Institutions, “Indian-ness,” and ICWA Implementation

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Hana E. Brown, *Who Is an Indian Child: Institutional Context, Tribal Sovereignty, and Race-Making in Fragmented States*, 85 **Am. Soc. Review** 776 (2020), available at SAGE.

The Indian Child Welfare Act (ICWA) is under attack,[1] and legal scholars (including me) have written much about it. But being lawyers, we typically focus on judicial decisions, and within that set, on decisions with precedential impact. That makes sociologist Hana Brown’s *Who Is an Indian Child: Institutional Context, Tribal Sovereignty, and Race-Making in Fragmented States* a welcome intervention. By examining the different ways that social workers, state courts, and federal judges apply ICWA’s “Indian child” definition, Brown provides valuable insights not just on ICWA, but on race-making generally and the importance of institutional context in translating law into practice.

To be covered by ICWA, a child must be an Indian child as the statute defines it. The definition rests on tribal citizenship: a child must be either enrolled in a tribe, or be eligible for enrollment and have a biological parent who is enrolled. 25 U.S.C. § 1903(4). But social workers and courts have applied the definition through a racial lens and excluded children from coverage because they were not racially Indian enough. Exclusion denies children, families, and tribes ICWA’s protections for family preservation and tribal sovereignty.

Brown’s examination reveals two key insights. First, although all three institutions often apply racial rather than citizenship-based definitions of Indian child, they have defined racial Indian-ness in different ways and for different reasons. Second, although Brown does not discount the role of racial ideology in this “race-making,” ideology did not explain the differences she found between the institutions. Instead, Brown identifies three other differences that shaped the Indian child determination: first, evidentiary standards, second, record-keeping requirements; and third, incentive structures.

The section on state caseworkers will be most interesting for legal scholars. Although such caseworkers are the frontline ICWA agents and the most influential institution in determining whether and how ICWA is implemented, studying their work poses challenges. First, access to records is limited to protect privacy. Even if records were available, deciphering who—out of the millions of children involved in child welfare cases each year—should have been identified as an Indian child but wasn’t is a nigh impossible task. Instead of taking it on, Brown analyzed and coded child welfare agencies’ annual reports and strategic plans, fifty assessments of ICWA implementation between 1979 and 2015, and extensive documents produced by the 2013 Child Welfare Truth and Reconciliation Commission, as a joint project between the State of Maine and five Wabanaki tribes.

This examination reveals that rather than inquire into tribal citizenship, caseworkers often followed a phenotypic definition of Indian-ness in determining whether ICWA applied. If a child “looked” Indian (e.g., had brown skin, dark straight hair, and dark eyes) they would inquire into tribal enrollment. If they did not, they would not. (Caseworkers and observers often raised the example of the blond-haired, blue-eyed child, but many other phenotypic combinations might not look Indian to outsiders.) This kind of assessment likely resulted in wrongful classification of many children. The Maine-Wabanaki Commission

found that half of ICWA-eligible children were misclassified, while another study found that the San Francisco child welfare agency missed at least 200 ICWA-eligible children between 2002 and 2012.

Although the caseworker definition of Indian-ness emerges from the popular conflation of race and phenotype, it became dominant because of the institutional in which context caseworkers operate. First, as to evidentiary standards, social workers must make numerous decisions with relatively few bright line rules. Significant weight is placed on their judgment and expertise, and the need to act rapidly to protect children's welfare leaves little room for extensive oversight of these decisions. This discretionary evidentiary standard, Brown argues, encourages the kind of "common sense" determination of Indian-ness according to appearance.

Second, caseworkers were not usually required to keep records of how or why they determine a child is or is not Indian. Until the early 2000s, only six states required caseworkers to even note whether the child qualified for ICWA. Even those generally required only a yes or no answer, creating no obstacle to decisions based on appearance.

Third, Brown found, the incentives facing social workers counsel against inquiring into ICWA eligibility. Determining tribal enrollment and complying with ICWA require additional time and paperwork from overburdened caseworkers. What is more, federal law incentivizes keeping children within the state system and placing them outside the home of origin, results that ICWA may prevent. The 1997 Adoption and Safe Families Act (ASFA) promotes adoption of children from the child welfare system, providing states with $4,000 to $6,000 for each adopted child, upwards of $20 million a year. Observers identified this incentive structure as one reason why South Dakota, with physical and sexual abuse rates lower than the national average, removed children from their homes at three times the national rate. Relying on a racial rather than citizenship-based definition of Indian status expedited South Dakota's removals for Indian children.

Brown also tracks the impact of shifting incentives for caseworkers. Lobbying by Alaska Native leaders, for example, led to an Alaska Tribal Child Welfare Compact that creates incentives to transfer cases to tribal child welfare systems to free up money and time for other cases. San Francisco also altered incentives by doing monthly checks that require caseworkers to do extra paperwork if they do not initially identify tribal children appropriately.

Brown found that while state court judges also distorted the Indian child definition, they employed a different form of race-making. Rather than rely on what they thought Indians should look like, they turned to cultural essentialism, relying on what they thought Indians should live like. Under what is known as the existing Indian family exception, many courts decided that the statute was not intended to apply to children who were not part of what they saw as an Indian family. Courts refused to apply ICWA because children had not lived on reservations, were not conversational in indigenous languages, or attended Christian churches rather than following Indigenous religious practices. As anyone familiar with federal Indian policy knows, these qualities describe many tribal citizens today, in part because of concerted efforts to move Native people off reservations and quash Native languages and religions.

There are some weaknesses to this section. The methodology Brown used yielded mostly cases from states that adopted the existing Indian family exception, and misses many cases from the larger number of states that rejected it. But the analysis still yields helpful insights. As to evidentiary standards and record-keeping, judicial obligations to issue public, written decisions justified under existing statutes and precedent discouraged the simple reliance on phenotype employed by some caseworkers.

The discussion of state court incentives is the most interesting. Because ICWA may require transfer of cases to tribal courts, the desire maintain judicial authority incentivizes judges to find that ICWA does

not apply. But this same effect may encourage courts to find that ICWA does apply in order to lighten heavy dockets. The Maine-Wabanaki Truth and Reconciliation Commission, for example, found that judges were generally not resistant to transferring cases to tribal court. Brown also reports that tribal advocacy with states has changed the incentives. This advocacy has led to adoption of 39 tribal-state agreements and 37 state statutes regarding implementation of ICWA, most clearly rejecting the existing Indian family exception. The relationships built through this advocacy have also shifted state judge beliefs that tribal jurisdiction should be resisted because tribal courts are incompetent or unjust.

The discussion on federal courts will be most familiar to legal readers, and focuses mostly on high-profile cases such as Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013), and the trial court decision in Brackeen v. Zinke, 338 F. Supp. 3d 514 (N.D. Tex. 2018), *rev'd sub nom*. Brackeen v. Bernhardt, 937 F.3d 406 (5th Cir. 2019), *aff'd in part and rev'd in part*, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc). More novel is the discussion of the different incentives facing state and federal courts in these cases. Federal court judges do not implement ICWA, so the cases before them generally question the statute generally, and federal judges are relatively isolated from external pressures. For these reasons, Brown finds, their race-making is more explicitly tinged with ideological perspectives.

Altogether the piece is a fascinating study of the different ways and places that race is defined and assigned, along with the factors beyond ideology that influence whether and how laws are implemented. Legal scholars in many fields will find lessons within it for their own work.

1. One of the most recent attacks culminated, for now, in Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (en banc), a fractured opinion holding that core provisions of ICWA were unconstitutional under the anti-commandeering doctrine and that one less important provision violated equal protection.

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