions the court to do so, and the state is obligated to transfer the case unless it has "good cause" not to do so. The "good cause" standard gives states significant discretion when determining which venue is appropriate for an Indian child custody case. Another area of wide state court discretion is in the "existing Indian family' doctrine," which allows courts to bypass ICWA standards when the Indian child's parents have failed to maintain close ties with their tribe or tribes. Evidence indicates that this wide discretion allowed to state courts under ICWA has resulted in ICWA's failure to protect and maintain Indian children and families, and in fact may have allowed governmental interference in Indian family life to continue.

26. § 1915(a)-(b).
27. See PEVAR, supra note 1, at 333-34.
28. Id. at 346-47.
30. PEVAR, supra note 1, at 346.
31. Id. at 345.
32. See GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 33-38, 44-46 (2005), available at http://www.gao.gov/new.items/d05290.pdf (reporting that, under the ICWA, Indian children spent comparatively more time in foster care than non-Indian children, were less likely to be adopted out of foster care, and more likely to be transferred to other agencies); Graham, supra note 12, at 3 (stating that "recent studies suggest that one-fifth of all Native American children 'are still being placed outside of their natural tribal and family environments.'").
Although the legal and social issues involved in the rape crisis afflicting Native women and the government’s lackluster or failing protection of Indian families seem quite different, a comparison of these two sets of issues is quite revealing. Despite politicians’ claim that Indian tribes are now living in an era of tribal self-determination, a study of the rape crisis among Indian women and the continued floundering of Indian families indicates that this is not so. The American government has, through some of the very statutes that claimed to ensure tribal self-determination, denied Indians significant control over Native women’s bodies and spirits, as well as the structure and stability of Native families. This note argues that Indian tribes cannot truly be self-determinative, independent, and stable without greater control over both rape prosecutions and the structure of their families. In order to demonstrate how current Indian policy has effectively deprived Indian tribes of self-determination, Part I of this note analyzes rape jurisdiction under federal statutes and P. L. 280 as well as the paternalistic effects of those statutes. Part II analyzes ICWA and the efficacy of this statute in protecting and maintaining Indian families. Finally, Part III discusses the obstacles inherent in devising a legal solution to these issues and argues that genuine tribal self-determination and resolution of the problems posed by the rape crisis and ICWA will result from efforts made on a micro level, not from blanket federal policies, federal legislation, or generalizations about tribal culture and needs.

I. JURISDICTIONAL PATERNALISM: A STUDY OF RAPE JURISDICTION UNDER FEDERAL AND STATE SYSTEMS

A. Federal Prosecution of Rape in Indian Country

A fundamental question worth asking before any discussion of jurisdictional issues in Indian country is: what constitutes Indian country? Indian country is defined under 18 U.S.C. section 1151, which “demarcates federal jurisdiction as extending to all lands within Indian reservations as well as” to land in “which the Indian titles have not been extinguished.” Simply stated, “Indian country is all the land under the supervision of the U.S. government that has been set aside primarily for the use of Indians.” Establishing at least a rough notion of what constitutes Indian country is important, as key

33. See, e.g., AMNESTY INT’L, supra note 13, at 5-8; Deer, supra note 17, at 124-28.
35. PEVAR, supra note 1, at 21 (emphasis omitted).
The federal government has asserted its influence in Indian country through both statutes and case law, tracing its ultimate authority to apply laws to Indians from the Commerce Clause, Article I, section 8, clause 3 of the Constitution. Although this clause states merely that “Congress shall have Power [t]o . . . regulate Commerce with . . . the Indian Tribes,” Congress has enacted numerous statutes affecting Indian tribes that do not entail interstate commerce. One such statute, and one of the most important statutes in examining federal jurisdiction over rape in Indian country is the Major Crimes Act (MCA). Passed by Congress in 1885, the MCA has since been amended to encompass a more extensive list of crimes, although the statute included rape from its inception. The text of the MCA states that Indians who commit certain offenses, including offenses under Chapter 109A, which involve sexual abuse offenses, are “within the exclusive jurisdiction of the United States.” As Sarah Deer notes, the MCA “did not explicitly divest tribal governments of concurrent jurisdiction.” This is indeed true; little doubt exists, though, that the MCA greatly eroded any sense of tribal sovereignty or independence.

Another important statute that limits tribes’ ability to deal effectively with rape is the Indian Civil Rights Act of 1968 (ICRA).
Interestingly, although the purpose of ICRA was to protect the civil rights of tribal members, Congress focused only on the potential or actual infringement of those rights by tribal governments and ignored any infringement by the federal government itself.  The most important part of ICRA, in terms of the tribes' ability to effectively handle sexual predators, is section 1302, which limits tribal courts from sentencing offenders to more than one year in jail or imposing a fine greater than $5,000.  This clause means that tribes "cannot respond to sex offenses in the same way as the state and federal systems" and are limited to merely imposing a slap on the wrist on those offenders over which they do have jurisdiction.  The degree to which ICRA has rendered tribes impotent to handle rape in particular, and crime in general, is perhaps one of the reasons why "tribes have never developed the law enforcement resources to prosecute and punish serious crimes . . . ." The United States Supreme Court has also had a role in limiting tribes' jurisdiction over rape, in particular with its decision in Oliphant v. Suquamish Indian Tribe.  Chief Justice Rehnquist's opinion for the majority overwhelmingly emphasized the degree to which Indian tribes are wholly subordinate to the federal government.  In the concluding paragraph of his opinion, Chief Justice Rehnquist noted the advances in tribal court systems and the procedural rights guaranteed to individuals through ICRA, but he nonetheless determined that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians."  In the context of rape of Indian women, lack of tribal jurisdiction over non-Indians is particularly harmful given the fact that eighty-six percent of the rapes are perpetrated by non-Indian men.  Before tribal law enforcement officers can take any action against a perpetrator, they must determine whether the offender is Indian or non-Indian, a determination that can clearly be difficult to make. As a result of the jurisdictional confusion and impotency of tribal law enforcement, "it is not uncommon for non-Indian offenders to commit crimes in Indian country knowing that there will be little, if any, retribution for their crimes."

46. Garrow & Deer, supra note 44, at 206.
48. Deer, supra note 17, at 128.
50. See, e.g., Deer, supra note 17, at 128 (citing Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).
52. Id. at 211-12.
55. Id.
The problems that tribes face in handling rape because of jurisdictional issues are only compounded by the ineffectiveness of the federal authorities in dealing with this issue. The FBI handles investigations of rape (and all other crimes under the MCA) in Indian country in conjunction with the Bureau of Indian Affairs (BIA). Unfortunately, because the FBI has investigative responsibilities in so many other areas, "Indian country crimes rarely rank high among the FBI's priorities." Federal prosecutors also have trouble prioritizing Indian country cases, particularly because of their lack of accountability to tribes, the paltry media attention to crimes committed on Indian territory, and their lack of involvement or participation in the tribal community. Tragically, "criminal justice in Indian Country is occasionally pursued aggressively and is sometime [sic] ignored, making criminal justice a haphazard event at best for Indian tribes." Even under the jurisdiction of a devoted federal prosecutor, the response to rape might still seem insufficient, as the high rate of rape and the small number of federal officials allocated to each tribe make it difficult to respond to each case. The failure of federal prosecutors to respond to crimes, even serious crimes like rape, in an adequate manner, and the tribe's inability to handle cases on its own, leads to frustration among tribal prosecutors.

The inadequate response to crime on the part of the federal authorities may also have something to do with a deeply-rooted lack of trust and broken lines of communication between those authorities and the tribes they serve. Kevin Washburn describes the concept of the "cavalry effect," stating that "the federal prosecutor in Indian country is, in some respects, the direct lineal descendant of the blue-coated, sword-wielding cavalry officer; the prosecutor represents the very same federal government that committed cruel and violent acts against Indian tribes for more than a century." Little wonder, then,
if Native rape victims, already in a state of vulnerability, might not want to trust an individual whose role carries so much cultural and historical baggage.\(^6^4\) This lack of trust would also explain why victims might hesitate to even report being raped, especially if neither the FBI nor the federal prosecutor can guarantee any sort of protection from retaliation.\(^6^5\) Hesitance to report a rape may also stem from an understanding among Native women that the authorities will respond insensitively or inappropriately.\(^6^6\)

Additionally, tribal and federal authorities may not have open lines of communication or a stable enough relationship to adequately work together on cases.\(^6^7\) Tribal authorities may be displeased with the ineffectiveness of the federal authority’s efforts to handle crime, and the federal authority may be dissatisfied with the tribe’s handling of the case before they passed it on to the government.\(^6^8\) As stated in a guidebook published by the Urban Institute and the Department of Justice:

> the realities of federal and state prosecutorial priorities normally do not give a high priority to prosecuting reservation crimes. The sense of helplessness and frustration engendered by the jurisdictional confusion that exists in present-day Indian country results in many crimes going unreported. . . . Tribes often find it difficult to secure the cooperation of neighboring state and local law enforcement authorities. The same situation often also applies to federal law enforcement agencies in addressing reservation crime.\(^6^9\)

Clearly, then, the interaction between tribal, state, and federal authorities gives rise to frustration on the part of all involved.

Given tribes’ lack of substantive jurisdiction over rape and their dependence on the federal government, it is hard to argue that tribes can act self-determinatively when it comes to this crisis. Rather, one can view the current system of rape jurisdiction as a holdover policy from the prime era of paternalistic federal Indian policy in the

\(^{64}\) Id.

\(^{65}\) Id. at 738.


\(^{67}\) THE HARV. PROJ., supra note 62, at 267 (asserting that poor communication and lack of trust leads to uneven law enforcement).

\(^{68}\) Id. at 266-267.

nineteenth-century. President Andrew Jackson's attitude towards tribes, the attitude that governed his decision to remove Indians to the west of the Mississippi River and out of the way of white settlers, exemplifies this concept of paternalism. As historian Francis Paul Prucha stated, "paternalism could be either benevolent or oppressive. Parents tended to see it as benevolent; children often viewed the same actions as unduly restrictive. Since children were defenseless, they required assistance and support, and since children were not fully responsible, they required guidance." Preventing tribes from pursuing, prosecuting, and sentencing rapists, and allowing that power to remain in the hands of an external entity, the federal government, suggests that tribes are defenseless when it comes to rape and are in need of guidance regarding how to handle such a crisis. Yet scholars indicate that this patronizing attitude toward tribes stems not from reality about tribes' inability to handle their own affairs, but more from a long history of policies that effectively made tribes dependent on the federal government. The concept of overlooking tribal authority and relying almost solely on federal authority, when it comes to dealing with rape, sounds eerily like something dreamed up in the nineteenth-century when there was concern about the Indians "languishing under the decay of their own government," with "no courts to appeal to, and no resort when they are wronged excepting to fight." The current system of federal jurisdiction over rape leaves little room for tribes to assert their own laws and means of remedying the rape crisis. Tribes, as a result, are prevented from addressing their members' needs through their own legal and punitive channels.

70. See Francis Paul Prucha, The Indians in American Society 1-27 (1985) (describing the historical paternalistic view that Indians are an inferior race who, for their general well-being and safety, must rely on, and be regulated by, the United States government).
72. Prucha, supra note 70, at 11.
73. See Washburn, supra note 34, at 738.
74. See Jeffrey Ian Ross & Larry Gould, Integrating the Past, Present, and Future, in Native Americans and the Criminal Justice System 241 (Jeffrey Ian Ross & Larry Gould eds., 2006) (asserting that "Native Americans have proven, time and time again, that they are fully capable of handling their own criminal justice issues in their own way . . .").
75. The Harv. Proj., supra note 62, at 23 (stating that "the Indians on the reservations became almost completely dependent, a dependency that paradoxically was intensified by the very programs and policies that the paternalistic government of the United States instituted to assist the dependent Indians" and that "[i]n many instances, prolonged federal paternalism has resulted in underdeveloped institutions and in tribal leadership that is ill-prepared to lead fully sovereign communities.").
77. Deer, supra note 17, at 122, 125-28.
78. Id. at 122, 127-29, 136, 142-43.
B. Rape Prosecution in P.L. 280 States

Although the federal government has jurisdiction over the rape of Native Americans in most states, Indian tribes in some states fall under the state's jurisdiction when dealing with rape.\(^7\) An explanation of why this is so necessarily entails an explanation of the "termination era" in federal Indian policy.\(^8\) The so-called "termination era" involved a renewed focus on forcing Indians to assimilate into American society so they would become less dependent on the federal government.\(^9\) Driven by desires to save federal funds spent on Indian programs and "set the Indians free"\(^10\) from the control of and dependence on the federal government, the severing of the connection between tribes and federal programs actually proved detrimental to tribes.\(^11\) Prucha notes that "Indian leaders and Indian organizations . . . demanded a continuation of the paternal role of the federal government in their lives. They were not yet ready to operate without the federal support systems."\(^12\) In the process of "terminating" the connection between the federal government and tribes, Congress enacted P.L. 280 in 1953.\(^13\) One of the most important effects of P.L. 280 is that it gave specified states criminal jurisdiction over tribes.\(^14\) The states specified by statute to have criminal jurisdiction are Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin, also known as "mandatory states."\(^15\) All other states are known as "option" states, and have the option of adopting P.L. 280, but as of an amendment of the statute in 1968, must obtain tribal consent before doing so.\(^16\)

The practical effects of P.L. 280 are generally negative and perhaps even worsen the jurisdictional and legal issues perpetuating the rape crisis in Indian country.\(^17\) In passing P.L. 280, Congress intended, in part, to ameliorate some of the crime problems on reservations exacerbated by ineffectual federal law enforcement, but in discussing

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79. PEVAR, supra note 1, at 11.
80. Id. at 122 (stating "the years between 1953 and 1968 are known as the 'termination era.'").
81. PEVAR, supra note 1, at 11.
82. Id.
84. PRUCHA, supra note 70, at 71.
85. PEVAR, supra note 1, at 122.
86. Id. at 122-24.
87. Id. at 123; Vanessa J. Jiménez & Soo C. Song, Concurrent Tribal and State Jurisdiction Under Public Law 280, 47 AM. U. L. REV. 1627, 1632, 1634 (1998) (noting that, although it applies only to six states, P.L. 280 has a significant impact because of the number of Indians and tribes inhabiting those six particular states).
88. PEVAR, supra note 1, at 123, 126.
the purpose of the law Congress focused primarily on the inadequacy of tribal law enforcement and essentially ignored the federal government's role.\(^9\) By failing to acknowledge the complex reasons behind the high crime rate on reservations,\(^9\) and simply replacing federal jurisdiction over crime with state jurisdiction, Congress only succeeded in creating a system in which tribes are still dependent on an external authority and often receive unenthusiastic and underfunded law enforcement aid.\(^9\) Clearly, then, the prevalence of uninvestigated, unprosecuted rape in Indian country under federal jurisdiction was not lessened with the passage of jurisdiction to the state.\(^9\)

One can see the disastrous effects of P.L. 280 on the rape crisis by examining the prevalence of rape among Native women in Alaska. Alaskan tribes came under P.L. 280 jurisdiction in 1959, when Alaska officially became a state.\(^9\) Alaska has the highest rate of rape of all the states in the union, and Native women experience the worst of this crisis, with Indians in Anchorage alone 9.7 times more likely to be rape victims than non-Indian women.\(^9\) Generally, non-Indians are responsible for seventy percent of violent acts committed against natives.\(^9\) Since the passage of P.L. 280, Alaskan Natives have protested the effects on their tribal systems of justice.\(^9\) They claim that "the state criminal justice system does not take into consideration native culture and that rural crime could best be resolved by allowing the villages to have criminal jurisdiction, but the state of Alaska is unwilling to give village councils and village courts the authority to handle local cases themselves."\(^9\) Alaskan Natives may find it even

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90. Id. at 1659-60.

91. Deer, supra note 17, at 122-29 (describing federal and tribal issues of enforcement and jurisdiction).

92. Jiménez & Song, supra note 87, at 1657, 1691.

93. See AMNESTY INT’L, supra note 13, at 2, 4. Additionally, tribes in P.L. 280 states lack authority when it comes to certain important legislative endeavors, such as the establishment of a sexual predator registry as mandated by the Adam Walsh Child Protection and Safety Act of 2006. Sarah Deer, Widening the Gap, INDIAN COUNTRY TODAY, http://www.indiancountry.com/archive/28149884.html (last visited Jan. 9, 2009). Under this act, non-P.L. 280 tribes can function as independent registration jurisdictions and establish their own sex offender registry. Id. Tribes in P.L. 280 states, however, must delegate that responsibility to the state. Id. Critics have maintained that state control over a tribal sex offender registry will only be inefficient and ineffectual and that tribes would know best how to structure a registry for their community. See Timothy J. Droske, Comment, The New Battleground for Public Law 280 Jurisdiction: Sex Offender Registration in Indian Country, 101 NW. U. L. REV. 897, 915 (2007); Deer, supra.

94. AMNESTY INT’L, supra note 13, at 36.

95. Id.


97. See id. at 220-21.

98. Id.
harder than other tribal groups to assimilate and accept the external jurisdiction of the state because of the degree to which federal and/or state intrusion is so new to them. Given the fact that the federal government failed to allocate any funding to P.L. 280 states for the additional burden of having to tend to tribal criminal cases, it is that much harder for Alaska state law enforcement to access the rural and remote regions where many Native rape victims live. Because ninety percent of the state is inaccessible by roads, state law enforcement must spend even more funds and expend more time investigating rape cases, if they exert any effort at all; there is some indication that "[w]hile the State has sought to limit the exercise of tribal authority and traditional justice methods for keeping the peace in villages, it has at the same time failed to provide state law enforcement services." The rape statistics of Alaskan Native women alone prove just how ineffectual criminal justice enforcement is under the P.L. 280 jurisdictional system.

Not only is it possible to attribute the paternalistic nature of the federal jurisdiction over rape to an entrenchment in practices and laws of an earlier, more distant, less culturally sensitive time, it is also possible to consider P.L. 280 the product of modern paternalism, specifically paternalism passed from the federal government to the state. No tribe has ever officially consented to P.L. 280, and as stated above, tribes have rejected the law's erosion of existing tribal judicial systems. Some states took liberties with P.L. 280, interpreting it to give them wide latitude over Indian tribes. Indeed, rather than helping tribes become more independent and autonomous, P.L. 280 gave states an avenue to become oppressively paternalistic. The ramifications of this oppressive paternalism are shown by the suffering of Native women under a jurisdictional system that fails

99. See PEVAR, supra note 1, at 299-300; Lee, supra note 96, at 221 (noting that "many natives . . . are not assimilated into the dominant culture . . . ").
100. Jiménez & Song, supra note 87, at 1657.
101. AMNESTY INT’L, supra note 13, at 36.
104. See, e.g., FRENCH, supra note 37, at 38-40.
105. Id.
106. Id. at 40.
107. Id. at 39-41.
to protect them from becoming victims of rape and provides them, at best, with ineffectual means of seeking justice: a jurisdictional system that seems to only exacerbate the problems experienced under federal rape jurisdiction.

II. THE INDIAN CHILD WELFARE ACT

A. How ICWA Was Born

As Part I explained, rape jurisdiction for Native Americans is a creature of several different statutes from different but nonetheless paternalistic eras of federal Indian policy. Unlike the system of rape jurisdiction, the system that dictates the process of removing Indian children from their homes and influences the structure of Indian families is a single piece of legislation enacted during the Self-Determination era, a period of federal Indian policy that presumably sought, and seeks, to protect and preserve tribal sovereignty. This piece of legislation is the Indian Child Welfare Act, or ICWA, and its effects (as Part II will show) have been mixed.

Any analysis of ICWA necessarily requires an understanding of the circumstances under which the Act was drafted and passed. Prior to the passage of ICWA, there was a prevailing sense in American jurisprudence that “[t]he Native American lacked the independence and drive for achievement perceived as normal and necessary not only for success, but even for survival.” This attitude is illustrated by the fact that, as shown by a 1969 survey of sixteen states, “approximately 85 percent of Native American children” removed from their homes were placed in non-native environments. This statistic indicates that in most Indian child custody cases, courts found Indian tribes incapable of, or unsuitable for, raising their own children. In light of the high rate of placement of Indian children in non-native environments, Congress became concerned with the idea that “tribes could disappear as their next generation was forcibly assimilated through termination of parental rights of Native Americans and outplacement of their children.” A 1975 report made for the American

113. See id. at 2-3.
114. Carriere, supra note 111, at 597-98.
Academy of Child Psychiatry, noted that regardless of the quality and supportive nature of the non-Indian foster home, Indian children placed in such a home would later suffer adjustment and identity issues due to the separation from their family and culture. The termination policies adopted in the 1950s had clearly taken a toll on tribal family structure and Indian children.

It is important to note, however, that the breaking up of Indian families had been occurring long before the “termination era” of federal Indian policy. Congress was dealing with an issue that had existed beginning in the 1800s, when Indian children were forcibly removed from the tribal environment and placed in white-run boarding schools in an attempt at forced cultural assimilation. Although there is some evidence that these boarding schools might have provided Indian children with opportunities and education they might not have otherwise received, most evidence indicates that the boarding school experience taught Indian children that their culture was inferior and that they must abandon their traditions and heritage.

Researchers have noted that through the boarding schools, reformers, educators, and federal agents waged cultural, psychological, and intellectual warfare on Native students as part of a concerted effort to turn Indians into “Americans.” School administrators and teachers cut children’s hair; changed their dress, their diets, and their names; introduced them to unfamiliar conceptions of space and time; and subjected them to militaristic regimentation and discipline.

It seems hard to imagine that the education and opportunities afforded Indian children through their placement in these boarding schools truly outweighed the effects of this so-called warfare.

As the era of the white-run Indian boarding school ended, assimilation was effected by the termination of Indian families through the removal of Indian children from the home and their adoption into white households. The hearings preceding the passage of ICWA indicate the inability of state child welfare officials to understand the

116. See French, supra note 37, at 39; Pevar, supra note 1, at 122.
traditions and methods involved in tribal child-rearing, which often involved the raising of children by non-immediate family members. Scholars have noted that tribal constructions of family differ dramatically from Anglo-American constructions of family; although in Anglo-American families “extended family such as grandparents, aunts, uncles, and cousins often play a part in the life of a child, their role is much less central than in most tribal familial relations.” Native families rely on an entire kinship community composed of non-nuclear family members for the raising and education of children. In certain tribal cultures, these family members even assume specific child-rearing responsibilities. Given this information, one might expect that tribal courts “embrace a more fluid concept of child rearing in which biology and formal adoption are not the only routes to the obligations and responsibilities of parenthood.” Through the pre-ICWA hearings, Congress finally recognized that cultural bias and a misunderstanding about tribal family structure played a role in most removals of Indian children from their tribal home. Congress asserted that it had the duty to protect the resources of Indian tribes, the most important of which is Indian children. Congress further stated that the purpose of ICWA was to establish minimum standards for the removal of Indian children from their homes and to attempt to place whatever children might be removed into tribal or tribe-affiliated homes. Critics have assailed ICWA, with some arguing that the Act merely perpetuates federal control over what should rightfully be intra-tribal issues. In order to truly evaluate the effects of ICWA and its role in determining the structure of Native families, one must examine certain key provisions of the statute itself.

121. Atwood, supra note 117, at 603; JONES ET. AL., supra note 112, at 3.
122. JONES ET. AL., supra note 112, at 3; 1 JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 192 (Jerry Gardner ed., 2004).
123. Graham, supra note 12, at 6.
124. Id.
127. § 1901(2), (3).
128. § 1902.
129. See Carriere, supra note 111, at 597-600. Carriere states that: the Act does not fully commit itself to its task of restraining the majoritarian states from destroying Native America, for it refuses to trust Native Americans in the role that it assigns them. It sidesteps the issue of Native American empowerment whenever sovereignty appears to pose a potential stumbling block to the incorporation of the group's individual members into the Euro-American world. In maintaining this contradiction, the ICWA recapitulates the inconsistencies of the popular cultural view of the Native American.

Id. at 598.
B. Key Provisions of ICWA

Section 1911 of ICWA outlines important jurisdictional standards that courts must follow when dealing with Indian child custody proceedings.\textsuperscript{130} Section 1911(a) states that Indian tribes will have "jurisdiction exclusive" over child custody proceedings involving children residing or domiciled on the tribe's reservation.\textsuperscript{131} Those children who are wards of tribal court will remain under the jurisdiction of the tribe no matter where they reside or claim domicile.\textsuperscript{132} This provision is mandatory and prohibits state interference with proceedings that are truly intra-reservation.\textsuperscript{133}

In terms of Indian children who do not reside on or who are not domiciled on the tribe's reservation, ICWA requires that the state court claiming jurisdiction must comply with certain standards.\textsuperscript{134} The state court claiming jurisdiction, "in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe . . . upon the petition of either parent or the Indian custodian or the Indian child's tribe."\textsuperscript{135} In addition to this safeguard, section 1912(a) requires that the Indian child's parent/custodian and tribe be notified of the proceedings and that no termination of parental rights or removal from the home take place until 10 days after the notice was received.\textsuperscript{136} Theoretically, these rules will allow tribes the time and notice to address child custody proceedings taking place outside of tribal court and, if necessary, remove that proceeding to tribal court.\textsuperscript{137}

One of the most important provisions of ICWA is found in section 1915, which addresses the rules and standards applicable to placement of Indian children.\textsuperscript{138} In terms of the adoption of Indian children, state courts must give preference to the placement of the children with a member of the child's extended family, a member of the child's tribe, or another Indian family.\textsuperscript{139} The criteria governing pre-adoptive and foster care placements list similar preferences for placement; if a member of the child's extended family is unavailable for placement, the child should be situated in a foster home "licensed,
approved or specified" by the tribe.\textsuperscript{140} If no such foster home exists, the child should be placed in an Indian foster home recommended by a non-Indian authorizing authority or a children's institution authorized or operated by the tribe, provided that it can serve the child's particular needs.\textsuperscript{141} In addition to these criteria, this section of ICWA specifies that the tribe can make a resolution for a different order of preferences; such a resolution forces the court to follow the tribe's preferences so long as the proposed placement is the least restrictive environment for the child and will be able to meet the child's needs.\textsuperscript{142} It is important to note that with respect to abiding by the preferred placements listed in section 1915(a) and (b), the state must follow those criteria for placement only "in the absence of good cause to the contrary."\textsuperscript{143} This exception to the otherwise mandatory placement preferences allows state courts flexibility in applying ICWA.

\textbf{C. Effects and Criticism of ICWA}

Despite the noble purpose behind the passage of ICWA, namely, the protection of the best interests of Indian children and the promotion of tribal stability and security,\textsuperscript{144} ICWA has come under criticism since its passage. One of the chief criticisms and concerns cited by legal scholars and social critics is the fact that so many Indian children, up to one-fifth, "are still being placed outside of their natural tribal and family environments"\textsuperscript{145} and that "[c]ourts, social welfare agencies, and attorneys who fail to follow the letter and spirit of the law have all contributed to this ongoing crisis."\textsuperscript{146} Indeed, the National Conference of State Legislatures, in discussing ICWA and its effects, noted that state officials' ignorance of the Act or refusal to comply with its provisions have detracted from its effectiveness.\textsuperscript{147} Clearly, without proper implementation by the states, the purpose of ICWA cannot truly be realized.

One of the ways in which states fail to properly implement ICWA or take liberties with the discretion provided in the Act is through

\begin{footnotes}
\item[140] § 1915(b).
\item[141] Id.
\item[142] § 1915(c).
\item[143] § 1915(a), (b).
\item[144] § 1902.
\item[146] Graham, \textit{supra} note 12, at 3.
\end{footnotes}
the "existing Indian family" doctrine.\textsuperscript{148} This doctrine "bars application of the ICWA when either the child or the child's parents have not maintained a significant social, cultural, or political relationship with his tribe."\textsuperscript{149} Many critics of this doctrine claim that it functions merely as a loophole states may use to avoid applying ICWA in child custody cases and thereby retain jurisdiction.\textsuperscript{150} The doctrine is entirely court-created and was first established in a Kansas Supreme Court case, \textit{In re Adoption of Baby Boy L.}\textsuperscript{151} In this case, the child in question was five-sixteenths Kiowa and was born to a man enrolled in the Kiowa tribe.\textsuperscript{152} In order to qualify as a member of the Kiowa tribe, a child must be at least one-quarter Kiowa; because of the child's qualification as a tribal member, he also qualified as an Indian child under ICWA's definition.\textsuperscript{153} The Kansas Supreme Court, however, chose to focus not on the strict letter of ICWA and its definition of an Indian child.\textsuperscript{154} Rather, the court found an "underlying thread that runs throughout the entire Act to the effect that the Act is concerned with the removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family."\textsuperscript{155} This "underlying thread" became the basis for the court not applying ICWA in the particular case at hand.\textsuperscript{156} Ten other states have employed this doctrine since its inception,\textsuperscript{157} although recently states such as Oklahoma and courts in California have rejected its use.\textsuperscript{158}

\begin{thebibliography}{9}
\bibitem{149} \textit{Id.} at 741-42.
\bibitem{150} \textit{Id.} at 741.
\bibitem{151} 643 P.2d 168, 175 (Kan. 1982); see Jaffke, \textit{supra} note 148, at 741.
\bibitem{152} \textit{Baby Boy L.}, 643 P.2d at 172, 176.
\bibitem{153} \textit{Id.} at 176.
\bibitem{154} \textit{Id.; see} 25 U.S.C. § 1903(4) (2000) (defining "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 Indian tribe and is the biological child of a member of an Indian tribe").
\bibitem{155} \textit{Baby Boy L.}, 643 P.2d at 175.
\bibitem{156} \textit{Id.}
\bibitem{158} \textit{See In re} Vincent M., 59 Cal. Rptr. 3d 321, 334 (Cal. Ct. App. 2007) (explaining that California had not taken a uniform stance on the doctrine, but that "[a]n unambiguous federal statute and an unambiguous state statute require the application of the ICWA's substantive provisions whenever the proceedings involve an Indian child. The plain language of these statutes precludes the existence of an exception where there is no existing Indian family."); Cherokee Nation v. Nomura, 160 P.3d 967, 974-75 (Okla. 2007) (explaining that the court "determined the Oklahoma Legislature amended the Oklahoma [Indian Child Welfare] Act in 1994 to abrogate the judicially created 'existing Indian family exception' to the Federal [Indian Child Welfare] Act in Oklahoma.").
\end{thebibliography}
A concern about how states use this doctrine still exists, though, as it has not been uniformly rejected; Kansas, the source of the problem, recently reaffirmed the doctrine's validity in *In re Adoption of B.G.J.*, and other states refuse to take a firm stance on the issue, leaving the door open for future use of the doctrine.

Critics of the use of the "existing Indian family" exception have noted that one of the main purposes of Congress's implementation of ICWA was to counter the jurisdictional abuse of state courts in Indian child custody cases, abuse that had resulted in so many Indian children being removed from tribal environments. By allowing state courts a loophole through which they can deny tribes jurisdiction, these courts are directly flouting one of the most significant statutory purposes. Additionally, critics have noted that the Supreme Court itself, in analyzing ICWA, felt that state courts had dangerously infringed on tribal jurisdictional rights and that "Congress would not have left the pivotal jurisdictional issue . . . to interpretation by state courts based on state law." The fact that the doctrine remains a viable avenue for some state courts to follow naturally concerns those who believe in the spirit and letter of ICWA.

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159. 111 P.3d 651, 659 (Kan. Ct. App. 2005) (explaining why the court was unable to officially reject the use of the "existing Indian family" doctrine, the court stated that "[t]his we cannot do as this court is duty bound to follow Kansas Supreme Court precedent in the absence of some indication that the court is departing from its previous position."), aff'd by 133 P.3d 1, 10 (Kan. 2006).

160. See, e.g., *In re Adoption of Kenten H.*, 725 N.W.2d 548, 556-57 (Neb. 2007) (acknowledging the debate over the use of the "existing Indian family" doctrine, but stating that Nebraska's higher courts had never decided the issue and did not need to do so in this case).


162. Thomas L. LeClaire, in his testimony before the Senate Indian Affairs Committee, expressed it convincingly:

   the "existing Indian family" doctrine grafts onto ICWA a subjective and open-ended test that, if anything, will increase the quantum of litigation. The existing trigger for ICWA — tribal membership or eligibility for tribal membership — is readily discernible by an inquiry to the relevant tribal government. In contrast, the "social, cultural, or political affiliation" test incorporates subjective criteria more likely to create additional litigation, with attendant delays in the adoptive placement of Indian children, than to "streamline" adoptive placements.


163. See Jaffke, supra note 148, at 741.

Another concern of ICWA critics relates to an aspect of the statute itself: the "good cause" exception in sections 1911 and 1915. As stated previously, this exception potentially allows states a significant amount of discretion when transferring the case to tribal court and deciding to apply the placement preferences dictated by the statute. Courts are bound to transfer the case to tribal jurisdiction upon petition and must place Indian children with tribal members or in a tribal environment unless they have "good cause to the contrary." State courts are left to their own devices in determining what constitutes a "good cause."

The Bureau of Indian Affairs wrote a set of Guidelines for State Courts that was published a year after the passage of ICWA, which indicated the BIA's interpretation of various provisions in ICWA, including the meaning of "good cause." The BIA notes in the introduction, however, that

[p]rimary responsibility for interpreting other language used in the Act . . . rests with the courts that decide Indian child custody cases. For example, the legislative history of the Act states explicitly that the use of the term "good cause" was designed to provide state courts with flexibility in determining the disposition of a placement proceeding involving an Indian child.

That said, the BIA then goes on to establish criteria for finding good cause to not transfer the case to tribal court upon a petition to do so. Some of these criteria are fairly obvious. For example, there would be good cause to not transfer if the tribe lacks a court. The BIA then goes on to describe other circumstances under which good cause to not transfer exists: if the child is over 12 years old and objects to transfer; if the proceedings in state court were already at an advanced stage upon petition; or if there would be undue hardship presenting evidence or calling forth witnesses should the case be transferred to tribal court.
The BIA also established guidelines for finding good cause to not follow the placement preferences set out in ICWA. The BIA lists three considerations for not following the preferred placement: if the biological parents or the child request a different placement; if the child has special physical or emotional needs, as shown by an expert; or if there are no available families meeting the preference criteria. Although these criteria could be helpful to state courts trying to interpret ICWA, it is important to reiterate that the BIA established mere guidelines, not requirements or imperatives. Indeed, "state courts have taken the view that the Guidelines established by the BIA do not state the only factors which may constitute good cause to the contrary and that, in fact, the child's best interests may override a tribal or family interest."

How much state discretion in applying and implementing ICWA plays a role in the effectiveness, or lack thereof, of ICWA is difficult to determine. A 2005 report from the U.S. Government Accountability Office indicates that there is a dearth of statistical data on how states are actually dealing with ICWA. The GAO did recommend, however, that the Department of Health and Human Services, specifically the Department’s Administration for Children and Families, use its oversight capabilities to better aid states in their implementation of the Act. More oversight is necessary to ensure that states are not abusing the discretion afforded them by the Act or created by the states through their loose interpretation of its provisions. Such change is necessary given that almost 30 years after the passage of ICWA, a disproportionate number of Indian children are still being removed from their homes and placed outside of a tribal environment.

### III. Federal Indifference, State Paternalism, and the Search for a Solution

As Parts I and II have illustrated, the U.S. and state governments play dual, intricate roles in dealing with sexual violence and children's custody issues. The federal government's ineffective control over the

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174. Id. at 67594.
175. Id.
176. Id. at 67584. This is apparent by the title of the document, "Guidelines for State Courts."
178. GOV'T ACCOUNTABILITY OFFICE, supra note 32, at 3 (explaining that data was forthcoming from only approximately five states).
179. Id. at 59.
180. Graham, supra note 12, at 3.
Rape of Indian women and its delegation of that control to states governed by P.L. 280, has resulted in providing Native women with little or no protection from rape or recourse should they become rape victims.\(^\text{181}\) The federal government’s development of ICWA seemed to mark a new era of respect for tribal sovereignty and tradition; however, the loopholes that allow states a great deal of discretion in how and when they apply ICWA has essentially undermined the very purposes for which Congress created the statute.\(^\text{182}\) As a result, both Indian women and Indian families continue to be victims of a vicious cycle of seeming indifference and paternalism on the part of federal and state governments.

Tribes cannot truly become self-determinative without greater social progress in terms of rape and child welfare issues, as “[a]t the very heart of sovereignty is the power to provide a safe environment for all citizens and to restore harmony when breakdowns occur.”\(^\text{183}\) Both the rape crisis in Indian country and the child welfare and custody problems that spawned ICWA are the result of interactions with white settlers or colonizers and/or the American government.\(^\text{184}\) For instance, “[s]everal scholars have suggested that sexual violence may have been extremely rare in indigenous communities in pre-Colonial times.”\(^\text{185}\) This is perhaps because of the status that women enjoyed in traditional tribal society: “[w]omen served as spiritual, political, and military leaders, and many societies were matrilineal...women and men lived in balance.”\(^\text{186}\) Additionally, native societies were much less aggressive and warlike compared to Anglo-American society, with only thirty percent of tribes actually engaging in war.\(^\text{187}\) Historians have argued that white settlers and colonizers used “[p]atriarchal gender violence . . . [to] inscribe hierarchy and domination on the bodies of the colonized.”\(^\text{188}\) Likewise, the problems that spawned ICWA resulted from the government taking Indian children out of their homes due to a lack of understanding of the culture and/or racist

\(^{181}\) See Deer, supra note 17, at 122, 125-28; Amnesty Int’l, supra note 13, at 2-10.

\(^{182}\) See Jaffke, supra note 148, at 740-41.


\(^{184}\) See Fren, supra note 37, at 39; Pevar, supra note 1, at 122; Andrea Smith, Conquest: Sexual Violence and American Indian Genocide 23 (2005) (discussing the lack of sexual assault prior to colonization and the role white settlers played in introducing this atrocity to Native Americans); Deer, supra note 17, at 129-134.

\(^{185}\) Deer, supra note 17, at 129.

\(^{186}\) Smith, supra note 184, at 18.

\(^{187}\) Id. at 19.

\(^{188}\) Id. at 23.
ideologies. The fact that a significant number of Indian children are still taken out of their tribal communities is arguably the result of the continuation of this misunderstanding of tribal culture as well as the general refusal to apply the Act correctly. The solution to these problems, then, will not be created by the tribes alone. Rather, tribes, the federal and state governments, and courts are inextricably intertwined, for better or worse. The path to finding a solution to these problems, therefore requires navigation of some of the most complex legal and socio-political issues in existence today.

A. The Limitations of Relying on Traditional Justice Systems

Scholars have noted the importance of having the structure of governmental and societal institutions mirror traditional cultural structures. That is, according to a hypothesis set forth by scholars Stephen Cornell and Joseph P. Kalt, "a society's formal institutions would be more effective the closer is the match of those institutions to the informal institutions that emanate from cultural norms." When it comes to dealing with the sexual victimization of women, tribes have virtually no control over how that victimization is handled or prevented. When it comes to dealing with child custody cases, tribes theoretically have more sovereignty and should be able to deal with those cases through their own tribal institutions, but as was discussed in Part II, too often state courts work around the provisions of ICWA to ensure that Indian child custody cases remain with the state. Clearly, in Indian country neither rape nor child custody is handled by institutions that mirror informal cultural institutions. Rather, these issues are dealt with by institutions (state or federal courts and law enforcement agencies) that do not come close to mirroring tribal cultural institutions.

190. See Graham, supra note 12, at 3-4.
192. See Deer, supra note 17, at 127-128.
194. Cornell & Kalt, supra note 191, at 453. The authors also note that: many American Indian tribes have formal systems of government which were not originally of their own design. Rather, they were presented (mostly in the 1930s) with constitutions and bureaucratic systems by agents of the Federal Government. With the strengthening of tribal sovereignty over the last 15-20 years, it could well be that the governmental structures under which tribes now find themselves operating do not match with underlying cultural foundations of authority and legitimacy.

Id.
One might conclude, given this hypothesis, that tribes could become more self-determinative if rape and child welfare issues were dealt with more by traditional tribal institutions of justice and less by the federal and state governments. Indeed, scholars have noted that "[i]ndigenous jurisprudence is generally guided by a more holistic approach to justice than the dominant (Anglo-American) judicial system." Indian law scholar Sarah Deer has suggested that developing and expanding this holistic approach in modern tribal court systems could serve to remedy the massive rape problem in Indian country, as women could turn to their own tribe for help and healing and would not have to depend on ineffective Anglo-American institutions. In terms of child welfare or custody disputes,

it is not enough to simply solve the immediate dispute existing between two individuals when there are probably many more people involved — people who, for the benefit of the community or tribe, will have to continue to live, work, and relate to each other as members of the same household, clan, band, or village.

The use of traditional dispute resolution techniques and peacemaking strategies, which take into account the effect of an issue on the entire community and not just the immediate parties involved, would theoretically be quite useful in child custody and welfare disputes as well as in rape cases.

It is important to note, though, that this solution is not as simple or straightforward as it sounds. Too often tribal cultural institutions are not even the product of tribal tradition and culture; even when tribes have jurisdiction or power over some aspect of a rape or child welfare case, that case is not necessarily being dealt with in a traditional, tribal manner. This means that in order to become the source of holistic healing and justice, tribes with more Anglo-American institutions will have to work to modify those institutions to bring back a more traditional, tribal structure and approach to justice. Although Deer acknowledges that tribes will have to effect these changes, she does not expound on what exactly it will take for tribes to develop

195. Martell & Deer, supra note 183, at 816.
197. RICHLAND & DEER, supra note 122, at 313.
198. Id. at 313-14.
199. See Nancy Carol Carter, American Indian Tribal Governments, Law, and Courts, 18 LEGAL REFERENCE SERVICES Q. 7, 14-16 (2000); see Cornell & Kalt, supra note 191, at 453.
201. See Martell & Deer, supra note 183, at 816-22.
more traditional approaches to issues like rape and child welfare and the degree to which tribes will have to battle against a history of cultural erosion by the American government.

The reason that so many tribes have Anglo-American systems of justice, of course, is from interactions with the American government. In 1934, the Indian Reorganization Act (IRA) dictated that tribes could reorganize and strengthen their internal governments with new constitutions approved by the Secretary of the Interior. As a result, tribes adopted primarily Anglo-American legal systems, some of which have been modified to reflect more traditional tribal justice systems and some of which have not. Indeed, “[t]he process of rebuilding tribal justice systems was slow and is still evolving.”

The diversity of tribes, tribal history, and the degree to which interactions with the federal government have hampered or affected the development and welfare of these tribes all play a role in what sort of tribal justice system the tribe has in place. Indian courts today fall into one of three categories: traditional courts; tribal courts or courts formed under the IRA; or Courts of Indian Offenses, which operate under BIA guidelines and provisions. The most prevalent type of court is the tribal or IRA court system. This diversity in the type of justice system in place means that it is impossible to generalize about the state of tribal justice among Indian tribes.

Another issue with implementing more traditional tribe court systems and approaches to justice is the fact that “people in tribal communities often disagree about the extent to which traditional norms, structures and practices represent their contemporary beliefs and way of life.” These disagreements about what constitutes traditional practices are reasonable, given that interaction with white settlers, termination and assimilation policies, and the general erosion of tribal customs and culture have made it difficult for many tribes to even know their own customary law. Naturally, more insular tribes with less assimilative histories tend to have preserved their customary law better than more widely dispersed tribes who

203. Id. at 8-9, 15.
204. Id. at 15.
205. See id. at 15 (noting that Southwestern Indian tribes retained the most traditional courts, as those tribes were the least affected by “the massive breakdown of tribal social and political traditions in the second half of the Nineteenth Century . . .”).
206. Id.
207. Id.
208. Id. at 9.
209. RICHLAND & DEER, supra note 122, at 314.
have lost most speakers of their tribal language.\textsuperscript{211} Without an understanding of traditional cultural and judicial practices, though, implementing those practices could prove an overwhelming task.\textsuperscript{212}

Additionally, scholars like Pevar have noted that "[f]ew tribes have the means to adequately fund their court systems, and Congress has not provided sufficient funding for this purpose."\textsuperscript{213} Recently, the Bureau of Justice Assistance has granted funding to tribes seeking to promote or enhance their tribal justice systems; however, the program dispensed a mere $8 million in 2007 and restricted tribes that received funding in 2006 or 2007 from reapplying in 2008.\textsuperscript{214} Studies indicate that funding from the federal government is key to maintaining tribal court facilities, training and employing court employees, and maintaining technology, but despite the importance of funding, the U.S. Commission on Civil Rights found that a "lack of funding had hampered the effectiveness of tribal courts for more than 20 years."\textsuperscript{215} Although not every tribe’s court system suffers from this lack of funding or seem to be failing to meet the needs of tribe members,\textsuperscript{216} it stands to reason that a general lack of funding might make it difficult for tribes to revamp their justice systems into something that more resembles a traditional, cultural system.

Given the difficulty in rediscovering customary law and agreeing on traditional tribal practices coupled with practical funding issues, it seems an inadequate solution to rely on tribal courts and justice systems to make up for the continued federal and state treatment of tribes indifferently or paternalistically. It is no doubt true that, ideally, tribes should work to rekindle custom and tradition in their justice systems so that tribal members can turn to their tribes for dispute resolution or healing whenever possible. One must keep in mind, however, that the diversity of tribes in terms of their economic positions, the state of their justice systems, and the amount of tradition and culture that they have preserved throughout history greatly affects how readily they can address rape and ICWA issues with traditional, cultural approaches.

\textsuperscript{211} Id. at 59.
\textsuperscript{212} Id. at 59-61.
\textsuperscript{213} PEVAR, \textit{supra} note 1, at 104.
\textsuperscript{216} See PEVAR, \textit{supra} note 1, at 104 (noting that "[t]he courts of the Navajo Nation process over forty-five thousand cases a year and publish decisions in an official reporter.").
B. Diversity and the Need for Micro-Solutions

It is important to remember when studying the rape crisis in Indian country and the problems with ICWA that tribes are incredibly diverse. With 562 federally-recognized tribes scattered across the United States, and with each tribe having their own unique history and interaction with federal and state governments, generalizing about the tribes of America would result in inaccurate conclusions. An overview of the state of modern tribes, which are arguably even more diverse as tribal members become increasingly scattered across the country and intermarry, reveals the heterogeneity of tribes today.

Although fairly obvious, it is worth noting that not all tribal members are full-blood Indians or come from tribal backgrounds. Tribes have different membership requirements, often requiring a certain blood quantum to enroll with the tribe. The percent blood quantum is determined by each individual tribe and can have a profound impact on how homogenous and culturally distinct the tribe is. Even determining who a Native American is for the sake of population demographics can become complicated. Only one-quarter of Native Americans live on reservations, meaning that most Indians are intermingled in society, living in urban areas, intermarrying, and leading significantly different lives than reservation Indians. One must note, however, that

urban-reservation differences, although obviously important, represent but one source of diversity among a socially, economically, politically, linguistically, and culturally plural Native American population. Tribal distinctions represent an even greater source of variability. Each tribe has its own government, legal system, justice system, educational system, and economic, social, and cultural organization. These differences are reinforced

220. Id. at 36.
221. Id.
222. Id.
223. Id. at 35 (explaining that “the decision about which variables to use in defining a given population is an arbitrary one. The implications of the decision for Native Americans can be enormous . . . ”).
224. Id. at 37.
225. Id. at 38-40.
by geographic distances among tribes and the isolation of many reservations. Historical patterns of conflict, competition, or cooperation also remain a legacy that shades contemporary intertribal relations, as does the fact that Indian communities often see one another as competition for scarce federal funding or federally regulated resources. Clearly, Indian tribes, even modern tribes with years of forced assimilation in their recent past, have remained significantly distinct from each other.

The relevance of this recognition of diversity to the discussion of how to remedy rape and child welfare issues, and thus lead to more self-determinative tribes, is simply that an understanding of the heterogeneity of tribes makes it clear that one generalized social or legislative solution will not suffice. Although many tribes and tribal members are suffering from the rape crisis and from the misapplication of ICWA, leading to the further erosion of their autonomy and infrastructure, each tribe will have to come to terms with those issues in an individual way. The federal government’s rhetoric regarding tribes has, without fail, been broad, lumping all Native Americans into one class of people. Federal Indian policy has always sought to deal with all tribes on the same level, whether in forcing assimilation or termination on all tribes, or later encouraging self-determination. Having uniform federal policies is, of course, necessary for an efficient and productive government. The efficacy of those policies, however, is limited due to how little consideration is given to the needs of the individual tribes to which those policies are applied.

Scholars who believe that an antidote to the social ills afflicting Indians today involves tribes returning to some of their traditional,


227. Interesting scholarship has been done on the differences between tribal women. See Devon A. Mihesuah, Commonality of Difference: American Indian Women and History, in NATIVES AND ACADEMICS: RESEARCHING AND WRITING ABOUT AMERICAN INDIANS 37-38 (Devon A. Mihesuah ed., 1998) (noting that although tribal women have shared experiences with genocide, oppression, etc., their tribal differences as well as their relative attachment to tradition and tribal culture have made them a multi-faceted and extremely diverse category of the population).

228. See, e.g., Major Crimes Act, 18 U.S.C. § 1153(a); Indian Self-Determination Act, 25 U.S.C. § 450(a) (1994) (using general language such as “Indian people” and “Indian communities” to describe the federal governments’ recognition of their obligation to ensure self-determination for Native American tribes); Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (2006); AMNESTY INT’L, supra note 13, at 28, 29 (noting the use of general language such as “Indian women,” “Indian Country,” “Native Americans,” and “American Indians” to describe tribes within the larger population no matter who diverse these groups may be).
cultural judicial and dispute resolution practices have certainly made valid points on the importance of rekindling traditional tribal culture.\textsuperscript{229} Merely working around the problems created by ineffective federal legislation and the destructive, racist federal policies of the past is not enough, however. Furthermore, expecting tribes to develop a cohesive traditional justice system or source of healing could prove unrealistic, depending on the tribe.

Because of the enormity of the problem and the degree to which tribes are still struggling to develop stability and autonomy, the federal and state governments cannot shirk their duty of working with tribes to make them more self-determinative. Both federal and state governments must truly recognize the seriousness of rape and family issues in Indian country and put teeth into the self-determination rhetoric. Because tribes are so incredibly diverse and have differing social and economic needs, rape and family issues affect tribes very differently. Any changes in legislation or policy have to result from genuine interaction with tribes and should produce more individualized, unique approaches to addressing these problems. Any blanket solution or policy that fails to result from an actual dialogue with tribal members will, necessarily, fail to serve tribes.

**CONCLUSION**

Despite the terming of the current era of federal Indian policy as one of self-determination, certain aspects of federal Indian law and state implementation of that law have in fact rendered tribes as dependent as they were in past paternalistic eras.\textsuperscript{230} Although the laws that govern the jurisdictional issues involved when Indian women are raped stem from an admittedly paternalistic era,\textsuperscript{231} the law governing the handling of Indian child custody proceedings was crafted out of a spirit of stabilizing and empowering Indian families and tribes.\textsuperscript{232} Interestingly, both sets of laws have contributed to the lack of security and autonomy faced by tribes today.

One must remember that the effect of rape does not stop at its victims; rather, it affects communities as a whole, particularly when the community is unable to deal with that rape effectively.\textsuperscript{233} Because of the intricate and confusing nature of rape jurisdiction under the various federal laws, tribes have been unable to alleviate the rape

\textsuperscript{229} See RICHLAND \& DEER, supra note 122, at 313-14; Deer, supra note 17, at 137.
\textsuperscript{230} See Graham, supra note 12, at 4.
\textsuperscript{231} See, e.g., supra notes 70-75 and text accompanying notes.
\textsuperscript{232} 25 U.S.C. § 1901 (Supp. II 1978-1979); PEVAR, supra note 1, at 333-34.
\textsuperscript{233} See Deer, supra note 17, at 122-24, 126-27.
crisis independently and effectively.\textsuperscript{234} Given the semi-powerlessness of tribes over such a fundamental, intimate issue, one must reconsider whether we are truly in an era of tribal self-determination and self-governance. Federal paternalism appears to be alive and well, and the concept of tribal self-determination seems more precarious than well-established in federal jurisprudence. The ineffective ways in which rape is currently being handled in Indian country suggest that a future of greater self-determination might be necessary to the protection of Native women.

In addition, Indian families continue to suffer from the failure of states to properly implement ICWA in child custody proceedings.\textsuperscript{235} Too often states either fail to abide by the specific provisions of ICWA or they abuse the discretion that ICWA affords and fail to uphold the "spirit of the law."\textsuperscript{236} Although Congress created ICWA in order to preserve and maintain Indian families and ensure that the best interests of Indian children are being met by state courts and social authorities, the actual effect of the Act on the placement of Indian children has been minimal at best.\textsuperscript{237} Given the ever-present issues with the rape of Indian women and the failure to protect and preserve them from this horror, as well as the inefficacy of ICWA in changing the course of Indian child custody proceedings, it is clear that substantive changes must be made in federal Indian law for the sake of the cultural, spiritual, and social survival of tribes.

\textbf{MAIRE CORCORAN}\textsuperscript{*}

\begin{footnotesize}
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\item \textsuperscript{234} See id.
\item \textsuperscript{235} See Graham, supra note 12, at 3-4.
\item \textsuperscript{236} Id. at 3.
\item \textsuperscript{237} See id. at 2-4.
\end{itemize}
\end{footnotesize}

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