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Moving Forward from the Scoop Era: Providing Active Efforts Under the Indian Child Welfare Act in Illinois

CASSANDRA CRANDALL*

This Comment argues that Illinois should adopt the view that active efforts are a higher standard than reasonable efforts and implement procedures encouraging state agencies and courts to implement these requirements. Following the Supreme Court's rationale in Mississippi Choctaw Band of Indians v. Holyfield, one of the only Supreme Court cases addressing the ICWA, this Comment argues that a uniform definition and application of "active efforts" should exist in every jurisdiction. Furthermore, this Comment emphasizes that "active efforts" require more than "reasonable efforts," and that these standards are different. Part I of this Comment reviews the history of the ICWA. Part II of this Comment examines the Congressional hearings concerning the ICWA to establish Congress' intent when passing the legislation more than thirty years ago. Part III examines the 1979 Guidelines promulgated by the Bureau of Indian Affairs. Part IV examines the evolution of case law regarding the ICWA. Part V discusses the application of active efforts in state courts, with an examination on the variation between jurisdictions. Part VI reviews the 2016 release of new Guidelines for the ICWA by the Bureau of Indian Affairs. Part VII discusses current challenges to the constitutionality of the ICWA and criticisms the active efforts standard has recently received. Part VIII makes recommendations to remedy the current shortage of guidance surrounding "active efforts" in section 1912(d) of the ICWA by examining the active efforts guide produced by Wisconsin under the Wisconsin Indian Child Welfare Act.

* Juris Doctor Candidate, May 2020, and Symposium Editor of the *Northern Illinois University Law Review*, Volume 40. First, I would like to thank Professor Wendy Vaughn, my faculty advisor, for her essential guidance throughout the research and writing process of this Comment. Along with Professor Vaughn, I would like to thank Judge Francis Martinez for giving me the opportunity to research this topic in a practical setting and for encouraging my interest in the ICWA. Lastly, I would like to thank my husband, William Crandall, and son, Ian Crandall, for their unwavering support throughout law school.

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The scoop was the term that we use because the children's administration and other agencies were allowed to come into our tribal communities and literally scoop as many children as they could and take them quickly far from our reservations and place them for adoption My mother, Karen, was taken during that era from my grandmother, Myrtle. My grandmother, she had to go into the hospital for surgery and while she was in the hospital my mom and her siblings were taken. They separated them immediately and put them in separate cars The Superior Court judge signed off on the paperwork within a matter of four days and said that my grandmother was morally unfit to raise her children. There was no explanation given after her children were taken. Some things never healed in her and she left the reservation. She was murdered on the streets of Tacoma. She was 38.¹

Historically, state courts have exercised jurisdiction over issues in family law.² Federal courts, in most cases, have left the resolution of do-

1. The National Indian Child Welfare Association, *The Heart of ICWA: Becky*, YOUTUBE (Dec. 7, 2016), <https://www.youtube.com/watch?v=tYMG13pKq4Y>.

2. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 269 (2009).

mestic relation disputes up to state legislatures and courts.³ This is due to the expertise of state courts and the federal court system's dislike in deciding family law issues.⁴ Nevertheless, in 1978, Congress passed the Indian Child Welfare Act ("ICWA" or "Act") to address the alarming rate of separation of Indian children from their families and tribes.⁵ The purpose of the Act was,

to protect the best interests of Indian children and to promote the stability 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.⁶

However, not all state courts have accepted the implementation of the Act. In fact, some state courts have pushed back against the ICWA because of their traditional jurisdiction over family law matters.⁷ Unfortunately, this has resulted in a patchwork of state violations of the ICWA.

Preliminarily, a short explanation of some of the Act's provisions may be beneficial. The ICWA applies to Indian child custody proceedings.⁸ "Child custody proceedings" refers to adoptive placement proceedings, the termination of parental rights, and foster care placement.⁹ The Act defines an "Indian child" as "any unmarried person who is under age eighteen and is either (1) a member of an Indian tribe or (2) is eligible for membership in an Indian tribe and is the biological child of a member/citizen of an Indian tribe."¹⁰ An "Indian tribe" is defined by the Act as "any Indian tribe, band, nation, or other organized group or community of Indians federally recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians."¹¹

3. *Id.*

4. Bradley G. Silverman, Note, *Federal Questions and the Domestic Relations Exception*, 125 YALE L.J. 1364, 1391-92 (2016).

5. *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, <https://nicwa.org/about-icwa/> [<https://perma.cc/2KBE-QFPL>].

6. Indian Child Welfare Act, 25 U.S.C. § 1902 (1978).

7. Elizabeth MacLachlan, Comment, *Tensions Underlying the Indian Child Welfare Act: Tribal Jurisdiction over Traditional State Court Family Law Matters*, 2018 BYU L. REV. 455, 455 (2018) ("From the early years of the existence of the United States, states have struggled against the sovereignty of Indian tribes. Instead of accepting tribes as third sovereigns, as the federal government dictates, states often view tribal jurisdiction as an intrusion into state authority.").

8. 23 C.F.R. § 23.2 (2016).

9. *Id.*

10. *Id.*

11. *Id.*

Since the Act passed, the Supreme Court has heard a limited number of cases involving the ICWA, leaving state courts and tribal courts mostly to their own devices to interpret the various terms and standards within the Act.¹² This Comment focuses on a small portion of the ICWA, section 1912(d), which states:

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 breakup of the Indian family and that these efforts have proved unsuccessful.¹³

Today, the definition of active efforts fluctuates depending on the jurisdiction. Some courts in states like California and Colorado treat active efforts the same as reasonable efforts, the standard used in proceedings that do not involve the ICWA.¹⁴ Other states, like Alaska and Wisconsin, believe that the active efforts language in section 1912(d) requires more than just reasonable efforts.¹⁵ Nevertheless, even among the majority of states that hold that active efforts require something more do not agree on what those efforts entail. Currently, Illinois case law has not established a distinction between active efforts and reasonable efforts.

I. THE HISTORY OF THE INDIAN CHILD WELFARE ACT OF 1978

My mother, Karen, went to live with this family. It was a very abusive home. She found herself pregnant with me at a very young age and was sent away. They still had Catholic-run schools for unwed girls. She was forced to sign papers to give me up for adoption and she ran away from that place and never went home. She carried that brokenness with her out onto the streets, which is where she lived. She was unseen and unheard and never allowed to come home because of those systems that were in place to keep us from our communities.

I was taken at birth and placed in a foster home and I can remember the day my social worker came to collect me and

12. See Ogle *infra* note 63.

13. Indian Child Welfare Act, 25 U.S.C. § 1912 (1978).

14. *In re Michael G.*, 74 Cal. Rptr. 2d 642 (Cal. Ct. App. 1998); *People ex rel. K.D.*, 155 P.3d 634 (Colo. App. 2007).

15. See *A.A. v. Dept. of Family & Youth Servs.*, 982 P.2d 256 (Alaska 1999); *State v. Debra F.*, 2005 WI App 88, 695 N.W.2d 905.

take me to meet my prospective parents. I was not quite four. I remember meeting these strange people, non-native folks. They oohed and awed over me and in less than a week my things were packed. It was the 70s and there was no ICWA in place to protect me. My adopted mother was very abusive to me physically. My adoptive father, he was very abusive to my mother . . . I think that my life would have been very different if ICWA had been available or in existence at the time of my forced adoption.¹⁶

Before the enactment of the ICWA, there was no existing legislation governing the adjudication of child placement cases involving Native American children and families.¹⁷ Native American tribes have sovereignty over their lands and their affairs; however, this was not always the case.¹⁸ Before the 1970s, there were policies in the United States that ranged from implementing reservations for tribes to even terminating tribes.¹⁹ These policies changed during the 1970s when the Nixon administration implemented policies to further the self-determination of Native American tribes.²⁰ Self-determination was a mixture of legislation and ideologies, which focused on providing Native Americans with the right to self-govern and to make crucial decisions regarding their tribe's affairs on their own.²¹

Congress enacted the ICWA in 1978 during the era of self-determination. The Act sought to address the "wholesale separation of Indian children from their families."²² Legislative testimony taken from all over the country confirmed that many county and state child-welfare agencies and workers, with the authorization of many state courts and some "Bureau of Indian Affairs officials, had engaged in the systematic, automatic, and across-the-board removal of Indian children from Indian families and into non-Indian families and communities."²³

16. National Indian Child Welfare Association, *supra* note 1.

17. See Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 382-84 (1997).

18. Allison E. Davis, Note, *Roadway to Reform: Assessing the 2015 Guidelines and New Federal Rule to the Indian Child Welfare Act's Application to State Courts*, 22 SUFFOLK J. TRIAL & APP. ADVOC. 91, 95 (2016).

19. *Id.*

20. *Id.*

21. *Id.*

22. H.R. REP. NO. 95-1386, at 9 (1978).

23. Matthew L.M. Fletcher, *The Origins of the Indian Child Welfare Act: A Survey of Legislative History*, MICH. STATE U. COLL. L. INDIGENOUS L. & POL'Y CTR. (April 10, 2009), <https://www.law.msu.edu/indigenous/papers/2009-04.pdf> [<https://perma.cc/9FKD-BUSE>]. See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

During this time, between 25% to 35% of all Indian children, nationwide, were removed by state government actors.²⁴ State agencies placed about 85% to 90% of these children in non-Indian homes.²⁵ During the 1974 legislative hearings, witnesses testified about the removal of Indian children “without due process of law.”²⁶ Social service agencies and courts made decisions to place Indian children in foster care with “few standards and no systematic review of judgments by impartial tribunals.”²⁷ A Sisseton-Wahpeton Sioux Tribe member in South Dakota testified that “state actors had taken Indian children without even providing notice to their families, with state courts then placing the burden on the Indian parent to prove suitability to retain custody.”²⁸

Mel Tonasket, the President of the National Congress of American Indians, testified that “a state caseworker came to an Indian woman’s house without warning or notice and took custody of an Indian child by force.”²⁹ After hearing Mr. Tonasket’s testimony, Senator James Abourezk stated,

welfare workers and social workers who are handling child welfare caseloads use any means available, whether legal or illegal, coercive or cajoling or whatever, to get children away from their mothers they think are not fit. In many cases they were lied to, given documents to sign and they were deceived about the contents of the documents.³⁰

One of the most shocking aspects of the removal of Indian children is the reasons given for separation. Indian children were removed due to abuse in only 1% of cases.³¹ In the other 99% of cases, children were removed for neglect or social deprivation.³² Social workers were uninformed about tribal

24. H.R. REP. NO. 95-1386, at 9 (1978).

25. Meagan Flynn, *Court Strikes Down Native American Adoption Law Saying it Discriminates Against Non-Native Americans*, WASH. POST (Oct. 10, 2018, 7:07 AM) https://www.washingtonpost.com/news/morning-mix/wp/2018/10/10/court-strikes-down-native-american-adoption-law-saying-it-discriminates-against-non-native-americans/?utm_term=.901e48f3f34f [https://perma.cc/2ZAA-WSJD].

26. *Problems that American Indian Families Face in Raising their Children and How These Problems are Affected by Federal Action or Inaction: Hearings Before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs*, Second Session, 93rd Cong. 11, at 21 (1974).

27. AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND MENTAL HEALTH: DEVELOPMENT, CONTEXT, PREVENTION, AND TREATMENT 270 (Michelle C. Sarche et al. eds, 2011) (ebook).

28. *Id.*

29. *Id.*

30. *Id.*

31. Kathleena Kruck, Note, *The Indian Child Welfare Act’s Waning Power After Adoptive Couple v. Baby Girl*, 109 NW. U. L. REV. 445, 449 (2015).

32. *Id.* at 450.

culture and familial norms.³³ This lack of knowledge often led to claims of neglect and abandonment being founded simply because children were raised outside of a traditional family structure.³⁴ However, in many tribes, it is ubiquitous for children to have many relatives care for them.³⁵

To solve the problem, Congress designed the ICWA to provide minimum procedural and substantive safeguards for Indian children, tribes, and families in state adjudicative forums.³⁶ The Act provides that “[a]n Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe.”³⁷ The idea was adopted from a common-law decision from the Western District of Michigan.³⁸ The Michigan court had reached the same outcome in 1973 in a case involving members of the Hannahville Indian Community.³⁹ Now, the Act presumes that tribal courts have “concurrent” and “presumptive” jurisdiction over child custody cases involving Indian children, even if the child is domiciled outside of Indian Country.⁴⁰

Under the ICWA, state courts must provide notice to both the Indian child’s tribe and parents if a state agency is petitioning for foster care placement or the termination of parental rights.⁴¹ If out-of-home placement is ordered, the state court must give preference to the Indian child’s extended family or another tribal community placement.⁴² Further, the state actor seeking the termination of parental rights must prove beyond a reasonable doubt that the continued custody of the child by the Indian parent is likely to result in severe emotional or physical damage to the child.⁴³

The adoption of these protections was ground-breaking. For possibly the first time in federal Indian law and policy, Congress recognized the impact that state law and policy had on the future of Indian tribes, children, and families. Congress found “that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian

33. *Id.*

34. *Id.*

35. *Id.*

36. 25 U.S.C. § 1912 (1978).

37. 25 U.S.C. § 1911 (1978).

38. *Wis. Potawatomes of Hannahville Indian Cmty. v. Houston*, 393 F. Supp. 719, 734 (W.D. Mich. 1973).

39. *Id.*

40. 25 U.S.C. § 1912 (1978).

41. *Id.*

42. *Id.*

43. *Id.*

children who are members of or are eligible for membership in an Indian tribe.”⁴⁴

II. LEGISLATIVE HISTORY AND THE PROPOSED AMENDMENTS OF THE INDIAN CHILD WELFARE ACT

The requirement that state child-welfare agencies provide active efforts before the termination of an Indian parent’s rights to their children resulted from the testimony that state actors rarely had, if ever, competently provided services to Indian families before removing children from the home.⁴⁵ The term active efforts in the framework of rehabilitative state services to children and families is “unique in American law.”⁴⁶ Due to its origin, and the purpose of the ICWA, the term active efforts has a distinctive character that focuses on the cultural norms of Indian families.⁴⁷

Initially, the ICWA did not define the term active efforts.⁴⁸ However, the legislative history of the provision supports that Congress wanted state courts and agencies to actively and affirmatively provide Indian children, parents, and families with rehabilitative services, not merely make those services available.⁴⁹ Comparing the two proposed drafts of the active efforts provision is illuminating. Initially, the first version of the statute did not use the term active efforts. Instead, the provision of the bill used the phrase “made available.”⁵⁰ The original subsection read:

No placement of an Indian child, except as provided in the Act shall be valid or given any legal force and effect . . . unless . . . the party seeking to effect the child placement affirmatively shows that available remedial services and rehabilitative programs designed to prevent the breakup of the Indian family have been made available and proved unsuccessful.⁵¹

44. 25 U.S.C. § 1901 (1978).

45. *Id.*

46. AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND MENTAL HEALTH: DEVELOPMENT, CONTEXT, PREVENTION, AND TREATMENT, *supra* note 27, at 271 (citing Mark Andrews, *Active Versus Reasonable Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes*, 19 ALASKA L. REV. 85, 87 (2002)).

47. *Id.*

48. S. REP. NO. 95-597, at 4 (1977).

49. *See infra* note 53.

50. S. REP. NO. 95-597, at 4.

51. *Id.* at 1.

However, on October 14, 1978, the final version of the bill read:

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 breakup of the Indian family and that these efforts have proved unsuccessful.⁵²

The change is significant. The legislature decided to move away from mandating that services be “made available,” and require that state actors make active efforts. In 1997, Congress stated that the active efforts language was specifically intended to remedy the “wholesale separation of Indian children from their families.”⁵³ This distinction supports the conclusion that there is a difference between states providing passive efforts and active efforts.

Further, the testimony heard at the 1977 hearings supports the assertion that active efforts was meant to be a higher standard. One of the most significant issues that led to the enactment of the ICWA was many states’ failure to provide adequate services to Native American families within the child-welfare system.⁵⁴ Several other witnesses at the hearings testified about the failures of state actors to provide services to Native American families.⁵⁵ A social worker from Albuquerque who worked directly with the Bureau of Indian Affairs testified that “State local governments sluff off their responsibilities to Indians, often by bureaucratic technicalities and thereby avoid providing meaningful services.”⁵⁶ It was also common for Indian families to consent to the mass enrollment of their children into boarding schools.⁵⁷

52. 25 U.S.C. § 1912 (1978).

53. S. REP. NO. 105-156, at 9 (1997) (quoting H.R. REP. NO. 95-1386, at 9 (1978)).

54. See *Indian Child Welfare Act of 1977: Hearing Before the S. Select Comm. on Indian Affairs*, 95th Cong. 53 (1977) [hereinafter *1977 Hearings*].

55. See *id.* at 53-56, 76-80, 152-53.

56. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 93rd Cong. 214 (1974) (statement of Evelyn Blanchard, Assistant Area Soc. Worker, Bureau of Indian Affairs).

57. Ann Piccard, *Death by Boarding School: “The Last Acceptable Racism” and the United States’ Genocide of Native Americans*, 49 GONZ. L. REV. 137, 151-52 (2013) (“In 1879, the federal government undertook to destroy all Native American culture by sending Indian children, forcibly when necessary, to day or boarding schools. The Bureau of Indian Affairs (BIA) was responsible for the boarding schools A former BIA Secretary acknowledged his agency’s role in the boarding schools’ efforts to eradicate the Native Americans: ‘This agency forbade the speaking of Indian languages, prohibited the conduct of traditional religious activities, outlawed traditional government, and made Indian people ashamed of who they were. Worse of all, the Bureau of Indian Affairs committed these acts

Other issues arose due to the passivity of state agencies.⁵⁸ It was not uncommon for caseworkers to wait until Indian families reached a point of crisis before intervening, only to initiate termination of parental rights.⁵⁹ In support of this, the Tribal Chief of the Mississippi Band of Choctaw Indians, Calvin Isaac, testified that states could have preserved Indian families if active efforts had been offered in time, or at all: “Often the situation which ultimately leads to the separation of the child from his family . . . is one which could be remedied without breaking up the family. Unfortunately, removal from parental custody is often seen as a simple solution.”⁶⁰

Another issue recognized by Congress was the lack of services that fit the cultural needs of Indian people. A 1976 report to the American Indian Policy Review Commission concluded that “[n]on-Indian public and private agencies . . . show almost no sensitivity to Indian culture and society.”⁶¹ Nancy Amidei from the United States Department of Health, Education, and Welfare testified that a twenty-one-state study conducted by her department found a “need to encourage States to deliver services to Indians without discrimination and with respect to tribal culture.”⁶²

Ultimately, the issues brought up in the testimony and debates leading to the enactment of the ICWA support Congress’ intent in enacting the active efforts provision. Before a state can order the breakup of an Indian family, the party moving for termination of parental rights must demonstrate that the state actually provided rehabilitative and preventative services to the Indian family.

III. THE RELEASE OF THE 1979 GUIDELINES AND THE SUBSEQUENT CONFUSION AMONG THE STATES

In conjunction with the enactment of the ICWA, Congress required the Secretary of the Interior to, “[w]ithin one hundred and eighty days after the

against the children entrusted to its boarding schools, brutalizing them emotionally, psychologically, physically, and spiritually.”).

58. *1977 Hearings*, *supra* note 54, at 137-38. (“Generally, non-tribal government agencies practice crisis intervention. Aware in the incipency of the presence of factors that frequently lead to family breakup, the agencies often passively observe the corrosive effect to these factors and intervene only when disintegration has reached the point of crisis to seek the legal separation of children from their families. Remedial and rehabilitative services are generally not made available to the Indian family in distress.”).

59. *Id.*

60. *Id.* at 156.

61. AMERICAN INDIAN POLICY REVIEW COMM., REPORT ON FEDERAL, STATE, AND TRIBAL JURISDICTION 87 (1976).

62. S. REP. NO. 95-597, at 23 (1977); *Hearings Before the Subcomm. on Indian Affairs and Public Lands of the Committee on Interior and Insular Affairs*, 95th Cong. 57 (1978).

enactment of this Act, . . . promulgate such rules and regulations as may be necessary to carry out the provisions of this Act.”⁶³ The Bureau of Indian Affairs (the “BIA”) was tasked with drafting the guidelines.⁶⁴ However, the BIA read this provision as solely granting it the authority to disseminate regulations where the ICWA “expressly delegate[s] to the Secretary the primary responsibility for interpreting a statutory term.”⁶⁵ Accordingly, the BIA’s 1979 regulations were nonbinding and only addressed specific areas. Unfortunately, the resolution’s many gray areas within the statute were left up to statutory interpretation by state courts.⁶⁶

The BIA did not believe that Congress had intended to grant it rule-making authority where the Secretary of the Interior was not clearly implicated.⁶⁷ Furthermore, the BIA took the position that applying any more regulatory authority with the ICWA than Congress had expressly given would be a violation of federalism principles and Congress’ intent.⁶⁸ Instead, the BIA followed the process detailed by the Administrative Procedures Act for rulemaking.⁶⁹

Unfortunately, the 1979 Guidelines left many provisions of the ICWA up to state interpretation, including the active efforts provision.⁷⁰ The vagueness of the ICWA and the 1979 Guidelines left the interpretation of the meaning of active efforts up to the states. Some state court decisions referenced the Guidelines, while others viewed the Guidelines as assisting but not as binding.⁷¹ State courts’ reliance on the BIA’s 1979 statement was not only foreseeable, but it was also expected. The BIA predicted this reliance by remarking that “[s]tate and tribal courts are fully capable of carrying out the responsibilities imposed on them by Congress without being under the direct supervision of this Department.”⁷²

63. Kasey D. Ogle, Comment, *Why Try to Change Me Now – The Basis for the 2016 Indian Child Welfare Act Regulations*, 96 NEB. L. REV. 1007, 1011 (2018) (citing 25 U.S.C. §§ 1901, 1963 (2012)).

64. *Id.*

65. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 44 Fed. Reg. 67,584 (Nov. 26, 1979).

66. Ogle, *supra* note 63.

67. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 44 Fed. Reg. at 67,584.

68. Ogle, *supra* note 63, at 1011-12.

69. *Id.* at 1012.

70. Tribal Reassumption of Jurisdiction Over Child Custody Proceedings, 44 Fed. Reg. 45,095 (July 31, 1979).

71. See Ogle, *supra* note 63, at 1012 (citing *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989)).

72. Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 44 Fed. Reg. at 67,584.

IV. ACTIVE EFFORTS IN STATE COURTS

After the BIA's release of the nonbinding 1979 Guidelines for the ICWA, state courts were tasked with interpreting many provisions of the Act on their own.⁷³ As a result, inconsistent law was created among the states. This inconsistency undercut the effectiveness of the ICWA. Nationwide, Indian children are still disproportionately represented in child-welfare proceedings at twice the rate of the general population.⁷⁴

When a State Agency takes a child into custody as a result of neglect or abuse, the child's parents have rights under American law. Before the State may permanently separate the parent and child, the State has a duty to make "reasonable efforts" to try to reunify them.⁷⁵ Reasonable efforts have been described as "passive efforts." For example, a case manager working with the State may draft a service plan that includes counseling, parent education, daycare, emergency assistance and advocacy assessments, transportation to obtain services, and medical assistance.⁷⁶ However, after the case manager makes a referral for these services, it is usually up to the parent to successfully complete the requirements of their service plan.⁷⁷

Under Illinois state law, as well as the federal Adoption and Safe Families Act, child-welfare officials are required to make reasonable efforts to reunify families.⁷⁸ The race or ethnicity of the child may alter the State's duty.⁷⁹ When an Indian child is removed from her home, the State must provide active efforts to reunify the family.⁸⁰ Active efforts must be made both before and after the removal of an Indian child from his or her home. The active efforts requirement links directly to one of the Congressional findings underlying the enactment of the ICWA (i.e., to curb "unwarranted removals of Indian children from their homes").⁸¹ Even though some state courts regard active efforts and reasonable efforts as synonymous, most

73. See Ogle, *supra* note 63, at 1011.

74. 2017 Report on Disproportionality of Placements of Indian Children, NAT'L INDIAN CHILD WELFARE ASS'N (2017), <https://www.nicwa.org/wp-content/uploads/2017/09/Disproportionality-Table.pdf> [<https://perma.cc/8K5N-KEMK>].

75. 20 ILL. COMP. STAT. 505/5 (2017).

76. 325 ILL. COMP. STAT. 5/8.2 (2011).

77. See *Principles of Permanency Planning*, ILL. DEP'T CHILDREN & FAMILY SERVICES § 315.200 (Aug. 21, 2018), https://www2.illinois.gov/dcf/aboutus/notices/Documents/Procedures_315.pdf [<https://perma.cc/U7ZD-CY3B>].

78. 20 ILL. COMP. STAT. 505/5 (2017).

79. 25 U.S.C. § 1912 (1978).

80. *Id.*

81. B. J. JONES & JOHN G. RICHARDSON, THE INDIAN CHILD WELFARE ACT: A CULTURAL AND LEGAL EDUCATION i (1997), <https://www.ncjrs.gov/pdffiles1/Digitization/173731NCJRS.pdf> [<https://perma.cc/HN5R-DCET>].

have concluded that active efforts requires a heightened obligation to reunite Indian children with their families.⁸²

Currently, no Illinois case law interprets the difference between active efforts and reasonable efforts. However, a majority of jurisdictions have held that active efforts is a more heightened standard than the reasonable efforts standard.⁸³ The Alaska Supreme Court confronted the issue of the elusive definition of “active efforts” after a father moved to continue a hearing on a petition to terminate his parental rights with respect to his son, an Indian child.⁸⁴ The court in *A.A. v. State, Dept. of Family & Youth*, stated that,

Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child.⁸⁵

After this ruling, other states seemed to follow the Alaska Supreme Court’s ruling.⁸⁶ However, there still was no consensus on what active efforts really required.

On the other hand, California and some Colorado courts have both held that active efforts and reasonable efforts are synonymous.⁸⁷ California

82. See generally *A.A. v. Dep’t of Family & Youth Servs.*, 982 P.2d 256 (Alaska 1999); *In re P.S.E.*, 2012 SD 49, 816 N.W.2d 110; *In re A.N.*, 2005 MT 19, 106 P.3d 556; *In re Walter W.*, 744 N.W.2d 55 (Neb. 2008).

83. *In re P.S.E.*, 2012 SD at ¶ 18, 816 N.W.2d at 115.

84. *A.A.*, 982 P.2d 256.

85. *Id.* at 261 (citing CRAIG J. DORSAY, *THE INDIAN CHILD WELFARE ACT AND LAWS AFFECTING INDIAN JUVENILES MANUAL* 157-58 (1984)).

86. *In re Nicole B.*, 976 A.2d 1039, 1042-43 (Md. 2009); *In re D.A.*, 2013 MT 191, 305 P.3d 824; *State ex rel. Children, Youth & Families Dep’t v. Yodell B.*, 2016-NMCA-029, 367 P.3d 881; *In re G.V.*, 2016 OK Civ App 6, 365 P.3d 89; *State ex rel. C.D.*, 2008 UT App 477, 200 P.3d 194; *In re JL*, 770 N.W.2d 853 (Mich. 2009); *In re Anhayla H.*, 2018-NMSC-033, 421 P.3d 814; *In re S.H.E.*, 2012 SD 88, 824 N.W.2d 420.

87. See *In re Michael G.*, 74 Cal. Rptr. 2d 642 (Cal. Ct. App. 1998); *People ex rel. K.D.*, 155 P.3d 634 (Colo. App. 2007). However, it is important to note that other Colorado courts have refused to equate reasonable efforts with active efforts and have applied a

courts have reasoned that the State holds a heightened view of reasonable efforts.⁸⁸ “[W]hile the court must make a separate finding under section 1912(d), the standard in assessing whether ‘active efforts’ were made to prevent the breakup of the Indian family, and whether reasonable services under state law were provided, are essentially undifferentiable.”⁸⁹ Thus, the two approaches are consistent; California law requires a higher burden in all its child-welfare proceedings.⁹⁰ Nevertheless, even though courts seem to be moving towards recognizing that active efforts require a higher burden than reasonable efforts, historically, there has been little agreement as to what active efforts actually entails.

V. ICWA IN THE SUPREME COURT: TWO FORMATIVE CASES

Ten years after the release of the 1979 Guidelines by the Bureau of Indian Affairs, the Supreme Court heard its first case involving the ICWA, *Mississippi Band of Choctaw Indians v. Holyfield*.⁹¹ The *Holyfield* court acknowledged that terms under the ICWA, such as “domicile,” must have nationwide, uniform application.⁹² Analyzing the meaning of domicile under the congressional intent of the ICWA, the court reasoned that the Act was never meant to be left up to state interpretation.⁹³

In *Holyfield*, a member of the Mississippi Band of Choctaw Indians, Jennie Bell, sought to place her child up for adoption.⁹⁴ Jennie “was twenty-four years old, a single mother of two, and she was pregnant with twins by a man who was married to another woman and had two children of his own.”⁹⁵ Ms. Bell sought to place the twins with Orrey and Vivian Joan (“Joan”) Holyfield.⁹⁶ She even moved into the Holyfield’s home temporarily to get to know them better.⁹⁷ Ms. Bell gave birth in a hospital 200 miles from the Choctaw reservation in December of 1985.⁹⁸ Twelve days later, she relinquished her parental rights.⁹⁹ Subsequently, the Mississippi Band

heightened standard. See *People ex rel. A.R.*, 2012 COA 195M, 310 P.3d 1007; *In re T.E.R.*, 304 P.3d 414 (Colo. App. 2013).

88. *In re Michael G.*, 74 Cal. Rptr. 2d at 650.

89. *Id.*

90. *C.F. v. Superior Court*, 178 Cal. Rptr. 3d 456, 463 (Cal. Ct. App. 2014).

91. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

92. *Id.* at 30.

93. *Id.* at 41.

94. *Id.*

95. Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1 (2008).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

of Choctaw Indians intervened because ICWA procedures were not followed by placing the children with the Holyfield family.¹⁰⁰

Once the case reached the Supreme Court, four years later, the decision rested on whether the children were domiciled on the Choctaw reservation.¹⁰¹ If the children were domiciled on the reservation, then the ICWA would apply to their adoption proceedings.¹⁰² In reaching its decision, the Court looked to the legislative history of the ICWA in order to determine Congress' intent.¹⁰³ Citing the 1978 House Report on the ICWA, the Court argued that the purpose of the ICWA is to create "a Federal policy that, where possible, an Indian child should remain in the Indian community," by ensuring that "Indian child welfare determinations are not based on 'a white, middle-class standard which, in many cases, forecloses placement with an Indian family.'"¹⁰⁴ On top of the goal of establishing federal uniform standards, the Court stated that the ICWA was passed to restrict state power.¹⁰⁵ By examining "the very text of the ICWA" along with "its legislative history and the hearings that led to its enactment," the court found that "Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities."¹⁰⁶

The Court held that the twins, as children of a Choctaw tribe member, shared the domicile of their mother. Ultimately, the Choctaw Tribe was granted jurisdiction to settle the adoption proceedings.¹⁰⁷ On February 9, 1990, four years after the Holyfields brought the twins home from the hospital, the Choctaw Tribal Court granted Joan Holyfield's adoption petition.¹⁰⁸ "Based on the home study conducted by Choctaw Social Services and the recommendation of the children's guardian ad litem, [the Choctaw Tribal Court] determined that it was the twins' best interest to remain with Joan Holyfield."¹⁰⁹

Twenty-four years after Holyfield reached the Supreme Court, another controversial case involving the ICWA was decided. *Adoptive Couple v. Baby Girl* involved a Native American father who sought to block the adop-

100. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 30 (1989).

101. *Id.* at 42.

102. *Id.*

103. *Id.* at 44.

104. *Id.* at 37.

105. *Holyfield*, 490 U.S. at 60. The *Holyfield* Court also relied upon the testimony of experts and studies that demonstrated the destructive effects of placing Indian children in non-Indian families and communities.

106. *Id.* at 44-45. In other words, Congress perceived the states and their courts are part of the problem it intended to correct with the passage of the ICWA.

107. *Id.* at 30.

108. Maldonado, *supra* note 95, at 121.

109. *Id.*

tion of his child by a non-Native American family.¹¹⁰ The father argued that he had not consented to the termination of his parental rights.¹¹¹ The Supreme Court of South Carolina held that under the ICWA, the termination of the father's rights was barred by the statute.¹¹²

Ultimately, the United States Supreme Court reversed the decision.¹¹³ The Court reasoned that the termination of the father's parental rights was not barred by the ICWA.¹¹⁴ Additionally, because the father was not seeking to adopt the child, the Act did not apply.¹¹⁵ The Court focused on the purpose of the ICWA, to "prevent the 'breakup of Native American families.'" In this case, the father had never established a parental relationship and had ended his legal parental rights before the birth of the child.¹¹⁶ Therefore, the Act did not apply.¹¹⁷

The decision in *Adoptive Couple* significantly affected the application of the ICWA. Even though the Court did not overturn the ICWA, restrictions on voluntary adoptions were created.¹¹⁸ Most importantly, the case highlighted the gray areas within the statute. This controversial case ultimately pushed the BIA to draft new guidelines and a new Final Rule, the purpose of which was to help clarify the application of the ICWA for state courts and agencies.¹¹⁹

VI. THE RELEASE OF NEW GUIDELINES AND FINAL RULE IN 2016 BY THE BUREAU OF INDIAN AFFAIRS

It could be argued that the distinction between active efforts and reasonable efforts is blurred because every family in the child-welfare system deserves the best support from the state agencies involved in their case. To some, "active efforts" may seem "reasonable." However, new Guidelines clarify the distinction with a concrete list of minimal efforts to be provided.¹²⁰ In 2016, The Department of the Interior, Bureau of Indian Affairs,

110. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013).

111. *Id.* at 637.

112. *Id.* at 638.

113. *Id.* at 639.

114. *Id.*

115. *Adoptive Couple*, 570 U.S. at 639.

116. *Id.* at 641.

117. *Id.* at 638.

118. Dustin C. Jones, *Adoptive Couple v. Baby Girl: The Creation of Second-Class Native American Parents Under the Indian Child Welfare Act of 1978*, 32 LAW & INEQ. 421, 422 (2014).

119. Kevin Heiner, Note, *Are You My Father? Adopting a Federal Standard for Acknowledging or Establishing Paternity in State Court ICWA Proceedings*, 117 COLUM. L. REV. 2151, 2153 (2017).

120. BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT § E.4 (2016),

issued Guidelines and a new binding Final Rule for State courts and agencies in Indian child custody proceedings.¹²¹ The updated Guidelines provide “examples of best practices for the implementation of the statute, with the goal of encouraging greater uniformity in the application of [the] ICWA.”¹²²

These Guidelines supersede and replace the 1979 Guidelines.¹²³ Additionally, the new Guidelines expand their application from just state courts to state courts and private child-welfare agencies.¹²⁴ The Guidelines emphasize that active efforts may vary from case to case and must be tailored to meet the needs of the family. Moreover, active efforts should be provided at the earliest point possible.¹²⁵

The 2016 Guidelines have now defined active efforts and detailed what is required, at minimum, of a social worker when working with an Indian family.¹²⁶ The guidelines state that social workers should engage “the Indian child and the Indian child’s parents, extended family members, Indian custodians, and Tribe.”¹²⁷ They encourage the identification of appropriate services to help “the parents to overcome barriers, including actively assisting the parents in obtaining such services.”¹²⁸

Additionally, the Guidelines state that the social worker must take into account “the prevailing social and cultural conditions of the Indian child’s Tribe,” and that “[d]etermining the appropriate active efforts may entail discussions with Tribal leadership, elders, or religious figures or academics with expertise concerning a given Tribe as to the type of culturally appropriate services that could be provided to the family.”¹²⁹ Under the Guidelines, the social worker must offer and employ “all available and culturally appropriate family preservation strategies” and contact and consult with “extended family members to provide family structure and support for the Indian child and the Indian child’s parents.”¹³⁰ Finally, the social worker must also find community resources, “including housing, financial, trans-

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf>
[<https://perma.cc/J9BP-KUDT>] [hereinafter GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT].

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, *supra* note 120, at 42.

126. *Id.* at 42-43.

127. *Id.* at 40.

128. *Id.* at 41.

129. *Id.* at 41.

130. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, *supra* note 120, at 41.

portation, mental health, substance abuse, and peer support services,” and actively assist “the Indian child’s parents, or when appropriate, the child’s family, in utilizing and accessing those resources.”¹³¹ These requirements are only a selection from the Guidelines.

VII. FORTY YEARS LATER: CRITICISM OF THE ICWA

A. QUESTIONING THE ICWA’S CONSTITUTIONALITY

Following the release of the 2016 Guidelines and Final Rule, there has been both praise and criticism for the new regulations about the ICWA. The BIA Assistant Secretary of Indian Affairs, Kevin Washburn, stated that the revised guidelines will be valuable in helping to promote Congress’ intent behind the statute.¹³² However, the constitutionality of the ICWA has been called into question, the matter having been ruled on with differing results.¹³³ In October of 2018, the Northern District of Texas issued a decision regarding the Act in *Brackeen v. Zinke*.¹³⁴ The *Brackeen* court challenged the constitutionality of the ICWA and the 2016 Final Rule. The district court ultimately held that the Act and the new rule were unconstitutional.¹³⁵

The lawsuit was initially brought by a non-Indian foster family and the State of Texas.¹³⁶ The foster family, the Brackeens, had an American Indian child placed with them.¹³⁷ The foster family had initiated adoption proceedings and sought to deviate from the placement preferences required under the ICWA, but their petition was denied.¹³⁸ Shortly after, the Texas Attorney General filed a lawsuit alleging that the 2016 Guidelines and the ICWA were unconstitutional.¹³⁹

Ultimately, the Texas court granted summary judgment in favor of the Brackeens.¹⁴⁰ The court’s decision relied on viewing the ICWA as a law

131. *Id.* at 41.

132. Suzette Brewer, *BIA Releases New ICWA Guidelines to Protect Native Families and Children*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 26, 2015), <https://newsmaven.io/indiancountrytoday/archive/bia-releases-new-icwa-guidelines-to-protect-native-families-and-children-rleRwA5LMkqWwo5d4Fh1Mw/> [<https://perma.cc/B8VT-GNJU>].

133. *Brackeen v. Zinke*, 338 F. Supp. 3d 514 (N.D. Tex. 2018); Nat’l Council for Adoption v. Jewell, 156 F. Supp. 3d 727 (E.D. Va. 2015); *In re T.A.W.*, 383 P.3d 492 (Wash. 2016); *In re Alexandria P.*, 204 Cal. Rptr. 3d 617 (Cal. Ct. App. 2016).

134. *Brackeen*, 338 F. Supp. 3d at 518-19.

135. *Id.* at 519.

136. *Id.*

137. *Id.*

138. *Id.* at 525.

139. *Brackeen*, 338 F. Supp. 3d at 525.

140. *Id.* at 519.

that discriminates on the basis of race.¹⁴¹ The Brackeens, along with six other families and the State of Texas, Louisiana, and Indiana, argued that the law violated the Equal Protection Clause of the United States Constitution and exceeded Congress' authority under the Indian Commerce Clause.¹⁴² Additionally, the court ruled that the ICWA violated the Tenth Amendment, the Nondelegation Doctrine, and challenged portions of the Final Rule by arguing that they violated the Administrative Procedure Act.¹⁴³ This decision was a stark contrast to the two United States Supreme Court cases that have upheld Congress' interest in legislating Indian affairs.¹⁴⁴

However, on August 9, 2019, the Fifth Circuit reversed the district court's ruling that granted summary judgment in favor of the Brackeens, holding that provisions of the ICWA and the Final Rule do not violate the Equal Protection Clause, the Tenth Amendment, the Nondelegation Doctrine, or the Administrative Procedure Act.¹⁴⁵ First, the most significant aspect of the Fifth Circuit's ruling was its denial of the claim that the ICWA is a "race-based" law.¹⁴⁶ Notably, the court stated, "If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized."¹⁴⁷

Historically, Native American tribes have been seen as sovereign nation-states within the country.¹⁴⁸ The precedent has been set by the Constitution, federal law, and hundreds of years of treaties; the federal government has jurisdiction over Indian affairs.¹⁴⁹ Under this authority, the ICWA has been legislated. Therefore, any fair reading of the ICWA must treat "Indian" as a political rather than racial classification, and the ICWA cannot be subject to strict scrutiny under equal protection.¹⁵⁰ To do otherwise is to reject the history of tribal relations in the United States.

141. *Id.* at 533.

142. *Id.* at 530.

143. *Id.*

144. *See* *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 670 (2013).

145. *Brackeen v. Bernhardt*, No. 18-11479, 2019 WL 3759491, at *1 (5th Cir. Aug. 16, 2019), *modified*, 937 F.3d 406 (5th Cir. 2019).

146. *Id.* at *9.

147. *Id.*

148. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

149. *United States v. Antelope*, 430 U.S. 641, 645 (1977); *Morton v. Mancari*, 417 U.S. 535, 552 (1974).

150. Allison Krause Elder, Note, "Indian" as a Political Classification: Reading the *Tribe Back into the Indian Child Welfare Act*, 13 *Nw. J.L. & Soc. Pol'y* 417, 438 (2018).

Further, the court held that the special treatment of the Indian children and families under the ICWA “is rationally tied to Congress’s fulfillment of its unique obligation toward Indian nations and its stated purpose of ‘protecting the best interests of Indian children and promoting the stability and security of Indian tribes.’”¹⁵¹ Additionally, the court rejected the argument that the ICWA violated the anti-commandeering doctrine by requiring executive agencies to apply federal standards in state courts.¹⁵² The court recognized that the Supremacy Clause controls in this case.¹⁵³ The Supremacy Clause states that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”¹⁵⁴ The court noted the distinction between “a state court and its political branches,” acknowledging that even though federal statutes may “direct state judges to enforce them . . . this sort of federal ‘direction’ of state judges is mandated by the text of the Supremacy Clause.”¹⁵⁵

Moreover, the court rejected the argument that the ICWA violated the Nondelegation Doctrine.¹⁵⁶ The ICWA gives Indian tribes the power to change preferred placement for an Indian child through tribal resolution.¹⁵⁷ The district court argued that this gives tribes the power to change legislative preferences with binding effect on the states, since the tribes are not part of the federal government, they cannot exercise this power.¹⁵⁸ However, the Fifth Circuit ultimately rejected this argument by stating that “[t]he Supreme Court has long recognized that Congress may incorporate the laws of another sovereign into federal law without violating the nondelegation doctrine.”¹⁵⁹ The Supreme Court has established Indian Tribes’ rights to regulate their internal and social relations.¹⁶⁰ Thus, allowing tribes to have a say in the placement of their children does not infringe on the Nondelegation Doctrine.

Finally, The Fifth Circuit found that the 2016 Final Rule is still valid and does not violate the Administrative Procedure Act.¹⁶¹ The court stated

151. *Brackeen*, 2019 WL 3759491, at *12.

152. *Id.*

153. *Id.* at *12-14.

154. U.S. CONST. art. II, § 2, cl. 2.

155. *Brackeen*, 2019 WL 3759491, at *13 (quoting *New York v. United States*, 505 U.S. 144, 178-79 (1992)).

156. *Id.* at 17.

157. 25 U.S.C. § 1915 (1978).

158. *Brackeen v. Zinke*, 338 F. Supp. 3d 514, 536 (N.D. Tex. 2018).

159. *Brackeen*, 2019 WL 3759491, at *16.

160. See *United States v. Mazurie*, 419 U.S. 544, 557 (1975); *Montana v. United States*, 450 U.S. 533, 564 (1981); *Merrion v. Jacarilla Apache Tribe*, 455 U.S. 130, 170 (1982).

161. *Brackeen*, 2019 WL 3759491, at *20.

that first, Congress unambiguously granted the Department authority to promulgate binding rules, and second, the BIA's current interpretation of its authority to issue binding regulations was reasonable.¹⁶² Initially, the district court ruled that since the BIA had reversed its position on the scope of its authority to issue binding regulations, without an explanation, its interpretation was not entitled to deference.¹⁶³

Nevertheless, the Fifth Circuit disagreed.¹⁶⁴ The court stated that “[t]he mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be arbitrary, capricious [or] an abuse of discretion.”¹⁶⁵ The agency must provide “reasoned explanation” for its new policy though “it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one.”¹⁶⁶ Finally, “[i]t suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”¹⁶⁷

The Fifth Circuit looked to the BIA's statement in the text of the 2016 Final Rule.¹⁶⁸ About its shift in ideology, BIA stated that the agency “had neither the benefit of the *Holyfield* Court’s carefully reasoned decision nor the opportunity to observe how a lack of uniformity in the interpretation of the ICWA by state courts could undermine the statute’s underlying purposes.”¹⁶⁹ Ultimately, Congress had intended for the ICWA to address a nationwide problem and leaving the interpretation of these provisions up to state courts created severe problems with uniformity.¹⁷⁰ In promulgating the rule, the BIA “relied on its own expertise in Indian affairs, its experience in administering [the] ICWA and other Indian child-welfare programs, state interpretations, and best practices, public hearings, and tribal consultations.”¹⁷¹ Thus, the court concluded: “the BIA’s current interpretation is not ‘arbitrary, capricious, [or] an abuse of discretion’ because it was not sudden

162. *Id.* at *20-21.

163. *Brackeen*, 338 F. Supp. 3d at 545.

164. *Brackeen*, 2019 WL 3759491, at *20-21.

165. *Id.* at *18 (citing *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (internal citations and quotation marks omitted)).

166. *Id.* (citing *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (internal citations and quotations marks omitted)).

167. *Id.* (citing *Fox Television Stations, Inc.*, 556 U.S. at 515 (internal citations and quotations marks omitted)).

168. *Id.* at *19.

169. *Brackeen*, 2019 WL 3759491, at *19 (citing Indian Child Welfare Act Proceedings, 81 Fed. Reg. 37,778 (June 14, 2016)).

170. *Id.* at *17.

171. *Id.* at *19.

and unexplained.”¹⁷² This decision is an essential step in the right direction for preserving the ICWA and its protections. The Fifth Circuit thoroughly articulated the ICWA’s constitutional protections. However, advocates should be wary of further attacks on the Act and developments in case law.

B. CRITICISM OF THE ICWA’S ACTIVE EFFORTS REQUIREMENTS

Additionally, the requirement to provide active efforts under the ICWA has also been criticized.¹⁷³ Critics have argued that because most courts have ruled that active efforts are more stringent than reasonable efforts, the circumstances that would typically relieve a state of the requirement to reunite a family would not be satisfied.¹⁷⁴ One article stated, “[t]his means that while officials are not required to reunify a non-Indian child with a family after she is removed due to parental substance-abuse problems, or physical or sexual abuse, such a duty does exist with regard to Indian children.”¹⁷⁵

However, the congressional intent behind requiring active efforts was to provide Indian children with procedural and substantive protections.¹⁷⁶ Requiring child-welfare agencies to provide active efforts is not outcome determinative in a case. If parties and child-welfare agencies try to circumvent the required procedures under the ICWA, higher courts applying the Act will make those entities go back and follow the protocol. Overall, it is important to note that the purpose of the ICWA is to provide reparations for the actions taken by the government against Native Americans.

VIII. MOVING BEYOND THE SCOOP ERA: THE INCORPORATION OF ACTIVE EFFORTS

With the goal of moving toward uniformity and consistency, the 2016 Guidelines and Final Rule are meant to help state courts and agencies apply the ICWA.¹⁷⁷ The Final Rule defines active efforts as “affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an

172. *Id.*

173. Timothy Sandefur, *Escaping the ICWA Penalty Box: In Defense of Equal Protection for Indian Children*, 37 CHILD. LEGAL RTS. J. 1, 36 (2017) (“ICWA’s ‘active efforts’ provision is so poorly designed that it often has the perverse effect of exposing Indian children to a greater risk of abuse or neglect, and frequently results in delaying or denying protection children need.”).

174. *Id.*

175. *Id.* at 37.

176. *Id.*

177. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, *supra* note 120.

Indian child with his or her family.”¹⁷⁸ The ICWA requires state actors to make active efforts in cases involving an Indian child in two areas. First, the state must provide services to the Indian family to prevent the removal of the child from his or her parent or custodian.¹⁷⁹ Second, state actors must work to reunify an Indian child with his or her parent or custodian after removal has occurred.¹⁸⁰ Further, early and active participation and consultation with the Indian child’s tribe is crucial in providing active efforts.¹⁸¹ The ICWA was meant to function as reparation and should be treated as such in all case planning decisions.

Even though some states have been criticized for failing to follow the ICWA provisions, other states have strived to achieve compliance with the Act. In 2005, the State of Wisconsin was failing to apply the ICWA properly.¹⁸² Statistics indicated systemic and persistent issues with implementing the Act in state court proceedings.¹⁸³ In 2008, a coalition comprised of tribal attorneys, tribal social services directors, Indian rights advocates, representatives of the state, and several Native American tribes was formed in order to develop the Wisconsin Indian Child Welfare Act (WICWA).¹⁸⁴ The coalition addressed some of the issues that were created by some of the gray areas within the ICWA and sought to clarify the problematic clauses in a way that was consistent with the original congressional intent behind the ICWA.¹⁸⁵ Wisconsin’s model and active efforts guide is trail-blazing and focuses explicitly on how state actors can be more culturally sensitive. Illinois should look to Wisconsin as a model for ensuring the requirements under the ICWA are met.

Wisconsin drafted its active efforts guide in 2013.¹⁸⁶ Similar to the BIA Guidelines that were released in 2016, the Wisconsin guidelines list nine specific activities for what active efforts should look like.¹⁸⁷ These nine activities include: (1) request that representatives of the Indian child’s

178. 25 C.F.R. § 23.2 (2016).

179. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, *supra* note 120, at § E.1.

180. *Id.* at 39.

181. *Id.*

182. Susan Reetz, *Missing Threads: The Story of the Wisconsin Indian Child Welfare Act*, YOUTUBE (Apr. 25, 2016), <https://www.youtube.com/watch?v=ZCLUbS4FxWo>.

183. *Id.*

184. *Id.*

185. *Id.*

186. WIS. DEP’T OF CHILDREN & FAMILIES, A CHILD WELFARE PRAC. GUIDE FOR MEETING THE WICWA ACTIVE EFFORTS REQUIREMENT (Dec. 2013), <https://dcf.wisconsin.gov/files/publications/pdf/464.pdf> [<https://perma.cc/M66G-V35U>] [hereinafter A CHILD WELFARE PRAC. GUIDE FOR MEETING THE WICWA ACTIVE EFFORTS REQUIREMENT].

187. *Id.*

tribe assist in developing the case plan; (2) complete a comprehensive assessment of the Indian child's family; (3) identify, notify, and invite representatives of the Indian child's tribe to participate throughout the proceedings; (4) identify and consult with extended members of the Indian child's family; (5) arrange to provide natural and unsupervised family interaction; (6) provide all available family preservation strategies; (7) actively assist or offer active assistance in accessing community resources to the child's family members; (8) monitor client progress and participation; and (9) consider alternative ways of addressing the Indian child's family's needs.¹⁸⁸

Involving representatives of the Indian child's tribe in the development of a case plan is extremely important in order to identify "traditional and customary support, actions, and services."¹⁸⁹ Tribal representatives have substantial knowledge of social and cultural standards for child-rearing within the tribal community.¹⁹⁰ By involving members who are familiar with the family's needs, courts can ensure that state actors are not making decisions based on cultural misunderstandings.¹⁹¹ For instance, "it is a common belief for Ho-Chunk families that you do not buy anything for an expectant mother until after the baby is born."¹⁹² This cultural misunderstanding "has led to referrals being made on Ho-Chunk families by non-tribal service workers expressing concern that the mother is not preparing for the birth of her child."¹⁹³ Increased communication between tribes and state agencies about cultural norms can help ensure that tribal families' needs are met.¹⁹⁴

State agencies should comprehensively assess the Indian child's family and identify in-home safety options.¹⁹⁵ Wisconsin's active efforts guide urges caseworkers to be in contact with the Indian child's tribe as soon as they become aware of the child's connection to a particular tribe.¹⁹⁶ However, there are no federally recognized Indian tribes of Illinois today, nor

188. *Id.*

189. *WICWA Online Resource for Case Workers*, WIS. CHILD WELFARE PROF'L DEV. SYS.,

https://media.wcwps.wisc.edu/foundation/WICWA_Online_Resource/efforts.html [<https://perma.cc/6NJM-3DPN>] (click the third tab titled "How Do I Demonstrate Active Efforts?") [hereinafter *WICWA Online Resource for Case Workers*].

190. *Id.*

191. A CHILD WELFARE PRAC. GUIDE FOR MEETING THE WICWA ACTIVE EFFORTS REQUIREMENT, *supra* note 186.

192. *WICWA Online Resource for Case Workers*, *supra* note 189.

193. *Id.*

194. *Id.*

195. *Id.*

196. A CHILD WELFARE PRAC. GUIDE FOR MEETING THE WICWA ACTIVE EFFORTS REQUIREMENT, *supra* note 186.

are there any Indian reservations.¹⁹⁷ With tribes located out of state, distance can be a common issue for Native American families. The Wisconsin active efforts guide recommends that the caseworker still regularly call the tribal representative and keep him or her updated on the case progress.¹⁹⁸

The Wisconsin active efforts guide emphasizes the importance of identifying, notifying, and inviting members of the Indian child's tribe to participate in the child custody proceeding as early as possible.¹⁹⁹ Tribal members and other members of the extended family can serve as an important resource for determining the needs of the child. Many Native American tribes have culturally different family structures.²⁰⁰ Sometimes, tribes will assign different types of responsibility to extended family members during child-rearing.²⁰¹ In some tribes, uncles and aunts are also considered to be parents of a child, and they would be the first option for the child to live with if something happened to the child's biological parents.²⁰² Further, other tribes view the uncle as the person to provide spiritual guidance or discipline to the child.²⁰³ If caseworkers did not reach out to these extended family members, it is possible that this essential connection to the child's culture could be lost in translation.

Additionally, the extended family members of the child should be consulted with in order "to identify and provide family structure and support for the Indian child, to assure cultural connections, and to serve as placement resources for the Indian child."²⁰⁴ These family members can be extremely helpful in assisting during parent-child interaction. Additionally, if a court cannot place an Indian child with a family member, the state should try to locate an Indian foster family for the child. A common barrier for Indian children entering foster care, in Illinois and nationwide, is the small number of Native American foster families. Developing programs to recruit Native American foster families could be a proactive way to prevent the cultural ties of a Native American child in foster care from being broken.²⁰⁵

197. *Federal and State Recognized Tribes*, NAT'L CONFERENCE STATE LEGISLATURES (Oct. 2019), <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> [https://perma.cc/WR9U-PAVP].

198. *WICWA Online Resource for Case Workers*, *supra* note 189.

199. A CHILD WELFARE PRAC. GUIDE FOR MEETING THE WICWA ACTIVE EFFORTS REQUIREMENT, *supra* note 186.

200. *WICWA Online Resource for Case Workers*, *supra* note 189.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. *Recruiting Families for Native American Children: Strengthening Partnerships for Success*, NAT'L RESOURCE CTR. FOR DILIGENT RECRUITMENT AT ADOPTUSKIDS (Mar. 2015), http://www.nrcdr.org/_assets/files/NRCDR-org/recruiting-families-for-native-american-children.pdf [https://perma.cc/KYX8-73G8].

Further, the Wisconsin active efforts guide states that the court and social services should identify “community resources offering housing, financial, and transportation assistance and in-home support services, in-home intensive treatment services, community support services, and specialized services for members of the Indian child’s family.”²⁰⁶ It is important to remember that many times, families within the child-welfare system are families in crisis. Poverty, substance abuse, and mental illness can often create many barriers to accessing necessary services. Social services agencies must not only provide information about community resources to Indian families, but they should also actively assist them in accessing the resources.²⁰⁷

Many barriers could prevent families from satisfying the requirements imposed by state agencies. Not having access to a phone could prevent a family from being able to schedule appointments that are necessary for their treatment plan.²⁰⁸ Further, not having access to a car, especially if the family lives in a rural area that lacks the infrastructure of public transportation, could make attending required appointments difficult, if not impossible.²⁰⁹ The Wisconsin Online Resource for Caseworkers states that “[i]t is up to the county [or] state caseworker to assist in overcoming these barriers by assisting in scheduling appointments and arranging transportation.”²¹⁰ The Wisconsin Online Resource for Caseworkers goes on to describe a case involving a mother who “had isolated herself from extended family.”²¹¹ After her child had been in out-of-home care for eighteen months, the assigned tribal worker convinced the grandmother to join a family team.²¹² Along with the child’s grandmother’s support, “the mother was able to reconnect with her family, make positive changes, and was reunified four months later.”²¹³

Finally, the active efforts guide stresses that the court should consider “alternative ways of addressing the needs of the Indian child’s family... if services did not exist or if existing services were not available to the family.”²¹⁴ Some have criticized the child-welfare court system as providing

206. A CHILD WELFARE PRAC. GUIDE FOR MEETING THE WICWA ACTIVE EFFORTS REQUIREMENT, *supra* note 186.

207. *WICWA Online Resource for Case Workers*, *supra* note 189.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *WICWA Online Resource for Case Workers*, *supra* note 189.

213. *Id.*

214. A CHILD WELFARE PRAC. GUIDE FOR MEETING THE WICWA ACTIVE EFFORTS REQUIREMENT, *supra* note 186.

“boilerplate” treatment plans.²¹⁵ When an Indian child comes before the court during a child custody proceeding, state actors must tailor the remedial efforts to fit the needs of the child and the family.²¹⁶ It is especially important to focus on services that support the cultural needs of the child.

Ultimately, the purpose of the ICWA was to prevent abuses by state actors and the courts in the removal of Native American children from their families and communities. The BIA Guidelines were groundbreaking. However, it is not only important to recognize the legal distinction between active efforts and reasonable efforts; courts and child-welfare agencies must understand the practical difference as well. Illinois can implement meaningful changes by not only recognizing the difference between active efforts and reasonable efforts, but also promulgating educational materials and implementing training for the state actors that handle cases involving Native American children and families. The Wisconsin legislature recognized the deficiencies within its child-welfare system and worked to remedy the situation. The Wisconsin active efforts guide serves as a great example of how state actors can work to ensure that an Indian child’s best interests are met.

CONCLUSION

The assaults on our communities and against our children, it continues today. When our children are lost, they languish in care. The disproportionality of the numbers of our children who are in extended care, who do not return home, are horrific and wrong and ICWA is in place to protect us from that. Sometimes people say that the issue is too complex and when I hear that word, I think about my mother dying. I think about my grandmother being murdered. I think about my great-grandparents, and I think about our ancestors that have prayed for us, as children, as great-grandchildren, and as far down as they could think ahead. What ICWA brings to our communities is the hope that our

215. See, e.g., Annette R. Appell, *Protecting Children or Punishing Mothers: General, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 601 (1997) (“Instead of offering meaningful assistance, caseworkers too often take a cookie cutter approach to the families and their problems.”); Kathleen A. Bailie, *The Other Neglected Parties in Child Protective Proceedings: Parents in Poverty and the Role of Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2319 (1998).

216. GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT, *supra* note 120, at 42-43.

children are going to be connected to us and not lost to us forever.²¹⁷

For almost forty-one years, the ICWA has served as a critical protection for Native American families and children. The Act has been described as the gold standard in child-welfare policy.²¹⁸ The BIA's release of a Final Rule and new Guidelines in 2016 was a step in the right direction for providing justice to Indian children. However, the work is not over. State courts and agencies should work for uniform application and cultural sensitivity when applying the ICWA.

The future of the ICWA is currently at a crossroads. While many support the purpose of the ICWA, there are also those who greatly oppose it. Overall, attorneys, judges, and social services workers should be mindful that the new ICWA Rule does exist and it is binding. Within the coming years, more changes to the ICWA will likely occur. The different applications of the ICWA among state courts is an issue that is evolving, for those working in state courts and those who are interested in Indian affairs. However, for now, courts and practitioners within Illinois should be aware of the new rules and the requirement for active efforts.

The 2016 Guidelines and Final Rule are a significant departure from the ways of the past. It is an attempt to right old wrongs and ensure justice by establishing uniformity. However, just as history has demonstrated, the laws are only successful if appropriately applied. While the Guidelines provide that active efforts, rather than reasonable efforts, should be utilized, a number of states, like Illinois, have applied their typical reasonable efforts standards in ICWA cases and commentators have noted that many attorneys, judges, and child-welfare officials are either unaware that the ICWA uses a different standard or they believe that the difference is unimportant.²¹⁹ The ICWA may never be a model of perfect state compliance. Nevertheless, steps can be taken to improve compliance and remedy the issues created when the ICWA is not followed. Illinois should recognize that the new Guidelines and Final Rule were created with Native American children and families in mind, and the processes within the rules must be followed to achieve tangible benefits and results.

217. National Indian Child Welfare Association, *supra* note 1.

218. *About ICWA*, *supra* note 5.

219. See Megan Scanlon, *From Theory to Practice: Incorporating the Active Efforts Requirement in Indian Child Welfare Act Proceedings*, 43 ARIZ. ST. L.J. 629, 640-43 (2011).