# The Long History of the Indian Child Welfare Act

**Author :** Karen Tani

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Margaret D. Jacobs, Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s, 37 **American Indian Quarterly** 136 (Winter/Spring 2013).

The modern nation-state is rife with contradictions: "hard" borders that are in fact both permeable and unstable; inhabitants who have assumed many of the rights and obligations of citizenship, but whose illegal border crossings undermine the nation's claim to sovereignty; territories within the nation-state where the state's jurisdiction is uneven or unclear. In recent U.S. history, these contradictions have been made visible in poignant form: Elián González, the Cuban boy whose asylum case captivated the nation in 2000; the high-achieving "alien minors" contemplated by the DREAM Act; and most recently, Baby Veronica, the child at the center of a fierce custody dispute between her biological father, a member of the Cherokee Nation, and her non-Indian adoptive parents. In December 2011, when Veronica was 27 months old, the South Carolina Family Court found that two provisions of the Indian Child Welfare Act of 1978 (ICWA) barred termination of the biological father's parental rights. In *Adoptive Couple v. Baby Girl*, No. 12-399 (U.S. June 25, 2013), the Supreme Court disagreed. The majority opinion, which casts Baby Veronica as only the slightest bit Cherokee (3/256, to be precise), should be read alongside Margaret Jacobs's important article, "Remembering the 'Forgotten Child': The American Indian Child Welfare Crisis of the 1960s and 1970s," which encourages us to remember *all* the children that came before—and all the nation-making and un-making done on their backs.

To be clear, the majority opinion in *Adoptive Couple v. Baby Girl* is not devoid of history—it recognizes the ICWA's concern for the disproportionate number of Indian children separated from their families and tribes through abusive child welfare practices—but the larger context is missing. Sometimes such omissions reflect gaps in the historical literature: knowledge about the past is easily lost when people are afraid or ashamed to talk, or when historians fail to ask them. In this instance, however, there was not only a selection of historically informed amicus briefs, but also Jacobs's superb scholarly article. Jacobs, a Bancroft-winning historian, explains why "the fostering and adoption of Indian children outside their families and communities had reached . . . crisis proportions by the late 1960s," and why Native Americans ultimately demanded greater legal protections. (P. 137.)

One of Jacobs's most important insights is that this relatively recent crisis had deep and ugly roots. From the late nineteenth century well into the twentieth, federal policy toward Native Americans was one of coercive assimilation. One well-known strategy was the allotment of tribal lands into individual parcels (via the Dawes Act of 1887). A second strategy was the removal of Indian children from their homes and their placement in distant boarding schools to be "civilized" and reeducated. This practice both "normalized Indian child removal," Jacobs argues, and left several generations unequipped "to raise children within their own cultural contexts." (P. 139.) Federal Indian policy shifted in the 1930s, when officials displayed greater solicitude for tribal self-determination, but policymakers continued to see Indians as a "problem" and "Indian child removal as a solution." (P. 140.)

Jacobs supports this argument through a close examination of the Indian Adoption Project (IAP), a joint effort by the Bureau of Indian Affairs (BIA) and the Child Welfare League of America. Starting in the late 1950s and continuing through the 1960s, the IAP vigorously promoted the adoption of Indian children. It served as a clearinghouse for prospective adoptive families, connecting them with state agencies. It

"cultivated the demand for adoptable Indian children," through ads in popular media and savvy portrayals of Indian children. (For example, tapping into Great Society rhetoric, the group depicted the Indian child as "forgotten" and desperately in need of white, color-blind goodwill. (PP. 142-43.)) Most startlingly, the IAP "sought to increase the[] *supply*" of Indian children, through alliances with BIA and state social workers. (P. 144.) In the course of providing social services and public welfare benefits, social workers encouraged Indian mothers to relinquish their infants. With the cooperation of state courts, they also removed children from the mother's custody or the care of extended family. To do so they relied on entrenched narratives of Indian family dysfunction and their own common-sense preference for the nuclear family model. Often they simply conflated poverty with parental neglect. In the meantime, the IAP cultivated a more favorable legal environment by lobbying for fewer restrictions on Indian adoptions and chipping away at tribal courts' jurisdiction over child welfare.

These revelations are sure to disturb any reader, but the point of Jacobs's important article is not to expose adoption proponents as disingenuous or malevolent. It is to place an ongoing phenomenon—Indian children's disproportionately high rate of separation from their families—in proper historical context. (P. 154.) "It is no coincidence," Jacobs writes, "that the IAP arose during the era in which the federal government promoted termination [of tribal nations' special status] and relocation policies for American Indians." (P. 152.) Adoptions enabled the federal government to terminate its responsibilities, child by child, by shifting them to "the ultimate 'private' sector." (P.154.) By extension, Jacobs argues, adoptive families also advanced the government's long-term "effort[] to eliminate Indianness." (P. 154.) This, Jacobs demonstrates, was the backdrop for the ICWA. When tribal leaders and advocacy organizations convinced Congress to enact the new law, it was a small victory in a long war. And when plaintiffs invoke the ICWA today, they raise a hard-won shield.

Jacobs's article should be required reading for all consumers of the Court's opinion in *Adoptive Couple v. Baby Girl*. It serves as a reminder that although 27 months is a long time in a small child's life, it is a short span in a multi-generational battle to preserve "Indianness," and although 3/256 may seem like a paltry fraction, it may look different to a people with legitimate but vulnerable claims to autonomy and self-preservation. Like the best legal histories, in other words, this article takes the legal categories and metrics that today seem utterly natural and unmasks them, inviting us to consider other ways of understanding our legal order.

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