Observing Change: The Indian Child Welfare Act and State Courts

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Perhaps more than any other area of law, family law cases are stories. To start a discussion with a family law practitioner is to start with "did you hear about the family where . . ." While all law is narrative, family law fits so well into storytelling because we all know unhappy families, unhappy family members, children of all ages. We have children the age of the children in the case, we have sisters who were in abusive relationships, we lived through a divorce, our niece had her son removed. Family law cases become personal quickly, and the faces of the people in the cases become the faces of the people we know.

While that happens, however, the cases also become routine, and the stories seem to be the same story over and over. The cases become frighteningly familiar. Parents cannot take care of their children. There are substance abuse problems. Mental health problems. Over and over the court system is faced with the same story over and over. When this happens, the repetitive, numbing nature of the task can overtake the individual human story of each case. Lawyers, judges, guardians ad litem, and social workers see each other over and over in the course of a day, a week, a month. The repetitive nature means the only parties who are new to the courtroom are the parents. Everyone else present knows what is going to happen, how the procedure works, who the people are in the courtroom. Only the people who are the subject of the proceeding are the ones who have no idea how to interpret what is happening around them.

For American Indian families, this process is necessarily entwined with the history of abusive state and federal family law policies specifically directed at American Indian families.[1]

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Those policies, all with the endgame of removing children from American Indian families whenever possible, means removal stories permeate all American Indian communities. They are one of the defining tribal narratives. The governments' removal, mistreatment, and abuse of children—and the historical and present trauma caused by that—is ever present. The policies, and the stories that come from them, led to Congress passing the Indian Child Welfare Act (ICWA) in 1978.[2] In so many ways, ICWA is the codification of those stories.

ICWA is an attempt to counter the generations of federal and state policies designed to remove Indian children from their parents.[3] The law puts up deliberate roadblocks for state courts to ensure due process for the parents, the tribes, and the children. Those roadblocks include the testimony of a qualified expert witness prior to placement in foster care or termination of parental rights. They include the required notification of a tribe when one of their children is the subject of a state proceeding. They include specific placement preferences for children in foster care and for adoptions. They include active, not just reasonable, efforts to avoid the breakup of the American Indian family.[4]

Congress designed these provisions to slow down and stop the process of removing Indian children from their homes. However, since ICWA passed, the movement of the federal and state requirements has been to speed up the process of removal and termination of parental rights to all children in the foster care system.[5] State law timelines and court rules often do not give judges enough time for the extra work ICWA cases require. This conflict creates one of the

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[1] BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN, 155-60 (2010).
[2] 25 U.S.C. §§ 1901, et seq (2000).
[3] Matthew L.M. Fletcher, *The Indian Child Welfare Act: Implications for American Indian and Alaska Native Children, Families, and Communities*, *in* AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND MENTAL HEALTH 269, 270 (Michelle C. Sarche et al. eds. 2011).
[4] 25 U.S.C. § 1912 (e), (f), (a), § 1915.
[5] Adoption and Safe Families Act of 1997, Pub. L. 105-89 (codified as amended in scattered sections of Titles IV-B and IV-E of the Social Security Act).

many reasons state court actors have a difficult time with ICWA enforcement. The extra work leads to the perception of ICWA as a burden, rather than the gold standard to which all child welfare cases ought to be held. [6]

In many state systems, practitioners are simply unable to treat the cases as individual cases. Most large counties rarely have enough funding or staff for true individualized treatment of cases. Practitioners make assumptions about the parents based on previous cases, or assumptions about what is best for the children based on their own beliefs. ICWA was designed to force the system to treat Indian family law cases differently, individually.[7] However, the nature of the law puts it at odds with the current systemic courtroom routines. This causes resentment about the law, and in turn the families who receive its protections.

While ICWA is one of the foundational laws of federal Indian law, it usually arises in the broader public consciousness when there is a voluntary adoption subject to the law. Recently, the law was subject to Supreme Court review in *Adoptive Couple v. Baby Girl*.[8] Though a heart-wrenching case, ICWA is far more regularly applied in abuse and neglect cases. Any involuntary removal of an American Indian child, as defined by the Act, requires the application of ICWA.[9] While cases of voluntary adoptions designed to thwart the requirements of ICWA require constant vigilance from states and tribes, the law provides broader protections for those families in the state child welfare system.

This article posits one way to both collect data about abuse and neglect compliance within the framework of ICWA, and increase that compliance through collaborative change to

[6] Brief for Casey Family Programs et al. as Amici Curiae Supporting Respondent at 30, Adoptive Couple v. Baby Girl 133 S.Ct. 2552 (2013) (No. 12-399).
[7] 25 U.S.C. § 1912 (d) ("Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that *active efforts* have been made to provide remedial services and rehabilitative programs designed to prevent the break up of the Indian family" (emphasis added)).
[8] 133 S.Ct. 2552 (2013).
[9] 25 U.S.C. § 1903 (1).

the systems. QUICWA, a project by the Minneapolis American Indian Center, consists of a group of interested stakeholders who have created a checklist to measure what happens in each individual hearing where the court must apply ICWA. While other groups, such as the National Council of Juvenile and Family Court Judges use a different checklist format, the goal of the projects are similar—to find ways to increase compliance with ICWA. Funded in collaboration with Casey Family Programs, law schools and social work programs in key states have started observing ICWA hearings using the QUICWA checklist. In Michigan, the Michigan State University College of Law has observed ICWA hearings in three counties, using law students as observers. Though family law is driven by narrative, collecting data is vital to identify patterns surrounding fairness and due process in the individual stories.

This project assumes the abuse and neglect cases are heard in an open courtroom. While this is true of both Michigan and Minnesota, it is not the case in every state. There are a number of good reasons to advocate for an open system, however. These cases are no less important than criminal cases. They are sometimes even called quasi-criminal cases, because indigent parents are appointed counsel. In ICWA cases, the standard of proof for termination of parental rights is no less than beyond a reasonable doubt, a standard otherwise reserved for criminal guilt.[10] The potential stigma onlookers might attach to the parents is outweighed by two factors. First, outsiders rarely in the courtroom on any given day. Very few members of the public have a reason to attend a court hearing not their own. Second, identifying serious due process issues, as illustrated by Amy Bach, in her book, *Ordinary Injustice.*[11] While Bach focused on criminal cases, the lessons from her work apply to abuse and neglect cases.

[10] *Id*. at 1912 (f).
[11] AMY BACH, ORDINARY INJUSTICE HOW AMERICA HOLDS COURT (2009).

Bach details what happens in criminal courtrooms in "small" cases, such as misdemeanors and some felonies.[12] All of the people in the courtroom knew what was happening. Everyone, that is, except the defendant. As the cases moved quickly through the system, the defendant often did not know what she was pleading to, and though she was represented, the attorney did not always explain the details of the proceedings.[13] One of Bach's proposed solutions? Have people monitor criminal hearings, to watch the operations of the court systems and point out where the systems are failing the people with the most to lose.[14] Not the judges, or the lawyers, or the social workers, but the accused. The lessons from Bach's book are easily applied to abuse and neglect cases. In Michigan, preliminary, or emergency, hearings for a child's removal are required within 24 hours. Like the hearings Bach observed, in emergency removal hearings, the court-appointed attorneys and guardians ad litem usually have not had time to meet the family. The hearings are usually held in front of referees, not judges, even though the removal of the children from the family easily can be as terrifying as a criminal conviction.

ICWA is a best practices statute and all children would be better off if the standards of ICWA applied to them. While ICWA exists due to the specific history of American Indian families and the non-Indian governmental structures that can, and did, destroy those families, monitoring and discussing cases with the court helps improve the handling of all abuse and neglect cases. Having outsiders in the courtroom can be disturbing and sometimes uncomfortable to the regular practitioners. But if both the practitioners and observers are willing to work in good faith, their perspectives can bring needed sunlight and change to difficult cases.

The goals of an observation project are multifaceted. Most of the stakeholders are particularly interested in collecting some form of data on ICWA compliance in state court. This

[12] *Id.* at 19-26.
[13] *Id.* at 12-76.
[14] *Id.* at 262.

data is useful for the state, the tribes, and Casey Family Programs to develop trainings and address areas of concern, such as conflicting court rules or difficulty complying with notice requirements. Perhaps more importantly, however, having an outside observer present provides a counter-weight to the familiarity of the state court actors. The observer notices issues that are otherwise overlooked as routine. The observer notices when the case goes off the record, what happens on the record versus off the record, or when a courtroom does not have enough chairs for all of the interested parties. An observer has the unique ability to understand the difficulty of when a party, usually the parent, don't know or understand who all the participants are in the room. While the observers eventually learn the system, their initial confusion provides a small window into what the non-practitioners feel when entering the courtroom.

Gaining court cooperation for an observation project can be either fairly easy or incredibly difficult. Without the court's cooperation, however, there is no way to share the data to help with quality improvement. Even then, how to share that data usefully also raises a number of questions. For perhaps obvious reasons, most judges and referees usually feel the need to defend their decisions rather than take the data at face value. Anything less than one hundred percent compliance creates a certain level of defensiveness. Emphasizing that no one is perfect all of the time, or that the goal is improved change over time helps in the delivery of data. Indeed, information from the data that seems the most benign can cause the most amount of consternation from the courts. On the other hand, some state actors prefer the observers presence, understanding the information they gather is inherently valuable.

Setting up an observation program does not take a lot of money, but it does take time and capacity. The program at Michigan State pays observers well, because they see the most difficult cases, and hear the most difficult facts. But even at $14 per hour, four to five students can

observe most of the ICWA cases in two counties for less than $2,000 per month, depending on the case load. In Michigan, the hearings are public, but in a large urban county, the docket for child welfare can be massive. Determining which cases may end up being an ICWA case requires the cooperation of the court administrator, DHS, or the prosecutor's office.

While the focus of the court involved with the project is usually the actual data, the very act of setting up an observation process leads to positive change. For example, how does a court system know if there is a potential ICWA case? In order to get that information, referees or judges have to make the inquiry into the child's potential tribal citizenship a uniform part of every hearing. Once that inquiry becomes a standard part of the procedure, hearings that involve Indian children are often continued so DHS can notify the tribe. Then a court system might be able to modify the tracking system to get a better understanding of what cases are being continued for ICWA notice procedures and which are not. That kind of systemic tracking can lead to improvements in the accuracy of how many ICWA cases are moving through any given court system.

The capacity aspect of an observation project includes a director who has connections with tribal attorneys, state courts, and the State Court Administrative Office. The Michigan State project dovetails with the existing work of the Indigenous Law and Policy Center. Adding the QUICWA program added work hours for staff, but gave students paying jobs with the added opportunity of exposure to the local court systems and key players. The information discovered through the observation has helped inform other projects involving American Indian child welfare and the state court system with which the Center was already involved.[15]

[15] *See* Kathryn E. Fort, *Waves of Education: Tribal-State Court Cooperation and the Indian Child Welfare Act*, 47 TULSA LAW REVIEW 529, 535-40 (2012).

These additional ICWA compliance related projects in Michigan, would not have been possible without the cooperation of the State Court Administrative Office (SCAO).[16] There is a dedicated SCAO staff person who works on issues of tribal-state court relations. In addition, SCAO created the Tribal Court Relations subcommittee of the Statewide Task Force. Both actions demonstrates a commitment of the state's Supreme Court and administrative body to tribal court relations in general and to ICWA compliance specifically. SCAO uses Court Improvement Program (CIP) money to fund various ICWA-related initiatives. This funding comes from the federal grant program, established in 1993 as part of the Omnibus Budget Reconciliation Act.[17] The money is to be used to "conduct assessments of [state] foster care and adoption laws and judicial processes and to develop and implement a plan for system improvement;" to implement "improvements the highest courts deem necessary to provide for the safety, well-being, and permanence of children in foster care;" and to "implement a corrective action plan as necessary."[18] This pot of money, which every state receives, should be used to insuring ICWA compliance. The provisions of ICWA apply only in state court, and it is the state courts' administrative body's responsibility to ensure training and education for ICWA compliance. SCAO has provided Michigan State University's observation program with the contacts and meetings necessary to get into courtrooms. Without that assistance, the observation program would not be able to do the work it does.

While SCAO does not have binding authority over the specific operations of each county's court system, their participation is vital in an observation program. There is a difficult balance between the county-by-county differences of each court, which are surprisingly large,

[16] *Id*.
[17] Pub. L. 103-66; U.S. Dep't of Health and Human Services, *Court Improvement Program* (April 21, 2010), www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/ct_imprv.htm.
[18] *Id.*

and statewide or federal requirements. Working with the statewide supervisory body of the court system makes it much easier to implement changes that can encourage court compliance. In addition, through SCAO and the CIP program, the observation program was able to make contacts with the representatives from the Department of Human Services, who also need to see the data and understand the role of the observation program.

Once the program is set up, training and scheduling students to go to court takes a fair amount of administrative work. Assigning one experienced student extra hours to supervise the other students, track the court hearings schedule, collect the hours from the students, and collect and scan the checklist, gives that student extra supervisory experience. Student observers must be notified of the hearings, they must be able to work out when they are available, how long a hearing may last, how to get to court, and how to work with the court clerks and administrators. These factors change by county, so depending on how many student observers there are and the number of counties monitored, training is an ongoing process. The observers, future lawyers, gain experience from watching the proceedings, from working with court clerks and court personnel, and learn how abuse and neglect cases work through the system. Student observers have had to figure out how to answer questions from referees such as, "How am I doing?" or "Is this how you would like me to do this?" or "Did I do that part right?" They learn how the courts work. They see what it means to become familiar with pain, and then what happens when someone becomes numb to it. If they plan on practicing in the area, they have made invaluable contacts, and are well ahead of their colleagues when they graduate. They are no longer scared of the courts. Rather, they are ready to change them.

The QUICWA observation process will not, on its own, force compliance with ICWA. It is, however, a valuable tool to add to education, training, and additional data driven projects.

More than thirty years after its passage, ICWA continues to confound state courts. The law is not difficult, but compliance with the law requires state systems to see American Indian families individually, and to dedicate the time and resources to them. Our systems must do better by way of our children. Perhaps in collecting data about the children can we see through the stories and find a way to change the way court systems operate for the betterment of the families in front of them.