

Reparations, Self-Determination, and the Seventh Generation

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I. SEVEN GENERATIONS

“In each deliberation, we must consider the impact of our decisions on the next seven generations.”

—Great Law of the Haudenosaunee¹

“[T]he grandmothers and grandfathers . . . thought about us as they lived, confirmed in their belief of a continuing life”

—Simon Ortiz, Poet and Writer²

Indigenous teachings on law and family help define our responsibility toward future generations and how the decisions that we make today can impact the wellbeing of each generation to come. This message is particularly relevant in this time of climate change, warfare, and lack of respect for basic human rights. So too is it an important message as we reflect upon the thirtieth anniversary of the Indian Child Welfare Act of 1978 (“ICWA”)³ and look to the future. We are just over one generation removed from this landmark legislation—legislation that I will argue in this article constitutes partial reparations for human rights violations committed against Native peoples and their children.⁴ According to the Haudenosaunee’s Great

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1. Responsibility to future generations is a central tenet of the Haudenosaunee decision-making process. “[I]t install[s] in government the idea of accountability to future life and responsibility to the seventh generation to come.” Oren Lyons, *American Indian in the Past*, in *EXILED IN THE LAND OF THE FREE* 13, 33 (Oren R. Lyons & John C. Mohawk eds., 1992). See also Degiyah’goh Resources: Worldview of the Haudenosaunee, *What is the Seventh Generation*, http://www.degiyahgoh.net/worldview_haudenosaunee.htm (last visited Dec. 21, 2007). Today, this mandate is a governing ethic of many indigenous nations, particularly in the areas of environmental protection and resource development. See, e.g., WINONA LADUKE, *ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE* 198 (1999); Jacqueline P. Hand, *Protecting the Seventh Generation: Saginaw Chippewa Tribe Serves as Natural Resources Trustee*, 83 MICH B. J. 28 (2004).

2. SIMON ORTIZ, *The Language We Know*, in *GROWING UP NATIVE AMERICAN* 29, 32 (1993).

3. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2000).

4. Native peoples are not a monolithic group. Each indigenous nation has its own story to tell with regard to human rights violations. However, the primary focus of this paper is on the common stories of Native peoples as they relate to the removal policies of the United States. In keeping with this broader focus, this paper uses the terms “American Indian,” “Native American,” and “indigenous peoples” interchangeably, while acknowledging the importance of separate group affiliations.

Law of Peace, we have six more generations to consider before we can truly understand the full impact of this law.

However, before looking forward, let us take a moment to look back. The long history of injustices against indigenous peoples of the Americas is well-documented.⁵ For purposes of the ICWA, the relevant historical point would be what one scholar has referred to as the "Native American holocaust in the nineteenth century."⁶ During this time the U.S. Government officially embraced policies of forced assimilation aimed at the breakup of the American Indian family. As early as 1867, the U.S. Commissioner of Indian Affairs advocated for the forcible removal of Indian children from their tribal nations as "the only successful way to deal with the 'Indian problem'."⁷ This was merely the beginning of what would amount to over one hundred years of U.S. policies aimed at separating the Indian child from his family and nation, and the consequences of these policies are still being felt today by the seventh generation of young children.⁸

In more recent times, the federal government has embraced a policy of self-determination for Native American nations and has made some attempts to redress the myriad of wrongs committed against them.⁹ The ICWA is part of that effort. In this article, I explore whether the ICWA achieves a genuine measure of reparations for some of these wrongs. Working directly with Native American nations and organizations, Congress passed the ICWA in response to the massive displacement of Native American children to non-Indian adoptive homes, foster care, and educational institutions by federal, state, and private child welfare authorities. This article

5. See, e.g., DAVID STANNARD, *AMERICAN HOLOCAUST* (1992); M. ANNETTE JAIMES, *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* (1992); LADUKE, *supra* note 1.

6. Keven Gover, "There is Hope": A Few Thoughts on Indian Law, 24 *AM. INDIAN L. REV.* 219, 228 (2000).

7. H.R. REP. NO. 104-808, at 15 (1996), available at <http://www.congress.gov/cgi-bin/cpquery/z?cp104:hr808pl>.

8. See *infra* notes 18-65 and accompanying text. See also Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 *AM. INDIAN L. REV.* 1, 48 (1999).

9. See, e.g., Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450 (1975). Some of these legislative responses have been criticized for not going far enough in terms of repairing the wrongs committed against Native peoples, their lands, and their culture. See, e.g., Roy L. Brooks, *Wild Redress?*, in *WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 233 (Roy L. Brooks ed., 1999) [hereinafter Brooks]. One example cited is the Indian Claims Commission ("ICC"), "a quasi-judicial tribunal. . . [established by the federal government in the 1940s to] hear the myriad of Indian tribe lawsuits pending against the federal government." *Id.* at 234. The commission's primary focus was on land deprivation, but as Professor Brooks argues, the ICC redress mechanisms were "unabashedly result-oriented" and therefore flawed from the outset. *Id.* As Professor Nell Jessup Newton points out, "the decision [of the Commission] to equate justice with money . . . was the most serious flaw in the commission's design and implementation." *Id.* These findings were recently confirmed by the Inter-American Commission on Human Rights in a case involving the Western Shoshone. See *Mary Dann and Carrie Dann v. United States*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.LV/II.117, doc. 1 rev. 1 (2002), available at <http://www.cidh.org/annualrep/2002eng/USA.11140.htm>. Other legislative examples critiqued in the Brooks collection of essays include the 1971 Alaska Native Claims Settlement Act, the Native American Graves Protection and Repatriation Act of 1990, and the Indian Gaming Regulatory Act of 1988.

will explore the relevance of this law within the context of emerging international human rights precepts. While the ICWA fails to provide complete relief under these principles, it is nevertheless an innovative approach to addressing past wrongs and deterring future wrongs.

Why is it important that we consider this legislation within the context of international human rights law? First, the ICWA clearly has its detractors, from scholars, to judges, to legislators.¹⁰ For instance, every few years, legislation to amend the ICWA is introduced in Congress. While some of these amendments seek to clarify ambiguities in the law, others—such as the codification of the “Existing Indian Family doctrine”¹¹—would eliminate important safeguards designed to prevent the repetition of human rights abuses against indigenous children and their families.¹² In order to properly assess these challenges, courts and policymakers should have a clear understanding of what the rights of indigenous peoples are under international law and how the ICWA furthers those rights. Secondly, reparation claims are gaining momentum in other areas. For instance, there is a growing movement among Native Hawaiians to redress the illegal overthrow of Hawaiian rule and the loss of Native Hawaiian lands,¹³ and among African Americans as a means of remedying centuries of slavery and Jim Crow laws.¹⁴ More globally, countries like Australia and Canada are grappling with their own comparable legacies of forcible removal of indigenous chil-

10. See, e.g., RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 450-518 (2003); H.R. 3156, 104th Cong. (1996) (“To amend the Indian Child Welfare Act of 1978 to exempt voluntary child custody proceedings from coverage under that Act”); H.R. 3275, 104th Cong. (1996) (“To amend the Indian Child Welfare Act to exempt from coverage of the Act child custody proceedings involving a child whose parents do not maintain significant social, cultural, or political affiliation with the tribe of which the parents are members”); *Rye v. Weasel*, 934 S.W. 2d 257, 264 (Ky. 1996) (“[I]t is very clear that Congress did not intend that the ICWA should be applied . . . to children who, although Indian by birth, have not lived for many years in an existing Indian family”); *Hampton v. J.A.L.*, 658 So. 2d 331, 337 (La. Ct. App. 1995) (holding that the ICWA was not intended to apply when the child does not live in an Indian environment and the removal will not cause the breakup of an Indian family).

11. See *infra* notes 277-280 and accompanying text. See also *In re Adoption of Crews*, 833 P. 2d 1249, 1252 (Wash. 1992) (holding that the child in question was not part of an existing Indian family because neither she, nor her family, ever lived on the reservation and there were no ties to any Indian tribe or community); *In re Adoption of Baby Boy D.*, 742 P. 2d 1059, 1064 (Okla. 1987) (holding that the ICWA is inapplicable where the child never resided in an Indian family and has a non-Indian mother); *S.A. v. E.J.P.*, 571 So. 2d 1187, 1189 (Ala. 1990) (holding that because the child was never part of an Indian family, never lived in an Indian home, never experienced the Indian social and cultural world, and was born to a non-Indian mother, the “existing Indian family exception” did not apply); *Rye*, 934 S.W. 2d at 261-62 (holding that the “existing Indian family exception” was not judicially created, but in fact, reflected congressional intent).

12. See *infra* notes 267-280 and accompanying text. See also Graham, *supra* note 8.

13. See, e.g., S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 311-12 (1994). See also R.H. K. Lei Lindsey, *Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual*, 24 U. HAW. L. REV. 693, n.96 (2002); Jennifer M. L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawaii's Annexation and Possible Reparations*, 17 U. HAW. L. REV. 463 (1995).

14. See, e.g., Brooks, *supra* note 9, at 309-90. See also Kyle D. Logue, *The Jurisprudence of Slavery Reparations: Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1393-94 (2004); Edith Y. Wu, *Repara-*

dren.¹⁵ The ICWA may well serve as an important guidepost to countries looking to address similar types of human rights violations. It demonstrates the potentially broad contours of future reparation plans (beyond mere compensation). Finally, from the perspective of international law and policy, United Nations member states have recently adopted an important U.N. document that will further clarify the rights of indigenous peoples throughout the world, particularly as they relate to the question of self-determination.¹⁶ Laws such as the ICWA demonstrate how these international human rights precepts might be implemented through domestic action.

Part II of this article provides the factual foundation for reparation claims, while Part III discusses some of the relevant human rights principles that are implicated by these claims. Part IV discusses reparation principles under international law. Part V connects these principles to the Indian Child Welfare Act.

II. THE POLICY OF REMOVAL AND ITS ONGOING EFFECTS

“A great general had said that the only good Indian is a dead Indian . . . I agreed with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him and save the man.”

—Captain R.H. Pratt, superintendent of the Carlisle Indian Boarding School, 1880s¹⁷

“The Indian culture is foreign to me, and I don’t think it is valid.”
—Adoption Attorney, 1987¹⁸

Elsewhere I have written about the forcible removal of American Indian children from colonial missionary times to the 1970s.¹⁹ Many others have written on the removal process as well.²⁰ This section, which is based primarily on these earlier works, offers a brief summary of U.S. removal poli-

tions to African-Americans: The Only Remedy for the U.S. Government’s Failure to Enforce the Thirteenth, Fourteenth, and Fifteenth Amendments, 3 CONN. PUB. INT. L.J. 342, 343 (2004).

15. See, e.g., AUSTRALIAN HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997) [hereinafter BRINGING THEM HOME] available at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/>; Aleck v. Canada, 27 A.C.W.S. (3d) 28 (B.C.S.C. June 3, 1991), available at 1991 A.C.W.S.J. LEXIS 32152; A.Q. v. Canada, [1998] Sask. R. 1 (Can.); D.A. v. Canada, [1998] Sask. R. 312 (Can.); H.L. v. Canada, [2005] 1 S.C.R. 401, 2005 SCC 25 (Can.). See also, Canada’s Indian Residential Schools Settlement Agreement of May 8, 2006, available at http://www.irsr-rsqpi.gc.ca/english/pdf/indian_residential_schools_settlement_agreement.pdf.

16. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). The Declaration was adopted by a vote of 143 in favor and 4 against (Australia, Canada, New Zealand, and the United States). *Id.*

17. DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 185 (2004).

18. Thomas B. Rosensteil, *Whites Adopt Navajo: Sovereignty On Trial In Custody Case*, L.A. TIMES, Feb. 11, 1987, at A1.

19. See, e.g., Graham, *supra* note 8, at 10-32.

20. See, e.g., CLYDE ELLIS, TO CHANGE THEM FOREVER (1996); JOHN REYNER & JEANNE EDER, A HISTORY OF INDIAN EDUCATION (1989); MARGARET CONNELL SZASZ, EDUCATION AND THE AMERI-

cies. In addition, it explores some of the contemporary intergenerational effects of those policies. The section sets the groundwork for the discussion of human rights violations in Part III and the right to reparations in Parts IV and V of this article.

A History of Forced Assimilation

It has been said that children are the most “logical targets of a policy designed to erase one culture and replace it with another,” as they are the most “vulnerable to change and least able to resist it.”²¹ The chiefs of the Iroquois Confederacy were keenly aware of this when they declined an offer in 1774 from the English to “educate” their children:

You, who are wise, must know that different Nations have different Conceptions of things; and you will not therefore take it amiss, if our Ideas of this kind of Education happen not to be the same with yours. We have had some Experience of it; Several of our young people were formerly brought up at the colleges of the Northern Provinces; . . . but, when they came back to us . . . [they] were neither fit for Hunters, Warriors, or Counsellors . . . We are however, not the less oblig'd by your kind Offer, tho' we decline accepting it; and, to show our grateful Sense of it, if the Gentlemen of Virginia will Send a Dozen of their sons, we will take great care of their Education, instruct them in all we know, and make Men of them.²²

Yet starting with colonial missionaries, education became one of the most pernicious means of separating indigenous children from their families and communities.²³ While these colonial missions met with mixed results, they would set the tone for emerging U.S. policies. The United States has a constitutionally-based political relationship with Native American Nations.²⁴ Yet early federal Indian policy vacillated between respect for tribal autonomy and support for complete assimilation. By the late nineteenth

CAN INDIAN (1977); Christine Metteer, *Pigs in Heaven: A Parable of Native American Adoption Under the Indian Child Welfare Act*, 28 ARIZ. ST. L.J. 589 (1996).

21. ELLIS, *supra* note 20, at 3.

22. DR. BENJAMIN FRANKLIN, TWO TRACTS: INFORMATION TO THOSE WHO WOULD REMOVE TO AMERICA, AND REMARKS CONCERNING THE SAVAGES OF NORTH AMERICA 28-29 (3d ed. 1794); *see also* THE PAPERS OF BENJAMIN FRANKLIN 481-83 (Leonard W. Labaree et al. eds., 1961).

23. *See, e.g.*, MARGARET CONNELL SZASZ, INDIAN EDUCATION IN THE AMERICAN COLONIES (1988).

24. Beginning with the Continental Congress, the United States pledged to “secure and preserve the friendship of the Indian nations.” FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 47 (1982). This pledge was further articulated in the U.S. Constitution, which recognizes the power of Congress to regulate commerce with “foreign nations, and among the several States, and with the Indian tribes.” U.S. CONST. art. I, § 8, cl. 3. Moreover, through numerous treaties, agreements, statutes, and executive orders, millions of acres of tribal land were ceded to the United States in return for promises to protect the sovereign status of Indian nations, as well as to provide various services and benefits. The U.S. Constitution further recognizes “all Treaties made” and all existing and future treaties shall be considered the “supreme Law of the Land.” U.S. CONST. art. VI, cl. 2.

century, supporters of forced assimilation began advocating for the complete destruction of indigenous cultures. A primary example of this policy was the federal boarding school system, in which Native American children were taken from their homes and placed in federal and church-run institutions around the country. Once there, they were denied the right to speak their language, practice their religion, or partake in any cultural practices.²⁵ Parental and familial visitations were also restricted. The suffering of these children was not limited to cultural dislocation. Many faced other types of abuses as well.²⁶

When the boarding school system failed to produce a complete metamorphosis of the cultural identities of indigenous children, new forms of forced assimilation were contrived. Those who continued to be ideologically and politically tied to notions of assimilation believed that the answer to the dilemma lay in earlier, longer, and perhaps even permanent removal of American Indian children from their families and communities. If complete assimilation were to be realized, the cohesiveness of the Indian family would need to be destroyed. One example would be the boarding school "outing" system, in which "students [were to] spend a period of one or more years of their school life away from the school in selected white families, under the supervision of the school . . . thus gaining experience in practical self-support and an induction into civilized family life not otherwise attainable."²⁷ This system of placing American Indian children with Anglo families served as a precursor to the twentieth century massive displacement of American Indian children to non-Indian adoptive homes, foster care, and institutions.

By the 1920s, the dual system of assimilation by education and massive allotment of land²⁸ had taken its toll on Native American nations and their families. John Collier, one of the leading reformers of the Progressive Movement who later became Commissioner of Indian Affairs, maintained that "the administration of Indian affairs [was] a national disgrace — A policy designed to rob Indians of their property, destroy their culture and eventually exterminate them."²⁹ American Indian children, in particular, were feeling the effects of forced assimilation. A 1928 governmental report on the state of Native American Affairs highlighted, among other things, the "dreary existence" of American Indian children living in boarding schools. The report noted that:

25. See PETER FARB, *MAN'S RISE TO CIVILIZATION* 257-68 (1968).

26. See generally DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION* (1995); MICHAEL C. COLEMAN, *AMERICAN INDIAN CHILDREN AT SCHOOL* (1993); ELLIS, *supra* note 20.

27. COMM'N OF INDIAN AFF., 1990 ANN. REP. at 430. Captain Henry Pratt of Carlisle Indian School's ultimate dream was "to scatter the entire population of Indian children across the nation, with some 70,000 families each taking in one Indian child." ADAMS, *supra* note 26, at 14.

28. Indian General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (amended 2000) (allowing the President to survey the lands of American Indian nations and then divide those lands into individual allotments, effectively destroying a tribe's communal property system).

29. John Collier, *America's Treatment of Her Indians*, 18 CURRENT HIST. 772, 772 (1923).

[T]he philosophy underlying the establishment of Indian boarding schools, that the way to 'civilize' the Indian is to take Indian children, even very young children, as completely as possible away from their home and family life, is at variance with modern views of education and social work, which regard the home and family as essential social institutions from which it is generally undesirable to uproot children.³⁰

The report also documented the dire socioeconomic conditions existing on Indian reservations and criticized federal Indian policy for failing to support American Indian self-sufficiency. This laid the groundwork for a shift in federal Indian policy toward one of "self-government" for Native American Nations. However, this policy, known as "Indian Reorganization," was short-lived, as the federal pendulum quickly began to swing back toward assimilationist thinking.³¹ At the end of World War II, there were calls to "release" American Indians from their tribal cultures and excessive land base, and "assimilate" them into the mainstream culture.³² Those who had opposed Commissioner John Collier's Indian reforms of the 1930s rallied behind this ideology and pushed for significant changes in federal policy. By 1953, Congress had officially adopted a new policy of rapid and coercive assimilation through "termination."³³ The assimilation practices of this era were aimed at every facet of Indian life—from the land base, to the community structure, to the individual child. Congress passed a number of laws aimed at ending or limiting the historic relationship between certain tribes and the federal government.³⁴ Federal health and social welfare programs were cut and state legislatures and courts were given jurisdiction over certain tribes and their members. This meant that state and local entities were obtaining control over "matters basic to Indian cultural integrity such as

30. THE PROBLEM OF INDIAN ADMINISTRATION 403 (Lewis Meriam ed. 1928) [hereinafter Meriam].

31. Wheeler-Howard Act of 1934, 48 Stat. 984 (1934) (amended and codified at 25 U.S.C. §§ 452-54). It was during this "Indian Reorganization" era that the Johnson-O'Malley Act ("J-O'M") was passed by Congress, which authorized the Secretary of the Interior to contract with states and private institutions "for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians." Ch. 147, 48 Stat. 96 (section 4 repealed and reenacted as amended 1975) (section 5 omitted and reenacted as amended 1975) (codified as amended at 25 U.S.C. §§ 452-454 (1994)). While the J-O'M and related policies were aimed at improving the dire socioeconomic conditions on reservations, they had other unforeseen consequences. In addition to public schools, the law encouraged the use of private, state, and local social welfare agencies to meet the needs of Native Americans, opening the door for increased conflict between tribes and states over Indian child welfare issues. The caseworkers in these agencies and the teachers and administrators in the public schools had no basis for evaluating the cultural values and social norms of Native American communities. The cultural misunderstandings that inevitably arose from this lack of knowledge would contribute significantly to the Indian child welfare crisis of the 1970s.

32. See, e.g., O.K. Armstrong, *Set The American Indians Free*, READER'S DIG., Aug. 1945, at 47.

33. Indian Termination Act, H.R. Con. Res. 108, 83rd Cong. (1953).

34. See, e.g., Menominee Tribe Termination Act, 68 Stat. 250 (1954), Klamath Indian Termination Act, 68 Stat. 718 (1954), Federal Supervision Termination Act, 68 Stat. 724 (1954).

education, adoption, and land use.”³⁵ Not surprisingly, Indian education once again became the focus of federal attention. A 1944 congressional report condemned the use of community schools and encouraged a return to off-reservation boarding schools, where the children could “progress” much more quickly in the “white man’s way of life.”³⁶ As a complement to such schools, the Bureau of Indian Affairs implemented a “Relocation Program” designed to remove American Indians from tribal reservations to urban areas for purposes of work. Most of those who were relocated to the cities under this program endured tremendous poverty as well as cultural isolation. Acoma Pueblo Poet Simon Ortiz described his own childhood experiences with termination:

It was an era which bespoke the intent of U.S. public policy that Indians were no longer to be Indians. Naturally, I did not perceive this in any analytical or purposeful sense; rather, I felt an unspoken anxiety and resentment against unseen forces that determined our destiny to be un-Indian, embarrassed and uncomfortable with our grandparents’ customs and strictly held values. . . . I felt loneliness, alienation, and isolation imposed upon me by the separation of my family, home, and community. . . . [T]here was an unspoken vow: we were caught in a system inexorably, and we had to learn that system well in order to fight back. Without the motive of a fight-back we would not be able to survive as the people our heritage had lovingly bequeathed us.³⁷

By the 1950s, Congress and the Bureau of Indian Affairs (“BIA”) were primarily interested in transferring responsibility for Indian education and social welfare programs from the federal government to the states, ignoring the longstanding hostilities between tribes and states of the union. At the urging of the BIA and other federal agencies, states entered the field of Indian child welfare services. Treaty-guaranteed funds for Indian child welfare services were distributed to state welfare agencies rather than to tribal governments, and the BIA began referring more on-reservation Indian child welfare cases to states. By the early 1970s, state agencies and state courts were handling most of the Indian child welfare cases. Also at the urging of the federal government, private institutions took up the cause of assimilating American Indian children into mainstream America. For instance, the Child Welfare League of America established an Indian Adoption Project aimed at placing American Indian children in non-Indian homes, where

35. COHEN, *supra* note 24, at 175.

36. H.R. REP. No. 2091, at 9 (1944).

37. ORTIZ, *supra* note 2, at 34-35.

project supporters claimed the children would receive better care.³⁸ In addition, religious groups continued to be actively involved in the placement of American Indian children outside of the tribal community.³⁹ All of these institutions—schools, child welfare agencies, and courts—were ill-equipped, and in some cases unwilling, to address the unique cultural interests and social needs of American Indian families.

Documenting Harms: The Indian Child Welfare Crisis

In Part V we will look at the American Indian resurgence of the late 1960s and 70s, which led to the passage of the Indian Child Welfare Act of 1978.⁴⁰ In the early 1970s, the Association of American Indian Affairs (“AAIA”) and other agencies undertook the arduous task of assessing the extent of the Indian child welfare crisis, including the number of American Indian children being removed from their homes, as well as the major causes and effects of this dislocation.⁴¹ Conservative estimates indicated that one-third of all American Indian children were being separated from their families and placed in foster care, adoptive homes, or educational institutions.⁴² Federal boarding schools, mission schools, private training schools, and BIA dormitory programs all contributed to this massive displacement.⁴³ Missing from these statistics were the generations of Native Ameri-

38. See, e.g., Bruce Davies, *Implementing the Indian Child Welfare Act*, 16 CLEARINGHOUSE REV. 179, 181 (1982).

39. See generally, Patrice Kunesh-Hartman, *Comment, The Indian Child Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 136 (1988); Joan Smith, *Young Once, Indian Forever*, IMAGE, July 3, 1988, at 9.

40. See *infra* notes 255-257 and accompanying text.

41. Some critics of the ICWA have taken issue with these studies, in one case referring to them as “junk social science.” RANDALL KENNEDY, *INTERRACIAL INTIMACIES* 499 (2003). While a fuller discussion of this claim of “junk science” is beyond the scope of this article, the argument ignores completely the parallel stories and experiences of American Indian children and their families. Moreover, such claims fail to consider the larger historical picture that led to the passage of the ICWA, including the need to remedy serious human rights violations, in part, by honoring the self-determining status of American Indian nations. See *infra* notes 257-314 and accompanying text. For a different analysis of the strengths and weaknesses of the law, see Barbara Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587 (2002). See also Russell Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L. J. 1287 (1980).

42. See, e.g., Hon. James Abourezk, *The Role of the Federal Government: A Congressional View*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES*, 1, 12 (Steven Unger ed., 1977) [hereinafter *AMERICAN INDIAN FAMILIES*]; H.R. Rep. No. 1386, 95th Cong., 2d Sess. 9, 11 (1978), *reprinted in* 1978 U.S.C.A.N. 7530 [hereinafter H.R. 1386]. In some individual states the problem was much worse. Minnesota, Montana, South Dakota, and Washington had American Indian placement rates that were five to nineteen times greater than that of the non-Indian rate. In the state of Wisconsin, American Indian children were at risk of being separated from their families at a rate 1600 times greater than non-Indian children. Moreover, many of these children were being completely cut off from their communities and heritages. At least 85% of the placements were in non-Indian homes and institutions, and a high proportion of those placements were out-of-state. See H.R. Rep. No. 1386, at 9.

43. For instance, in 1971, the BIA school census showed that 34,538 American Indian children lived in its institutional facilities rather than at home. H.R. Rep. No. 1386, *supra* note 42, at 9. On the Navajo reservation alone, 20,000 children in grades K-12 were living in boarding schools at the time of the studies. *Id.*

cans who were previously disconnected from their families as a result of BIA "relocation" programs, federal "outing" programs, and mission-run "educational" placement programs. Additionally, no study could completely capture the effects of years of national paternalism and attempted assimilation on the psyches of Native Americans who were taught, in the words of one former student, that "being American Indian meant that you were something less than a complete being, a 'savage' or a 'pagan'."

The AAIA studies and legislative hearings revealed how deeply ingrained the assimilative attitudes of the past had become in American society. The cultural values and social norms of Native American families—particularly indigenous child rearing practices—were viewed institutionally as the antithesis of a modern-day "civilized" society. Indeed, in a number of the child welfare cases examined, American Indian communities were shocked to learn that the families they regarded as "excellent care-givers" had been judged "unfit" by caseworkers.⁴⁴ This disparity in viewpoint was the result of general disdain for American Indian family life. Senator James Abourezk, a Democrat from South Dakota, remarked in 1977 that, "[p]ublic and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indians."⁴⁵ The legislative history of the ICWA mirrored this position. For instance, historical scholars note that many "[s]ocial workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, considered leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights."⁴⁶ Yet in many indigenous communities, extended family members play an important role in child-rearing. For instance, in the Blackfoot community, it is not uncommon for grandparents to raise one of their grandchildren. This is how cultural knowledge is passed from community to child and from generation to generation.⁴⁷

Cultural bias and stereotypes were also evident in cases involving substance abuse. Studies revealed that in areas where rates of problem drinking among Indians and non-Indians were the same, the Indian family was more likely to have their children removed from the home. Moreover, American Indian families were less likely than non-Indian families with substance abuse problems to receive supportive services as an alternative to removal of their children.⁴⁸ Caseworkers and teachers also ignored the disciplinary practices of Indian families, alleging that American Indian children lacked close parental supervision and strong discipline. Indigenous forms of disci-

44. See H.R. 1386, *supra* note 42, at 9; see also William Byler, *The Destruction of American Indian Families*, in AMERICAN INDIAN FAMILIES, *supra* note 42, at 2.

45. AMERICAN INDIAN FAMILIES, *supra* note 42, at 12.

46. *Id.* at 3; H.R. 1386, *supra* note 42, at 10.

47. See BEVERLY HUNGRY WOLF, *THE WAYS OF MY GRANDMOTHER* 195 (1980).

48. See H.R. 1386, *supra* note 42, at 10. See also AMERICAN INDIAN FAMILIES, *supra* note 42, at 22; Barsh *supra* note 41, at 1295.

pline—alternatives to physical punishment, including teasing, ostracism, peer pressure, and storytelling—were seen as too permissive. Yet, as evidenced by the legislative history of the ICWA, “[w]hat is labeled as ‘permissiveness’ may often, in fact, simply be a different but effective way of disciplining children.”⁴⁹ However, at the time, removal was seen as a tool for separating American Indian children from their “inferior” culture and heritage.⁵⁰ Additionally, in instances where it was necessary to remove a child from the home, extended family members were often disqualified as foster or adoptive parents for reasons that had nothing to do with their ability to care for the child.⁵¹

American Indian children and their families faced similar bias in state courts. The House Committee on Interior and Insular Affairs agreed with advocates of the ICWA that “the abusive actions of social service agencies would be largely nullified if more judges were themselves knowledgeable about Indian life and required a sharper definition of child abuse and neglect.”⁵² The “best interest of the child” standard was (and, in some cases, still is) being narrowly interpreted by state courts without recognition of or appreciation for the cultural and familial values of Native American nations. Parents were often not properly notified of court dates and rarely had legal representation or the supporting testimony of expert witnesses on Indian child-rearing practices available to them.⁵³ Moreover, extended family members and tribes were rarely, if ever, consulted about the children’s welfare. There was also no avenue available for the state courts to be informed of the familial resources available to the children in their own communities. Similarly problematic were the unclear lines of demarcation between state and tribal court jurisdiction over Indian child custody proceedings.⁵⁴

49. See H.R. 1386, *supra* note 42, at 10; SZASZ, *supra* note 20, at 21. For example, Santee Sioux author Charles Eastman wrote about his grandmother’s stories of the “Hinakaga (owl) who swooped down in the darkness” and carried the naughty child up into the trees. See *id.* Clark Wissler in a study on Native cultures noted in particular that “admonition and mild ridicule” were more predominant forms of discipline than “force or punishment.” *Id.*

50. For instance, in one 1977 California case, a child was removed from the custody of her extended family on the sole ground that “an Indian reservation is an unsuitable environment for a child and that the pre-adoptive parents were financially able to provide a home and a way of life superior to the one furnished by the natural mother.” AMERICAN INDIAN FAMILIES, *supra* note 42, at 3.

51. See, e.g., *Indian Child Welfare Program: Hearings Before the Subcomm. On Indian Affairs of the Senate Comm. On Interior and Insular Affairs*, 93rd Cong. 70, at 5 (1974) [hereinafter 1974 Hearings].

52. H.R. 1386, *supra* note 42, at 9, 11.

53. In one such case, a child was held in foster care for seven months under a state *ex parte* emergency removal order before a hearing was scheduled. And even then, the mother was notified of the hearing only by publication despite the fact that she had continuously lived at the same address from which the child had been removed. See *Decoteau v. District County Court*, 211 N.W.2d 843 (S.D., 1973). See generally 1974 Hearings, *supra* note 51, at 65-69; H.R. 1386, *supra* note 42, at 11.

54. Historically, tribes have clashed with states laying claim to jurisdiction over matters essential to tribal survival; family matters are no exception. See, e.g., Barbara Ann Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 35 UCLA L. REV. 1051 (1989).

According to the legislative history of the ICWA, a number of economic factors contributed to the crisis.⁵⁵ For instance, in “voluntary” waiver of parental rights cases, there was evidence that state welfare agencies were conditioning the availability of social services on parents agreeing to the waiver.⁵⁶ Other families who became aware of these tactics were less inclined to seek services that could have alleviated some of the social conditions ultimately cited as grounds for removal by those same agencies. Another economic factor contributing to the crisis was an increase in demand for American Indian children in the private non-Indian adoption market, leading to additional displacement of American Indian children from their families and communities.⁵⁷ This discussion of harm is by no means comprehensive. Rather it provides a general framework for understanding the kinds of harms caused by U.S. policies aimed at separating American Indian children from their families and communities. The next section focuses more specifically on the intergenerational effects of those policies.

Ongoing Effects

U.S. removal policies have affected generations of indigenous families and communities. This section offers but a few examples of those effects. On the individual level, children of removal experienced long-term emotional, social, and psychological problems, evidenced in part by a suicide rate twice that of the reservation population and four times that of the general population.⁵⁸ Moreover, Native American children faced significant social problems in adolescence and adulthood as a result of the displacement—problems that were often carried on through the next generation of families.⁵⁹ For instance, children who were raised in boarding schools or other such educational institutions knew very little of life in a “family.” Thus, as parents they lacked the necessary cultural and social patterns for rearing their own children.⁶⁰ Moreover, they were being educated in systems that devalued their Native cultures, which in turn resulted in further alienation from their communities. The large number of American Indian

55. See Graham, *supra* note 8, at 27-30 for further details on economic factors affecting removal and foster care placement of American Indian children.

56. H.R. 1386, *supra* note 42, at 11. See also Barsh, *supra* note 41, at 1299.

57. See Barsh, *supra* note 41, at 1299; see also 1974 Hearings, *supra* note 51, at 5, 70, 116.

58. See Troy R. Johnson, *Introduction*, in *THE INDIAN CHILD WELFARE ACT: UNTO THE SEVENTH GENERATION* (Troy R. Johnson ed., 1993). See generally *AMERICAN INDIAN FAMILIES*, *supra* note 42, at 8.

59. The American Academy of Child Psychiatry agreed, noting that “[t]here is much clinical evidence to suggest that Native American children placed in off-reservation non-Indian homes are at risk in their later development. Often enough [the children] are cared for by devoted and well-intentioned foster or adoptive parents. Nonetheless, particularly in adolescence, they are subject to ethnic confusion and a pervasive sense of abandonment” *Indian Child Welfare Act of 1977: Hearing on S. 1214 Before the Senate Select Comm. On Indian Affairs*, 95th Cong. 538 (1977) (statement of Drs. Carl Mindell and Alan Gurwitt, American Academy of Child Psychiatry).

60. Graham, *supra* note 8, at 30-32.

children raised in foster care similarly perpetuated the destruction of American Indian communities. "Stricken by a 'constant sense of not knowing where they will be or how long they'll be there,'" these children found it difficult both in childhood and adulthood to establish permanent roots.⁶¹ Moreover, because they were raised in an environment that often frowned upon their indigenesness, many sought to deny their own heritage. This denial and lack of community connection caused further distress, often leading to such things as substance abuse.

On the familial level, AAIA related studies indicate that removal of a child "effectively destroyed the family as an intact unit . . . exacerbat[ing] the problems of alcoholism, unemployment, and emotional duress among parents."⁶² The consistent threat of losing one's child created a sense of hopelessness and powerlessness that made it difficult for adults to function well as parents. Many feared emotional attachment because of the inevitable loss. One psychologist noted that some American Indian parents had become so conditioned to the possibility of removal that they would often place their own children in boarding schools or foster care as a matter of course. Others would place the children with social service agencies and hospitals rather than entrusting them to the care of extended family members.⁶³

Individuals and families were not the only ones victimized by the removal process. These policies tore at the very fabric of Native communities. A complex symbiotic relationship exists between Native American children and their communities, what the late Professor Vine Deloria referred to as "a multi-generational complex of people and clan and kinship responsibilities that extend to past as well as future generations."⁶⁴ Since many of the economic, cultural, and social structures of American Indian communities were built around these kinship networks, the destruction of the family unit contributed to the dire socioeconomic conditions befalling many Native American nations. In this recent era of indigenous self-determination, codified as U.S. federal policy in the 1970s, some improvements to these socioeconomic conditions have been made.⁶⁵ Yet current indicators—such as high rates of unemployment, alcoholism, suicide, and child welfare re-

61. Barsh, *supra* note 41, at 1291 (quoting 1974 *Hearings*, *supra* note 51, at 58).

62. Margaret Plantz et. al., *Indian Child Welfare: A Status Report, Final Report of the Survey of Indian Child Welfare and Implementation of the Indian Child Welfare Act of 1980*, ES-1 at 54 (1988).

63. H.R. 1386, *supra* note 42, at 12.

64. VINE DELORIA, *INDIAN EDUCATION IN AMERICA* 22 (1991).

65. See, e.g., Jonathan B. Taylor and Joseph P. Kalt, *American Indians on Reservations: A Databook of Socioeconomic Change Between the 1990 and 2000 Censuses*, available at <http://www.ksg.harvard.edu/hpaied/pubs/documents/americanindiansonreservationsadatabookofsocioeconomicchange.pdf>, at vii-xii (comparing socioeconomic census data in 1990 to 2000). The data analysis demonstrates some positive changes in such areas as income, employment, poverty, education and health, but also notes that more needs to be done in these areas).

moval⁶⁶—suggest that even more needs to be done to repair and strengthen the familial and socioeconomic networks of American Indian communities.

The harms caused by these policies were intergenerational; so too must the solutions be intergenerational. Part V of this paper focuses on how the ICWA advances this aim of protecting and strengthening future generations. No single piece of legislation can address all of the human rights violations arising from these policies.⁶⁷ The ICWA is nevertheless an important piece of the overall puzzle.

III. HUMAN RIGHTS

“If we do not understand each other, if we do not know the culture or the history of each other, it is difficult to see the value and dignity of each others societies.”

—Chief Justice Yazzie, Navajo Nation Supreme Court, 1993⁶⁸

Scholars from various disciplines have referred to the treatment of Native peoples in the United States and elsewhere as “ethnic cleansing,”⁶⁹ “cultural genocide,”⁷⁰ “ethnocide,”⁷¹ and “racism.”⁷² Each of these terms sug-

66. See *id.* Studies show that about 20% of all American Indian children are still being placed outside their families and tribes. See Troy R. Johnson, *Introduction, in THE INDIAN CHILD WELFARE ACT: UNTO THE SEVENTH GENERATION*, *supra* note 58. As one tribal leader notes, addressing these concerns is a matter of survival: “[C]ulturally, the chances of Indian survival are significantly reduced if our children . . . are . . . denied exposure to the ways of their People.” 1974 *Hearings*, *supra* note 51, at 193 (quoting Chief Calvin Isaac of the Mississippi Band of Choctaw Indians).

67. See *infra* notes 269–272 and accompanying text.

68. See Lisa Driscoll, *Tribal Courts: New Mexico's Third Judiciary*, 32 N.M. B. BULL., Feb. 18, 1993, at A5.

69. See, e.g., Earl M. Maltz, *Brown and Tee-Hit-Ton*, 29 AM. INDIAN L. REV. 75, 99 (2005); John R. Wonder, “*Merciless Indian Savages*” and the Declaration of Independence: Native Americans Translate the *Ecun-naunuxulgee* Document, 25 AM. INDIAN L. REV. 65, 65 (2001); Robert Laurence, *Symmetry and Asymmetry in Federal Indian Law*, 42 ARIZ. L. REV. 861, 896–97 (2000). See also Kenneth C. Davis, *Amnesia*, N.Y. TIMES, Sept 3, 1995, at E1.

70. See, e.g., STANNARD, *supra* note 5, at xii (describing the treatment of American Indians in the Americas as “purposeful genocide”); Atwood, *supra* note 41, at 602 (discussing the treatment of American Indian children at white-run boarding schools as “blatant cultural genocide”); Matthew L. M. Fletcher, *Saunaugezewag: “The Indian Problem” and the Lost Art of Survival*, 28 AM. INDIAN L. REV. 35, 39–41 (2004) (discussing the “genocide perpetrated on Indian people”); Robert B. Porter, *A Proposal to the Hanodaganyas to Decolonize Federal Indian Control Law*, 31 U. MICH. J. L. REFORM, 899, 920–21 (1998) (“[T]hroughout the 222 years of United States history, every conceivable policy objective has been attempted, ranging from the pursuit of peaceful coexistence—through the Treaty, Reorganization, and Self-Determination policies—to outright genocide—through the Warfare, Removal, Reservation, Allotment, and Termination policies.”).

71. See, e.g., Robert A. Williams, Jr., *Frontier of Legal Thought III: Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 DUKE L. J. 660, 665 (1990) (stating that indigenous people have been “pushed to the brink of extinction by . . . policies of . . . ethnocide.”); John P. Lavelle, *Rescuing Paha Sapa: Achieving Environmental Justice by Restoring the Great Grasslands and Returning the Sacred Black Hills to the Great Sioux Nation*, 5 GREAT PLAINS NAT. RESOURCES J. 40, 80–81 (2001) (describing the treatment of the Sioux tribes as ethnocide.); see also, *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 276 (1992) (Blackmun J., concurring in part and dissenting in part) (describing allotment as a “systematic ‘ethnocide,’” quoting H. SHUSTER, *THE YAKIMAS: A CRITICAL BIBLIOGRAPHY* 70 (1982)).

gests a grave violation of fundamental human rights. Building on the evidence offered in Part II, this part explores some of the human rights violations that arise out of forcible removal policies. However, neither this section nor the previous one can fully capture the scope and breadth of the historical and ongoing wrongs committed against indigenous children, their families, and their communities.⁷³ We will see in Part IV that international reparation claims often focus on gross violations of human rights. Two of the violations explored in this part, genocide and systematic discrimination, are “inherently ‘gross’ violations of human rights.”⁷⁴ Single or isolated violations of the other two human rights, cultural identity and self-determination, may not be inherently “gross” under customary human rights law, but nevertheless may be deemed “‘gross’ *ipso facto*” if there is state policy demonstrating a consistent pattern of violations of these fundamental rights.⁷⁵

Self-Determination

The first human rights precept to be explored is the right of self-determination. This section focuses on contemporary understandings of this precept and, in particular, its application to indigenous peoples. As Professor James Anaya suggests, “self-determination is a foundational principle of international law that bears particularly upon the status and rights of . . . Native . . . people . . . in light of their history and contemporary conditions.”⁷⁶

Numerous scholars have written on the origins and content of the right of self-determination.⁷⁷ National courts and human rights bodies have simi-

72. See, e.g., DEAN NEU & RICHARD THERRIEN, ACCOUNTING FOR GENOCIDE: CANADA'S BUREAUCRATIC ASSAULT ON ABORIGINAL PEOPLE 4 (2003) (describing the removal and indoctrination of First Nations children as a “force of racism, applied bureaucratically and rationalized economically at arm's length, working insidiously as psychological terrorism”); ROBERT A. WILLIAMS, JR., LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA 97-113 (2005) (discussing the racist underpinnings of nineteenth and twentieth century Supreme Court precedent) [hereinafter WILLIAMS I]; ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 316-17 (1990) (describing Chief Justice John Marshall's reliance on the European “doctrine of discovery” as an act of preserving “1000 years of European racism and colonialism” on America) [hereinafter WILLIAMS II].

73. See, e.g., STANNARD, *supra* note 5; NEU & THERRIEN, *supra* note 72.

74. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702(m) (1987).

75. See *id.* (“All rights proclaimed in the Universal Declaration and protected by the principal International Covenants . . . are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity. Consistent patterns of violations of such rights as state policy may be deemed ‘gross’ *ipso facto*.”). This paper contends that both the right of self-determination and the right of cultural identity are fundamental aspects of indigenous peoples' dignity as peoples.

76. Anaya, *supra* note 13, at 330.

77. See, e.g., S. James Anaya, *A Contemporary Definition of the International Norm of Self-Determination*, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131 (1993); S. JAMES ANAYA & ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES (1995); HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION (1990). See also Lorie M. Graham, *Resolving Indigenous Claims to Self-Determination*, 10 ILSA J. OF INT'L & CONTEMP. L. 385 (2004) [hereinafter *Resolving Indigenous Claims*]; Lorie M. Graham, *Self-Deter-*

larly expressed their views on the meaning and scope of this right.⁷⁸ The term itself is often linked to Wilsonian ideals of democracy and freedom, but its historical origins extend beyond Western political thought.⁷⁹ Following World War II, “self-determination of peoples” became a part of international conventional law, most notably in the U.N. Charter.⁸⁰ In the 1960s, the right of self-determination served as a springboard for the process of decolonization and became an integral part of the international human rights movement. Under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights “all peoples have the right to self-determination,” including the right to “freely determine their political status,” to “freely pursue their economic, social, and cultural development,” and to “freely dispose of their natural wealth and resources.”⁸¹ Today, self-determination is an accepted principle of customary international law.⁸²

Current debates on the principle of self-determination often focus on two questions: who are the “peoples” entitled to this legal right and how far does that right extend. These issues have been explored in earlier works on indigenous self-determination.⁸³ For purposes of this article, neither issue need delay us for too long. First, domestic and international bodies have defined the term “peoples” to include sub-national groups that are part of a larger territorial sovereign unit.⁸⁴ “When one considers the common factors that make up these sub-national groups, which include common racial, ethnic, linguistic, religious or cultural histories, some claim to territory or land, and a shared sense of political, economic, social and cultural goals, one sees that indigenous groups of the Americas easily meet these criteria.”⁸⁵ Another major controversy concerns the meaning of “self-determination” itself. While some have sought to equate this term with secession and independent statehood,⁸⁶ its meaning under contemporary international law extends well beyond this statist framework. For instance, the two major human rights covenants link self-determination to notions of cultural sur-

mination for Indigenous Peoples After Kosovo: Translating Self-Determination “Into Practice” and “Into Peace,” 6 ILSA J. of INT’L & CONTEMP. L 455 (2002) [hereinafter *Self-Determination After Kosovo*].

78. See, e.g., Reference Re Secession of Quebec, [1998] 37 I.L.M. 1340; UNITED NATIONS HUMAN RIGHTS COMMISSION, The Right to Self-Determination of Peoples, art. 1, Mar. 13, 1984, CCPR General Comment 12, available at <http://www.unhcr.ch/tbs/doc.nsf/0/f3c99406d528f37fc12563ed004960b4>.

79. See S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004).

80. U.N. Charter art. 1, para. 2.

81. International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic Social and Cultural Rights, art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

82. See HANNUM, *supra* note 77, at 27; ANAYA, *supra* note 79, at 97.

83. See *Resolving Indigenous Claims to Self-Determination*, *supra* note 77, at 386-398; *Self-Determination After Kosovo*, *supra* note 77, at 445-50.

84. See, e.g., Reference re. Secession of Quebec, [1998] 37 I.L.M. 1340, 1373 (1998); Report of the Human Rights Committee, U.N. GAOR, 47th Sess., Supp. No. 40 at 52, U.N. A/47/40 (1992).

85. See *Resolving Indigenous Claims*, *supra* note 77, at 388-389.

86. See *id.* at 389-390; *Self-Determination After Kosovo*, *supra* note 77, at 446-452.

vival, non-discrimination, economic development, political freedoms, and other basic human rights.⁸⁷ This suggests, as argued by Professor Anaya, that “self-determination is not separate from other human rights norms; rather [it] is a configurative principle or framework complemented by the more specific human rights norms that in their totality enjoin the governing institutional order.”⁸⁸

In the past several decades, indigenous peoples from around the world have garnered international support for their right to live and develop as distinct communities.⁸⁹ Their efforts have brought about significant changes in both conventional and customary international law. One example is the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, which recognizes “the aspiration . . . of [indigenous] peoples to exercise control over their own institutions, ways of life, and economic development and to maintain and develop their identities, languages and religions within the framework of the States in which they live.”⁹⁰ Even more far-reaching in terms of collective rights is the United Nations Declaration on the Rights of Indigenous Peoples, which was recently adopted by the General Assembly.⁹¹ The Declaration specifies important freedoms, conditions, and rights necessary for indigenous peoples to be fully in control of their own destinies. Two provisions directly address the right of self-determination: Article 3 of the Declaration mirrors the language found in the two major human rights covenants regarding “the right of self-determination,” and Article 4 states that “[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs. . . .” However, equally important are the remaining parts of the Declaration, which entail the constituent parts of indigenous self-determination. For in-

87. See *supra* note 81 and accompanying text.

88. See ANAYA, *supra* note 79, at 99. A related concern is that application of the principle of self-determination beyond the colonial context leads to violence and unrest. However, elsewhere I have suggested another scenario – that violence and unrest may be averted or minimized by international processes and institutions that address early on alleged violations of a group’s claim of self-determination. See *Resolving Indigenous Claims*, *supra* note 77.

89. See, e.g., ANAYA, *supra* note 79, at 45-58; see also *Programme of Activities for the International Decade of the World’s Indigenous People* G.A. Res. 50/157, at Annex para. 4, U.N. Doc. A/RES/50/157 (Feb. 29, 1995), available at <http://www.unhcr.ch/html/menu6/2/fs9.htm>.

90. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted June 27, 1989, 169 I.L.O. 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991), available at <http://www.unhcr.ch/html/menu3/b/62.htm>.

91. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 16. In 1982, the U.N. Economic and Social Council and Human Rights Commission authorized the formation of a Working Group on Indigenous Populations. By 1993, a Draft U.N. Declaration on the Rights of Indigenous Peoples was completed. That same year, the General Assembly proclaimed the International Decade of the World’s Indigenous People. These two events were conceptually linked in that adoption of the Declaration by the General Assembly was a major goal of the Decade. While the Declaration was not adopted by the end of the Decade, it was approved by the Human Rights Council and sent to the General Assembly for adoption during the 2006 session. However, at the request of several countries consideration of the Declaration was delayed until this year when it finally gained approval.

stance, the Declaration affirms the right to non-discrimination and full participation in the life of the State. Additionally, it addresses collective rights to live as distinct peoples, including protection against genocide and ethnocide. It also protects the cultural, spiritual, and linguistic identities of indigenous peoples. Finally, the Declaration seeks to improve socioeconomic conditions by, among other things, recognizing the right of indigenous peoples to control their development, lands, and resources. In its fullest sense, the right of self-determination embodies the right of indigenous peoples to live and develop as culturally distinct groups, in control of their own destinies, and under conditions of equality. A similar set of "core precepts" can be found in a host of other U.N. and regional documents that, according to Professor Anaya, are now "widely accepted and, to that extent, . . . indicative of customary law."⁹² Many of these human rights instruments address individual human rights. Yet it is the collective nature of indigenous rights that is crucial to indigenous communities' survival as peoples.⁹³ As one U.N. working group observed, "the harsh lessons of past history showed that recognition of individual rights alone would not suffice to uphold and guarantee the continued dignity and distinctiveness of indigenous societies and cultures."⁹⁴

Admittedly, there has been some controversy surrounding the final adoption of the Declaration on the Rights of Indigenous Peoples, particularly due to the use of the word self-determination and its potential connection with the right to secede.⁹⁵ While these and other related objections are addressed in more detail elsewhere,⁹⁶ most are based on a fundamental misunderstanding of what indigenous self-determination embodies under current and emerging principles of international law.⁹⁷ Existing and emerging international norms on the rights of indigenous peoples set the foundation for political relationships that strengthen (not tear apart) "political alliances," but in a manner "that does not engage the historical cycle of conquest, oppression, and domination."⁹⁸ In other words, indigenous groups

92. ANAYA, *supra* note 79, at 70.

93. In other works I have discussed the collective aspects of the declaration and how they might impact final adoption. See *Resolving Indigenous Claims*, *supra* note 77, at 385.

94. See Report of the Working Group on Indigenous Populations on its Sixth Session, U.N. ESCOR CN.4, U.N. Doc. E/CN.4/Sub.2/1988/24 at 21, para. 77 (Aug. 24 1988).

95. See United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 16. In terms of the issue of secession, language was added in the final version in Article 46 that states "Nothing in this declaration may be interpreted . . . or construed as authorizing or encouraging any action which would dismember or impair totally in part the territorial integrity or political unity of sovereign and independent States."

96. See, e.g., *Resolving Indigenous Claims*, *supra* note 77; *Self-Determination after Kosovo*, *supra* note 77.

97. Some nation-states have stated their objection slightly differently, suggesting that international recognition of collective self-determination for indigenous peoples is contrary to liberal theories of constitutionalism. Professor Rebecca Tsosie offers a different formula, one in which "the concept of self-determination . . . bridge[s] the gap between the individualistic focus of liberalism and the group focus of tribalism." Rebecca Tsosie, *Tribalism, Constitutionalism, and Cultural Pluralism: Where do Indigenous Peoples Fit Within Civil Society?*, 5 U. PA. J. CONST. LAW 357, 376 (2003).

98. *Id.* at 378.

are not looking to dismantle nation-states, but such groups do insist on the right to control their own lands, resources, and decision-making institutions, and to maintain their own distinct cultures.

From a reparations perspective, the right of indigenous self-determination has a dual function, which aligns with Professor Anaya's approach to distinguishing between the principle's substantive elements and its remedial prescriptions. Substantive self-determination includes the right to participate in "the creation of or change in institutions of government" as well as the right to "make meaningful choices in matters touching upon all spheres of life on a continuous basis."⁹⁹ "The substance of the norm," however, "must be distinguished from the remedial prescriptions that may follow from a violation of the norm, such as those developed to undo colonization."¹⁰⁰ Thus, for instance, certain actions on the part of a State, such as the removal of indigenous children for purposes of eradicating a culture or people, can constitute a violation of the substantive aspects of self-determination, including the right to live and develop as culturally distinct groups. However, an appropriate remedy for this and other related human rights violations might also focus on maintaining or improving various core aspects of self-determination, such as social welfare and development, cultural integrity, and self-government.¹⁰¹ Specific state policies might include provisions similar to those found in the Indian Child Welfare Act, such as the right of indigenous nations to adjudicate or be involved in future removal cases, as well as the right to seek funds for their own culturally relevant child welfare programs. Similarly, rehabilitative steps may be necessary to undo the intergenerational cultural and psychological harms caused by the removal policy. The relevant provisions of the ICWA that incorporate these international precepts of indigenous self-determination are explored in Part V of this article.¹⁰²

Genocide and Ethnic Cleansing

The term "genocide" was coined in 1943 by Raphael Lemkin and first appeared in print in his 1944 book *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*. According to Lemkin:

By "genocide" we mean the destruction of a nation or of an ethnic group Generally speaking, genocide does not necessarily mean the immediate destruction of a nation It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national

99. ANAYA, *supra* note 79, at 105-106.

100. *Id.* at 104.

101. *Id.* at 129-156.

102. See *infra* notes 257-314 and accompanying text.

groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.¹⁰³

In 1946, The United Nations General Assembly condemned "genocide" as a "crime under international law" that denies "the right of existence to entire human groups."¹⁰⁴ Around the same time, the United Nations Charter and the Universal Declaration of Human Rights provided for the universal promotion and protection of human rights and fundamental freedoms. Shortly thereafter, the 1948 Convention on the Prevention and Punishment of Genocide was unanimously adopted by the General Assembly, incorporating much of Lemkin's definition of genocide.¹⁰⁵ In particular, Article II of the Convention defines genocide as "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) *Forcibly transferring children of the group to another group.*"¹⁰⁶ Despite some open questions on scope,¹⁰⁷ this definition is now an accepted part of international law. Domestically, the Restatement (Third) of the Foreign Relations Law of the United States notes that this "definition is generally accepted for purposes of customary law" and is thus "part of the law of the United States to be applied as such by State as well as federal courts."¹⁰⁸ Article 7 of the United Nations Declaration on the Rights of Indigenous Peoples similarly recognizes "the collective right" of indigenous peoples "to live in freedom, peace and security as distinct peoples and [to] not be subjected to . . . genocide . . . including

103. RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE; LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (Carnegie Endowment for International Peace, 1944).

104. G.A. Res. 96, U.N. G.A., 1st Sess. UN Doc No. A/RES/96(I) (Dec. 11, 1946). *See also* BRINGING THEM HOME, *supra* note 15, at 266.

105. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

106. *Id.* (emphasis added).

107. *See* STANNARD, *supra* note 5, at 280-81.

108. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702 (1987).

forcibly removing children of the group to another group.”¹⁰⁹ In terms of state responsibility, the International Court of Justice (“ICJ”) has affirmed that individuals are not the only ones that can be found guilty of genocide. A State that commits or is complicit in the commission of genocide may also be in violation of the Genocide Convention.¹¹⁰

“Ethnocide” (or “cultural genocide”) is a closely related concept. Raphael Lemkin also coined the term “ethnocide,” which he viewed as interchangeable with “genocide.”¹¹¹ “Ethnocide” has been defined by scholars as involving “the [systematic] destruction of a culture without the killing of its bearers.”¹¹² The term itself does not appear on the face of the Genocide Convention. Yet other instruments, such as the Declaration of San Jose, declare that “ethnocide, that is, cultural genocide, is a violation of international law equivalent to genocide, which was condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948.”¹¹³

Ethnic cleansing is a related, yet arguably broader, human rights violation. It includes “the elimination of an unwanted group from society” either by genocide or forced migration.¹¹⁴ The U.S. State Department adopted a similar definition with respect to the Kosovo/Serbia conflict, noting that ethnic cleansing includes “the systematic and forced removal of members of an ethnic group from their communities to change the ethnic composition of a region.”¹¹⁵ Recently, the ICJ “stress[ed] the difference between genocide and ‘ethnic cleansing’: while ‘ethnic cleansing’ can be carried out by the displacement of a group of persons from a specific area, genocide is defined by the . . . specific intent to destroy the group or part of it.”¹¹⁶

The use of the terms “genocide” or “ethnocide” in conjunction with the treatment of indigenous peoples and their children, while perhaps controversial, is consistent with the various domestic, international, and scholarly

109. See U.N. Doc. A/61/L.67, adopted September 13, 2007. For earlier versions see Draft United Nations Declaration on the Rights of Indigenous Peoples, art. 6, U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub2/1994/56 (1994).

110. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 91 (February 26), paras. 166-169, available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

111. See LEMKIN, *supra* note 103, at 79.

112. FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 8-10 (Yale University Press 1990).

113. See Declaration of San Jose, UNESCO, 1981, available at <http://unesdoc.unesco.org/images/0004/000499/049951eo.pdf> for a further discussion of what international instruments denounce the concept of ethnocide.

114. See Karyn Becker, *Genocide and Ethnic Cleansing*, <http://www.munfw.org/archive/50th/4th1.htm> (last visited Oct. 22, 2007).

115. See U.S. DEP’T OF STATE, *ERASING HISTORY: ETHNIC CLEANING IN KOSOVO* 3 (1999), available at <http://italy.usembassy.gov/pdf/other/kosovo.pdf> (last visited Feb. 8, 2008).

116. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*) International Court of Justice Press Release 2007/8, available at <http://www.icj-cij.org/presscom/index.php?pr=1897&pt=1&p1=6&p2=1>.

definitions discussed above. More specifically, the forcible transfer of American Indian children to non-Indian institutions, foster care, and adoptive homes qualifies as genocide so long as there was an intent to destroy the “essential foundations of the life of [a] national group[]” through the “disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of [that] group[]”¹¹⁷ Part II of this article demonstrated that the Indian child removal policies of the nineteenth and twentieth centuries were an integral part of a larger governmental effort to eradicate indigenous cultures and communities in the United States.¹¹⁸ This effort included the federal allotment policy,¹¹⁹ which was designed to strip indigenous peoples of their communal land base. It was described by one United States President as the “mighty pulverizing engine to break up the tribal mass[es] . . . act[ing] directly upon the family and the individual.”¹²⁰ Taken together these policies amounted to what one Supreme Court Justice has referred to as “systematic ethnocide.”¹²¹

According to the Genocide Convention, “forcibly transferring children” from one group to another can constitute genocide so long as the intent of that transfer was “to destroy in whole or in part, a national, ethnical, racial or religious group.”¹²² Some might contend that the “intent” element of genocide cannot be met with respect to the forcible transfer of Indian children because some of the objectives of removal were “benign” (to provide education and training) and because it was done with the alleged “best interest of the child” in mind. However, these claims do not withstand close scrutiny. In terms of specific intent, Part II demonstrated that the erasure of Native American cultures and communities was a predominant goal of the forced assimilation and removal policies. Government documents as well as independent studies show that American Indian children were removed from their families and communities primarily as a means of preventing them from acquiring knowledge of their culture and tradition, thereby eventually destroying that culture.¹²³ As one Commissioner of Indian Affairs noted, U.S. Indian policy was “designed to rob Indians of their property, destroy their culture and eventually exterminate them.”¹²⁴ More-

117. LEMKIN, *supra* note 103, at 79, 127; *see also* BRINGING THEM HOME, *supra* note 15, at 266-275.

118. *See supra* notes 18-65 and accompanying text.

119. Indian General Allotment Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887).

120. President Theodore Roosevelt, State of the Union Message (Dec. 3, 1901), *available at* <http://www.humanitiesweb.org/human.php?s=&p=&a=i&ID=1683>.

121. *See* County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 276 (1992) (Justice Blackmun, concurring in part and dissenting in part) (describing allotment as “systematic ‘ethnocide’”) (quoting H. SHUSTER, *THE YAKIMAS: A CRITICAL BIBLIOGRAPHY* 70 (1982)).

122. United Nations Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 105, art. II.

123. *See supra* notes 18-65 and accompanying text.

124. Collier, *supra* note 29, at 772.

over, recent scholarship suggests that the abuse and neglect that indigenous children suffered at the hands of their substitute caregivers were not the result of “unfortunate and unintended consequence[s] of policies directed towards securing the health and well-being of . . . young people.”¹²⁵ Rather, they were the result of “deliberate racial hygiene strategies” intended to further the official discourse of civilization and assimilation.¹²⁶

Additionally, a policy of forced removal can still be genocide even if it is motivated in part by “good intentions.”¹²⁷ This issue was explored in depth by the Australian Human Rights and Equal Opportunity Commission, which was charged with the task of investigating the facts and principles relating to the forcible separation of Aboriginal and Torres Strait Islander children.¹²⁸ While the removal process may have been somewhat more successful in Australia, the legal findings of the Australian Commission are equally relevant in the American context. It is true that some U.S. programs were aimed at providing indigenous children with an education, skills training, and religious instruction. However, none of these objectives negate the primary goal of these programs, which was to forcibly separate children from their families and indoctrinate them with Anglo values and beliefs at the expense of their own cultural, familial, linguistic, and religious beliefs. As one United Nations official noted prior to the passage of the Genocide Convention, separating children from their families “forc[es] upon the former at an impressionable and receptive age a culture and mentality different from their parents. This process tends to bring about the disappearance of a group as a cultural unit in a relatively short time.”¹²⁹ Moreover, as was the case in Australia, the “genocidal impact” of state welfare “practice[s] of preferring non-Indigenous foster and adoptive families for Indigenous children” was “reasonably foreseeable,” which in turn supports a finding of “intent” under the Convention.¹³⁰ Nor does the fact that not all American Indian children were forcibly removed negate this finding. As noted by the Australian Human Rights Commission, “it would be erroneous to interpret the [Genocide] Convention as prohibiting only the total and actual destruction of the group. The essence of the crime of

125. See Judith Bessant, *Unintended Consequences or Deliberate Racial Hygiene Strategies: The Question of Child Removal Policies*, in *HARD LESSONS* 187, 188 (Richard Hil & Gordon Tait eds., 2004).

126. *Id.* at 187.

127. See BRINGING THEM HOME, *supra* note 15, at 274 (“The debates at the time of the drafting of the Genocide Convention establish clearly that an act or policy is still genocide when it is motivated by a number of objectives.”) (citing LORNA LIPPMANN, *GENERATIONS OF RESISTANCE: MABO AND JUSTICE* 22-23 (1994)).

128. See generally, BRINGING THEM HOME, *supra* note 15.

129. *Id.* at 271 (quoting United Nations Secretary-General, UN Doc. E/447 1947).

130. *Id.* at 274 (citing Sarah Pritchard, “*International Law*,” in *ABORIGINES AND TORRES STRAIT ISLANDERS, LAWS OF AUSTRALIA* (1993)). See also L. KUPER, *THE PREVENTION OF GENOCIDE* 12-13 (1985).

genocide is the intention to destroy the group as such and not the extent to which that intention has been achieved."¹³¹

Removal of indigenous children from their homes also raises the issue of ethnic cleansing, which includes the "elimination of an unwanted group from society" either by genocide or forced migration, as well as the "systematic and forced removal of members of an ethnic group from their communities."¹³² At Indian boarding schools, Native American children were forbidden to speak their language, practice their religion, partake in any cultural practices, or visit with family.¹³³ The intent of the government, "as articulated by Army Captain Richard Henry Pratt, a key architect of federal Indian education, was to 'kill the Indian so as to save the man within.'"¹³⁴ This intent on the part of the United States to "kill" the various Indian cultures is thus akin to cultural genocide or "ethnocide." Moreover, the forced removal of Indian children to foster care and adoptive homes had the same effect as forced migration. As noted by a United Nations official, this type of separation from family and community at an early age can "bring about the disappearance of a group as a cultural unit in a relatively short time."¹³⁵

Systematic Discrimination

The third human rights violation, systematic racial discrimination, has been recognized as contrary to international law at least since the U.N. Charter of 1945, which provides in Article 55 that "the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."¹³⁶ Similarly, the Universal Declaration of Human Rights, an interpretative guide to the Charter, provides that "[a]ll human beings are born free and equal in dignity and rights" and are "entitled to equal protection against any discrimination in violation of this Declaration."¹³⁷ Even prior to the Charter and Declaration, there were a number of bilateral and multilateral treaties that spoke to the issue of non-discrimination based on nationality.¹³⁸ Other more recent treaties, such as the Interna-

131. BRINGING THEM HOME, *supra* note 15, at 272.

132. See U.S. DEP'T OF STATE, ERASING HISTORY: ETHNIC CLEANING IN KOSOVO 3 (1999), available at <http://italy.usembassy.gov/pdf/other/kosovo.pdf> (last visited Feb. 8, 2008).

133. See e.g., Graham, *supra* note 8, at 16; Carole E. Goldberg, *Individual Rights and Tribal Revitalization*, 35 ARIZ. ST. L. J. 889, 902 (2003).

134. See Raymond Cross, *American Indian Education: The Terror of History and the Nation's Debt to the Indian People*, 21 U. ARK. LITTLE ROCK L. REV. 941, 944 (1999).

135. See BRINGING THEM HOME, *supra* note 15, at 271 (quoting United Nations Secretary-General, UN Doc. E/447 1947).

136. See U.N. Charter art. 55, para 1.

137. See Universal Declaration of Human Rights art. 1 & art. 7, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

138. See, e.g., The Balkan Pact of 1934, Feb. 9, 1934, 7 MOFA TREATY COLLECTION 67-68 (1934); The Treaty of Versailles of 1919, June 28, 1919, THE TREATIES OF PEACE 1919-1923 (1924); The

tional Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, reaffirm the equality rights articulated in the Charter and Declaration.¹³⁹ Moreover, racial discrimination is a violation of customary law when it is practiced systematically as a matter of state policy.¹⁴⁰

In his book *Indigenous Peoples in International Law*, Professor James Anaya discusses the importance of the concept of non-discrimination as it relates to indigenous peoples: "The nondiscrimination norm is acknowledged to have special implications for indigenous groups which, practically as a matter of definition, have been treated adversely on the basis of their immutable or cultural differences."¹⁴¹ This right of non-discrimination for indigenous peoples entails, among other things, affirmation of their right to exist as distinct political and cultural communities. This principle has been articulated in specific U.N. instruments relating to indigenous peoples, such as the Convention Concerning Indigenous and Tribal Peoples in Independent Countries and the Declaration on the Rights of Indigenous Peoples, both of which speak to Native peoples' rights to develop indigenous identities and cultures without assimilation.¹⁴² Yet this right is not often honored by States. As recently as 1997, the U.N. Committee on the Elimination of Racial Discrimination found:

[I]n many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular . . . they have lost their land and resources to colonists, commercial companies, and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.¹⁴³

Scholars of various disciplines have written extensively on issues of "race" and "racism" as they relate to indigenous-state relations. David Stannard's book *American Holocaust* and Robert A. Williams' book *The American Indian*

Faisal-Weizman Agreement of 1919, Jan. 3, 1919, available at <http://www.jewishvirtuallibrary.org/jsource/History/faisaltext.html>.

139. See International Convention on the Elimination of all Forms of Racial Discrimination, G.A. Res. 1904, 18th Sess. (Nov. 20, 1963). See also International Covenant on Civil and Political Rights, art. 1, Dec. 16, 1966, 999 U.N.T.S. 171.

140. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702 (1987).

141. See ANAYA, *supra* note 79, at 98.

142. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, adopted June 27, 1989, 169 I.L.O. 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991), available at <http://www.unhcr.ch/html/menu3/b/62.htm>; United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/61/L.67, adopted Sep. 13, 2007. See also S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. LAW 13, 23-25 (2004).

143. General Recommendations XXIII: Indigenous Peoples, U.N. Doc. CERD/C/51/misc13/Rev. 4, para. 3 (1997).

in *Western Legal Thought: The Discourse of Conquest* offer compelling historical accounts of the linkages between “racist ideology” and Euro-American policies toward the indigenous peoples of the Americas.¹⁴⁴ According to Williams, these attitudes toward indigenous populations can be traced back to medieval times, when the rhetoric of inferiority and difference were used to relegate non-Christian peoples to the status of “infidels.”¹⁴⁵ The legal and political rationalization that supported the Crusades to the Holy Land served as the core foundation for the exercise of control over the indigenous populations of the New World in later centuries.¹⁴⁶ A 1989 United Nations report echoed these findings that “racial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration, and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as ‘primitive’ and ‘inferior.’”¹⁴⁷

Here in the United States, starting with the advent of federally funded boarding and mission schools, indigenous children and their families were subjected to laws and practices that discriminated against them. These laws and practices are explored fully in Part II of this article.¹⁴⁸ They suggest that unlike other children, American Indian children were forced to endure a system of education that sought to strip them of their identity, language, culture, and community and familial life. The inequity of such a system has been acknowledged in U.S. governmental reports, one of which found that the process of removing Indian children from their homes and families was “at variance with modern views of education and social work, which regard the home and family as essential social institutions from which it is generally undesirable to up root children.”¹⁴⁹ Yet even after the advent of boarding schools, indigenous families continued to be systematically discriminated against through inappropriate and unequal application of child welfare laws. As earlier demonstrated, cultural bias and Western notions of what constitutes an appropriate family underscored many of the decisions to separate a child from an Indian home or community.¹⁵⁰ For

144. See STANNARD, *supra* note 5, at 268-281. See also WILLIAMS II, *supra* note 72; WILLIAMS I, *supra* note 72, at 102 (2005).

145. See WILLIAMS II, *supra* note 72, at 13-57.

146. *Id.*

147. Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States, U.N. Doc. E/CN4/1989/22, HR/PB/89/5 at 5 (1989). Although in direct contradiction to natural law theory, the processes of colonization, seizure of land, and attempts at outright destruction of indigenous cultures were further supported and advanced through state-centered norms and procedures. ANAYA, *supra* note 79 at 26-31. It is only in the last century that international law has shifted away from being an “instrument of colonialism” to protecting the rights of individuals and groups, including indigenous peoples. *Id.* However, this rhetoric of conquest and inferiority is still evident in some domestic legal systems, suggesting that the issue of discrimination against indigenous peoples is ongoing. See, e.g., WILLIAMS I, *supra* note 72, at 172. See also Lorie M. Graham, *The Racial Discourse of Federal Indian Law*, 42 TULSA L. REV. 103 (2006).

148. See *supra* notes 18-65 and accompanying text.

149. Meriam, *supra* note 30, at 403.

150. See *supra* notes 44-55 and accompanying text.

instance, some Indian children were being removed from the custody of their family on the sole grounds that "an Indian reservation is an unsuitable environment for a child and that the pre-adoptive parents were financially able to provide a home and a way of life superior to the one furnished by the natural mother."¹⁵¹ Cultural bias was evident in other cases, from termination of parental rights for leaving a child with extended family members for long periods of time to removal on the basis of weak disciplinary practices on the part of the parent.¹⁵² Moreover, American Indian families were less likely than non-Indian families to receive supportive social services as an alternative to removal.¹⁵³ Additionally, the "best interest of the child" standard, utilized in most child custody proceedings, has been (and still is being) used by some courts as a tool of removal, based in part on cultural stereotypes of what it means to be part of a Native American nation or community.¹⁵⁴

Similar to the issue of genocidal intent, providing indigenous children with skills and training or believing that one is acting in the "best interest of the child" does not undermine a claim of discrimination. First, evidence suggests that the policy of removal was part and parcel of a larger policy of "deliberate racial hygiene."¹⁵⁵ Second, international law covers both intentional acts as well as those that have the effect of discriminating based on unequal enjoyment of human rights. For instance, the International Convention on the Elimination of All Forms of Racial Discrimination defines "racial discrimination" to include "any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."¹⁵⁶

Cultural Identity

There are also important linkages between the right to nondiscrimination and the right to "cultural integrity" or identity. Professor Anaya maintains that:

[T]he nondiscrimination norm, viewed in light of broader self-determination values, goes beyond ensuring for indigenous *individuals* . . . the same access to . . . social welfare programs. It also upholds the right of indigenous *groups* to maintain and freely de-

151. AMERICAN INDIAN FAMILIES, *supra* note 42, at 1, 3.

152. See *supra* notes 47-51 and accompanying text.

153. See *supra* note 48 and accompanying text.

154. See *supra* notes 52-54 and accompanying text.

155. See Bessant, *supra* note 125, at 187.

156. See United Nations Convention on the Elimination of all Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (*entered into force* Jan. 4, 1969) (emphasis added).

velop their cultural identities in coexistence with other sectors of humanity.¹⁵⁷

These protections are articulated in various treaty regimes, such as the U.N. Convention Against Racial Discrimination (“CERD”), which has been interpreted by the Committee on the Elimination of Racial Discrimination to include a right of recognition and respect for the distinct cultures and identities of indigenous peoples.¹⁵⁸ Article 27 of the International Covenant on Civil and Political Rights (“ICCPR”) similarly provides for the right of persons belonging to “ethnic, linguistic or religious minorities . . . in community with other members of their group, to enjoy their own culture, to profess and practice their own religion [and] to use their own language.”¹⁵⁹ This provision has been the basis of a number of favorable decisions supporting indigenous peoples’ rights. For instance, in the 1977 case of *Lovelace v. Canada*, the U.N. Human Rights Committee found that Sandra Lovelace was being denied “the right . . . to access her native culture and language in community with the other members of her group . . .” by a Canadian law that denied the Indian status of all Indian women who married non-Indians.¹⁶⁰ Similar claims could be made with respect to Native children that are forcibly removed from their communities and denied the right to “access [their] native culture and language” in community with other members of their group, in violation of the cultural integrity norm embodied in Article 27 of the ICCPR.

Indeed, a child’s right to be raised and nurtured in her family and community of origin has been increasingly recognized in international children’s rights discourse. For instance, the Hague Intercountry Adoption Convention addresses, among other things, the “world-wide phenomenon involving migration of children . . . from one society and culture to another very different environment.”¹⁶¹ Additionally, Article 8 of the Convention on the Rights of the Child recognizes “the right of the child to preserve his or her identity, including nationality, name, and family relations.”¹⁶² There are also specific provisions that address the unique needs of indigenous children in terms of language, education, and cultural identity.¹⁶³ Although

157. See Anaya, *supra* note 77, at 129.

158. *Id.* at 130.

159. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

160. *Lovelace v. Canada*, Communication No. R.6/24, Report of the Hum. Rts. Comm., U.N. GOAR, 36 Sess. Supp. No. 40 at 166, U.N. Doc. A/36/40, Annex 18 (1977); see also Anaya, *supra* note 77, at 101.

161. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1211 (1993), available at http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

162. Convention on the Rights of the Child, art. 8, Nov. 20, 1989, 1577 U.N.T.S. 3 (*entered into force* Sept. 2, 1990).

163. See *id.*, art. 30 (right of indigenous children to enjoy their own culture), art. 29(1)(c)(d) (right to an education respecting a child’s indigenous identity), art. 17 (recognition of the linguistic needs of indigenous children). See also Committee on the Rights of the Child, Recommendations: Day of General

both of these conventions have been widely ratified, this issue of protecting a child's community or "identity of origin" is not without controversy. Professor Barbara Bennett Woodhouse states that the "very notion of preserving children's cultural or ethnic identity seems to conflict with liberal conceptions of parents' and children's individual rights, ideals of colour-blind equality" ¹⁶⁴ She notes, however, that missing from this debate of individual versus group identity "is a coherent schema for articulating children's rights to preservation of their identity." ¹⁶⁵ As we will see in Parts IV and V, the Indian Child Welfare Act seeks to protect a child's "identity of origin." Yet it does so in a way that is consistent with generally accepted international norms that seek to protect, when possible, "the child's . . . family and community of origin from disruption," thereby ensuring two essential aspects of reparations—restitution and rehabilitation. ¹⁶⁶

Human Rights Obligations of the United States

Part IV addresses the right to reparations under international law for serious violations of human rights and fundamental freedoms. ¹⁶⁷ The issue to be explored here is the obligations of the United States with respect to human rights violations committed prior to 1978. The United States did not ratify many of the major human rights treaties cited above—such as the Genocide Convention, the Convention on the Elimination of All Forms of Racial Discrimination, and the International Covenant on Civil and Political Rights—until well after the ICWA became law in 1978. However, this does not preclude us from considering U.S. policies and practices within the context of the standards set in those treaties. As a member of the United Nations, the United States, as early as the 1940s, assumed general human rights obligations enunciated in such instruments as the 1945 Charter of the United Nations and the 1948 Universal Declaration of Human Rights. More specifically, in the case of genocide and even the prohibition against systematic racial discrimination, such norms have been recognized for some time as binding on all member states under principles of customary inter-

Discussion on the Rights of Indigenous Children, 34th Session, 15 September–3 October 2003, *available at* <http://www.ohchr.org/english/bodies/crc/docs/discussion/indigenouschildren.pdf>; United Nations Permanent Forum on Indigenous Issues, Report of the Second Session, 12–23 May 2003, U.N. Doc E/2003/43, E/C.19/2003/22, para. I.B.1. (Indigenous children and youth) *available at* http://www.un.org/esa/socdev/unpfi/en/session_second.html.

164. Barbara Bennett Woodhouse, *Protecting Children's Rights of Identity Across Frontiers of Culture, Political Community, and Time*, in *FAMILIES ACROSS FRONTIERS* 259, 260 (Nigel Lowe & Gillian Douglas eds., 1996).

165. Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 *DUKE J. GENDER L. & POL'Y* 107, 108 (1995).

166. *See infra* notes 286–296 and accompanying text.

167. *See infra* notes 178–197 and accompanying text.

national law.¹⁶⁸ Once a custom is widely accepted as a norm of international law, it binds all governments not expressly and persistently objecting to its development as such.¹⁶⁹ Moreover, as earlier noted, while certain violations of fundamental human rights may not be violations of customary law when “committed singly or sporadically,” “they become violations . . . if the state is guilty of a ‘consistent pattern of gross violations’ as state policy.”¹⁷⁰ In terms of the forcible removal policy, which lasted more than a century in different forms and includes the ongoing intergenerational harms discussed in Part II, it would be difficult to argue against a finding of a “consistent pattern of gross violations.” Additionally, as previously discussed, the principle of self-determination encompasses a duty on the part of States to take remedial measures for violations of a group’s substantive right to self-determination. Self-determination is a part of international customary law and, as argued by some, may even be a preemptory norm much like the prohibition against genocide and systematic racial discrimination.¹⁷¹ To the extent that indigenous nations in the United States are still being denied effective means to address or participate in matters affecting their children, the substantive aspect of self-determination is not being fulfilled and therefore requires an adequate remedy. Additionally, the United States has a duty to ensure that past violations are remedied through programs that effectuate the norms that comprise self-determination, which is in part what the ICWA is intended to do.¹⁷²

IV. REPARATIONS

“[S]ociety cannot simply block out a chapter of its history; it cannot deny the facts of the past”

—Jose Zalaquett, member of the Chilean National Commission on Truth and Reconciliation¹⁷³

“[R]estorative justice . . . aims for the healing and restoration of all concerned.”

—Truth and Reconciliation Commission of South Africa¹⁷⁴

168. See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702; ANAYA, *supra* note 77 at 97; THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 277, 279 (1995); *Oyama v. California*, 332 U.S. 633, 649–50, 679 (1948).

169. See FRANK C. NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY AND PROCESS 18 (2nd ed. 1996).

170. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702.

171. See Anaya, *supra* note 77, at 97.

172. See *infra* notes 248-306 and accompanying text.

173. Jose Zalaquett, *Balancing Ethical Imperatives and Political constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425, 1433 (1992).

174. See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, REPORT 109 (2003), available at <http://www.info.gov.za/otherdocs/2003/trc/>.

Reparation for human rights violations triggers a host of critical questions.¹⁷⁵ Some of those questions are relevant to the issue of the ICWA as a tool for reparations, such as: When are reparations warranted? How is it possible to judge certain past wrongs by contemporary standards? What constitutes an appropriate remedy or response? And how does one identify the victim class?

Professor Mari Matsuda has suggested that reparations require “the formal acknowledgment of historical wrong, the recognition of continuing injury, and the commitment to redress, looking always to the victims for guidance.”¹⁷⁶ Others equate reparations with the act of “atonement” for the commission of some injustice. For the victims of injustice, the delivery of some form of apology may be an important first step in the process of obtaining justice and healing wounds.¹⁷⁷ Still others consider monetary compensation to the individual as the most important aspect of reparations.¹⁷⁸ In many of these cases, the primary focus is placed on redress for a wrong done. However, beyond this normative goal of reparation, the “making of amends for a wrong,”¹⁷⁹ so too is there a holistic goal, to “restore” or “repair” damaged relationships.¹⁸⁰ This concept of restoration or repair is at the center of many indigenous legal systems. For instance, Justice Raymond Austin has described the goals of the Navajo justice system as not only providing individual restitution for an injury caused to a person, but also repairing familial relationships and regaining harmony within the community.¹⁸¹ Repairing and rebuilding relationships is also an essential component of the restorative justice movement. Professor Elizabeth Spelman suggests that restorative justice “isn’t only about fixing the flaws and making up for the imperfections in existing institutions, it’s about putting the repair of victims, offenders, and the communities of which they are a part at the center of justice.”¹⁸² The Truth and Reconciliation Commission of South Africa offers a similar definition of restorative justice, noting that it aims, among other things, to restore all those concerned—the victim, the offender, the families, and the larger community.¹⁸³ So, too, should reparations be viewed with these dual aims in mind: to redress wrongs as well as repair or restore damaged relationships. By considering international norms

175. See generally Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 373–74 (1987).

176. *Id.* at 397.

177. See ELIZABETH V. SPELMAN, REPAIR: THE IMPULSE TO RESTORE IN A FRAGILE WORLD 83 (2003).

178. For a more extended discussion on financial restitution to address human rights violations see, e.g., LAZER BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES (2000).

179. BLACK’S LAW DICTIONARY 602 (2nd Pocket Ed. 2001).

180. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 945 (11th Ed. 2003).

181. See GETCHES, *supra* note 17, at 422.

182. SPELMAN, *supra* note 177, at 51.

183. See TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA, REPORT 109 (2003), available at <http://www.info.gov.za/otherdocs/2003/trc/>.

on reparations, as well as some regional and domestic examples, we can see how these dual aims may translate into law and policy.

International Principles and Guidelines

A right to reparations claimed a place in international legal discourse following World War II and the emergence of international human rights norms and procedures.¹⁸⁴ Today, many international human rights instruments recognize a general right to redress for victims of violations of international human rights law. For instance, Article 8 of the Universal Declaration of Human Rights states that “[e]very one has the right to an effective remedy by the component national tribunals for acts violating the fundamental rights granted him by constitution or by law.”¹⁸⁵ The International Covenant on Civil and Political Rights provides that each state party is to ensure an “effective remedy” for violations of rights and freedoms under the ICCPR.¹⁸⁶ The International Convention on the Elimination of All Forms of Racial Discrimination speaks directly to the issue of reparations in Article 6, articulating a right to “just and adequate reparation or satisfaction for any damage suffered as a result of [racial] discrimination.”¹⁸⁷ Regional instruments, such as the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights, similarly incorporate notions of “just satisfaction” for breach of a State’s human rights obligation.¹⁸⁸ An important corollary to the right of redress is a State’s affirmative duty to ensure victims’ access to those remedies. In particular, states have an obligation to provide “reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.”¹⁸⁹ States also have a general duty to ensure procedures and processes that allow for effective,

184. See generally Christian Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 *TUL. J. INT’L & COMP. L.* 157 (2002).

185. Universal Declaration of Human Rights, art. 8, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

186. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

187. International Convention of the Elimination of All Forms of Discrimination, *supra* note 133, art. 6. Other important conventions offering similar protections for violation of human rights include: Convention of Rights of the Child, *supra* note 156, art. 39; and ILO Convention No. 169, *supra* note 136, art. 12 (concerning Indigenous and Tribal Peoples in Independent Countries).

188. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 13, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (*entered into force* Sept. 3, 1953); American Convention on Human Rights, art. 63, Nov. 22, 1969, 1144 U.N.T.S. 123 (*entered into force* July 18, 1978). See also African Charter on Human and Peoples’ Rights, arts. 20(3), 21(2), *adopted* June 27, 1981, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 I.L.M. 58 (*entered into force* October 21, 1986) (suggesting a right to a remedy against foreign domination and spoliation of property).

189. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, para. 15, U.N. Doc. A/RES/60/147 (Mar. 21, 2006), *available at* <http://www.ohchr.org/english/law/remedy.htm> [hereinafter Basic Principles].

appropriate, and prompt reparations.¹⁹⁰ Domestic law may also provide a basis for a claim of reparations, particularly where a victim is denied rights equally enjoyed by other members of the State. For instance, in a national inquiry on the separation of Aboriginal children from their families and communities, an Australian human rights commission concluded that the century-long practice of forced removal of indigenous children violated fundamental common law rights in addition to international human rights principles.¹⁹¹ Later in this article I will consider specific international instruments, regional decisions, and state practices that support indigenous claims to reparations for past and continuing wrongs. As Part III demonstrated, there are important developments in international law relating to the survival of indigenous peoples that are tied to the recognition and protection of communal rights, which are in turn linked to the right of self-determination.

In 2005, the U.N. General Assembly adopted a resolution on “[T]he Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.”¹⁹² This resolution was the culmination of several U.N. studies¹⁹³ that had sought to clarify the right to reparations and potential processes for achieving that right. The studies adopt a broad definition of reparations, emphasizing the need to “render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations.”¹⁹⁴ The contents of any redress plan would in turn be shaped by the gravity of the violation at issue, the resulting damages, and the needs and wishes of the victims.¹⁹⁵ “[F]ull and effective reparation” would mean pursuing various forms of redress, such as restitution, rehabilitation, compensation, and satisfaction and guarantees of non-repetition.¹⁹⁶ Restitution is designed to restore the victim to pre-violation status whenever possible and includes restoration of liberty, identity, family life, citizenship, property, and employment.¹⁹⁷ Compensation is described as providing for “economically assessable damages” for such things as physical and mental harm, lost opportunities, material damages, harm to one’s reputation or dignity, legal costs, and moral damages.¹⁹⁸

190. *Id.* para. 11.

191. See generally BRINGING THEM HOME, *supra* note 15

192. Basic Principles, *supra* note 189.

193. See, e.g., Theo van Boven, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights & Fundamental Freedoms: Final Report*, U.N. Doc E/CN.4/SUB.2/1993, reprinted in 59 LAW & CONTEMP. PROB. 283 (1996) [hereinafter van Boven I]; see also Theo van Boven, *Revised Set of Basic Principles and Guideline on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, U.N. Doc E/CN.4/Sub.2/1996/17 (May 24, 1996) [hereinafter van Boven II].

194. van Boven I, *supra* note 193, para. 7.

195. van Boven I, *supra* note 193, para. 137(4); Basic Principles, *supra* note 189, para.18.

196. van Boven I, *supra* note 193, para. 137(4); Basic Principles, *supra* note 189, para.18.

197. Basic Principles, *supra* note 189, para. 19.

198. *Id.*, para. 20.

Rehabilitation includes offering special types of care for victims to help in the healing process, including medical and psychological care as well as legal and social services.¹⁹⁹ Non-repetition is addressed, among other things, through cessation of continuing human rights abuses; public disclosure of past acts; public acknowledgement and apology for those abuses; official declaration restoring the dignity, reputation, and legal rights of a victim or victim's family; judicial or administrative actions to ensure against future abuses (including mechanisms to monitor and prevent social conflicts); and the promotion of human rights education and training.²⁰⁰

While any human rights violation gives rise to the right of redress under international law, the primary focus of the U.N. studies is on "gross violations of human rights and fundamental freedoms."²⁰¹ Commonly identified gross violations include those explored in Part III of this article: genocide, systematic discrimination, and forcible transfer of a population or group. Others include slavery, arbitrary execution, torture, cruel or inhuman treatment, enforced disappearance, and prolonged detention.²⁰² A state also commits a gross violation of human rights if it, as a matter of state policy, "practices, encourages or condones . . . a consistent pattern of . . . violations of internationally recognized human rights," which includes any human right that is "fundamental and intrinsic to human dignity."²⁰³ As earlier demonstrated, both the right to a cultural identity and the right to self-determination constitute rights that are fundamental to the basic survival and dignity of indigenous peoples.

On the issue of identification of the victim class, international law recognizes the right to reparations for individuals, groups, and communities. For instance, the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines "victims" as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights." Additionally, U.N. studies on reparations note that "both individuals and collectivities are often victimized as a result of gross violations of human rights."²⁰⁴ Where indigenous peoples are concerned, the "individual and collective aspects of victimized persons and groups are in many instances closely related."²⁰⁵ This relationship is particularly compelling in the context of removal, where familial and cultural dislocation affects not only the child, but the child's family and community as well. The U.N. resolution on reparations acknowledges as much in noting that

199. *Id.*, para. 21.

200. *Id.*, para. 22-23.

201. van Boven I, *supra* note 193, para. 137(1); Basic Principles, *supra* note 189, Preamble.

202. van Boven I, *supra* note 193, para. 13; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702.

203. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §702.

204. van Boven I, *supra* note 193, at 288.

205. van Boven I, *supra* note 193, para. 14-17.

“contemporary forms of victimization, while essentially directed against persons, may nevertheless also be directed against groups of persons who are targeted collectively.”²⁰⁶ It thus defines victims as “persons who individually or collectively suffered harm. . . .”²⁰⁷

Finally, there is the question of the appropriateness of evaluating past wrongs in light of current standards and the fairness of having those who were not directly responsible for the wrongs pay the costs of reparations. The U.N. General Assembly resolution, while not directly addressing these questions, notes that statutes of limitations that might otherwise bar a claim to reparations do not apply to gross violations that constitute a crime under international law.²⁰⁸ As for other types of human rights violations, the resolution states that domestic laws should not be “unduly restrictive” in this regard.²⁰⁹ A recent report from a non-governmental organization, Human Rights Watch, deals more directly with the issue of the outer limits of reparations:

[T]here are practical limits to how long, or through how many generations . . . claims should survive. Because human history is filled with wrongs, many which amount to severe human rights abuse, significant practical problems arise once a certain time has elapsed in building a theory of reparations on claims of descendancy alone. . . . For these practical reasons, when addressing relatively old wrongs, we would not base claims of reparations on the past abuse itself but on its contemporary effects. That is we would focus on people who can reasonably claim that today they suffer the effects of past human rights violations through continuing economic or social deprivation. . . . This approach concentrates on those people who continue to be victimized by past wrongs and seeks to end their victimization . . . [thereby] redressing the contemporary impact of past wrongs.²¹⁰

In cases of injury that do not arise solely out of contemporary injustices, Human Rights Watch suggests that the appropriate focus might be on rectifying or addressing contemporary economic and social deprivations.²¹¹ As we will see in the next section, several states have developed reparation plans with such a model in mind.

Professor Mari J. Matsuda echoes many of the sentiments of Human Rights Watch, noting that “the outer limit [of reparation claims] should be the ability to identify a victim class that continues to suffer a stigmatized

206. Basic Principles, *supra* note 189, Preamble.

207. *Id.*, para. 8.

208. *Id.*, para. 6.

209. *Id.*, para. 7.

210. See HUMAN RIGHTS WATCH, AN APPROACH TO REPARATIONS, available at <http://hrw.org/english/docs/2001/07/19/global285.htm>.

211. *Id.*

position enhanced or promoted by the wrongful act in question."²¹² For instance, in the case of reparations for Native Hawaiians, Professor Matsuda emphasizes the "continuing group damage engendered by past wrongs" as a basis for maintaining a right to reparations. Evidence of this "stigmatized position" or "continuing group damage" is demonstrated, among other things, by statistical data that suggest that indigenous Hawaiians "are on the bottom of every . . . indicator of social survival: . . . lower birth rates, higher infant mortality . . . , higher rates of disease, illiteracy, imprisonment, alcoholism, suicide and homelessness." Professor James Anaya takes this argument one step further by arguing that there are ongoing substantive violations of Native Hawaiian peoples' right to self-determination, thereby giving rise to the need for remedial measures on the part of the United States.²¹³ In the case of removal of Indian children, objections based on time have little force, for many of the reasons identified by Human Rights Watch and scholars such as Matsuda and Anaya.²¹⁴ While the federal government no longer forces American Indian children to attend boarding schools or supports the removal of Indian children by state welfare agencies, some of the practices and violations addressed by the ICWA are ongoing.²¹⁵ Moreover, the ICWA is necessary both because American Indian children and their families remain in a "stigmatized position" and because the law provides some guarantees against repetition of abuse, in part by recognizing an Indian nation's right to self-determination where child welfare matters are concerned. This issue is explored more fully in Part V.

Regional and Domestic Examples

The international norms discussed above are finding their way into state practice, which in turn is influencing international jurisprudence. This section explores some of those state practices. The following examples are a mere sampling of the many plans currently being considered or implemented by state and regional bodies. They were chosen in part because they offer some helpful insight on the question of the ICWA as partial reparation.

The most well-known national example of reparations is Germany's redress program for the egregious crimes committed against the victims of the Holocaust. In 1949, the Republic of Germany began working on a series of reparations laws designed to compensate individuals for persecu-

212. Matsuda, *supra* note 175, at 385.

213. See Anaya, *supra* note 77, at 319.

214. There are two important elements—the ongoing damage suffered by a particular group and the fact that fraud, misrepresentation, and denial often prevent timely presentation of such claims.

215. See *supra* notes 18-65 and accompanying text.

tion and injury perpetrated by the Nazi regime.²¹⁶ In later years, these laws were supplemented to greatly expand the class of victims entitled to compensation.²¹⁷ More recently, the focus of new laws has been on redress for victims of forced and slave labor.²¹⁸ In many cases, redress has come in the form of monetary compensation. Recent estimates indicate that Germany has made payments to victims of the Holocaust in excess of eighty billion dollars.²¹⁹ In terms of non-monetary relief, some have suggested that Germany's official apology was perhaps the "most important . . . event that took place."²²⁰ Others have highlighted the non-monetary remedies that were not included, such as a forum to allow survivors to tell their stories as well as attempts at rebuilding communities.²²¹

A different reparations claim arising out of World War II involves the United States and its redress plan for Japanese Americans incarcerated in internment camps. In 1942, the U.S. Government passed an Executive Order whereby citizens and residents of Arizona, California, Oregon, Washington, and the territories of Alaska and Hawaii were removed or excluded based on their Japanese ancestry.²²² The alleged justification behind the Order was that Japanese nationals or Japanese Americans were likely to act as espionage agents for the Empire of Japan during World War II, a justification that has long since been discredited. In 1948, the U.S. Congress adopted the Japanese-American Evacuation Claims Act, which authorized the settlement of property loss claims resulting from the internment.²²³ In 1988, the U.S. Government passed other laws relating to internment, which included, among other things, an official apology for the actions of the government, a public education fund to educate the public about the internment of Japanese Americans, and compensation to other victims of

216. See Barry A. Fisher et al., *What Happens Next?*, 20 WHITTIER L. REV. 91, 106-112 (1998); German Compensation for National Socialist Crimes, available at <http://ushmm.org/assets/frg.htm> (last visited Feb. 18, 2008).

217. Over the years, the class of victims has been expanded to include immigrants from the Soviet Union, survivors in East Germany, and non-Jews who were unable to file claims under the original laws. See generally, Robert Hochstein, *Jewish Property Restitution in the Czech Republic*, 19 B.C. INT'L & COMP. L. REV. 423, 432-33 (1996). In 1995, Germany and the United States signed the U.S.-German Nazi Persecution Agreement (the "Princz Agreement") to compensate survivors who were U.S. nationals at the time of the Holocaust. See Fisher, *supra* note 216, at 113 (1998). More recently, a number of corporations have agreed to pay compensation to individuals of forced and slave labor. *Id.* at 117.

218. See Michael J. Bazylar, *The Holocaust Restitution Movement in Comparative Perspective*, 20 BERKELEY J. INT'L L. 11, 22-32 (2002).

219. See Michael J. Bazylar & Amber L. Fitzgerald, *Trading With the Enemy: Holocaust Restitution, the United States Government, and American Industry*, 28 BROOKLYN J. INT'L L. 683, 719 (2003).

220. See *Transcript: The Strategies Used to Achieve Non-Monetary Goals*, 25 FORDHAM INT'L L. J. 177, 196-97 (2001).

221. *Id.*

222. See Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

223. Japanese-American Evacuation Claims Act, 62 Stat. 1231 (July 2, 1948). The compensation was aimed at loss or damage to real or personal property that was the "reasonable and natural consequence of the evacuation or exclusion of such person by the appropriate military commander from a military area" under EO 9066 and which was not covered by insurance.

the war.²²⁴ The U.S. reparations plan to remedy these wrongs incorporated the more commonly known elements of reparations—a national apology and individual payments to surviving victims. However, it also included some elements of restitution, such as a review of any position, status, or entitlement lost as a result of the government's discriminatory actions, as well as the review of any criminal conviction arising out of those actions. The plan also called for the United States to discourage the occurrence of similar injustices in the future and to make credible and sincere declaration of concerns over violations of human rights committed by other nations.

While the primary focus of World War II reparations was compensatory, the concept of reparation as embodied in the U.N. studies extends well beyond monetary relief. The potential breadth of any reparation plan is perhaps most evident in South Africa's response to Apartheid. Members of South Africa's Truth and Reconciliation Commission ("TRC") were charged with reviewing past policies of the Apartheid regime and recommending reparations for the victims of such policies. The recommendations proposed by the TRC included both restorative and redress measures, incorporating international norms of restitution, rehabilitation, assurances against non-repetition, and compensation.²²⁵ While individual monetary relief was a component of the plan, the major focus was on healing, reconciliation, and capacity-building. The TRC stressed the importance of developing a comprehensive reparations plan that would improve the quality of life of victims of gross human rights violations and their dependents.²²⁶ These goals were to be realized through a series of proposals that included interim reparations, individual reparation grants, symbolic reparations, community rehabilitation, and institutional and government reform.²²⁷ The proposals offered redress to both the individual and the group by targeting

224. Aleutian and Pribilof Islands Restitution Act, Pub. L. No. 100-383, 102 Stat. 903 (August 10, 1988). In 1988, Congress also passed the Civil Liberties Act calling for the review of criminal convictions of U.S. citizens and residents of Japanese ancestry who were convicted of crimes under EO 9066 and for the restitution of up to \$20,000 per person for person convicted under that Order.

225. The plan was "aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights." See The Promotion of National Unity and Reconciliation Act 34 of 1995, available at <http://www.doj.gov.za/ttc/legal/act9534.htm>.

226. See generally Marianne Geula, *South Africa's Truth and Reconciliation Commission as an Alternative Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. Int'l L. J. 57, 65 (2000).

227. Interim reparations were intended for those victims who had an urgent need for public services, such as medical attention, psychological counseling, family welfare and other such programs. Individual reparations grants would take the form of monetary relief intended to help cover the cost of daily life for the victims. Symbolic reparations were designed to cover legal and administrative services denied to victims or their families by the Apartheid regime. Proposals began with setting aside certain days for remembrance of victims lost during the regime and moved into more tangible services provided to the surviving families of victims. Community reparations were proposed as a means of group healing and included such things as the naming of streets or public facilities after victims, the placing of community memorials and monuments, and the holding of public ceremonies to celebrate the lives of the victims. See Promotion of National Unity and Reconciliation Act 34 of 1995, available at <http://www.doj.gov.za/ttc/legal/act9534.htm>; cf. Rosemary Nagy, *Postapartheid Justice: Can Cosmopolitanism and Nation-Building be Reconciled?*, 40 Law & Soc'y Rev. 623, 639-47 (2006).

individual need as well as broader socioeconomic conditions. Yet this emphasis on social and economic rights has raised some questions regarding the appropriate role of development in the reparations process. For instance, while many acknowledge that “individual reparations are undermined if they do not take place in a context of wider programs for social justice and national rehabilitation,” some critics warned against governments “conflat[ing] reparations with their development discourse.”²²⁸

Similar issues have arisen in the context of other reparations plans, such as Peru’s plan to redress human rights abuses resulting from armed conflict between 1980 and 2000. In November of 2000, Peru’s Truth and Reconciliation Commission drafted a reparations plan that emphasized six major areas of redress: symbolic reparations, health care, education, restitution of rights, economic reparations, and collective reparations.²²⁹ Many of these programmatic measures were later incorporated into a comprehensive reparations plan that focused on the contemporary effects of past human rights violations.²³⁰ The recommendations were designed to “respond to the collective harms suffered by communities and groups as well as by individual victims and their families,” thereby broadly defining the victim class.²³¹ Thus, a major thrust of the plan was ensuring economic and social rights for individuals as well as groups.²³² From an implementation standpoint, concerns have been raised (similar to the South African situation) over whether the State is seeking “to use development and poverty alleviation programs as a vehicle for reparations.”²³³ These concerns are well-founded, but should not foreclose the possibility of linkages between development and reparations. Development strategies may well be an important part of a State’s reparations plan, so long as those strategies are responsive to the harms caused by the violations and not merely used as a pretext to avoid additional State obligations. Indeed, such policies may be an essential part of that plan, when, as in the case of forcible removal of indigenous children, the State’s actions were aimed at destroying the social, cultural, and economic well-being of a group.

There are a number of domestic and regional cases involving indigenous peoples that raise similar issues of collective and intergenerational harm.

228. *South Africa, Reparations and the TRC’s Recommendations: A Missed Opportunity*, THE REPARATION REPORT (REDRESS, London, U.K.), May 2006, at 5, available at <http://www.redress.org/reports/the%20reparation%20report%20vol%207%2028%20final%20june%2006.pdf>.

229. For a detailed description of Peru’s reparation plan, see TRUTH AND RECONCILIATION COMMISSION OF PERU, FINAL REPORT (2003), <http://www.cverdad.org.pe/ingles/ifinal/conclusiones.php>; see also *Peru and Reparations: Little Progress on the Ground*, THE REPARATION REPORT (REDRESS, London, U.K.), May 2006, at 7, available at <http://www.redress.org/reports/the%20reparation%20report%20vol%207%2028%20final%20june%2006.pdf>.

230. *Id.* at 8.

231. *Id.* at 7.

232. *Id.* at 8.

233. *Id.* at 9.

Only a few will be explored here.²³⁴ The first is *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, decided by the Inter-American Court of Human Rights.²³⁵ In 1998, the Inter-American Commission on Human Rights ("IACHR") filed an application with the Inter-American Court on Human Rights on behalf of the Awas Tingni Indians against the government of Nicaragua. The original claim before the Commission was based on Nicaragua's granting of land concessions and logging licenses to foreign companies on lands that the Awas Tingni claimed as ancestral lands. After ruling in favor of the indigenous group, the Commission referred the case to the Inter-American Court based on breaches of the American Convention on Human Rights.²³⁶ In 2001, the Court ruled that Nicaragua had denied the Awas Tingni certain rights to their ancestral lands and resources. In doing so, the Court recognized, among other things, a right to property that encompassed the communal property rights of indigenous peoples.²³⁷ The State of Nicaragua was not only ordered to pay monetary reparations,²³⁸ but also to adopt "measures of a legislative, administrative and whatever other character necessary to create an effective mechanism for official recognition, demarcation and titling of the indigenous communities' properties, in accordance with the customary law, values, usage and custom of these communities."²³⁹ Thus the reparations order made it clear, as do later decisions from the Inter-American system,²⁴⁰ that "relief" for wrongs committed by States against indigenous populations extends beyond monetary compensation to the protection and promotion of communal rights, such as the right to property.

This is an important development in international law for indigenous peoples generally, including the Native Hawaiians who continue to seek redress for group wrongs. In 1993, the United States officially apologized to Native Hawaiians for its involvement in the "illegal overthrow of the Kingdom of Hawaii" and for "deprivation of the rights of Native

234. For a more comprehensive look at international, regional and domestic decisions relating to indigenous peoples rights, see Anaya, *supra* note 77.

235. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H. R. (Ser. C) Case No. 79 (Aug. 31, 2001). See also *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, reprinted in 19 ARIZ. J. INT'L & COMP. LAW 395, 438 (2002).

236. See S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. LAW 1, 2-8 (2002) (describing Awas Tingni's path to the Inter-American Court).

237. Anaya, *supra* note 77, at 145.

238. The Court ordered Nicaragua to pay the Awas Tingni \$50,000 in damages and indemnify them for \$30,000 in legal expenses. The monetary reparations seem to have been less than those actually suffered due to procedural errors relating to the presentation of actual damages. See Anaya & Grossman, *supra* note 236, at 8.

239. See *Inter-American Court of Human Rights: The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua: Judgment of August 31, 2001*, reprinted in 19 ARIZ. J. INT'L & COMP. LAW 395, 438 (2002).

240. See, e.g., *Case of Mary and Carrie Dann v. United States*, Case No. 11.140, Inter-Am. C. H.R. No. 75/02 (Dec. 27, 2002).

Hawaiians to self-determination.”²⁴¹ However, unlike in the context of Japanese Americans, which involved individual claims and resulted in individual monetary settlements, the U.S. Government has not done enough to adequately redress the group wrongs committed against indigenous Hawaiians.²⁴² These wrongs are both historical (deprivation of the right to self-government followed by illegal confiscation of lands), as well as ongoing (continued suppression of cultural, economic, and political rights).²⁴³ According to Professor Anaya, these wrongs constitute a deprivation of the right to self-determination under international law that the United States has a duty to remedy.²⁴⁴ In particular, he proposes a negotiated settlement or similar procedure that addresses what he identifies as the core norms of indigenous self-determination: “cultural integrity, land and resources, social welfare and development, and self-government.”²⁴⁵ As we have already seen, this principle of self-determination is a defining aspect of reparations for indigenous peoples and thus needs to be considered in the drafting of any plan to redress historical and contemporary wrongs.

Canada has faced similar challenges with respect to its treatment of First Nations peoples, most recently relating to the State’s one-hundred year policy of compulsory residential boarding schools for indigenous children. In 1990, First Nations leaders called on the Canadian government and church leaders to acknowledge and remedy the cultural, physical, emotional, and sexual abuses committed against Native children at these institutions.²⁴⁶ Canada responded by convening a Royal Commission on Aboriginal Peoples that was charged with, among other things, receiving testimony from victims and their families. While the Commission recommended a public inquiry into Canada’s residential school system, it was not until 2005, following a series of lawsuits that placed a number of church-run institutions on the verge of bankruptcy, that Canada agreed in principle to a two billion dollar settlement plan.²⁴⁷ Among other things, the plan takes into consideration First Nations’ concerns over the intergenerational harm caused by these abuses, addressing wrongs committed against individual boarding school victims as well as the victims’ grandchildren, “[who] are survivors as well; for they too, have suffered . . . the affects of the residential

241. Pub. L. No. 103-150, 107 Stat. 1510 (1993).

242. See Matsuda, *supra* note 175; Anaya, *supra* note 77; cf. Rice v. Cayetano, 528 U.S. 495 (2000); Arakaki v. Lingle, 477 F.3d 1048 (9th Cir. 2007); and Doe v. Kamehameha Schools, 470 F.3d 827 (9th Cir. 2006).

243. See Anaya, *supra* note 77, at 342.

244. *Id.*

245. *Id.* at 342.

246. See generally Canada’s Indian Residential School Settlement Agreement (May 8, 2006), available at http://www.irsr-rqpi.gc.ca/english/pdf/indian_residential_schools_settlement_agreement.pdf. See also Aleck v. Canada, 1991 A.C.W.S. (3d) 28 (1991); A.Q. v. Canada, 169 Sask. R. 1 (1998); D.A. v. Canada, 173 Sask. R. 312 (1998); and H.L. v. Canada, 2003 S.J. No. 298 (2003).

247. See Agreement in Principle (Nov. 20, 2005), available at http://www.irsr-rqpi.gc.ca/english/pdf/aip_english.pdf.

school legacy.”²⁴⁸ Moreover, similar to South Africa and Peru, Canada’s plan focuses on the process of “healing, reconciliation, and . . . renewal” of the group.²⁴⁹ Thus, in addition to monetary compensation to surviving students,²⁵⁰ the plan establishes a Truth and Reconciliation Commission charged with documenting and publicizing the history of forced separation. Additionally, it provides significant funds to the Aboriginal Healing Foundation to promote inter-cultural healing.²⁵¹ Of course, Canada was not alone in its policy of removal. Australia is still grappling with how best to redress policies that resulted in the forcible removal of thousands of Aboriginal and Torres Strait Islander children.²⁵² Moreover, as Part II demonstrated, the United States suffers from a similar stigma. In 2000, the Assistant Secretary of the Bureau of Indian Affairs offered a formal apology for that agency’s past involvement in the removal of Native children, noting that the BIA had systematically “committed . . . acts against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually.”²⁵³ Recently, victims of these removal policies have sought monetary relief through the U.S. courts. While some of these cases have been dismissed on procedural grounds, others are still pending.²⁵⁴ Thus the Indian Child Welfare Act is to date the most prominent remedial response by the United States to this removal.

In addition to international norms, this Part explored state and regional practices regarding reparations for serious human rights violations. While this discussion is not comprehensive enough to demonstrate established customary law, there are several trends in these practices that are relevant to any discussion of the ICWA as reparations: reparations are not limited to individual monetary relief, the concept of the victim encompasses both in-

248. Matt Ross, *Abuse Survivors Finally To Receive Compensation*, in INDIAN COUNTRY TODAY, B1 (December 7, 2005) (quoting Assembly of First Nations Chief Phil Fontaine). See also, *Indian residential schools Agreement in principal: FAQs*, in CBC News Online (Nov. 25, 2005).

249. Canadian Justice Minister Irwin Cotler noted that “no agreement can erase the memories of generations of pain . . . and that is why this agreement goes beyond monetary recognition . . . to provide healing, to provide reconciliation, to provide the capacity for renewal.” Ross, *supra* note 248, at B1.

250. Lump sum payments will be paid to residential school victims in the amount of \$10,000, plus \$3,000 for every year they attended the residential school. However, these awards do not override pending individual lawsuits.

251. Minister’s Message on Canada’s Residential Schools Resolution, available at http://www.cbsct.gc.ca/0607/oirs-bropa/oirs-bropa01_e.asp.

252. See generally BRINGING THEM HOME, *supra* note 15. See also ANTONIO BUTI, SEPARATED: ABORIGINAL CHILD SEPARATIONS AND GUARDIANSHIP LAW (2004).

253. See Kevin Gover, *Remarks at the Ceremony Acknowledging the 175th Anniversary of the Establishment of the Bureau of Indian Affairs*, 25 AM. INDIAN L. REV. 161, 162 (2000). Attempts were made to have similarly worded apologies from Congress, but the proposed resolution failed to gain final approval. For instance, Senator Brownback from Kansas introduced a resolution that, among other things, offered an apology for “the forcible removal of Native children from their families to faraway boarding schools where their Native practices and languages were degraded and forbidden.” S.J. Res. 37, 108th Cong. (2004), available at http://www.unitednativeamerica.com/issues/res37_print.html.

254. See generally Boarding School Healing Project, <http://www.boardingschoolhealingproject.org/suits1.htm> (last visited Feb. 8, 2008).

dividual human beings as well as collectivities, and reparations can be forward-looking in their application and take the form of economic and social reform (which is especially useful when redressing intergenerational harms). Moreover, incorporating elements of healing and repair helps to ensure key aspects of reparations, such as restitution, rehabilitation, and non-repetition of harm.

V. THE INDIAN CHILD WELFARE ACT AS REPARATIONS

“Let us put our minds together and see what kind of future we can build for our children.”

—Hunkpapa Lakota Leader

History & Purpose

The 1960s marked the beginning of a cultural and political renaissance for indigenous peoples of the United States. Pro-Indian organizations protested years of broken treaties and discriminatory treatment of American Indians by federal and state governments. Others fought the battle for recognition of Indian sovereignty in the courtrooms and on Capitol Hill.²⁵⁵ By the 1970s, U.S. policy toward its indigenous peoples had moved away from a policy of assimilation by termination toward one of self-determination. President Nixon decreed in 1973 that the “right of self-determination of the Indian will be respected and [Indians’] participation in planning their own destiny will actively be encouraged.”²⁵⁶ Following this decree, Indian nations embarked on new political alliances with Congress, developing legislation designed to promote tribal sovereignty and reverse, where possible, the ongoing effects of forced assimilation.²⁵⁷

In the 1970s, Congress held a series of hearings on the plight of American Indian children and their families. Complementing these hearings were studies on the number of children being removed from their homes, as well as the major causes and effects of this dislocation. These studies supported what most Native American nations already knew—that indigenous children and their families were facing massive displacement as a result of U.S.-sanctioned assimilative policies and practices.²⁵⁸ Congressional findings noted that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children . . . by non tribal

255. See generally CHARLES E. WILKINSON, *AMERICAN INDIANS, TIME, AND THE LAW*, 82-83 (1987).

256. President Richard M. Nixon, *Special Message to the Congress on Indian Affairs*, 1970 Pub. Papers 564 (July 8, 1970).

257. See, e.g., Indian Self-Determination and Education Act, 25 U.S.C. §§ 450-458 (1975), Pub. L. No. 93-638, 88 Stat. 2203. However, despite its common usage in domestic laws and policies, the United States has taken a different position in international discussions regarding the use of the term “self-determination” with respect to indigenous peoples. See Graham, *supra* note 79.

258. See *supra* notes 41-65 and accompanying text.

public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions."²⁵⁹ Working closely with Native American nations and organizations, Congress passed the Indian Child Welfare Act of 1978, declaring:

It is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.²⁶⁰

The law covers various child care placements such as termination of parental rights, foster care, and adoption, and applies to all Native American children who are members of a federally recognized Indian nation or at least eligible for membership. It allocates child welfare jurisdiction between tribal courts and state courts and establishes placement preferences with American Indian families and communities when possible. Additionally, the law encourages and assists American Indian nations in the development of child welfare programs and family courts.

The ICWA was specifically designed to achieve a number of interrelated goals. First, the law seeks to reverse the assimilative policies and practices that led to the massive removal of American Indian children to non-Indian institutions, foster care, and adoptive homes.²⁶¹ The law acknowledges that Indian children are not "better off" far from the influence of family and community, and that their "best interests" are in fact inextricably connected to that of their tribe. While no law could dictate a change in the attitudes of social workers, educators, and judges regarding indigenous cultures, the ICWA could minimize the effects of those lingering attitudes by setting minimum standards and procedures for the future placement of American Indian children outside the home.

Second, the ICWA seeks to recognize and respect the familial traditions and responsibilities of Native American nations. When viewed in the context of indigenous familial values, the law recognizes the importance of the kinship structure and the role of the extended family in the rearing of children. For instance, the ICWA provides for foster care and adoptive placement preferences with extended family members or other tribal members, and requires state courts to consider the social and cultural standards of

259. 25 U.S.C. § 1901.

260. 25 U.S.C. § 1902. Congress' power to pass such a law is derived from the special relationship between American Indian tribes, their members, and the U.S. government. 25 U.S.C. § 1901.

261. 25 U.S.C. § 1901 (3), (4), (5).

tribes when making placement determinations.²⁶² The law also seeks to protect the rights of Native American children to be raised, whenever feasible, in their families and communities of origin by mandating that families receive culturally appropriate remedial services before a placement occurs.²⁶³ Additionally, the Act was designed to be sufficiently flexible to meet the diverse cultural interests and complex social needs of American Indian children, including those with “competing cultural identities,” an issue addressed more fully below. Evidence of this flexibility can be found in state and tribal court opinions that provide for “open adoptions” and other forms of visitation that ensure a cultural link with the child’s indigenous roots.²⁶⁴

Third, the ICWA seeks to promote Indian self-determination in the area of child welfare. The law recognizes the sovereign power of Native American nations to develop their own child welfare systems and reaffirms tribal court jurisdiction over certain child custody proceedings. Additionally, the law ensures that tribes and extended family members will have an opportunity to be heard through notification provisions and the ability to intervene in state court proceedings.²⁶⁵ These provisions recognize the unique symbiotic relationship that exists between a child and her tribe, including the child’s human right to access her native culture and language “in community with the other member’s of her group,” as well as the tribe’s right to exist as a distinct political community.

When the Act has been challenged on constitutional grounds, some courts have held that “the provisions of the ICWA were deemed by Congress to be essential for the protection of Indian culture and to assure the very existence of Indian tribes. . . . [This protection] is a permissible goal that is rationally tied to the fulfillment of Congress’s unique guardianship obligation toward Indians.”²⁶⁶ This holding is consistent with U.S. case law upholding federal statutes designed to promote the sovereignty and well-being of Native American tribes and their members.²⁶⁷ These statutes are directed toward Native peoples not as members of discrete “racial” groups, but, rather, as members of quasi-sovereign tribal entities.²⁶⁸ So long as these statutes are rationally tied to the fulfillment of Congress’ trust obligation to Indian nations, the statutes do not violate due process or equal protection

262. 25 U.S.C. § 1915.

263. 25 U.S.C. § 1912(d).

264. See Graham, *supra* note 8, at 49-52; see also Atwood, *supra* note 41 at 663-666.

265. 25 U.S.C. §§ 1911, 1912(a), 1931-1934.

266. See, e.g., *In re Armell*, 550 N.E.2d 1060, 1068 (Ill. App. Ct. 1990). *But see In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. 1996). See generally Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 LOY. L.A. L. REV. 647 (1997).

267. See, e.g., *Morton v. Mancari*, 417 U.S. 535, 554 (1974).

268. See *id.*

principles.²⁶⁹ The ICWA would similarly pass constitutional muster even under the U.S. Supreme Court's more stringent strict scrutiny test of *Adarand Construction v. Pena*,²⁷⁰ because the ICWA is narrowly tailored to promote and protect the stability of Native American nations and remedy centuries of gross violations of human rights including systematic discrimination. The D.C. Circuit Court's holding in *Jacobs v. Barr*²⁷¹—that “Congress . . . had clear and sufficient reason to compensate interns of Japanese . . . descent; and the compensation is substantially related (as well as narrowly tailored) to Congress's compelling interest in redressing a shameful example of national discrimination”—applies equally to Congress' attempt through the ICWA to redress government-sanctioned policies of forcible removal of Indian children.

Despite some ambiguities in the ICWA, there is a general consensus among Native American nations that the law provides “vital protection to American Indian children, families and tribes.”²⁷² Yet the legislation has its critics, many of whom oppose the law on the grounds of “race matching” or a violation of individual freedoms.²⁷³ This article is not intended to address these claims directly, but to suggest another view of the law—one which is consistent with international precepts on reparations. As Part II and III demonstrated, Native American children and their families “have been subjected to a singularly tragic fate” that has resulted in serious human rights violations.²⁷⁴ The Indian Child Welfare Act is one of a host of responses necessary from the United States to remedy these violations. While I agree with some of the critics of the ICWA that the remedial scope of the law does not address all of the “social ills” afflicting indigenous families, it is still an important piece of the remedial puzzle. There is little doubt that centuries of land dispossession, cultural and political oppression, and discrimination have led to many of the social welfare challenges facing Native American nations today. However, as the official policy of the United States for most of its history has been aimed at the breakup of the Indian

269. See *id.* at 541-42 (1974); see generally, *United States v. Lara*, 541 U.S. 193, 210 (2004) (holding that federal law which allowed tribes to prosecute criminals did not violate double jeopardy, because the law was not a grant of federal power, but merely a return of sovereignty previously held by the tribe).

270. *Adarand Construction v. Pena*, 515 U.S. 200 (1995); see also Metteer, *supra* note 266.

271. *Jacobs v. Barr*, 959 F.2d 313 (D.C. Cir. 1992), cert. denied 506 U.S. 831 (1992).

272. *Amendments to the Indian Child Welfare Act: Hearings Before the Senate committee on Indian Affairs*, 104th cong., 2nd Sess. 303 (1996) [hereinafter 1996 *Hearings*] (statement of Jack F. Trope, for AAIA); see also *id.* at 134 (statement of Ron Allen, President of the National Congress of the American Indian) (“The National Congress has never advocated that the Indian Child Welfare Act be amended. Our tribes have taken the position that ICWA works well and, despite some highly publicized cases, continues to work well.”).

273. See, e.g., KENNEDY, *supra* note 41; 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, 557 (1990); see also Brief for American Academy of Adoption Attorneys as Amicus Curiae Supporting Respondents Brief, In re Bridget R., 49 Cal.Rptr.2d 507 (Cal.App. 2 Dist. 1996) (No. B093520).

274. RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE & IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD* 18 (2002).

family via the removal of its children, it makes sense for the United States to adopt legislation directed at those dominant societal institutions responsible for carrying out that policy. This by no means absolves the United States of its responsibility to redress the other ongoing social effects of its past policies, including poverty and its consequences. The remaining part of this article analyzes some key aspects of the ICWA within the four major elements of reparations—guarantees against repetition, restitution, rehabilitation, and compensation.

Guarantees Against Repetition

As Jose Zalaquett of the Chilean National Commission on Truth and Reconciliation notes, “[t]ruth. . . [is] an absolute, unrenounceable value. . .” in terms of reparation and prevention.²⁷⁵ Thus, verification of the facts, public disclosure and acknowledgement of those facts, as well as acceptance of responsibility for the abuses arising out of those facts are all important components of any reparations plan.²⁷⁶ While the word “apology” does not appear on the face of the ICWA,²⁷⁷ both the legislative history and the statute expressly acknowledge the wrongs committed against Native children and their families and the role governmental officials played in the crisis. Equally important is the extensive fact-finding that accompanied the passage of the ICWA. The legislative history, which incorporates evidence from Congressional hearings and task forces, states that “the wholesale separations of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.”²⁷⁸ The legislative history also highlights a number of factors contributing to the “destruction of the Indian family and community life,” including federal boarding school and dormitory programs, abusive practices of state social welfare workers and judges, procedural irregularities in the judicial process, and public as well as private foster care and adoption programs.²⁷⁹ The Congressional findings section of the ICWA acknowledges that “an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies.” The law further acknowledges the substantial role of state officials in the crisis based on their failure to “recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”²⁸⁰

275. Zalaquett, *supra* note 173, at 1433.

276. van Boven I, *supra* note 193, para. 137 (11).

277. Recently, the Child Welfare League of America, an agency involved in the removal of Indian children, offered a formal apology to American Indian nations for its involvement in the taking of American Indian children from their homes and families. See Marcia Yablon, *The Indian Child Welfare Act Amendments of 2003*, 38 FAM. L. Q. 689, 690 (Fall 2004).

278. H.R. 1386, *supra* note 42, para. 137 (11).

279. *Id.*

280. 25 U.S.C. § 1901.

Affirmative steps in the form of judicial and administrative action are also important in ensuring against the recurrence of human rights violations. Thus, the ICWA goes beyond a formal acknowledgement of responsibility to establish "minimum Federal standards" aimed at preventing the repetition of human rights abuses against Native American children and their families. The law employs a number of procedural safeguards that are aimed at protecting the "best interests of Indian children" and promoting "the stability and security of Indian tribes and families."²⁸¹ These safeguards include the right to transfer child welfare cases to tribal courts, the right of notice and intervention to the child's community, the right to remedial services designed to prevent the further breakup of Indian families and communities, and written protections against improper termination of parental rights.²⁸² The law requires the application of "prevailing social and cultural standards" of Indian communities in the placement of children and provides preferences for placement to the child's extended family and community when possible.²⁸³ Equally important in terms of non-repetition of harm is the assistance provided to tribes to develop and operate their own child and family service programs. As a result of the law, tribes, urban Indian organizations, and even states are developing innovative early intervention and family preservation programs.

While the ICWA offers vital protection against unwarranted removal of Indian children, one shortcoming of the law is its lack of accountability for those who seek to circumvent its provisions.²⁸⁴ More needs to be done to ensure that individuals working with children, including lawyers and judges, are aware of the historical and contemporary underpinnings of the law and the abuses that it seeks to remedy. However, mere knowledge of the law may not be sufficient. For instance, some courts have purposely resisted the application of the law by failing to transfer cases to tribal courts, ignoring the community placement preferences, or creating judicial exceptions. One such example is the judicially created "Existing Indian Family doctrine" ("EIF"), which excludes from the coverage of the Act any child whose parent does not maintain, in the opinion of the judge, a "significant social, cultural, or political" relationship with his or her tribe.²⁸⁵ Elsewhere I have argued that these types of judicial exceptions represent a return to the assimilationist thinking of the past.²⁸⁶ They also undermine key remedial aspects of the ICWA intended to prevent a repetition of abuses. The lawyers and judges who advocate for these exceptions to the law often focus their concerns on the child's individual right not to be tied to a family or community to which she or her parents have no significant (ap-

281. See H.R. 1386, *supra* note 42, at 8.

282. 25 U.S.C. §§ 1911, 1912, 1913.

283. 25 U.S.C. § 1915.

284. See Yablon, *supra* note 277, at 695-709, for a discussion of the various proposed amendments.

285. See Graham, *supra* note 8, at 34-43.

286. *Id.*

parent) ties. This argument is similar to the individual versus group dichotomy discussed earlier with respect to the protection of a child's cultural identity. There are many responses to these claims.²⁸⁷ For purposes of this paper, I will focus on the question of prevention of human rights abuses. Perhaps one of the best guarantees against repetition of harm where indigenous peoples are concerned is the recognition and promotion of self-determination norms. Earlier I suggested that the removal policy violated the right of self-determination by, among other things, denying indigenous groups the right to live and develop as culturally distinct peoples. To remedy this and other related human rights violations, the U.S. Congress has embraced, through the ICWA, the right of indigenous nations to control their own destinies where matters of child welfare are concerned. This is evidenced in the law's intent to respect "the unique [familial] values of Indian culture[s]," including the right of Indian nations, as distinct political communities, to determine a child's membership or citizenship. The law similarly incorporates into existing child welfare systems the "cultural and social standards prevailing in Indian communities and families."²⁸⁸ Judicially created exceptions like the EIF, which circumvent indigenous views of "family," open the door once again to abusive practices that devalue Indian culture and Indian sovereignty. The procedural safeguards of the ICWA offer the best protection against these types of abuses by ensuring meaningful tribal and familial participation in each step of the removal process. This does not mean that a child will never be removed from his family or community of origin. What it does help to ensure, however, is that the removal is not done for reasons that violate the basic human rights of that child and her community.

Restitution

Restitution focuses on the act of restoring victims to pre-violation status. It includes such things as restoration of liberty, identity, family life, and property. Restitution for the types of human rights violations associated with the process of removal is a complex endeavor, both because the harms caused by such abuses are intergenerational and because they affect individuals as well as collectivities (individual child, child to family, child to community, family, family to community, and community). The harms caused by removal were particularly dire for Native American nations, whose societies are built upon these familial and communal connections. As the late Vine Deloria described it, family denotes a "multigenerational complex of people and clan and kinship responsibilities" that extends to past and future generations.²⁸⁹ Understanding and respecting the complex symbiotic

287. See *supra* notes 155-159 and accompanying text; see also Graham, *supra* note 8.

288. 25 U.S.C. § 1901(5).

289. DELORIA, *supra* note 64, at 22.

relationship that exists between child and community is essential to understanding and respecting indigenous familial relations. For instance, one major criticism of the ICWA is that it favors the collective rights of the community over the individual rights of the child. Yet, these are actually two sides of the same coin. A child's right to love and nourishment (cultural, emotional, spiritual, and physical) is the community's responsibility; in turn, these collective "responsibilities are [the child's] individual rights."²⁹⁰ Thus, to place a child outside her kinship community absent culturally relevant safeguards is to deny that child basic individual rights. Moreover, from a collective rights standpoint, such a placement works to break the cycle of indigenous life.

Given this situation, it would be difficult to comprehend a single piece of legislation that could actually restore the individual child and her community to pre-violation status. The ICWA is no exception. As some of the critics of the ICWA like to point out, the statute is in some ways a "procedural statute for a substantive problem."²⁹¹ To restore Indian nations and their families to pre-violation status would require sacrifices that individual States and individual Americans might be unwilling to make, particularly when it comes to the issue of land and resources.²⁹² It would also mean that Congress would need to do more in addressing the question of adequate group compensation. Moreover, American society as a whole would need to do a better job of accommodating cultural pluralism and cultural rights within existing systems of law and policy. With that said, however, the restorative aspects of the ICWA can be compelling when the spirit and language of the law are followed, such as demonstrated by this story involving a child that had been removed from her Navajo family at the age of eighteen months:

She was placed out with a foster family and was never returned to her biological mother. She had no knowledge of her Indian family, and, while she knew she was Indian, her non-Indian adoptive family forbid her to speak of her Indian heritage and passed it off as something that was not important. Later, after battling depression and anxiety about her lost identity, she developed a substance abuse problem and her own children were placed in substitute care. But this time there was the Indian Child Welfare Act and a social worker that knew how to implement it. Even though the mother was never enrolled in her tribe because of her placement in a non-Indian family and thus her children were never enrolled, the social worker notified the Navajo Nation who willingly enrolled the mother and children. But there is more.

290. *Indian Child Welfare Amendments: Hearings on S. 1976 Before the Senate Select Comm. on Indian Affairs*, 100th Cong. 97 (1988), at 97 (statement of Evelyn Blanchard).

291. See KENNEDY, *supra* note 41, at 498.

292. Cf. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005).

The Navajo Nation found the mother's maternal aunt who asked that the children be placed with her while the mother sought treatment for her substance abuse problem. Upon visiting the aunt's home to do a home study, the social worker found pictures of the mother at eighteen months of age still on the wall. The aunt told of the grief of the family who could not find the child whom they had helped raise. They told of not being able to get information to even know where she was or if she was all right. Today the mother has over two years of sobriety and has been reunited with her Navajo family. She has found her identity and her children have found a loving home with their extended family.²⁹³

To better comprehend how the statute might achieve restitution for the multiple victims affected by removal let us again consider cases involving Indian children who never lived in what some state court judges refer to as an "existing Indian family or home." The ICWA is designed to not only prevent the repetition of harm against indigenous children and their families, but to assist indigenous nations in reconstituting their familial structures. It establishes as a primary restorative goal, "the continued existence and integrity of Indian tribes . . . [achieved by] protecting Indian children who are members of or are eligible for membership in an Indian tribe."²⁹⁴ Any child who is considered by the tribe to be a member or citizen, whether she is officially enrolled or not, will gain the benefit of the law, giving tribes the opportunity to reconnect with individuals and families dislocated by years of abusive child welfare practices. Thus, decisions that seek to limit the number of children covered under the statute undermine key remedial aspects of the law.²⁹⁵ If the statute is to achieve its restorative goals, child welfare workers must take into consideration the effects that almost two centuries of coercive separation and assimilation have had on generations of Indian people. One example of the failure of a court to understand these aspects of the law is the case of *In re Bridget R.*,²⁹⁶ in which an appellate court in California used the parent's alienation from his parents' community as strong evidence against the application of the ICWA. Courts should not be using the very abuses that caused so many Indian people to be separated from their homes and communities as the basis for ignoring the restorative aspects of the ICWA. This understanding is supported by the legislative history of the ICWA and the U.S. Supreme Court decision in

293. *Hearings on H.R. 1448 Amendments to the Indian Child Welfare Act Before the Subcomm. on Native American and Insular Affairs*, 103rd Cong., 2nd Sess. (1995) (reprinted at 1005 WL 283199) (statement of Terry Cross, Executive Director, National Indian Child Welfare Association) [hereinafter 1995 *Hearings*]; see also Davies, *supra* note 38, at 181.

294. 25 U.S.C. § 1901(3).

295. 25 U.S.C. § 1915.

296. *In re Bridget R.*, 49 Cal. Rptr. 2d 507 (Cal. Ct. App. 1996).

Mississippi Band of Choctaw Indians v. Holyfield, both of which acknowledge the ongoing effects of the removal policy and, in particular, the alienation of some Indian parents from their society and community.²⁹⁷ To assist in the restoration of these familial relationships, the ICWA contains a number of provisions designed to ensure that the parental waiver of rights is voluntary, that parents are made aware of all their options regarding possible placement, and that tribes and extended family members have a voice in the process.

Another criticism of the ICWA is that it does not adequately address contemporary issues of mixed ancestry or "competing cultural identities," such as where a Native American father is married to a non-Native American custodial mother, but the child is nevertheless considered a member or citizen of the father's tribe or nation. A related criticism is the point mentioned earlier regarding whether under the ICWA a child's collective identity trumps her individual identity. While this paper is not aimed at the finer points of the ICWA and its day-to-day application, these criticisms must be considered within the larger context of the ICWA as reparations for serious human rights abuses, particularly as the law relates to the question of restitution and repair. On the issue of identity, the ICWA does not seek to protect the rights of the group at the expense of the rights of the individual, but rather seeks to protect the identity rights of American Indian children within the context of their own historical and contemporary realities. The law recognizes that it is in the best interest of American Indian children to maintain ties with their extended families and communities whenever feasible. Moreover, it does so in a way that acknowledges the unique self-determining status of Indian nations in this country. In particular, the law recognizes the ability of tribes to adjudicate child custody cases involving children residing or domiciled on the reservation and in all other cases to maintain a right of intervention.²⁹⁸ In either case, the child may end up being removed from the home and even perhaps permanently placed outside the kinship community. However, the ICWA is intended to ensure that this does not happen because of a court or agency's unwillingness to "recognize either the vitality or validity of contemporary American Indian cultures and values."²⁹⁹ Nor is the law designed to undermine the individual survival needs of a child. Indeed, just the opposite is true. By its very terms the ICWA is designed to strengthen families, prevent improper removals, and ensure that when placement is necessary, a child's indigenous familial options are considered and explored. On the point of competing cultural identities, it is important to remember that the ICWA is not a law

297. See H.R.1386, *supra* note 42, at 12; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 50, 51, n.25 (1989).

298. See 25 U.S.C. § 1911.

299. Donna Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L.J. 1, 10 (1990).

of absolutes. Professor Barbara Atwood, in her post-modern critique of the ICWA, argues that the statute is sufficiently broad to encompass a child's multiple identities as well as her individual interest in continuity of placement.³⁰⁰ In particular, Professor Atwood points to substantive provisions of the ICWA that allow, under the appropriate circumstances, for "multidimensional, situated interpretations" on issues of placement.³⁰¹ One well-known example of this type of accommodation of multiple interests is *In re Adoption of Halloway*, in which a Navajo tribal court fashioned a remedy that sought to protect the child's cultural identity as well as his right to continuity of care.³⁰² The court awarded permanent guardianship rights to the non-Navajo family who had had custody of the child for over five years, while at the same time recognizing visitation rights of the child's mother and tribe. There are a number of other cases that have fashioned similar remedies to address the "multiple needs and multiple identities" of Indian children.³⁰³ These cases suggest a reading of the statute that is consistent with international human rights precepts, both in terms of cultural identity protection and self-determination. If restoration of identity and family life are to be achieved, courts and child welfare agencies must be open to creative solutions under the ICWA that further these ends. Such solutions would also be consistent with the principle of indigenous self-determination, which "promotes a political order that is less state-centered and more centered on people living in a world of distinct yet increasingly integrated and overlapping spheres of community and authority."³⁰⁴ The ICWA, when properly followed, can help courts and welfare agencies navigate these overlapping spheres of identity and community.

Rehabilitation and Compensation

Rehabilitation focuses on steps needed to improve the lives of individual victims, their families, and communities. Like restitution, it is closely linked to the holistic goals of repair and restoration. The ICWA attempts to address some of these goals through its rehabilitative provisions. For instance, the law authorizes grants to Indian nations and organizations to assist in the development of family service programs and child welfare laws. The funds support social service programs, such as licensing of Indian foster and adoptive homes, counseling and treatment centers, professional child welfare training, education and training of tribal court judges and staff, and legal representation and advice to Indian families involved in child custody

300. Atwood, *supra* note 41.

301. *Id.* at 27.

302. 732 P.2d 962 (Utah 1986). See also Graham, *supra* note 8, at 50. This case does not deal directly with the interpretation of the ICWA, but is nevertheless indicative of the types of remedies available to courts under that statute.

303. See Atwood, *supra* note 41, at 28.

304. Anaya, *supra* note 77, at 156.

proceedings.³⁰⁵ Tribes, urban Indian organizations, and states have all relied on these grants to develop family preservation programs and special cross-cultural training programs for judges and child welfare workers.³⁰⁶ For children remaining in the state system, the ICWA requires that no Indian child be placed out by state officials without first being provided "remedial services and rehabilitative programs designed to prevent the further breakup of the Indian family."³⁰⁷

The two biggest roadblocks to ensuring rehabilitative success are lack of governmental aid, as well as legislative proposals and court decisions that limit the self-determining rights of Native American nations. Inadequate funding for Indian social services has been identified as a key factor in the continued higher than normal removal rates of Native American children.³⁰⁸ Thus, while the ICWA helps to prevent unwarranted removals, it does not do enough to address the ongoing harms of past removal. There is little question that assimilative policies of the past are an underlying cause of the dire socioeconomic conditions facing Indian communities today. Reversing the effects of these policies will take both time and money. Experts in the field suggest that a good starting place would be to adequately fund ICWA-related programs, both in terms of child protection and family preservation.³⁰⁹ A much larger issue is the inconsistent commitment on the part of the United States to basic human rights precepts regarding indigenous populations, including the right of self-determination.³¹⁰ We have already seen that recognition of this right is crucial to achieving basic justice for indigenous peoples in the form of reparations for past and ongoing human rights violations. Indian nations would like nothing more than to be able to get on with the business of improving the lives of their children and families through their own economic, cultural, and social development. While there are a number of domestic impediments to achieving these ends, many could be overcome by the United States firmly embracing the

305. 25 U.S.C. § 1913.

306. Other federal statutes address more directly the issues of educational, cultural, and language revitalization. *See, e.g.*, Tribally-Controlled School Grants Act, 25 U.S.C. §§ 2501-2511 (1988); Indian Education Act, 25 U.S.C. §§ 2601-2651 (1988), *repealed by* Improving America's Schools Act of 1994, P.L. 103-382, 108 Stat. 3976; Tribally Controlled Community College Assistance Act, 25 U.S.C. §§ 1801-1852 (1978); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1990); Native American Language Act, 25 U.S.C. §§ 2901-2906 (1990); and Indian Child Protection and Family Violence Act, 25 U.S.C. §§ 3201-3211 (1990). An important feature of these laws is the significant role that tribes and Indian organizations played in their development and implementation—a far cry from the days when the BIA and other federal agencies controlled every aspect of Indian life. Although these laws were not part of the original ICWA redress plan, they provide important rehabilitative services to Indian people who continue to suffer the ongoing effects of removal and force assimilation.

307. 25 U.S.C. § 1912(d).

308. Arwood, *supra* note 41, at 13.

309. *Id.* at 622-623.

310. *See generally* Graham, *supra* note 8.

international human rights precepts embodied in the U.N. Declaration on the Rights of Indigenous Peoples.

There are no provisions in the ICWA providing for direct compensation to the victims of removal or their families. Yet the law does envision the granting of funds to Native American nations and organizations for such things as family assistance services, subsidies to Indian foster and adoptive children, treatment and counseling facilities for those affected by removal, and legal representation and advice for Indian families involved in child custody proceedings. Such programs represent a form of collective reparations, affording indigenous communities the opportunity for self-determination in the form of social welfare and development. Thus the structure of the ICWA is consistent with established and emerging international precepts entitling indigenous peoples to “financial and technical assistance, from States and through international cooperation.”³¹¹ This includes funding and otherwise supporting “special projects”—such as the ICWA’s family assistance, subsidies, and treatment programs—that are designed to improve the living and health conditions of Native peoples and their children. The establishment and continued financing of these programs are also consistent with country practices that emphasize economic and social reform as a means of redressing collective and intergenerational harms such as those experienced by indigenous peoples as a result of removal.

However, social welfare and development support, particularly in the limited nature provided under the ICWA, does not foreclose additional state obligations. For instance, on the issue of direct compensation, nothing in the ICWA precludes the award of damages to individuals or their families. However, neither does the law address the various procedural and substantive barriers that claimants might encounter in such suits. It was only recently that some of these claims have been filed in U.S. courts, several of which have been dismissed on procedural grounds.³¹² Two primary hurdles faced by litigants in the United States and elsewhere include difficulties of proof and statutes of limitations. Moreover, there is also the emotional trauma that accompanies any court battle to remedy harms of the nature at issue in these cases. As one Aboriginal organization noted, “the separation issue is a very private and personal one for the people concerned. The stress and trauma of a court case and the resulting loss of privacy is likely to deter many Aboriginal people from bringing a legal action against the Government.”³¹³ The U.N. reparation studies outline a number of steps that might be taken to address some of these concerns such as adapting the legal system of States to ensure that the right to reparations is “readily accessible,” not applying statutes of limitations “to periods during which no effective reme-

311. U.N. Declaration, *supra* note 142, art. 39.

312. See generally Boarding School Healing Project, <http://www.boardingschoolhealingproject.org/suits1.htm> (last visited Feb. 8, 2008).

313. See BRINGING THEM HOME, *supra* note 15, at 305.

dies exist for human rights violations” or to any claims relating to reparations for gross violations of human rights, making evidence in the possession of the government “readily available” to the victims, and recognizing that “records or other tangible evidence may be limited or unavailable” and that claims may be based primarily on “the testimony of victims, family members, and medical and mental health professionals.”³¹⁴

Finally, as is the case with rehabilitation, federal budgetary constraints and cutbacks result in a level of uncertainty that significantly undermines compensatory child welfare and development programs for Indian nations. While all countries need flexibility in terms of prioritizing their limited resources, since the ICWA is partial collective reparations for serious human rights violations, a strong argument can be made that it should not be subject to the same type of prioritizing as other federally funded programs. In any event, there is little question that at present the funding level for tribal child welfare programs is woefully inadequate.

VI. CONCLUSION

The danger lies in forgetting. Forgetting, however, will not affect only the dead. Should it triumph, the ashes of yesterday will cover our hopes of tomorrow.

—Elie Wiesel³¹⁵

“We must not let indigenous children down. They embody the will of indigenous peoples to survive and prosper into the future, with their dignity and human rights respected and their voices heard at all levels of national and international society.”

—Mr. Ole Henrik Magga³¹⁶

The forcible removal of indigenous children from their homes and families led to serious human rights violations. While the United States no longer embraces such removal policies, their effects are ongoing, profoundly disrupting Indian peoples’ sense of well-being, family cohesiveness, and cultural survival. This article demonstrates that the ICWA, while not a perfect law,³¹⁷ is an important step for the United States towards meeting its international obligations to provide reparations for these harms. The statute does not focus on what we often think of as typical reparations—individual monetary relief. Rather, the ICWA encompasses the broader international components of reparations: rehabilitation, restitution, prevention of future harm, and collective compensation. Moreover, the law’s basic

314. See van Boven I, *supra* note 193, para. 137.

315. STANNARD, *supra* note 5, at xiii.

316. Ole Henrik Magga, Chairperson, United Nations Permanent Forum on Indigenous Issues, Statement on the Occasion of the Launch of UNICEF’s Digest on the Indigenous Child (Feb. 24, 2004), available at <http://www.un.org/esa/socdev/unpfi/pfii/members/magga%20statement%20unicef.htm>.

317. See, e.g., Yablon, *supra* note 277.

premise is consistent with principles of human rights, indigenous peoples' rights, and indigenous views on family and community. In particular, the ICWA recognizes "intergenerational" or "seventh generational" justice in the form of indigenous self-determination. And while the United States may not have been clearly focused on its human rights obligations when it passed the ICWA, these principles should be in the forefront of any debate to amend or repeal the law.

On a more global note, if indigenous peoples around the world are to be made whole, as reparation plans often seek to do, nation states must first fully embrace an understanding of self-determination that respects indigenous rights to land and resources; social, cultural and economic development; and some form of autonomy or self-government. A good starting point was the recent adoption of the Declaration on the Rights of Indigenous Peoples by the U.N. General Assembly. In voting for this declaration,³¹⁸ U.N. member states took an important step toward addressing the second important component of reparations: repairing and restoring relationships. Today we live in a world where no society of people can expect to go it alone. However, indigenous peoples have for far too long suffered the ongoing effects of discrimination, oppression, and forced assimilation. States need to acknowledge their duty to work with indigenous communities to repair the unjust relationships that have arisen from these historical and contemporary phenomena. This includes respecting and supporting the rights of indigenous peoples to live and develop as distinct, self-determining communities. The Indian Child Welfare Act is but a small step in that direction.

318. Unfortunately, the United States joined three other states with large indigenous populations—Australia, New Zealand, and Canada—in voting against this declaration.