

BY JERRI L. COOK

# The Space Between Birthright and Blood Quantum



Until 1974, the father's name was not included on birth certificates of children born in Wisconsin to unwed parents. This practice has particularly serious ramifications for Indigenous children who would otherwise qualify for tribal enrollment. Wisconsin lawyers can help bridge the gap between birthright and the fiction of blood quantum determinations for individuals affected by the former birth certificate practice.

A male grass dancer during Grand Entry at Oneida Nation's 48th Annual Pow Wow. Photo by Sadie Cheyenne Wilson, ©2022 Sadie Cheyenne Photography



t's 1941. In a small town in southern Wisconsin, a child has just been born to unwed teenage parents. Both are full-blooded members of the Oneida Nation, but their newborn son is subsequently listed on the Tribe's membership rolls as only having one-half blood quantum. Twenty years later, their son's child is listed on the membership rolls as one-fourth Indian by blood quantum. Their son's grandchild, born in the 1980s, is not eligible for enrollment because he has only one-eighth blood quantum. Not only is he ineligible for tribal enrollment, his siblings and cousins are similarly disqualified.

How did this happen? Clearly, the child born to unwed parents in 1941 was a full Indian by blood quantum. Both his parents were full Indian. However, because of public policy in Wisconsin and other states in the 19th and 20th centuries, members of an entire generation of Indigenous people who would otherwise be eligible for tribal enrollment have been excluded.

Until 1974, it was the practice in Wisconsin to omit the father's name on birth certificates of all children born to unwed parents.<sup>1</sup> The newborn child kept the mother's last name. For most people, the effect was ostracization from certain religious and social groups, the inability to use the father's last name, and denial of financial support. However, for Indigenous children who would otherwise qualify for tribal enrollment, the practice of omitting the father's name resulted in errors in blood quantum, which resulted in stripping members of multiple generations of their birthright.

### Understanding Blood Quantum

Blood quantum is a controversial subject. It is often said that blood quantum requirements only apply to horses, dogs, and Indians.<sup>2</sup> According to the Native Governance Center, the concept is rooted in eugenics, not science.<sup>3</sup> Blood quantum is a fictional construct conjured up by the federal government in 1884, when Congress enacted 23 Stat. 76, 98.<sup>4</sup> The law required the Commission of Indian Affairs (now the Bureau of Indian Affairs) to document the number of Indians in the United States annually. From the start, the effort was fraught with problems.

Initially, the information was entered onto a form and sent to Washington D.C. However, no copies were made, ensuring that if the original from a tribe was misplaced, there would be no

record from that tribe in the census year.<sup>5</sup> There also were many jurisdictional issues. What if someone was a member of one tribe but lived in a different area with another tribe or completely off the reservation? There were also questions about who could confirm someone was a member of a tribe. The Indian Census Rolls were full of unreliable information from the start.

By 1930, the distortions ballooned. The initial reporting rules did not require the agents to record blood quantum. However, when the federal government began using machines to tabulate information in 1930, the Bureau of Indian Affairs required the reporting of blood quantum but only allowed three categories – “F” for full blood, “1/4 +” for individuals with less than full blood quantum but equal to or greater than one-quarter, and “1/4 –” for individuals with less than one-quarter blood quantum.<sup>6</sup>

In 1933, field agents started using five categories: F, 3/4, 1/2, 1/4, and 1/8. The problem, as noted by historians, is that it is not possible to start from an artificially compressed category and then accurately extrapolate to an expanded category with greater detail.<sup>7</sup> If an agent was operating off the pre-1933 census rolls that only allowed three categories of blood quantum when they were conducting the 1933 census, the blood quantum information entered on the latter was incorrect for many of the Indians on the rolls. This was not only because of the artificially expanded categories but also because the widespread practice of leaving the father's name off the birth certificate complicated the task.

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tribal community. They had the Tribe’s customs. They observed the Tribe’s traditions. They were Indians.

One Indian woman, when asked about her non-Indian husband, told the agent that her husband was an Indian because he created his identity as an Indian by

based on the error-ridden BIA census.<sup>9</sup> Today, some tribes, facing plummeting enrollment numbers, consider the concept of blood quantum “paper genocide.”<sup>10</sup> If enrollment numbers continue to fall, the tribes in the U.S. will eventually cease to exist.

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his actions. Others told the agent that some Indians are light skinned. Some are not. It was frustrating for the agent who went to the White Earth Tribe as well as agents throughout the U.S. who were tasked with determining the status of individual Indians. Eventually, the stymied agents decided to take skin and hair samples along with body measurements and used these to determine who was and who wasn’t an Indian. What could go wrong?

After passage of the Indian Reorganization Act of 1934, the federal government encouraged tribes to draft constitutions that defined specific blood quantum criteria for tribal enrollment

There is no doubt that the Indian Census Rolls, based wholly on the fiction of blood quantum, are incorrect. Even so, this is the system most tribes and the federal government use to determine enrollment eligibility. Because of this, the number of enrolled tribal members in the U.S. is rapidly declining. The fiction of blood quantum combined with the now-obsolete practice of omitting the names of fathers from the birth certificates of children whose parents are not married to each other has contributed to the declining numbers of enrolled tribal citizens in Wisconsin. However, Judicare Legal Aid’s Indian Law Office recently prevailed in a case

that allowed an individual whose blood quantum was only 1/8 because of the inaccurate recording practices to correct the record, raising his blood quantum on paper to 1/4 and thereby qualifying for enrollment in the Oneida Nation.

**The Case**

The client came to Judicare Legal Aid’s Indian Law Office with an unusual problem. His grandfather was a full-blooded Indian. However, when the grandfather was born in 1941, to parents who were not married to each other, the great grandfather’s name was intentionally left off the official birth certificate. Because of this, the grandfather’s child (the client’s mother) had a recorded blood quantum of only 1/4. Her child with a non-Indian, the client, had only 1/8 blood quantum, making him ineligible for enrollment. The challenge was to get a court order to amend the grandfather’s 1941 birth certificate to correctly list the father’s name, allowing for the correct recording of blood quantum for future generations.

Attorneys in the Indian Law Office were confronted with two issues. Was the matter time barred after 82 years, and what was the burden of proof if it wasn’t?

**Fixing Old Birth Certificates in Court: Type of Activity Is Key**

In Wisconsin, paternity actions are time barred after 19 years by Wis. Stat. section 893.88. However, a motion to determine paternity is distinct from a paternity action and is not time barred.

In *DiBenedetto v. Jaskolski*, the appellants sought to prove they were the grandnieces and grandnephews of an individual who died intestate, leaving an estate valued at more than \$1 million.<sup>11</sup> The decedent’s children claimed that the motion before the court was time barred by Wis. Stat. section 893.88, which limits an action for paternity to 19 years from the date of birth of the child. In holding that the motion was not time barred by statute, the court

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distinguished an action from a motion:

"[A] 'motion' is not an 'action.' A 'motion' may be nothing more than 'an application to [a] court for an order.' See Wis. Stat. § 802.01(2). An 'action,' however, as used in the Wisconsin statutes, means 'a

## The Burden of Proof

Pursuant to Wisconsin JI-Civil 5001, the petitioner has the burden to show by clear, satisfactory, and convincing evidence that there is a reasonable certainty of paternity.<sup>13</sup> In support of the

enabling the Tribe to correct its enrollment records.

In his remarks, Judge Ziegler said that the evidence the Judicare team provided was persuasive, but the piece of evidence that he found the most compelling was the record from the National Archives showing the great grandfather had enlisted in the Army right after the birth of the grandfather and listed one dependent with the same birth date as the grandfather. With that, the order compelling the Wisconsin Vital Records Office to amend the 1941 birth certificate was entered into the record.

## Why Tribal Sovereignty Matters

The history of Indian tribes and blood quantum is interesting, but why should non-Indians care? For some, the answer lies in the realm of cultural preservation and valuing the contributions of all who call the United States home. However, the overriding reason that declining tribal enrollment matters to everyone is tribal sovereignty. Tribal sovereignty is a limit on federal power, which is the underlying principle of the U.S. Constitution.

Sovereignty is the ability of a people to govern themselves. Tribal sovereignty existed long before the government of the United States was established. Sovereign nations determine their own citizenship eligibility. However, most tribes in the U.S. have provisions in their constitutions that reflect the federal



Dancers watch others compete in Menominee Nation's 54th Annual Contest Pow Wow. Photo by Sadie Cheyenne Wilson, ©2022 Sadie Cheyenne Photography

lawsuit brought in a court' and 'denotes the entire controversy at issue.'"<sup>12</sup>

The appellate court held that in a probate action to determine the status of a decedent's estate, paternity motions are not time barred.

Eighty-two years after his grandfather was born, the client moved the Monroe County Circuit Court for an order instructing the Wisconsin Vital Records Office to amend the birth certificate of his now-deceased grandfather. Attorneys from Judicare's Indian Law Office argued that the motion before the court was brought to determine the status of the petitioner's birthright; it was not an action against anyone, and there was no adverse party. The Oneida Nation and the petitioner's relatives received notice of the motion; no one came forward to oppose it.

motion, Judicare's attorneys submitted statements of family history and affidavits from family members and tribal elders. The petitioner also had a record from the National Archives showing that when his great grandfather joined the Army shortly after his grandfather's birth in 1941, the great grandfather stated he was single and had one dependent, whose birthdate was the same as that of the petitioner's grandfather.

On Oct. 9, 2023, Judge Todd Ziegler found that attorneys from Judicare Legal Aid's Indian Law Office had shown by clear and convincing evidence that the client's great grandfather, a full-blooded Indian, was the father of the client's grandfather. This meant that the grandfather's blood quantum was full blooded, not 1/2. His grandson was able to establish 1/4 blood quantum,



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government's blood quantum requirements for enrollment.<sup>14</sup> Nonetheless, blood quantum requirements for enrollment are a mathematical genocide, and many tribes in the U.S. are considering reforming their constitutions to allow lineal descendants to enroll regardless of blood quantum.<sup>15</sup> Many tribes that are now considering changing their constitutions cite the authority of sovereign nations to determine their own requirements for citizenship. They do not believe the federal government should have that authority.

For some tribes, exercising their sovereign authority to determine citizenship is a matter of survival. With declining enrollment numbers, the time will soon come when some tribes won't have enough members to provide services and maintain order on their lands. As membership dwindles, so does the ability to challenge state and federal regulations that affect tribal resources.

The loss of tribal sovereignty would necessarily lead to an increase in federal authority over Native Americans and federal control over vast swaths of land. Tribal sovereignty is a constitutional

that the Indian Census Rolls used by the federal government and tribes to determine eligibility for enrollment are fraught with errors. Nearly 100 years after these rolls were established, these

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counterbalance to federal power. It is an integral part of U.S. founding principles that everyone should care about.

#### Going Forward

The concept of blood quantum became important during the Allotment period (1887-1934), when the federal government began dividing Indian lands. The less blood quantum an individual had, the sooner the individual could alienate the land the government allotted to the individual.<sup>16</sup> This led to a rapid loss of most of the land once held by tribal nations. Today, as during the Allotment, the blood quantum fiction is threatening to eliminate the tribal nations themselves.

The annual Indian censuses ended in 1940. In 2024, it is common knowledge

errors, combined with the unconscionable practice of leaving the father's name off the birth certificate of children born to unmarried parents, continue to contribute to the declining enrollment that threatens tribal sovereignty.

In Wisconsin, circuit courts have the authority to correct a birth certificate, even if the birth certificate is decades old. Indigenous people who can show their ancestor's blood quantum is incorrect because of the missing information on a birth certificate can petition the court to change the information. This alone has the potential to increase tribal enrollment in Wisconsin. It is a small contribution, to be sure. However, when a sovereign tribal nation is facing elimination, even small contributions are important. **WL**

#### ENDNOTES

<sup>1</sup>63 Op. Att'y Gen. 501 (Oct 7, 1974).  
<sup>2</sup>Dogs, Horses and the Indian: A History of Blood Quantum (Oct. 12, 2022), <https://youtu.be/MLrfzuMVMbk?si=Dvgu9oXDx3ijELX3>.  
<sup>3</sup>Native Governance Ctr., *Blood Quantum and Sovereignty: A Guide*, <https://nativegov.org/resources/blood-quantum-and-sovereignty-a-guide/> (last visited May 6, 2024).  
<sup>4</sup>Nat'l Archives, *Indian Census Rolls, 1885-1940*, <https://www.archives.gov/research/census/native-americans/1885-1940>.  
<sup>5</sup>*Id.*  
<sup>6</sup>*Id.*  
<sup>7</sup>*Id.*  
<sup>8</sup>Univ. of Ariz. Native Nations Inst., Indigenous Governance Database, *Jill Doerfler: Defining Citizenship: Blood Quantum vs. Descendancy*, <https://nnigovernance.arizona.edu/jill-doerfler-defining-citizenship-blood-quantum-vs-descendancy> (last visited May 6, 2024).  
<sup>9</sup>Tommy Miller, *Beyond Blood Quantum: The Legal and Political Implications of Expanding Tribal Enrollment*, *Am. Indian L.J.*, vol. 3, issue 1 (Dec. 15, 2014).  
<sup>10</sup>Cecily Hilleary, *Some Native Americans Fear Blood Quantum is Formula for 'Paper Genocide'*, *VoA News* (July 24, 2021), [https://www.voanews.com/a/usa\\_some-native-americans-fear-blood-quantum-formula-paper-genocide/6208615.html](https://www.voanews.com/a/usa_some-native-americans-fear-blood-quantum-formula-paper-genocide/6208615.html).  
<sup>11</sup>*DiBenedetto v. Jaskolski (In re Est. of Thompson)*, 2003 WI App 70, 261 Wis. 2d 723, 661 N.W.2d 869.  
<sup>12</sup>*Id.* ¶ 26.  
<sup>13</sup>See also *State ex rel. Schlehlein v. Duris*, 54 Wis. 2d 34, 194 N.W.2d 613 (1972).  
<sup>14</sup>*Id.*  
<sup>15</sup>See *supra* note 2.  
<sup>16</sup>Miller, *supra* note 9. **WL**