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**INDIGENOUS GENOCIDAL TRACINGS: SLAVERY, TRANSRACIAL
ADOPTION, AND THE INDIAN CHILD WELFARE ACT**

A dissertation submitted in partial satisfaction
of the requirements for the degree of

DOCTOR OF PHILOSOPHY

in

HISTORY OF CONSCIOUSNESS
with an emphasis in AMERICAN STUDIES

by

Soma de Bourbon

June 2013

The Dissertation of Soma de Bourbon is
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Vice Provost and Dean of Graduate Studies

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Abstract

Indigenous Genocidal Tracings: Slavery, Transracial Adoption, and the Indian Child Welfare Act

by

Soma de Bourbon

Indigenous Genocidal Tracings: Slavery, Transracial Adoption, and the Indian Child Welfare Act is a feminist, interdisciplinary history that traces the genealogy of U.S. property interests in Indigenous people from enslavement to the continued transracial adoption of Native children. The interconnection of Native history with that of Black Americans is interrogated, paying critical attention to the ways in which both communities continue to suffer overrepresentation in prisons, jails, juvenile detention centers, reproductive control programs, and child welfare systems (foster and adoptive care).

In contrast to the work on Native transracial adoption (TRA) that has focused almost exclusively on outcome, the dissertation argues that Native TRA constitutes a group-based harm and situates it within the active process of settler colonialism and genocide. Specific attention is paid to slavery, land dispossession, boarding schools, adoption programs (such as the Indian Adoption Project and the Mormon Placement Program), and the creation of “unfit” women and “unwanted” children. Drawing on the Association on American Indian Affairs archives, *Indigenous Genocidal Tracings*

argues that the ways in which putatively “unfit” Native women fought back were the impetus for one of the most important federal Indian laws ever passed by Congress, The Indian Child Welfare Act (ICWA).

The dissertation’s chapters investigate the history of ICWA and the ways that state courts continue to violate ICWA’s intentions by circumventing it through judicially created exceptions such as the Existing Indian Family. Through personal interviews with members of the Christian Alliance for Indian Child Welfare (CAICW), an organization that works to defeat ICWA, the author highlights the way CAICW’s work can be seen as an example of the current landscape of ownership over Native people. *Indigenous Genocidal Tracings* ends with the work of the First Nations Repatriation Institute and its Director and co-founder Sandy White Hawk to illustrate not only the amazing survivance of Native people, but also the fact that Native people continue to find Native-centered ways of ameliorating the harmful effects of transracial adoption and colonization.

Dedication

To my brother David de Bourbon, whose love continues to guide me

1964-1979

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I am indebted to my children: Kaya, Fiona and David for being in my life and for always believing in the strength of their mother. They have endured ten years of graduate school, even when they wished it was over, and continued to love and support me. My other two children, Lily and Shane (my niece and nephew), have also put up with this never-ending regime of school. Other family members have also offered their love: my mother, Elaine, my sisters, Rain and Antara, and my brothers, Arjun and Kiva. In particular, my sister Rain has been by my side through this process, and if it were not for her emotional support, I would not have had the courage to finish this degree.

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The work of many organizations is key to the continued strength of tribal communities, and to my dissertation, and I am particularly grateful to the National Indian Child Welfare Association and the Association on American Indian Affairs for taking the time to share their knowledge with me.

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Introduction

Moving Away From Outcome

Three years ago, my then eight-year-old daughter came home from her elementary school in a northern California town with a handout on Ohlone legends. The content did not appear particularly problematic. However, I was skeptical about my daughter learning Native California history from this particular teacher, who had previously demonstrated her lack of knowledge on Indigenous histories. I cajoled myself into optimism, but my past experiences of racism within the school system remained salient in my thoughts.¹

In the weeks following, I discovered that the teacher intended to have the children write an “authentic” Ohlone legend, which they were to render into a school play. I was concerned that this was going to end poorly—anytime white people get together and dress as Indians, it cannot end well. I was perplexed regarding the teacher’s sense of entitlement and her willingness to make up a myth of another culture. I questioned whether the school would allow the children to make up a Black, Chicano, Chinese, Polish, German, or any other cultural legend.² I initially thought

¹ My own childhood was filled with remarks by school children such as “You’re not a ‘real’

² Cheryl I. Harris, “Whiteness as Property,” *The Harvard Law Review* 106, no. 8 (1993): 1707-1791, accessed May 17, 2011, <http://www.jstor.org/stable/13,41787>. Cheryl Harris argues that we should use the term Black as opposed to African American. For the most part I use the term Black, but I also use African American and Black American interchangeably.

that the school would not participate in such a blatant racist enactment. I assumed, for example, that there would be a lawsuit if the school dressed children like African Americans (even without Blackface) and instructed them to make up an authentic legend; yet, I found the issue to be more complex.³ For instance, it was not long ago that Blackface was in vogue for the white working-class, and although instances of Blackface still occur, most academics condemn this racist practice.⁴ The sentiment around “dressing Indian” is, unfortunately, all too common and has not gained a similar recognition as racist. Another example of this racial ridicule, and where a protracted battle continues to be fought by Native activists, is the use of Indian mascots, including accouterments such as plains headdresses, moccasins and “Indian”

³ One example of the complexity of cultural enactment can be seen at the nearby middle school where my stepdaughter attends school. The middle school requires all sixth graders to study Egypt, which seems innocuous enough, yet the children must create a “living museum” by dressing as Egyptians (they cannot pass the assignment without dressing up). On the day of the “living museum,” my stepdaughter’s teacher played “Walk Like an Egyptian” by the Bangles and aired a video of Steve Martin dressed as an Egyptian telling jokes. The children laughed and jeered at the Egyptian enactments.

⁴ Roy Hurst, “The Legacy of Blackface Artists Take On Roots of Racist Performance Tradition,” National Public Radio (hereafter referred to as NPR), June 2, 2004, accessed Apr. 3, 2012, <http://www.npr.org/templates/story/story.php?storyId=1919122>. Blackface started in the early part of the 1800s, continued into the 1970s. One example of this is the Black and white Minstrel Show, a program run on the BBC. There continue to be instances of Blackface, and an example from last year is of a popular comedian who donned Blackface to interview Brigham Young University students for Black History Month; see Amber E. Hopkins-Jenkins, “Hot Topic: Blackface, Black History, and Brigham Young University: Rutgers Ford Fellow discusses racial stereotypes featured in controversial viral video,” *Rutgers Today*, Feb. 2, 2012, accessed Apr. 2, 2012, <http://news.rutgers.edu/medrel/q-and-a-hot-topic/hot-topic-2012/hot-topic-blackface-20120213>. Another recent Blackface controversy was over the photographs of model Lara Stone who was painted Black; see Lizzy Davies, “Outrage over Vogue photographs,” *The Guardian*, Oct. 13, 2009, accessed Apr. 2, 2012, <http://www.guardian.co.uk/media/2009/oct/13/french-vogue-photographs-outrage>.

dances, by sports teams.⁵ The U.S. has professional sports teams named *The Red Skins*, *The Indians*, *The Chiefs*, and *The Braves*, which Native people continue to protest against. There is also a car named the *Cherokee* and a motorcycle named the *Indian*.⁶ In a metaphorical representation of the 1800s when U.S. soldiers and citizens were massacring Indians and wearing their body parts (breasts, scalps, and skins), U.S. citizens continue to “wear” Indians (*Red Skins* or *Indians* shirts or hats) and “ride” on them (*Indian* motorcycles).⁷

With regard to the instance of “playing Indian” at my daughter’s school, I felt that I had to level a critique.⁸ My tipping point came when my daughter was selected to be the pet dog of the fictitious tribe! The performance setting was pre-colonization—therefore dogs had not been introduced into the “new world.”⁹

⁵ Suzan Shown Harjo, “Just Good Sports: The Impact of ‘Native’ References in Sports on Native Youth and What Some Decolonizers Have Done About It,” in *For Indigenous Eyes Only: A Decolonization Handbook*, ed. Waziyatawin Angela Wilson and Michael Yellow Bird (Santa Fe: School of American Research Press, 2005), 31-52; and *In Whose Honor* (smoking munchkin video, 1997). The use of Indian mascots to represent sports teams, from elementary schools to professional leagues, is something Native people are against.

⁶ Marchell J. Wesaw, “Finders Keepers? Adulteration of Native American Cultures in the Name of Profit,” *Cultural Survival* 18, no. 4 (1994), accessed May 4, 2012, <http://www.culturalsurvival.org/ourpublications/csq/article/finders-keepers-adulteration-native-american-cultures-name-profit>.

⁷ David Stannard, *American Holocaust: the Conquest of the New World* (New York: Oxford University Press, 1992). Stannard details some of the Indian massacres such as Sand Creek and Wounded Knee—where Indians were killed, scalped, mutilated, and their body parts were worn as war trophies by the U.S. army and its militia.

⁸ See the work of Philip J. Deloria, *Playing Indian* (New Haven: Yale University Press, 1998).

⁹ There were no domesticated dogs before Europeans came to this continent. This teacher did not like my explanation that there were no pet dogs pre-contact. She angrily asserted, “I have the right to do this! The children have worked very hard to create this story, and we are going to do this play. You have no right to tell me that I can’t do this!”

Unfortunately, Natives have been produced in normative streams to be like Tonto who, in the quintessential American TV show *The Lone Ranger*, has no language. Therefore, by speaking out, I was locating myself outside of their imagined role of a muted “invisible Indian” and was asserting my right to language, even if through a colonized tongue. I requested that the school not continue with their legendary enactment.¹⁰ The visceral, enraged response I received from teachers, parents, and staff was grater than I had anticipated. The white community congealed around the issue, and my protest seemed to fuel their already homogenized stance: keep Indians

My daughter’s school also had other problematic instances of placing Natives in the past. For example, the principal was a white woman that espoused feminist ideals and showed tolerance for many kinds of difference, yet she had the fifth and sixth graders dress as Indians, make spears, build tulle houses, and go to the beach to catch fish as a way of “studying” California Indians. There was no mention of living Indians. She also had the fifth and sixth graders go to Yosemite and spend two days and a night in a program called the Environmental Living Program (ELP). The ELP required the children dress as pioneers, with full dress codes enforced, and other 1800s people, including one Indian. The 1800s was not a peaceful time for Native peoples. The ELP supports Yosemite Park Services and legitimates their land claim to an area sacred to several tribes.

Both programs are framed as “honoring” Indians and the pioneers who were “first” in California. As Michelle Raheja points out, it would be easy to see how offensive it would be to have children dress as Nazis and Jewish Holocaust victims. Why then are other instances of similar magnitude and similar racial offensiveness not only tolerated but vehemently defended? How do race, class and gender intersect here? What does it mean to have a Native, Black, or Chinese girl attend this program dressed as a white settler? My daughter was assigned to be a white painter who had a great deal of money and could travel as she pleased. Kaya had to dress in “high status” clothing where she was barely able to move. The incident was offensive enough, but for her it was tragic—she ended up coming home and having a psychotic break where she thought she was the white woman character she had been “playing.” what does this mean? I don’t know, but I have a feeling that historical trauma is at play in her experience. What does it mean for a Black boy in her class who played a white cavalry lieutenant in charge of Indian removal?

¹⁰ I did not do as my partner, also Indian (with a higher blood quantum than I have but also not enrolled), suggested. He advocated staging a protest and inviting the newspaper. I felt that I could not live with the hate that Kaya would receive for those actions. I did, however, pull my daughter out of the class for a period of days, but the teacher refused to take my daughter’s name off of the “story” that she created, saying that my daughter was vital to the group and that she had agreed to be the tribe’s dog. Although I held my daughter out of school and didn’t attend, the teacher was insistent that I have a copy of the play. The children teased my daughter for not wanting to participate. The excitement and fervency with which the parents, teachers, and children participated in and defended their right to do this play was striking.

in the past.¹¹ They went forward with the enactment, and it took place in front of the entire school. The collective white norm came together: the principle participated, the music teacher made up “Indian” songs for the children to sing, a dance was choreographed by the parents, and a collective effort was garnered to produce elaborate “Ohlone” outfits. My point is that these racial mockeries have the effect of creating ownership over Indigenous culture, which legitimates any land, resource, or military operation that the U.S. undertakes over Native peoples.

The play articulated an exhibition of white domination over Indigenous people and their histories, and it affirmed Indigenous disappearance. It was performed with racially stereotypical Indians fully expressed: Hollywood style headdresses, scantily clothed girls, and imagined songs and dances. White patriarchy was superimposed upon the Native landscape: the “Indian” boys rescued the “Indian” girls from peril.

Unfortunately, my daughter’s situation is not an anomaly—it is the norm. When I discussed my daughter’s situation with other Indigenous people in the northern California area, I found countless stories mirroring mine. I also heard Native scholar Michelle Raheja speak about a similar instance of Indigenous “honoring” at her daughter’s school in Southern California.¹² Raheja’s daughter’s school performed

¹¹ Beverly Daniel Tatum, *Why Are All the Black Kids Sitting Together in the Cafeteria? and Other Conversations About Race* (New York: Basic Books, 1997). Psychology professor Beverly Tatum explains that: “Native American communities are typically portrayed as people of the past, not of the present or the future. This depiction prevails even in places where there is a large and visible Indian population” (Ibid., 150).

¹² Michelle Raheja, “How Critical Ethnic Studies Informs and Shapes Other Disciplinary Formations” (Closing Plenary for conference *Critical Ethnic Studies and the Future of Genocide: Settler Colonialism/ Herteropatriarchy/ White Supremacy* conference, UC Riverside, March 2011),

an elaborate celebration of Thanksgiving Day—all the children came to school dressed as either Indians or Pilgrims and performed a food sharing ritual. Raheja wrote a letter requesting that the school reconsider this “honoring.” When the school refused and parents mounted a considerable attack on her, with derogatory remarks and letters, Raheja organized a protest with other California Natives at the school’s “Thanksgiving.” Raheja underscored the fact that we would not tolerate racial mockery of other minority groups: “I’m sure you can appreciate the inappropriateness of asking children to dress up like slaves (and kind slave masters), or Jews (and friendly Nazis), or members of any other racial minority group who has struggled in our nation’s history.”¹³ Raheja not only received national attention, she also received hate mail, sinister phone calls, and death threats for her protest of the school’s pageant.

I began to comprehend the enactment of the “authentic” Natives at my daughter’s school, at Raheja’s daughter’s school, and at countless schools across the

accessed May 15, 2012, http://mainstream.ucr.edu/CESA_2011_Sat_PM.mov. Although I heard her speak live, her talk can also be listened to online at the web address listed above.

¹³ Seema Mehta, “Insulting stereotype, or harmless holiday feast? District agrees to drop costumes from kindergarten Thanksgiving party. Some parents insist it’s political correctness gone awry,” *Los Angeles Times*, Nov. 25, 2008, accessed Mar. 3, 2013, <http://articles.latimes.com/2008/nov/25/local/me-thanksgiving25>; Seema Mehta, “Woman is targeted by hate e-mails: Michelle Raheja is dismayed by backlash after she objected to Claremont schools’ holiday tradition,” *Los Angeles Times*, Dec. 6, 2008, accessed Mar. 5, 2013, <http://articles.latimes.com/2008/dec/06/local/me-claremont>; and Alicia Garcia, “Return to the Circle: Experiences of Transracial Adoption by American Indians” (mater’s thesis, College of Saint Catherine and University of Saint Thomas, 2004). Alicia Garcia’s thesis mentions that the Native transracially adopted adults she studied stated that they experienced racism in school. Garcia states, “In many cases, school was the first place that the respondents experienced racism . . . The respondents had to endure watching white children ‘dress up like Indians’, ‘making the war cries’, and ‘make a mockery of Indian people’” (Garcia, “Return to the Circle,” 39).

U.S. as assertions of rights rather than attacks on individual Indians. It is through these assertions of property interests in Natives that schools continue to justify these displays of power. These pre-contact portrayals of Indigenous people affirm the Native's disappearance while simultaneously reinforcing white ownership over their current existence. Natives are then legible only when existing in a space that is always already 500 years in the past. The right to authenticate Indigenous people through claims to their voice, culture, and history, rests with the Lone Ranger—the white community.¹⁴

Teaching the history of Indigenous people is important for all teachers, but it must be taught without rendering Indigenous people invisible and freezing them in a particular historical moment. If the only Indians children can imagine are Indians from hundreds of years ago, what does it mean for *living* Indigenous children? It renders them out of existence and into what feminist scholar Anne McClintock calls “anachronistic space” because Indigenous peoples “are not supposed to be spatially there.”¹⁵ It then follows that Indigenous people are inextricably bound to a liminal space 500 years in the past. Therefore, when I emerged to challenge a white teacher's

¹⁴ Margaret Jacobs, *Mother to a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia, 1880-1940* (Lincoln: University of Nebraska Press, 2009); and Andrea Smith, *Conquest Sexual Violence and American Indian Genocide* (Cambridge: South End Press, 2005). Margaret Jacobs stresses the importance of recognizing the historical relationship of the white matriarch in the history of Native peoples, and Andrea Smith stresses the need to understand “playing Indian” and “white shamanism” as forms of sexual violence.

¹⁵ Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest* (New York: Routledge, 1995), 30.

authority to define Indigenous histories, identities, dances, stories, and songs, I occupied anachronistic space and had to be put firmly back in my place.

Why begin a dissertation on genocidal tracings and transracial adoption with instances of racial mockery? The answer lies in the underlying ideology and material consequences it has. The ideology of asserting control over Native people through mockery may seem benign, yet when coupled with other forms of control, this logic gains traction and becomes physical domination. For example, if society can ignore Natives in their communities, then Natives can be ignored in schools, work sites, and courts. These assertions of rights morph into physical control with the removal and transracial adoption of Native children. The racial mockery that schoolchildren learn and the underlying text of a society that is always already belonging to them translates into power over Native peoples lives when these same children grow up to become attorneys, judges, senators, and child protective service workers.

It is within the context of racial mockery as control over a people that the situation at my daughter's school can be seen as not just an example of racism—but as an assertion of property rights. Legal scholar Cheryl Harris meticulously traces the history of how whiteness has been legally claimed as a property interest—it “evolved into a form of property, historically and presently acknowledged and protected in American law.”¹⁶ Harris argues that whiteness as a property right has delineated from different genealogies for Native and Black peoples. She argues that “[t]he origins of

¹⁶ Harris, “Whiteness as Property,” 1730.

whiteness as property lie in the parallel systems of domination of Black and Native American peoples out of which were created racially contingent forms of property and property rights.”¹⁷ Harris traces the way the law has affirmed this property interest:

The legal legacy of slavery and of the seizure of land from Native American peoples is not merely a regime of property law that is (mis)informed by racist and ethnocentric themes. Rather, the law has established and protected an actual property interest in whiteness itself, which shares the critical characteristics of property and accords with the many and varied theoretical descriptions of property.¹⁸

Here Harris argues that it is Native land dispossession that leads to their status as a property of white people, yet I argue that it is not only from their land dispossession but also from their extensive enslavement by European nations that they become a commodity to white society. I demonstrate the ways in which slavery for Native people is entangled with that of Black Americans and how this entanglement can be linked to current shared disproportionalities in the criminal justice system and the child welfare system.

I want to suggest that Native child welfare has its roots in captivity and state control. There are ways that the state has maintained its colonial relationship with Native peoples, particularly Native women, and these relations continue to produce violence in Native communities. In particular, I am looking at the child welfare system, where Native children are overrepresented and where the state continues to

¹⁷ Harris, “Whiteness as Property,” 1714.

¹⁸ Ibid., 1724.

play a significant role. I am interested in exploring the tensions between the invisibility of state intervention, control, and surveillance of the “private” spaces of Native women’s lives by way of reproductive control (sterilization, IUDs, and taking of children), and the hypervisibility of state sponsored solutions to these issues, such as the Indian Child Welfare Act (ICWA) of 1978, which is framed as a solution to state intervention. Although I am a strong supporter of ICWA, and when tribes have retained jurisdiction over child welfare through ICWA provisions, they have had success, yet I am also wary of any solution that continues to rest power in state courts—the same courts that were passing the decrees to remove countless Indian children in the 1950s, 1960s, and 1970s. There is wide acceptance that over 25-35% of Native children were removed from their homes and placed in foster care, adoptive care, or boarding schools.¹⁹ Although thousands of Native children were transracially adopted, there has been little written about the subject.

¹⁹ This number has been documented and is widely cited; see the Association on American Indian Affairs archives, microfilm, Stanford University; John G. Red Horse, et al., “Family Preservation: Concepts in American Indian Communities,” Casey Family Foundation (2000), 17; Kathleen A. Earle, “Child Abuse and Neglect: An Examination of American Indian Data,” Casey Family Foundation (Dec. 2000), 15-17; Kathleen A. Earle and Amanda Cross, “Child Abuse and Neglect Among American Indian/Alaska Native Children: An Analysis of Existing Data,” Casey Family Foundation (Dec. 2001), 15; and Steven Unger, “The Indian Child Welfare Act of 1978: A Case Study” (PhD diss., University of Southern California, 2004), 167-185; William Byler, “Statement of William Byler, Executive Director, Association on American Indian Affairs,” U.S. Senate (1974) Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Indian Child Welfare Program. Hearings on Problems that American Indian Families Face in Raising their Children and How These Problems are Affected by Federal Action or Inaction*, 93rd Congress, 2nd Session, 14-32.

Dominated By Outcome

What has been published on the transracial adoption of Native children has focused almost exclusively on the outcome of the adoption—whether or not the child turned out well adjusted. Until a few years ago, there was only one scholarly book published: *Far from the Reservation*, by David Fanshel (1974).²⁰ *Far from the Reservation* presented the findings of a study of Indian transracial adoptees who were placed through a program called the Indian Adoption Project (IAP), which was a partnership between the U.S. government’s Bureau of Indian Affairs (BIA) and the Child Welfare League of America (CWLA). Fanshel noted that the Indian Adoption Project’s purpose was to “stimulate the adoption of American Indian children on a nation-wide basis.”²¹ It ran from 1958 until 1967 and placed Indian children, from birth to eleven years old, in white homes.²² Steven Unger, a political historian, estimates that “altogether, from the 1950s to the 1970s, the Child Welfare League of America was responsible ... for the placement of approximately 650 Indian children in non-Indian homes.”²³ Unger notes that thousands of Indian children were adopted during these three decades through other similar programs across the United States. Fanshel followed 96 of the families who adopted Native children through the CWLA during this period. He assessed the “outcome” of the family’s adoption by doing

²⁰ Fanshel, *Far From the Reservation* (New Jersey: The Scarecrow Press, Inc., 1972).

²¹ *Ibid.*, 35. The Indian Adoption Project is discussed further in Chapter Two.

²² *Ibid.*, 34.

²³ Unger, “The Indian Child Welfare Act,” 168.

interviews with the adoptive parents over a five-year period. The primary measures of “success” were based on how the adoptive parents felt the adoptees had adjusted, and Fanshel concluded that the adoptions were an overwhelming success.²⁴

Like Fanshel, Catherine Roherty also examined the outcome of Native transracial adoption. Roherty interviewed twelve adoptive families in 1968, and reported that the “outcome” of the adoptions had been favorable—ten of the twelve families would adopt again.²⁵ In the 1970s and 1980s, Rita Simon and Howard Altstein, white sociologists, dominated the “outcome” approach to transracial adoption.²⁶ Simon and Altstein conducted large-scale research on the transracial adoption (TRA) of minority children (primarily African American and Native

²⁴ Rita Simon and Howard Altstein, *Transracial Adoption* (New York: Wiley, 1977). Simon and Altstein note that Fanshel did not do research with Native adoptees directly: “It is important to emphasize that all these impressions were based on the parents’ responses to their children’s adjustment over three different time periods. The professional evaluation of parental impressions (referred to as the Overall Child Adjustment Rating) was the yardstick by which the children’s adjustments were viewed, and it served as the basis for predictions for the future. At no time did Fanshel involve the children in attempting to predict future adjustments” (Ibid., 30).

²⁵ Catherine Roherty, “Exploratory Project on Outcomes of Adoption of Indian Children by Caucasian Families” (report to the Division of Family Services, Wisconsin State Department of Health and Social Services, 1968).

²⁶ Rita Simon and Howard Altstein, *Adoption Race and Identity: From Infancy Through Adolescence* (New York: Praeger, 1992); Rita Simon and Howard Altstein, *Intercountry Adoption: a Multinational Perspective* (New York: Praeger, 1991); Rita Simon and Howard Altstein, *Transracial Adoption: A Follow Up* (Lexington: Lexington Books, 1981); Rita Simon, Howard Altstein and Marygold Melli, *The Case for Transracial Adoption* (Washington: American University Press, 1994); and Rita Simon and Rhonda M. Roorda, *In Their Own Voices: Transracial Adoptees Tell Their Stories* (New York: Columbia University Press, 2000). In the previous list of books, one of the primary groups of subjects is Native transracial adoptees. In *The Case for Transracial Adoption*, Simon, Altstein and Melli advocate for transracial adoption. Although Simon and Altstein look at outcome from the viewpoint of the parents—they look at the perceived racial belonging of child adoptees—they are still assessing the “outcome” of transracial adoptions. Their scholarship advocates for transracial adoption as the solution to the overrepresentation of children of color in the child welfare system.

American), when few scholars were interrogating transracial adoption.²⁷ In 1972, Simon and Altstein studied 204 families (from five Midwestern states) who had adopted at least one child transracially. For their research, they interviewed 388 children between the ages of three and eight years of age. They used standardized exams to assess the children's perception of their own racial identity. Simon and Altstein found that, for the most part, the adoptees were without racial prejudice:

We found black children who did not think that white children were smarter, cleaner, or more attractive than themselves. We found white children who did not think that black children were dumber, meaner, less attractive, and so on. In other words, our results demonstrated that black and white children responded in similar fashion to traditional questions about which doll or which children they would like to play with, or have as a friend, or looks bad.²⁸

It was then, with the ammunition of positive adoption outcome, that Simon and Altstein published their findings in *Transracial Adoption* (1977) in which they confirmed for transracial adoption advocates that white homes were, in fact, a beneficial place for “neglected” minority children.

Simon and Altstein followed the same group of transracially-adopted children for many years (1972 to the early 1990s). Their second study of this group (1979) was included in *Transracial Adoption: A Follow Up* in which they concluded: “the great majority of the parents continue to believe that they have made a wise and wonderful

²⁷ Simon and Altstein, *Transracial Adoption: A Follow Up*, 1. The primary groups they looked at were African American and Native American, yet they included a small number of Korean, Eskimo, and Mexican children.

²⁸ *Ibid.*, 1.

choice in deciding to adopt transracially. Their lives have been enhanced, enriched, and made more joyous by their decisions.”²⁹ However, they did note that not all of the parents were “joyous” about their decision to adopt: “but for some of our parents, less than a quarter of them, the problems have been greater than they had anticipated, and bitterness and disillusionment have become everyday emotions. But seven years cannot tell the whole story.”³⁰ Although seven years may not have been long enough to “tell the whole story,” it was clear that some families were quite unhappy with the choice they made to transracially adopt. In 1991, Simon and Altstein published their last book of findings from this particular group of children they began studying in 1972: *Transracial Adoption: From Infancy Through Adolescence*. In this final affirmation of the success of these adoptees, they declared that the children had indeed “turned out well,” and they unambiguously gave their endorsement for transracial adoption.

Although Simon and Altstein conducted extensive research on transracial adoption, they almost completely ignored the reason the child welfare system was dominated by children of color. In *The Case For Transracial Adoption* (1994),

²⁹ Simon and Altstein, *Transracial Adoption: A Follow Up*, 5.

³⁰ Ibid. It is unclear what they mean by “less than a quarter.” Do they mean twenty-four per cent, twenty percent, or five percent? It seems that if they are using twenty five percent as a marker, they found that the number was close to twenty-five percent who were dissatisfied with their adoption. I suppose that number is “good” for an outcome, but what if we are talking about actual people? What if we assume twenty-four percent of 143 families were unhappy—that would be roughly thirty-four families who were unhappy with their transracial adoption. That is a lot of children who are living with families who are unhappy with their choice to adopt. Are those children better off in a “permanent” family that doesn’t want them? I don’t know.

Simon, Altstein, and Melli outlined some of the arguments against transracial adoption and refuted them with “scientific evidence.” One of the groups specifically criticized in *The Case For Transracial Adoption* was the National Association of Black Social Workers (NABSW), which had articulated a very clear position against the wholesale transfer of Black children out of their communities to white foster and adoptive homes. Simon, Altstein and Melli argued that the NABSW was not only “militant” but had “never presented scientific data to support their position” against transracial adoption.³¹ Simon, Altstein and Melli further attempted to undermine the NABSW’s work by arguing that the “best interest of the child,” a standard in child welfare, had been met with transracial adoption:

The case for transracial adoption rests primarily on the results of empirical research. . . . The data show that transracial adoptions clearly satisfy the ‘best interest of the child’ standard. They show that transracial adoptees grow up emotionally and socially adjusted, and aware of and comfortable with their racial identity.³²

Simon and Altstein produced a prolific body of work to support their position on the transracial adoption of Native and Black children. Their work rests on looking at the individual child—on the individual transracial adoptee’s “outcome,” which became the benchmark for investigating transracial adoption.

Simon co-authored, with Sarah Hernandez, *Native American Transracial Adoptees Tell Their Stories* (2008), which differs from Simon’s previous work in that

³¹ Simon, Altstein, and Melli, *The Case For Transracial Adoption*, 51.

³² *Ibid.*, 51.

it is not presented as a study—it is a printing of the complete transcripts of twenty interviews of adult Native adoptees (it is unclear if these are the same adoptees she studied previously). It is the first and only book to provide full-length interviews of Native Adoptees. The book includes a very brief, general history, and only a cursory analysis of the interviews—the rest of the book is transcripts.³³ Besides the book of interviews, Simon’s work on Native adoptees has focused on identity and “outcome” as the measures of “success.” This narrowed focus has had consequences for the study of Native transracial adoption. It has resulted in concentrated efforts to prove that Native children, like African American children, also benefited from transracial adoption.³⁴ This hyperfocus on adoptee “success” has also resulted in the obfuscation of larger issues that are directly impacting the overrepresentation of Native children in the child welfare system—namely colonization and settler colonialism. If we could see the larger structure, it would make the claims of the “successful outcome” of Native transracial adoption suspect as further tools to eradicate Native peoples rather than benevolent acts.

³³ The interviews were structured with similar questions being asked to each participant, so it is relatively easy to pull out recurring themes. Although this book has Rita Simon’s name on it, unlike her previous work, it does not include much interpretation as to whether transracial adoption is positive or not.

³⁴ For work on the positive outcome of Black transracial adoption see Lucille J. Grow and Deborah Shapiro, *Black Children-White Parents: A Study of Transracial Adoption* (New York: Child Welfare League of America, Inc., 1974); and Lucille J. Grow and Deborah Shapiro *Transracial Adoption Today: Views of Adoptive Parents and Social Workers* (New York: Child Welfare League of America, Inc., 1975). Grow and Shapiro’s finding supported the benefits of transracial adoption. Some of the organizations at forefront of promoting Black transracial adoptions were the Children’s Service Center, the Open Door Society, Parents to Adopt Minority Youngsters, Adoptable Children, and Families for Interracial Adoption.

Although the studies that followed Simon and Altstein's also focused on "outcome," there was a shift to looking not at the families' perception of the children, or at the children's perception of themselves, but at the adoptees as adults. Rosalind Hussong's dissertation, "A Phenomenological Study of the Experience of Adult Transracially Adopted American Indians Who Have Been Reunited with Their Birth Parents" (1978), although still focused on the individual "outcome," is the first academic work to engage with adult Native adoptees. Hussong explores the experiences of five adoptees who were reunited with their birth parents.³⁵ Hussong, a Native adoptee herself, found that being transracially adopted did not affect Native adoptees more than other adoptees: "in general, the fact of being transracially adopted was no more of an issue for the subjects in this study than is the fact of being adopted for other adoptees."³⁶ She finds that all five of the subjects had "normal" childhoods, and all supported Native transracial adoption.³⁷ Hussong does not agree with the claim of genocide for the large number of Native children taken, which is a claim supported by many Native people. She writes, "[t]he findings of this research do not support the 'cultural genocide' argument."³⁸ Although she does not support the claim of genocide, she is also not investigating the situation of Native adoption from a

³⁵ Rosalind Hussong, "A phenomenological Study of the Experience of Adult Transracially Adopted American Indians Who Have Been Reunited with Their Birth Parents" (PhD diss., Union Institute and University, 1978).

³⁶ Hussong, "A phenomenological Study," 118.

³⁷ *Ibid.*, 115.

³⁸ *Ibid.*, 119.

macro or community level. Her scope is narrower—specifically, she focuses on Native adoptee identity formation. She finds that Native adoptees find themselves between white and Native worlds, and they felt they had access to both communities:

Although the subjects experienced little conflict between the two cultures, they did perceive themselves to be somewhere in the middle between the two cultures. This being in the middle was felt to be a positive attribute in that it gave them the special ability to see both sides, understand both sides, and choose the best from both cultures.³⁹

As Hussong notes, Native adoptees occupy a middle space between two cultures that they find to be positive.

While Hussong finds that belonging between two cultures is positive for adoptees, Jeffrey J. Peterson argues that it is problematic. Peterson, writing almost thirty years after Hussong, also conducted a phenomenological study: “Lostbirds: An Exploration of the Phenomenological Experience of Transracially Adopted Native Americans” (2002). He interviewed twelve Native adoptees between the ages of twenty-six and fifty-five.⁴⁰ Like Hussong, Peterson looks at Native adoptee

³⁹ Hussong, “A phenomenological Study,” 100.

⁴⁰ Jeffrey J. Peterson, “Lostbirds: An Exploration of the Phenomenological Experience of Transracially Adopted Native Americans” (PhD diss., University of Wisconsin, 2002), 38. The twelve adoptees he interviewed were from eleven different tribes in the U.S. and Canada. One of the ways that he contacted people was at the First Annual First Nation’s Repatriation Institute (previously the First Nation’s Orphans Association) Powwow in 2001. Peterson’s work is short, 110 pages, and lacks some of the breadth and depth of Rosene and Hussong’s dissertations. He does not seem to be aware of earlier works that looked at the transracial adoption of Natives; for example he does not mention the work of Hussong, Rosene, Roherty, and Robert Bensen, ed., *Children of the Dragonfly: Native American Voices on Child Custody and Education* (Tucson: The University of Arizona Press, 2001)—all of whose work was on related topics and conducted prior to his. Peterson writes, “A review of the literature reveals little empirical research regarding the ethnic identity of transracially adopted adults. ... Only one study addresses the ethnic identity of adult adoptees of American Indian heritage” (Peterson, “Lostbirds,” 15).

belonging, yet he finds that belonging to two worlds is not positive for the Native adoptees he interviewed:

One of the main struggles emerging from transracial adoption resulted from a sense of not belonging to either the Indian or non-Indian world. They described a perpetual sense of being caught in a position between two-worlds, having not been fully accepted by either their culture of origin or the culture represented by their adoptive families.⁴¹

Peterson's findings that Native adoptees find themselves in a liminal space of belonging between Native and white worlds is an issue that Susan Devan Harness addresses in her study of transracially adopted Natives. Both Peterson and Harness are interested in attending to identity and belonging, and they both worked with Sandy White Hawk and the First Nations Repatriation Institute, an organization that works with Native adoptees to support them in healing, as a way of accessing Native adoptees for interviews. Harness, like Peterson, comes to the conclusion that Native adoptees find themselves caught between cultures. Her book, *Mixing Cultural Identities through Transracial Adoptions: Outcomes of the Indian Adoption Project (1958-1967)*, appeared in 2008 and was the first book-length study of transracial Native adoption since Fanshel's *Far from the Reservation* (1979).

Harness offers an anthropological investigation of the outcome of the Indian Adoption Project, the same project that Fanshel examined. Like Fanshel, Harness focuses on identity formation and how the adoptees "turned out," but she questions how the participants belong, or do not belong, to Native or non-Native cultures.

⁴¹ Peterson, "Lostbirds," 85.

Harness questions this lack of belonging that many Native adoptees face, and some of her research questions became: “Why is it that so many American Indian transracial adoptees feel like they do not belong “anywhere” meaning in either ethnic group? And why are our claims to American Indian identity questioned or disregarded?”⁴² She is particularly interested in the boundaries that exist within and between these groups, and how her participants negotiated these complicated connections or disconnections. She argues that, “both American Indian and Euro-American ethnicities are defined by their respective boundaries.”⁴³

Harness argues that transracial adoptees occupy a space at the boundaries of two cultures, and that: “Adoptees find the Euro-American boundary impermeable because of being ‘Indian’ and the American Indian boundary impermeable because of a lack of cultural knowledge, negative consequences of capital accumulation, and being too ‘white.’”⁴⁴ She asserts that the reason that transracial adoptees have such a difficult time in the world is because they cannot “fit” in either ethnic group, and

⁴² Susan Devan Harness, *Mixing Cultural Identities Through Transracial Adoption: Outcomes of the Indian Adoption Project (1958-1967)* (Lewiston: The Edwin Mellen Press, 2008), 3. Harness conducted three types of data collection: “freelisting, life histories, and a semi-structured telephone survey” (Harness, *Mixing Cultural Identities*, 3). She completed 45 freelisting, which consisted of three groups: white, Native, and Native adoptees, 9 life histories, and 25 phone interviews. There was some overlap in participation; meaning, someone could participate in more than one part of the study—they could participate in the freelisting exercise and in the life history interview. The freelisting exercise consisted of asking the three different groups to list five words to describe white, or Caucasian American, and five words to describe American Indian (Ibid., 75).

⁴³ Ibid., 3.

⁴⁴ Ibid., 144.

when they come to the boundaries of white and Native cultures, they are granted access to neither.

Alicia Garcia's master's thesis in Social Work, "Return to the Circle: Experiences of Transracial Adoption by American Indians" (2004), does not specifically look at this border between Native and white cultures that is either permeable or impermeable depending on the investigator, yet she does focus on identity, as so many researchers have.⁴⁵ Her scholarship builds on Hussong and Peterson's in that it involves identity and belonging, yet it differs in approach. Garcia conducted qualitative interviews and pulled out common themes. One of her findings is that there was a general "positive" outcome for the adoptees, yet all of the adoptees she interviewed (10) were against the transracial adoption of Native children.⁴⁶

Another work, which explores similar issues as Hussong, Peterson, Harness, and Garcia is Raven Sinclair's dissertation, "All My Relations ~ Native Transracial Adoption: A Critical Case Study of Cultural Identity" (2007), which investigates the cultural identity of Native adoptees in Canada who were placed during the "Sixties Scoop" (a term used to describe the large scale apprehension and adoption of

⁴⁵ Alicia Garcia conducted ten interviews with Native transracially adopted adults (she interviewed eight females, one male, and one transgender person). Garcia, like Peterson, ignores much of the previous work on Native transracial adoptees. Garcia writes, "After an extensive search utilizing databases at various university, colleges and public libraries, the researcher only found two studies that focused primarily on transracially adoption American Indians" (Garcia, "Return to the Circle," 13).

⁴⁶ Ibid., 76.

Aboriginal children in Canada from 1950s to the early 1980s).⁴⁷ Sinclair is primarily concerned with the issue of Native identity and outcome. Sinclair is writing against the concept of a diagnosis called “Split Feather Syndrome” that was given to Native transracial adoptees who were suffering from an array of psychological issues related to being transracially adopted. The term Split Feather comes from a study done by Carol Locust, “Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children” (2000).⁴⁸ Locust’s scholarship illuminates the serious psychological damage that many Native transracial adoptees have suffered. Locust looked at twenty Native adoptees, between the ages of 19-72, and found that 19 of the 20 adoptees “had moderate to severe psychological problems.”⁴⁹ Locust introduces the term Split-Feather as a psychological diagnosis to account for these issues.

Locust finds that Enrollment is important for all of the adoptees that she worked with: “Tribal affiliation - being enrolled in a tribe - was a serious subject for all twenty of the Split Feathers. Sixteen of them had had their enrollment canceled when they were adopted into non-Indian homes.”⁵⁰ Although Locust brings up

⁴⁷ Raven Sinclair, “All My Relations: Native Transracial Adoption: a Critical Case Study of Cultural Identity” (PhD diss., University of Calgary, Canada, 2007), 28.

⁴⁸ Carol Locust, “Split Feathers: Adult American Indians Who Were Placed in Non-Indian Families as Children,” *OACAS Journal* 44, no. 3 (2000).

⁴⁹ *Ibid.*, 3-4. Fourteen of the twenty adoptees were taken from their biological families when they were between birth and two years old. Locust finds that all of the twenty adoptees felt “negative feelings” about being “different” before the age of 8, and all felt it was wrong for non-Natives to adopt Native children.

⁵⁰ *Ibid.*, 18.

enrollment and other issues, she brings them up as part of her primary concern, which is the psychological damage being done to Native adoptees. Locust believes that there are severe problems with placing Native children in non-Indian homes:

This study has revealed several pieces of information: (1) Placing American Indian children in foster/adoptive non-Indian homes puts them at great risk for experiencing psychological trauma leading to the development of long-term emotional and psychological problems in later life; (2) The cluster of long-term psychological liabilities exhibited by American Indian adults who experienced non-Indian placement as children may be recognized as a syndrome.⁵¹

The syndrome that Locust recognized became known as the Split Feather Syndrome, which recognized the negative, long-term psychological consequences for Natives placed in non-Native homes.

Although some Native adoptees embrace the use of the term Split Feather, others find it problematic. Sinclair, a Native transracial adoptee, disagrees with the use of the term and argues that by placing a psychological diagnosis on Native adoptees the onus of responsibility is on the adoptee rather than on society:

Labeling someone as having an “identity” issue places the locus of responsibility for the problem on that individual. Hence, native children in non-native homes become somehow responsible for the confusion and turmoil they experience as native children in non-native homes; as if the child changing their identity will magically alter their intra and extra-familial contexts. ... by defining racism as the problem, the locus of responsibility is contextualized structurally. The children are relieved of the burden of responsibility for situations in which they had no power.⁵²

⁵¹ Ibid., 14.

⁵² Sinclair, “All My Relations,” 287.

Sinclair stresses the need to understand that the problem doesn't originate from the individual adoptee, and that by placing the focus on the individual the larger issue of external racism is obscured.

Prior to the publication of *Locust's Split Feather* diagnosis, other scholars had noted the negative psychological impacts on Native transracial adoptees. In 1993, Cheryl Avina worked with 20 Natives who had been removed from their birth homes and 15 who had not been removed.⁵³ She found that the Natives who had been removed were more likely to have issues related to chemical dependency, mental health, the criminal justice system, and identity. Linda Roberts Rosene completed her dissertation (1985) in clinical psychology, "A Follow-up Study of Indian Children Adopted by White Families," which also undertook assessing the psychological impact of Native transracial adoption on Native adoptees.

Rosene specifically investigated one of the adoption projects run through the Lutheran Social Services (LSS) of South Dakota.⁵⁴ The LSS program that Rosene worked with had placed 305 Indian children with 240 white families between 1965-1976. Rosene, with full access to LSS files, located and got agreement from 110 white adoptive mothers and 140 Indian adoptees to participate in her study.⁵⁵ Rosene

⁵³ Cheryl Avina, "Effects of Forced Removal from Family and Culture on Indian Children" (practicum paper, NAES College, Twin Cities, 1993).

⁵⁴ Linda Roberts Rosene, "A Follow-up Study of Indian Children Adopted by White Families" (PhD diss., The fielding Institute, 1985). Rosene provides a literature review, which is extensive (over seventy pages), on the studies done on transracial adoptee's identity.

⁵⁵ *Ibid.*, 92.

described her study as investigating, among other markers of adjustment, the correlation of a child's Indian identity with their adjustment to adoption. Rosene's study demonstrated a correlation with increased Indian identity and increased negative effect of the adoption. The more Indian identity the child expressed, the more dissatisfied the adoptive family was. Yet she also discovered that an "increased Indian identity was related to the children's earning higher grades in school and to their getting along well with other Indians."⁵⁶ Therefore, Rosene finds a complicated interaction between Indian identity and the impact this identity had on the transracial adoptee and their family.

Another study on Lutheran Social Service's Native adoption programs, which is not an identity study but is an outcome study, looks at outcome and measures adoptees "success" at integrating into the white community. The markers of success looked at were job attained, salary earned, behavior issues (if any), and IQ. This study, "Looking Back: How Have They Fared" (1996), conducted by Barbara Holtan and Barbara Tremitiere was facilitated and supported by the Tressler Lutheran Services, which initially supported Native transracial adoption but reversed its previous support, in part, because of the findings of Holtan and Tremitiere.⁵⁷ The Tressler Lutheran Services adoptions that Holtan and Tremitiere investigated were

⁵⁶ Rosene, "A Follow-up Study," vi.

⁵⁷ Barbara Holtan, and Barbara Tremitiere, "Looking Back: How Have They Fared? An Outcome Study of Three Populations of Adoptees" (outcome study, Tressler Lutheran Services, 1996), accessed Oct. 21, 2011, <http://www.family-source.com/cache/907123/idx/0>.

both transracial and transnational: facilitated between the U.S. and Korea (82 children), Viet Nam (43 children), and Canada (46 Native American children).⁵⁸

Holtan and Tremitiere found serious problems in the Native adoptees while the Korean and Vietnamese adoptees had relatively few problems. For example, while only six percent of Korean adoptees and two percent of Vietnamese adoptees had been involved with the juvenile justice system, twenty-eight percent of Native adoptees had been involved. As in the Split-Feather study, Holtan and Tremitiere found many psychological problems with Native adoptees; for example, 33 percent were rated as not having a conscience, where only seven percent of Korean and only two percent of Vietnamese adoptees were rated as such. As far as belonging, most Korean and Vietnamese adoptees stated that they were attached to their adoptive parents (89 and 95 percent, respectively), and most of the adoptive parents stated that they were attached to their Korean and Vietnamese adoptees (90 and 95 percent, respectively). The attachment numbers for Native adoptees were quite different; only 83 percent of the adoptive parents felt attached to their Native adoptee, and only 54 percent of the Native adoptees felt attached to their adoptive parents. The study also found a marked difference in the job and salary attainment for Native adoptees.⁵⁹

⁵⁸ Holtan and Tremitiere, "Looking Back," 1.

⁵⁹ Ibid., 2-3. The occupations of adult adoptees in this study demonstrated a marked difference in the level of careers attained between these three ethnic groups. As a group, Korean adoptees had attained doctorates and engineering degrees. There was a range, from "Thief" to "Brain Surgeon," but the clear trend was in professional occupations. Overall, Vietnamese adoptees also attained professional degrees. For Native Canadian adoptees, there was an evident lower employment status attained. The occupations of many of the Natives were "McDonalds," "Taco Bell," "Welfare," and many who listed "None" (Ibid., 3-4). Again, there was a range, from "McDonalds" to "Paralegal," of

It is essential to take seriously the studies described above in order to understand the historical implications of transracially placing so many Native children. The studies, however informative, are partial histories that reveal traces of loss, suffering, trauma, success, and fulfillment. If each work is looked at separately, the meta-story of genocide is lost, and it becomes a back-and-forth between studies of “successful” Native transracial adoption and studies of “unsuccessful” transracial adoption. What is lost in this back-and-forth tension between positive and negative outcomes is the common threads in these works—the ways in which many of these stories, which may seem disparate, actually reinforce one another. For example, Peterson and Harness look at the belonging of Native transracial adoptees and find that they exist in a liminal space and may never find full belonging in either white or Native culture. This can also be seen as white Americans defending the boundaries of their property interests so that even though a Native adoptee may have undergone assimilation into a white family, they can never fully access the capital of white status. The work of Peterson and Harness may seem at odds with the work of Locust, Holtan, and Tremitiere, because Locust and Holtan find very negative overall “outcomes” for Native adoptees in terms of drug addiction, being entrapped by the criminal justice system and the child protective system, yet if we look at the issue from a meta level, all four studies are looking at the marginality of Native adoptees. Peterson and Harness find that Native adoptees occupy a space of precarious

professions, but there was a clear drop in the level of job status among the Native Canadian adoptees. I would argue that this points to the ability/inability to access the property rights of their adopted class—showing the complex interchange of racial hierarchy in access to “white” status.

belonging, while Locust, Holtan, and Tremitiere find the consequences more severe than a liminal existence—they find drug addiction, incarceration, loss of children, and suicide.

I utilize these works, which broadly address identity and adoption outcome, as partial tracings of the complicated history of Native genocide. Although these works are important for the work I am doing, I am not looking specifically at identity and adoption outcome. If I were to focus only on the outcome of adoption, I would be trapped into a space where the only question I could ask was whether or not Native transracial adoption was in the best interest of the child. If I engaged in the identity outcome debate, I would be forced into answering a question that is flawed in its premise. The question of individual outcome is based on Eurocentric notions of individualism and enlightenment, rather than on notions of group identity and the best interests of the community—concepts that are more in line with Indigenous cultural perspectives. It is also flawed in that it assumes that the system of justice within tribal communities is not adequate for dealing with and ameliorating the harms in those communities, which follows from notions of U.S. governmental paternalism.

In order to work through these genocidal tracings, I employ approach of ethnic studies or critical ethnic studies to approach the issue of transracial adoption. I approach the topic of transracial adoption by insisting that settler colonialism must be at the center of the analysis in order to understand the meta-story of genocide. I argue that the history of Native child welfare has its roots in captivity and state control.

There are ways that the state has maintained its colonial relationship with Native peoples, particularly Native women, and these relations continue to produce violence in Native communities.

Critical Ethnic Studies Undercurrents

Several scholars who do work that could be placed in the ethnic studies or critical ethnic studies category, undergird much of my dissertation, particularly the work of Cheryl Harris, Dorothy Roberts, Sara Deer, Kris Weller, Luana Ross, Andrea Smith, Renya Ramirez and Angela Davis. These scholars inform my work through their theories of justice and group-based harm caused by state-sponsored systems of injustice such as the prison industrial complex, the juvenile justice system, and the child welfare system. These scholars maintain attention to the individual harm caused by these systems, yet they also attend to the larger question of a group based harm that is inherent in state structures of care. For instance, Harris shifts the focus from the cruelties that African Americans suffered under slavery to the ways that the system of slavery continued to represent the property rights of whites in current legal debates such as affirmative action. The ways that these scholars move from a historical understanding to an analysis of present conditions of injustice has influenced the way I examine the historical traumas that inhabit contemporary institutions that attempt to manage Native populations, such as the child welfare system.

Another legal scholar key to my dissertation is Dorothy Roberts, who engages in interrogating the racist structure of the child welfare system. She considers in *Shattered Bonds: The Color of Child Welfare* (2002) the ways that Black women have been targeted by this system, not only by way of their race, but also because of poverty. Roberts engages with current arguments such as colorblindness and refutes them with statistics on the disparity of the child welfare system, which is overwhelmingly African American. She employs the stories of Black women who have been traumatized by the system to show how with every state intervention Black women are overpenalized.⁶⁰ Roberts does not try to distance her work from that of the National Association of Black Social Workers (NABSW), who have been called militant by authors such as Simon and Altstein; rather, she endorses some of their ideology. She argues that a group-based harm is being done to African American people, which NABSW also argued:

I argue instead that disproportionate state intervention in Black families reinforces the continued political subordination of Blacks as a group. This argument is closely related to claims for respect of Black Americans as a cultural group, like the NABSW statement on transracial adoption.⁶¹

Roberts insistence on adhering to a group-based harm model is refreshing given the way the field has been dominated by looking at adoption outcome that

⁶⁰ Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare* (New York: Basic Civitas Books, 2002); and Dorothy Roberts, *Killing the Black Body: Race, Reproduction, and the Meaning of Liberty* (New York: Random House, Inc., 1997). In many ways Roberts is continuing the line of inquiry which she formulated in *Killing the Black Body*, in which she very explicitly links the control of Black women's reproductive freedom to their enslavement.

⁶¹ *Ibid.*, 254.

assesses whether or not the transracial adoption of Black children by white families have been “successful.” In my work, I insist that the field of transracial adoption of Native children, which is also dominated by outcome, must return to the original arguments of Tribes, Native women who had lost their children, and the American Indian Movement who insisted that a group-based model had to be utilized to understand that the transracial adoption of Native children was, and continues to be, a process that repeatedly recapitulates historical genocide.

Roberts uses the idea of group-based harm and acknowledges that Native Americans have gained traction when using this argument while African Americans have not. She writes, “With the recent legislation prohibiting race-matching, the federal government has definitively rejected this notion of Black cultural injury. Yet Congress recognized this type of claim when it passed the Indian Child Welfare Act in 1978.”⁶² In many ways, the work that Roberts has done in focusing on the ways that the state continues to inflict a group-based harm on African American people is similar to the work that I am doing with regard to the group-based harm done to Native American peoples. Although Roberts mentions a connection between African Americans and Native Americans, I make this connection explicit in my work, not only in the child welfare system, but also in relation to a common heritage of slavery. I am arguing that we must understand the interrelated property relations of Native and Black enslavement to understand how these two groups are still grossly

⁶² Roberts, *Shattered Bonds*, 248.

overrepresented in the child welfare system. I also argue that through this entangled history we can remap the ways that the state profited by separating the categories of Black and Native, or not separating them, both under slavery, and in current institutions such as the child welfare system.

Sarah Deer connects the overrepresentation of Native girls and women in the sex industry to their historical enslavement in “Relocation Revisited: Sex Trafficking of Native Women in the United States” (1910).⁶³ Her work is essential to an understanding of the child welfare system, especially the compounding effect of the intersections of sex trafficking and incarceration with the child welfare system. The concept of “intersectionality,” put forth by Kimberle Crenshaw, underscores the fact that multiple systems of oppression are at play, such as sexism, racism, and classism, and that these modalities of oppression often operate in tandem or in complex interchanges.⁶⁴ Delinking the child welfare system from slavery would allow us to overlook these intersections of racial categories with other layers of oppression such as how Native women and girls are both targeted because of their gender and because of their ethnicity. I use the analytical framework of intersectionality to examine the ways that slavery, even though it was abolished, continues to influence the child welfare system.

⁶³ Sarah Deer, “Relocation Revisited: Sex Trafficking of Native Women in the United States,” *William Mitchell Law Review* 36, no. 2 (2010): 621-683.

⁶⁴ Kimberle Crenshaw ed., *Critical Race Theory: the Key Writings that Informed the Movement* (New York: New Press, 1995).

Andrea Smith has provided a rich framework for feminist interdisciplinary approaches to Native American Studies in her books, *Conquest: Sexual Violence and American Indian Genocide* (2005) and *Native Americans and the Christian Right: The Gendered Politics of Unlikely Alliances* (2008). Smith connects seemingly disparate issues such as land taking, sterilization, boarding school abuses and testing on Native women. Of particular interest for my work is her concept of “rapability.” She argues that “[b]ecause Indian bodies are “dirty,” they are considered sexually violable and ‘rapable,’ and the rape of bodies that are considered inherently impure or dirty simply does not count.”⁶⁵ Another theorist central to my thinking is feminist legal scholar Kris Weller, who uses a term in her work called “capturable.” Weller argues that notions of legal personhood are directly linked to notions of whether or not a person has the right to capture. She argues that not all people and genders have historically moved from the position of capturable to the position of captor. Weller states, “[i]n the conceptual framework I am using, women and members of minoritized populations have not been moved en masse from the class of capturable to the class of captor.”⁶⁶ Although she does not explicitly take up the issues of Indigenous peoples, she does mention that they are among those populations disproportionately represented as capturable subjects. She argues that it is precisely

⁶⁵ Smith, *Conquest*, 9.

⁶⁶ Kris Weller, “Defining Human: Species, Sanity, and Legal Subjecthood” (PhD diss., University of California at Santa Cruz, 2010), 59.

because of their historical role as oppressed people that they remain in a category of capturable:

Perhaps especially at risk are members of groups on whose oppression our country was founded, including African Americans and Native Americans, and Latinos, who were racialized during the earliest border disputes with Mexico and have been made capturable in new ways and to different extents with each revision of U.S. immigration policy. Members of all three of these groups continue to suffer the consequences of their historical capture and remain capturable, and, in grossly disproportionate numbers, captive, as well as much more likely than their white counterparts to live below the poverty line, to die earlier from a variety of health problems, to be on the receiving end of state violence. Women in these groups then are capturable along lines related to both sex and race.⁶⁷

I utilize Weller's notion of capture in my attempt to untangle Indigenous legal histories and specifically in my analysis of why First Nations people have continued to suffer the capture of their children. Following the work of Smith and Weller, and using the work of Harris, Roberts and many others, I argue that Native people are not only considered "rapable" and "capturable" but are objectified and placed in a category of property by the state. I use the term "ownable" to account for various forms of state sanctioned property interest in Native peoples, including slavery, land takings, reproductive control, incarceration, juvenile detention, foster and adoptive care, religious appropriations (white Shamanism), mascots, and historical cleansing.⁶⁸

⁶⁷ Ibid., 59-60. Weller is an interdisciplinary scholar who brings together multiple fields, from legal studies to animal studies, to look at notions of legal personhood. Although much of what she writes about can be applied to the capture of Native peoples, particularly Native children, there is an element that needs further inquiry because she is not looking specifically at Indigenous history. Although she mentions that certain populations remain in a state of permanent capturable, she does not expand on the history of why Native people continue to fall into this category.

⁶⁸ Renya K. Ramirez and Angela Y. Davis also inform my thinking—their work has been integral to my research for the ten years that I have been a graduate student. Davis' multiple works

Methodology

My work employs not only historical methodology, but also interdisciplinary feminist, ethnographic, and legal methodologies. I work to map a contextual history of why Native children were removed at such unprecedented numbers. To accomplish this I employed a range of research methods. I did archival work with the Association on American Indian Affairs (AAIA) records, which are on microfilm at Stanford University.⁶⁹ AAIA was, and continues to exist as, an organization that fought (fights) against the wrongful takings of Native children. In the 1960s and 1970s, AAIA represented many Native women who were fighting to regain custody of their children who had been wrongfully removed. AAIA also provided extensive testimony during hearings before the Senate on Indian Child Welfare in 1974 and 1977. Although I did historical research on AAIA, I felt it was essential to have dialogue with the current director, Jake Trope, in order to further understand how the issues of removal continue to be fought in state courts. This history is living: the violence of removing a large percentage of Native children from their communities continues; therefore, my work had to be connected to people currently in the field.

have informed my thinking, particularly her work on incarceration and the intersection of race, class, and gender within systems of state control. Ramirez' writings and teachings also undergirds much of my thinking. Her book, *Native Hubs: Culture, Community, and Belonging in Silicon Valley and Beyond*, which attends to the issues of urban Natives in California has forwarded my understanding of Indigenous identity politics.

⁶⁹ I did not have time to include much of this in my dissertation, but I hope to use it in future writings.

I knew that in order to understand what was happening with Indian child removal, I would have to engage with state courts. As part of my fieldwork, I chose to take a job with the State courts of California in the Administrative Office of the Courts (AOC) in the ICWA Full Compliance Project.⁷⁰ I approached my field work with the ICWA Full Compliance Project from at least three angles: daily field notes and observations, interviews with both tribal and state experts in the field, and research on legal aspects of ICWA.⁷¹ This part of my work is ethnographic in nature.

⁷⁰ I was hired as a Research Assistant for the ICWA Full Compliance Project, which was under the Administrative Office of the Courts (AOC) in the Center for Children, Families, and the Courts. I think that there could be a dissertation on just defining the many branches of the AOC, and how they work, or do not work together. Simply put, I worked for the California State court system as a researcher. When I was hired, I was clear with my boss, Jennifer Walter that I was doing my dissertation on ICWA and would be using the information for completing my dissertation. She was an extremely supportive boss. In representing California state courts, I was sent to several conferences on ICWA. One conference was in Wisconsin that was produced for individuals involved in the legal process of Indian child welfare: state court judges, federal judges, state and federal ICWA workers, tribal ICWA workers, and tribal court judges from all over the United States.

⁷¹ I worked for the AOC for about a year, from 2004-2005. The ICWA Full Compliance Project was comprised of four women: the Supervising Attorney (Jennifer Walter), the Lead Attorney (Christine Williams), the Research Analyst (myself), and the Administrative Director (Kristie Bergen). We worked with the Department of Social Services (DSS), which was funding the ICWA Full Compliance Project. This fact, along with many others, began to bother me—it is problematic to have a system which has historically worked to control women of color be the funder for state court improvement and development of informational binders for judges. As discussed in later parts of the dissertation, Native people have historically had a fraught relationship with the federal government, and an even more tense relationship with states. Some of the work that I did as a Research Analyst for the state consisted of researching aspects of ICWA, such as researching how other states implement ICWA (for example other rules of court), and how other countries implement other laws that are similar/dissimilar to ICWA. I was also responsible for creating an archive of material on tribal programs that had to do with the Active Efforts piece of ICWA. The active efforts piece of ICWA calls for “active” efforts to reunify the family. I gathered information on services such as drug rehabilitation programs that were specifically tailored for Native people, like the Friendship House in San Francisco, and counseling services that were specific to Native communities. Some of these services are available at Indian Health Services in various locations. IHS has a better reputation now, but historically it was responsible for supporting the sterilization of Native women. The information that I worked to collect was to be provided in binder form to State court judges who attended the ICWA conferences that we put on, and it was later to be available to all court judges online. The conferences that the ICWA Unit produced were a fast passed crash course on ICWA and its regulations. We provided presentations on the history leading to the Act’s passage, and the “nuts and bolts” of the Act. The basics of ICWA was

Although I collected a great deal of “data” while working there, my work at the AOC generally served to enrich my understanding of ICWA, the State courts, and the interchanges between tribes and state courts. I also got a great deal of legal help (lessons on removal procedures, court rules written by the AOC, and case law on ICWA) from the team of lawyers I worked with. The instruction I received at the AOC, particularly from Christine Williams, the lead attorney, undergirds my understanding of ICWA and the requirements of state courts to follow it (or not follow it). It is worth noting in this section that the work of legal scholars Raquel Myers, Joseph Myers, and Karen Biestman informs my general understanding of Federal Indian Law.⁷²

Congressional records were also useful in my examination of law and child welfare. Particularly important to my dissertation were the proceedings before the Senate in 1974 and 1977, which offered thousands of detailed records of witness testimony on Indian child removal from both Indians and non-Indians involved in education and child welfare. There were also many studies and accompanying documentation that was helpful, such as “expert” documentation from psychologists, psychiatrists, and physicians. In addition, I reviewed congressional records dealing with Indian education, Indian Child Welfare and ICWA. I also reviewed many ICWA

something I assumed all court judges who were handling ICWA cases had a grasp on, but this was clearly not the case, which became evident during the questions portion of the “nuts and bolts” section. While I worked there, our group held three conferences in different parts of California, and compiled a great deal of information that was made available to State court judges.

⁷² I took many classes from Raquel (Kelly) Myers, Joseph Myers and Karen Biestman (Native legal scholars) at U.C. Berkeley, including “Federal Indian Law.”

cases (state and federal) that had to do with legal determinations, such as the “Existing Indian Family” and “Good Cause.”

To complete my understanding of the current landscape of Indian child welfare and ICWA, I conducted ten interviews with members of various organizations, including The Christian Alliance for Indian Child Welfare (CAICW), First Nations Orphans Association (FNOA), ICWA Full Compliance Project, the Association on American Indian Affairs (AAIA), California Indian Legal Services (CLIS) and the National Indian Child Welfare Association (NICWA).

Doing an interdisciplinary dissertation of this breadth may have produced some limitations, which are important to acknowledge. One of the limitations in working to understand Indian child welfare from many angles (legal, social, historical, psychological, and political) and their intersections is that some of the specifics are lost. If I had focused on just one aspect of Indian child welfare, such as ICWA non-compliance in state courts, I may have been able to provide a more comprehensive analysis and made a more valuable contribution to ICWA history. In addition, because of the long temporal period with which I engage, beginning with enslavement and ending with the current landscape of child removal, I may have produced some oversimplified analysis. But without casting a wide historical net it would be difficult to cover the topic of Indian child removal in a responsible manner. If I had, for example, limited my analysis to interviewing Native adoptees, I may have only been able to provide a description of “outcome” and the broader picture of

enslavement, incarceration, and genocide would have fallen away. If I had alternately chosen to focus on ICWA abuses, I would have left the reason for those abuses unarticulated, namely state ownership. I therefore have confidence that my methodology serves to further the literature on Native women's reproductive control, enslavement, transracial adoption, and ICWA by making the connections and showing the depth of the genocidal policies that have taken place and how they continue.

An Accountability Note

Accountability is important, but to whom must I be accountable? As scholar of Indigenous heritage, this is a question with which I had to engage.⁷³ I knew that when conducting research I had to be accountable to my own family and community and to the community I am working with. As Jeffrey Shepherd, a historian, advises, "Give copies of your research to the community so they can judge it."⁷⁴ I have

⁷³ My heritage is Native (Blackfeet) and French. I am a "mixed-blood," who is not enrolled, and although my identity is not the focus of this dissertation, it is important to note that I am not an enrolled member. I was raised as Indian, and have always been loved and accepted by other Indian people, and it was not until I reached the university system that I began to feel ashamed of being "mixed blood." The politics of enrollment are complicated because of the colonial context from which they emerge, and in order to qualify for many federal programs, a certain blood quantum—a percent of Indian blood is required (usually 25 percent). In addition to federal program requirements, each tribe sets its own requirements for enrollment, often also based on blood quantum, but this varies with each tribe.

⁷⁴ Jeffery P. Shepherd (respondent), "a Discussion of Scholarly Responsibilities to Indigenous Communities," in "Native Experiences in the Ivory Tower," ed. Joyce Kievit, special issue, *American Indian Quarterly* 27 ½ (Winter–Spring, 2003): 3-45, accessed Feb. 22, 2012, <http://www.jstor.org/stable/4138840>.

committed to provide my dissertation to three Native-run organizations that I interviewed: The First Nations Repatriation Institute (FNRI), the Association on American Indian Affairs (AAIA), and the National Indian Child Welfare Association (NICWA). I know that these organizations might not agree with what I have written here, but accountability is important for not only Native people, but for all academic researchers.⁷⁵

For Native people, methodology, particularly anthropological methodology, has been directly linked to colonization. For example, Franz Boas who is widely considered “the father of Anthropology” conducted his research by digging up Native graves and examining skulls.⁷⁶ It is through scientific studies, such as those of Boas, that Natives were decapitated, dismembered and studied. There have been attempts to delink scientific methodology from other forms of methodology, such as cultural anthropological methodology, but this is problematic. One only has to look at the history of salvage anthropology to understand the congealing of these methodologies

⁷⁵ The move to provide my dissertation to these groups is my responsibility, yet I am not providing my dissertation to the Christian Alliance for Indian Child Welfare (CAICW) because I do not feel that they would use my work in a healthy way. For example, CAICW takes information that NICWA provides and twists it in ant-Indian arguments.

⁷⁶ Julian Smith, “Insider: Who Owns the Dead?” *Archaeology: A publication of the Archaeology Institute of America* 64, no. 1 (Jan./Feb. 2011), accessed, Apr. 2, 2012, <http://www.archaeology.org/1101/departments/insider.html>; and “Franz Boas,” the Anthropology Department website at Columbia University, accessed Apr. 3, 2012, <http://www.columbia.edu/cu/anthropology/about/main/one/boas.html>. Information on Boas is widely available, yet it may leave out his unsavory dealings with Native human remains. For example, Columbia University’s website lauds Boas without noting any controversy.

to support “academic” advancement and a general notion of the “vanishing Indian.”⁷⁷

It seems that we must concede that research in its present form is bound in some way to state violence.⁷⁸ Linda Tuhiwai Smith, a Native expert in Indigenous methodology, discusses the imperialist underpinnings of research:

While it is more typical (with the exception of feminist research) to write about research within the framing of a specific scientific or disciplinary approach, it is surely difficult to discuss research methodology and indigenous peoples together, in the same breath, without having an analysis of imperialism, without understanding the complex ways in which the pursuit of knowledge is deeply embedded in the multiple layers of imperial and colonial practices.⁷⁹

Smith’s work acknowledges a conversation that has been going on within Native communities for centuries.⁸⁰ Smith is working to provide an entry into research that is not damaging to Native communities. I attempted to conduct research that did not cause harm. Methodology has been a word that has meant ways of taking what does not belong to you, and research has been used to kill, cut up, dissect, use, extract, and

⁷⁷ Orin Starn, *Ishi’s Brain: In Search of American’s Last “Wild” Man* (New York: W.W. Norton and Company), 204. Salvage Anthropology was an area of anthropology that stressed the collection of “data” from Native peoples in order to capture that information and material goods before the Native people “went extinct.” Although this type of anthropology is now widely considered imperialist, the ideology continues to survive.

⁷⁸ I am not saying that no research with Indigenous peoples should be done, but I do think it must be contemplated and entered into with care.

⁷⁹ Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: Zed Books Ltd, 1999), 2.

⁸⁰ See the work of Vine Deloria Jr., Andrea Smith, Ward Churchill, and Gerald Vizenor. Within my own family, academia was not considered a site of knowledge production, but a site of oppression. I have struggled with the consequences of choosing graduate school over a paid job. Even going to school to get my bachelors degree was a complicated decision. Being a poor person of color, academia has been a site of continued violence, and it has only been in spaces outside or marginally within academia that I have found any acceptance and belonging (spaces such as the Women of Color Cluster and the American Indian Resource Center).

abuse Native peoples.⁸¹ I remained mindful while writing this dissertation that what I did, do, wrote and write, has consequences.

As Devon A. Mihesuah notes, we must consider the ramifications of our work on Native communities (even if our work is not “scientific”).⁸² She underscores the need to attend to how the U.S. has colonized Native people when we conduct research with Native communities:

Considering that this is a country founded by colonizers whose policies and behaviors disrupted and almost destroyed Indigenous cultures and lives, historians of the Indigenous past have a responsibility to examine critically the effects of their historical narratives on the well-being of Natives and of the influences their stories have on the retention and maintenance of the colonial power structure.⁸³

Particularly because I am interested in the interplay between the state and the intimate spaces of Native peoples lives, this struck a cord with me. Does the work I do help Native communities by making the connections of the current child removals to the colonial legacy of enslavement and state control, or does my work continue to place Native people as passive observers, or, worse yet, does it do harm by allowing others

⁸¹ Research has been used to exhume and measure the skulls of Native people. Linda Tuhiwai Smith also notes, “Just knowing that someone measured our ‘faculties’ by filling the skulls of our ancestors with millet seeds and compared the amount of millet seed to the capacity for mental thought offends our sense of who and what we are” (Smith, *Decolonizing Methodologies*, 1).

⁸² As Linda Tuhiwai Smith notes, “most indigenous peoples and their communities do not differentiate scientific or ‘proper’ research from the forms of amateur collecting, journalistic approaches, film making or other ways of ‘taking’ indigenous knowledge that have occurred so casually over the centuries” (Smith, *Decolonizing Methodologies*, 2).

⁸³ Devon A. Mihesuah (respondent), “a Discussion of Scholarly Responsibilities to Indigenous Communities,” in “Native Experiences in the Ivory Tower,” ed. Joyce Kievit, special issue, *American Indian Quarterly* 27 ½ (Winter–Spring, 2003), 3-45, accessed Feb. 22, 2012, <http://www.jstor.org/stable/4138840>.

to misconstrue my scholarship as a condemnation of ICWA? These were questions that I had to engage with in order to write this dissertation.

Chapters

Indigenous Genocidal Tracings: Slavery, Transracial Adoption, and the Indian Child Welfare Act is a feminist, interdisciplinary history that traces the genealogy of U.S. property interests in Indigenous people particularly women and children from enslavement to the continued removal and transracial adoption of Native children. The interconnection of Native history with that of Black Americans is interrogated, paying critical attention to the ways in which both communities continue to suffer overrepresentation in: prisons, jails, juvenile detention centers, reproductive control programs (sterilization and long acting contraceptives), and the child welfare system (foster and adoptive care).

The first chapter, “White Property Interests in Natives,” argues that slavery must be accounted for in any discussion of the history of the colonization of Native peoples, which is particularly pertinent when thinking through the high rate of Native children in the child welfare system. Legal theorist Cheryl Harris links whiteness as a property interest to the enslavement of Blacks and to the taking of Native land. This chapter asserts that we must not only tie the property interest of whites to the land for Native people but also to their enslavement. There is an attention to the ways that Black and Native people became historically and legally entangled through their

respective subjugations in systems of slavery. There is a call for the use of a more inclusive term than property when trying to articulate the history of the colonization of Native people, and the term “ownable” is introduced, following the work of Andy Smith, who argues that Native women have been constructed as “rapable,” and the work of Kris Weller, who argues that certain populations remain in a category of “capturable” based on their historic relationship to the nation state.

Chapter Two, “Indian Adoption Projects: Native Women Fight Back,” attempts to situate Native adoption as part of a larger genealogy of state ownership by tracing the history of white guardianship over Native children through the Dawes Act, boarding schools, and Indian adoption programs. There were many Native adoption programs from the 1950s-1980s, and this chapter looks more closely at two of them, the Indian Adoption Project, which was a partnership of the BIA and the CWLA, and the Mormon Church’s Indian Placement Program. The chapter argues that in settler societies the creation of the “unwanted” Indian child coincides with the ideological production of the “unfit” Indigenous woman. It asserts that the ways that putatively “unfit” Native women, women who had experienced the unwarranted removal of their children, fought back was the impetus for one of the most important federal Indian laws ever passed by Congress, The Indian Child Welfare Act (ICWA).

In Chapter Three, “Identity Control: the Existing Indian Family Exception,” the tracing of ownership over Native people is continued by asserting that state court judges continue to violate the intentions of ICWA by circumventing it through

judicially created exceptions such as the Existing Indian Family (EIF). Through the EIF exception, Judges effectively assert the state's right (although unfounded) to determine who is a "real" Indian, using such measures as whether or not the mother in question attends powwows or uses Indian Health Services.

The assertion that government agents, such as state court judges and social workers, treat Indigenous people as property of the state is continued in Chapter Four, "White Desires: the Indian, Not-Black Child." Chapter Four asserts that it is through their placement in a racial hierarchy that Native children move out of the "special needs" category into the "adoptable" category. Specifically, it is through the creation of the Native child as not-Black that they become adoptable. The chapter argues that although altruism may have been an aspect of adoptive parents' desire to adopt Indigenous children, it was also state pressure, coupled with their own racist attitudes, that led white Americans to adopt Indian children in unprecedented numbers. Attention is brought to an organization, the Christian Alliance for Indian Child Welfare (CAICW), with members across the US and Canada, which works to defeat ICWA, to illustrate a current articulation of the continued assertion by non-Indians of their property rights over Native people. Although claims of ownership over Native people is likely to continue, in the Conclusion there is a shift from the CAICW's work of claiming ownership over Native children to the work of the First Nations Repatriation Institute (FNRI), which is a group that is working to heal Native

communities from the historical trauma that has been created by this ownership, particularly by transracial adoption.

This shift is necessary to account for the continued survivance of Native people in the face of such brutal colonization. The FNRI is the first Native organization to provide a space for Native adoptees to heal. Sandy White Hawk, Native adoptee, co-founder and director of FNRI, has created a space for countless Native adoptees to find belonging. White Hawk's work illustrates not only the amazing survivance of Native people but also the fact that Native people continue to find Native centered ways of ameliorating the harmful effects of not only transracial adoption but also, more broadly, colonization.

Chapter One

White Property Interests in Natives

The history of slavery in the United States cannot be restricted to the story of African American slaves and white owners—there was a tri-racial relationship that involved Native, Black and white peoples. This tri-racial history of slavery is often flattened into a biracial framework, that of African American enslavement and white ownership, in order to maintain a cohesive narrative of bondage that does not deviate from previous scholarship or prevailing notions of master/slave relations. Although this excision of the historical record has long been accepted by many academics, it obscures the interconnected history of Native Americans and African Americans under the system of slavery. To trouble this biracial dichotomy, a more nuanced understanding of U.S. enslavement is required—one that includes the wholesale enslavement of certain Native groups, some un-free white labor, Indian slaveholding, and the interchanges between Native and Black slaves under colonization (including, but not limited to, intermarriages). I do not attend to all of these complex issues; rather, I create a framework for later chapters that ultimately links Black and Indian

captivity to the current overrepresentation of Native, Black, and Black Native children in the child welfare system.¹

I begin this chapter with a discussion of the Native slave as a constitutive contradiction and engage the framework of Cheryl Harris, which stresses the need to draw on the historical legacy of Black American's enslavement and Native people's land dispossession in order to understand whiteness as a category with contingent property status. I underscore the discourse of property relations that Harris attends to in order to stress the concept of ownership as central to the colonization of Native people.

After discussing the importance of the construction of Native people as property, I move to the broader history of Indian slavery, utilizing a hemispheric approach that takes into account multiple colonizations, including the Spanish, the French, the British, and U.S. The next section, "Colonizing Indigenous Women's Bodies," continues to track Native enslavement by highlighting the sexual exploitation of Native slaves. From this broad discussion of competing colonizations, I move to a more focused examination of California as a site of sexual exploitation for Native women.

¹ William Loren Katz, *Black Indians: A Hidden Heritage* (New-York: Aladdin Paperbacks, 1997); and Joseph O. Palacio Sr., "History and Continuity: Being Garifuna and Black Indian in the United States," in *IndiVisible: African-Native American Lives in the Americas*, ed. Gabrielle Tayac (Washington: Smithsonian, 2009), 91-98. There are several terms used to describe people of African American and Native American heritage: Black Indian, Black Native, African-Native American, African-Indian, Black Indigenous. I use the term Black Native or Black Indian. William Katz uses the term Black Indian, "I have defined Black Indians as people who have a dual ancestry or black people who have lived for some time with Native Americans" (Katz, *Black Indians*, 7).

After deconstructing some of the myths surrounding Native people and enslavement, I move to a discussion of a series of legal cases in which individuals in bondage argued that they were unjustly enslaved. I trace through the East Coast freedom cases of the 1700s the discourses surrounding the definition of Native and Black peoples to highlight the ways in which early court decisions conceptualized, ossified, and codified the categorization of individuals as either Native *or* Black but not Native *and* Black. I stress this distinction because the early legal framework that was constructed to divide people who were Native *and* Black as either Native *or* Black continues to be relevant in the child welfare system, which I turn to in later chapters, pointing out that individuals, particularly children, are categorized as either Native *or* Black, but not both. The chapter ends with an analysis of the Thirteenth Amendment and Native American reproductive control that highlights the multiple ways in which Native people continued to be subject to servitude after the passage of the Thirteenth Amendment in 1865. I argue that Native women and Black women suffered a similar history of reproductive control because of their shared history of enslavement.

The Native Slave: A Constitutive Contradiction in America

The genealogy of Native slavery has been, and continues to be, intentionally “cleansed” from normative scholarship. As theorists Kate Shanley, Ella Shohat, and Robert Stam argue, “Indians are not supposed to be visible; they occupy a ‘present

absence.”² Indians are not imagined to be spatially present and are supposed to exist in history in already defined ways that do not include bondage to white Americans. Slavery has been reserved in the U.S. white, heteropatriarchal imagination for Blacks, “the holocaust” has been reserved for the Jewish population, and Indians have been identified as “savages,” “squaws,” or warriors, but not as slaves.³ Ablavsky, a legal scholar who has recently written on Native slavery, notes the extensive nature of Native captivity:

Despite present-day conceptions that all slaves were Africans, Indian slavery was ubiquitous. Indian slaves could be found in all thirteen mainland British colonies in 1772, as well as in the French and Spanish colonies of North America. In Virginia alone, thousands of descendants of enslaved Indians toiled alongside African slaves on plantations.⁴

As Ablavsky deftly points out, there continues to be a denial of Indian slavery, particularly in the United States. Although this misconception continues, a number of scholars have recently challenged this false assumption.⁵

² Cited in Smith, *Conquest*, 9. From Ella Shohat and Robert Stam, *Unthinking Eurocentrism* (London: Routledge, 1994).

³ Trask, Haunani-Kay, *From a Native Daughter: Colonialism and Sovereignty in Hawaii* (Honolulu: University of Hawaii Press, 1999), 18. It seems to me that this “stupidity” is racism; it is not just misinformation or a lack of information, it is an assertion of the fact that Natives have been and continue to be thought of as property of the state and the normative population.

⁴ Gregory Ablavsky, “Making Indians ‘White’: The Judicial Abolition of Native Slavery in Revolutionary Virginia and Its Racial Legacy,” *University of Pennsylvania Law Review* 159, no. 1457 (2011): 1459, citation omitted.

⁵ James F. Brooks, ed., *Confounding the Color Line: The Indian-Black Experience in North America* (Lincoln: University of Nebraska Press, 2002); Alan Gallay, *The Indian Slave Trade: The Rise of the English Empire in the American South, 1670-1717* (New Haven: Yale University Press, 2002); Alan Gallay, *Indian Slavery in Colonial America* (Lincoln : University of Nebraska Press, 2009); Carl J Ekberg, *Stealing Indian Women: Native Slavery in the Illinois Country* (Urbana: University of Illinois Press, 2007); and Jack D. Forbes, *Africans and Native Americans: the language*

The silencing of the issue of Native enslavement is widespread—even the most skilled legal historians can leave out, not acknowledge, or simply not have knowledge of Native American enslavement in the United States. For example, legal scholar Cheryl Harris who wrote “Whiteness as Property,” has made important inroads into the scholarship of Native and Black people being considered property, yet she wrote that only Black Americans were taken as slaves:

The hyper-exploitation of Black labor was accomplished by treating Black people themselves as objects of property. Race and property were thus conflated by establishing a form of property contingent on race - only Blacks were subjugated as slaves and treated as property.⁶

Unfortunately, this is not indicative of the historical record, which demonstrates that Natives were enslaved alongside Africans in a frequently indistinguishable servitude.

William Loren Katz, one of the first authors to specifically address the interconnected

of race and the evolution of Red-Black peoples (Urbana: University of Illinois Press, 1993), previously printed under the title: *Black Africans and Native Americans: Color, Race and Caste in Evolution of Red-Black Peoples*. See also: R. Halliburton, Jr., *Red Over Black: Black Slavery among the Cherokee Indians* (Westport: Connecticut, 1977); Thomas N. Ingersoll, *To Intermix With Our white Brother: Indian Mixed Bloods in the United States from Earliest Times to the Indian Removals* (Albuquerque: University of New Mexico Press, 2005); William Loren Katz, *Black Indians: A Hidden Heritage* (New-York: Aladdin Paperbacks, 1997); Daniel F. Littlefield Jr., *The Cherokee Freedmen: From Emancipation to American Citizenship* (Westport: Greenwood Press, 1978); Tiya Miles, *Ties That Bind* (Berkeley: University of California Press, 2005); Patrick Mingos, *Black Indian Slave Narratives (Real Voices, Real History)* (John F. Blair, 2004); Patrick Neal Mingos, *Slavery in the Cherokee Nation : the Keetoowah Society and the Defining of a People* (London : Routledge, 2003); Celia E Naylor, *African Cherokees in Indian Territory: From Chattel to Citizens* (Chapel Hill: University of North Carolina Press, 2008); Theda Perdue, “Mixed Blood” Indians: Racial Construction in the Early South (Athens: University of Georgia Press, 2003); Perdue, “Race and Culture: Writing the Ethnohistory of the Early South,” *Ethnohistory* 51 (2004), 701-723; Circe Sturm, *Blood Politics: Race, Culture, and Identity in the Cherokee Nation of Oklahoma* (Berkeley: University of California Press, 2002); Gabrielle Tayac, ed., *IndiVisible: African-Native American Lives in the Americas* (Washington: Smithsonian, 2009); and Fay A. Yarbrough, *Race and the Cherokee Nation: Sovereignty in the Nineteenth Century* (Philadelphia: University of Pennsylvania Press, 2008).

⁶ Harris, “Whiteness as Property,” 1716.

enslavement of Native and Black people, writes: “On both northern and southern American continents, Europeans enslaved Africans and Native Americans and drove both hard to pile up profits in the shortest possible time.”⁷ As Katz points out, the enslavement of both populations played a major role in the accumulation of capital in the United States.

While Harris does not assert that Native people were never indentured as servants, she does not specifically postulate that they were. Instead, she demarcates a clear line between indenture and other forms of unfree labor by arguing that slavery was “distinguished from other forms of labor servitude by its permanency and the total commodification attendant to the status of the slave. Slavery as a legal institution treated slaves as property that could be transferred, assigned, inherited, or posted as collateral.”⁸ I agree with Harris that slavery was not the same as indentured servitude, at least not in all instances. Slavery amounted to being property under the law, while indenture was a property status that would expire after a number of years.

Theoretically, the indentured Native could outlive the time of indenture and become free again. Because Native people were enslaved both legally and extra-legally, and also indentured, the instances of indenturing often congealed with enslavement to produce the status of object and the conditions of servitude only outlivable in theory.

Although Harris overlooks the issue of Native slavery, her larger argument, which centers on whiteness as a form of property, offers an important framework for

⁷ Katz, *Black Indians*, 101.

⁸ Harris, “Whiteness as Property,” 1716.

working through the issue of how Native and Black peoples fit into the ideology of whiteness and ownership more broadly. While Harris links both Native and Black Americans to the creation of a white property status,⁹ she derives the white property interest over Black Americans from their enslavement and over Native Americans from the seizure of Native land:

Slavery linked the privilege of whites to the subordination of Blacks through a legal regime that attempted the conversion of Blacks into objects of property. Similarly, the settlement and seizure of Native American land supported white privilege through a system of property rights in land in which the ‘race’ of the Native Americans rendered their first possession rights invisible and justified conquest.¹⁰

Her claim that the property interests of whites over Native Americans was linked to the dispossession of their land is not unfounded. Although the conquest of Native people was geographically uneven, there were some continuities and land dispossession was, clearly, one of them. Harris is therefore not incorrect when linking the issue of land dispossession to a property interest in whiteness, yet her analysis completely leaves out the slavery of Indigenous people, even as she meticulously connects the property interest of whiteness to the slavery of Black Americans. Rather than contradicting Harris, my work builds on her acknowledgement of the importance of land dispossession, which I explicitly take up later in the dissertation, in analyzing the creation of white property interests in Natives. I argue that captivity must also be accounted for, particularly when considering the continued removal of children from

⁹ Ibid., 1714.

¹⁰ Ibid.,1721.

Native communities and the placement of Native children in state institutions of control. In order to reconceptualize the current and past mass transfers of Black and Native children to white families, scholars must dispel the idea that indigenous people were not slaves.

The social geography of Indian enslavement was uneven, yet every colonizing nation abducted Indians into slavery. As Max Carocci, a historical scholar who argues for the importance of recognizing Native slavery, stresses: “For over 300 years after the arrival of the first Europeans, Native Americans continued to be sold, bartered, exchanged and forced to work for all colonial powers in a variety of ways and contexts.”¹¹ The Dutch, British, French, Spanish, and U.S. all participated in the capture and bondage of Indigenous peoples, so to limit the scope of my analysis to the U.S. would obfuscate the pervasiveness of a long-established system of capture and bondage that crosses U.S. boundaries, temporalities, and laws. As Native legal scholar Sarah Deer argues, we must look at the Americas as a whole to understand the history of U.S. slavery because the colonizers of the Americas were linked not only by a shared history of domination, but also through mutual legal justifications for their conquests. Therefore, I utilize a hemispheric approach to understanding the history of Native captivity.

Although all colonizers enslaved Indians, the Spanish were the first to practice widespread capture and bondage of Native peoples in the Americas. In fact, as Deer

¹¹ Max Carocci, “Written Out of History: Contemporary Native American Narratives of Enslavement,” *Anthropology Today* 25, no. 2 (April 2009).

notes: “[t]he European institution of commercial human trafficking was implemented only days after Christopher Columbus landed in North America.”¹² Columbus, a former African slave trader, wasted no time in the Americas, and continued to deal in slaves—he moved from African slave trading to Indigenous slave trading.¹³ On one occasion in 1495, Columbus and his men captured 1,600 slaves, and shipped them to Europe.¹⁴ Unfortunately, few survived the brutal passage. Cortez was in charge of 23,000 Indigenous slaves at one point.¹⁵ Millions of Indigenous people were captured, tortured and enslaved. David Stannard, an author who has extensively documented the history of Native slavery, writes: “[b]y 1542 Nicaragua alone had

¹² Deer, “Relocation Revisited,” 636. Michael Omi and Howard Winant, *Racial Formation in the United States from the 1960s to the 1990s* (New York: Routledge, 1994). Omi and Winant wrote about the formation of race in the U.S. They outlined racial projects and their historical underpinnings. The issue of Native enslavement is only briefly discussed as an important racial formation: “For the ‘discovery’ raised disturbing questions as to whether all people could be considered part of the same ‘family of man,’ and more practically, the extent to which Native peoples could be exploited and enslaved ... The conquest, therefore, was the first—and given the dramatic nature of the case, perhaps the greatest-racial formation project” (Omi and Winant, *Racial Formation*, 61-62). Although they state that conquest could be the “greatest-racial formation project,” this argument is primarily put forth in their footnotes.

¹³ For a discussion on Columbus, see Stannard, *American Holocaust*, 10-11, 57, 62-71, 84, 101, and 192-207; and Deer, “Relocation Revisited,” 636. Indigenous people would react, or not react to having the *requerimiento* being read in Spanish, which was not understood by Indigenous people. If Native people ran away, they were hunted down. If they did nothing, they were considered not to have accepted the *requerimiento*, at which point the Spanish would take them into slavery. All choices were met with the same outcome: slavery. The language of the document shows something of the Spanish position on slavery.

¹⁴ Stannard, *American Holocaust*, 67. Katz references Columbus’ cruelty and taking of slaves. Katz notes that Columbus on one occasion took 1100 Tiano men and women as slaves and shipped them to Spain and only three hundred survived (Katz, *Black Indians*, 26). See Forbes, *Africans and Native Americans*, 22-23, for a discussion of Columbus.

¹⁵ Stannard, *American Holocaust*, 80.

seen the export of as many as half a million of its people for slave labor .”¹⁶ The Indigenous slave trade was so prevalent that for a period of time Indigenous slaves were branded:

[They] had their chattel status burned into their faces with branding irons that stamped them with the initials of their owners. When sold from one Spaniard to another, a replacement brand was made. Consequently, some slaves’ faces were scarred with two or three or four branding mutilations identifying them as transferable pieces of property.¹⁷

The branding of slaves indicated not only the “owner” to whom they belonged, but also inscribed their status as transferable units of property.¹⁸ Another cruel practice that the Spanish introduced, which demonstrates the inhuman status Natives were afforded, was the practice of using Native people as food for dogs brought over on ships by the Spanish. These dogs were aptly named “dogs of conquest.”¹⁹ Worth noting is the perpetuation of this practice hundreds of years later by some U.S. citizens.²⁰

¹⁶ Ibid., 82.

¹⁷ Ibid., 84.

¹⁸ As Harris argued, “Slavery as a legal institution treated slaves as property that could be transferred, assigned, inherited, or posted as collateral” (Harris, “Whiteness as Property,” 1720).

¹⁹ Stannard includes examples of instances of this practice: “Some Christians encounter an Indian woman, who was carrying in her arms a child at suck; and since the dog they had with them was hungry, they tore the child from the mother’s arms and flung it still living to the dog” (Stannard, *American Holocaust*, 84). Stannard provides many other examples of similar cruelty (Ibid., 83 and 88).

²⁰ Robert Heizer, *The Destruction of California Indians* (Lincoln: University of Nebraska Press, 1993). For example, a San Francisco newspaper article from 1859 documents this cruelty: ‘An old Indian and his squaw were engaged in the harmless occupation of gathering clover on the land of a Mr. Grigsby, when a man named Frank Harrington set Grigsby’s dogs upon them, (which, by the way, are three very ferocious ones,) and before they were taken off of them, they tore and mangled the body of the squaw in such a manner that she died shortly

The construction of Native people as property, a practice established under the Spanish, introduced a maze of cruelties into the Americas. For instance, the ownership of Indians by the Spanish reduced the life span of certain Indigenous populations to their lowest historical point: three to four months after capture. This was seen most notably in communities forced to mine—the tactic was to work the Indigenous slave population to death, since replacing them was cheaper than feeding them. The Spanish priority was extracting resources through mining, forcing Natives to mine almost continuously, leaving no time for the planting of their crops, which created extensive food shortages.²¹

Military control over Native people, such as forced labor, was part of the Spanish conquest; yet the Spanish also employed a legalistic framework to justify enslavement. The legal rationalization of bondage provided a working jurisprudential map for concurrent and future colonizers to utilize. One of the Spanish enslavement laws was the *requerimiento*, which, in part, recognized the clear possibility of Native capture and enslavement:

‘I certify to you that, with the help of God, we shall powerfully enter into your country and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of Their Highnesses. We shall take you and your wives and your children, and shall

after. It is said the dogs tore her breasts off her. ... But he only set them on for fun, and they were only Diggers! There is a talk of having him arrested, but no doubt it is all talk’ (Heizer, *Destruction of California Indians*, 305).

This practice then, which started at the beginning of conquest, continued. Article is reprinted in *Destruction of California Indians*.

²¹ Stannard, *American Holocaust*, 87-94.

make slaves of them, and as such shall sell and dispose of them as Their Highnesses may command. And we shall take your goods, and shall do you all the harm and damage that we can, as to vassals who do not obey and refuse to receive their lord and resist and contradict him.²²

Many scholars have noted that the *requerimiento* was read in Spanish, a language that was unknown to the majority of Native peoples, which most often resulted in their immediate capture and enslavement.

While the Spanish brutally enslaved Native peoples in the Americas, in Spain there were intellectual debates over the morality of Native slavery.²³ One of the first well-known racial debates on the humanity of Indigenous people took place in Spain in 1550.²⁴ The debate “pitted the philosopher and translator of Aristotle, Gines de Sepulveda, against the Dominican Bishop of the Mexican state of Chiapas, Bartolome de Las Casas.”²⁵ The two philosophers were interested in placing Native peoples

²² Ibid., 66. See also David H. Getches, Charles Wilkinson, and Robert A. Williams Jr., eds., *Cases and Materials on Federal Indian Law*, 4th ed. (St. Paul: West Group, 1998) 39-52. Getches, Wilkinson and Williams, Jr. discuss the *requerimiento* and other Spanish laws of the 1500s that pertain to Indians. They write, quoting Lewis Hanke: ““for the Requirement was read to trees and empty huts and when no Indians were to be found. Captains muttered its theological phrases into their beard on the edge of sleeping Indian settlements, or even a league away before starting the formal attack, and at times some leather-lunged Spanish notary hurled its sonorous phrases after the Indians as they fled into the mountains” (Getches, Wilkinson, and Williams, *Cases and Materials*, 48).

²³ John C. Mohawk, “Indians and Democracy: No One Ever Told Us,” *Exiled In the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*, ed. Oren Lyons and John Mohawk (Clear Light Publishers: Santa Fe, 1992), 43-72. See the work of John C. Mohawk on the importance of the debate that was being waged in Spain and its inconsequential nature in detouring Indigenous cruelty.

²⁴ Omi and Winant, *Racial Formation*, 182.

²⁵ Ibid., 182; and Stannard, *American Holocaust*, 209. Some of the earliest laws were codified by Spain were in the early 1500s, called ‘Leyes de Burgos’ (Laws of Burgos), Burgos is the town where the laws were formulated in 1512 (Deer, “Relocation Revisited,” 621-683). De Las Casas and de Sepulveda were “[c]alled before the so-called Council of Fourteen by Charles V—the Holy Roman

within the existing racial hierarchies (many philosophers at this time thought Indians were a missing link between men and apes).²⁶ De Sepulveda argued that the Indians were “natural slaves”—a natural slave was considered to have no soul and was intended by God to be a slave. In contrast, de Las Casas argued that although Natives were “completely barbaric,” they were not “natural slaves.” While de Las Casas was one of the few prominent Spanish figures to argue against the pervasive logic of Natives as “natural slaves,” he maintained that Africans were “natural slaves” and promoted the substitution of African slaves for Indian slaves in the West Indies.²⁷ This did not result in an exchange of bodies. African slaves were brought to the Americas and entered a repressive system of forced bondage and servitude alongside Indians.

Although de Las Casas did not engage directly with the interrelatedness of African and Indian enslavement, he was one of the first contributors to the language

Emperor and the most powerful man in Europe—to argue whether the natives of the Americas should be considered natural slaves” (Stannard, *American Holocaust*, 210).

²⁶ Omi and Winant, *Racial Formations*, 182. The debate fueled scientific experimentation on Indigenous people, such as decapitation of Native Americans for measuring cranial capacity. Cranial capacity was used to justify the theory of polygenesis, which was a theory that was developed in the 1500s and maintained that different races came from different lineages and were therefore not only not related but different species. Black, white and Native people were thought to be different species that did not all evolve from Adam and Eve: “Africans, Indians, and other non-Christian peoples of color were not even descended from Adam and Eve, but from separate and inferior progenitors” (Stannard, *American Holocaust*, 209). The alternate theory to emerge was monogenesis, which was the idea that the differences between racial groups was not due to humans being different species, and linked all humans to a common ancestor.

²⁷ Cedric J. Robinson, *Black Marxism: The Making of the Black Radical Tradition* (Chapel Hill: The University of North Carolina Press, 1983), 127. Philosophers such as Aquinas and Aristotle also argued the idea of a race of humans that was created by God to be a slave race or “natural slaves.” During this period, Europeans for the most part believed that African peoples were “natural slaves.” Cedric J. Robinson, professor of Black studies and political science, points out that Las Casas was fully aware of the fact that the Spanish crown needed Indigenous slaves to maintain the conquest.

of this entanglement. It is, in part, due to the fact that Natives are seen as other than Black, or not-Black that de Las Casas asserted that Indians should be freed and Africans should be enslaved.²⁸ The basic tenant of Spain’s racial debates on the enslavability or naturalness of Indian entrapment was taken up by concomitant colonizers, such as the British, French, Dutch, and U.S., as the issue of land became more paramount over time, hitting an apex with U.S. expansion and the idea of manifest destiny.²⁹

“The Largest Land Transaction in the History of The World”³⁰

Andrea Smith argues in *Conquest: Sexual violence and the American Indian Genocide* that the rape of Native women is correlated with the rape of the land:

Native peoples have become marked as inherently violable through a process of sexual colonization. By extension, their lands and territories have become marked as violable as well. The connection between the colonization of Native people’s bodies—particularly Native women’s bodies—and Native

²⁸ See Robinson’s discussion of race relations in *The Making of the Black Radical Tradition*, 74-81. Robinson writes: “Like the slave, legally chattel to be sold at the discretion of a master, often the subject of cruel punishments, and without the rights to property, to marry without the permission, of the master, or to drink in a public tavern, the white servant jointed the vast excluded majority of the young republic’s population” (Robinson, *Making of the Black Radical Tradition*, 78). See also Max Carocci and Stephanie Pratt *Native American Adoption, Captivity, and Slavery in Changing Contexts* (New York: Palgrave Macmillan, 2012). There are groups that continue to advocate for Black Natives, who have been denied their heritage in certain instances—such as the Cherokee Freedman case. See the work of artist Eve Young Winddancer and Louis B. Myers, “African-Native Americans: We Are Still Here” (New York: Baruch College, William and Anita Newman Library, Feb. 1999), accessed June 16, 2012, <http://newman.baruch.cuny.edu/digital/native/default.htm>.

²⁹ Manifest destiny is the idea that it was destiny for Europeans, specifically the Pilgrims, to take over the land of Natives from “sea to shining sea,” and God was in effect bringing disease on Native people to clear the land for white settlers.

³⁰ Karen Biestman said this many times (Fall 2000).

lands is not simply metaphorical. Many feminist theorists have argued that there is a connection between patriarchy's disregard for nature, women, and indigenous peoples.³¹

Smith here argues that Native women have been constructed as inherently able to be violated and have been created by the state as “rapable”—“Because Indian bodies are ‘dirty,’ they are considered sexually violable and ‘rapable,’ and the rape of bodies that are considered inherently impure or dirty simply does not count.”³² Smith exposes the link between the desecration of the land and state attempts to control the reproductive freedom of Native women. How is the land connected to issues of Native adoption? The dispossession of the land and the construction of Native women as part of an ownable population are part of a larger project that defines Indian parents as unfit and their children as only able to be cared for by white institutions and families.

While acknowledging the importance and erasure of Native enslavement, Indigenous land dispossession cannot be ignored. As many scholars have previously argued, land must be understood as foundational to the accumulation of capital. As the Marxist theorist Rosa Luxemburg so deftly pointed out:

It is an illusion to hope that capitalism will ever be content with the means of production which it can acquire by way of commodity exchange. In this respect already, capital is faced with difficulties because vast tracts of the globe's surface are in the possession of social organizations that have no desire for commodity exchange or cannot, because of the entire social structure and the forms of ownership, offer for sale the productive forces in

³¹ Smith, *Conquest*, 55.

³² Deer, “Relocation Revisited,” 10.

which capital is primarily interested. The most important of these productive forces is of course the land, its hidden mineral treasure, and its meadows, woods, and water, and further the flocks of the primitive shepherd tribes.³³

While Luxemburg argues that Indigenous peoples were not easily offering up this “productive force” to their capitalistic colonizers, it is also important not to collapse the question of land and the colonization of Indigenous women’s bodies, which are linked in complex ways. This would only further discount the brutality that Indigenous people, particularly Indigenous women, suffered under slavery.³⁴ To see how the land and Native women’s reproductive control are linked, we can look at the long historical record of constructing the “new world” as a virgin Indian woman.

Rebecca Solnit, feminist theorist, argues that Americans are obsessed with the “virgin” wilderness:

There’s a strangely popular subject of speculation for hikers and explorers: whether they were the first person ever to tread on a piece of land. It comes out of the American obsession with virgin wilderness, which is itself a deeply problematic idea, and it speculates about the possibility of utterly new, of an experience without predecessors.³⁵

³³ Rosa Luxemburg, *The Accumulation of Capital* (Yale University Press: New Haven, 1951), 370.

³⁴ Maria Yellow Horse Brave Heart, “From Intergenerational Trauma to Intergenerational Healing” (Keynote address at the Fifth Annual White Bison Wellbriety Conference, Denver, Colorado, Apr. 22, 2005), accessed May 26, 2012, 5/26/2012). <http://www.whitebison.org/magazine/2005/volume6/no6.htm>. I believe that a feminist approach must account for Native men as well. If we are looking at the context of colonization, Native men were traumatized as well. I do not mean to conflate the trauma inflicted on Native women (for example, being considered rapable) with the trauma inflicted on Native men (for example, having little power or mobility in a white dominated world), rather I think it important that both suffered “Historical Trauma,” a concept that is developed by Maria Brave Heart Yellow Horse.

³⁵ Rebecca Solnit, *Savage Dreams: A Journey into the Landscape Wars of the American West* (Berkeley: University of California Press, 1999), 24.

As Solnit points out, Americans are fixated with being the first, “without predecessors.” Therefore, the land, even if occupied by millions of Native people, has been constructed as virgin.³⁶ Feminist scholar Anne McClintock, in *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest*, also engages the idea of “virgin” land:

the myth of the virgin land is also the myth of the empty land, involving both a gender and a racial dispossession. ... Within the colonial narratives, the eroticizing of “virgin” space also effects a territorial appropriation, for if the land is virgin, colonized peoples cannot claim aboriginal territorial rights, and white male patrimony is violently assured as the sexual and military insemination of an interior void.³⁷

³⁶ Many authors utilize the concepts that Solnit and McClintock have come up with. For instance, historian David Stannard uses their works and speaks to the idea of a “vacant,” or “wild” land. Stannard argues that the colonizer continues to construct the land as a “void.” McClintock and Stannard both argue that the process of colonization is tied to the concept of a “vacant,” “empty,” and “virgin” land, which is one of the constitutive contradictions of the language of conquest. Stannard wrote: “recently, three highly praised books of scholarship on early American history by eminent Harvard historians Oscar Handlin and Bernard Bailyn have referred to thoroughly populated and agriculturally cultivated Indian territories as ‘empty space,’ ‘wilderness,’ ‘vast chaos,’ ‘unopened lands,’ and the ubiquitous ‘virgin land’ that blissfully was awaiting European ‘exploitation’” (Stannard, *American Holocaust*, 12-13). Although this may seem benign, there is work done by continuing these myths. Stannard contends that the “empty land” ideology continues today not only in textbooks, but also in “highly praised books of scholarship” (Ibid.). Stannard claims that far from the land being “empty” it was vastly populated and the population of the Americas was probably more than that of Europe and Russia combined (Ibid., 11).

³⁷ Anne McClintock, *Imperial Leather: Race, Gender and Sexuality in the Colonial Contest*, 30. The population, of the Americas in 1492 has been and continues to be highly contested. Stannard states: “Today, few serious students of the subject would put the hemispheric figure at less than 75,000,000 to 100,000,000 ... while one of the most well regarded specialists in the field recently has suggested that a more accurate estimate would be around 145,000,000 for the hemisphere as a whole”³⁷ (Stannard, *American Holocaust*, 11). Another expurgation comes from scientists determination of the length of time that Indigenous people have been on this continent. Recent scholarship over the last decade has exposed that previous estimates were vast underestimates:

Until the 1940s, for example, it commonly was believed that the earliest human inhabitants of the Americas had migrated from the Alaskan portion of Berengia down into North and South America no more than 6000 years ago. It is now recognized as beyond doubt, however, that numerous complex human communities existed in South America at least 13,000 years ago and in North America at least 6,000 years before that. These are absolute minimums. Very recent and compelling archaeological evidence puts the date for earliest human habitation in Chile at 32,000 B.C. or earlier and North American habitation at around 40,000 B.C. while

As McClintock underscores, when the land is constructed as “virgin,” there are material consequences, one of which is that it prohibits Native people from claiming aboriginal title. It is within these “vacant lands” that actual bodies existed and were violated. Therefore, the dispossession of Native land must be accounted for not only because the loss of land is a loss of sovereignty, but because the land was occupied by Native peoples who were constructed as part of the wilderness, the landscape, and therefore as real estate able to be owned.

Harris argues that settling and confiscating Native land bolstered white property interests by nullifying aboriginal rights and justifying conquest.³⁸ Although each colonizer engaged with Native nations separately, the U.S. followed the precedent set by previous colonizers who had entered into treaties with tribal Nations. I do not want to conflate treaty-making with an equal sharing of power—there was not equality, but there was an acknowledgement that there was a legal relationship, a treaty making relationship, a government to government relationship. As Harris argues, there was a systematic taking of land, and land tenure was only legally recognized when held by white Americans:

some highly respected scholars contend that the actual first date of human entry into the hemisphere may have been closer to 70,000 B.C (Stannard, *American Holocaust*, 10) Although the issues of population density and time may seem benign, they are not. The stakes are history, land, rights and the reproductive freedom of Native women. If Indigenous people only occupied the land for a “short time,” conquest is more readily justified. If there were 145 million people upon the land, it was hardly a project of “discovery” of a “vacant” land by Europeans. If there were 145 million Indigenous people occupying this continent since 70,000 B.C., the project of “discovery” would have to be renamed what it was: a genocide.

³⁸ Harris, “Whiteness as Property,” 1721.

the conquest, removal, and extermination of Native American life and culture were ratified by conferring and acknowledging the property rights of whites in Native American land. Only white possession and occupation of land was validated and therefore privileged as a basis for property rights.³⁹

While, as Harris notes, the only fully recognized property rights over the land were held by whites, the rights of Native peoples were complex and ranged from chattel to partial sovereign. Certain rights were granted to Native people over their land, even if only as a legal maneuver to gain title and not as an actual guarantee of rights.

Although the only verifiable “owners” of the land were the federal government and white settlers, Native people did hold land and vast quantities of it (although not in fee simple). Whites held property interest in the land via their status and skin color, as Harris argues, but Native people also did not lose their property rights completely.

My work departs from Harris in its examination of the complex nature of Indigenous land rights through the legal case of *Johnson v. M’Intosh* (1823) and its engagement with the nuances of Native property relations.

The legal relationship between the U.S. and indigenous people with regard to land tenure was not invented in 1776, as legal scholars David Getches, Charles F.

Wilkinson, and Robert A. Williams. Jr. note in *Cases and Materials on Federal*

Indian Law:

Legal ideas applied by Europeans to questions of the rights of American Indians in the lands they occupied and possessed in the New World trace to the medieval era. In fact, a legal tradition which justified denying complete rights of self-rule and property to non-Christian peoples was already nearly four centuries old by the time of Christopher Columbus’s ‘discovery’ of the

³⁹ Ibid., 1721.

New World in 1492.⁴⁰

As Getches, Wilkinson, and Williams suggest in this passage, the rights granted to American Indians by colonizers have their roots in the medieval era. Therefore, the U.S. relied on the ideology of the previous colonizers to take Indigenous land, such as the “right to Christianize” and the “right of conquest,” which were rooted in the “Doctrine of Discovery.”⁴¹ Legal scholar Felix Cohn argued that Franciscus de Vitoria, a prominent Spanish theologian in the early 1500s, produced much of the land rhetoric that was adopted by Spain during their colonization of the Americas. De Vitoria produced precedents that are still at work today; for example, in 1532, he wrote that Natives owned the land: “natives were the true owners of the land. Since the Indian owned the land, the Spanish could not claim title through discovery, for title by discovery could only be justified where property is ownerless.”⁴² Although de

⁴⁰ For a discussion of the early roots of Indigenous land tenure, see Getches, Wilkinson, and Williams, *Cases and Materials*, 39-72; Vine Deloria Jr. and Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1983) 2-4; and Ward Churchill, and M. Annette Jaimes, *Fantasies of the Master Race: Literature, Cinema and the Colonization of American Indians* (Monroe: Common Courage Press, 1992). Deloria and Lytle note that de Vitoria was advising the emperor of Spain on the “Indian question” (Deloria and Lytle, *Nations Within*, 3). Ward Churchill wrote of the “Doctrine of Discovery” and the “right of Conquest” and argues that Spain was interested in setting international law down in regards to lands that were “discovered.”

⁴¹ The idea of “discovery” was well rooted in European legal tradition; for example, King Henry VII of England “issued a charter of discovery to the Italian captain John Cabot in 1497,” which was similar to the one that was issued by Spain (Getches, Wilkinson and Williams, *Cases and Materials*, 52-53).

⁴² Deloria and Lytle, *Nations Within*, 3. This is not to say that the Indigenous populations were not brutally dispossessed of their land—they were, but different colonizers had different justifications or “laws” at play in this dispossession. By the colonizer recognizing that Indigenous people had ownership of their land, even if only partial, it required, at least in theory, a negotiation to take place. Yet, de Vitoria’s acknowledgment of indigenous land rights could easily be nullified through Native refusal of Christianity. De Vitoria decreed: “Acquisition of land title from indigenous

Vitoria can be seen as supportive of Native land tenure, his writing did not necessarily produce actual rights for Indigenous peoples.

Although the U.S. did not assign “full ownership” to Native peoples over the land, they did grant a partial standing. The U.S. case that solidified Native land tenure was *Johnson v. M’Intosh* (1823), which centered on a piece of land that both Johnson and M’Intosh purportedly owned, yet the case was not only over who owned the particular piece of land in question, but also over the larger question of who had the right to “buy” Indigenous land. Johnson bought a piece land prior to the Revolutionary War from the Piankeshaw and Illinois Nations, while M’Intosh bought the same land from the U.S. government after the Revolutionary War.⁴³

At this time, John Marshall, who was the Chief Justice of the Supreme Court, could have handed down a ruling that supported complete land title for Indigenous nations.⁴⁴ For example, he could have stated that Native nations owned the land and could dispose of it as they chose. If Marshall had given that rationale, Johnson would have rightful title to the land that he bought prior to the Revolutionary War.

peoples could occur only by their consent—that is, by an agreement usually involving purchase—rather than through force of arms, so long as the natives did not arbitrarily decline to trade with Crown representatives, refuse to admit missionaries among them, or inflict gratuitous violence upon citizens of the Crown” (Deloria and Lytle, *Nations Within*, 3).

⁴³ Ward Churchill, “The Earth is Our Mother: Struggles for American Indian Land and Liberation in the Contemporary United States,” in *The State Of Native America: Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 139-188; Deloria Jr. and Lytle, *Nations Within*, 2-6, 26-27; and Unger, “The Indian Child Welfare Act,” 36-39. Many Native scholars have written about the significance of this case.

⁴⁴ John Marshall represented slaves claiming Indian decent in two cases before he joined the Supreme Court: *Hannah v. Davis* and *Coleman v. Dick and Pat*. He helped to free several slaves in these cases (Ablavsky, “Making Indians ‘White,’ 1506).

Conversely, Marshall could also have decided that Indigenous nations held no land title, which would have given title to M'Intosh. Justice Marshall, under pressure from all sides because of the vast quantities of land potentially at stake, decided something in the middle. Marshall began setting down legal precedent that would frame U.S. federal Indian law for hundreds of years.⁴⁵

In arguing his position, Marshall employed a document from medieval English common law, the “Doctrine of Discovery.” According to this doctrine, if a Christian nation “discovered” land that was occupied by non-Christians, the Native people could be conquered and Christianized. In a convoluted legal maneuver, Justice Marshall held that Indian people had been conquered and therefore retained “use and occupancy” of the land, and the U.S. had retained (as the conqueror) the title to all “discovered” land. Marshall linked the land taking to Christianity and England:

So early as the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England ... The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country.⁴⁶

It is clear from this passage that the notion of discovery was embedded in the language of the time, and although Marshall used the “Doctrine of Discovery” to argue that the U.S. had full title to all Indigenous land, he nevertheless left room for Native “use and occupancy” of their land. Essentially, this meant that Natives were

⁴⁵ Getches, Wilkinson, and Williams, *Cases and Materials*, 39-72.

⁴⁶ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). This case is also printed in its entirety in Getches, Wilkinson, and Williams, *Cases and Materials*, 65.

not completely left without legal standing, at least with regard to their land. This was crucial because it meant that the U.S. government, theoretically, had to enter into agreements to purchase land rather than take it by force (although force was allowed when it was a “just war”). Although the distinction of “use and occupancy” was precarious, it had lasting implications.⁴⁷

Ethnic Studies scholar Ward Churchill argues that Marshall was not supportive of or ambiguous about Native sovereignty in his decision. Churchill asserts that Marshall needed to establish a legal precedent to disenfranchise Natives from the land because if he did not do so, much of the land in the eastern states would be in question:

As Chief Justice of the Supreme Court John Marshall pointed out rather early on, almost every white-held land title in the country—New England, New York, New Jersey, Pennsylvania, Maryland, Virginia, and parts of the Carolinas—would have been clouded had the standards of international law truly been applied. More, title to the pre-revolutionary acquisitions west of the 1763 demarcation line made by the new North American politico-economic elite would have been negated, a long with thousands of grants of land in that region bestowed by Congress upon those who had fought against the Crown.⁴⁸

In this passage, Churchill signals the importance of land promised by the government to white individuals who fought for the U.S. in the Civil War. Even if Marshall was torn on the issue, it should be noted that he and his son were poised to lose 20,000

⁴⁷ Although Marshall was finding avenues to support limited Native sovereignty, the rhetoric he used was typical of the time. It is clear through the language of his opinion that there was a general sentiment during the 1800s that Natives were “savages.” Marshall states: “the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness” (Smith, *Conquest*, 56).

⁴⁸ Churchill, “The Earth is Our Mother,” 142.

acres of land if Marshall ruled that Natives had full title to the land.⁴⁹ Marshall handed down a decision stating that tribes had “use and occupancy” of the land and that the U.S. (the federal government, not states or individuals) had, as “discoverer,” the sole right to “buy” Indian land.

One of the lasting impacts of the Johnson case was its legal cementing of land title and race. Johnson produced (or continued) the ideology that the only race “advanced” enough to gain access to full title was the white race. By defining Native people as “quasi-sovereign” and in need of protection by the federal government (at the time, white men), it opened the legal channel for continued violence through land dispossession. The federal government continued the pattern of violence anchored by law in passing the paternalistic General Allotment Act, also referred to as the Dawes Allotment Act or Dawes Act, of 1887.⁵⁰

The Dawes Act divided existing Indigenous reservations, which were “held” by Indigenous tribes but “owned” in trust by the federal government, into parcels. The parceling of land was carried out with a formula that distributed “a grant of 160 acres to each family head, of 80 acres to each single person over 18 years of age and to each orphan under 18, and of 40 acres to each other single person under

⁴⁹ Ibid.

⁵⁰ Vine Deloria Jr., *Custer Died for Your Sins: An Indian Manifesto* (Norman: University of Oklahoma Press, 1988), 42-49. This act is also referred to as the Dawes Act, the Allotment Act, or the General Allotment Act; Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995), 19-21, 221 n.15.

eighteen.”⁵¹ The federal government then “acquired” 100 million acres of “surplus” land after it finished allotting Native lands.⁵² This was the largest land transaction in the history of the world.

The Dawes Act not only stole 90 million acres from Indigenous peoples, it also codified racial quantifications by cementing the use of blood quantum as a universal marker to define Indians, which remains a designation still used by most tribes and the federal government.⁵³ Although the Dawes Act cemented blood quantum, it did not invent it. It was used to mark African Americans and Native Americans in the 1700s. As will be discussed later in the chapter, there were a series of cases called freedom suits in the mid to late 1700s in which Native or Black Native people were arguing for their freedom by proving descent from a *free* Native woman.

⁵¹ Winona LaDuke, *All Our Relations: Native Struggles for Land and Life* (Cambridge: South End Press, 1999), 142.

⁵² Ward Churchill, *Kill the Indian, Save the Man* (San Francisco: City Lights Books, 2004); Ward Churchill and Glenn T. Morris, “Key Indian Laws and Cases,” in *The State Of Native America: Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 14. The Dawes Act was framed by Jerome, the Commissioner of Indian Affairs in the late 1880s, as an act that would “result in you having plenty of food and clothing; and instead of having, as you sometimes do, only one meal a day, you will have three meals a day ... you will not have your babies die from the cold, but you will have them grow up good, strong, healthy men and women, instead of putting them in the ground” (Churchill, *Kill the Indian*). Unfortunately, it resulted in an increase in child removal, poverty, destruction of culture, and death.

⁵³ For a discussion of blood quantum as related to the Dawes Act see Lenore A. Stiffarm and Phil Lane Jr. “The Demography of Native North America: A Question of American Indian Survival,” *The State Of Native America: Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 41-42. For a discussion of U.S. government policy, blood quantum, and the Dawes Act see Rebecca L. Robbins, “Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance,” in *The State Of Native America: Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 87-122. For a discussion of the general provisions of the Act and a discussion of the impact of blood quantum, see M. Annette Jaimes, “Federal Indian Identification Policy: A Usurpation of Indigenous Sovereignty in North America,” *The State Of Native America: Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 123-138.

Even if they could prove such descent, freedom was not automatically granted—they remained subject to the whim of the courts, and were often at the mercy of their owners to abide by the ruling. Blood quantum was only one factor in these cases, but it permeated the delineation of race throughout the 1700s.

Colonizing Indigenous Women's Bodies

Blood quantum gained traction in Native communities not only because of the intermarriage between Black and Native people, but also because of the rape of Native and African American women and the state's need to quantify their children. It is evident from the records that not only did all European colonizers take part in the enslavement of Native people, they all engaged in the sexual exploitation of Indian women's bodies. Although I do not want to flatten the many colonial relationships that existed between Native peoples and invading European nations from the sixteenth through the nineteenth centuries, it is safe to say that none was benign to Native peoples, particularly to Indigenous women. For example, the French fur trade is often discussed in historical texts as a mutually beneficial relationship between the French and Indigenous Nations. While it is true that the French had a different relationship with Native nations than the Spanish and British, it was nevertheless a relationship of violence. Deer notes that the French made many alliances with Native Nations, yet they simultaneously violated these alliances by enslaving thousands of

Indigenous people.⁵⁴ The French enslaved Indigenous women at a far greater rate than they enslaved Indian men: a rate of two to one.⁵⁵ Deer recognizes this disproportionate gender entrapment as sexual exploitation:

In Louisiana Territory, the sexual nature of this slave trade concerned members of the clergy. For example, 'French missionary Francois le Maire bemoaned the trade in 'savage female slaves' who though reputedly bought to perform domestic services, in actuality became concubines.'⁵⁶

As this excerpt points out, French 'settlers' were motivated to entrap women and girls as sex slaves. Deer notes that the English enslavement of Natives, similar to the reference to the French, has often been presented by historians as a "benign" one, made up of farm help and domestic servitude.⁵⁷ These representations only obfuscate and minimize the violence of the entrapment. Highlighting the relationship between punishment and property, Deer describes an English man who went to great lengths to keep "his property," an Indian woman named Sarah: "Squaw Sarah's master went so far as to devise 'an iron Engin made almost like pot hooks with a revett soe that would come about her necke, and a padlocke to keep it fast there.'"⁵⁸ Clearly this was not a benign undertaking. It was also not a small scale operation, as historian Max Carocci notes, "[i]t has been estimated that before 1715, 51,000 Native Americans

⁵⁴ Deer, "Relocation Revisited," 639.

⁵⁵ Ibid., 650.

⁵⁶ Ibid., 651.

⁵⁷ Ibid., 638.

⁵⁸ Ibid., 639, quoting from Kathleen Joan Bragdon, "Crime and Punishment Among the Indians of Massachusetts, 1675-1750," *Ethnohistory* 23, no. 28 (1981).

were sent by the British from North and South Carolina to the newly established colonies of the Caribbean.”⁵⁹ As Carocci points out, the practice of Native enslavement was more widespread than many scholars have acknowledged.

The enslavement of Native peoples, particularly women and girls, under U.S. colonization was extensive, and the purchase of Indian girls was commonplace across the U.S. This passage from the *Daily Cleveland Herald* in 1858 illustrates the pervasiveness of exploiting Native women and girls as sex slaves:

An intelligent writer in the train of the Utah Peace Commissioners states that the system of buying and selling Indian women is carried on all along the route across the plains among the traders and frontiersmen, as a regular established practice. Almost every white man along this route has an Indian concubine purchased. In the case of young and beautiful squaws at as high price as three or four horses, though old and ugly ones may be had at a much less cost. Once sold to the white men her Indian relatives renounce all further interest in her, and not merely her person, but her life, is at the disposal of her owner. When a white man gets tired of his slave-wife, he ships her off and gets another. The children of their union are totally neglected by their father and grow up as they may under the care of the mothers. At all the forts along the route, the young officers, settlers, and all who can afford it, keep their squaws.⁶⁰

This passage underscores the extensive property rights that white men exercised over Native women. Deer describes another instance from 1868 when a white hunter is describing how to brutalize a Native girl into slavery: “The girl, when sold to a white man, is generally skeary for a while and will take the first chance to run away ...

⁵⁹ Carocci, “Written Out of History,” 15.

⁶⁰ “Squaw Slaves in Utah,” *The Daily Cleveland Herald*, July 6, 1858, accessed Feb. 2, 2012, http://infotrac.galegroup.com.oca.ucsc.edu/itw/infomark/442/902/149358966w16/purl=rc6_NCNP&dyn=14!start_at?sw_aep=ucsantacruz.

should you take her again, and whip her well, and perhaps clip a slice of her ear, then she will stay.’’⁶¹ It is worth noting that the similarities in these narratives show the continued capture of Native women and children as slaves well after the Emancipation Proclamation in 1863, the passage of the Thirteenth Amendment in 1865, and the end of the Civil War in 1865.⁶²

When thinking through the continued enslavement of Native people after the passage of the Thirteenth Amendment, California stands out as a site where pervasive violence against Indian women continued well into the post-emancipation era. I investigate California specifically because of the importance of its legal archive, because the enslavement, capture, and control over Native women and children in California was extensive—and because my research is based in California. Historian Robert F. Heizer compiled a comprehensive collection of primary documents demonstrating how the state systematically went about destroying California Indians.⁶³ A central piece of legislation in California’s state-sponsored enslavement and entrapment of Natives was the 1850 *Act for the Government and Protection of Indians*. Although the Act purported to seek protection for Indigenous people, it was

⁶¹ Deer, “Relocation Revisited,” 653. Deer is quoting from David T. Courtwright, *Violent Land: Single Men and Social Disorder From the Frontier to the Inner City* (1996).

⁶² *Ibid.*, 655.

⁶³ Heizer uses documents such as letters from military agents (who were often the same as the Indian agents). See Luana Ross, *Inventing the Savage: The Social Construction of Native American Criminality* (Austin: University of Texas Press, 1998), 17-18 for an explanation of the historical context under which the BIA was created within the war department in 1824. This helps to explain how military agents were the same as Indian agents.

more accurately a legal maneuver to legitimate the already existing trade in Native people, particularly Native girls.⁶⁴ This passage of the 1850 Act, lays out how a settler would legally come into possession of an indentured Native:

Any person having or hereafter obtaining a minor Indian, male or female, from the parents or relations of such Indian minor, and wishing to keep it, such person shall go before a justice of the Peace in his Township, with the parents or friends of the child, and if the Justice of the Peace becomes satisfied that no compulsory means have been used to obtain the child from its parents or friends, shall enter on record, in a book kept for that purpose, the sex and probable age of the child, and shall give to such person a certificate, authorizing him or her to have the care, custody, control, and earnings of such minor, until he or she obtain the age of majority. Every male Indian shall be deemed to have attained his majority at eighteen, and female at fifteen years.⁶⁵

If a white person was found in violation of their Native “possessions,” for instance, for not properly “caring” for the Native men, women, and children that were entrapped, the penalty was ten dollars.⁶⁶ The 1850 Act also defined an “Indian” as having one-half or more Indian blood, and the definition was amended in 1851 to

⁶⁴ For a general discussion on the early laws of California and specific archival language of these acts, see Kimberly Johnston-Dodds, “Early California Laws and Policies Related to California Indians” (Sacramento: California Research Bureau, Sept. 2002), accessed Jan. 1, 2013, http://deltarevision.com/2009_even_more_docs/early_ca_water_law.pdf; and Kimberly Johnston-Dodds, “Bearing Archival Witness to Euro-American Violence Against California Indians, 1847-1866: Decolonizing Northern California Indian Historiography” (master’s thesis, California State University, Sacramento, 2009).

⁶⁵ Heizer, *Destruction of California Indians*, 220-221. For a discussion of the situation that existing during this period see Vernon T. Johnson “European Contacts in California,” *California Association of Human Relations Organizations* (April/May 1997).

⁶⁶ *Ibid.*, 222.

include Natives with one-fourth or more Indian blood, thereby including many more possible captives.⁶⁷

The legal boundaries for the enslavement of Native was further broadened in 1860 to incorporate Natives who were prisoners of war (a somewhat ambiguous designation), as well as “vagrants” and those not under the care of a white person.⁶⁸ This, of course, was a flagrant abuse of Native people, who often did not have a means of livelihood and were tormented by the white population. The Act clearly lays out a set of conditions for which Natives can be punished that included a wide array of ambiguous designations such as “loitering”:

Any Indian able to work and support himself in some honest calling, not having wherewithal to maintain himself, who shall be found loitering and strolling about, or frequenting public places where liquors are sold, begging, or leading an immoral or profligate course of life, shall be liable to be arrested on the complaint of any resident citizen of the county, and brought before any Justice of the Peace of the proper county, Mayor or Recorder of any incorporated town or city, who shall examine said accused Indian, and hear the testimony in relation thereto, and if said Justice, Mayor, or Recorder shall be satisfied that he is a vagrant . . . he shall make out a warrant under his hand and seal, authorizing and requiring the officer having him in charge or custody, to hire out such vagrant within twenty-four hours to the best bidder, by public notice given as he shall direct, for the highest price that can be had.⁶⁹

Therefore, it took only the word of a white individual that an Indian was guilty of vagrancy, begging, going to places where liquor was sold (Indians were not allowed

⁶⁷ Johnston-Dodds, “Early California Laws,” 6.

⁶⁸ Heizer, *Destruction of California Indians*, 223.

⁶⁹ Johnston-Dodds, “Early California Laws,” 11.

to consume alcohol), or being “immoral” to convict them of said offense.⁷⁰ Thus, it seems clear that most Indians during the mid to late 1800s could easily be enslaved, and the State of California supported the sweeping entrapment of Native people through both legal and extra-legal actions.⁷¹

Although many scholars have either ignored or too readily distinguished Native slavery from indenture, differences in the lived experiences of indenture versus enslavement were not noticeably apparent to Natives in California. As the *Sacramento Union* noted in 1860, the Act created a mandate, or was interpreted as such, that all Natives could be enslaved by any means necessary:

Under an act passed by the last Legislature, a large number of Indians are held in domestic servitude in this State, whose condition differs very little from that of absolute slaves. This law provides that persons who may wish to obtain Indians, ‘whether as children or grown persons, when held by their parents, or other persons holding with consent of their parents, or when held as prisoner of war, or when having no settled habitation or livelihood’—have only to go to the County or District Judge and agree to ‘suitably clothe’ and provide for them necessaries of life.⁷²

⁷⁰ The amended law also increased the age children could be kept: girls until age twenty-one (previously fifteen) and boys to twenty-five (previously eighteen) Heizer, *Destruction of California Indians*, 220-229.

⁷¹ The U.S. acquired California from Mexico in 1848 just prior to the passage of the 1850 California Act was passed. California was taken from Mexico with the Treaty of Guadalupe Hidalgo, through which land was promised to many Indigenous communities that they only partially received (a protracted battle continues to be waged over this land). For thinking through the lasting impact of the Treaty of Guadalupe Hidalgo, see: “Treaty of Guadalupe Hidalgo,” The Avalon Project, Yale Law School, accessed Apr. 25, 2012, http://avalon.law.yale.edu/19th_century/guadhida.asp; and The United States General Accounting Office, “Treaty of Guadalupe Hidalgo: Findings and Possible Options Regarding Longstanding Community Land Grant Claims in New Mexico,” (Washington, D.C.: General Accounting Office, Report to Congressional Requesters, June 2004), accessed Apr. 20, 2012, <http://www.gao.gov/new.items/d0459.pdf>.

⁷² “Indian Slavery in California” *North American and United States Gazette* (Philadelphia, PA) August 30, 1860, accessed Mar. 2, 2012,

As recorded in the *Union*, the legal status of the indentured versus the outright enslaved was not a clear distinction in California. There is evidence to suggest that the state was well informed as to the general white citizenry's use of this Act, for it was frequently noted in military correspondence, newspapers, and personal journals, as this military correspondence from 1861 illustrates:

Edward Dillon 2d. Lieutenant to Captain C.S. Lovell.
Fort Bragg Cal.
May 31st 1861

Captain

I have the honor to report that there are several parties of citizens now engaged in stealing or taking by force Indian children from the district in which I have been ordered to operate against the Indians.

I am reliably informed that as many as forty or fifty Indian children have been taken through Long Valley within the last few months and sold both in and out of the country.

The parties, I am told, at least some of them, make no secret of it; but boldly assert that they will continue to do so and that the law cannot reach them. It is pretended I believe that the children are purchased from their parents; but all who know these Indians can fully appreciate the value of this assertion. It is needless to say that this brutal trade is calculated to produce retaliatory depredations on the part of the Indians and exasperate them to a high degree.⁷³

In addition to military correspondence, the letters of Indian Agents not only illustrate the pervasiveness of the takings, but also the complacency of the military in them. Another letter from the Northern California Superintendent of Indian Affairs in

http://infotrac.galegroup.com.oca.ucsc.edu/itw/infomark/442/902/149358966w16/purl=rc6_NCNP&dyn=14!start_at?sw_aep=ucsantacruz.

⁷³ Heizer, *Destruction of California Indians*, 229.

1861 to Indian Agent Hanson makes clear that the Act was providing a cover for the sale of slaves:

The laws should be so changed or made as to protect the Indians against kidnapers. There is a Statute in California providing for the indenturing of Indians to white people for a term of years. Hence under cover of this law (as I think unconstitutional) many persons are engaged in hunting Indians (see my report of this month). Even regular organized companies with their Pres, Sec. and Treas. are now in the mountains and while the troops are engaged in killing the men for alleged offenses, the kidnapers follow in close pursuit, seize the younger Indians and bear them off to the white settlements in every part of the country filling the orders of those who have applied for them at rates, varying from \$50 to \$200 a piece, and all this is being done under a plea of “Kindness to the poor Indians.” Such act and injustice and violence are now tolerated by an unconstitutional law⁷⁴

As this letter makes clear, a monetary value was attached to Native bodies as exchangeable units of property to be sold both within and without the boundaries of the United States.⁷⁵ The enslavement of Native California women and children during this period could be accounted for by the need for cheap labor, but that would only be a partial reading. As Deer argues, we must understand that Native women and girls fulfilled a dual labor role—both physical and sexual, as an 1856 article from the *San Francisco Bulletin* made clear:

⁷⁴ Ibid., 230. For more articles and letters on the child stealing see Ibid., 236-241.

⁷⁵ Many sources document the sale of Indian children, particularly Indian girls to locations within and outside of the U.S. In California, in the *Ukiah Herald*, an article outlines several cases, one of a man who had sixteen young Indians and was apprehended as he was taking them out of the country:

‘Here is well known there are a number of men in this county, who have for years made it their profession to capture and sell Indians, the price ranging from \$30 to \$150, according to quality. Some hard stories are told of those engaged in the trade, in regard to the manner of the capture of the children. It is even asserted that there are men engaged in it who do not hesitate, when they find a rancheria well stocked with young Indians, to murder in cold blood all the old ones, in order that they may safely possess themselves of all the offspring’ (Johnston-Dodds, “Early California Laws,” 11).

[s]ome of the agents, and nearly all of the employees, we are informed, of one of these reservations at least, are daily and nightly engaged in kidnapping the younger portion of the females, for the vilest of purposes. The wives and daughters of the defenseless Diggers are prostituted before the very eyes of their husbands and fathers.⁷⁶

It may seem that Native people did not fight back, but that would be incorrect. When Native tribes fought to protect themselves and their community from rape and enslavement, white historians recorded it, for the most part, as unprovoked acts of warfare against Europeans. The next section analyzes a series of freedom suits by Native and Black Native people in order to underscore the ways that Native people fought for themselves and their children.⁷⁷

Not-Black Slaves: The East Coast Freedom Cases

Native peoples from all across the country fought for their freedom through slave rebellions, “uprisings,” killing white colonizers, moving to remote locations, and even using the colonial and U.S. court systems. Legal historian Gregory Ablavsky traces some of these freedom suits from the eighteenth and nineteenth centuries in Virginia, which involved enslaved Natives arguing that they were wrongly enslaved because they descended from a free Native woman. Ablavsky argues that Native slaves gained their freedom by becoming legally white. Like Roberts, Deer, and Carocci, he uses the period of slavery to document the ways in

⁷⁶ Reprinted in Heizer, *Destruction of California Indians*, 278.

⁷⁷ *Ibid.*, 241.

which racial formations in the revolutionary period set a framework that was not dislodged with emancipation.

The history of slavery is complex, and as Ablavsky argues, scholars need to understand the history of slavery as a tri-racial one intermediated between Black, Native and white. Authors such as Cedric Robinson, Max Carocci, Tiya Miles, William Loren Katz, Jack Forbes and others have, at least in part, espoused this argument. Max Carocci's scholarship is based on interviews with Native descendants of slaves. He stresses the need to take seriously the role that slavery had in the history of colonizing Native people:

this more nuanced version of American history, in which slavery, servitude and debt bondage played a major role for thousands of Native Americans, symptomatically revolves around tales of mixed unions between Africans and Amerindians, suggesting a lasting legacy and one that can be readily appreciated in the faces of many members of eastern nations.⁷⁸

These continued connections between Black Americans and Native Americans and the unevenness of Native enslavement are critically important to an understanding of the legacies of slavery. Native captivity was uneven, not all tribes were enslaved, and some tribes adopted a form of Black slavery within their Native Nations, such as the Cherokee. While the Spanish, Portuguese, British, French, Dutch, and U.S. all enslaved Native peoples, they did so in different legal forms and to different extents.⁷⁹

⁷⁸ Carocci, "Written Out of History," 15-16, citation omitted.

⁷⁹ Deer, "Relocation Revisited," 621-683. Deer carefully examines different colonizers and their enslavement of Native peoples.

Scholars of the complex history of Native enslavement make clear that we cannot continue to flatten the history of slavery into a biracial story—we must insist on a tri-racial history. Ablavsky, who calls for such an approach, built his research on the works of previous scholars who began publishing in the 1980s, such as Jack Forbes and William Katz—both foundational in illuminating the interconnected histories of Black and Native peoples.⁸⁰ Ablavsky makes the pervasiveness of Native and Black entanglements clear by investigating legal documents, particularly the freedom suits of the 1700s. He demonstrates the almost insurmountable hurdles that Native and Black Natives had to surmount in order to gain their freedom. It was possible to gain emancipation from slavery through a freedom suit, yet it was improbable. The law at this time could not account for people who were both Black and Native—a person was either Black or Native, but not both. This distinction proved to be precarious given the complex relationships between these two groups, which had formed over the previous centuries through shared entrapment. Freedom suits can be seen as a site where these interrelations are made visible. These suits were a site of resistance, but also a site where the government began to make rigid racial classifications in order to maintain a population that was legally subject to slavery.

⁸⁰ Forbes, *Africans and Native Americans*. The work on the subject of Black Natives is a field that only emerged in the 1980s, when there was a resurgence of interest in the long left out history of the connections between the enslavement of Native people and that of African American peoples.

There were many freedom suits up until emancipation, and the cases Ablavsky investigates center on whether the person in question could prove they were Indian. Unfortunately, only whites were granted standing as witnesses. Gabrielle Tayac, who writes about the connections between Black and Native peoples under slavery, points to a law of 1717 in Maryland (Bacon's Law), which codified the illegibility of Native and Black people in a court of law:

'That from and after the End of this present Session of Assembly, no Negro, or Mulatto Slave, Free Negro, or Mulatto born of a white Woman, during his Time of Servitude by Law, or any Indian Slave, or Free Indian Natives of this or the neighboring Provinces, be admitted and received as good and valid Evidence in Law, in any Matter of Thing whatsoever, depending before any Court of Record, or before any Magistrate within this Province, wherein any Christian white Person is concerned.'⁸¹

Because Natives could not speak on their own behalf, or that of another person of color, they had to vie for their freedom at the mercy of individuals who had a vested interest in keeping them enslaved.

Saidiya Hartman, a feminist theorist who writes about Black women under U.S. law during the antebellum period in the U.S., argues that Black women only had rights under the law if they were being punished.⁸² For example, the law only recognized them as having legal status if they had committed a crime, at which point they emerged as subjects to be punished, but if they were fighting off a rape, they

⁸¹ Gabrielle Tayac, "Claiming the Name: White Supremacy, Tribal Identity, and Racial Policy in the Early Twentieth-Century Chesapeake," in *IndiVisible: African-Native American Lives in the Americas*, ed. Gabrielle Tayac (Washington: Smithsonian, 2009), 110.

⁸² Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997).

were ineligible and illegible and could only enter the courtroom as objects—as property. The circumstances that Hartman writes about cannot be superimposed on the oppressive environments that Indians or Black Indians faced, yet parallels can be drawn: both populations were enslaved together and existed as impotent and muted under the law.

If a Native or Black Native, both enslaved, could prove maternal decent from an Indian woman, it did not necessarily lead to a granting of freedom because the Indian ancestor had to be a free Indian woman. For example, in 1747, “Indian Will” claimed that his mother, “Anne Williams Indian,” was an Indian and therefore he should be granted freedom from slavery. Twenty white Christians testified that indeed Anne Williams was an “Indian” *but* that she lived and died as a slave.⁸³ Since the status of the child followed the status of the mother, the court denied Will’s freedom suit.⁸⁴ Tiya Miles, whose scholarship centers on the enslavement of Black Americans by the Cherokee Nation, notes a 1706 proclamation that points to the fact that there were several different groups enslaved and that all children took the status of their mothers:

‘the baptizing of any Negro, Indian, or Mulatto Slave shall not be any cause or reason for setting them or any of them at liberty ... All and every Negro, Indian, Mulatto, or Mestee shall follow the state and condition of the mother

⁸³ Ablavsky, “Making Indians ‘White,’” 1478.

⁸⁴ Tiya Miles, “Taking Leave, Making Lives: Creative Quests for Freedom in Early Black and Native America,” in *IndiVisible: African-Native American Lives in the Americas*, ed. Gabrielle Tayac (Washington: Smithsonian, 2009), 139-150.

and be esteemed and reputed, taken and adjudged to be a Slave or Slaves to all intents and purposes whatsoever.’⁸⁵

This is one of many statutes that make clear that the status of both Black and Native children followed the status of their mothers.

The rejection of Will’s freedom suit referenced a previous law that allowed Indian slavery—a 1682 statute that clearly declared Indians who were sold to be slaves like all other slaves. It decreed, in part: “all Indians which shall hereafter be sold by our neighboring Indians, or any other trafiqueing [sic] with us as for slaves are hereby adjudged, deemed and taken . . . to be slaves to all intents and purposes, any law, usage or custome [sic] to the contrary notwithstanding.”⁸⁶ Given this and other similar laws and the frequency and complexity of Indian slavery, the Native and Black Native freedom suits often cemented the system of Native enslavement rather than allowed for the possibility of freedom.

In 1772, the case of *Robin v. Hardaway* marked a turn for Native freedom suits, and they began to gain traction and lead to freedom for some Native and Black Native slaves—at least for some who could prove maternal descent from a free Indian

⁸⁵ Ibid., 147.

⁸⁶ Ablavsky wrote a succinct description of the *Robin v. Hardaway* case: In 1772, George Mason, later famous as the ‘Father of the Bill of Rights,’ represented a slave named Robin and eleven other enslaved plaintiffs in the General Court of Virginia, the colony’s highest court. The slaves claimed that maternal descent from an American Indian made their enslavement illegal, and Mason marshaled arguments from natural law and statutory history to support that contention. In a terse one-paragraph opinion typical of the era, the court agreed, freeing the plaintiffs and ordering their former master to pay them nominal damages (Ablavsky, “Making Indians ‘White,’” 1471).

woman.⁸⁷ The specifics of *Robin v. Hardaway* (1772) revolved around a Native woman who had been sold into slavery in Virginia and lived and died as a slave. Robin and eleven other descendants of the enslaved Native were arguing for their freedom.⁸⁸ George Mason, the attorney representing the slaves, argued, in part, that because of a 1707 statute granting the U.S. trade rights with Indian nations, Indians were free—using the logic that the U.S. only traded with free peoples. Mason argued another controversial angle when he stated that Indians were not “natural slaves,” a concept that had been debated two hundred years earlier during the Spanish conquest of the Americas.

Although the court granted the freedom of these twelve Native slaves, it did not mark a clear divergence in the logic of the time, nor did it automatically guarantee freedom for any other slaves who brought suit in court. The practice of Native slavery continued, and even when a court ruled that a slave was “free,” it was not a guarantee

⁸⁷ Sandra Gioia Treadway, “Working Out Her Destiny: Women’s History in Virginia 1600 – 2004” (The Library of Virginia), http://www.lva.virginia.gov/exhibits/destiny/public_opinion/slaveorfree.htm. The General Assembly passed a law in 1662 stating that the status of the mother determined the status of her children: ““Whereas some doubts have arisen whether children got by any Englishman upon a negro woman should be slave or free ... all children borne in this country shall be held bond or free only according to the condition of the mother”” (Treadway, “Working Out Her Destiny”). This was also the case for Native women during this time—the status of the mother determined the status of the children. Ablavsky notes that it was difficult to prove that the mother was “free” given the unclear status of categories at this time. For example, if a Native woman had been indentured for 30 years, was she free? Many freedom suits explicitly rejected the claim that a Native mother would guarantee freedom. For example, Ablavsky notes, “In some places, including New Jersey and Louisiana, courts explicitly rejected the lawyers’ claims that “proof of being an Indian is equivalent to proof of freedom,” even though the court admired the Virginian “doctrines” on Indian slavery because they were “liberal, and honorable to the respectable judges by whom they have been delivered” (Ablavsky, “Making Indians ‘White,’” 1516).

⁸⁸ Ablavsky, “Making Indians ‘White,’” 1458.

of their freedom. For example, in 1773, three Native slaves, Samuel Findlay, Rachel Findlay and Judy Findlay, were granted their freedom in court, but prior to the final decree, their slaveholder understood that he was going to lose the case and sold the slaves in question further south, leaving the slaves without knowledge of the outcome of their case. What was astonishing about the case is that Rachel Findlay continued to argue for her freedom for nearly fifty years. As Sandra Gioia Treadway, scholar at the Virginia Library notes Findlay's sustained heroic battle for her freedom:

Rachel Findlay was illegally held in slavery from 1773 until 1820. When she was nearly sixty years old and living in Wythe County, Rachel Findlay first learned about the outcome of the 1773 law suit and began a heroic struggle to obtain documents, establish her identity, and win her freedom. In 1820 Rachel Findlay received the freedom to which she had been entitled since 1773. By then she had nearly forty descendants who were entitled to their freedom, too.⁸⁹

The legal ramifications of these early cases were significant both historically and to the individuals whose freedom was granted, yet future decisions did not grant freedom in uniform ways, and many courts continued to reject the logic of freeing Indian slaves: “[i]n some places, including New Jersey and Louisiana, courts explicitly rejected the lawyers’ claims that “proof of being an Indian is equivalent to proof of freedom.”⁹⁰ Consequently, slavery continued asymmetrically across the U.S.

Freedom cases demonstrated the intermixing of Native and African Americans under slavery, and the precariousness of their struggle to gain emancipation. Moreover, in Virginia, in 1806, another freedom case, *Hudgins v.*

⁸⁹ Treadway, “Working Out Her Destiny.”

⁹⁰ Ablavsky, “Making Indians ‘White,’” 1516.

Wrights, declared that Indians in Virginia could not be enslaved after a law that was passed in 1691 that the court felt explicitly prohibited it.⁹¹ Unfortunately, and probably quite purposely, the court ruled that descendants of Indians mixed with Africans would not be granted freedom. The new legal distinction of mixed Native African slaves proved problematic and cemented the enslavement of many Black Natives. The consequences of this can be seen not only in the increased profit from keeping certain bodies as commodities, but in the further disenfranchisement of many Native people.

Many scholars have interpreted the racial landscape of these lawsuits as hinging on a Native legal strategy of claiming whiteness. For example, Ablavsky argues that Natives sought to be classified as white under the law:

By defining Indians as equivalent to whites, *Robin* implied that Indians could not simultaneously be black. This separation of Natives and Africans made the possession of multiple legal identities impossible, despite the existence of numerous intermixed groups of “black Indians” throughout the United States.⁹²

Here is where I diverge from Ablavsky’s logic. It seems to me that individuals, or rather the lawyers who represented them, were really arguing that Black Natives were not-Black, rather than white. During the 1700s and 1800s, into the 1900s, to be white required proof of “pure ancestry,” yet, interestingly enough, up to one-sixteenth Indian blood was permissible for a white status under the Racial Integrity Laws of the

⁹¹ *Ibid.*, 1491.

⁹² *Ibid.*, 1519-1520.

1920s, yet not a drop of Black blood was permitted. To be Black required no legal adjudication, while to be designated Indian, the individual was required to have no more than one-quarter African American blood. The fact that Indianness has been defined within the parameters of less than a quarter African American blood suggests the need to distinguish between the two groups and account for a considerable deal of intermixing. Ablavsky notes that in the mid-1800s, “The descendants of Indians even possessed court-issued certificates that testified to their Native ancestry and protected them from the numerous legal restrictions imposed upon free blacks.”⁹³ Yet, as Ablavsky himself notes, Natives were getting affidavits “Certifying Individuals Are of Indian Ancestry and *Are Not Free Negroes*” (emphasis mine).⁹⁴

It seems to me clear that Native and Black Native slaves were, at least in some instances, arguing they were not-Black, rather than white. Jack Forbes’s work on the terms that colonizers used to describe Native people bolsters my argument that many Natives were assigned to and forced to fight against a Black, or colored designation. Forbes illuminates the way that terms currently vested with the definition of African Americas, such as negro, were historically used to delineate both African and Native slaves: “In the British slave colonies of North American, along the Atlantic coast, many persons of American ancestry were at times classified as blacks, negroes, mulattoes, or people of color, and these terms were, of course, used for people of

⁹³ Ibid., 1521.

⁹⁴ Ibid., 1521, footnote.

African ancestry.”⁹⁵ Another important example that clarifies or complicates the use of racial classifications that encompass both Native and African peoples is the Census of 1797, which defined Indians as “free Negros.”⁹⁶

Forbes, a founding scholar of the interrelatedness of Native and Black peoples, published a book in 1988: *Black Africans and Native Americans: Color, Race and Caste in Evolution of Red-Black Peoples*, which is an exceedingly detailed work on the entangled racial terminology that colonizers used to classify Native, Black, and white slaves. He delineates the genealogy of many words not only historically, but also by particularizing which colonizer utilized each term. Some of the terms he focuses on are: loro, negro, mulatto, black, moor and negro. While he traces these terms through time and location, he, all-the-while, painstakingly documents the pervasiveness of the capture and bondage of Indigenous people of the Americas and their intermixing with African slaves. Through the mapping of these terms, Forbes provides a clear exposition of the interrelatedness of Native and Black peoples under captivity.⁹⁷

⁹⁵ Forbes, *Africans and Native Americans*, 65-88. Forbes refers to Native Americans as Americans or Indians throughout this text. He provides examples of other colonizers usage of the term negro to include Native peoples: “It seems highly likely that the Spaniards referred to slaves generally as *negros* in the Caribbean, partly because the term became the equivalent of ‘slave’ but also because such usage allowed them to continue to illegally enslave Americans without revealing the fact to the authorities of Spain” (Ibid., 79). The Portuguese also used the term negro to denote a slave of several different ethnicities, such as Native, Chinese, Japanese, and Sinhalese (Ibid., 75).

⁹⁶ Tayac, “Claiming the Name.”

⁹⁷ Forbes argued that we must turn the unidirectional conversation of the influx of whites to the Americas into a complex conversation by adding how the dissemination of Indian slaves influenced Europe and Africa. He argued that the Black Indian tradition that was established in the Americas predated the importation of African slaves—he asserted, that many of the early alliances between

Another scholar has made significant contributions in uncovering the shared history of Black and Indian peoples is William Loren Katz, particularly in his 1986 book: *Black Indians: A Hidden Heritage*, in which he makes broad strokes to stress the importance of the alliances established between Black and Native peoples in bondage. Katz illustrates the extensive misconception of many who automatically categorize individuals as Black, when they may have had just as much Indian ancestry. For instance, he provides examples of prominent historical figures, such as Paul Cuffee, who led the “black back-to-Africa” movement, and Frederick Douglass, who was a leading voice during the Civil War—both of mixed Black and Indian heritage.⁹⁸

The work of Forbes and Katz has recently been invigorated by a number of scholars seeking to bring light to a subject that has been long silenced, or little voiced, in academia—the issue of Black Indians. Three books that are compilations of essays by prominent scholars of the history of Black Natives have recently been published: *Confounding the Color Line: The Indian-Black Experience in North America* (2002) edited by James F. Brooks; *IndiVisible: African-Native American Lives in the Americas* (2009) edited by Gabrielle Tayac and *Crossing Waters, Crossing Worlds:*

Black and Native slaves were formed prior to entering the U.S. through their shared captivity in Europe. He underscores that many Indians did not die in the American holocaust: “Thus the veil of evil descended up the Caribbean and many long years of rape and genocide commenced. ... But the tens of millions of Americans who disappeared after 1492 did not all die in the ‘holocaust’ inflicted within the Americas. Many thousands were sent to Europe and Africa and where their descendants still live” (Forbes, *Africans and Native Americans*, 24). Another interesting argument that Forbes puts forth is that African explores most likely visited the Americas prior to Columbus and that Columbus knew of this and aimed to confirm what he had learned from the Africans (Ibid., 14-15).

⁹⁸ Katz, *Black Indians*, 12.

The African Diaspora in Indian Country (2006) edited by Tiya Miles and Sharon P. Holland. The range of issues these books address is vast, from “We Heard it in the Fields: The Native American Roots of the Blues” by MWALIM (Morgan James Peters), where he argues that Native peoples and their music directly contributed to the creation of Blues and Jazz music, to several essays on the Cherokee’s adoption of Black slavery, illustrating the nature of the emergent field. Tiya Miles, one of the foremost contemporary experts on Cherokee slaveholding contributes to *IndiVisible* with her essay “Taking Leave, Making Lives: Creative Quests for Freedom in Early Black and Native America,” in which she stresses not only the need to understand how the Cherokee adopted Black slaveholding but also the essential acknowledgment of the long history of Native and Black Americans being enslaved together:

The shared circumstances of enslavement in which many indigenous and African Americans found themselves for at least a century and a half, people came together to forge relationships and share cultural ways. Treated like beasts of burden and forced to labor for the profit of others, slaves faced an environment in which their humanity was degraded and their daily lives dimmed.⁹⁹

So, although Miles’ work details Cherokee slaveholding, particularly in her book *Ties that Bind*, her work progressed to stress the shared enslavement of Black and Native Americans.

⁹⁹ Miles, “Taking Leave, Making Lives,” 142.

Ripples of Slavery: The Thirteenth Amendment and Native American Reproductive Control

Both Native and Black Americans who were enslaved celebrated the 1865 passage of the Thirteenth Amendment, which simultaneously enacted sweeping changes in the legal status of slaves and also cemented their continued servitude.¹⁰⁰

As feminist theorist Angela Y. Davis explains the way that the thirteenth amendment continued servitude:

When the thirteenth Amendment was passed in 1865, thus legally abolishing the slave economy, it also contained a provision that was universally celebrated as a declaration of the unconstitutionality of peonage. ‘Neither slavery nor involuntary servitude, *except as a punishment for a crime*, whereof the party shall have been duly convicted, shall exist within the United States, or anyplace subject to their jurisdiction.’¹⁰¹

In this passage, Davis is referencing African Americans, yet her work is important because it highlights the continued connection of punishment with race. The “exception” embedded in the Thirteenth Amendment, servitude for the punishment of a crime, proved not only to apply to Black Americans but also to Native Americans.¹⁰² For example, with the passage of the 1850 *Act for the Government and Protection of Indians*, California provided a set of “Native Codes” that were similar

¹⁰⁰ U.S. Const. amend. XIII. Johnston-Dodds explains that the Thirteenth Amendment changed the laws in California, yet because of the “loophole,” which allowed for involuntary servitude for the punishment of a crime, Natives continued to be enslaved (Johnston-Dodds, “Early California Laws,” 14).

¹⁰¹ Angela Davis, “From the Prison of Slavery to the Slavery of Prison: Frederick Douglass and the Convict Lease System,” *The Angela Davis Reader*, ed. Joy James (Blackwell, 1998), 75-76.

¹⁰² Theda Perdue, “Native Americans, African Americans and Jim Crow,” in *IndiVisible: African-Native American Lives in the Americas*, ed. Gabrielle Tayac (Washington: Smithsonian, 2009), 21-34. There has been a resurgence of interest in the role of Natives in legal regimes that were thought only to apply to African Americans, such as “Black codes,” such as the article listed above by Perdue.

to the Black Codes passed in the south that aimed at controlling the newly freed slave population. Jim Crow laws, as they have come to be known, were racially restrictive laws passed across the U.S. between 1867 and 1965 that established a set of punishable behaviors, such as vagrancy and loitering.

Historian Theda Perdue recently argued that the Jim Crow laws of the south sometimes specifically mentioned Indians and sometimes did not, yet regardless of the wording, Indians were subject and punished under these laws. Some of the Jim Crow laws did explicitly reference Indians; for instance, as Perdue notes, in the late 1800s, miscegenation laws were not only passed to regulate Black and white relations, but were also utilized to enforce African American and Native American boundaries: “In 1873, North Carolina prohibited unions between whites and African Americans or Indians, and in 1879, South Carolina declared, ‘Marriage between a white person and an Indian, Negro, mulatto, mestizo, or half-breed shall be null and void.’”¹⁰³ Some states, such as Louisiana, defined miscegenation as between a Native and Black person from 1920 up until 1942.¹⁰⁴

The 1850 *Act for the Government and Protection of Indians* was aimed specifically at Natives, as were other restrictive federal laws, including the outlawing of Native American religious practices. Similar to African Americans during this time period, Indians in California could be recognized and punished if they committed a

¹⁰³ Perdue, “Native Americans, African Americans,” 24.

¹⁰⁴ Ibid.

crime, yet they were barred from testifying against any white person.¹⁰⁵ An account of this can be seen in an 1851 case, as reported in Sacramento's *Union* newspaper, when a white man killed an Indian man, yet all knew he was not going to be punished for it because the witnesses were other Indians: "four or five Indians were present, witnesses to the transaction, and they pursued the murderer, caught him and carried him before a magistrate. Will it be believed that he was almost immediately released from custody, because our laws will not allow an Indian to testify against a man?"¹⁰⁶ As is clear from many statutes, white men during this time exercised a much greater range of freedoms than people of color. White men could violate and rape women and girls of color because of the legal construction of certain bodies as belonging to white people, either legally or de facto legal. The right to capture and enslave Native and Black peoples was regularly enacted by white men.

The idea that certain people are approved by the government (white males) to capture and enslave is written about by feminist legal scholar Kris Weller. Weller postulates that the limits of legal personhood are bound by the concept of capture—who has had, and continues to have, the right (or requirement) of capture and who was, and is, capturable. Weller uses statutes and case law to illustrate the precarious legal status of certain populations: women, minority persons, humans with disabilities

¹⁰⁵ Heizer, *Destruction of California Indians*, 293.

¹⁰⁶ *Ibid.*, 297.

and “non human animals.”¹⁰⁷ Weller connects this notion of capture to the 1850 Fugitive Slave Act, which amended the 1793 Fugitive Slave Act, and required that white citizens participate in the capture of Black slaves who were in free states:

The 1850 act provided that all Marshals, deputy Marshals, and commissioners appointed by them may ‘summon and call to their aid the bystanders, or posse comitatus of the proper county, when necessary to ensure a faithful observance of the clause of the Constitution referred to,’ and asserted that ‘all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required’¹⁰⁸

Weller’s notion of capture applies to minority groups who have not completely succeeded in moving from the category of captive to captor. Weller notes that certain human animals are not released from a state of captivity; rather, they exist in a perpetual state of capture:

Therefore, the move from legal human objecthood to legal human subjecthood is also a move from captured to captor. A mark of capturable remains on categories of humans who have been in the class of legal object, and removal of this mark is achieved only on an individual basis by those who are both able and willing to capture, able and willing to help police the border between human-person and nonhuman-thing-property, which is always already laced with race-class-gender-sexuality-ability determinations in addition to species.¹⁰⁹

Her notion of capture is pertinent when looking at why Native peoples, particularly women and children, continue to suffer disproportionately in areas such as sex trafficking. She argues that they existed and continue to exist in a state of perpetual

¹⁰⁷ Weller uses the term non-human animal, which brings up the distinctions within the law as to who is granted rights and under what circumstances, which is often based on an animal hierarchy where humans occupy the top position.

¹⁰⁸ Weller, *Defining Human*, 157.

¹⁰⁹ *Ibid.*, 53

capture. I use Weller's notion of capture and Andrea Smith's notion of rapable to argue that when theorizing about Native people it might be fruitful to understand the position that they occupy as owned or ownable, which would encapsulate the right to own a people's culture, language, religion, land, human remains, personhood, and all else that defines Native peoples.

Although freedom from enslavement and ownability shifted with the passage of the Thirteenth Amendment, it simultaneously opened another avenue for slavery to continue. Angela Davis argues that it is precisely at this moment when freedom is declared that it is simultaneously foreclosed upon:

It certainly is understandable that this loophole might be overlooked amid the general jubilation with which emancipation initially was greeted. However, the southern states' rapid passage of Black Codes – which criminalized such behavior as vagrancy, breach of job contracts, absence from work, the possession of firearms, and insulting gestures or acts – should have stimulated critical reconsideration of the dangerous potential of the amendment's loophole.¹¹⁰

It is, in part, because of loopholes within the Thirteenth Amendment that control over African Americans, Native Americans, and other minority groups, continues.

Several scholars investigate the nature of the continued control placed on people of color. Two prominent scholars Cheryl Harris and Dorothy Roberts argue that slavery is the genesis of current modes of domination, such as legal status and reproductive control. Both Harris and Roberts trace current forms of control over Black Americans to their historical enslavement. Harris uses theories of property

¹¹⁰ Davis, "From the Prison of Slavery," 76.

interest buttressed by case law to articulate how whites not only have feelings of entitlement, but actual legal claims over certain populations, such as Black and Native peoples, which she traces back to slavery and conquest, respectively.

Current scholars, such as Sara Deer and Andrea Smith, articulate the linkage of Native women's reproductive control to their historical enslavement. Deer writes about Native women's overrepresentation in sex trafficking and an interrelated regime of sexual violence that leads Native women to "suffer sexual violence at the highest rate of any ethnic group within the United States."¹¹¹ Deer argues that in order to understand the disproportionate numbers of Native women in the sex trade today, we must look at the history of their enslavement and insist that sex trafficking is, in fact, a form of slavery.¹¹² Deer claims that sex trafficking rightfully belongs to a long lineage of Native enslavement:

Notably, most of the government-funded reports imply that the sex trafficking to, from, and within the United States is either a relatively new phenomenon, or one that has only recently experienced sudden and dramatic growth. This assumption is mistaken. Sexual trafficking has a long and storied history within the United States and failure to acknowledge this reality impedes the resolution of the epidemic of sexual exploitation within this country.¹¹³

Through Deer's detailing of the exploitation of Indigenous women, she makes clear that sex trafficking is not a "new phenomenon" by giving numerous examples of Native women being forced into sex trafficking over the past several centuries. Deer's

¹¹¹ Deer, "Relocation Revisited," 624.

¹¹² *Ibid.*, 622.

¹¹³ *Ibid.*, 623.

work illustrates the need to continue the effort of relating the sexual exploitation of Native women to their historical enslavement.

While Deer traces Native women's overrepresentation in sex trafficking to their historical enslavement, Dorothy Roberts connects Black women's reproductive control to their enslavement. Roberts analyzes how control over the reproductive freedom of Black women in the 1990s was a continuation of a long history of control:

We are in the midst of an explosion of rhetoric and policies that degrade Black women's reproductive decisions. Poor Black mothers are blamed for perpetuating social problems by transmitting defective genes, irreparable crack damage, and a deviant lifestyle to their children. A controversial editorial in the *Philadelphia Inquirer* suggested coerced contraception as a solution to the Black underclass.¹¹⁴

Roberts's formulation of this issue is useful not only because she engages questions of reproductive freedom, but also because she uses captivity as the genesis of this domination: "[t]he brutal domination of slave women's procreation laid the foundation for centuries of reproductive regulation that continues today."¹¹⁵ Roberts links several seemingly different aspects of reproductive control to slavery, from rape to the separation of women from their children by way of sale and adoption. Roberts insists that the linkage from slavery to reproductive control must be maintained in order to fully understand the actions of the state against Black women. In a similar way, I argue that the lineage from enslavement to reproductive control must also be kept in plain sight when trying to understand the overrepresentation of Native women

¹¹⁴ Roberts, *Killing the Black Body*, 3.

¹¹⁵ *Ibid.*, 23.

in state systems of control, such as prisons and child welfare. This overrepresentation is an outgrowth of the fact that at every juncture in the legal system, as is the case with African American women, Native women are over reported and punished more harshly than their white counterparts.

Many parallels can be drawn between the histories of attempts to control the reproductive freedom of Black women and attempts to control the reproductive freedom of Native women. Andrea Smith, critical ethnic studies scholar, has written about the control of Native women in *Conquest: Sexual Violence and American Indian Genocide*, particularly in the chapter “Better Dead Than Pregnant: The Colonization of Native Women’s Reproductive Health.”¹¹⁶ Smith articulates how Native women have been systematically targeted for reproductive control through sterilization policies. Smith acknowledged that there are varying statistics on the sterilization of Native women, from five percent (which is the General Accounting Office [GAO] study) to “as high as 80 percent on some reservations.”¹¹⁷ Smith discusses the important research that Dr. Connie Uri, a Cherokee/Choctaw physician, did to uncover the extent of Native sterilization abuses:

one of the first people to uncover this mass sterilization of native women in the 1970s after a young Indian woman entered her office in Los Angeles in 1972 and requested a ‘womb transplant.’ Upon further investigation, Uri discovered that the woman had been given a complete hysterectomy for birth

¹¹⁶ See the work of Andrea Smith, particularly in *Conquest*.

¹¹⁷ *Ibid.*, 82-83.

control purposes when she was 20 years old and had not been informed that the operation was irreversible.¹¹⁸

As this passage underscores, Native women were not only targeted for sterilization programs, they were often sterilized without their consent. Smith provides numerous examples of sterilization abuses in the past and contends that, “Sterilization abuse, while curbed, is certainly not dead, either in IHS [Indian Health Service] or society at large.”¹¹⁹

Both Smith and Roberts argue that it is the government who has and is sponsoring the sterilization of women of color. Roberts argues that while white women were encouraged to have children, Black women were marked by the government for sterilization:

By World War II involuntary sterilization in the South had increasingly been performed on institutionalized Blacks. The demise of Jim Crow had ironically opened the doors of state institutions to Blacks, who took the place of poor whites as the main target of the eugenicist’s scalpel. South Carolina reported in 1955, for example, that all of the twenty-three persons sterilized at the State Hospital over the previous year were Black women. The North Carolina Eugenics Commission sterilized nearly 8,000 ‘mentally deficient persons’ in the 1930s and 1940s, some 5,000 of whom were Black.¹²⁰

Both scholars have brought to light not only widespread policies of sterilization but also the unequal targeting of certain populations for long-acting contraceptives, such

¹¹⁸ Ibid., 82.

¹¹⁹ Smith notes that “[i]n Peru, the Health Ministry recently issued a public apology for sterilizing 200,000 indigenous people (primarily Quechua and Aymara) without consent during the presidency of Alberto Fujimori” (Smith, *Conquest*, 85).

¹²⁰ Roberts, *Killing the Black Body*, 89-90. Roberts gives numerous examples of sterilization abuse in the section entitled “The New Reign of Sterilization Abuse” (Ibid., 89).

as Norplant and Depo Provera.¹²¹ Although both scholars address the individual history of reproductive control over Native and Black women, they do not connect them as part of a larger tri-racial regime. Given the historical entanglement of Native and Black peoples under slavery, and the presence of so many Black Natives, it seems to me that the struggles of Black and Native women against reproductive control are parallel and interconnected struggles that can only benefit from a more nuanced approach to the historical legacies of slavery.

Native, Black, and Black Native women have suffered a different trajectory than white women in the U.S.—while white women were fighting for the right to abortion and contraceptive use, women of color were fighting for the right to raise their children and not be used as test subjects for experimental contraceptives. Native, Black and Black Native women have had to fight, and continue fighting, for the right to care for their own children who comprise the bulk of the children in the child welfare system. The history of how African American and Native American children became overrepresented in systems of control is not the same, but again parallels can be drawn. There are important overlaps and many children that are both Black and Native cannot be accounted for as such under the foster care system, just as they could not be accounted for as such under the system of slavery and emancipation.

In reconceptualizing relations of race and property as part of the story of the overrepresentation of Native, Black, and Black Native children in foster and adoptive

¹²¹ Smith, *Conquest*, 88-96; Roberts, *Killing the Black Body*, see Chapter 3: “From Norplant to the Contraceptive Vaccine,” 104-149.

care and other institutions of control, this chapter stresses the need to acknowledge the long-standing enslavement of Native people, particularly the sexual exploitation of Native women and children. The East Coast freedom cases offered a point of entry into how Natives fighting for their freedom had to define themselves as not-Black rather than white. I ended with a discussion of the Thirteenth Amendment and the similar history of reproductive control that Native and Black women faced, and continue to face, and the shared struggle to keep their children in their communities.

The struggle to keep Native children with their tribes and families is connected to the continued construction of Native people as property. In the next chapter, I investigate the unique history of removing Native children from their families and argue that although it shares similarities with other adoption histories, such as African American people, it is also unique because of the status of Native peoples vis-à-vis the U.S. government.

Chapter Two

Indian Adoption Projects: Native Women Fight Back

The history of Native transracial adoption reveals some similarities with the transracial adoption of Black, Chicano, Korean, and Vietnamese children, yet there are also clear differences—differences that can be attributed to the ongoing historical impact of U.S. settler colonialism. Native and Black children, for example, traverse similar institutions and share similar patterns of incarceration, juvenile detention, and placement in the child welfare system as a result of their intertwined legacies of enslavement. This chapter attempts to situate Native adoption as part of a larger genealogy of Native removal by tracing the history of white guardianship over Native children through boarding schools and Indian adoption programs, including the Church of Latter-day Saints programs. I argue that without these lines of inquiry, the transracial adoptions of Native children might be misread as the altruistic acts of well-meaning white families, rather than as an essential component of a state-sponsored genocidal project. The removal of Native children is a reflection of the unique history of Native people vis-à-vis the U.S. government.

Although African Americans and Native Americans share the complex legacies of enslavement, my focus remains on Native peoples and on mapping the historical contours of their removal to the child welfare system. I track the ways in

which Native peoples have been claimed by the U.S. government as a population that is ownable. Although I focus specifically on white guardianship over Native children, I end by addressing why both African American and Native American communities formulate similar arguments about genocide when trying to explain why so many of their children have been removed by the state.

Conflating Histories

Although Native children have had different trajectories to adoptability than white children, there is still a tendency for academics to conflate these histories. For example, Lori Askeland (2006), an adoption historian, traces the history of Native, Black and white adoption to a single motive—parental needs.¹ Askeland’s argument is flawed on several levels. To begin with, she assumes that Black, Native, and white groups are somehow homologous with regard to the cultural history of their adoption practices. There may be shared historical underpinnings, but it is problematic to attribute such a diverse history of adoption experiences to one underlying theme. Even within Native communities, adoption practices vary widely, and with over 550 federally recognized tribes today, there is not, and has never been, one Native culture.

Another problematic and homogenizing tendency in some of the adoption literature involves tracing the first instance of legalized adoption to the Massachusetts

¹ Lori Askeland, “Informal Adoption, Apprentices, and Indentured Children in the Colonial Era and the New Republic, 1605-1850,” in *Children and Youth in Adoption, Orphanages, and Foster Care: A Historical Handbook and Guide*, ed. Lori Askeland (Westport: Greenwood Press, 2006), 4.

Adoption of Children Act of 1851. Many scholars of adoption, including Susan Devan Harness, point to the importance of the *Adoption History Project*, established by Ellen Herman at the University of Oregon, which traces the history of adoption to the 1851 Massachusetts Adoption Act.² Although the adoption of white children resulted from the law's passage in 1851, this Act is not the origin of all adoption histories and does not explain state adoption practices involving children of color. As noted in chapter one, the capture, sale, and enslavement of Native children was still widely practiced in 1851. If we anchor a general adoption history for all ethnic groups in the U.S. to this Act, it erases the historical relationship between adoption and the enslavement of Black and Native peoples. Amalgamating these often very specific histories of adoption in order to produce a more general philanthropic picture of whites "saving" children who would otherwise suffer economic and cultural deprivation erases the underlying work of racism and colonialism. If 1851 becomes the marker of advancement in the care of all destitute children through adoption, then the fact that children of color were adopted and "acquired" through legal and extra-legal means for another hundred years is erased from the historical record.

Unfit Mothers and Native "Orphans"

In order to engage in a discussion of group-based harm, I turn to how Native communities, families, and women were framed by the state as "unfit" to care for

² Ellen Herman, "Adoption History Project" (University of Oregon, 2007), accessed Aug. 15, 2011, <http://pages.uoregon.edu/adoption/index.html>.

their children. The value of fitness was based on a white, middle-class model, in this case, white, middle-class motherhood. Susan Devan Harness describes how Native women who left their children in the care of relatives, which would have been a culturally appropriate practice for their community, were labeled “unfit” by the state.³ Harness outlines how it became the role of social workers, in a new and emerging field in the 1900s, to establish and enforce the fitness of women, particularly women of color. Once a child was taken from an “unfit” home, the mandate for social workers became to find a “fit” home. The fitness of a home was narrowly defined around wealth:

Adoptive parents were required to be good housekeepers, provide separate sleeping quarters, and have enough space to allow children room to run. They were also to provide access to education. It was essential that adoptive parents be of good character, demonstrate marital stability, and most of all possess financial security.⁴

These requirements seem to outlaw the motherhood of all working-class women of color. How were working-class women of color at this time going to provide “separate sleeping quarters” for each child? The imposition of a white middle-class norm of “marital stability” justified the removal of “illegitimate” children from poor single women all over the country, as women of color were disproportionately marked by the cultural and racial concept of illegitimacy.

³ Harness, *Mixing Cultural Identities*, 39.

⁴ Ibid., 39; Harness is reviewing the work of Barbara Melosh, *Strangers and Kin: The American Way of Adoption* (Cambridge: Harvard University Press, 2002). Many scholars note the rigid requirements for qualifying for foster or adoptive placements, which often left relative placements disqualified due to income and space requirements.

Although there are ways that Native children were removed and adopted as part of this larger class of removals that relied on racialized understandings of fitness, motherhood, and illegitimacy, they were also specifically targeted in ways that had to do with their status as Native Americans. One insidious example is guardianship. Through the passage of the Dawes Act in 1887, Native children became the owners of large tracts of land, and the government gave these children white men as “guardians” who the children didn’t know and were not related to them.⁵ The Dawes Act was therefore used in part to define fitness and to dispossess Native parents and their communities of their rights to parent their children. Native parents, for example, were legally defined as “unfit” to raise their children unless they were legally designated sufficiently fit or “civilized.” As the government began to assign white legal guardians to Native children, they were defined as “orphaned” under the law, even though they clearly had parents who wanted them.⁶ Marilyn Irvin Holt, historian and author of *Indian Orphanages*, brought to light some of these guardianships. She writes that when the federal government forced allotment of Native land it “introduced the nightmare of child guardianship.”⁷ White citizens exercised their right to capture and own Native children by petitioning the court for guardianship of Indigenous children, thereby gaining access to their substantial land allotments:

⁵ The Dawes Act was part of the larger project of dispossessing Native people of their land and children.

⁶ The term “orphan” is problematic; see the work of Jeanniene Carriere, *Aski Awasis/Children of the Earth: First Peoples Speaking on Adoption* (Black Point: Fernwood Publishing, 2010).

⁷ Marilyn Irvin Holt, *Indian Orphanages* (Lawrence: University Press of Kansas, 2001), 142.

The situation was ripe for the unscrupulous ‘professional’ guardian who applied to the court and became the person in charge of a minor’s property. Most of these guardians were not satisfied with only one or two wards but made a business out of finding children and cashing in on their allotments. Orphaned children became a valuable commodity, sought out for financial gain rather than out of benevolent concern.⁸

That Indian children became “valuable commodities” underscores the relationship of adoption to ownability and property rights. It also underscores the legal work of possession because under slavery, Black and Native peoples were deprived of their parental rights through the law. Throughout the 1800s and 1900s, Indigenous people were robbed of their parental rights through ideological and physical assertions by the government and white citizens that they were the true “owners” of Native children. In describing the importance of law in the process of making children orphans, Holt describes a Native father who tried to get custody of his own son, pointing out that the court tutored him in the fact that although he was the “natural guardian” of his child, he was not the “legal guardian.”⁹ The government therefore asserted its legal right of ownership not only over the allotted land but also the children. Similar legal strategies anchored the government’s capture and removal of Native children to boarding schools, to indentured servitude, and to foster and adoptive care.

The government, with a long history of asserting its ownership over indigenous people and their property, acted as judicial body and transferred Native

⁸ Ibid., 143.

⁹ Ibid., 142.

children as property from their communities to individual white citizens. As Holt notes, white males could easily gain knowledge of Native children that had land to be usurped by going over the Dawes rolls:

Rolls listed each person entitled to an allotment, and the shyster looking for a way to profit from dissolution used the rolls to find children and then become their court-appointed guardian . . . the federal government aided this scam when, in 1908, minors were removed from federal protection and given over to the probate courts, which then assigned guardians to the youngsters.¹⁰

This passage underscores the government's role in removing federal protection for Indian children and in transferring legal authority to local courts.¹¹ For instance, Holt provides numerous examples of cases where children were in the care of a relative, or parent, and still assigned to a "guardian," thus transferring the child and the child's possessions to the white individual.

While the capture and transfer of Native children was rampant in the early 1900s, it is important not to conflate the issue of adoption with the practice of

¹⁰ Ibid., 142. Holt cites a newspaper article from the *Vinita Weekly Chieftain* that illustrates how this early form of "foster care" or "adoption" existed without any actual care:

And yet there were not a few thrifty geniuses who hit upon the scheme of hunting out and gathering up Indian orphans, and under the pretense of benevolently caring for their infantile wants, secure[d], through the help of federal courts, personal control and use of their allotments until the little ones become of age. The profit that a guardian might receive from such a business is too manifest to need explanation (Ibid., 144).

Holt describes another example in which a Native girl has her land taken and declared orphaned, yet she is left in the care of her grandmother so that the man who is her "guardian" can utilize the full profit from the sale of her land. The girl and her grandmother suffered in poverty while a white guardian sold off the girl's allotment.

¹¹ Holt lauds one white reformer, Kate Barnard, who worked to reverse "guardianships" in Oklahoma. Among her cases in 1910 were those of "11 full-blood children and 16 mixed-bloods whose guardians were not providing their wards with 'any part of their maintenance from their estates.'" In 1912, Barnard reported an increase in prosecuted cases: "8 cases representing 12 children in Pontotoc County; 9 cases representing 15 children in Haskell County; 12 cases representing 21 children in Tulsa County" (Holt, *Indian Orphanages*, 143).

“guardianship” under the Dawes Act. At the same time, these early legal relations of guardianship form an important part of the history of Native adoption and illustrate the complicated and unique status of Native peoples in relation to the United States government. In attending to the different historical underpinnings of Native adoption and to the larger genealogy of Native removal, scholars must also address Native boarding schools.

Boarding Schools

Native Boarding schools provide another site for thinking through the ways in which the history of Native adoption diverges from other adoption histories. The writing on Native boarding schools is extensive, but the connection to the removal of children to foster and adoptive care by the state is often not attended to in a careful way. If we leave out the history of boarding schools when looking at adoption, then the claim of genocide gets decontextualized, when in fact, the genocide of Native people was undertaken for centuries and continues today with unprecedented numbers of Native children removed for placement in the child welfare system. The forced removal of Indigenous children to boarding schools led to the forced removal of Indigenous children to foster and adoptive homes. These two processes were interconnected.

Although the link between boarding schools and adoption in the U.S. is often missing from the adoption literature (no literature traces the history of Native

adoption to the history of Native enslavement), some scholars have worked to trace the shared histories of boarding schools and adoption. Sinclair who links boarding schools to adoption practices in her dissertation noted: “[t]he white social worker, following on the heels of the missionary, the priest, and the Indian agent, was convinced that the only hope for the salvation of the Indian people lay in the removal of their children.”¹² The connection that Sinclair makes here—that social workers emerged as replacements for earlier agents of capture who stole Indian children and gave them to white parents—is key to understanding the apparently seamless transition from the placement of Native children in boarding schools to the placement of Native children in foster and adoptive homes.

Native parents did not consent to these effective kidnappings. In fact, there was often widespread devastation over the stealing of Native children. Native scholar Dane Coolidge writes of the pain that families experienced in the early to mid twentieth century as a result of losing their children. One example, of many similar instances, makes clear how desperate the situation often was:

[Jodie] and his wife had ten children. But as they came of school age they were taken away from him, and of the first eight all but one died in school...Jodie informed me that the truck was soon coming to take his little boy and girl, the last two children of ten. His wife, he said, sat and cried all the time and he asked me what he should do.¹³

¹² Sinclair, “All My Relations,” 28. Sinclair was citing the work of Founier and Crey in this instance.

¹³ Dane Coolidge, “‘Kid Catching’ On the Navajo Reservation: 1930,” in *The Destruction of American Indian Families*, ed. Steven Unger (New York: Association on American Indian Affairs, 1977), 20.

The utter despair that Native parents faced is evident from this example, where Jodie and his wife sought help from Coolidge to keep their last two children from the harsh realities of boarding schools. Coolidge advised them to hide their children, and they took his advice, yet their concealment was ineffective. The sorrow that Coolidge describes can be seen in countless cases of kidnapping and forced confinement in boarding schools. These sorrows ran deep in communities, and may have been most evident in the despair of the children who were forced to leave. Coolidge points to another instance of a boy who went to great lengths to try to return to his mother:

In 1925, while visiting Henry Chee Dodge, then chief of the Navajo Council, I noticed a sad-faced little boy who sat alone, always looking down the road. He had been to the Tohatchee School, some sixty miles from his home, but becoming lonely for his mother had run away several times. For this he had been ordered transferred to Phoenix and had run away again. He had come to appeal to the chief of all the Navajos to save him from the long separation, but even the chief was powerless.¹⁴

This heartbreaking example of a boy who just wanted his mother and his home illustrates the resistance that often occurred in boarding schools. It also underscores the widespread despair over the various forms of power that the U.S. asserted over Native communities and the lengths the government would go to capture and keep Indian children. Carolyn Attneave, Native author and activist, deftly points to the issue of submission:

Many Indian families came to expect that they would have to send their children to boarding schools or foster homes to be reared and educated by non-Indians. Even now this happened too often—not because Indian parents do not wish to keep their children, but because it seems hopeless for them to

¹⁴ Ibid., 19.

try to do otherwise.¹⁵

As this passage illustrates, Native parents and Native children have always resisted capture and forced confinement by the state, but were all too often legally and physically beaten into submission by the state.

As Attneave points out, Native peoples were forced to accept conditions that were often unbearable, conditions that were justified as part of larger “civilizing” project. The U.S. government began appropriating money to “civilize” Indigenous people through the development of a civilizing fund in 1819.¹⁶ As Thomas J. McKenney stated to Congress in 1818, “[i]n the present state of our country, one of two things seems to be necessary: either that these sons of the forest should be moralized or exterminated.”¹⁷ The sentiment of “civilize or exterminate” was common in the 1800s, with people falling on both sides of the debate. It is important to note that both happened simultaneously—Natives were enslaved at the same time that funds were being appropriated to “civilize” them.

¹⁵ Carolyn Attneave, “The Wasted Strengths of Indian Families,” in *The Destruction of American Indian Families*, ed. Steven Unger (New York: Association on American Indian Affairs, 1977), 29; and William Byler, “The Destruction of American Indian Families,” in *The Destruction of American Indian Families*, ed. Steven Unger (New York: Association on American Indian Affairs, 1977), 1-11. William Byler, the director of the AAIA at the time of the congressional hearings on Indian child welfare in the 1970s, also stressed the continued despair of families and made the connection between boarding schools and the continued removal of Native children to foster and adoptive care. He argued that the removals of the 1960s and 1970s were really only a continuation of the entrenched boarding school policies (Byler, “Destruction of American Indian Families,” 7).

¹⁶ George Noriega, “American Indian Education in the United States: Indoctrination for Subordination to Colonialism,” in *The State of American Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 376.

¹⁷ Jon Reyhner and Jeanne Eder, *American Indian Education: A History* (Norman: University of Oklahoma Press, 2004), 43.

Even prior to government appropriations, the U.S. sought to “civilize” Indians through policies on Native education. For example, in 1776, “[f]unds were appropriated in the interest of peace by the Continental Congress for the maintenance of Indian students at Dartmouth College and the college of New Jersey which is now Princeton University.”¹⁸ Indigenous people did not meet this initial “education” project with enthusiasm, as Cornplanter, a Seneca leader, so eloquently articulated in this now famous quote:

[Y]ou, who are wise, must know that different Nations have different Conceptions of things; and you will therefore not take it amiss, if our ideas of this kind of Education happens not to be the same as yours. We have had some experience of it; Several of our young people were formerly brought up at the Colleges of the Northern Provinces; they were instructed in all your Sciences; but, when they came back to us, they were bad Runners, ignorant of every means of living in the Woods, unable to bear either Cold or Hunger, knew neither how to build a Cabin, take a Deer or kill an Enemy, spoke our Language imperfectly, were therefore neither fit for Hunters, Warriors, nor Counsellors; they were totally good for nothing. We are however not the less oblig’d by your kind Offer, tho’ we decline in accepting it; and, to show our grateful Sense of it, if the Gentlemen of Virginia will send us a Dozen of their Sons, we will take great Care of their Education, instruct them in all we know, and make Men of them.¹⁹

As Cornplanter underscored, Native people did not have the same ideas about “education” as Europeans. The U.S. government knew early on that tribes did not want their children “educated,” but the U.S. increased its efforts with an increase in appropriations for Indian “education.”²⁰ Until the 1820s, the monetary appropriations

¹⁸ Noriega, “American Indian Education,” 376.

¹⁹ Ibid.

²⁰ Ibid., 377.

were for various forms of education, primarily for missionary education and sending Indians to college to strengthen alliances with certain tribes. In 1820 the first money was allocated for day schools and boarding schools located on reservations, which had self-sufficiency as the explicit goal and used the children as laborers.²¹ The Indian boarding schools on reservations were centered on manual labor and were called agricultural schools or industrial schools. The industrial schools were theoretically aimed at training Indigenous children in a trade, but the bulk of the child's day was spent in physical labor and in learning rigid Euro-centric gender roles—farming for boys and sewing for girls.²² Many Native authors have argued that these schools were a form of “modified slavery.”²³

In the 1870s, the government started off-reservation boarding schools that took children far from their reservations, often across the country, to be “educated.”²⁴ The complete removal of children from their communities to off-reservation schools was a divergence from the previous ideology of civilizing entire Indian tribes. Historian Steven Unger argues that it was Lieutenant in the U.S. Cavalry Richard

²¹ Many scholars report the requirement of “self sufficiency” for boarding schools because of the meager funds appropriated by Congress (Unger, “The Indian Child Welfare Act,” 144).

²² For a discussion on the gendering of Native children through boarding schools see Smith, *Conquest*; Andrea Smith, “Boarding School Abuses, Human Rights, and Reparations,” *Social Justice* 31, no. 4, 2004; K. Tsianina Lomawaima, *They Called It Prairie Light: The Story of Chilocco Indian School* (Lincoln: University of Nebraska Press, 1994); and K. Tsianina Lomawaima and Teresa L. McCarty, *To Remain an Indian* (New York: Teachers College Press, 2006).

²³ Noriega, “American Indian Education,” 379. This is a claim made by several Native scholars; for instance, see the work of Churchill, Carocci, Byler, and Justice William Thorn.

²⁴ Charla Bear, “American Indian Boarding Schools Haunt Many,” NPR, May 12, 2008, accessed Jan. 5, 2013, <http://www.npr.org/templates/story/story.php?storyId=16516865>.

Henry Pratt that changed the lives of thousands of Indigenous children for generations.²⁵ Pratt founded Carlisle, which was the first off-reservation boarding school (opened in 1879). Pratt found the inspiration for starting Carlisle from his previous work with Native prisoners, which convinced him in the possibility of stamping out the Indianness while preserving the man. In 1875, prior to the opening of Carlisle, Pratt was in charge of transporting and managing the incarceration of seventy-two Indian, primarily Cheyenne and Kiowa, warriors from Oklahoma to Florida. When the prisoners were released after three years of incarceration, Pratt found private funding for twenty-two of the seventy-two Indian men to continue their “education.” Interestingly enough, the only college that would take them was Hampton Normal and Industrial Institute of Virginia, a college founded for free-black slaves.²⁶ From this experience, Pratt became obsessed with separating Indians from the rest of their community in order to destroy her/his Indianness. He believed that it would be most beneficial to remove children rather than adults. In the late 1870s, Pratt capitalized on the numerous Christian groups who were trying to “save” Indians and mobilized their support to “kill the Indian, save the man.”²⁷

The U.S. government, through the off-reservation boarding school system, did not allow Indigenous children to return to reservations in the summers, and they were

²⁵ Pratt was a Civil War veteran, and after the war, he went west and was a part of the Tenth U.S. Cavalry, an all-black unit (Unger, “The Indian Child Welfare Act,” 97).

²⁶ Ibid., 98-99.

²⁷ Ibid., 100-110.

shipped across the country to prevent their return home. Many of the children were placed into the “leasing” or “outing” programs during the summers where they were placed among white families who assumed “guardianship” over them. These programs were a continuation of the forced labor of Indigenous people under slavery and boarding schools. Native historian Tsianina K. Lomawaima argues that “outing” was also developed by Pratt at Carlisle in order to promote children living a “civilized” life.²⁸ Holt also underscores the fact that some of these charitable organizations that handled the outing programs were nothing more than “clearinghouses for placing children.”²⁹ Lomawaima argues that specific tribes and even specific Native children were targeted for removal to boarding schools. She states that the children of tribal leaders, particularly tribes who were fighting the U.S., were taken as “hostages” in order to force compliance with U.S. desires.³⁰ There were people who spoke out against this type of “education” such as the well-known Native educator Henry Roe Cloud.³¹

²⁸ Lomawaima, *They Called It Prairie Light*, 50.

²⁹ Holt, *Indian Orphanages*, 208.

³⁰ Lomawaima, *They Called It Prairie Light*, 51.

³¹ Holt wrote: “Henry Roe Cloud, a Winnebago leader and educator, spoke for many at the 1914 Lake Mohonk Conference when he criticized the federal government for emphasizing vocational training at the expense of academic preparation” (Holt, *Indian Orphanages*, 195).

In 1889, there were an estimated 36,000 Indian youth in the United States and of those 10,500 were in Pratt-style boarding schools.³² Many Indian families resisted the forced removal of their children.³³ In fact, in my own personal experience, I can remember my mother's Navajo friends telling stories about the great lengths to which the government went in order to remove Navajo tribal children.³⁴ As Sharon O'Brien, a scholar of Indigenous studies, writes: "Navajo Reservation children were literally lassoed from horseback and kidnapped by federal officials to be sent to boarding schools where they were forbidden to practice their own traditions or speak their own language, on pain of whipping or going without food."³⁵ The cruelty O'Brien mentions in this passage is described over and over again in the literature on boarding schools. K. Tsianina Lomawaima, Brenda J. Child, and Margaret L Archuleta cite an unpublished manuscript entitled "We Will *Not* Give Up Our

³² Tom Holm, "Patriots and Pawns: State Use of American Indians in the Military and the Process of Nativization in the United States" in *The State Of Native America: Genocide, Colonization, and Resistance*, ed. M. Annette Jaimes (Boston: South End Press, 1992), 362.

³³ Sarah Deer argues that many instances of resistance to the enslavement of Indian children by tribal communities get misrepresented in history as act of aggression without a precipitant. See also the instance of the Hopi men imprisoned for resisting the removal of their children: Wendy Holliday "Hopi Prisoners on the Rock" *National Park Service*, accessed Jan. 10, 2013, <http://www.nps.gov/alca/historyculture/hopi-prisoners-on-the-rock.htm>; and Unger, "The Indian Child Welfare Act," 110.

³⁴ As a child, I would listen to Native women's experiences of getting taken to boarding schools. I can remember stories about how the Navajo adults would hide their children anytime they would hear a car coming—and how the kidnapers, government agents, would wait until night fall to ambush and capture Indian children.

³⁵ Sharon, O'Brien, *American Indian Tribal Governments* (Norman: University Of Oklahoma Press, 1989), 76.

Children” from the Hampton Archives that demonstrates the systems of tribal resistance that were set up to fight against removal:

[The Indians] were very courteous but very firm. Crowds of men and women had collected around the tipi and when we came out feeling like chastened children we had to pass down a long line of blanketed Indians, some of whom responded to our smiling ‘How’ while others looked pained and grieved to see women so young and so apparently innocent ready to tear little children from the loving arms of their parents. They had seen to it, however, that there was nothing to fear, for not a child of the five hundred appeared in sight to tempt us. Where so many could have hidden in tipis so devoid of hiding places we shall never know, but the children must have been in the game for no sound of them reached our ears.³⁶

This passage not only establishes the lengths that Native parents went to keep their children, but also demonstrates the knowledge state workers possessed of Native people’s resistance.³⁷ As Unger, quoting Archuleta, Child, and Lomawaima notes:

On the Navajo reservation, because of resistance, the Fort Defiance school had to go to great measures, ‘[R]ope and tie them, throw them in the back of a wagon and haul them off to school, where if they displayed any dissatisfaction or desire to return back home, they were chained to the bed and/or were forced to haul a large chain and ball around with them.’³⁸

Although it is important to understand the ways that Native children and parents resisted boarding schools, it is also important to not lose sight of the fact that the state had a practice of swift retaliation that resulted in a level of surveillance and control that was not known to most people.

³⁶ K. Tsianina Lomawaima, Brenda J. Child, and Margaret L Archuleta, *Away from Home: American Indian Boarding School Experience, 1879-2000* (Phoenix: Museum of New Mexico Press, 2000), 125; also cited by Unger, “The Indian Child Welfare Act,” 106.

³⁷ I never want to lose site of the fact that only half out our ancestors survived the boarding schools.

³⁸ Unger, “The Indian Child Welfare Act,” 105.

Even in the face of such brutal measures to control Native people, Native people continued to resist. There is evidence that the level of resistance waged by children was extensive. Steven Unger provides many examples of Native children's resistance, including one from the Fort Mohave school in 1890 where, in the words of the school teacher: "after several runaways were placed in the school jail, the kindergartners at Fort Mohave who were not locked up used a big log as a battering ram to break the sturdy jail door from its hinges, and the entire class escaped."³⁹ Children who resisted the boarding school system were locked up in cells for acting on their desire to return home, punished with "the ball and chain," and chained to their beds.⁴⁰ Police were often stationed at schools and employed to catch runaways, who were called "deserters" or "AWOLs" (Absent Without Leave).⁴¹ The regime of punishments employed against Native youth reveals a striking resemblance to incarceration and militarization, which would be consistent with the fact that these tactics were developed by a military officer (Pratt) from his experience incarcerating Native adults.

³⁹ Ibid., 123.

⁴⁰ Ibid., 110-123.

⁴¹ Ibid., 122.

The Indian Adoption Projects

The unique history of the removal of Indian children cannot be separated from the history of boarding schools. In 1934, with the passage of the Indian Reorganization Act, the government mandated that the forced removal of Native children to boarding schools be halted.⁴² Unfortunately, the coercion inflicted on Native communities to relinquish their children did not stop. In fact, many Indian boarding schools did not close until the 1990s, and some still operate. The closing of boarding schools cannot be considered a major shift in policy, as is sometimes assumed; rather, the partial closure implemented a new system of oppression in addition to the boarding school—the child welfare system. It has been documented that beginning in the 1940s, 25 to 35 percent of all Indian children were removed from their homes and placed in non-Indian foster homes, adoptive homes, and boarding schools. The removal of children to foster and adoptive care was done primarily by non-Indian social workers through the child welfare system.⁴³ One might argue that the large number of removals of Indian children to white homes was part of a larger systemic shift in U.S. policy away from confinement in larger “orphanages” to care by individual families. This policy shift alone cannot account for the

⁴² The Indian Reorganization Act (IRA) of 1934 was met with mixed responses from tribes. The Lewis Meriam Report that outlined the severe conditions on reservations was part of the catalyst that pushed Congress to pass the IRA in 1934. The Meriam Report indicated that Native people were living in conditions extreme poverty, suffering, discontent and would likely have a shortened life span (the average in 1928, the date of the report, was 40 years for a Native person). The IRA changed many governmental policies; for example, one major shift was the halting of the allotment policy established by the Dawes Allotment Act of 1887.

⁴³ Getches, Wilkinson, and Williams, *Cases and Materials*, 661.

disproportionately high number of Native children that continued to be removed and placed in boarding schools. For example, in 1974 there were around 35,000 Native children in BIA boarding schools, representing around 15% of the Native school age population and around 10% of the total Native children under 18 years old.⁴⁴ It also cannot explain why Native children were so disproportionately placed in foster and adoptive care. For example, the 25-35% does not include Native children adopted through private adoption agencies and those adopted independently, such as informal placement within a family or tribe and external placements done without the help of a state or private agency. This number also does not include children placed through church programs, such as the LDS Indian Student Placement Program, and it does not include children placed through the juvenile justice system, in which Native children are overrepresented.

Even without including all of the additional information, which would raise this number substantially, 25-35% remain a staggering statistic. Native children were considered ownable objects and transferred at will by the U.S. government. The complex dynamics that produced a juvenile population under capture can only be understood as part of the larger genocidal project against Native people.

While the combination of capture, enslavement, and forced adoption were reserved for Native children, the shift toward “child welfare” in the 1950s marked a reversal in the availability of adoptive care for Native children. Native and Black

⁴⁴ U.S. Senate, *Indian Child Welfare Program* (1974), 14-32.

children had to be explicitly packaged by the state as adoptable in order for them to find white middle-class adoptive homes. As adoption historian Barbara Melosh notes: “[r]ace set the limits of the postwar era’s broadening definition of ‘American’ and ‘middle class,’ and adoption in these years predominately served a white clientele ... in 1951, for example, of 80,000 adoption petitions filed, only 4 percent involved African American children.”⁴⁵

Because women of color had been represented as “unfit” not only through stereotypes but also through the material consequences of colonization, such as impoverishment, incarceration, and institutionalization, they were not considered qualified as foster or adoptive parents. The only “fit” home for any child was therefore with a white family.⁴⁶ As a result, from boarding schools to foster care and adoptive homes, minority children were removed from their families and placed in a variety of “care” alternatives that were almost exclusively staffed or “mothered” by white women.⁴⁷ This was a white maternalistic racial project funded by the government.

⁴⁵ Melosh, *Strangers and Kin*, 108.

⁴⁶ See the work of Harness, Jacobs, Bensen, DeMeyer, Locust, and Avina. Melosh provides a discussion of the changing normative perceptions of unwed mothers and pathology associated with unwed pregnancy (Melosh, *Strangers and Kin*, 111). Melosh notes that the concept of unwed motherhood changed over time, but that it was continually pathologized and subject to state intervention: “The zeal for relinquishment was driven partly by the conviction that women pregnant out of wedlock were by definition unfit mothers” (Ibid., 110).

⁴⁷ Several scholars bring this up, most notably Margaret Jacobs. Byler also points out that “[i]n most of the federal and mission boarding schools, a majority of the personnel is non-Indian” (Byler, “Destruction of American Indian Families,” 2).

Because children of color, including Native children, were made difficult to place through a racial hierarchy of adoptability, they were moved into a category historically reserved for physically and mentally handicapped children—the “special needs” category.⁴⁸ When foster and adoptive parents took in a “special needs” child, they could access funds to offset their expenses. Even with the added incentives to adopt these “special needs” children of color, Black and Indian children were often placed in substandard foster care homes.

In the 1960s, social workers and reformers sought to deinstitutionalize white children and “special needs” children. It was thought that some “advancements” in care would allow more frequent placements of “special needs” children. Reformers thought that although many special needs children were getting attention, not enough was being done for the Indian child, who according to Fanshel, had become the “‘forgotten child,’ left inadequately cared for on the reservation, without a permanent home or parents he could call his own.”⁴⁹ Fanshel, in 1957, prior to his joining the Columbia School of Social Work in 1965 and establishing Columbia’s Child Welfare Research Program,⁵⁰ estimated that there were about 1000 Indian children “legally free for adoption [but] forced to live in foster homes and institutions because adoptive

⁴⁸ Melosh, *Strangers and Kin*.

⁴⁹ Fanshel, *Far From the Reservation*, 35.

⁵⁰ National Association of Social Workers, “NASW Social Work Pioneers” (2004), accessed May 5, 2012, <http://www.naswfoundation.org/pioneers/f/fanshel.html>.

resources had not been found for them.”⁵¹ Because many children of color were cared for in large institutions due to a “shortage” of available white middle-class homes, Fanshel, wanted to find more permanent placements for the “forgotten Indian Child.”⁵² He argued that the larger residential institutions were “damaging” and “not appropriate for preschool children.”⁵³

While the stated directive of the joint project was to “stimulate the adoption of American Indian children on a nation-wide basis,” the Indian Adoption Project encouraged the widespread adoption of Indian children by non-Indian families.⁵⁴ With the 1957 study by the CWLA showing that there was a “forgotten Indian child” in need of rescue, the Indian Adoption Project expanded to place around 700 Indian children in white homes. The Project ran from 1958 until 1967, and placed Indian children from birth to 11 years old.⁵⁵ Fifty agencies were involved in the project, both private and public. Steven Unger, Director of the Association on American Indian Affairs (AAIA) in the 1970s, wrote that, “[a]ltogether, from the 1950s to the 1970s, the Child Welfare League of America was responsible ... for the placement of approximately 650 Indian children in non-Indian homes.”⁵⁶ Unger and other scholars

⁵¹ Fanshel, *Far From the Reservation*, 40.

⁵² *Ibid.*, ix.

⁵³ *Ibid.*, 49.

⁵⁴ *Ibid.*, 35, 167.

⁵⁵ *Ibid.*, 34.

⁵⁶ Unger, “The Indian Child Welfare Act,” 168.

note that thousands more Indian children were adopted in these three decades by other public and private adoption agencies.⁵⁷

The U.S. government promoted the expansion of the Indian Adoption Program programs all over the country. Canadian scholar Robert Bensen wrote that in the U.S. there was a “gray market” for Indian children.⁵⁸ Even after the Indian Adoption Project had ended, the adoption of Indian children was encouraged by President Lyndon Johnson in a special message to Congress on March 6, 1968: “which reminded elected officials that the poverty and deprivation under which American Indians lived within the reservation system had not improved.”⁵⁹ The continuation of adoption programs in changing forms throughout this period led to the transfer of an incredible number of Native children from their communities of origin to white middle-class families.

The Lost Tribe of Israel

One of the main private agents of this transfer was the Church of Latter-day Saints, often referred to as Mormons, who conducted the largest “child-transaction” in the history of the world. According to Unger, “[t]he Church estimated in 1990 that more than 70,000 Indian youngsters had participated in the program up to that time.”

⁵⁷ Adoption scholars seem to disagree on the number of children taken; for instance, Melosh puts the number at 700 (Melosh, *Strangers and Kin*, 160).

⁵⁸ Bensen, *Children of the Dragonfly*, 12, citation omitted.

⁵⁹ Harness, *Mixing Cultural Identity*, 18.

The program advertised itself to Native parents as a way that Native people could fulfill their destiny—a destiny directly linked to Mormon scripture, in which Native American people were identified as the Lamanites or the “lost tribe of Israel.” The LDS Indian Placement Program ran from 1947 to 1996, but has attracted the attention of few scholars. Lynette A. Riggs, a member of the LDS church who published her dissertation in 2008, describes a pamphlet that was given to Indian parents:

An early LDS public relations pamphlet meant for Indian families states that the program would ‘help your child succeed in his home life, his job, and in his service in the Church. As you help him in this program, you will be helping the Indian people fulfill their destiny.’ ‘Destiny’ refers to an LDS *Doctrine and Covenants* scripture (D & C 49:24) which promises, ‘the Lamanites [Native Americans] shall blossom as the rose’.⁶⁰

“Lamanites” or Native Americans were important to the Church; a former student in the LDS Placement Program stated: “[t]hey used to tell us to go home and teach our family ... They didn’t say so they could be saved, they said so they could blossom like the rose.”⁶¹ Another former student said: “They used to tell us we were a chosen race. They used to call us the Lamanites and [say] that because we didn’t listen to God we were cursed so we came out with dark skins and black hair.”⁶² Many Mormon families who took Native Placement students thought that the Indian’s skin

⁶⁰ Lynette A. Riggs, *The Church of Jesus Christ of Latter-Day Saints’ Indian Student Placement Service: A History* (PhD diss., Utah State University, 2008), 1, citation omitted.

⁶¹ Kate Davidson, “Saints and Indians,” NPR, Jan. 1, 2005, accessed Mar. 18, 2012. <http://www.npr.org/templates/story/story.php?storyId=4463101>. This is from an NPR story on the Church of Latter Day Saints’ Indian Student Placement Program. The Indian Placement student’s name was not given in the story.

⁶² *Ibid.*

would quite literally lighten after placement.⁶³ As historian Steven Unger writes, “Lamanites, whose dark skin was a curse from the Lord” would, by accepting the Mormon scripture, “have the curse removed and their skin would become white.”⁶⁴ The pressure from the LDS Church to have Native children bring their parents back to the Church was an extension of the U.S. government’s surveillance of Native communities. Native students were questioned by their “adoptive families” when they came back from spending the summer on their reservation. Their Placement parents would ask whether they attended Church, “Indian Squaw Dances,” or Indian ceremonies while they were home. This church surveillance was often very painful for Placement students.

Riggs acknowledges that because she is an active member of the LDS Church and a white former foster child in an LDS family, she cannot openly criticize the church.⁶⁵ She describes her work not as criticism of the LDS church, but as criticism of the “conquerors and colonizers” of Native Americans.⁶⁶ Although Riggs cannot openly criticize the Church Placement Program, she seems conflicted about some

⁶³ Riggs, *Church of Jesus Christ*, 8.

⁶⁴ Unger, “The Indian Child Welfare Act,” 279.

⁶⁵ Riggs, *Church of Jesus Christ*, 10.

⁶⁶ *Ibid.*, 11. Riggs also notes that, “[m]ost of my Native American students have been placement program participants. Surrounded by white students and teachers, they generally held us at arms length and were politely obedient. Their classroom chatter was superficial, and their narratives were never about the reservation. I rarely saw inside their heads and hearts—that hurt me— but I believed I knew why” (*Ibid.*, 11). This situates her as an insider in the very system that (as many Native people would argue) oppressed these Native children.

aspects of the program, including the pressure LDS families felt when they were asked to take in an Indian child. She acknowledges that it was considered a duty for Mormons to take in American Indian children, even if they may not have been clear that it was the best choice for their family:

Even though most LDS families obediently accepted students into their homes because they were asked or they felt they could contribute to the well-being of a child, tribe, or humanity in general, I acknowledge that most human charity is not completely selfless. There were rewards for accepting a placement student, as I discuss further on. Concerning the placement program, typical rewards or prompts might include guilt, a promise of spiritual reward, curiosity, social expectations, or companionship. It was and is considered inappropriate to deny a direct request from LDS church leaders, for that refusal would indicate a lack of true testimony and spiritual conversion. No LDS family received financial remuneration, although family-situated labor, such as farm labor and babysitting, might be considered as such.⁶⁷

Her discussion of the culture of the Placement Program shows that there was not much choice for LDS families told to accept an Indian child into their home.

Although the largest LDS program was directed primarily at Navajo children, many other tribes were targeted for placement. As Riggs notes, “The demographics for the 1966-67 school year indicated participation from 62 tribes.”⁶⁸ The fact that the LDS church was heavily recruiting from all tribes in the United States is important because their role in adoption and colonization is often understated.

One source for learning about the experiences of Native LDS adoptees is a 2008 National Public Radio (NPR) story by Kate Davidson entitled “Saints and Indians.” The story consists of the voices of Indian students and of the LDS families

⁶⁷ Riggs, *Church of Jesus Christ*, 12.

⁶⁸ *Ibid.*, 113.

who fostered them. There is somewhat of a back and forth between children who felt that they benefitted and those that felt harmed, although the interviews are weighted on the side of children who felt very sad about leaving their families. The feelings of former Placement participants illustrates the divergent experiences Natives had in the Placement Program. For instance, one former student states: “[m]y name is Floyd Nelson, and the Church has been a tremendous blessing to me. I’ve come to understand who I am as a Native American through the Book of Mormon. Yes, we have a curse to identify who we are, but I don’t look at it as a curse. I look at it as a blessing.”⁶⁹ Another former Placement Program participant states: “[t]o this day, August is the month I dread most because that was the month that I always left to go on placement. ... I always associate those rainy August days with having to leave home again.”⁷⁰ And another former student recalls: “[w]e always left at night, and being the oldest boy in the family, I tried to always put on a brave face, and I swore I would never cry, that never happened. I cried every time.”⁷¹ The differences in these perceptions of the Program as a source of blessings or as painful makes clear that a uniform experience cannot be attributed to Natives who were fostered in the LDS Placement Program.

⁶⁹ Davidson, “Saints and Indians.”

⁷⁰ Ibid., man’s name was not given.

⁷¹ Ibid., man’s name was not given.

Through interviews with LDS families who took in Indian children, the NPR story brought forth some of the racism of LDS Placement families. One former LDS placement “mother” focused on the idea of keeping your race “pure” and encouraged her male “adoptee” to date “Indian girls” because “You need to keep your lines pure and clean. You know, keep that Navajo line clean, pure, you know, but he didn’t do that. He married a white girl and they have beautiful children.”⁷² This former placement “mother” remained bound by racist ideology in encouraging racial “purity.” Another LDS member makes clear the fact that Mormons thought of American Indians as having fallen from God’s grace, which justified the loss of Native cultural practices: “Which culture did these children give up? ... Did they give up their original culture when they had the gospel of Jesus Christ? Or did they give up another culture they got when they left the gospel of Jesus Christ?”⁷³ This LDS member refers to Mormon scripture, which positions Native people of the Americas, including Central and South America and Polynesia, as descendants of the ancient House of Israel.⁷⁴

In the various debates over the “success” and “failure” of adoption programs, what is lost is the fact that 70,000 Indian children were targeted for assimilation by one Church organization. Seventy thousand Indian children were taken from their

⁷² Ibid., LDS Placement “mother.”

⁷³ Ibid., LDS Church member, name not given.

⁷⁴ William Lobdell, “Bedrock of a Faith Is Jolted: *DNA Tests Contradict Mormon Scripture. The Church Says the Studies Are Being Twisted to Attack Its beliefs,*” *Los Angeles Times*, Feb. 16, 2006, accessed Jan. 3, 2013, <http://articles.latimes.com/2006/feb/16/local/me-mormon16>.

homes, shipped to cities across the U.S. where they were often the only Native person in the community, (they tried to isolate each child as part of the immersion process) and were not allowed to return home until summer vacation. When the focus is placed on community harm, it is clear that Native communities were crippled by the loss of entire generations of children.

Colonization and Borders: Residential Schools in Canada and Australia

The U.S. was not the only colonizer to remove the Indigenous population within its borders to boarding schools. In fact, the U.S. and Canada share similar colonial underpinnings with regard to the treatment of Indigenous peoples. In 1879, when the U.S. was engaged in their efforts to remove Native children to boarding schools, Canada sent Nicholas F. Davin to study how the U.S. was “dealing” with its “Indian problem.” Davin was convinced the Americans were correct in their approach, and he surmised that the only way to “civilize” Indigenous people was to remove their children from the disruptive influences of the parents and community. His final comment in his report stated, ““if anything is to be done with the Indian, we must catch him very young.””⁷⁵ The Canadian example is important because it

⁷⁵ Paul L.A.H. Chartrand, Wendy Whitecloud, Eva McKay, and Doris Young, “Aboriginal Justice Implementation Commission Final Report,” Aboriginal Justice Implementation Commission, June 29, 2001, accessed Nov. 14, 2011, http://www.ajic.mb.ca/reports/final_toc.html. This is a comprehensive report published by the Canadian government, and Chapter 14 deals with child welfare.

represents an example of the exportation of U.S. colonial systems for controlling Indigenous people.

Through the U.S. idea of the “Indian Problem,” Canada began a trajectory that mirrored the U.S.’ by appropriating money to “educate” Aboriginal people and left the majority of the educational work to Christian organizations.⁷⁶ Also, like the U.S., in residential or boarding schools, “every aspect of European life, from dress and behavior to religion and language, was impressed upon the Aboriginal children.”⁷⁷

The Aboriginal Justice Implementation Commission stated in their final report of 2001 that the Canadian government had a clear goal of assimilating Indians:

The residential school system was a conscious, deliberate and often brutal attempt to force Aboriginal people to assimilate into mainstream society, mostly by forcing the children away from their languages, cultures and societies. In 1920, during debates in the House of Commons on planned changes to the *Indian Act*, Duncan Campbell Scott, the Deputy Superintendent of Indian Affairs, left no doubt about the federal government’s aims: ‘Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department, that is the whole object of this Bill.’⁷⁸

As Duncan Campbell Scott, the Canadian Deputy Superintendent of Indian Affairs made clear, the government’s plan for Canadian Indians in 1920 was mass confinement in a residential school system that was part of a deliberate system of genocide borrowed from the U.S. boarding school system.

⁷⁶ Australian Indigenous people are often referred to as Aboriginal people.

⁷⁷ Chartrand et al, *The Aboriginal Justice Implementation Commission*.

⁷⁸ Ibid.

The abuses suffered by Native children under these oppressive systems were also similar in both countries: Sexual, physical and psychological abuse molded Indian children into fractured subjects. As a son of a survivor of the residential school system underscores:

My father, who attended Alberni Indian Residential School for four years in the twenties, was physically tortured by his teachers for speaking Tseshaht: they pushed sewing needles through his tongue, a routine punishment for language offenders.... The needle tortures suffered by my father affected all my family (I have six brothers and six sisters). My Dad's attitude became 'why teach my children Indian if they are going to be punished for speaking it?'⁷⁹

As this passage illustrates, Aboriginal parents were frightened to teach their children traditional ways—they wanted to save their children from the cruelty they had endured. As *The Aboriginal Justice Implementation Commission Report* notes that children who survived the residential school system in Canada were seen as “straddling two worlds, the European one and that of their own Aboriginal societies, but belonging to neither.”⁸⁰ What is striking about this finding, and the existence of a kind of borderland identity, is that it mirrors recent studies in the United States on identity and belonging among Native transracial adoptees.⁸¹

Because the literature on the Canadian residential school system is more comprehensive than that of the U.S., I cannot attend here fully to the shared history of

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ See the work of Harness and Peterson. A summary of work on transracial adoption appears in the introduction above.

the U.S. boarding school and Canada residential school systems. Much of the Canadian literature focuses on the “breakdown” of the family. For example, *The Aboriginal Justice Implementation Commission* considers the impact of removal on the children of successive generations and concludes that when Aboriginal parents looked to their elders for examples of how to raise their children, role models were often difficult to find due to the extensive institutionalization of so many extended family members.⁸² While the Canadian government has acknowledged the link between the removal of Native children to boarding schools and their removal to foster and adoptive homes, the U.S. government has not. *The Aboriginal Justice Implementation Commission* also clearly places much of the blame on social workers:

The child welfare system was doing essentially the same thing with Aboriginal children that the residential schools had done. It removed Aboriginal children from their families, communities and cultures, and placed them in mainstream society. Child welfare workers removed Aboriginal children from their families and communities because they felt the best homes for the children were not Aboriginal homes. The ideal home would instill the values and lifestyles with which the child welfare workers themselves were familiar: white, middle-class homes in white, middle-class neighborhoods.⁸³

These regimes of forced adoption were also linked to the colonial project in Australia, where Aboriginal people suffered from similar genocidal policies including

⁸² Chartrand et al., *The Aboriginal Justice Implementation Commission*. Sinclair also wrote of the destruction of the family network from residential schools:

Aboriginal communities and families have now faced several decades of fall-out from the Residential school period, which included, as by-products of an assimilationist agenda the deliberate destruction of traditional family, social, and political systems, intergenerational abuse, and social pathology in many communities. A logical consequence of the replacement of traditional socialization with institutional abuse and trauma (Sinclair, “All My Relations,” 27).

⁸³ Sinclair, “All My Relations,” 27.

the mass removal of children to residential schools. The United States, Canada, and Australia simultaneously undertook campaigns to remove Indigenous children from their communities. As historian Margaret D. Jacobs notes, colonists in New South Wales “began taking Aboriginal children into their homes nearly from the moment they established a colony.”⁸⁴ According to Sinclair, children in Australia also experienced the sexual violence of capture, and “Settlers frequently shot indigenous adults and took their children as laborers. ... Aboriginal girls became particular targets as sex slaves or prostitutes.”⁸⁵

While Australia did not establish boarding schools, the government planned a system of removal that was similar to the US’s boarding school system. The Australian system emerged through similar ideas about illegitimacy and ownability. The children being removed in the early and middle nineteenth century were the children of poor white women, and there was a fear by white upper-class people that these children were a drain on the economy and, therefore, a drain on the nation’s wealth. This perceived drain on the economy was relieved by the removal of “underclass children” to punitive institutions where they were put to work in state

⁸⁴ Ibid., 58.

⁸⁵ Ibid. Jacobs also makes the connection to the California law. Also see the work of Sarah Deer on the sex traffic of Native women. Jacobs covers this topic from the vantage point of the white woman reformer, and argues that they took their place in the “frontier” by asserting their maternalistic superiority to Indigenous women. Jacobs’ book is a genealogy of white women reformers, and her work is thorough. She uses archives in the US and Australia, and documents white women reformers who supported the removal of Indigenous children, and some who ended up working to stop the removal.

workhouses or orphan asylums. Some were indentured.⁸⁶ Many of the children removed were children of immigrants.

In *White Mother To a Dark Race: Settler Colonialism, Maternalism, and the Removal of Indigenous Children in the American West and Australia*, Margaret D. Jacobs untangles the underpinnings of race and removal through an account of how Native women were designated by the state as unfit mothers through similar trajectories as the children of poor Europeans in Australia:

As in the United States, Australian state governments also engaged in removing the children of white working-class families. Before colonizing Australia, England had regularly removed children of the working classes who were deemed orphaned, destitute, or delinquent. Authorities boarded out some of these children with families or placed them in institutions. . . . Australia itself became one destination for removed children. Between 1830 and 1842 Britain removed and transported approximately five thousand working-class youth, some as young as seven.⁸⁷

Although Jacobs does not look at adoption, she offers a historical account of how white middle-class women reformers in the U.S. used similar rhetoric towards American Indians as white middle-class women in Europe used against immigrant women.⁸⁸ Many of the immigrant women targeted for removal of their children were

⁸⁶ Jacobs, *White Mother To a Dark Race*, 54-60. Jacobs notes that in Colonial New England this was called *parens patriae* and that “the state was the ultimate parent of every child” (Jacobs, *White Mother To a Dark Race*, 55). It is important to note that the state did not choose to exercise its “parental right” over white children in the same manner that it did children of color, particularly Native children.

⁸⁷ *Ibid.*, 60.

⁸⁸ *Ibid.*, 57. See also the work of David Stannard on the use of the rhetoric that the British utilized when colonizing the Irish and how the British used the same rhetoric when colonizing Native Americans.

Irish, Jewish and southern Europeans, who were thought to be “separate, nonwhite races.”⁸⁹ While removal strategies in the U.S., Australia, and Canada relied on narratives of fitness and a racialized “underclass,” Jacobs notes that there were also key differences in state strategies of removal for Native and white children—“the state never envisioned the removal of *all* children of immigrant and working-class parents [but it sought to place *all* Indian children in boarding schools.”⁹⁰ As a result, the history of American Indian removal has to be understood in relation to other histories of child removal but also as a history anchored in the specific experiences of capture, enslavement, and forced adoption.

Canadian Adoption Programs

Many Indigenous children from Canada were taken across the U.S.-Canada border for adoption in the U.S.⁹¹ Canadian Indigenous peoples were therefore removed to residential schools and foster and adoptive care in Canada and across the border in the United States. Academics and non-academics alike have referred to this mass removal of Indigenous children in Canada as the “sixties scoop”:

The phenomenon, repeated across Canada, has become known as the ‘Sixties Scoop,’ wherein social workers would ‘quite literally scoop children from

⁸⁹ Jacobs, *Mother to a Dark Race*, 57.

⁹⁰ *Ibid.*, 57-58.

⁹¹ Karen Andrea Balcom, *The Traffic in Babies: Cross-Border Adoption and Baby-Selling Between the United States and Canada 1930-1972* (Toronto: University of Toronto Press, 2011).

reserves on the slightest pretext—poverty, sanitation, housing standards, nutrition—without regard for the effects on the child, family, or reserve.⁹²

As Bensen enumerates, the removal of Indigenous people was done with little regard for the consequences for the child, family and community. The way the Canadian government has treated Native people mirrors many aspects of the treatment of Native people by the U.S. government. The issue of removing Indigenous children to foster and adoptive care has striking historical similarities in both countries as well as in Australia's treatment of the aboriginal population.

In Canada, as was the case with the US, in order to promote the adoption of Indian children into white homes, the government instituted a campaign to make Native children more desirable to white middle-class families. In both countries, the government paid for television ads that highlighted Native children in need of adoption.⁹³ These campaigns overrode any notion of Native sovereignty by marketing Native children as commodities. While both countries practiced racial matching in adoption for white children from the 1950s to the 1970s (the idea that a children should be placed with people they resemble and with people of similar religious affiliation), this practice was abandoned for Indian children in the U.S. and Canada.⁹⁴ Native children were considered property rather than members of other sovereign nations.

⁹² Bensen, ed., *Children of the Dragonfly*, 12.

⁹³ Sinclair, "All My Relations," 35.

⁹⁴ See the work of Harness, Sinclair, and Herman.

U.S. Congressional Hearings and the Association on American Indian Affairs

Native people fought against the continued taking of their children. In the U.S., Native people organized against the removal of their children and engaged in a protracted fight to get some kind of legal protection. Native women were at the forefront of the fight for legislation that would recognize Native sovereignty and stop the unwarranted removal of their children. These efforts eventually resulted in the passage of the Indian Child Welfare Act (ICWA) in 1978.

The Association on American Indian Affairs (AAIA) was a central player in getting ICWA passed. The AAIA gathered extensive data, including the testimony of Native people, Native tribes, and various “experts” and organizations in order for Native women to demonstrate to Congress “that state courts and welfare departments were removing an inordinately high proportion of Indian children from their homes.”⁹⁵ In 1974, William Byler, the Executive Director of the AAIA, testified to congress on the Association’s research findings. Byler’s statement, though lengthy, offers an important summary of the AAIA’s findings:

Surveys of states with large Indian populations...show that about 25 percent of all American Indian children are taken away from their families. In some States it is getting worse. For example, in Minnesota, presently, approximately

⁹⁵ James B. Reed and Judy A. Zelio, eds., “States and Tribes: Building New Traditions. A Broad Examination of the Condition of State-Tribal Relations and Opportunities for Mutually Beneficial Cooperation as the 21st Century Approaches, from a State Legislative Policy Perspective” (Washington: National Conference of State Legislatures, 1995), 28.

1 out of every 8 Indian children is in an adoptive home, but as recently as 1971 and 1972, 1 out of every 4 Indian children born that year was placed into adoption.

The disparity in rates for Indian adoption and non-Indian adoption is truly shocking. I'd like to read some of the statistics. In Minnesota, Indian children are placed in foster or in adoptive homes at the rate of five times or 500 percent greater than non-Indian children.

In South Dakota, 40 percent of all adoptions made by the state's department of public welfare since 1968 are of Indian children, yet Indian children make up only 7 percent of the total population. The number of South Dakota Indian children living in foster homes is per capita nearly 1,600 percent greater than the rate of non-Indians. In the State of Washington the Indian adoption rate is 19 times, or 1,900 percent greater and the foster care rate is 1,000 percent greater than it is for non-Indian children. In Wisconsin, the risk of Indian children being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children.⁹⁶

Byler's statement to Congress illustrates the pervasiveness of Indian child removals across the U.S. The mass removals were often unwarranted, and white social workers were removing Native children primarily for "neglect." Byler underscores the fact the majority of removals were for "neglect": "[a] survey of a North Dakota tribe indicated that, of all the children that were removed from that tribe, only 1 percent were removed for physical abuse. About 99 percent were taken on the basis of such vague standards as deprivation, neglect, taken because their homes were thought to be too poverty stricken to support the children."⁹⁷

The criterion for removal were based on heteronormative family standards such as no running water, no plumbing, no electricity, no nuclear family, and no

⁹⁶ William Byler, "The Destruction of American Indian Families," in *The Destruction of American Indian Families*, ed. Steven Unger (New York: Association on American Indian Affairs, 1977), 3.

⁹⁷ *Ibid.*, 5.

separate bedroom for each child. As Byler explained regarding boarding schools, which was one of the concerns that the congressional hearings in 1974 on Indian child welfare took up: “[p]overty, poor housing, lack of modern plumbing, and overcrowding are often cited by social workers as proof of parental neglect and are used as grounds for beginning custody proceedings.”⁹⁸ In the 1974 hearings, Byler connected removal to boarding schools and the later removal to child welfare. Byler is one of the few scholars who has explicitly made this intervention:

I think one of the primary reasons for this extraordinary high rate of placing Indian children with non-Indian families rather than in Indian homes is that the standards are based upon middle-class values; the amount of floor space available in the home, plumbing, income levels. Most of the Indian families cannot meet these standards and the only people that can meet them are non-Indians.⁹⁹

The standards were clearly discriminatory and heavily disadvantaged populations most affected by colonization. B.J. Jones, one of the foremost experts on ICWA, describes how Indian parents often “consented” to the removal of their children under pressure. He notes that, “Congress documented instances of state welfare agencies pressuring Native American families into signing away custody of their children to the state under threat of the termination of welfare benefits.”¹⁰⁰ This is similar to

⁹⁸ Ibid., 3.

⁹⁹ U.S. Senate, Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, *Indian Child Welfare Program, Hearings on Problems that American Indian Families Face in Raising their Children and How these Problems are Affected by Federal Action or Inaction*, Hearing, 1974 (93rd Congress, 2nd Session, Washington, DC: Government Printing Office), 5.

¹⁰⁰ B. J. Jones, *The Indian Child Welfare Act Handbook: A Legal Guide to the Custody and Adoption of Native American Children* (American Bar Association, 1995), 1-12. When children were removed by social workers they were put into foster care. "Foster care" was often just another name for

some of the tactics used by the government to remove Indian children to boarding schools, namely withholding rations from families who refused to send their children. The United States was founded on the land and labor of Native and Black peoples, yet in the process of controlling those groups and accruing great wealth, the government further penalized them for resisting colonization. For example, Native people's land was taken and they were forced onto land that was often of little value and forced to live on rations, which created conditions of widespread poverty. The government then turned that poverty into a marker of Native parents' lack of fitness and removed their children, further punishing them for their colonization.

The abuse that the government forced upon Native families was extensive, as Senator James Abourezk, U.S. Senator from South Dakota, stated in his opening statement in 1974: "It appears that for decades Indian parents and their children have been at the mercy of arbitrary or abusive action of local, State, Federal, and private agency officials."¹⁰¹ Senator Abourezk was not only a key player in getting ICWA passed, he also linked the issue of the removal of Native children to the removal of other children of color—something rarely discussed, especially in the 1970s: "This problem does not affect Indians alone. Indians, blacks, Chicanos, and the poor are

manual labor school. Foster care became another way to not only "assimilate" Indians but to use them for labor.

¹⁰¹ U.S. Senate (1974), *Indian Child Welfare Program*, 1. Senator Abourezk (Democrat from South Dakota) was a key supporter of ICWA. Unger makes this interesting note about many of the non-Indian key supporters of ICWA: they had some direct connection to Native people, meaning they actually knew some Native people. This included Abourezk who was raised on an Indian reservation (Unger, "The Indian Child Welfare Act," 20).

exposed to extraordinary risks; and if an Indian child, or one child at all is threatened with removal unjustly, then it threatens all children.”¹⁰² Making connections between the risk factors for Indian people and the risk factors for other people of color was an important intervention, but it is equally important to recognize the unique history of Indian child removal. Linking removal to the larger regime of race in the U.S, Byler argues that:

it's a copout when people say it's poverty that's causing family breakdown. I think perhaps the chief thing is the detribalization and the deculturalization, Federal and State and local efforts to make Indians white. It hasn't worked and it will never work and one of the most vicious forms of trying to do this is to take their children. Those are the great emotional risks to Indian families.¹⁰³

The attempt to make Indians white has been one of the most insidious racial projects of our time.

As social workers, judges, Bureau of Indian Affairs officials, adoption agencies, foster, and adoptive parents actively worked to remove Native children from their homes, they judged Native women to be “unfit” mothers and often cited “immoral conduct” as a reason for the removal of one’s children. The idea of “immoral conduct” relied on patriarchal notions of proper white middle-class families, which often conflicted with the traditions of many Native peoples. Many Native people married and divorced within their tribe according to the traditions of tribal law, and these marriages and divorces were not necessarily processed by a state

¹⁰² U.S. Senate (1974), *Indian Child Welfare Program*, 8. Byler was responding to a question about poverty asked by Senator Bartlett.

¹⁰³ *Ibid.*, 9.

agency. This produced a great deal of “immoral conduct” on reservations, which was utilized to pronounce Native women unfit. Responding to Senator Abourezk, Byler stresses the impact of enforcing outside notions of immoral conduct on Native communities:

there's never any evidence to demonstrate in this case or that case that the behavior of the parent is damaging that child. Immoral conduct is often judged by the wildest stretches of the imagination. For example, on one reservation more than 50 percent of the people live in common-law situations. These unions have lasted 5, 10, 15 years. The people don't have enough money to afford divorces and they want a family life, so they live with a person for 5, 10, 15 years. Police will sometimes, then make a sweep of a whole reservation and arrest the people that are living in illicit cohabitation. People living in illicit cohabitation are subject to having their kids taken away from them.¹⁰⁴

Because fifty percent of some reservations were living in common-law marriages and therefore subject to sanction and removal under the auspices of “illicit cohabitation,” these legal “sweeps” must be seen as punitive not only to the individuals engaged in “immoral conduct” but also to entire Native communities which were being declared unfit. It is therefore important that scholars of Native adoption history acknowledge the importance of understanding it through the guise of group-based harm.

Native Women: Resisting Punitive Removal and Incarceration

Native communities have long understood the group based harm caused by the mass removal of their children. It is Native parents, particularly Native women, who have long understood this harm. While U.S. legislators and organizational

¹⁰⁴ U.S. Senate, *Indian Child Welfare Program* (1974), 11.

leaders are often credited with the passage of the much-lauded Indian Child Welfare Act, little has been written on the contribution of Native women who were fighting against the illegal taking of their children. Because Native women never stopped struggling against the government for their children, this section of the chapter documents a fraction of the struggle Native women undertook in the 1960s and 1970s to stop the removal of Indian children and to get ICWA passed.

In 1968, a ten-year process of hearings and reports to Congress on Indian child welfare was initiated because of outcry from Native women across the U.S., such as the women from Spirit Lake reservation, previously called Devil's Lake reservation—and in the archives it is referred to as Devil's Lake, in North Dakota.¹⁰⁵ The Association on American Indian Affairs (AAIA) developed and implemented studies, and the results were presented before Congress, but it was Native women who requested that the AAIA intervene in the illegal removals that were taking place.¹⁰⁶ Although Native women's voices remain silent in the scholarly literature on ICWA, they were not silent during congressional hearings, and it was their voices that moved so many people to take action.¹⁰⁷ Understanding the role and strategies of Native women in organizing against removal is vital to understanding the depth of the

¹⁰⁵ The name has since been changed to Spirit Lake, see Unger, "The Indian Child Welfare Act," 186. In the archives the women and tribe are referred to as Devil's Lake, but I use the current name of the tribe: Spirit Lake.

¹⁰⁶ Bensen, *Children of the Dragonfly*, 12.

¹⁰⁷ These hearings were extensive and resulted in several hundred pages of transcripts, testimony, and accompanying documents. As Unger notes, they are an invaluable resource that has not fully been utilized. See also Bensen, *Children of the Dragonfly*, 12.

atrocities perpetrated on Native communities.

Native women went to AAIA and requested their help in getting their children back and help in finding a way to halt the continued takings. AAIA represented hundreds of women in their struggle to get their children back.¹⁰⁸ Native people on Spirit Lake reservation were at the forefront of the resistance to the illegal takings. The women on Spirit Lake reservation appealed to the media, and outlined to them the severity of the situation, which is one of the ways that the situation became known outside Native communities. The circumstances in which Native people lived on Spirit Lake reservation were similar to conditions on many other reservations: sometimes referred to as “third world” conditions. Spirit Lake was/is the home of the Wahpeton Sioux and the Sisseton Sioux, who lived in extreme poverty, with unemployment rates over ninety percent.¹⁰⁹ According to Unger, social workers were removing children precisely because of poverty:

Welfare workers were routinely removing children from Devils Lake and in an AAIA study it was found that, ‘virtually all of the children taken away (99%) were removed on vague allegations of deprivation or child neglect—because their families were thought to be too impoverished to care for their children.’¹¹⁰

¹⁰⁸ Unger includes over twenty pages detailing important cases in which AAIA represented Native women in getting their children back (Unger, “The Indian Child Welfare Act,” 86-214). Many of these cases are also discussed in the hearings, either by Indian mothers or by AAIA. These cases are available in the AAIA archives, yet the microfilm reels at Stanford remain unorganized and the Finding Aid is incomplete.

¹⁰⁹ Unger, “The Indian Child Welfare Act,” 186, citation omitted.

¹¹⁰ Ibid., 186. See also U.S. Senate, *Indian Child Welfare Program* (1974), 37-44, and AAIA archives at Stanford University, microfilm, in the documents on the delegation from Devils Lake.

As Unger suggests, social workers in the 1960s and 1970s adhered to the general principal that reservations were not places for raising children. William Byler, Director of AAIA in the 1970s confirmed the experience of group-based harm when he wrote of the continued perception that reservations were unsuitable for habitation. He notes that in the 1970s, one mother was declared unfit simply because of her choice to reside on a reservation: “The social workers asserted that, although they had no evidence that the mother was unfit, it was their belief that an Indian reservation is an unsuitable environment for a child.”¹¹¹

Although many Native women fought the child welfare system, the actions of a Native grandmother living on Spirit Lake reservation, Mrs. Alex Fournier, led many people to take action. Mrs. Fournier persuaded the tribal council to pass a resolution against the taking of her grandson—a resolution that infuriated the Benson County Welfare Department of North Dakota. The Welfare Department took retaliatory action and stopped payments to Mrs. Fournier and other tribal members.¹¹² The fight that Native women on Spirit Lake engaged in received national attention, and put a spotlight on the matter of Indian child removal. At the request of the tribe, AAIA wrote to the Department of the Interior and requested help with the situation in Benson County. They framed the situation on Spirit Lake as one of governmental

¹¹¹ Byler, “Destruction of American Indian Families,” 3.

¹¹² See Unger, “The Indian Child Welfare Act,” 187; U.S. Senate, *Indian Child Welfare Program* (1974), 53; and AAIA archives. Mrs. Fournier was not the biological grandmother of Ivan, but in the tribe, she was his grandmother.

coercion—Benson County was withholding monies from Indian foster parents as a way of applying pressure so that they would relinquish their children.¹¹³

Mrs. Fournier testified in 1974 to the circumstances that led to her resistance. According to her, she was the mother of a boy named Ivan. She clarified the situation to Senator Abourezk after he asked, “You have been living with your grandson, and his name is Ivan Brown?” She replied, “He isn't my grandson. This child is no relative of mine, but I have taken him since his mother died. ... He takes me as his mother, and I take him as my own.”¹¹⁴ Mrs. Fournier had been caring for Ivan since he was three weeks old, and when he was two, after repeated attempts, a county social worker tried to take him by force while the Spirit Lake Sioux tribal court was hearing Mrs. Fournier’s case. Mrs. Fournier testified before the U.S. Senate that officials had tried to take the child from her during a hearing:

Senator Abourezk: It was tribal court?

Mrs. Fournier: Yes, and they took me and the welfare people took me in and they wanted to take the child and I said no, I can't let him go. This man jumps up, my little boy was out in the hall, and he went out and he grabbed the child and he was going to walk out with him, and the little boy fought.

Senator Abourezk: During the court, he tried to take Ivan with him then?

Mrs. Fournier: He was playing out by the entrance, and he went out and took the child and he was going to walk out with him. The little boy cried and started fighting back. So, the judge in the courtroom said, Margaret Ironheart was the judge then, and she said ‘look they're taking him.’ I looked back and I

¹¹³ AAIA archives, letter from William Byler, Executive Director of AAIA entitled “American Indian Child Custody Problems – II” (not dated).

¹¹⁴ U.S. Senate, *Indian Child Welfare Program* (1974), 51.

ran out and he was screaming and crying and hollering ‘momma.’ He yelled out that he was taking him away and I said, ‘no you're not going to take him. The way he's crying, you're not going to take him. I took the child and I took him in.’¹¹⁵

As this excerpt from her testimony demonstrates, the social workers were boldly asserting their right to Native children, even snatching them up under the very eyes of a tribal judge during a hearing on the matter. Byler credits Mrs. Fournier’s case with sparking tribal resistance at Spirit Lake.¹¹⁶

The determination of Mrs. Fournier led her to visit Washington D.C. twice (in 1968 and 1974) as part of her effort to stop the removal of Indian children from their families.¹¹⁷ She was accompanied in 1968 by a delegation of women from Spirit Lake (sometimes referred to as the “Women’s Delegation” or the “Mother’s Delegation,” or “the Delegation”) who brought national attention to Indian child removal. The Mother’s Delegation was comprised of Alex Fournier, Alvina Alberts, Mrs. Left Bear, and Elsie Greywind.¹¹⁸ The Tribal Chairman, Lewis Goodhouse, also went with AAIA and the Mother’s Delegation in 1968. Coverage of a press conference that the Mother’s Delegation conducted, notes the claims of the Delegation that welfare workers were threatening women in order to get their children:

Charges of child-snatching from American Indian parents and coercion by

¹¹⁵ U.S. Senate, *Indian Child Welfare Program* (1974), 53; and Unger, “The Indian Child Welfare Act,” 187.

¹¹⁶ *Ibid.*, 54.

¹¹⁷ She might have gone other times on the behalf of Native children that I am not aware of.

¹¹⁸ AAIA archives, “the Delegation.”

welfare workers through starvation threats were made at a news conference at the Overseas Press Club yesterday (Tues., July 16). Making the charges was a mother's delegation of Devils Lake Sioux Indian women and their Tribal Chairman, Lewis Goodhouse, who came from their North Dakota reservation to New York before their appearance today in Washington, to beseech help from government officials.¹¹⁹

The women of Spirit Lake inspired hundreds, if not thousands, of women from across the U.S., Canada, and Australia in asserting that the removal of their children was unwarranted and unjust. During the congressional hearings of 1974, which eventually led to more hearings and the passage of ICWA in 1978, many women testified to their personal experience of having their children stolen. Native women's testimony was invaluable in convincing Senators to consider the passage of ICWA.

One of the recurring themes from the testimony of Native women in 1974 was the impact of incarceration on child welfare. Understanding the issue of incarceration became invaluable to understanding the cycle of government violence against Native peoples. Mrs. Townsend, the first Native woman to testify before the Senate in the 1974 hearings on Native child removal, addressed the issue in this way:

My children were taken out of my home because of the harassment of the police department in Fallon, Nev. The chief of police told me that he was going to make it hard for me to get my children and that I was going to lose my driver's license and that it was going to be hard for me to keep out of jail. So, he turned my children over to the juvenile probation officer and they went into my home and took my children and placed them in a foster home. And, I think they were abused in the foster home.¹²⁰

¹¹⁹ AAIA archives, "the Delegation."

¹²⁰ U.S. Senate, *Indian Child Welfare Program* (1974), 41-42.

Police often intimidated Native women with threats of jail time and child removal. Elsie Greywind was jailed several times, explicitly because she refused to hand over her grandchildren to foster care. She stated, “I’ll starve before I’ll give up my grandchildren.”¹²¹ The practice of incarcerating Native women who refused to relinquish their children is not a new practice. For over a hundred years, Native women and men have been incarcerated for refusing the taking of their children. One well-known instance of the use of incarceration as punishment for resisting capture involves nineteen Hopi men who were incarcerated for a year on Alcatraz Island in 1895 for refusing to allow their children to be removed to boarding school.¹²²

Incarceration has long been a mechanism for maintaining control over Native people, and Native people continue to be overrepresented in the system of “justice,” as Native scholar Luana Ross points out:

The disproportion of imprisoned natives is more clearly seen at the state level, where they account for 33.2 percent of the total prison population in Alaska, 23.6 percent in South Dakota, 16.9 percent in North Dakota, and 17.3 percent in Montana compared to approximately 15 percent, 7 percent, 4 percent, and 6 percent of the overall state populations, respectively.¹²³

These numbers are illustrative of the level of control that the state exerts through the mass incarceration of Native people. The criminalization and over-incarceration of

¹²¹ U.S. Senate, *Indian Child Welfare Program* (1974), 95. Greywind is one of the woman from the Devil’s Lake Mother’s Delegation.

¹²² See Holliday, “Hopi Prisoners on the Rock”; and Unger, “The Indian Child Welfare Act,” 110.

¹²³ Ross, *Inventing the Savage*, 89. Ross cites the work of Camp and Camp (1995) when gathering these numbers.

Native people is directly linked to ideas about unfit motherhood. Ross explicitly speaks to this, arguing that “[t]he most damned women in our society are those classified as ‘unfit’ mothers.”¹²⁴ Accounting for the disproportionate numbers of Black and Native children in the foster care system and the racialized constructions of fitness that undergird that overrepresentation requires attending to the linked history of incarceration. If we leave out incarceration, we erase an important mechanism for taking Native children from their communities.

Although incarceration is not the only avenue leading to the taking of Native children from their mothers, when a woman enters the penal system, she loses the ability to care for her children. All women are not incarcerated at the same rate, and it is women who have been enslaved who are overrepresented in the penal system. As Angela Davis and Cassandra Shaylor point out, “[t]he women most likely to be found in U.S. prisons are Black, Latina, Asian American, and Native American women.”¹²⁵ They also underscore that while no specific data have been gathered on Native American women prisoners, “numerous studies document that they are arrested at a higher rate than whites and face discrimination at all levels of the criminal justice system.”¹²⁶ The high level of incarceration of men of color compounds the issue of child removal because they are also unavailable to care for their children when

¹²⁴ Ibid., 178.

¹²⁵ Angela Y. Davis and Cassandra Shaylor, “Race, Gender, and the Prison Industrial Complex California and Beyond,” *Meridians: Feminism, Race, Transnationalism* 2, no. 1 (2001), 6.

¹²⁶ Ibid., 6, citation omitted.

incarcerated. For example, Black men over 18 have a one in fifteen chance of incarceration and Latino men of this age range have a one in 36 chance of incarceration, compared to one in 106 for white men.¹²⁷

Although Native people were and are incarcerated at alarming rates compared to whites, what is most significant for the purposes of this study are the consequences of that incarceration with respect to the ability of women to mother. Understanding the connections from slavery to incarceration and adoption is crucial to understanding how it is overwhelmingly women of color who are overrepresented in not only the criminal justice system but also in the child welfare system.¹²⁸ At every encounter with state intervention in the lives of Black and Native women, they are unequally penalized and prosecuted in comparison to their white counterparts. As scholars Marilyn Brown and Barbara E. Bloom argue with regard to the intersection of incarceration and child welfare systems for Native Hawaiian women, “[t]his process of dual criminalization—of women as offenders and as subjects of child welfare investigations—has had a particularly deleterious effect on women of Native Hawaiian ancestry.”¹²⁹ While Native Hawaiian women are overrepresented in child welfare, juvenile detention, and adult incarceration institutions, Native parolees

¹²⁷ PEW Charitable Trust, “One in 100: Behind Bars in America 2008,” *PEW Charitable Trust* (2008), accessed Mar. 7, 2012, www.pewcenteronthestates.org.

¹²⁸ Avery F. Gordon, “Globalism and the prison industrial complex: an Interview with Angela Davis,” *Race & Class* 40, no. 2/3 (1999).

¹²⁹ Marilyn Brown and Barbara E. Bloom, “Colonialism and Carceral Motherhood: Native Hawaiian Families Under Corrections and Child Welfare Control,” *Feminist Criminology* 4 (2009), 151, accessed Mar. 25, 2012, <http://fcx.sagepub.com/content/4/2/151>.

accounted for 53 percent of all parolees, while only making up less than 25 percent of the Hawaiian population. White women in Hawaii make up 26.8 percent of the population but only sixteen percent of the parolees.¹³⁰ Brown and Bloom note that 85 percent of the incarcerated women in their study were mothers.

Like Brown and Bloom, Ross underscores the concept of ‘double punishment’ in which imprisoned mothers endure both “a prison sentence and the threat of the termination of parental rights”¹³¹ Although equally as many incarcerated men are fathers, they do not suffer the same shame as women who are “deviant” mothers. As Davis and Shaylor argue there is a deleterious effect on communities that suffer from overrepresentation the system of peonage:

Almost 80% of women in prison have children for whom they were the primary caretakers before their imprisonment. The removal of a significant number of women of color, coupled with the alarming rates of incarceration for their male counterparts, has a disabling effect on the ability of poor communities to support families, whatever their constellation.¹³²

If, as Davis and Shaylor note, most women are the primary caretakers of their children when they are arrested, where do these children then end up? Davis and Shaylor point out that when women are incarcerated their children are often fast tracked into adoption, especially after the passage of the Adoption and Safe Families Act: “[w]hen mothers are arrested, children are often placed in foster care and, in line

¹³⁰ Brown and Bloom, “Colonialism and Carceral Motherhood,” 155.

¹³¹ Ross, *Inventing the Savage*, 179.

¹³² Davis and Shaylor, “Race, Gender, and the Prison Industrial Complex,” 14.

with new laws, such as the Adoption and Safe Families Act of 1997, many are streamlined into adoption. All ties with birth mothers and extended families are thus systematically severed.”¹³³ The Adoption and Safe Families Act (ASFA) was a law meant to reduce the foster child population and facilitate permanent homes for children. Unfortunately, it has resulted in disproportionately punishing women of color and incarcerated women, and these two populations heavily overlap. As Brown and Bloom note, “[c]onditions such as poverty, gender violence, substance abuse, and marginalization that are implicated in women’s offending are also associated with child maltreatment.”¹³⁴ As Brown and Bloom point out, the criminal justice system is intricately linked to the child welfare system, and women who have risk factors for entering one also have a high likelihood of encountering the other.

As Sinclair and other scholars indicate, there is evidence to indicate that being a Native adoptee is itself a risk factor for further encounters with the child welfare system as an adult: “[i]nformally, those involved in the adoption field know that the levels of substance abuse, homelessness, incarceration, and suicide among adoptees in the last thirty years have been alarming.”¹³⁵ Trace DeMeyer, a Native adoptee and journalist, underscores the government’s financial incentive for adopting Native children to white families: “[i]f you want to destroy a culture, destroy

¹³³ Ibid., 14.

¹³⁴ Brown and Bloom, “Colonialism and Carceral Motherhood,” 160, citation omitted.

¹³⁵ Sinclair, “All My Relations,” 71.

its future. You don't make a treaty with dead Indians or prison Indians or pay for Indian kids adopted to whites."¹³⁶ DeMeyer refers to the government's economic incentives that promoted the adoptions of Native children, which cost the government in the short run in incarceration fees, but meant in the long run that they could not claim treaty rights as Indians.

The research on the continuing impact of foster care among adult adoptees reveals a trend from incarceration to parental termination. Avina, who conducted research on adult Indian adoptees also gave her own story of being taken as a child and placed in foster homes: "In January of 1965 my sister, being truant from school a lot of the time, had to appear in court with my parents. My parents showed up intoxicated and were given 30 days in jail."¹³⁷ Avina points here to the problem of alcohol in Native communities, which is a problem in most poor communities. Although Native women were losing their children due to alcohol addiction, they were more often losing their children due to abuses by the state, for example for minor traffic violations. An example from the 1974 congressional hearings illustrates the complex relationship between racism, incarceration, and the child welfare system:

[She was] picked up for some misdemeanor and at the time, her baby was 4 months old. She was still nursing her baby when they put her in jail. She had her baby in jail for 17 days. The Nebraska State Welfare [Agency] came along and took her children and the baby that she had in jail, and they went into the country where the father of the other three children had the children, and the county sheriff went out there with a court order and picked up the other three

¹³⁶ DeMeyer, *One Small Sacrifice*, 138.

¹³⁷ Avina, "Effects of Forced Removal," 30.

children. She was not married to the man at the time, but the children carried his name. They couldn't get married because the father was Japanese and Nebraska would not recognize interracial marriages.¹³⁸

As this passage emphasizes, there were real consequences for interracial couples in states with miscegenation laws that prohibited them from marrying, such as the loss of their children.

Children are removed and adopted, in part, due to the role of incarceration in the lives of Native communities. There is some evidence to suggest that Native adoptees also have a higher risk of coming in contact with the penal system than Natives who were not adopted, thus fulfilling a cycle of state intervention in successive generations. Avina compared 15 Natives who were not removed from their homes to 20 who were and found that 70 percent of the Native children removed from their homes had trouble with the law, while 27 percent of the Natives not removed from their homes had trouble with the law.¹³⁹ Avina concludes that there is a clear correlation between removal and incarceration. Bensen also describes this cycle in which “parents despair and give up, and their children, ‘lost between two cultures they endure foster and group homes until they end up in jail or as victims of suicide.’”¹⁴⁰ Carol Locust, Cherokee activist and scholar also found a link between removal and incarceration: six of the nine males and four of the eleven females in her

¹³⁸ U.S. Senate, *Indian Child Welfare Program* (1974), 154.

¹³⁹ Avina, “Effects of Forced Removal,” 29.

¹⁴⁰ Bensen, *Children of the Dragonfly*, 14. Bensen cited a study done by Bradford that illustrated these connections.

study “had contact with the juvenile authorities by the age of 15.”¹⁴¹ The data from Wisconsin presented in the 1974 Senate hearings offers another important finding—the number of Native children who are removed from the community should be closer to 40% and not the 25-35% that has been cited:

In the State of Wisconsin, we have 780 of our Indian children that are incarcerated in correctional institutions at this time. We have 680 that are in fostercare, and we have 473 that are in adoptive placement. Now these statistics are only statistics that come from the Department of Social Services in the State of Wisconsin. They do not include the voluntary adoptions or placements to the various church organizations. Projecting this figure, we come close to 40 percent of our Indian children that are away from our families, and this does not include our children that are in boarding schools.¹⁴²

The level of state control in the lives of Native youth at this time is astounding. While the number of Native children removed from their families is often figured at 25-35 percent, it is known to be an underestimate. As I stated earlier, this statistic does not include children placed in church programs such as the LDS Indian Student Placement Program, children placed through the juvenile detention system, children placed independently of public and private agencies, and children placed through private adoption agencies.

If we look at just one church program, albeit the largest church program involved in taking Indian children, the LDS Indian Student Placement Program, we would have to raise that statistic. It is estimated that during the 1970s around 5000 students were being placed yearly through the LDS Student Placement Program. That

¹⁴¹ Locust, “Split Feathers,” 7.

¹⁴² U.S. Senate, *Indian Child Welfare Program* (1974), 168.

would represent about 2% of Native school aged children.¹⁴³ Maybe that would not raise the statistic substantially, but it would certainly add to it.

If we also consider private adoptions, the statistic would have to be raised considerably. Looking at adoption trends in the U.S., the percentage of overall U.S. adoptions that are carried out by private agencies has varied from around 29% in 1951 to 40% in 1970 and back down to 29% in 1986.¹⁴⁴ Public adoptions have also fluctuated from around 18% in 1951 to around 40% in 1986.¹⁴⁵ The exact percentage of Native adoptions conducted by private agencies is unknown at this time, but it seems safe to think that they were being conducted at a similar rate to the national average. I have not done enough research to definitively say that we can follow the national averages for public/private adoption for Native adoption, and given the unique history of Native adoption, it may be that we cannot. However, there is evidence to suggest that a substantial number of Native adoptions went through private agencies. One example of this can be seen in the Indian Adoption Project in which over half of the Native students placed were placed through private adoption agencies.¹⁴⁶ Another example is AAIA's research that indicated that with adjusting

¹⁴³ According to the U.S. Census for 1970, there were 253,582 thousand Native children between the ages of 5-18.

¹⁴⁴ Kathy S. Stolley, "Statistics on Adoption in the United States," *The Future of Adoption* 3, no. 1 (Spring 1993), 29-30.

¹⁴⁵ Ibid.

¹⁴⁶ Fanshel, *Far From the Reservation*, 58; and Unger, "The Indian Child Welfare Act," 178-190.

for yearly percentages of children adopted, there were more Native children in adoptive placements than in foster care placements in 1976.¹⁴⁷ That would suggest the national average of 30-40% placement through private agencies to be low. If we take the national average, or even a much lower number, then the 25-35% calculation is quite an underestimate and this number could more closely be put at 50% of all Native children being placed outside of their homes.

Genocide

Removing half of all Indian children from their families to be raised in another culture can only be called genocide. Although genocide is rarely acknowledged in the recent literature published on Native adoption, the claim of genocide was generated in tribal communities in the 1960s. Michael Chosa, a Native man from The American Indian Child Placement and Development Program in Wisconsin, asserted that genocide was the only frame for what “the White race” had done to Native people: “The International Court has defined GENOCIDE in a variety of ways, one being ‘the systematic removal of children of one race of people to the care of another race of people.’ This is what exists in today's America.”¹⁴⁸ Genocide is therefore not “missing” from scholarly literature in the U.S., but has only recently been less pronounced.

¹⁴⁷ AAIA archives, “Indian Child Welfare Statistical Survey” (July, 1976).

¹⁴⁸ U.S. Senate, *Indian Child Welfare Program* (1974), 171, statement from Michael Chosa.

The American Indian Movement (AIM) and the National Association of Black Social Workers (NABSW) argued in the 1970s that the transracial adoption of huge numbers of children from their communities to white middle-class homes constituted genocide. Both AIM and NABSW were forerunners in the call of genocide. NABSW presented a paper that outlined their reasoning behind calling the transracial adoption of large numbers of Black children genocide:

The transracial adoption movement has elicited an anti-transracial adoption movement. The Black Social Workers (NABSW) presented a position paper in 1972 which attacked the practice of transracial adoption: ‘We have committed ourselves to go back to our communities and work to end this particular form of genocide [transracial adoption].’¹⁴⁹

Clearly NABSW was not hesitant to call the mass transfer of children from their community genocide. The claims of genocide from AIM and NABSW have been echoed by Canadian scholars in several dissertations and in Canadian Justice Edwin Kimelman in his 1985 report *No Quiet Place: Review Committee on Indian and Métis Adoption and Placements*, also known as the Kimelman Report.¹⁵⁰ While academics in the U.S. do not generally address Native adoption as a group-based harm, as genocide, Native communities continue to frame the taking of Indigenous children as such. Given the forced removal of Native children for enslavement, indenture, boarding schools, land takings, and foster and adoptive care, there is no other

¹⁴⁹ Hussong, *A phenomenological Study*, 15-16.

¹⁵⁰ Sinclair, “All My Relations,” 28-30.

framework than that of genocide that makes this history legible.¹⁵¹ If genocide is enacted, according to the U.N. Convention on Genocide, by “forcibly transferring children of the group to another group,” then there can be no doubt of the genocidal dimension of the removal of up to 50 percent of Native children from their communities, their cultures and their traditions.¹⁵² These children have been removed from a group that has experienced a genocidal continuum from the early violence of settler colonialism to the forcible detention of children in boarding schools, prisons, and adoptive and foster care.

As discussed in this chapter, the U.S.’ genocidal project against Native communities has manifested in many ways, such as forced removal of Indigenous children to boarding schools, indentured servitude, incarceration, and the child welfare system. The property interests in Native people, or the assertion of ownership over Native people works in tandem with genocidal projects. In the next chapter, I illustrate the way that the assertion of ownership over Native identity, particularly through the existing Indian family exception to the Indian Child Welfare Act, assists

¹⁵¹ The Convention on the Prevention and Punishment of the Crime of Genocide states in Article Two that:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Cited from Yale University, “Convention on the Prevention and Punishment of the Crime of Genocide,” *The Avalon Project* (1998), Yale University, last accessed 10/25/2011, <http://www.yale.edu/lawweb/avalon/un/genocide.htm>

the genocidal project of continuing to remove large numbers of Native children from their communities and adopt them to white families.

Chapter Three

Identity Control: The Existing Indian Family Exception

The normative population's assertion of the ownability of Native people directly assists in the state's genocidal projects against Native people in many ways. I often felt the impact of this ownability, albeit on a small scale, while I was a research analyst at the Administrative Office of the Courts (AOC) of California. Through the AOC, I was given the unique opportunity to interact with state court judges to a limited extent. While some of these interactions were positive, others left me muted, like Tonto of the infamous TV series *The Lone Ranger*. For example, at an AOC conference in San Francisco specifically for state court judges, I was standing with my coworker, both of us Indigenous women, handing out informational binders, when I handed one to a judge who asked, "So, where is my free headdress?" Laughing heartily at his own joke, he walked away. My coworker and I exchanged a look of disbelief. I felt I had entered a time warp—anachronistic space—and had nothing but my co-worker's glance of horror to reaffirm that I was not, in fact, out of space and time.

In this chapter, I continue to argue that government agents, including state court judges and social workers, who make countless remarks like the "free headdress" comment, treat Indigenous people as property of the state. The state

asserts its domination over Indian peoples, their histories and their lived experiences as part of a continuum of ownership over Indigenous lands, bodies, spiritualities, identities, and children. This chapter focuses on a battle that Indigenous people won: the passage of Public Law 95-608, the Indian Child Welfare Act (ICWA) of 1978.¹ This chapter builds on the analysis of Native women's activism around ICWA in the previous chapter in order to offer an account of ICWA's conflicting legacies. ICWA was intended to support Indigenous people in taking back control from states over the welfare of their children, and, in part, it accomplished that. It was intended to halt the rampant removal of Indian children by the state, and as B.J. Jones, a lawyer and an expert on ICWA, writes, "The act was intended by Congress to protect the integrity of Indian tribes and ensure their future."² It was intended to support Native Nation's right to autonomy from the U.S.—their tribal sovereignty.

Although ICWA continues to be lauded by Indigenous people and has brought many positive changes to Native communities that I do not want to overlook, the state also left its mark of ownership embedded in the final version of ICWA that became law. It is precisely through the marking of ownership that was codified within the text

¹ Tonya Gonnella Frichner, "The Indian Child Welfare Act: A National Law Controlling the Welfare of Indigenous Children," *American Indian Law Alliance* (2010), accessed Feb. 2, 2013, <http://www.un.org/esa/socdev/unpfii/documents/The%20Indian%20Child%20Welfare%20Act.v3.pdf>. See also, the Native American Rights Fund, <http://narf.org/icwa/federal/lh.htm>, for sources and documentation on ICWA.

² See Jones, *The Indian Child Welfare Act Handbook*, 7; and Matthew L.M. Fletcher, "The Origins of the Indian Child Welfare Act: A Survey of the Legislative History," *Indigenous Law & Policy Center Occasional Paper Series*, Michigan State University College of Law, (2009), accessed Feb. 2, 2013, <http://www.law.msu.edu/indigenous/papers/2009-04.pdf>.

of ICWA that state court judges have been able to violate ICWA's intent and continue to remove unprecedented numbers of Indian children. Through a careful analysis of the legislation along with related case law, policy studies, interviews, and personal experience, this chapter argues that Native children continue to be viewed as property by government agents through an ownability that began with slavery and was not dismantled after the end of the repressive structure of bondage. It continues today in state courts where the original expressions of sovereignty and citizenship rights that were the intentions undergirding ICWA are twisted and redefined by judges to conjure judicially created "exceptions," such as the Existing Indian Family exception, which judges use to remove Native children. My assertion is that these "exceptions" are indicative of the normalization of state control—an assertion that the state will not relinquish its property interest in Indian children. Although these "exceptions" can be understood as individual judges deviating from the meaning of ICWA, I consider them to be symptomatic of the larger U.S. system of ownership over Indigenous people.

These "exceptions" have been created and or adopted in certain states and rejected in others. California has had a particular attachment to the Existing Indian Family exception. This may be, in part, due to the complex history, as discussed in the first chapter, of California's many colonizations by the Spanish, the British, the French, the Dutch, the Russian, and the U.S. These overlapping imperial projects produced extreme conditions for Native peoples in California and left them

particularly vulnerable to state intervention. Complicating the matter of jurisdiction under ICWA is the fact that California was the site of a complex web of federal assimilative programs, such as the Termination Acts of the 1950s, the “Relocation Programs” of the 1950s, and Public Law 280.³ Precisely because of these assimilative federal acts, California has the largest Native population of any state in the U.S. and has the most federally unrecognized tribes—there are 109 federally recognized tribes and 78 tribes that are not federally recognized.⁴ Because of these compounding factors, California Native families continue to suffer the loss of their children at alarming rates.

Although I focus on California, my interest is on the state’s continued claim to Native children through a law that was clearly meant to support and strengthen Indian families. ICWA has been hailed as one of the most affirmative acts of Indian sovereignty ever passed by Congress, hence if state courts can manipulate ICWA and continue to remove Indian children, it demonstrates the level of commitment that they have to the continued control over Native peoples. This chapter examines the way that ICWA was a divergence to earlier assimilative policies, how state courts have twisted the meaning of ICWA to claim ownership rights over Indian children, and if

³ See the work of Vine Deloria Jr. and Clifford M. Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 16; and Frank Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life* (Berkeley: University of California Press, 1995), 240 n. 83. In 1947, acting Commissioner of Indian Affairs William Zimmerman was asked by Congress to provide a list of tribes that he felt could be terminated and reasonably absorbed into the surrounding communities.

⁴ The Judicial Branch of California, “California Tribal Communities,” accessed Feb. 2, 2013, <http://www.courts.ca.gov/3066.htm>.

mutilations to ICWA, such as the Existing Indian Family, are having a deleterious effect on the number of Indian children removed from their homes.

ICWA: A Divergence from Termination Policies of the 1950s

In order to understand how the state has deviated from the mandate of ICWA, it is important to understand that ICWA was a stark contrast to the assimilative trajectory that had gripped federal Indian relations in the 1950s. ICWA marked a clear divergence from the policies of the 1950s that were centered on the U.S. governmental push to end the federal-tribal relationship, which had been in place through treaty-making and congressional acts for over a century. The 1950s also had the goal of making the financial “burden” of Indians disappear and have been called by many Native historians “The Termination Era.”⁵ Although there was a general strategy, beginning in the 1940s, of trying to curb federal expenses having to do with American Indians, the government framed their efforts, particularly the Termination Act of 1953 (House Concurrent Resolution 108), under the auspices of “freeing” Indians from federal control. It is within this “freeing” that the government terminated the federal status of over 100 federally recognized tribes, and created a

⁵ See Robbins, “Self-Determination,” 98-100; and Churchill and Morris, “Key Indian Laws and Cases,” 15, for a discussion on termination.

legal situation in which terminated tribal members went to sleep Indians and woke up non-Indians according to the federal government.⁶

The Termination Act was accompanied by a host of other initiatives passed between 1945 and 1961, including the Indian Relocation Program, which began in the late 1940s. Initially the relocation effort began with targeting the Navajo and Hopi tribes who were relocated to Denver, Salt Lake City and Los Angeles through the Navajo-Hopi Act, or Long Range Act of 1950. Commissioner of Indian Affairs Dillon Myer, who was appointed in 1950, expanded the program to other tribes in 1951, and in 1952 he announced the official program as Operation Relocation.⁷ The U.S. governmental efforts to relocate Native people from reservations all across the country to urban areas went on until the 1970s. Indians on reservations were promised jobs and housing, but these promises were often not kept leaving many Native people destitute. Sara Deer argues that the relocation programs was a major contributor to the continued sex trafficking

⁶ See the work of Deloria and Lytle, *American Indians, American Justice*, 15-21; Churchill and Morris, "Key Indian Laws and Cases," 13-22; and Ross, *Inventing the Savage*, 23-24. See also the work of Getches, Wilkinson, and Williams, *Cases and Materials*, 11-12, 204, 214-223; Gary Orfield, "A Study of the Termination Policy," in *Cases and Materials on Federal Indian Law*, 4th edition, ed. Getches, Wilkinson, and Williams (Saint Paul: West Group, 1998), 204-208; Charles F. Wilkinson and Eric R. Biggs, "The Evolution of the Termination Policy," in *Cases and Materials on Federal Indian Law*, 4th edition, ed. Getches, Wilkinson, and Williams (Saint Paul: West Group, 1998), 209-212; and W.T. Trulove and David Bunting, "The Economic Impact of Federal Indian Policy: Incentives and Response of the Klamath Indians," in *Cases and Materials on Federal Indian Law*, 4th edition, ed. Getches, Wilkinson, and Williams (Saint Paul: West Group, 1998), 212-213.

⁷ For a discussion of the relocation program, see Larry W. Burt, "Roots of the Native American Urban Experience: Relocation Policy in the 1950s," *American Indian Quarterly* 10, no. 2 (Spring, 1986): 85-99, JSTOR, <http://www.jstor.org/stable/1183982>. In 1950, President Harry Truman appointed Dillon Myer to the post of Commissioner of Indian Affairs, and Myer was extremely interested in terminating the federal-tribal relationship.

of Native women. It is estimated that from 1950s to the 1970s over 100,000 Natives were relocated to urban centers through this one program.⁸ Several of the relocation centers established by the BIA were located in California; for example, Los Angeles, San Francisco, Oakland and San Jose were all official relocation sites.⁹ Because of this, California saw a huge influx of Native people.

Public Law 280 (1953), another termination era program, also impacted California. PL 280 transferred civil and criminal jurisdiction over reservations from the federal government to state governments. The U.S. had a long-established federal-tribal relationship—a nation-to-nation relationship, and PL 280 was a clear deviation from this legal relationship.¹⁰ Initially, the law included the five states of California, Nebraska, Minnesota, Oregon, and Washington as well as the territory of Alaska. It was later expanded to include nine additional states.¹¹ The impact of PL 280 cannot

⁸ Burt, “Roots of the Native American Urban Experience, 87-88.

⁹ Some of the other centers were located in Chicago, Cleveland, Cincinnati, Denver, Dallas, Oklahoma City, Oakland, Salt Lake City, and St. Louis. James H. Gundlach, P. Nelson Reid, and Alden E. Roberts, “Migration, Labor Mobility, and Relocation Assistance: The Case of the American Indian,” *Social Science Review* 51, no. 3 (Sep. 1977): 464-473, JSTOR, <http://www.jstor.org/stable/30015512>.

¹⁰ Individual states have long fought to gain control over reservation lands within their borders. For example, in the Cherokee Cases of the 1830s, often referred to as the Marshal Trilogy, the State of Georgia wanted control over the Cherokee reservation. The federal government has long claimed to be the legal entity with a clear constitutional relationship with tribes, and PL 280 is therefore in direct conflict with the historical tribal-federal relationship.

¹¹ See Churchill and Morris, “Key Indian Laws and Cases,” 13-22; Ross, *Inventing the Savage*, 15-16; and Carol Goldberg, “Public Law 280: The Limits of State Jurisdiction Over Reservation Indians,” in *Cases and Materials on Federal Indian Law*, 4th edition, ed. Getches, Wilkinson and Williams (St. Paul: West Group, 1998), 488-495. It is important to note that PL 280 did not unilaterally apply in states where it was enacted. In some states certain reservations are not under PL 280, and there are other provisions of the act that are specific to certain tribes.

be understated because although it did not terminate tribes, it nonetheless made it extremely difficult for them to continue to thrive because it not only transferred federal jurisdiction, but also federal programs to states, including Indian Health Services, a vital program in many tribal communities. The idea that the government can unilaterally decide to terminate a Native nation or transfer it to a state, must be situated in the larger context of an ideology of ownership: tribes were not desired by the federal government any longer, so they terminated them outright or transferred them to states, like property.

Given the oppressive landscape of termination from which ICWA emerged, it is easy to see why many scholars saw, and continue to see, ICWA as an incredible departure from the era of termination. ICWA is celebrated by Native scholars as one of the most important acts of legislation pertaining to Native peoples.¹² It is not only celebrated by Indigenous communities in the U.S., but also by Indigenous communities in Canada and Australia. For example, Canadian adoption history scholar Robert Bensen argued that in Canada, ICWA is envied because of the legal protection that it brought to Indigenous communities.¹³

¹² There are countless sources that take this celebratory view of ICWA, and given the scarcity of sovereignty affirming laws passed by Congress, it is understandable. Some recent examples include Susan Waszak, “Contemporary Hurdles in the Application of the Indian Child Welfare Act,” *American Indian Culture and Research Journal* 34, no. 1 (2010), 121-135; William A. Thorne Jr. “An Overview of the Indian Child Welfare Act (ICWA),” *Judges’ Page* newsletter (April 2004); and all of the articles in the book edited by Matthew L.M. Fletcher, Wenona T. Singel, and Kathryn E. Fort, *Facing the Future: The Indian Child Welfare Act at 30* (East Lansing: Michigan State University Press, 2009).

¹³ Bensen noted that although ICWA was lauded in Canada, it has also been “abhorred” because it increased the demand for Canadian Aboriginal children. The issue of a global demand for children that are not-Black is something that I take up further in the next chapter.

Although ICWA was a clear divergence from the termination era, it did not reverse the application of PL 280 in states where it was enacted; it did, however, provide an avenue for some tribes to reassume jurisdiction over child custody proceedings, with the approval of the Secretary of the Interior. In ICWA, Congress asserted that state courts were not the appropriate venue for Indian child custody proceedings and that tribes in PL 280 states never lost jurisdiction over child custody proceedings: they retained concurrent jurisdiction. Congress also cast blame for the atrocities perpetuated against Indian parents on state agents such as social workers and state court judges. In a way, Congress slapped states on the wrist for “mismanaging” its Indians. As historian Matthew L.M. Fletcher argued with reference to ICWA, “it serves as one of the most stinging rebukes of states’ rights by Congress in the twentieth century.”¹⁴ But in blaming the states, the federal government also made clear that although it had transferred jurisdiction to certain states with PL 280, it had never rescinded its unilateral power over Indian tribes.

Codification of Federal Power Over Native Children

The first page of ICWA declared the federal government the correct owner of Indigenous people, in particular Indian children. As the first sentence of the Act states,

¹⁴ Matthew L.M. Fletcher, “ICWA and the Commerce Clause,” in *Facing the Future: The Indian Child Welfare Act At 30*, ed. Matthew L.M. Fletcher, Wenona T. Singel, and Kathryn E. Fort (East Lansing: Michigan State University Press, 2009, print), 28-49.

[r]ecognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—(1) that clause 3, section 8, article I of the United States Constitution provides that ‘The Congress shall have Power ... to regulate Commerce ... with Indian tribes and, through this and other constitutional authority, Congress has plenary power over Indian affairs¹⁵

Here, the federal government claims “plenary power” or total power in asserting ownership over tribes. Because the federal government’s proclamation of plenary power over Indian people has been so deeply ingrained in federal Indian legal history, it is avowed here without hesitation.¹⁶

Even in the wake of a jurisdictional shift away from termination, the federal-tribal relationship continues to be undergirded by paternalistic rhetoric. ICWA, a law so clearly aimed at wresting power from states and returning it to Native communities, is nonetheless embedded with imperialist language. For example, in §

¹⁵ The Indian Child Welfare Act of 1978, Public Law 95-608, 92 Stat. 3069, enacted Nov. 8, 1978; 25 U.S.C. § 1901. Several sites have extensive documentation of ICWA and its provisions. For example, a Native centered website is The Tribal Court Clearinghouse, a project of the Tribal Law and Policy Institute, accessed Mar. 12, 2012, http://www.tribal-institute.org/lists/chapter21_icwa.htm.

¹⁶ See Myers, Joseph A., ed., *They Are Young Once But Indian Forever* (Oakland: American Indian Lawyer Training Program, Inc., 1980), 56-59; Linnéa M. Johnson, “The Indian Child Welfare Act in the California Courts: An Abrogation of the Supremacy, Due Process and Equal Protection Clauses of the United States Constitution,” *Central California Appellate Program* (2000), accessed Mar. 3, 2005, http://www.capcentral.org/juveniles/dependency/articles/docs/indian_child_welfare.pdf; and William A. Thorne, “An Overview of the Indian Child Welfare Act (ICWA),” *Judges' Page Newsletter*, National Court Appointed Special Advocates for Children (CASA) and The National Council of Juvenile and Family Court Judges (April 2004), accessed July 12, 2011, <http://nc.casaforchildren.org/files/public/community/judges/0404-ICWA.pdf>. The idea of plenary power, although some Native scholars have argued that it is a colonial fiction set up to dominate Native Nations, is, nonetheless, well established in federal Indian law. As Indian legal scholar Joseph A. Myers stated, “The plenary power is derived from two sources—the Commerce Clause and the dependent relationship of tribes to the federal government” (Myers, *They Are Young Once*, 57). Myers is referring to the “Marshal Trilogy,” specifically to a Supreme Court case: *Cherokee Nation v. Georgia* that conjured the notion of Indians as “dependent” on the U.S. and therefore under their supervision.

1901, Congress stated: “Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources.”¹⁷ Not only does the federal government assert that it owns tribes, it also owns their “resources.” In ICWA, children are defined as “resources” to be protected by the federal government: “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and ... the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”¹⁸ The federal government claimed its property interest in Indian children by placing them in the category of a resource that it alone must protect. I remain unwaveringly pro-ICWA and unequivocally support it, and I believe a critical analysis of the language of the statute can help us to see how it continues to be violated.¹⁹ In order to understand the ways in which ICWA both disrupted and left in place hierarchical relationships of state ownership over Indigenous people, the next

¹⁷ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901. Congress has long established itself as wielding power over Indian people; for a discussion of this establishment, see Robert A. Williams Jr., “Columbus’s Legacy: The Rehnquist Court’s Perpetuation of European Cultural Racism Against American Indian Tribes,” in *Cases and Materials on Federal Indian Law*, 4th edition, ed. Getches, Wilkinson, and Williams (Saint Paul: West Group, 1998), 35-37. See also David H. Getches who noted, “Congress is the ‘trustee’ for American Indian tribes and has nearly unfettered power over Indian Affairs. Thus, the study of Indian law is essentially a study of what Congress did or did not do” (Getches, Wilkinson, and Williams, *Federal Indian Law*, 39).

¹⁸ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901.

¹⁹ Jones, *The Indian Child Welfare Act Handbook*, 1-12.

section of the chapter reviews the complexities of the legislation and the different aspects of child custody it defines.

ICWA Mechanics

In § 1901 of ICWA, in the same section in which the federal government claims rights over Indian children, the federal government criticizes the involvement of states in Indian child welfare:

[A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentages of such children are placed in non-Indian foster and adoptive homes and institutions; and (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.²⁰

Here Congress recognized that states did not understand tribal “culture,” and made mistakes in the removal of Indian children. In essence, they shift culpability from the federal government to the states, in a sort of sleight of hand Congress creates an illusion that the unprecedented removals are not part of a long history of removing Native children. It is important to note that Congress asserted a renewed claim to ownership through pro-Indian rhetoric: “The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum

²⁰ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1901.

Federal standards for the removal of Indian children from their families.”²¹ In the establishment of “minimum Federal standards,” Congress mandated that states follow a uniform set of guidelines rather than their own individual directives. In California and other PL 280 states this was, and continues to be, increasingly important because the majority of Indian Child custody cases are heard in state courts.

In order to create uniformity within state courts, Congress was specific regarding who fell under the statute, and it is these seemingly benign definitions, such as “Indian,” that continue to be fought over in state courts. The delineations in ICWA for “Indian,” “Indian child,” and “Indian tribe” continue to be of critical importance in outlining who is eligible for the protections afforded by ICWA. Although these terms may seem benign, their interpretation often determines whether a child does or does not fall under the jurisdiction of the Statute. Under ICWA, Indian is defined as “any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43.”²² Although this may appear straightforward, it can be complicated. For example, if a parent is the child of an enrolled member but cannot be enrolled due to blood quantum guidelines set by the tribe that parent may consider himself or herself Indian, but would not be considered as such under the Act. Similar complications arise with the definition of “Indian child,” which ICWA defines as “any unmarried person who

²¹ See “Congressional Declaration of Policy,” The Indian Child Welfare Act of 1978, 25 U.S.C. § 1902.

²² The Indian Child Welfare Act of 1978, 25 U.S.C. § 1903.

is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”²³ If the child in question was not enrolled in the tribe at birth, but has a parent that is an enrolled member of a tribe, they may still be eligible for enrollment. If a child is not enrollable, it means that according to the federal government the child is not an Indian child. The federal government designates Indian to be a political designation, not a racial one. When a person is an enrolled member of a tribe, they are a citizen of that Nation and a citizen of the U.S., just as someone might hold dual citizenship the United States and a foreign country.²⁴

Another area of ICWA that has frustrated many tribes is the legal definition of “Indian tribe,” which states: “any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43.”²⁵ Tribes that are not federally recognized, even if they are state recognized, do not fall under the purview of ICWA. A tribe may not be federally recognized for a variety of reasons, including legal

²³ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1903.

²⁴ For a discussion of ICWA and citizenship, see the work of Abby Abinanti, the current sitting Chief Judge of the Yurok Court, previously she was a Commissioner for the California Superior Court: Abby Abinanti, “Understanding the Justice of ICWA,” *The Connection*, Court Appointed Special Advocates for children, Oct. 29, 2009 (Fall, 2001), accessed Mar. 2, 2012, http://www.californiacasa.org/LocalPrograms/resource_library.html; and Abby Abinanti, “The Indian Child Welfare Act and CASA/GAL Volunteers: Advocating for the Best Interests of Native Children” (Court Appointed Special Advocates for children), accessed Mar. 2, 2012, http://www.californiacasa.org/LocalPrograms/resource_library.html.

²⁵ Emphasis mine. See the Indian Child Welfare Act of 1978, 25 U.S.C. § 1903.

termination. The inability of a tribe to access ICWA protection may lead to the further removal of Indian children, setting in motion a cycle of continued disenfranchisement. These definitions reveal the extent to which the government relies on logics of property relations to define the boundaries of Indian identity and to delineate its relations to Native peoples, and they lead us into the complex realm of federal, state, and tribal jurisdiction.

The jurisdiction under ICWA is somewhat complicated, but the intention of Congress was to affirm that tribes are the appropriate venue for Indian child custody matters, not states. There are several layers of jurisdiction under ICWA; the first is “exclusive jurisdiction,” which under §1911 (a) is “given” to Indian tribes “as to any State” in custody proceedings “involving an Indian child who resides or is domiciled within the reservation of such tribe, *except where such jurisdiction is otherwise vested in the State by existing Federal law*” (emphasis mine).²⁶ This means that, theoretically, a social worker cannot come and remove a child from a family on the reservation and place that child through the state court system. Since many of the problems recognized by congress occurred because of social workers removing children without vesting any authority in the tribe, this section is crucial for recognizing sovereignty to tribes.

If an Indian child is not domiciled on the reservation and enters into the state court system, the state court is supposed to transfer the proceedings to the appropriate

²⁶ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1911.

tribal court. The wording of this section is important: “In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceedings to the jurisdiction of the tribe”²⁷ The contested issue of transfer has emerged because state court judges have interpreted “good cause to the contrary” very broadly, and included, for example, distance from the tribal court as “good cause” not to transfer.²⁸

Although exclusive jurisdiction and transfer of jurisdiction are essential for tribes that have judicial systems to deal with child custody proceedings, not all tribes have such infrastructure. For instance, in California and other Public Law 280 states, many tribes do not have the legal infrastructure to take such cases, which means, according to ICWA, that they must enter into state court proceedings. As ICWA states, § 1911 (c), “In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child’s tribe shall have a right to intervene at any point in the proceeding.”²⁹ Interestingly enough, one of the aspects of ICWA that is unique is that it allows for tribes in states that were subject to PL-280 to reassume jurisdiction. The

²⁷ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1911. The words “in the absence of good cause to the contrary” are important because state courts often capitalized on any available claims to the ownership of Indian children through any avenue that they can.

²⁸ Andrea Smith has noted that when a court argues that the distance to tribal court is too far for state witnesses, it is a flawed argument because the distance is the same that “tribal witnesses have to travel to attend state courts” (Smith, *Conquest*, 42).

²⁹ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1911.

Act states under § 1918 (a), “Any Indian tribe which became subject to state jurisdiction pursuant to the provisions of the Act of August 15, 1953 ... may reassume jurisdiction over child custody proceedings.”³⁰ Although resumption of jurisdiction is possible under the Act, it must be requested through the Secretary of the Interior, and requires that tribes prove that they have a “suitable plan to exercise such jurisdiction.”³¹ This, as with other aspects of ICWA, can be problematic. How do tribes “prove” that they can adjudicate cases? It is often only through the production of a legal system that mirrors the U.S.’ that this can be granted.

Another hurdle for Native tribes when asserting their rights under ICWA in state courts has been the process of giving notice as outlined under the Law. Under § 1912 (a), notice of any government proceeding is to be given to the Indian custodian and the tribe “by registered mail with return receipt requested” and must include:

a statement of the pending proceedings and of their right of intervention ... No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, that the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceedings.³²

Despite these provisions in the Act, state court judges have often refused to notify the tribe and Indian custodian of all hearings pertaining to an Individual child.

³⁰ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1918.

³¹ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1911.

³² Section 1912 (a) is important because tribes need adequate notice to participate in court proceedings or intervene to have them transferred, “Notice; time for commencement of proceedings; additional time for preparation” (The Indian Child Welfare Act of 1978, 25 U.S.C. § 1912).

While judges do not always adhere to the aspects of ICWA that have to do with definitions and notice requirements, they also sometimes fail in another area of the Act that is supposed to provide family rehabilitative services. The law states that

[a]ny party seeking to affect 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.³³

While working at the AOC, I learned that many tribal ICWA workers feel that state court judges have blatantly ignored the “active efforts” piece of the Act, which requires active efforts in two areas: one, in the area of preventing the removal of Indian children from their families, and two, if a removal happens, in reunification of the child with his or her family, including culturally appropriate rehabilitation services to Indian parents. In a non-ICWA case, the standard is “reasonable efforts,” which is less involved. For example, National Indian Child Welfare Association (NICWA) notes that under “reasonable efforts” the court may only need to provide a referral for services, while if “active efforts” are needed, the court must not only refer the client, but also be involved in facilitating the client in accessing those services.³⁴

Prior to any efforts at reunification, there is a process that sets in motion the removal of children. In defining when Native children can be taken away, ICWA

³³ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1912.

³⁴ For an explanation of active efforts versus reasonable efforts see NICWA’s website, “Frequently Asked Questions About ICWA,” NICWA, 2013, accessed May 31, 2013, http://www.nicwa.org/indian_child_welfare_act/faq/, and Native American Rights Fund website, “What are active efforts compared to reasonable efforts?” accessed May 31, 2013, <http://narf.org/icwa/faq/active.htm#Q4>

situates the removal of an Indian child as different from the removal of a non-Indian child. The Act states, in § 1912: “No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.”³⁵ In essence the standards for removal have been raised for the removal of Indian children.

In addition to determining the conditions under which Indian children can be removed by the state through agencies like Child Protective Services, ICWA also defines the terms of a voluntary termination of parental rights:

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge’s certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian ... Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.”³⁶

Indian people lobbied for this provision for many reasons, namely because their children had been taken for adoption without their consent. In many instances, Native children were forcibly taken, or parents were pressured to give up their children. As BJ Jones has noted, “Congress documented instances of state welfare agencies pressuring Native American families into signing away custody of their children to

³⁵ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1912.

³⁶ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1913.

the state under threat of the termination of welfare benefits.”³⁷ In ICWA, the terms under which Native parents are permitted to voluntarily give up their children to whom they chose, as opposed to whom the tribe approves of, continues to be contested in U.S. courts. There is currently a case before the U.S. Supreme Court, *Adoptive Couple versus Baby Girl*, often referred to as the “Baby Veronica” case, which involves a contested “voluntary” relinquishment of parental rights.³⁸

In determining when children can be taken and voluntarily relinquished, ICWA establishes an order of adoptive preferences for state courts to follow. The law gives to “(1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”³⁹ Unfortunately, the adoptive preference order is preceded by one particular clause that has caused a great deal of grief for Indian communities: “preference shall be given, in the absence of good cause to the contrary.”⁴⁰ The term “good cause” has been used in adoptive placement, as with “good cause” not to transfer to tribal court, as a loophole by state court judges to get around applying the provisions of ICWA.⁴¹

³⁷ Jones, *The Indian Child Welfare Act Handbook*, 3.

³⁸ The case has been highly publicized, and is currently before the Supreme Court of the U.S. There has been a great deal of false information about the case, and NICWA is leading a campaign to keep the facts of the case in focus. See NICWA’s website for further direction: NICWA website, accessed Feb. 19, 2013, <http://www.nicwa.org/documents/FactCheckMedia.pdf>.

³⁹ The Indian Child Welfare Act of 1978, 25 U.S.C. § 1915.

⁴⁰ *Ibid.*,

⁴¹ The preference order for foster care placement is slightly different: if a child is to be placed in a foster care setting the placement preference should be considered in the following order; “(i) a member of the Indian child’s extended family; (ii) a foster home licensed, approved, or specified by

In those cases where it was determined that ICWA was violated in a placement, “any parent or Indian custodian from whose custody such child was removed, and the Indian child’s tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of section 1911, 1912, and 1913 of this title.”⁴² This is meant to provide a safeguard for Indian parents and tribes from state court judges who might choose to ignore the Act. Unfortunately, in order to get redress, the Indian parent or tribe must petition the same court system that mishandled their case initially, and then move within the same legal framework to obtain justice. These instances of judicial refusal to acknowledge those aspects of ICWA that support Native sovereignty make it important for scholars to insist on the importance of ICWA for Native communities, but also to critique the underlying forms of ownership embedded in the Act that allow for the continued misapplication of the Act.

Mississippi Band of Choctaw Indians v. Holyfield,

Although state courts have continued to utilize the underlying ideology of ownership to circumvent ICWA, the Supreme Court, in the one case that it has

the Indian child’s tribe; (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs” (Indian Child Welfare Act of 1978, 25 U.S.C. § 1915).

⁴² The Indian Child Welfare Act of 1978, 25 U.S.C. § 1914. The Act also had a component for tribes to access grant monies, yet, for the most part, this component has been very problematic. With title IV-E, there has been a shift in the functionality of the funding of the Act, yet there is still a substantial need for more easily accessed funding.

handed down on ICWA, decided in favor of ICWA and, like Congress, chastised state courts for not following the spirit of the Statute. The case that the Supreme Court decided with regard to ICWA was the *Mississippi Band of Choctaw Indians v. Holyfield* (1989), which addressed the question of the appropriate venue for ICWA cases (state or tribal courts) in the case of children born to Indian parents who resided on the reservation. The Holyfield case involved two members of the Mississippi Band of Choctaw Indians who lived and were domiciled on the Choctaw reservation in Mississippi. The Choctaw mother traveled 200 miles off the reservation to give birth to twins, and after being released from the hospital, she and the father went to the Chancery Court and filed consent-to-adoption and termination of parental rights petitions. The biological parents wanted the twins to be adopted by the Holyfields, a white couple, with whom they had made an adoptive arrangement prior to the birth of their twins. Given the clear directive of ICWA on this matter, under § 1911 (a) that exclusive jurisdiction is given to Indian tribes “over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation,” the case should have been straightforward. But many state courts were not following the directives of ICWA at this time.⁴³

Under ICWA, an enrolled member of a federally recognized Indian tribe who is domiciled on the reservation cannot voluntarily give up her/his child through a state

⁴³ Allie Greenleaf Maldonado, “The Disconcerting Vicissitudes of State Judicial Power: Determining If Good Cause Exists to Deny Transfer in ICWA Cases,” in *Facing the Future: The Indian Child Welfare Act at 30*, ed. Matthew L.M. Fletcher, Wenona T. Singel, and Kathryn E. Fort (East Lansing: Michigan State University Press, 2009. Print), 148-163.

court. The Indian parents of the twin babies born on December 29, 1985, filed the consent-to-adoption on January 10, 1986 in the Chancery Court of Harrison County. On January 28, 1986 the Chancery Court issued a Final Decree of Adoption.⁴⁴ The Chancery State Court chose to ignore the Act and the adoption was finalized only one month after the children's birth. When the tribe learned of the adoption, two months after the final decree, they argued in the Chancery Court that the state court did not have jurisdiction in the case. The Chancery Court ruled that it did in fact have jurisdiction because the children were never domiciled on the reservation. In making this ruling, the state court violated several provisions of ICWA, including § 1911, which vests exclusive jurisdiction to tribes when the parents are domiciled on the reservation, and § 1912, which states that notice of any Indian child placement proceedings must be given to the tribe (excluding custody battles between two parents).

While several aspects of the lower court cases are troubling, the Supreme Court only took up the narrow issue of defining domicile as defined by a state or as defined by the federal government. The lower courts of Mississippi held that the case did not need to be transferred to the Mississippi Choctaw Tribe because the Indian

⁴⁴ For a discussion of ICWA, see Manuel P. Guerrero, "Indian Child Welfare Act of 1978," in *Cases and Materials on Federal Indian Law*, 4th edition, ed. Getches, Wilkinson, and Williams (St. Paul: West Group, 1998) 660-664. For a discussion of *Holyfield*, see Getches, Wilkinson, and Williams, *Cases and Materials*, 670-682; Nuri Nusrat, "No Right to Be: The Existing Indian Family Exception to the ICWA" (master's thesis, San Francisco State University, 2007); Maldonado, "The Disconcerting Vicissitudes," 150-151; and Waszak, "Contemporary Hurdles," 123-124.

children were not ever domiciled on the reservation according to Mississippi law.⁴⁵

The Supreme Court of the United States reversed and stated that it would be against the purpose of ICWA to let each state's laws definitions override the federal guidelines:

First, and most fundamentally, the purpose of the ICWA gives no reason to believe that Congress intended to rely on state law for the definition of a critical term; quite the contrary. It is clear from the very text of the ICWA, not to mention its legislative history and the hearings that led to its enactment, that Congress was concerned with the rights of Indian families and Indian communities vis-à-vis state authorities. More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings. Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.⁴⁶

The Supreme Court reaffirmed the understanding the state courts were to blame for part of the mass transfer of Indian children away from their communities and that by not following ICWA's provisions state courts were perpetuating the same injustices that required Congress to pass ICWA. The Court ruled that the federal definition of domicile should have been followed, and that the domicile of the child follows the domicile of the parents. Therefore, the Supreme Court reversed the lower court decision and directed state courts when hearing ICWA cases to follow the *federal* guidelines and not *state* laws when they conflicted.⁴⁷

⁴⁵ *Mississippi Band of Choctaw Indians v. Holyfield*, Supreme Court of the United States, 1989, (490 U.S. 30, 109 S.Ct. 1597), also printed in Getches, Wilkinson, and Williams, *Cases and Materials*, 670-675.

⁴⁶ *Mississippi Band of Choctaw Indians v. Holyfield*, (490 U.S. 30, 109 S.Ct. 1597)

⁴⁷ *Ibid.*

It is interesting to note that three Supreme Court Justices dissented in the *Holyfield* case. The dissenting opinion stated, in part, that “[t]he interpretation of the domicile adopted by the Court requires the custodian of an Indian child who is off the reservation to haul the child to a potentially distant tribal court unfamiliar with the child’s present living conditions and best interests.”⁴⁸ With nine justices making up the Supreme Court, three dissensions is a significant number. The dissenting justices pointed to an issue that continues to plague ICWA cases—the ideology that tribal courts may not understand the “best interests” of the child, even when, like in the *Holyfield* case, both parents resided on the reservation. The dissenters argued that state judges understood the best interests of the child rather than tribal judges. This assumption is undergirded by ideas about the ownability of Indian children.

Although there was dissent in the *Holyfield* case, it nonetheless clearly buttressed tribal sovereignty by remanding the case back to tribal court. *Holyfield* was a stinging rebuke of the refusal of state courts to follow the spirit of ICWA.

The Unequal Application of ICWA

Even with the *Holyfield* decision clearly mandating uniform decision-making in state courts, the various provisions of ICWA continued to be applied differently

⁴⁸ *Mississippi Band of Choctaw Indians v. Holyfield*, (490 U.S. 30, 109 S.Ct. 1597).

between states and even within states.⁴⁹ This unequal application of the Act was more than just the consequence of varying degrees of knowledge regarding ICWA on the part of state court judges; rather, it was an indicator of the ownability of Indigenous children. While the jagged application could be indicative of the racism within state courts, it could also be seen in a more historical context as a product of slavery: a continuance in the relegation of Indian people to a category of property.

The consequences of judges not applying ICWA includes not only the loss of an individual Indian child, but also the setting of a precedent that can lead to the further loss of Indian children through a cycle of judicially-created “exceptions.” Bruce Davies, an attorney with the Native American Rights Fund, writes of the uneven application of ICWA between states: “[s]ome of the states have moved vigorously to implement the Act ... Other states have not even realized that the Act is in effect ... Still others have attempted to ‘stonewall’ the Act.”⁵⁰ While some states continue to ignore ICWA without penalty, some state agencies have worked in partnership with tribes. Washington State, for example, has been supportive of the formation of an intertribal court for hearing ICWA cases, and some Washington

⁴⁹ See BJ. Jones, “Indian Child Welfare Act: A Pilot Study of Compliance in North Dakota” (Casey Family Programs, 2000), 21; and Troy Johnson, *The Indian Child Welfare Act: Unto the Seventh Generation* (conference proceedings, Los Angeles: The Regents of the University of California, 1993). Johnson speaks to many specific areas of ICWA including the unequal application of the Act.

⁵⁰ American Indian Lawyer Training Program, Inc., *They Are Young Once But Indian Forever* (Oakland: American Indian Lawyer Training Program, Inc. 1980, 22).

tribes have moved to reassume jurisdiction over ICWA proceedings.⁵¹ Although Washington has been willing to work with tribes, many other states have not.⁵² As a result, non-compliance with the Act is widespread.

Within each state there is also a great deal of variation in the application of ICWA. I witnessed this when I was a research analyst for the Administrative Office of the Courts (AOC). It was evident that certain counties trained themselves in the basics of the Act and were open to fulfilling its promises, while others remained openly hostile to its provisions. The fact remains that many individuals work for the state courts with varying degrees of understanding of the Act and varying degrees of commitment to the spirit of the Act. Judges wield the power in state ICWA cases and often rely on the assumption that if a case is transferred to tribal court, somehow the best interests of the child will be subordinated to the interests of the tribe. Just recognizing an Indian tribal court as a venue to adjudicate a case was something many judges were unwilling to do. As Unger so pointedly noted, “[r]ecognizing the sovereignty of an Indian tribal court to decide custody matters concerning tribal members was a difficult pill to swallow for many non-Indian social service

⁵¹ As of 1980, many Washington tribes had moved to reassume jurisdiction, including the Yakima, the Muckleshoot, the Spokane, and the Colville tribes.

⁵² For a discussion of sovereignty and ICWA, including tribal-state compacts, see Terry L. Cross and Robert J. Miller, “The Indian Child Welfare Act of 1978 and Its Impact on Tribal Sovereignty and Governance,” in *Facing the Future: The Indian Child Welfare Act At 30*, ed. Matthew L.M. Fletcher, Wenona T. Singel, and Kathryn E. Fort (East Lansing: Michigan State University Press, 2009. Print), 3-12. Under ICWA, states can enter into government-to-government agreements with tribes, but the agreements are voluntary on both sides, so they are the exception rather than the rule.

administrators, social workers, and judges.”⁵³ And, many state court judges simply refused to swallow the “difficult pill” and continued to place Indian children through state courts without any deference to the Act or to tribal courts.

The unwillingness of certain judges to follow ICWA guidelines, for instance refusing to transfer to tribal courts, does seem to be based on their assumption that the actions of the tribal courts are somehow at odds with the best interests of the child. This logic transfer further into an assumption that if ICWA is applied, the best interest of the child will suddenly be abrogated to the best interest of the tribe. This false argument is advanced by Congressional Representatives such as Deborah Pryce, in legal scholarship, and in newspaper articles.⁵⁴ For instance, in 1997, *The Washington Times* wrote that ICWA “subordinates the best interests of the child to the jealousies of Indian parents, Indian tribes or the child's extended family.”⁵⁵

Although some might think that tribal courts are not interested in the best interest of

⁵³ Unger, “The Indian Child Welfare Act,” 8.

⁵⁴ Unger, “The Indian Child Welfare Act,” 10-11, and NICWA’s website for some of the recent anti-ICWA articles that have come out around baby Veronica. See also a comment made by Megan Lindsey, who is the assistant director of policy at the National Council for Adoption, in which she argued that ICWA should not have been applied in the case of baby Veronica because the court allowed “race” to trump the “best interests of the child”: Megan Lindsey, “What’s Best for the Child,” *The New York Times* (The Opinion Page) Jan. 24, 2013, accessed Mar. 6, 2013, <http://www.nytimes.com/roomfordebate/2013/01/24/adoptive-parents-vs-tribal-rights/in-any-adoption-decisions-should-focus-on-whats-best-for-the-child>.

⁵⁵ Bruce Fein, “Fighting against legal privilege,” *The Washington Times*, Sept. 9, 1997, accessed June 27, 2012, LexisNexis. See also, Meg Kinnard, “South Carolina Supreme Court Agrees with Return of Native American Child,” *The Associated Press*, 27 July 2012, accessed Mar. 2, 2013, http://www.tulsaworld.com/news/article.aspx?subjectid=13&articleid=20120727_12_A7_CUTLIN928403. Because of the current Supreme Court Case on baby Veronica, court case name is actually *Adoptive Couple v. Baby Girl*, there has been a heightened level of awareness on ICWA and a flurry of articles that either make anti-ICWA comments or provide false information on the case; see NICWA’s website on the coverage of the baby Veronica case: <http://www.nicwa.org/documents/FactCheckMedia.pdf>, accessed Mar. 3, 2013.

the child, yet it is clear that tribal courts are as, if not more, concerned as state courts, over the welfare of Indian children. In a manual specifically for tribal court judges, published by the National American Indian Court Judges Association, the “best interest” of the child is underscored again and again. For example, in the section on adoption, the manual stresses that the tribe does not have an alliance with either the biological parents or the adoptive parents, but rather is in service of the child: “the Indian court, as always in matters relating to children, views itself as the protector of the child, who is assumed to be too young to protect itself.”⁵⁶ The deep concern of tribal courts for the welfare of Indian children is the rule in Indian country, not the exception.⁵⁷

Although ICWA is a federal statute, and should provide broad uniformity in Indian child placement, it has not, and I think this is, in part, due to, as Unger so aptly put it, state court judges inability to swallow the “difficult pill” of tribal sovereignty. What emerged as I researched cases at the AOC was not only wide variation in compliance between and within states, but also frequent cases of judges refusing to

⁵⁶ It should be noted that it was also stressed that Indian children’s identity is important and although white homes would be considered, finding appropriate American Indian homes would be preferred. National American Court Judges Association, *Child Welfare and Family Law: Studies for American Indian Court Judges* (Washington: National American Indian Court Judges Association, Inc. 1976).

⁵⁷ Many of the speakers at this conference emphasized the role of tribal courts and were deeply concerned with the welfare of Indian children; for example, Utah state court judge William Thorne, who is also a member of the Pomo tribe and works with numerous Native organizations and tribes, argued that there has been success in many states, but others refuse to apply ICWA: see Johnson, “The Indian Child Welfare Act,” 250-259.

apply ICWA.⁵⁸ Although I was not startled by the divergent ideologies of state court judges, I was surprised at how much these ideologies affected their application of ICWA. For example, at one of the three conferences that I helped organize while working for the AOC, I witnessed many disturbing conversations. One problematic conversation centered on ICWA and occurred between two state court judges, presumably from the San Francisco Bay Area. I was standing behind the program table welcoming the state court judges to a one-day conference on ICWA, when two judges approached the table, and I said, “Good morning. Here is your information binder,” yet I must have appeared to be the stoic Indian because they pretended that I had not said anything—that I was invisible. They took their binders, and proceeded to hold a conversation directly in front of me. One judge told the other that he did not think ICWA was constitutional and said, “We don’t have to follow it, right?” The other judge replied that he was surprised the law was still standing. Then they walked into the conference. Given the way these judges dismissed ICWA, it left me wondering if the Indian children under their jurisdiction would have ICWA protection. The purpose of these AOC conferences was to help educate judges on ICWA, but I found it difficult to believe that the information we provided would have much effect on judges with such anti-ICWA attitudes.

⁵⁸ To see some of the unequal applications of the law, see Christine Metteer, “Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act,” *Santa Clara Law Review* 38, no. 2, Santa Clara University (1998); and see Troy Johnson, *The Indian Child Welfare Act*.

While working for the AOC, I was also sent to a conference in Wisconsin, “Walking on Common Ground: Pathways to Equal Justice,” for state, federal and tribal ICWA representatives. The intention of the conference was to bridge the communities that work on Indian child welfare. When I was at this conference, I continually heard comments that showed a disdain for the application of ICWA and a disregard for the rights of tribes. For example, in a breakout group of about ten people that consisted of state court judges, tribal ICWA workers, federal court judges, federal ICWA workers, and state court ICWA workers, I encountered a judge from California. I was speaking about the issue of poverty and was referring to my own experience growing up extremely poor when I noticed a clear interest from this state court judge from California. I told my story of growing up in a one-room studio with my parents and five siblings. I had meant the story to elicit a response of interest in working against the poverty that many Native people face. This judge seemed truly concerned and I thought she comprehended how detrimental the impact of severe poverty can be on communities of color. As soon as I finished speaking, she came right in with, “Yes, I know what you mean. I can relate. I totally understand what you are speaking about. Thank you so much for clarifying this for me. I see this in cases all the time. I knew Mexican people liked to live all together in one room; I just never knew Native Americans also liked to live all huddled together.”⁵⁹ I was bewildered by her comments. There was no response to give, and our session time was up. I left

⁵⁹ “Walking on Common Ground: Pathways to Equal Justice,” 2005 National Gathering for Tribal-Federal-State Court Relations (Green Bay, Wisconsin, July 2005).

feeling fully discombobulated. Rather than seeing my story as part of the legacy of how Indians have been treated in the U.S., and how we need to continue to fight poverty, this judge conflated my experience not only with that of all Native peoples, but also with all Mexicans. She flippantly shifted the attention from human rights to cultural essentialism.

These are only two examples from my limited experience with the courts, but they point to some important tensions that have emerged since the passage of ICWA. Although the state court system may be filled with racist judges, the unequal application of the law points to the fact that certain judges, whether they are racist or not, follow the guidelines of ICWA. Sherri Sobel is one Referee (a position similar to a judge—an individual who decides child custody cases) in Los Angeles County who has been outspoken in her support of ICWA. Los Angeles is unique because it has assigned one court to hear all ICWA cases, and even cases that are not technically ICWA cases when the individual child is ineligible for membership but has tribal heritage.⁶⁰ Referee Sobel writes of the possibilities of the Act to not only protect Native parents, but to reconnect children and parents to their tribal communities:

In cities without reservations or coordinated Indian living situations, people are scattered, disaffiliated, or simply separated from their culture. This is compounded by the loss of a child and it is important to understand and comply with both the letter and spirit of the law. Reaching out to Indian

⁶⁰ Sherri Sobel, “Indian Child Welfare Act in an Urban Setting,” *Judges' Page Newsletter*, National Court Appointed Special Advocates for Children (CASA) and The National Council of Juvenile and Family Court Judges (April 2004), accessed July 12, 2011, <http://nc.casaforchildren.org/files/public/community/judges/0404-ICWA.pdf>.

service providers and to the tribal community not only helps with reunification, but may help a parent reconnect with her history and culture.⁶¹

Here, Sobel gets to the heart of the issue: judges can either continue to destroy Indian communities and families or can strengthen them. Sobel was speaking to the redemptive role that state court judges can play not only for Native children but for their parents, who themselves have sometimes been alienated from their own cultures due to federal government programs such as Termination and Relocation. Sobel notes that there are over 100 tribes represented in the Los Angeles area, yet there is no tribal land base.⁶² She addresses many of the challenges of working with urban Indians and continues to remain committed to applying ICWA, even if it the course is difficult to navigate.

At one of the conferences that the AOC held, Sobel was speaking to the fact that she felt strongly that in order for ICWA to be successful, tribes needed to be included in the entire process. Another state court judge challenged her assertion that tribes could be included in the entire court process, including removal proceedings, by commenting that it would be impossible to bring tribes in at the initial hearing. Sobel responded to this with creative thinking:

Well, I know that many tribes have to be contacted telephonically, and that is what I do. I just call, and I know that it is not formal protocol, but it works for tribes, and I do not want them to find that we are noticing them months after the child has already been removed. I make sure that the tribe is involved

⁶¹ Ibid.

⁶² Ibid.

early on, and until I know what they are going to do, I apply ICWA, that way things move in the right direction.⁶³

Sobel's application of ICWA's guidelines to include tribes in all hearings is crucial because it translates into cases that have followed ICWA and supported tribal sovereignty. It also means that tribes have a better chance of keeping their children. If the notice and inclusion provision of ICWA is not followed, there is a higher probability that the child will have been in a temporary or pre-adoptive placement for a period of time, and the tribe will have a difficult time getting the child removed to an Indian placement. Pre-adoptive parents argue again and again that removing a child after she/he has "bonded" with a caregiver can be detrimental to their wellbeing.⁶⁴ Although Sobel is willing to come up with creative solutions to include tribes in all proceedings having to do with the Indian child in question, many judges simply rely on the fact that tribes will be left out of the process. Unfortunately, if the "temporary" placement continues for an extended period, the tribe will have little chance of intervention.

State courts continue to be extremely sensitive to how long a child has resided with their current placement. If a child is only three weeks old and needs to be moved to a new placement, it is seen as acceptable. If a child is older, say three years old, and has been in one stable placement, particularly if that placement wants to adopt the child, the court is usually hesitant to remove the child. This is problematic because if

⁶³ AOC ICWA Compliance conference held in LA, 2005.

⁶⁴ See the work of Waszak, "Contemporary Hurdles."

ICWA has not been followed in terms of the requirements of advance notice and tribes are not aware of the situation until the child has been in a placement for years, the situation is complicated for all parties involved. This has sometimes been the case in California: where a tribe has to decide whether to move a child who has bonded with a caregiver—this is not an easy call for tribes. The longer a child is kept in the foster home, which is usually a non-Indian home, the better chance that child has of remaining there. It is therefore to the advantage of a white couple wanting to adopt an Indian child to keep the child in their home and to keep the case in litigation. I have heard stories of adoptive parents being advised by their attorneys or the Christian Alliance for Indian Child Welfare to engage in “district shopping,” which involves moving to a district that has a history of deciding cases on the side of white families.⁶⁵

One organization, the Christian Alliance for Indian Child Welfare (CAICW), whose central mission is to defeat ICWA, has capitalized on the emotional pain that white families have gone through when losing “their” Indian children. CAICW publishes stories from white foster and adoptive families who “have been hurt by the ICWA”⁶⁶ (that is the title of one of the sections where I found many first hand accounts of families “injured” or “hurt” by ICWA). In these stories the tribes

⁶⁵ Waszak, “Contemporary Hurdles, 127.

⁶⁶ This is the title of one of their sections where you can view many first hand stories of foster and adoptive parents, some with their actual names, some are omitted for the privacy of the family: Christian Alliance for Indian Child Welfare, accessed Apr. 16, 2011, <http://www.caicw.org/index.html>.

involved are blamed for the “stealing” children from happy and healthy homes. Tribes are accused of “ripping away” *their* Indian children. When I looked more closely at the specifics of many of the cases, it was evident that the blame should have been placed on state court judges who chose not to apply ICWA from the beginning of the case. The CAICW does an excellent job of bringing forth the emotional toll “inflicted” on pre-adoptive families:

They came on Saturday morning and took him away. He had just celebrated his second birthday and his second Christmas with our family in Colorado. The screams as they took him away will not go away. I hear them everyday and I try to put them out of my head but still each day I hear him scream, ‘No, Mama, No!’ I couldn’t protect him.⁶⁷

This story elicits a potent response from most people—no one wants to hear of a child suffering. The unfortunate aspect of this story is that it does not include the agony of the mother, grandmother, aunts and uncles of losing this child, or the agony of children who lose their ties to their biological families. It also does not seem to matter to the CAICW that the state courts did not follow ICWA, and therefore, resulted in the child staying in a placement for a longer period than he would have if he were placed according to ICWA. The story silences the fact that much of this child’s trauma could have been avoided by the simple application of the Act. Unfortunately, once such heightened emotions are introduced—having to think of a child separated from his loving foster parents—there is a legal trajectory, however unfair, that begins to gain momentum and is difficult to overcome.

⁶⁷ Christian Alliance for Indian Child Welfare (CAICW) website, accessed Apr. 16, 2011, <http://www.caicw.org/index.html>, hereafter referred to as CAICW website.

These accounts conceal the suffering of birth parents, birth relatives, and birth communities that lost the child. These foster care placement families then blame the tribe and ICWA for this untimely removal from their home where the child has bonded. Another foster family recounts the story of the tribe taking a child from “all that she had”:

She was 7 months old when we got her and was 18 months when the tribe took her away from us to place her in a Native foster home. We were the only family she knew. Her own family didn't visit her. We were all she had and then one day the tribe comes sweeping in and we had to give her to strangers.⁶⁸

Foster and pre-adoptive placement families of Indian children play on the concept of being the only resource the child has and do not acknowledge that the child has already suffered the loss of a parent, an extended family, and a community. It is also problematic to think that the Indian community somehow accounts for “less” than the foster home for an Indian child.

Are You Indian Enough? The Existing Indian Family Exception

The idea of Native families and communities not being as worthy as white homes has been part of the colonial ideology since colonization. Unfortunately, this condemning rhetoric continues to permeate the discourse surrounding Native removal to foster and adoptive homes. Native families not only have to measure up to white middle-class standards, but to the white imaginary “real,” authentic Indian. Even

⁶⁸ CAICW website.

though ICWA explicitly lays out the requirements for who qualifies as Indian under the Act, state court judges have decided that Congress only intended to apply ICWA in cases where the individual was a “real” Indian. State court judges have continued to ignore the mandate under ICWA and have made themselves the rightful judge of the “Indianness” of enrolled tribal members. One way they have done this is through an “exception” to ICWA called the Existing Indian Family exception, which some have called a doctrine.⁶⁹ The Supreme Court of Kansas initially formulated the Existing Indian Family (EIF) exception through a case called *In re Adoption of Baby Boy L.* (1982). *In re Adoption of Baby Boy L.*, a child was born in Wichita, Kansas to a non-Indian mother and a Kiowa father who was incarcerated at the time. The non-Indian mother placed the child for adoption at the time of birth, the Kiowa Tribe of Oklahoma petitioned to have the case transferred back to its tribal court, and the Supreme Court of Oklahoma denied transfer. The Supreme Court of Oklahoma stated that although the child in question met the requirements of an Indian child under

⁶⁹ Waszak, “Contemporary Hurdles,” 124; Getches, Wilkinson, and Williams, *Cases and Materials*, 678-682; Lorinda, Mall, “Keeping It in the Family: The Legal and Social Evolution of ICWA in State and Tribal Jurisprudence,” in *Facing the Future: The Indian Child Welfare Act at 30*, ed. Matthew L.M. Fletcher, Wenona T. Singel, and Kathryn E. Fort (East Lansing: Michigan State University Press, 2009), 164-220; Aliza G. Organick, “Holding Back the Tide: The Existing Indian Family Doctrine and Its Continued Denial of the Right to Culture for Indigenous Children,” in *Facing the Future: The Indian Child Welfare Act at 30*, ed. Matthew L.M. Fletcher, Wenona T. Singel, and Kathryn E. Fort (East Lansing: Michigan State University Press, 2009), 221-234; Cheyaña L. Jaffke, “Judicial Indifference: How does the ‘existing Indian family’ exception to the Indian Child Welfare Act continue to endure in the Age of Obama?” *Western State University Law Review* 38, no. 2 (Spring 2011), accessed Jan. 12, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1979216, and Metteer, “Hard Cases Making Bad Law,” 427-436.

ICWA, the child was not part of an Indian home.⁷⁰ The specific wording of the case has proved important:

the overriding concern of Congress and the proponents of the [Indian Child Welfare] Act was the maintenance of the family and tribal relationships in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.⁷¹

In defining the child essentially as non-Indian because he was “illegitimate,” the Court went against a long-held legal precedent of deferring tribal membership to individual tribes.⁷² The matter of citizenship in a Native nation has been left entirely in under the purview of individual tribes. If a child is a citizen of a federally recognized Native nation, that child should be considered Indian under ICWA.

Through the application of the EIF exception Native parents are being punished for not being Native enough according to a white judge. Native parents are

⁷⁰ The child’s father had been charged with battery of the child’s mother and with battery of a police officer, and he had been determined by the court to be “unfit” to raise his child. The mother had stated that if the adoption did not go through, she would raise the child and never let the Kiowa have the child. See Dan Lewerenz, and Padriac McCoy, “The End of ‘Existing Indian Family’: Jurisprudence: *Holyfield* at 20, *In The Matter of A.J.S.*, and the Last Gasps of a Dying Doctrine” *William Mitchell Law Review* 36, no.2 (Jan. 18, 2010), 686-722, accessed Feb. 15, 2013, <http://www.wmitchell.edu/lawreview/documents/9.Lewerenz-McCoy.pdf>. I wonder if the child had an incarcerated Black father and had never been a part of “an African American community,” would the court have been moved to say that the child in question would “probably never” become a part of the African American community in the United States?

⁷¹ See *In re Adoption of Baby Boy L.*, 643 P.2d 168, 172 (Kan. 1982); Getches, Wilkinson and Williams, *Cases and Materials*, 678-679; and Lewerenz and McCoy, “The End of ‘Existing Indian Family,’” 693-694.

⁷² See Getches, Wilkinson, and Williams, *Cases and Materials*, 509-520, for a discussion of *Santa Clara Pueblo v. Martinez* and issues surrounding tribal membership.

being punished from being separated from their tribal culture, when it was the federal government that implemented the Relocation Program that dislocated over 100,000 Native people. Native scholar Luana Ross argued that Native women suffer “double punishment”: punishment for a crime and punishment with the termination of their parental rights, or the threat of having their parental rights terminated.⁷³ I think that women of color and *men* of color, in this case Native men, often suffer a similar double punishment when they are incarcerated. It seems that the father of Baby Boy L. was being punished not only for a crime that he committed, but also with the loss of his child, *and* the loss of his child’s Native citizenship rights.

After the legal creation of the Existing Indian Family exception in Kansas through the *Baby Boy L.* case, several other states followed. In 1985, Oklahoma became the second state to adopt the EIF exception with a very similar rationale,⁷⁴ followed by Missouri in 1986,⁷⁵ South Dakota in 1987,⁷⁶ and Indiana in 1988.⁷⁷ While there was a shift in some of the state courts following the 1989 ruling in *Holyfield*, which did not explicitly address the exception but affirmed the mandate to follow federal guidelines, many judges and scholars took *Holyfield* to be a direct

⁷³ Ross, *Inventing the Savage*, 179.

⁷⁴ See *In re Adoption of Baby Boy D.*, 742 P.2d 1059, 1064 (Okla. 1985); and Lewerenz and McCoy, “The End of ‘Existing Indian Family,’” 695-696.

⁷⁵ See *In Interest of S.A.M.*, 703 S.W.2d 603 (Mo. Ct. App. 1986); and Lewerenz and McCoy, “The End of ‘Existing Indian Family,’” 696-697.

⁷⁶ *Claymore v. Serr*, 405 N.W.2d 650, 654 (S.D. 1987).

⁷⁷ 525 N.E.2d 298 (Ind. 1988).

mandate to follow the letter of the law,⁷⁸ and many state courts did move away from the EIF exception.⁷⁹

Although some state court judges vigorously denounced the exception after *Holyfield*, others in California, Oklahoma, and Washington moved to find new ways to apply the exception. *In re Crews* (1992) in the state of Washington further codified a non-Indian parent's right to derail ICWA. The situation involved Tammy Lee Crews, an Indian mother (Choctaw), and a non-Indian father, who both initially consented to a private adoption with Hope Services. Tammy Lee Crews' disclosure to Hope Services that she was not sure "how much Indian blood" she had should have triggered ICWA since the burden is on the state or private adoption agency to determine if a child is Indian under the definitions of the Act. The non-Indian father fought the mother's decision to seek the application of ICWA and withdrew his consent for adoption. The court held that, in fact, the adoption was valid because the child had not been removed from an EIF—that the mother had not been raised on a reservation:

B. has never been a part of an Existing Indian Family unit or any other Indian community. Neither Crews nor her family has ever lived on the Choctaw reservation in Oklahoma and there are no plans to relocate the family from

⁷⁸ The opinion that *Holyfield* directed state courts to follow the letter of the law is a common theme in academic work and even in many court rulings: see Getches, Wilkinson and Williams, *Cases and materials*, 670-682; Lewerenz and McCoy, "The End of 'Existing Indian Family,'" 699-702; Waszak, "Contemporary Hurdles," 123-125; and Metteer, "Hard Cases Making Bad Law," 433-434.

⁷⁹ For example, South Dakota adopted the exception in *Claymore v. Serr*, and reversed its previous application of the exception in *In re Baade* (1989). See *Claymore v. Serr* 462 N.W.2d 485 (S.D. 1990). Alaska provided a strong argument against the exception in *In re Adoption of T.N.F.* (1989). See *In re Adoption of T.N.F.*, 781 P.2d 973, 978 (Alaska 1989).

Seattle to Oklahoma. Bertiaux, B.'s father, has no ties to any Indian tribe or community and opposes B.'s removal from his adoptive parents. Moreover, there is no allegation by Crews or the Choctaw Nation that, if custody were returned to Crews, B. would grow up in an Indian environment. To the contrary, Crews has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future.”⁸⁰

The court’s assumption that the mother had not been active in her tribe and that she would not be in the future erases the fact that the child, if retained within the family and tribe, would have the opportunity to partake in her culture, and if removed, she would most likely not be afforded this citizenship right. What seems evident is that non-Indian parents seem to be at an advantage when they explicitly fight against having ICWA applied to their children.⁸¹

There are many more cases that either affirm or deny the applicability of the existing Indian exception to cases where the child is clearly Indian as defined under the Act. I wonder if it is a coincidence that two of the states with the largest Indian populations, California and Oklahoma, have resisted the application of ICWA and extensively utilized the Existing Indian Family exception?⁸² Although the EIF exception can be seen as just that, an exception, it can also be seen as the state’s

⁸⁰ *In re Adoption of Crews*, 118 Wash.2d 561, 825 P.2d 305 (1992).

⁸¹ See for example, *In re S.C.*, 833 P.2d 1249 (Okla. 1992), where the children were Indian under the Act, but the non-custodial Indian father was not involved with the two children up for adoption, and the non-Indian mother had her rights terminated. The court ruled that the children were not being removed from an “existing Indian family,” and that within ICWA the idea of the existing Indian family was woven throughout. This insidious argument has been taken up by later courts, which cited *In re S.C.* as legal precedent.

⁸² Some scholars believe that the Existing Indian Family exception will not last, specifically see the work of Lewerenz and McCoy, “The End of ‘Existing Indian Family,’” yet there is still a number of courts that cling to the exception.

continued assertion of a right of ownership over Indian people, including the right to define and write out of existence those it chooses to define as “not Indian enough.”

Given the fact that state courts retain a great deal of power, even after the passage of ICWA, I began to question the impact of these “exceptions.” In the last section of this chapter, I explore the number of Indian children that are currently being removed from their families and communities in order to more fully understand how judicially created exceptions, and state non compliance with ICWA continue to impact Indian communities.

The Numbers: Were State Court Judges Successful in Derailing the Spirit of ICWA?

ICWA was supposed to stop the disproportionate removal of Indian children, yet it is not clear to what extent it has accomplished this. One issue is that there is not comprehensive data on how many Indian children are being removed and adopted out.⁸³ I asked Jack Trope, the current director of the Association on American Indian Affairs, why I was having such trouble obtaining current data, and he stated: “you know the current statistics are really poor; the data is really poor, and there really aren’t any statistics out there that I would consider to be viable.”⁸⁴ This is troubling because if data isn’t being collected, how do we know what impact judicially created

⁸³ For example, even in the scant data that is collected, private adoptions are not included.

⁸⁴ Jack Trope, personal Interview, Oct. 25, 2010.

exceptions, such as the EIF, are having?⁸⁵ As Unger pointed out in 2005 regarding ICWA data collection:

[t]he federal government continues to fail in its responsibilities in this area, as only the Department of the Interior, home of the U.S. Bureau of Indian Affairs. . . . ha[s] the authority and jurisdiction to collect the information policy makers need to make informed decisions on the effectiveness of child welfare, adoption, and foster care programs.⁸⁶

If we rely on the Bureau of Indian Affairs who partnered with the Child Welfare League of America to adopt out Native children and who lobbied against the passage of ICWA to levy the authority to impose oversights on states to collect data, we, again, run into not only conflict of interests, but clear vulnerabilities for tribes and Indian children. David Simmons, Director of Government Affairs and Accountability for the National Indian Child Welfare Association (NICWA), responded when I asked him about ICWA oversight: “there is no real federal oversight of the Indian Child Welfare Act, no required review of states and other agencies that are doing this work. We don’t have that data that we really need, and from that data we could probably devise better strategies about how to improve compliance.”⁸⁷ The idea that states are not reviewed for their compliance with ICWA is clearly an issue, as both Trope and

⁸⁵ The Existing Indian Family is not the only “exception” to ICWA that courts have created, courts have also deviated from ICWA by way of “good cause” not to transfer jurisdiction and “good cause” to deviate from placement preferences.

⁸⁶ Unger, “The Indian Child Welfare Act,” xiii.

⁸⁷ David Simmons, personal interview, Feb. 21, 2012.

Simmons underscored.⁸⁸ Simmons also noted that states that are out of compliance have an interest in not providing the information that would bring light to the fact that they were out of compliance, which might result in some penalization or federal oversight.

As both Trope and Simmons made clear, there is not a comprehensive gathering of the number of Native children removed from their families, through both voluntary and involuntary means. If we had the numbers of children removed and placed then we could begin to understand the ways that judicially created exceptions to ICWA have abrogated the spirit of ICWA. Although there is not comprehensive data being collected, there have been a few studies to guide us in looking at these questions.⁸⁹ For example, in 2005, the Government Accountability Office (GAO) published a report that it had been working on since 2003, and the report is one of the few that have looked at the implementation of ICWA across the entire country. The GAO research was done at the request of Congress who was concerned, in part, over the interaction of ICWA with the Adoption and Safe Families Act (ASFA). Under

⁸⁸ The lack of data collecting by states has been pointed out by many scholars; for example, see a study done by the Casey Foundation that stated: “Although the Indian Child Welfare Act of 1978 (ICWA) has been lauded as one of the most significant pieces of federal legislation affecting American Indian families, little research has been conducted to determine its effectiveness in practice” Eddie Brown, Gordon E. Limb, Ric Munoz, and Chey A. Clifford, “Title IV-B Child and Family Services Plans: An Evaluation of Specific Measures Taken by States to Comply with the Indian Child Welfare Act” (Seattle: Casey Family Programs, 2001), accessed Dec. 4, 2010, <http://www.nicwa.org/>.

⁸⁹ There are conflicting opinions as to whether ICWA has had a large impact on the rates of removal of Native children. One article (1996) argued that there has been a clear benefit, yet they said that their assessment was very preliminary: see Ann E. MacEachron, Nora S. Gustavsson, Suzanne Cross, and Allison Lewis, “The Effectiveness of the Indian Child Welfare Act of 1978,” *Social Services Review* (1996).

ASFA, the federal government mandated that states begin the termination of parental rights for all children who were in foster care 15 of the last 22 months, so that those children could be “freed” for adoption.⁹⁰ The government may have been deeply concerned that children were “languishing” in foster care for years and that children are more adoptable the younger they are, yet it is worth noting that the government must pay for children in foster care placements, but not for children who are adopted. The GAO found that although ICWA required a different set of rules be followed, overall, it did not increase the length of time or the number of placements for an Indian child.⁹¹

Besides looking at the impacts of the interaction of ASFA with ICWA, the GAO was also interested in reviewing state compliance with ICWA.⁹² In 2003, they found after reviewing 51 Child and Family Services Reviews (CFSR) conducted through the Administration for Children and Families (ACF) that 32 states had issues implementing ICWA, and ten had no discussion of ICWA implementation whatsoever. The following year, in 2004, of the 32 states that had acknowledged issues with the implementation of ICWA, only twenty had taken any action to

⁹⁰ For the specifics of ASFA, see Adoption and Safe Families Act (H.R. 867), Public Law Number 105-89, 19 Nov. 1997, accessed Jan. 2., 2011, <http://www.gpo.gov:80/fdsys/pkg/BILLS-105hr867enr/pdf/BILLS-105hr867enr.pdf>. For the explicit goals of the GAO report see The Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States*, Report to Congressional Requesters, United States Government Accountability Office GAO (2005).

⁹¹ GAO, *Indian Child Welfare Act* (2005), 1-5.

⁹² *Ibid.*, 2.

improve implementation, and twelve did not indicate any plan for correction of the situation. These numbers point not only to problems with implementing the Act, but also to the fact that states do not feel compelled to correct issues that arise. The concerns with compliance might not seem so problematic if they weren't coupled with continued disproportionate removal of American Indian children from their homes. The GAO found that in five states twenty five percent or more of the entire foster care population was comprised of American Indian children. For example, in Alaska 62 percent, in South Dakota 61 percent, in Montana 35 percent, in North Dakota 30 percent, and in Oklahoma 25 percent of the foster care population was American Indian.⁹³ These numbers are staggering and in many ways mirror the numbers of removals that were taking place pre-ICWA. Similar to the pre-ICWA numbers, these numbers do not include children placed through private adoption agencies and informal placements through the tribe, which would raise the percentages considerably.

Although these numbers may surprise many people not involved in Indian child welfare, those who work in the field have known for some time that although there has been headway in some states, many states continue to remove Native children at unprecedented rates. For example, Native historian Troy Johnson stated in 1993:

In spite of the enactment of the Indian Child Welfare Act (ICWA) in 1978, 20-30 percent of Indian Children are still being placed outside of their natural

⁹³ Ibid., 13.

tribal and family environments, primarily in non-Indian foster care and out-of-culture adoptions ... It is not enough to say that there is an Indian Child Welfare Act designed to protect Indian children. The Act is being ignored in many, many instances. More Indian children are being placed outside Indian family today than during the years preceding passage of the ICWA.⁹⁴

Johnson made clear that ICWA had not changed the number of removals of American Indian children; in fact, he noted that the numbers had gone up. I underscore the continued unwarranted removal that the GAO, Johnson and others bring up because I am concerned with the ownership the state continues to assert over Native people by removing their children, and in certain cases, erasing their very existence through the Existing Indian Family exception. With the continued removal of Native children, state court judges have not only sustained a prolonged assault on the intentions of ICWA, but have also succeeded in continuing the legacy of ownership over Native people by marking them as transferable units of property: able to be given to non-Indian foster and adoptive homes, or declared legally dead under the federal-tribal relationship by applying the EIF exception.

Although state courts have played a central role in the continued marking of Native people as ownable, there are other people involved in these unjust takings, such as private adoption agencies, adoption attorneys and foster and adoptive parents. In the next chapter, I examine the permeation of ownership into the landscape of

⁹⁴ Johnson, *The Indian Child Welfare Act*, see the introduction. Many other scholars have noted the continuing removal of a large percentage of Native children; for example, see Lisette Austin “Serving Native American Children in Foster Care,” *The Connection* (Court Appointed Special Advocates (CASA) for children, winter 2009), accessed Feb. 8, 2011, http://nc.casaforchildren.org/files/public/community/judges/July_2010/Connection_Winter2009.pdf.

adoption. I underscore the need to look at the unprecedented number of Native adoptions as, at least partially, a symptom of the racist hierarchy of adoptability that saturates the child welfare system. I argue that it is, in part, due to the placement of Native children in an adoptability hierarchy, which places white children at as the most desirable and African American children as the least desirable, that Native children are appraised as being not-Black, and thus more desirable than Black children.

Chapter Four

White Desires: The Indian, Not-Black Child

In this final chapter, I further explore the concept of not-Black, which I began to develop in the first chapter by looking at the eighteenth century freedom suits in which Native and Black Native slaves battled for their emancipation by arguing maternal descent from a free Native women.¹ In this chapter, I underscore how not-Black continues to be a salient concept in the rigid racial classification of the child welfare system, which often excludes multiple legal identities.²

Unyielding racial hierarchies that solidified in the eighteenth century took on new meaning in the 1950s, when all children of color were moved into the “special needs” category that had been previously reserved for children who were physically and or mentally differently-abled.³ In this chapter, I explore the movement of Native children from the “special needs” category of adoption to a condition of adoptability.

¹ The status of the child followed the status of her/his mother: see Miles, “Taking Leave, Making Lives,” 147; and Treadway, “Working Out Her Destiny.”

² For a discussion of racial classifications of African and Native American peoples see the work of Jack D. Forbes, *Africans and Native Americans*. Two books that are compilations of articles on the intersection of Black and Native peoples and explore a broad range of issues that have to do with Black Natives have recently come out: Tayac, *IndiVisible*; and Tiya Miles and Sharon P. Holland, eds., *Crossing Waters, Crossing Worlds: The African Diaspora in Indian Country* (Durham: Duke University Press, 2006).

³ For a discussion of the category of “special needs,” see the work of Simon, Altstein, and Melli, *The Case for Transracial Adoption*, 3-6; and Patricia Jennings, “The Trouble with the Multiethnic Placement Act: An Empirical Look at Transracial Adoption,” *Pacific Sociological Association* 49, no. 4 (Winter 2006), 559-581, accessed Dec. 4, 2011, <http://www.jstor.org/stable/10.1525/sop.2006.49.4.559>.

I argue that this shift in the adoptability and desirability of Native children occurred not only because the state had a long standing maternalistic project (this is a concept developed by Margaret Jacobs') of "caring" for Native children, but also due to the lack of healthy white babies, the desires of white parents to have a child that was "not-Black," and state coercion.

The factors that existed to create Native children as adoptable interplayed with one another and existed in a landscape of deep racial divides in the broader United States, and the child welfare system more specifically. I stress the issue of racism because transracial adoptions, and more specifically adoptive parents, did not exist outside of the larger racist geography. While much of the literature assumes that white parents wanted to adopt Black or Native children for altruistic reasons, I argue that white parents were often coerced into adopting children of color, particularly Native children, when their first choice, a healthy white baby, was not available. The state project of funneling Native children to white families through the reassignment of Native children to the category of adoptability relied on a legacy of ownership, and tangible property interests, over the lives of Native children.

I utilize the Christian Alliance for Indian Child Welfare (CAICW), a large organization with members across the U.S. and Canada that works to defeat ICWA, to address the ways that adoptive parents continue to view Native children as belonging to them and not to Native parents, their extended family, or their tribe. I believe the fact that white families continue to lay claims to Native children emanates from the

long history of ownership over Native people from slavery, guardianship, boarding schools, and Indian adoption projects, in which white people were constructed as their saviors.

Healthy White Babies and Antiracist White Saviors

The emergence of the white adoptive savior in 1950s must be seen as embedded in the complex terrain of child welfare. White families began adopting children of color, both transracial and transnational adoptions, beginning after WWII, at which time the practice increased.⁴ transnational and transracial, and it should be noted that Native adoptions can be thought of as both transnational (Nation to Nation) and transracial, adoptions in the 1950s were not considered desirable because the general sentiment was that a process of “matching” should take place. From the beginnings of legal white middle-class adoption history, with the Massachusetts Adoption of Children Act of 1851, “matching” was the protocol until about the 1970s. Although “matching” was primarily bound by race, it also encompassed matching things such as religious beliefs, physical attributes, class standing, and perceived intellectual potential.⁵ As was discussed previously, Native children have a long history of being removed and placed in the “care” of white people through

⁴ Hussong, “A Phenomenological Study,” 12; and Simon, Altstein and Melli *The Case For Transracial Adoption*, 1.

⁵ For a discussion of matching see the work of Harness, *Mixing Cultural Identities*, 39; Hussong, “A phenomenological Study,” 12-13; and Rosene, “A Follow-up Study,” 8.

enslavement, guardianship, boarding schools, and indentured servitude, and added to that in the 1950s was the transracial adoption.

One of the factors that affected the increase in transracial adoptions in the post-WWII United States was the declining availability of healthy white infants. Rita Simon, Howard Altstein, and Marygold Melli write of the decline of the healthy white infant:

Transracial adoption did not come about as a result of deliberate agency programming to serve populations in need; rather, it was an accommodation to reality. Social changes in the United States—changes regarding abortion, contraception, and reproduction in general—significantly reduced the number of white children available for adoption, leaving nonwhite children as the largest available source.⁶

Simon, Altstein and Melli underscore the factors that brought about the decline of “healthy white babies” available for adoption, such as the increased availability of contraceptives, the legalization of abortion, and the destigmatization of single white motherhood, which made it more socially acceptable for single young white girls to raise their children without being ostracized. All of these factors led to a lack of white infants available for adoption compared to the demand for them by white adoptive couples.

⁶ Simon, Altstein, and Melli, *The Case For Transracial Adoption*, 1; Askeland, *Children and Youth in Adoption*; and Martha Satz and Lori Askeland, “Civil Rights, Adoption Rights: Domestic Adoption and Foster Care, 1970 to the Present,” in *Children and Youth in Adoption, Orphanages, and Foster Care: A Historical Handbook and Guide*, ed. Lori Askeland (Westport: Greenwood Press, 2006, print), 45-46. For a discussion of the impact of *Roe v. Wade* on the availability of white infants up for adoption see Melosh, *Strangers and Kin*, 7-15.

Ethnic studies scholar, Jodi Kim, asserts that this new reproductive terrain where adoptable white infants were declining coincided with WWII, the Korean War and the creation of “orphans” all over the world, particularly in Vietnam, and Korea.⁷ I put orphans in quotes because the concept of orphan usually implies that the parents are deceased, yet recent scholarship, such as that of Kim, has demonstrated that “orphans” from other countries often had living parents. Kim argues that the term orphan is used “precisely because it is so rhetorically powerful” in creating a “legal fiction” that furthers the political project of imperialism and shifts attention from the fact that it was the U.S. that created the destruction in these countries that in turn created large numbers of displaced children.⁸ As I discussed in the previous chapter, the U.S. has a long history with Native Americans of legally orphaning Native children who have parents, so it is not surprising that the U.S. then transposes the production of ideological orphans to other peoples of color.⁹ As I discussed in the last

⁷ For a general discussion of the transnational adoption of Vietnamese children see Simon, Altstein, and Melli, *The Case For Transracial Adoption*, 9. For a more critical understanding of the issue see Hussong, “A phenomenological Study,” 15. There is evidence to support the fact that the removal of thousands of Vietnamese children was for political reasons and that those children were not actually parentless or “orphans.” See the work of Jodi Kim, “An “Orphan” with Two Mothers: Transnational and Transracial Adoption, the Cold War, and Contemporary Asian American Cultural Politics” (*American Quarterly*, The American Studies Association, 2009), 862.

⁸ Kim, “An ‘Orphan’ with Two Mothers,” 867.

⁹ I should underscore that the term orphan makes no sense in Native societies, or, as many are coming to realize, in most societies. For a discussion on the idea of a Native orphan being contrary to Native ways, see the work of Jeanniene Carriere, *Aski Awasis/Children of the Earth*. *Aski Awasis/Children of the Earth* puts forth Native-centered ways of dealing with adoption.

chapter, during this time Native children were also constructed as unwanted, orphaned, or in need of rescue from unfit parents living in dire poverty.¹⁰

Directly connected to the creation of the U.S. rescue of “unwanted” children is the creation of the white adoptive saviors who took in these “orphans.” These families are portrayed as saviors that transcended racism and adopted unwanted children of color.¹¹ For example, Simon and Altstein write: “[i]n the United States the groups initially involved in adoption across racial lines seem quite clearly to have been motivated by humanitarian principles and a sense of social responsibility.”¹² Simon and Altstein frame adoptive parents as motivated by the highest moral standards. Satz and Askeland also argue that transracial adopters were seeking out opportunities to move across “racial and national boundaries.”¹³ Many other adoption scholars frame white interests in transracial adoption as stemming from anti-racist benevolent roots. For example, Barbara Melosh, another adoption history scholar, states, with regards to transracial adoption within the U.S., “At home, longstanding racial barriers were breached as, for the first time, white adopters embraced African American and

¹⁰ See Harness, *Mixing Cultural Identities*, 18; Bensen, *Children of the Dragonfly*, 12; and Byler, “The Destruction of American Indian Families,” 1-11.

5. Jones, *The Indian Child Welfare Act Handbook*, 1-12.

¹¹ See the work of Melosh on the history of adoption and “as if begotten,” and how transracial adoptions violate the ideology behind “as if begotten” (Melosh, *Strangers and Kin*, 160).

¹² Simon and Altstein, *Transracial Adoption*, 11.

¹³ Martha Satz, and Lori Askeland, “Civil Rights, Adoption Rights: Domestic Adoption and Foster Care, 1970 to the Present,” in *Children and Youth in Adoption, Orphanages, and Foster Care: A Historical Handbook and Guide*, ed. Lori Askeland (Westport: Greenwood Press, 2006), 40.

American Indian children as their own.”¹⁴ It is interesting that Melosh framed transracial adoptive families as “embracing” Black and Native children. While this argument may be seductive, it silences the fact that white middle-class families did not adopt Native and Black children at first, and when they wanted to “embrace” another culture they looked to Vietnam, Korea, China and other countries before they looked to Native or Black children.¹⁵ It took extensive efforts by the state to place children of color in white middle class homes, even going so far as to designate them “special needs” to attract adoptive families.

While some scholars attribute the transracial adoptions of the post-WWII period to a transcendence of rigid racial boundaries, or a celebratory multicultural “embrace,” it would be a mistake to assume that the complex historical legacy of ownership over Native children was no longer operating in adoption practices. Satz and Askeland note that it is against the tide of public opinion about children of color as “an encumbrance upon society” that white parents willingly transgressed and adopted them.¹⁶ This continues to glorify transracial adoptive parents not only as antiracist but also altruistic and eager to take in “unwanted” children of color.¹⁷ I do

¹⁴ Melosh, *Strangers and Kin*, 158. Melosh goes on to state, “For some adopters, their interracial families were visible signs of their personal commitment to postwar ideals of racial integration” (Melosh, *Strangers and Kin*, 159).

¹⁵ During the period after WWII, foster care became increasingly Black; see the work of Dorothy Roberts, specifically: *Shattered Bonds*, 7.

¹⁶ Satz and Askeland, “Civil Rights, Adoption Rights,” 35.

¹⁷ See Karen A. Balcom, *The Traffic in Babies: Cross-Border Adoption and Baby-Selling Between the United States and Canada, 1930-1972* (Toronto: University of Toronto Press, 2011), 197.

not want to diminish the fact that these parents fulfilled a desire to become parents by adopting children of color, and did so in spite of a racist society, but I think that glorifying them leads us astray from broader inquiries, such as why are children of color, particularly Black and Native children, so disproportionately represented in the child welfare system?¹⁸ It also shifts the conversation away from more subtle questions, such as, how “freely” did white parents choose their child?

My research looks at the desires and ideology of adoptive parents in order to bring out the larger argument of the continued claiming of ownership of Native children not only by the state but also by white parents. I am interested in how the child welfare system and all the actors within it: social workers, state court judges, attorneys, adoptive parents, private and public adoption agencies manifest the legacy of colonization through the continued claim of Black and Native children. The literature often leaves out the role that social workers and adoption agencies play in directing families to the child they “choose.” In particular, Native children have been “offered” to white families for adoption through a structure of racial hierarchy in which children are more adoptable because they are not-Black.¹⁹ Here, again, Native people continue to be read in opposition to Black people in order to be legible to the

¹⁸ As I discussed in the introduction, Roberts does an exceptional job of working to answer that very question. Roberts argues that if we get trapped into thinking whether or not white families can raise well-adjusted African American children, we lose site of why there are so many Black children in the child welfare system. She highlights that part of the problem is the disproportionate poverty in Black communities, and that we need to address the poverty in order to strengthen families and lessen the rate of child removal.

¹⁹ Roberts, *Shattered Bonds*, 6-7.

white public and state, as they were required to in the freedom suits of the eighteenth century.

Property Interests

The requirement that Native children be read in opposition to Black children is disturbing in its own right, but when the tangible property interests are added to it, the conversation turns more sinister, which is precisely the case in the child welfare system. In state care, and in private adoptions, children are not thought of as equal, and the value placed on a child is based in a rigid racial hierarchical structure.²⁰

Within this structure, the Black child is placed at the bottom, and assigned a value that is far lower than that of a white child. Harris underscores the way that whiteness is based on the fact that white is considered superior to other peoples: “as it emerged, the concept of whiteness was premised on white supremacy rather than mere difference. ‘White’ was defined and constructed in ways that increased its value by reinforcing its exclusivity.”²¹ The idea that whiteness is a coveted commodity is quite salient in the realm of adoption politics. A white child is requested more by adoptive parents, is easier for an adoption agency to find a home for, and actually holds a higher monetary value. The child welfare system is rife with examples of the

²⁰ Here value is based within a hierarchical system where many factors are accounted for, including race, class, gender (more girls have historically been requested for adoption), and intelligence.

²¹ Harris, “Whiteness as Property, 1707-1791.”

convergence of race and financial cost. Adoption agencies have not been shy about advertising the monetary value of infants. For example, a U.S. agency published the following price scale for infants in 1990:

White infants	\$7,500.00
Biracial infants	\$3,800.00
Black infants	\$2,200.90 ²²

The pay scale for adopting infants in the U.S. is clearly race-based, as is the international adoption arena. Current adoption scholars are working to explain the disparate pay scale for international adoptions. Simon, Altstein, and Melli postulate that the clear price differences for infants from different countries has to do with racial markings:

we heard a possible explanation for why Latin American adoptions cost more than Asian adoptions do. The reason rests on the cultural and racial preferences of the adopters, namely, that there is a greater likelihood of adopting a Caucasian or Caucasian-appearing child from Latin America than from Asia.²³

The idea of a child from Latin America having more of a possibility of appearing “Caucasian” would explain the higher monetary value placed on those infants.

The price scale for adoption is not conceived arbitrarily, it operates as an economic apparatus that is directly shaped by racist societal attitudes, which is very much influenced by the “first choice” of adopters. Adoption historian Richard Banks

²² Simon, Altstein and Melli, *The Case For Transracial Adoption*, 11.

²³ *Ibid.*, 10.

emphasizes the connection between adoption “preferences” and the “value” placed on Black children:

The severity of the social inequality produced by adoptive parents' preferences is made starkly clear by a fact too often accepted as inevitable, albeit lamentable, rather than as a predictable outcome of our own preference-promoting policies: Black children are simply worth less than white children.²⁴

The way that Banks underscores the preferences of adoptive parents and its impact on the monetary value placed on Black children is crucial. If adoption were not a system based on economic principles of supply and demand, we may have a more clear conversation about the “antiracist motivations” of adopters; yet it is these very preferences, or “demands,” of white middle-class adopters that helps to create a system with a racially based adoptive fee scale. The racially marked fee scale is not a secret in adoption politics, nor is it hidden that the color of an infant’s skin directly influences the “price” of her/his adoption.

African American families who wish to adopt have been particularly troubled by the fact that adoption is so heavily correlated with the “buying and selling” of children:

the pro-adoption organization, the North American Council of Adoptable Children, recently commissioned a study of this problem, which found several serious, systemic barriers to prospective nonwhite adoptive parents. For instance, due to their deep awareness of the history of slavery, many black adults are very suspicious of adoption fees, which makes the process too much like ‘buying’ a baby.²⁵

²⁴ R. Richard Banks, “The Color of Desire: Fulfilling Adoptive Parents’ Racial Preference Through Discriminatory State Action,” *The Yale Law Journal* 107, no. 4, (January 1998), 881.

²⁵ Satz and Askeland, “Civil Rights, Adoption Rights,” 55, citation omitted.

As the North American Council of Adoptable Children found out, many African American people see a link between slavery and the current practice of pricing children based on the color of their skin. Given that the legacies of slavery remains embedded in a system of fees for adoption that reproduce racial hierarchies, it is important to consider the politics of adoption through a tri-racial framework of desirability. As the white child became more and more coveted in the post WWII U.S., children of color were still not adopted in great numbers.²⁶ Children of color were deemed unadoptable, or difficult to place, so the government placed them in the “special needs” category with children that were physically and mentally differently-abled.

Once in the “special needs” category, Native American adoptions continued to have complex property relations undergirding them. Native children occupied the same category as all other children of color, but they had a “savior” campaign that had been waged on their behalf by the BIA, the Child Welfare League of America, Churches, such as the Church of Latter Day Saints, as I discussed previously. The result of the efforts of the government and private organizations was the creation of a structure to place Indian children that required a continual supply of Native children.²⁷ William Byler, director of the Association on the American Indian Affairs

²⁶ Roberts, *Shattered Bonds*, 13-14.

²⁷ There are many who note the economic incentives; for example, see Byler, “Destruction of American Indian Families,” 6.

from 1962 until 1980, stressed in the 1970s, the monetary component to removing Indian children from their families:

The Bureau of Indian Affairs and the Department of Health, Education and Welfare (HEW) bear a part of the responsibility for the current child-welfare crisis. The BIA and HEW both provide substantial funding to state agencies for foster care and thus, in effect, subsidize the taking of Indian children ... In some instances, financial considerations contribute to the crisis. For example, agencies established to place children have an incentive to find children to place.²⁸

Because the Bureau of Indian Affairs and the Department of Health, Education, and Welfare paid/pays for the care of Indian children when they were/are removed and placed under state supervision. Therefore, states have a financial incentive for removing Indian children and keeping them in foster homes because the state only retains federal monies when children are in the custody of the state.

National Public Radio (NPR) recently (2011) aired a three part series on the state's incentive for removing Indian children, and how it continues to play a major role in the current overrepresentation of Native children in the child welfare system. NPR, through the investigative research of Laura Sullivan, looked at South Dakota in particular and found that little had changed since the 1970s. In 1976, the Association on American Indian Affairs (AAIA) presented their findings, from the extensive research they had conducted over a ten-year period, that in South Dakota 64 percent

²⁸ Byler, "Destruction of American Indian Families," 6. DeMeyer wrote, "There are certain economic incentives for removing Indian children. Agencies that are established to place Indian children have a vested interest in finding Indian children to place" (DeMeyer, *One Small Sacrifice*, 130).

of the children in foster care were Indian children, while they comprised 7 percent of the total population for South Dakota.²⁹ Compare that with the present numbers that NPR found: 60 percent of the state run foster care population is American Indian while Native children make up less than 15 percent of the child population in South Dakota.³⁰ The numbers NPR found can be cross-referenced with the Government Accountability Office (GAO) Report of 2005 that found that South Dakota's foster care system was comprised of 61 percent Native children.³¹

NPR found that there are not only disproportionately high numbers of Native children in the child welfare system in South Dakota, although that is problematic in

²⁹ I wanted to compare the numbers that NPR concluded with those of the AAIA from the 1970s, but they had them calculated differently. AAIA marked that there were 832 total children in foster care and 530 of them were Indian; see the work of the Association on American Indian Affairs, "Indian Child Welfare Statistical Survey, July 1976" (New York: Association on American Indian Affairs, 1976), 592-593. According to another study, conducted in 1995, 40 percent of all of the adoptions in South Dakota since 1968 have been of American Indian children; see Reed and Zelio, "States and Tribes: Building New Traditions," 28.

³⁰ Laura Sullivan, reporter, Amy Walters, host, "Incentives And Cultural Bias Fuel Foster System," in the series "Native Foster Care: Lost Children, Shattered Families," *All Things Considered*, NPR, Oct. 25, 2011, accessed Dec. 2, 2012, <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>; Laura Sullivan, reporter, Amy Walters, host, "Native Survivors Of Foster Care Return Home," in the series "Native Foster Care: Lost Children, Shattered Families," *All Things Considered*, NPR, Oct. 27, 2011, accessed Dec. 2, <http://www.npr.org/2011/10/27/141728431/native-survivors-of-foster-care-return-home>; Laura Sullivan, reporter, Amy Walters, host, "South Dakota Tribes Accuse State Of Violating Indian Welfare Act," in the series "Native Foster Care: Lost Children, Shattered Families," *All Things Considered*, NPR, Feb. 6, 2013, accessed Mar. 2, 2013, <http://www.npr.org/2013/02/06/171310945/south-dakota-tribes-accuse-state-of-violating-indian-welfare-act>; Laura Sullivan, reporter, Amy Walters, host, "Tribes Question Foster Group's Power And Influence," in the series "Native Foster Care: Lost Children, Shattered Families," *All Things Considered*, NPR, Oct. 26, 2011, accessed Dec., 2012, <http://www.npr.org/2011/10/26/141700018/tribes-question-foster-groups-power-and-influence>; and Nathan Rott, "A Fight For Her Grandchildren Mirrors A Native Past," in the series "Native Foster Care: Lost Children, Shattered Families," *All Things Considered*, NPR, Oct. 24, 2011, accessed Dec. 2, 2012, <http://www.npr.org/2011/10/25/141650809/a-fight-for-her-grandchildren-mirrors-a-native-past>.

³¹ GAO, *Indian Child Welfare Act* (2005), 3-4.

itself, there is also a financial stake in these removals—South Dakota is heavily dependent on funding they receive from the removal of Native children. The State receives 100 million dollars each year from the federal government for its child welfare program, and the child welfare program employs 1000 workers, funds 700 foster families, and funds “dozens of independent group homes that get millions of dollars in contracts to take care of children.”³² Even if there were a way to justify the incredible number of Native children removed from their homes, it would be difficult to make sense of group homes making profit from the removal and care of Native children.³³

The linkage between private foster homes, government interests, and state interests, was highlighted by NPR’s attention to one privately run foster care home in South Dakota, Children’s Home. The then acting governor of South Dakota, Dennis Dugaard, was employed as the governor while at the same time was paid over 100,000 a year as Executive Director of Children’s Home. This relationship was complicated by the fact that during the years that Dugaard was executive director (a ten year period), Children’s Home received 50 million dollars from the government for the care of foster children most of whom were Native American.³⁴ Bill Janklow, another former governor of South Dakota, responded when NPR asked him how

³² Sullivan and Walters, “Tribes Question Foster Group's Power And Influence.”

³³ Ibid.

³⁴ Ibid.

important the child welfare money was to South Dakota: “‘Incredibly important. Look, we're a poor state. We're not a high-income state. We're like North Dakota without oil. We're like Nebraska without Omaha and Lincoln. We don't have factories opening here, hiring people at high-wage jobs.’”³⁵ The former governor is able to see the impact this money makes. Unfortunately, 90 percent of the Indian children in the child welfare system in South Dakota are in non-Indian care.³⁶ In the transfer of Native children from the care of their families and tribes to the care of white families and institutions, they are again made into transferrable commodities that can only be capitalized on when in the care of white hands.

Another financial consideration is the situation of white families who adopt Native children and receive monetary compensation from the child’s trust account. Adoption scholar Trace DeMeyer notes: “It’s interesting to note that in many cases, the rate of non-Indian people applying for Indian children for foster care, or especially adoptive care, raises dramatically when there is an Indian claims settlement.”³⁷ If DeMeyer’s assertion is correct, it points to an aspect of desirability

³⁵ Sullivan and Walters, “Incentives And Cultural Bias Fuel Foster System.”

³⁶ Ibid.

³⁷ DeMeyer is arguing that it was, in fact, a financial incentive—not only to the government (the child would be off the rolls), but also for the adopting parents who could claim monies the child may eligible (DeMeyer, *One Small Sacrifice*, 130). See also the work of Byler, who stated: “Neither the BIA nor HEW effectively monitor the use of these federal funds. Indian community leaders charge that federally-subsidized foster-care programs encourage some non-Indian families to start ‘baby farms’ in order to supplement their meager farm income with foster-care payments and to obtain extra hands for farm work” (Byler, “Destruction of American Indian Families,” 6).

associated only with Native adoptees. Fanshel touched on the monetary interest attached to Native children:

If the child was enrolled in a tribe, the superintendent of the Indian agency provided a statement concerning any tribal monies that might be coming to the child through inheritance or tribal rights was also included. If the child was eligible for any tribal benefits, it was the responsibility of the adoption agency to establish a guardianship or trust arrangement to protect the funds until the child reached majority.³⁸

Even if monetary compensation directly linked to trust funds was the exception for a Native adoptee, it does point to the complicated history of Native adoption as linked to property. This property dynamic has similar aspects to what took place in the late 1800s, when courts were granting white men “guardianship” over Native children in order to gain their land allotments.

These instances of monetary entanglement with state care of Native children are unique in some ways because of Native nation’s relationship vis-à-vis the government, yet in other instances they are quite similar to the situation that other children of color face, which is almost certainly tied to the nation state’s commodification of people of color to differing degrees. The idea of children as a commodity in adoption is taken up by Kim: “The very existence of transracial adoption, and the various options and choices that are afforded prospective adoptive parents, bring up disturbing questions of ‘supply’ and ‘demand’”³⁹ The logic that Kim addresses of children being a marketable commodity is clearly evident in the case of

³⁸ Fanshel, *Far From the Reservation*, 42

³⁹ Kim, “An “Orphan” with Two Mothers,” 867.

Native children in the Indian adoption projects where children were marketed to white families as desirable, and paid for by the state and individual families.

It is important to underscore the fact that the white middle-class family's "embrace" of children from Vietnam and Korea coincided with the U.S. literally producing them as orphans by killing their families or their family's livelihood through its military invasions, while simultaneously manufacturing an advertisement campaign of a need for white saviors for destitute children. It cannot be forgotten that while Americans were "saving" Vietnamese and Korean children by the thousands, it is against the backdrop of thousands of unadopted African American children in the child welfare system. Here we can see that adoption is tied to the nation state and we cannot separate the adoption of children of color, particularly Native children, from the racial projects of the government.

When altruism is placed at the center of the discussion on transracial adoption, what is left unaccounted for is the state's interest in and promotion of these adoptions. Just as the state's interest in the removal and adoption of Korean and Vietnamese children must be linked to the U.S.' war campaigns in those countries, the removal and adoption of Native children must be understood as a protracted process of colonization—a process to claim, control and disappear Native peoples. In order to understand how white middle-class families became entangled in a state genocidal project, I look as white desires.

The Indian, Not-Black Child

One way of examining the various motivations behind white desires for Native children is to consider the tri-racial context that led white parents to adopt Native children. Many adoptive parents did not initially want to adopt Indian children, and they were particularly averse to adopting Black children. In Fanshel's study of Indian adoptees, he probed the motivations of adoptive parents and their "liberalness" and found that of the 96 families that Fanshel followed for five years, only one family adopted a child who was partially Black, and this child was the adoptive families eighth child.⁴⁰ In Fanshel's study, the adoptive parents were asked to rank children from different ethnicities according to their preference, or "willingness to adopt." The adopters were also asked to preferentially rank mentally handicapped, physically handicapped, older, shy, and aggressive children. According to Fanshel's data, the least "adoptable" child was one from "mixed Negro-white parentage who was obviously Negro in features and skin color"—with 58.3 percent of the parents stating that they "could not consider" such a child.⁴¹ The next least adoptable child was from "Negro-white parentage" who was "not obviously Negro in appearance"—47.9

⁴⁰ Fanshel, *Far From the Reservation*, 80-81. The family who adopted the Black child had their children in this order: Natural, Natural, Oriental, Natural, Oriental, Oriental, Native American, and Black—the racial categorization is how Fanshel categorized adoptions, not my own creation.

⁴¹ *Ibid.*, 120-121.

percent said that they “could not consider” such a child. It is important to note that these potential parents were not even asked if they would adopt a child from a Black mother and a Black father, which was assumed to be an unacceptable adoption to a white couple.⁴² These parents indicated that they would rather adopt a child who was “slightly retarded” or a child who was “seriously handicapped” than adopt a half-Black child.⁴³

With the question of the adoptability of an American Indian child left unasked, I looked at some of the interview material he provided in his book—he does not give full transcripts of his interviews, but he does include extensive responses from adopters as to why they adopted an Indian child. I noticed two clear trends: first, the white adoptive parents who adopted an Indian child really wanted to adopt a white child but “settled” for an Indian child, and second, the state through social workers was in the business of “selling” or encouraging the adoption of particular children. While Fanshel does not point out that Native children were often adopted by parents who did not necessarily initially desire them, it seems quite clear from his data that these adoptive parents wanted to adopt a white child, and after white they wanted the closest thing to white, as long as the child was not Black. For example, one family from Fanshel’s study stated, “At the time we applied to the Department of Public Welfare, we wanted to adopt a Caucasian child, but because of our ages, it did not

⁴² Ibid., 120-121.

⁴³ Ibid.

look as though one would be forthcoming.”⁴⁴ There were rigid qualifications for adopting a child that were very closely associated with middle-class norms. Adoptive couples were also ranked on their desirability, and certain factors made a couple more or less desirable such as race, income, marriage, household, how many children the adoptive family already had, age of adoptive parents, and the ability for the adoptive mother to stay home with the children. It is not an accident that the only Black child noted in Fanshel’s study was adopted as the eighth child—the family was probably very limited as to “what kind” of child they could “get,” and since Black was, and continues to be, at the bottom of the adoption hierarchy, that was probably their only option. And although some clearly sought out Native children, such as the LDS church and many other church groups, along with individual families who were drawn to the idea of attaining some kind of Indian “souvenir,” many families did not want to adopt Indian children. Many families adopted Indian children after they realized the long waiting list for a white infant:

We learned that there was an enormous waiting list for the Protestant, Caucasian children who were available for adoption. It was at this point that we became aware of the fact that our best possibility would be to consider a child of mixed racial background or a Caucasian child who was physically handicapped.⁴⁵

Here it is evident that this family felt that they had to “downgrade” when they could not obtain a white child to a child that was either handicapped or of color. It became

⁴⁴ Fanshel, *Far From the Reservation*, 92.

⁴⁵ *Ibid.*, 92-93.

increasingly clear that no matter what an adoptive couple may have desired, in public adoptions, the state had a great deal of control over what child they placed with what family. If a family was itself demoted in the hierarchy of desirability for adoptive families because of lack of income, age, or already had other children, then they were not afforded a first-class white child, and were only offered one of the “special needs” children. One family’s remarks make visible the hierarchy of their desires: “We wanted to have a third child. The agency worker asked if we could consider an Indian child; we had already applied for a handicapped child.”⁴⁶ As this couple suggests, Indian children were seen as less desirable than handicapped children.

Through these stories of white adoptive couples “choosing” Indian children, the state social worker emerges as an agent of change. These families applied for white children, and were given the choice of handicapped, Black, or Native children. These families explicitly state that they would not adopt Black children, and it seems that Native children fell somewhere between Black and seriously handicapped white children. Therefore, Native children were less adoptable than seriously handicapped white children, but more desirable than Black and partially Black children. As one family stated, “We had not applied specifically for an Indian child but had the understanding that it would be easier to adopt if we did so ... [t]he only thing that gave us pause was my concern about the darkness of their skin.”⁴⁷ This excerpt

⁴⁶ Ibid., 88.

⁴⁷ Ibid., 90.

underscores the difficult position that social workers were putting families in, not to mention the hardship that would be faced by placing Indian children in families who did not initially desire them. One adoptive mother outlines her turmoil at having to face the choice of whether to take an Indian child or not:

The question of an Indian child arose when we were informed that the agency that had placed our first child with us, only placed second children who were special kinds of children. We pursued the possibility of adopting an Oriental child and eventually contacted the worker at the agency who told us they had an Indian baby at that time. I was immediately thrown into tremendous conflict. I did not know anything at all about Indian children. I could not refuse the child since I felt this meant we would not be given another chance for any other kind of child. ... I think the worker made a mistake in promoting an Indian adoption with us because she did not see that there was a frightened side of my personality.⁴⁸

This account of one adoptive mother's struggle to accept an Indian child, and face "a frightful side of [her] personality," points to the racial hierarchy that she was operating within. It is only after her bid for her first choice white baby and her second choice "Oriental" is rejected that she must face a Native child, and her "frightened side," the side of her that is fearful of an Indian child. The social worker emerges as a powerful state agent who wields control over the ultimate "choice" of so many white middle-class families.

Although one could discount these stories as outdated, the current literature points to the fact that the racial assignment of a child is still very much a predictor of the adoptability of the child. Black children are still considered "hardest to place," and Native children often fall out of the discussion of adoptability, even though they

⁴⁸ Ibid., 89.

continue to be overrepresented in the child welfare system.⁴⁹ However outmoded the practice of placing children of color in a “special needs” category may seem, it is still a part of the structure of the state’s child welfare system. Adoption scholar Patricia Jennings challenges the assumption that somehow race has become irrelevant, or even less relevant than it was in the 1970s. Jennings notes that the category of “special needs” still exists in adoption and it still includes children of color: “[t]he Special Needs Adoption Program (1998) categorizes white children over the age of ten, Black children over the age of three, members of sibling groups, and children with physical, mental, and emotional disabilities as “special needs” populations.”⁵⁰ Although Jennings does not mention Native children, they are often placed in the “special needs” category.⁵¹

While Jennings’ study looks at the decision making processes of white infertile women to adopt transracially, she also notes that few studies attend to the desires of adoptive parents and there continues to be a need to attend to this, especially given the passage of the Multi Ethnic Placement Act (MEPA).⁵² The underlying assumptions of MEPA are, “(a) White couples are willing to adopt Black children and (b) the decision to adopt transracially signifies antiracist attitudes on the

⁴⁹ There are several scholars who note the continued overrepresentation of Native children in the child welfare system; for example, see the GAO report, *Indian Child Welfare Act* (2005).

⁵⁰ Jennings, “The Trouble with the Multiethnic Placement Act,” 566

⁵¹ Sullivan and Walters, “Incentives And Cultural Bias Fuel Foster System.”

⁵² Jennings “The Trouble with the Multiethnic Placement Act,” 559-581.

part of white adoptive parents.”⁵³ Jennings questions the assumption that white families who adopt transracially desire to do so and are antiracist. Through her work with infertile white middleclass women who are looking into adoption, Jennings demonstrates that these women’s decisions are still bound by race. According to Jennings: “Women who adopted a White child born to a young, White, middleclass woman (usually a college student) were often protective of the birth mother, framing the unplanned pregnancy as a mistake and the placement as a selfless act.”⁵⁴ And yet these same women “viewed White, low-income birth mothers and birth mothers of color as social deviants.”⁵⁵ Indicating that fitness continues to be linked to race.

One of the most salient findings that Jennings uncovers is that even when white middle-class infertile women are faced with a lack of healthy white babies and many available Black or bi-racially Black children, they do not necessarily move to adopt Black or bi-racially Black children.⁵⁶ Two adoption experts that Jennings interviews point out that Black children are still placed at the bottom of the racial hierarchy. One of the experts, only identified as Beverly, gives an account of her experience counseling adoptive couples: “The biracial thing is . . . people want the

⁵³ Ibid., 560.

⁵⁴ Ibid., 567.

⁵⁵ Jennings noted that the white women’s perception of the biological mother influenced their perception of the child, and that they viewed children of “socially deviant” lower white and all women of color’s children as “damaged” (Ibid., 568).

⁵⁶ Jennings noted that these women often move to adopt transnationally rather than adopt a partially Black child because international children were considered more able to assimilate (Ibid., 570-572). Jennings interviewed 14 infertile white middle-class women and three adoption experts.

option of getting a younger child. I worry when they say, ‘We’ll take a biracial child,’ and I say, ‘Will you take an African American child?’ And they say, ‘Oh no!’”⁵⁷ This points to the fact that there has been little movement in the rigid racial hierarchy that was evident in Fanshel’s study. It is not just attitudes that marks this hierarchy, as I noted earlier, and Jennings also notes—the pricing of infants today has not changed: healthy white infants are worth “tens of thousands of dollars” while Black children are valued at very little.⁵⁸

The narrative of racial hierarchy was also something that I noticed in my own interviews with adoptive parents that I conducted in 2011. The partial transcript below indicates how Johnston Moore, an adoption advocate, CAICW board member, successful Hollywood writer, *and* adoptive father of three Native American children, one Black child, and two Latino children, sees his participation in the adoption industry:

MOORE: You know I see this with black kids. There is a terrible shortage of African American foster and adoptive homes, and that is why most African American kids once they reach a certain age—they are done. They are going to stay in the foster care system or in group-homes and end up aging-out. You know, do we really want to spend time running around looking for an African American home? According to the National Association of Black Social Workers, we do! [*Moore laughs*] I think that is still their position-statement. Is that really the best for the kid? Ok, there may be identity issues down the road, but they can deal with that. At least they will have a mom and dad that are going to love them from day one, and that is better than aging out of the system—it is just better.

⁵⁷ Jennings, “The Trouble with the Multiethnic Placement Act,” 572.

⁵⁸ *Ibid.*, 572-573.

INTERVIEWER: Do you think that white people want to adopt black kids?

MOORE: I have one (laugh), and, um, that is one of the things our family does. We promote adoption. I speak at adoption conferences. I tell people to step out of their comfort zones and give kids a home—to be color-blind when making their decisions. But, by and large, no. No, people don't want to adopt Black kids, and that is something that society needs to get over.⁵⁹

Moore's discussion is rife with contradictions. On the one hand, he acknowledges the resistance of white middle class families to adopt Black children—"by and large," they do not want to adopt Black children, yet he also implies that there are white homes clamoring to take Black children by stating that there is no need to go "running around looking for an African American" homes. Moore is aware of the Multi Ethnic Placement Act (MEPA) that makes it illegal to include racial preference in the placement of children, yet because the National Association of Black Social Workers (NABSW) has held to their belief that African American children should be placed in African American homes, he shifts the blame for Black children's overrepresentation in the child welfare system from white adopters who "by and large" do not want Black children to NABSW who is making social workers run around searching for Black families.

I continued my discussion with Moore about NABSW, and asked him if there was not some truth to what NABSW was saying—if not because of clear racism, why

⁵⁹ Moore, personal interview.

are there so many Black children who cannot find homes?⁶⁰ He replied with two stories of white families he knew who were willing to adopt Black children, but who had been denied because the social worker on the case felt an African American home was a better match for the child:

I know of a white family who was fostering a black child since birth. This child was the product of an incestuous rape—this boy’s grandfather raped his daughter, so this boy’s father was also his grandfather. He ended up going to prison. This was a very dysfunctional home—it was *South Central LA*. He was born into a very dysfunctional home life, and he ended up going to a white foster home who was willing to adopt him, and they had him for his first year of life. And then the social worker came to them and told them that he should be raised in his own culture, and took him away and placed him with his grandmother who was part of that whole dysfunctional situation to begin with—all in the name of race and culture, and the child had already formed attachments to the white home.⁶¹

In Moore’s account, the grandmother somehow becomes implicated in the rape of her daughter, and residence in South Central Los Angeles becomes a marker dysfunction. Moore provides as proof of the grandmother’s lack of fitness because of her part in the “whole dysfunctional situation,” and her residence in South Central Los Angeles. Interestingly enough, Moore presents himself, and I am certain that he truly believes himself to be, antiracist and motivated by “saving” children from a damaging foster care system, yet his narrative reveals the deeply ingrained racist logic of red lining entire communities as unfit. He is both motivated by altruistic ideals *and* deeply

⁶⁰ I specifically asked him this, “I think that people say, ‘well how could the Black Social Workers say those things? But in actuality, there must be a great deal of racism against Black people if we have no homes for them?’”

⁶¹ Moore emphasized South Central L.S. It seemed that he was saying that it was self evident that families in South Central L.S. are all dysfunctional.

entrenched in the racist structure that continues to disenfranchises entire communities with the removal of their children.

In our discussion, Moore continued to grapple with the question I had asked him earlier about whether white families wanted to adopt Black children, and later in the interview he said: “Yes there is racism. I have seen many families who have said, ‘Yes, we’ll take any race except Black.’ And I personally chastise that. But you are right, for years and years, um, part of the problem with Black kids not getting adopted is that there is a stigma, certain beliefs, and it comes down to racism.”⁶² Moore, a celebrated adoption advocate, acknowledges the dirty not-so-secret “secret” of liberal white adopters—most do not want Black children, even if they take them. It is within this framework of Black children’s unadoptability that Native children emerge as adoptable.

The Christian Alliance For Indian Child Welfare

The Christian Alliance for Indian Child Welfare enters at the juncture of adoptability of Native children and the lack of desire of white parents to adopt Black children. It is their mission to support all adoptions of American Indian children if the Indian child is being taken away from a reservation or an “unfit” Indian family. It was while I was working in San Francisco as a Research Analyst for the Administrative Office of the Courts (AOC) that I came across the anti-ICWA website of the CAICW.

⁶² Moore, personal interview.

Their website provides a massive amount of ammunition for someone wanting to fight ICWA. They offer an overwhelming amount of information through a website that is easy to use and provides “facts” on the major controversial ICWA cases with links to the cases. Many of the facts that they provide are really partial facts gleaned from a wealth of statistics that ironically come from one of the strongest supporters of ICWA, the National Indian Child Welfare Association (NICWA). CAICW utilizes statistics that NICWA has compiled to argue that Native children are unsafe. For example, they site the fact that Native children disproportionately live in poverty and are overrepresented in cases of child suicide, and they use this to argue that we must remove Native children from reservations. When NICWA studies these problems they do it with and for the benefit of tribes—and work with tribes to solve these problems. CAICW turns these statistics into justification for white pre-adoptive parents to fight tribes for Native children. The fight of these families, who have been “hurt” by ICWA is put front and center and you can read hundreds of them on their website. It should be noted that they serve, almost exclusively, white families. For the white foster and adoptive families who are struggling to keep “their” children, CAICW provides assistance that ranges from referrals to anti-ICWA lawyers and anti-ICWA expert witnesses to assistance on ways to “get around ICWA” and prayer.⁶³

⁶³ Some areas that ICWA has not been applied, or has been misapplied, is “good cause” not to transfer, “good cause” not to follow the placement preferences under ICWA, and the Existing Indian Family exception.

The idea of a Christian organization being anti-ICWA doesn't seem that exceptional given the Christian colonization that Native people have faced, yet what is strange is that CAICW was co-founded by an Ojibwa man, Ronald Morris, and his wife, who is white, Elizabeth Morris. Ronald Morris was an enrolled member of the Minnesota Chippewa Tribe and was raised on the Cass Lake reservation in Minnesota.⁶⁴ CAICW was founded in February of 2004, and four months later, in June of 2004, Roland Morris died. His non-Indian wife, Elizabeth Morris, continued the work they started against ICWA. I worked for several months to get an interview with Morris, and at first she said that one of their many board members would be a more appropriate person to interview, such as an adoptive parent, but after seeing that I felt it was important to interview one of the founders, she agreed.

I want to bring out a few themes from my interview with her, Johnston Moore, and from CAICW's extensive archives of stories of people who have been "hurt" by ICWA. Some of the themes that emerged were underlying motivations, a belief that reservations are inhospitable for any child, and that Indian children can be claimed through the Existing Indian Family exception. There was no wavering from anyone that I spoke to in the organization that they were in the right. The righteous stance of this organization mirrors that of state court judges—a clear claim of ownership over Native children.

⁶⁴ CAICW website, accessed Dec. 3, 2010, <http://www.caicw.org/inmemoriam.html>

Motivations Behind CAICW

One thing that clearly stood out about Morris was her unwavering passion for destroying ICWA. To her, ICWA was not an abstract law; it was something that caused great fear and pain and must be stopped. Since Elizabeth Morris is white and the mother to children who are enrolled members of the Chippewa Tribe, if something were to happen to her (her Native husband is deceased), the tribe (theoretically) would be notified and have a say in any custody proceedings regarding her children because a transfer of Indian children is supposed to invoke the court to apply ICWA.⁶⁵ When I spoke to her, she spoke of the fear of losing her children because of ICWA. For example, when I asked her to tell me about co-founding the CAICW, she said:

Well, my husband and I started to get involved with the Indian Child Welfare Act way back in like 1995 or so, when our babies were all still little. What struck me initially was an article I read out of Oregon about a five-year-old boy, whose mother was non-Indian and his father was Indian, and the mother and father weren't together, and the mother put the baby up for adoption soon after his birth, and he was raised in a non-Indian home in Idaho, I believe it was... by a ranch family. And, when the child was about two or three years old, the father didn't come back into the picture, but his family did from South Dakota—as far as the reservation is concerned. They entered a legal battle at that time. The child had *never* been an Indian, you know, he had been raised by this family in Idaho. And it broke my heart because I had small children and I was not Indian. My husband was Indian and I just couldn't imagine my children going through something like that. ... wow, what if something like that were to happen to me and my family?⁶⁶

⁶⁵ ICWA does not apply to divorce, but when children are to be raised outside of their immediate family, ICWA can be involved.

⁶⁶ Elizabeth Morris, personal interview, Oct. 10, 2010.

The case that Morris brings up is a typical case that gets highlighted because of the voluntary relinquishment of the child to a white couple. She is bringing up one of the main arguments against ICWA—that it violates individual parents rights. Although ICWA is unique in many ways, it is buttressed by a clear history of vesting sovereignty to tribes over their members—a citizenship right, and that Native nations have the right to decide the placement of their citizen’s children. The problem, as discussed in the previous chapter, is that tribes are not allowed to make those decisions precisely because ICWA is being violated. Then, the situation becomes, such as the one Morris notes—taking a five year old out of a stable home and moving him, which invokes fear and sadness in most people. What is unstated in Morris’ account is that this case could only have come about if ICWA was *not* followed to begin with. Thus, Morris is capitalizing on the pain of the situation and blaming it on ICWA, making the actual culprit of the injustice—state social workers and judges—disappear.

When Morris read the case of the five-year-old boy who was removed, she immediately saw herself, “And it broke my heart because I had small children and I was not Indian.” The fact that a tribal nation would have say over her children if something happened to her clearly upset her.

My intention is not to call into question the character of Morris, but rather to point to the underpinnings of the CAICW, which seems to be based, at least in part, on fear. For example, she stated later in the interview:

What if we [her husband and herself] should both die, who ever we chose to take care of our babies would not be allowed to have them. We knew we wouldn't get that choice. The tribal government could come in, and they would decide, but they do not have my best interest or my children's best interests at heart.

Again, she is reiterating a real fear that her choice would not only be taken away, but also that the tribe did not have her best interest or her children's best interests in mind. During the interview she continued to refer to Native people as "they," "them," and "those people," and "they" were always in opposition to her, and "they" were always to be feared.⁶⁷ This highlights the normative conception that tribal courts have different interests than the best interests of the child and that tribal worldview somehow conflicts with the best interest of the child.

CAICW and the Existing Indian Family Exception

It is against the backdrop of "the best interest of the child," a standard in child welfare, that the Existing Indian Family (EIF) exception took hold and continues to be exercised. The EIF is exercised, in part, because of a fear of sending a child to tribal court to have a "foreign" entity decide the placement outcome of a child who is really "not Indian." Despite the work of the AAIA, Native organizations, Native activists, and tribal communities, the EIF exception, as discussed in the previous chapter, continues to be used by non-Indians to claim Indian children as property, and

⁶⁷ For instance, she stated: "You don't see. See, none of *those people* represent me, none of *those people* represent my family" (Morris, personal interview, my emphasis added).

has been one avenue that adoption attorneys and white adoptive parents have gained traction in courts and succeeded in abrogating ICWA. CAICW has been vocal about supporting the use of this exception. When I interviewed Moore, he clearly knew a great deal about how to argue this exception in court. In order to adopt his two Indian boys, he engaged in a protracted court battle with the Cherokee Nation who were a party in the suit. Moore eventually won the case and adopted the two Cherokee boys. Moore gave a detailed explanation of why his boys were *not* Indian:

The Act is being used in such a way that it is taking kids who have never been part of that culture to begin with, kids who are born and raised 1000 miles from the reservation, whose parents have no contact with tribal life, tribal culture, they're not kids raised in the Native way, they are just abusing or neglecting their kids, and we can't say that is the tribal way. Our boys are a prime example—their mother was 1/8 Native, they're 1/16th Native—she didn't even know the name of the tribe. She grew up 1000 miles from the reservation—no contact whatsoever. The boys grew up 1000 miles from the reservation: they didn't even know they were part Indian. They were homeless and they were bouncing around from house to house, and she left them with complete strangers: in what was probably a crack house, and because of that, they went into the system. And she had a drug addiction problem and things like that. Well, that is not what ICWA was intended to do. It was not intended to apply to my kids.⁶⁸

The argument that Moore makes, that his children were never part of “tribal life, tribal culture” and not “raised in the Native way,” is what the Existing Indian Family exception is based on. Here the Native mother is being judged as not Indian because she is disconnected from her tribe. From Moore's account of the situation, the mother was clearly addicted to drugs and having a difficult time taking care of herself and her children, but that does not mean that the children did not fall under the purview of

⁶⁸ Moore, personal interview.

ICWA. ICWA was intended to require that judges understand that in Native communities, the individual child is part of an extended family that all have responsibility for that child. Those two boys, being enrolled members of the Cherokee Nation, were squarely under ICWA's definition of an "Indian child." Moore continued to stress that the intentions of ICWA were never supposed to apply to children that did not have tribal contact, to kids like *his* kids.

Moore did not go out looking to adopt Native children, like so many other adoptive parents, but after they were placed with him through foster care, he refused to let them go, they became *his*, even if they were not yet adopted, and when confronted with letting the Cherokee Nation decide what was the best placement for *his* two boys, he fought and won in the California state court system. It is precisely the ownership over a child that gets forcibly transferred from the tribe to the state, who then transfers them to white parents, and tribes face an uphill battle to reassert their rights even when ICWA says that they explicitly have those rights.

Although the case of Elizabeth Morris is very different, the underlying notion that the child belongs to the U.S. nation and not to the tribe, and therefore the child's best interest will only be served if under state control, aligns these two stories. Although Morris adopted four Indian children under ICWA, she did so knowing she did not feel that she should. She felt that she had to in order to save them from the tribe and the reservation, but she felt that she was not the right placement and could not handle so many children:

We are exactly why, another of the many reasons why, ICWA is very wrong and very bad. These children needed more than I could give them. Now we arranged for him [her step grandchild who she was raising] to go to the Dakota boys ranch, and the tribe isn't involved, and I told the judge he has not been in an Indian home, so this is not removing him from an Indian home, so it is not an ICWA case. I took the words from the ICWA, and took them very literally, and showed them to the judge.

Here Morris was “educating” the judge and arguing that even though the child was a member of a federally recognized tribe and the child of an enrolled member, the Act did not apply because Morris, who was raising him, was non-Indian and therefore the boy was in a non-Indian home. I asked her to clarify if she used the Existing Indian Family exception, and she stated:

Yes. But also, see, I'm not Indian, so removing him wouldn't be removing him from an Indian home. I'm not Indian. They stayed with me after Roland died. Anyway, so he's at a very good place now, a very safe place, everything he needs, and warmth, and counseling. The thing all along was, if I don't take them, if I can't keep them, what is going to happen to them? But I was not the best home for them. That is another facet of why the ICWA is messed up. The strain and stress on the few healthy Indian families is too much.⁶⁹

Morris at first argues that by removing her step grandchild from her home, the judge had to understand that the home was *not* an Indian home, and then she turned to how strained the family was because they were one of the few healthy *Indian* homes.⁷⁰ It seems clear that at the moment when she faced the possibility of giving up her step

⁶⁹ Morris, personal interview.

⁷⁰ Part of this can be clarified by the fact that her husband, Roland Morris, was an enrolled Indian and their children were initially placed per ICWA guidelines because they were his grandchildren (his children's children from a previous marriage) and Roland Morris would constitute a preferred ICWA placement, under the placement preferences, as a relative of the children. Once Mr. Morris passed away, the home placement was not a relative placement. Yet the situation she is talking about is specific to her step grandchild's removal, and either she considered herself to be an Indian home or not an Indian home.

grandchild, even though she couldn't care for him, she was willing to be both a family that was one of the "few healthy *Indian* families" and a family that was *not Indian*. The need to contain two competing legal identities was necessary to protect the children from the reservation. The removal of her step grandchild, who fell under ICWA guideline and should have invoked ICWA, did not because the judge did not choose to do so, and who was going to tell the tribe? Not Morris, and not the judge. Morris used the reputation of the Existing Indian Family exception without ever needing to actually invoke it. It is interesting that the judge not only did not apply the exception, but also did not notify the tribe, which is in direct violation of ICWA, but how would the tribe even find out? Tribes rely on social workers, lawyers, and courts to notify them if there is a placement of one of their members.⁷¹

Through the logic of protection children from reservations, Morris is doing more than "saving" a not-Black child—she is rescuing a child that is specifically Indian. In Morris we see another category of adopters, those specifically out to save Indian children. While Morris, in some ways, represents the more quintessential adopter of the 1960s, such as adopters who were responding to advertisements and governmental pleas from the BIA and adoption agencies to help the "languishing" Indian child, the poor, starving, impoverished Indian child, Moore may be more typical of the current trend of adopters who feel that *all* children should be equally available for taking and are particularly troubled by the fact that there is interference

⁷¹ This child had not been adopted and therefore ICWA still should have applied. For every placement that is made for an Indian child, ICWA is supposed to be applied, including juvenile detention placements.

with their adoptive choice. This becomes heightened with the unwillingness of adopters to take Black children. The common thread from initial colonization to current white adopters is white ownership and assertion of that ownership over Indian children.

Given the enormous number of children that are in the child welfare system who are in need of placement options, most of whom are Black children, it is troubling that foster and adoptive parents are so angered by the fact that they do not get to “choose” Indian children. It is embedded then in the larger “waiting to be adopted” pool of children who because of a racist society will not “choose” them that the Native child becomes desirable. I asked Moore about the large numbers of children that are not adopted, when he was very upset at the fact that the Cherokee Nation had fought him for *his* two boys, and he noted:

Yes, yes there are. And a part of that is that people are still looking for that, for lack of a better term, that healthy white infant. And people who adopt want a kid who is going to make them look good, and they are not necessarily in it to help a kid who needs help, like some of the people who do private adoptions, yeah. But there are 107 thousand kids in foster care right now in America waiting for adoptive homes. And so, yeah, we’ve got to do a better job, and so that’s why we try to encourage it wherever we go. If you have a spare bedroom, consider this. And so, absolutely there are far more kids out there than there are homes.⁷²

It is interesting that Moore understands the large number of children that are waiting to be adopted, yet he continues to argue that Native children need to be made available for adoption. On the surface this seems a contradiction, but if we embed his

⁷² Moore, personal interview.

statement in the landscape of Black children being deemed “less desirable” than white children, the Native child then emerges as a valuable commodity. I also do not want to get caught into the linear trap of thinking that if we could only convince enough “fit” parents to take all of these children waiting for adoption, the problem would be solved. It would not. The “problem” is ownership and the continued creation of entire communities of people as “unfit.”

Redlining Reservations: “just not a place for children at all to be”

It is through the creation of entire communities as “unfit” that the child welfare system continues to be dominated by people of color. Reservations have long been targeted for child removal by the U.S. government, and they continue to be constructed as such. For example, Morris stressed that although at one point she and her husband lived on a reservation, they were never “part of the reservation.” They moved away from the reservation and had not wanted their children to be raised on a reservation “because it was so dangerous and so destructive. And it is just not a place for children at all to be.”⁷³ Morris told sad story after sad story about why she thought reservations were not safe places for children to live. She spoke affectionately about her husband’s family, and how sad it was that they were on the reservation:

When Michelle hung herself in a closet, that might not mean anything to a congressman, but I knew Michelle. 15 years old—she was beautiful, she was

⁷³ Morris’ Her late husband was “100 percent Indian,” didn’t speak English until school and was raised traditionally.

intelligent, she was totally messed up, totally depressed. She was gang raped. She was beaten by her mother. She was abandoned by her father. And the closet she hung herself on, the stick in there touched my head. I stood in there and it was right above my head. She was a little taller than me. You know what she did to herself? She strangled herself. She could have stood up.⁷⁴

Morris blames the fact that Michelle was raised on the reservation for her gang rape, her mother beating her, her father abandoning her, and for her eventual suicide. I do not know the full story of Michelle, but it is true that Native people have a higher rate of suicide, unemployment, poverty and intervention by systems of state control, such as incarceration and child welfare. Unfortunately, I have heard this argument about reservations over and over; historically, it was precisely the conditions of the reservations that white reformers used to justify the theft of Indian children and their placement in boarding schools and in foster and adoptive homes.

Morris continued to stress the fact that no child is safe if they are left on a reservation:

No one, not the federal government, not the tribal government, no one can tell me that these children are being raised in a healthy way. No one can tell me that these children are safe. No one can tell me that because I've seen. I watched them take Alphie out on a stretcher with her head covered, and Owen stabbed himself. Brenda took pills and killed herself.⁷⁵

Morris continued to offer examples of children who died on the reservation from suicide to argue that no child should be left on a reservation to suffer this fate. The fact that by their very placement on the reservation they were not safe was

⁷⁴ Morris, personal interview

⁷⁵ Ibid.

undergirding much of her argument. I asked Moore if he agreed with Lisa's (Elizabeth Morris goes by Lisa) assertion that reservations were "just not a place for children to be" and he said that some reservations were okay, clean, "well kept, you know, like a small rural community, like a fine place for people to live," and others were not. He strongly upheld that all children from Leech Lake reservation should be removed:

Leech Lake, and places like that, I don't think that anyone should live there—a dog shouldn't live in some of these places. But I think that about part of our cities. So, it's not the fact that it is a reservations, it's what the environment is. Is Leech Lake safe for kids? Is it churning out healthy adults? No.⁷⁶

He, unlike Morris, thinks that some reservations are "a fine place for people to live" and others are "not even fit for a dog." Moore points to Leech Lake, a very poor Ojibwa reservation in Minnesota. He is right to think that compared to the rest of the country Leech Lake is disadvantaged in many ways, extreme poverty being one of them. Morris, brings up another reservation that is extremely poor, and again argues that no child should live there:

⁷⁶ Moore, personal interview.

I would like to ask these congressmen, ask them, would you want your grandchild to be raised in these kinds of conditions? Tell them, come with me and we'll walk around on the reservation, and you can talk to some of my relatives, and you can see the bed that they're sleeping on, and the conditions of their home. And we'll walk up to my niece's house where it is just a dirt patch: there is no lawn, no play equipment, and cigarette and beer cans ground into the packed dirt. The place is infested with roaches, and people drink there every night; and you tell me (because that is where two of my husband's grandchildren live, we didn't get custody of all of them, we only got custody of four of them), if you want your grandchildren living there?⁷⁷

Morris has a point. Who would want a child to be raised under those kinds of conditions? It seems evident that no one would. What is seductive about her argument is that it leads in a linear path to removal. If no child should live this way, then of course, let's get them out of there—let's save them. But the argument is flawed. Byler most clearly articulated the problem of using the conditions on reservations to argue for removal. In the 1974 hearings on Indian Child Welfare before the Senate, he maintained that “[i]t is argued, in the case of boarding schools, that Navajo children don't have adequate food and clothing. Let's bring the food and the clothing to the children and not the children to the food and clothing.”⁷⁸ Here Byler takes a common assumption and turns it on its head. Here we can see the roach infested house Morris describes in a new light; here it can be seen as needing an infusion of resources, not

⁷⁷ Morris, personal interview.

⁷⁸ U.S. Senate (1974), *Indian Child Welfare Program*, 4.

the extraction of children. The state is willing to spend the resources to place the child in a white home, but not to maintain a Native one.⁷⁹

The willingness of the state to pay more for children of color when they are placed in state care is documented by Dorothy Roberts who notes that the state is in fact willing to pay almost twice as much for the care of a child if he/she is in foster care (typically white families) rather than in their own home:

In the early 1990s, Illinois paid foster parents an average of \$350 per child, whereas AFDC benefits were \$102 per one child and less for each additional child. A California foster parent of siblings ages eight to sixteen received a foster care stipend of \$849 per month in 1996, compared to only \$479 in AFDC benefits.⁸⁰

The numbers clearly paint a picture of a state willing to pay more for the care of a child when outside of her/his home. Roberts argues that this disparate level of support “reflects the government’s perverse willingness to give more financial aid to children in state custody than to children in the custody of their parents.”⁸¹ This logic marks entire communities as unfit to raise their children, communities like South Central Los Angeles and reservations. Morris feels that reservations are “just not a place for children at all to be.”⁸² The notion of a community of unfit parents seems to play into normative ideals. In the NPR story of Native foster care in South Dakota, they found

⁷⁹ See the NPR report of the willingness of the state to pay when children were in the care of foster families off the reservation, but not ones on the reservation (Sullivan and Walters, NPR program).

⁸⁰ Roberts, *Shattered Bonds*, 260.

⁸¹ *Ibid.*, 260.

⁸² Morris, personal interview.

that there were plenty of Native foster homes on the reservation, but social workers would not place children in those homes.⁸³ In an interview that I conducted with Jack Trope, the current director of the Association on American Indian Affairs, I asked him to discuss the claims of CAICW that the conditions on reservations are so bad that children should not live on them. Trope was quick to answer dispel the myth that there are not healthy Indian foster care families willing to take children on reservations:

That is just nonsense. You know, tribal programs are placing kids with good families, Indian families, every day. There are plenty of good Indian families everywhere. It is nonsense to say that you can't place a child on the reservation—there are plenty of good families on the poorest reservation in America. You can find plenty of families that would do a great job raising a foster child, or adoptive child, or guardian or whatever. That is kind of nonsense, it doesn't mean that mistakes aren't going to be made, they will. Tribes aren't perfect. Tribal social workers aren't perfect, and neither are state social workers or the state system. To say that you can't place children back on the reservation is just nonsense. It really is.⁸⁴

Trope's voice is important because he again shifts our attention to the fact that if a child has to be removed, there are homes available, and the notion that reservations are inadequate for children is just "nonsense." As the director of AAIA, Trope is intimately involved in serving reservation Indians, and he has a vast knowledge of the conditions on many reservations. Trope, along with NPR, found that although there were registered Indian foster homes on the reservation, they were not always utilized.

⁸³ Sullivan and Walters, NPR program.

⁸⁴ Jack Trope, personal interview.

In conclusion, by looking at the desires of white families that adopted Native children, a complicated picture emerges where altruism occurs within a child welfare system based on a racial hierarchy where white continues to occupy the top position, Black the bottom, and Native must be read as desirable only when placed against Black. My exploration of these issues is not intended to vilify adoptive parents, nor is it intended to continue to laud them. It is intended to work to understand how Native children continue to be overrepresented in the child welfare system even when the Indian Child Welfare Act was enacted more than thirty years ago. While white desire for not-Black children is only one aspect of the reason that Native peoples are still so overrepresented in the child welfare system, it falls squarely under the larger colonial project of ownership over Native people. The Existing Indian Family exception can only be utilized when judges believe that they are the true owners of Native identity.

Although I focus on the ownability of Native people throughout this dissertation, from enslavement to white desires, in the conclusion, I will focus on the continued survivance of Native people.

Conclusion

Survivance

Indigenous Genocidal Tracings began sketching the history of Native transracial adoption with the story of my daughter's school mocking Native people and culture by making up an "authentic" Ohlone legend, in order to illustrate the underlying ideology that was at play, namely an assertion of property rights. The racial mocking of Indian people is merely symptomatic of the more invasive ownership over Native culture, cosmology, land, and even over their very heart—their children.

I traced the theme of ownership throughout my investigations of Native slavery, transracial adoption, and the Indian Child Welfare Act. I began this investigation by asserting that the white property interests in Natives must not only be tied to land, as legal theorist Cheryl Harris has argued, but also to their enslavement. I paid particular attention to the ways in which Black and Native people became historically and legally entangled through their respective subjugations in systems of slavery. I continued this line of inquiry with a discussion of the interrelated forms of white "guardianship" over Native children through an analysis of the white guardianships, the boarding school system, and Indian adoption programs such as the Indian Adoption Project and the Indian Student Placement Program. I asserted that although the statistic most often cited with regard to the number of Native children

placed outside their homes from the 1950s through the 1970s is 25-35 percent, the number should more accurately be close to 50 percent. I argue that this is because the Association on American Indian Affairs numbers did not include several types of placements such as private adoptions, independently placed children, and children placed through church groups, particularly the LDS Indian Student Placement Program.

With such an exceptionally large percentage of Native children removed from their homes, it was no surprise to find ample evidence in the AAIA archives of protracted battles waged by Native women against these takings. I argue that it is Native women, particularly the women at Spirit Lake (previously Devil's Lake) Reservation, who fought these unjust takings and generated the impetus for the passage of ICWA. Although ICWA's intention was clearly to stop the unwarranted removal of Native children, it continues to be circumvented by state court judges who have created judicial "exceptions" such as the Existing Indian Family exception. Given that Native children continue to be taken in unprecedented numbers, and in many places at higher rates than before ICWA, *Indigenous Genocidal Tracings* examines the impact of the continued abrogation of ICWA's original intentions.

I attend to where these Native children were placed after they were taken away from their homes. I point out the hierarchy of desirability and value that has been created in the child welfare system, with white children literally "costing" more to adopt. I ask how the view of Native children shifted from a status of undesirable

and to one of desirable objects of white possession. My research demonstrates that this shift resulted from their place in a rigid racial structure where Native children were framed as desirable in part because they were not-Black. In claiming this, I do not discount other aspects of transracial adoptive parents motivations, such as the fact that Indians have been historically constructed as commodities and that altruism must also be looked at. However, when altruism becomes the singular focus in adoption history, it silences other, often competing, motivations. There is a tendency to place altruism into a category of benign motivation located outside of history, which it is not. Within this context, I continue to utilize the concept of ownable to illustrate that logics of colonialism and slavery continue to anchor the removal and adoption of Native children.

In interrogating the presumption of altruism in adoption, I highlight the work of the Christian Alliance for Indian Child Welfare, particularly of the co-founder Elizabeth Morris and board member Johnston Moore. CAICW's work is utilized to illustrate how pervasive the logic of ownership continues to be. This organization has capitalized on the failings of the court system to protect the integrity of Indian families and communities, and has reframed the conversation that emerged in the 1970s and 1980s after the passage of ICWA from one that was centered on the integrity of Native families and communities as being *in the best interest of the child* to one focused on the harm that Native communities are inflicting on white adoptive families and "their" Native children. This pervasive shift has been propagated by

white adoptive parents and has congealed around the current Supreme Court case *Adoptive Couple v. Baby Girl* (2012).

Because Native people continue to be attacked for seeking the return of their children and because their children continue to be placed in the category of ownable by non-Natives, Native people continue fighting, and I end this dissertation on a note of survivance. In this conclusion, I highlight the work of a woman and an organization at the forefront of the movement not only to stop the unwarranted taking of Indian children, but also to heal and bring home the children that have been taken—Sandy White Hawk and the First Nations Repatriation Institute (FNRI).

Sandy White Hawk

Sandy White Hawk was born in 1953 on the Rosebud Sioux Reservation in South Dakota to Nina Lulu White Hawk, who had eight of her children taken from her and placed in foster and adoptive homes, including Sandy White Hawk, who was adopted by a missionary family when she was 18 months old.¹ White Hawk was abused in her adoptive home and suffered greatly. She told reporter Kristen Kreisher, “I was told that what I came from was horrible, savage, pagan, and that I was so lucky

¹ The First Nations Orphans Association website (hereafter, FNOA website), last modified Apr. 30, 2005, <http://www.angelfire.com/falcon/fnoa/>. When I was doing research on this, and when I spoke to Sandy White Hawk, the name of the organization was the still the First Nations Orphans Association. FNOA has since been renamed the First Nations Repatriation Institute, which although the same organization, has its own website.

to be taken away from all of that.”² Although White Hawk suffered abuse in her adoptive home, she found a way to heal herself. She reflected on how returning to her tribe and the land where she was from was a big part of her healing: “It was over time, and certainly going home, getting to know my relatives. Getting to a place of feeling good was being on the land of my ancestors—just walking on that same land, just being there was very healing.”³ Going to powwows and healing ceremonies and becoming a part of the Native community was also important to White Hawk’s healing process:

Then going to powwows, our traditional powwow in particular. In the area where I’m from, we have jingle dress dances and we have prayer where we pray for the healing for an individual. I just remember experiencing a lot of healing just by being there. I remember this one elder lady from Wisconsin; she used to tell me, ‘just go sit by the drum, you don’t have to do anything, just listen and open yourself up to that healing,’ and I became over time ... I just began to feel comfortable in me.⁴

Through becoming involved with her tribe and the Indian community, White Hawk found a way to heal herself from the trauma that she had gone through. What is exceptional about White Hawk is that she not only transformed her own life, but she dedicated herself to the healing of all Native transracial adoptees and the communities from which they were taken.

² Kristen Kreisher, “Coming Home: The Lingering Effects of the Indian Adoption Project,” *Children’s Voice* (Mar. 2002), accessed Sept. 30, 2010, <http://www.cwla.org/articles/cv0203indianadopt.htm>.

³ Sandy White Hawk, personal interview, Feb. 26, 2011.

⁴ Ibid.

I asked White Hawk how she came to do the phenomenal work that she does, and she told me that after she healed herself, she was working at a college and kept seeing Native adoptees come in who were still suffering:

I was working at this college and I was noticing that there were still students coming in who were very disconnected . . . I saw in these individuals what I saw in myself—all this fear and hesitation and anger, and a lot, *a lot* of hurt. I kept thinking, well, what helped me? How come I wasn't feeling that anymore, and what had helped me?⁵

The questions that White Hawk asked herself about how she had healed began an investigation into how to help others heal. White Hawk described part of the process of finding her own belonging:

I was sitting there, I was there . . . ten years, in the very spot that I sat in at the very first powwow, where I saw my first powwow at Rosebud—I was sitting there, and it was then that I had been powwow dancing and a member of a Color Guard, and a lot of things, well, I just felt I had become who I was supposed to be. I was relaxed in who I was.⁶

It was then, after White Hawk had become who she was “supposed to be,” that she realized, during that powwow when a song was being sung for a Native veteran, that she had never heard a song sung for a Native adoptee:

I realized that I had never seen anyone welcome adoptees home. I mean, my family had welcomed me home—they were very welcoming, but I realized that at the powwow there were probably people wandering around that were like I had been, not sure who to talk to, who to strike up a conversation with. I also knew that the people sitting there at the powwow probably had relatives that had been taken away and were probably, when they were drawn together, thinking about them. They were probably wondering how they were doing and

⁵ Ibid.

⁶ Ibid.

if they were okay. So it just came to me that what if we had a song that would begin that healing process.⁷

White Hawk not only has the ability to see other adoptee's suffering, but also the ability to create something to alleviate that suffering. White Hawk, with the help of Chris Leith, Prairie Island Dakota elder and Spiritual Advisor to the National Indian Child Welfare Association, and Oglala Lakota Jerry Dearly, turned what began as a vision into a song that has been sung many times over the years to facilitate healing for Native adoptees and their families.⁸

In the last fifteen years, since she first envisioned that song, White Hawk has created what I would call a Native hub for adoptees. A Native hub is a concept that was envisioned by Ohlone elder Laverne Roberts and developed into an academic concept by Renya Ramirez. According to Ramirez, a Native hub is broadly defined as a social, cultural, and political location that has the potential of strengthening the community. It can encompass a physical location, such as a powwow, a cultural event, family meeting, tribal meeting, or it can be a virtual location, such as a website. Although Ramirez's definition is broad, a Native hub must strengthen Native communities.⁹ Ramirez uses this concept to explain the ways that urban Indians are able, contrary to popular belief, to retain and strengthen their Native identity. I

⁷ White Hawk, personal interview. It should be mentioned that she is not talking about a "pop song" or something to that effect. In most Native cultures, songs have power, and she is talking about a song to heal, and healing songs hold power.

⁸ Ibid., and FNOA website. The song was first sung at the World Peace and Prayer Day in 2000.

⁹ Ramirez, *Native Hubs*, 2-4.

believe that White Hawk has created a Native hub for Native adoptees, their families, and their tribes. She has created one of the only spaces that is devoted entirely to healing Native adoptees and their families, the First Nations Repatriation Institute (FNRI).

The FNRI, in some respects, is the antithesis of the CAICW. Where CAICW works tirelessly to remove Native children from their families and reservations, FNOA helps Native adoptees return “home” to their tribe after being adopted. Their work is also at opposite ends of the spectrum in the ways in which they conduct operate in the world. The CAICW is focused on attacking ICWA, tribes, and reservations, and on destroying ICWA. FNRI is focused on healing not only adoptees and their families, but also foster and adoptive families. FNRI holds monthly support groups for Native adoptees in the Minneapolis area with a potluck and talking circle. They also hold a “Truth and Reconciliation Forum,” which brings together community members, adoptees, fostered individuals and their families.¹⁰ They also host an annual powwow called “The Gathering for Our Children” to honor Native adoptees and fostered individuals. As White Hawk describes it: “it really pulls together everyone. We honor our foster parents and adoptive parents with an honor song. We welcome adoptees and fostered individuals back to the circle, and we do an

¹⁰ Curt Brown, “After Many Years, We Are Home,” *Star Tribune*, Oct. 16, 2007, accessed Jan. 6, 2012, <http://www.startribune.com/local/11606826.html?elr=KArksUUUoDEy3LGDiO7aiU>. With the help of White Hawk, White Earth Reservation in Minnesota has done a formal welcoming ceremony for Native adoptees, probably the first of its kind in the Nation.

honor song and a welcoming song for them. And we just celebrate our community strength that day.”¹¹

White Hawk also welcomes social workers, academics, and tribes to participate in their events. In many respects, White Hawk has created an organization that functions not only as a Native hub for so many adoptees and their families, but also as an academic hub. For instance, many of the authors of dissertations on Native transracial adoption have given thanks to White Hawk for connecting them with adoptees and forwarding their academic scholarship; for example, Susan Devan Harness and Jeffery Peterson both credit White Hawk for working with them to contact adoptees. Without hesitation, I include myself in the group of academics whose work has been forwarded by the wisdom of White Hawk. It was in a conversation with her about the published work on Native adoption that she informed me of the many dissertations that had been written on the subject. Beyond her academic contribution, she has contributed inspiration to the field of transracial adoption.

White Hawk is not only inspiring to academics, but adoptees across the U.S. and Canada have expressed their gratitude for her work. White Hawk described the

¹¹ Sandy White Hawk, personal interview. FNRI also conducted a policy summit on Native adoption in 2011. The organization also does a variety of other things; for example, they “1. Assist adopted and fostered individuals apply for tribal enrollment. 2. Assist adopted and fostered individuals with search and reunion process. 3. Assist adopted and fostered individuals with post reunion psychological supports. 4. Assist adopted and fostered individuals understand and access their rights and benefits as enrolled tribal members. 5. Assist adopted and fostered individuals with other issues that rise as a result of their lived experiences as adoptees” (FNOA website).

unexpected response that people had when the song that she helped to create was sung for the first time:

The people there had such a strong response. After it was sung, people came up to me and said, ‘thank you, thank you.’ This one man told me a story, and he told me this through tears, and he said, ‘back when I was little, the social workers wanted to take us away from my mom, my mom was able to get us three older ones back to the reservation, but the two younger ones got adopted out. We found one of my sisters, but we haven’t found my baby sister yet.’ He just kept saying, ‘thank you, thank you, I’ve never danced for her like this before.’¹²

It is clear how moved the entire community has been by White Hawk’s work. There has been a response across the U.S. and even in other countries, particularly in Canada, and White Hawk frequently speaks at events, such as NICWA’s yearly conference, about the work that she is doing. By bringing adoptees, their families, social workers, and academics together, White Hawk has created a Native-centered approach to healing the trauma of Native transracial adoption.

For the Future

The work that Sandy White Hawk and FNRI are doing are vital not only to the healing process, but to academic research. There is little written in the field of Native transracial adoption (TRA). This is also the case in several of the other fields that I engaged with in this dissertation, including Black Native adoption and Black Native history. ICWA has also not yet been the subject of a book-length inquiry, and there is also ample evidence in the archival collection of the Association on American Indian

¹² White Hawk, personal interview.

Affairs (AAIA) to support a publication on the lives and work of the women at Spirit Lake and the battle that they waged to keep their children and get ICWA passed. Although the materials were not included in this dissertation, the AAIA Archives are available on microfilm at Stanford and at Yale University's Seely Mudd Library. My initial reading of these materials revealed that the AAIA played a significant role in the passage of ICWA alongside Native women from Spirit Lake, who the AAIA represented in several court cases. The archives of the Child Welfare League of America and the Church of Latter Day Saints are also important avenues for future research.

Another important area of future research would focus on the legal side of this history by looking specifically at the California courts. The California courts are a complex interchange of sites working to support ICWA that include the Administrative Office of the Courts (AOC) through the ICWA Full Compliance Project, as well as sitting anti-ICWA judges who attempt to undermine the legislation. In future research, I hope to interview people, such as Jenny Walter, who oversees and develops ICWA compliance procedures at the AOC. An account of the legal aspects of ICWA in California would also necessarily include a history of the adjudication of ICWA in Native communities because although California falls under Public Law 280, there are many tribes in California that hear ICWA cases, and

consortium courts that hear ICWA cases.¹³ In the future, I also intend to draw on my own experiences working at the AOC.

From a policy perspective, it would be fruitful to investigate the ways that children are tracked in the child welfare system. Currently, there is no federal oversight of ICWA, and there is no clear tracking of the children that are Native or Black Natives. Given the entanglement of the Black and Native communities beginning with slavery, it would be beneficial to investigate the ways in which these populations overlap in the child welfare system and the intersections, if any, between the perceived adoptability of these groups. It would also be fruitful to complete a history of the Existing Indian Family exception, since only short articles have traced its history in addition to a master's thesis by Nuri Nusrat entitled "No Right to Be: The Existing Indian Family exception to the ICWA." No history has yet been written of the lives of the individuals who have been affected by the EIF exception. Therefore, interviewing Native people who have lost their children would be a great contribution to the limited literature on the subject.

Given my interest in group based harm, an account of the legal history of transracial adoption in California would also attend to the complicated legacies of ICWA in specific communities. I have heard the Chair of the Amah Mutsun Tribe, Valentine Lopez, state publically several times that his tribe has lost several children

¹³ One of the women I worked with, Christine Williams, is now a tribal court judge, and would be an important resource for thinking through this area. Joseph Myers, Kelly Myers, and Karen Biestman are also tribal attorneys who work in California and have an extensive knowledge of this matter.

to adoption in the few years that he has been Chair. The Amah Mutsun tribe is not federally recognized, and it would be beneficial on several levels to work with them on the history of the loss of their children to transracial adoption. Such a study would not only contribute to the field of Native TRA, but would also be important for understanding the additional strain that non-federally recognized tribes experience because of their inability to access the protection of ICWA.

What will also add greatly to the field is the work of Sandy White Hawk, and she is currently working on a book to add to the literature on Native transracial adoption. When White Hawk was developing her song and thinking of what it might do for adoptees, she did not know what impact it would have, but she dreamed it anyway. She thought that there might be a way for everyone to heal:

I thought what if there was a song and it were sung at a powwow and the MC said, ‘at this time we want to bring all of our relatives that are trying to find their families—if you are here, we want to invite you to come to the center. If you are a family member that has a child who has been adopted out or in foster care, or are the grandmother, aunt, uncle, or cousin, we want you to come up with our relatives who are looking to find their way home and let’s at this time think about that part of our circle that needs to heal.’ I was thinking things like that. And if we had a song, wouldn’t it help, wouldn’t it help adoptees make that passage from the outside of the circle to the inside? And wouldn’t it ease the burden of our families that are waiting to have that support, that encouragement? And maybe if an adoptee couldn’t meet their relative, maybe one of those individuals would be willing to be a relative to them. Maybe one of those adoptees would fill that gap of the family member they were looking for, maybe at least for that moment. And they would have that sense of community.¹⁴

¹⁴ White Hawk, personal interview.

There is still much to be done, but if we follow White Hawk's example and continue to dream, who knows what we might accomplish.

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