NOTE: THE AMBIGUITY OF CULTURE AS A BEST INTERESTS FACTOR: FINDING GUIDANCE IN THE INDIAN CHILD WELFARE ACT'S QUALIFIED EXPERT WITNESS

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Text

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I. INTRODUCTION: LET ME INTRODUCE YOU TO MY CHILDREN

It is the 1970s. Two white women are sunning themselves, and black children are running around the pool. "Isn't it awful?" says one woman to the other, nodding toward the black children. [1] Little does she know, these black children are the adopted children of the other white woman. "Let me introduce you to my children," the adoptive mother responds. [2] A painfully awkward moment of silence follows. [3]

This vignette illustrates the problems faced by mixed-race families in a 1970s society that could not comprehend anything other than the typical, all white, nuclear family unit. [4] Forty years later, the adoptive mother noticed **[*731]** her daughter got "the same stares [she] got when [she] was a young mother in the supermarket, with three African-American kids hanging off the cart." [5] Sadly, it is not just the parents who must deal with societal impositions of race, culture and family structure; children, who are arguably less prepared to deal with these issues, must also cope with these societal impositions.

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[1] Susan Saulny, In Strangers' Glances at Family, Tensions Linger, N.Y. Times, Oct. 12, 2011, at A1.

[2] Id.

[3] Id.

[4] See Cynthia G. Hawkins-Leon, The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis, *36 Brandeis J. Fam. L. 201, 209- 11* (1997-98) (proposing that the Anglo-American concept of the nuclear family is incompatible with the practical concerns facing non-white families).

[5] Saulny, supra note 1. Mrs. Dragan, the adoptive mother, is referencing her daughter, Ms. Greenwood, who is a dark skinned woman who married a white man and has two mixed-race children with him. Mrs. Dragan said she used to get asked if she was hosting inner-city children as part of a charitable effort. Now, in contrast, her daughter is asked if she is the nanny to her children. Ms. Greenwood's son Silas, whom she had with a Latino man, said one day a wave of questions hit him. "'What am I?' Silas recalled. And, 'What are you? Are we the same thing?' I was just shooting questions. It was like a brain mash. I looked at my family and thought, 'What is going on here?' I was just lost.'" Id. Silas did not understand who he was in relation to his parents because of their different racial make up. He would look at his family wondering what was going on, and could not find any answers. Id.

Non-white children who are removed from their parents by the child services system and placed with white families experience a similar confusion of identity. [6] Substantial concerns arose surrounding the impact that removal of these children from their families had on the community as a whole, and the subsequent inability of these children to develop positive cultural and racial identities. [7] Indian tribes remedied these concerns through legislation in the 1970s, creating procedural mechanisms which provide judicial guidance regarding culture. [8] This remedy is not applicable in its entirety to other non-white cultures; however, certain provisions of it should be.

Part II-A of this comment will provide an overview of how race has factored into child removal and placement decisions either through social values or pressure from interest groups. [9] Part II-A will further explore the **[*732]** how Minnesota statutes have changed in response. [10] Next, Part II-B of this comment will introduce the Indian Child Welfare Act, ranging from the circumstances surrounding its enactment, to its current use in Minnesota, and including the idea of a qualified expert witness as the Act's solution to provide a cultural lens to the courts. [11] Part II-C of this comment will note the similarities and differences between Indian tribal culture and black communities, and will highlight commonalities between the cultures. [12] Finally, Part III of this comment will conclude by arguing that the qualified expert witness, as utilized by the Indian Child Welfare Act in child removal and placement proceedings, is the ideal way to provide cultural guidance for non-ICWA child protection matters without making blanket generalizations based on racial and cultural stereotypes and still affording the court its necessary discretionary decision-making abilities. [13]

II. BACKGROUND

A. History of Racial and Cultural Considerations in Child Removal and Placements

Race and culture, while ever-present, have played varying roles in child removal and placement decisions since the 1950s. [14] Race-matching, or the notion that children should be placed with parents of the same color skin, has

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[6] Lauren K. Pfeil, Note, Recognizing Race as a Reality, Not a Barrier: The Problems with Colorblind Adoption Policy within a Race-Conscious America, 29 Child. Legal Rts. J. 34, 40 (2009).

[7] Donna B. McElroy, The Consideration of Race in Child Placement: Does it Serve the Best Interests of Black and Biracial Children? 2 Margins: Md. L.J. Race, Religion, Gender & Class 231, 239 (2002); see also Recent Legislation, Transracial Adoption-Congress Forbids Use of Race as a Factor in Adoptive Placement Decisions.- Small Business Jobs Protection Act, Pub. L. No. 104-188, 1808 (1996), *110 Harv. L. Rev. 1352, 1354 (1997)* [hereinafter Transracial Adoption]. This concern is based on the notions that black communities have a right to self-determination, and that the practice of social welfare agencies removing black children from black communities is a sort of cultural genocide. Id.

[8] See generally The Indian Child Welfare Act, *25 U.S.C. 21* §§ 1901-1963 (2006). This Act is discussed more thoroughly below. See infra notes 80-114 and accompanying text.

[9] See infra notes 14-49 and accompanying text (discussing the history of transracial adoptions and how the use of race has changed due to changing social values and pressure from interest groups).

[10] See infra notes 50-59 and accompanying text (explaining how the courts have handled equal protection concerns regarding the use of race as a factor in child placement decisions and how federal and Minnesota law has changed as a result).

[11] See infra notes 75-117 and accompanying text (introducing the Indian Child Welfare Act and the qualified expert witness concept).

[12] See infra notes 118-179 and accompanying text (examining the differences and similarities between Indian tribes and black communities, and examining the commonality of the extended family).

[13] See infra notes 235-305 and accompanying text (analyzing the application of a qualified expert witness in non-ICWA cases).

[14] See infra notes 18-25 and accompanying text (noting the initial means by which race was considered in adoption and how social and political movements changed how race was utilized).

been a recurring practice since that time, although justifications for the practice have varied. [15] Not only have the policies behind this practice changed over time, but also, equal protection concerns have challenged the constitutionality of the practice. [16] While the law generally has shifted in **[*733]** response to these concerns, ambiguities still remain regarding how race and culture should factor, if at all, in child removal and placement decisions. [17]

1. The Start of Transracial Adoptions

The use of race as a factor in child removal and placement decisions has changed throughout United States history to reflect social policy and political movements. [18] Although today transracial child placements occur regularly, they did not take place in the United States until the mid-twentieth century, as many states prohibited them by law. [19] Adoption was not uncommon, as in fact, white, infertile parents often chose to adopt white children and raise them as their own. [20] Race-matching during this period was regularly practiced so the adopted child would appear as though he or she was biologically similar to other family members. [21] Because of white parents' desire for an outward appearance of racial sameness, there was no place for black children in the white adoption system. [22]

The practice of race-matching changed in the 1960s as the introduction of birth control into mainstream America decreased the number of white children available for adoption. [23] Also, political events, such as the rise of the Civil Rights Movement and the Korean War, raised awareness about the vast number of non-white children in need of permanent **[*734]** placement. [24] Activist groups responded to these social movements by publicizing the plight of black children and pressing adoption agencies to allow black children into the white adoption system. [25]

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[15] See infra notes 18-49 and accompanying text (discussing how, initially, race-matching was used amongst white families to avoid the stigma of adoption by forging a same outward appearance, but the policy later shifted to preserve the cultures of black communities).

[16] See infra notes 50-55 and accompanying text (describing the equal protection concerns with employing race as a factor in child placement decisions).

[17] See infra notes 60-64 and accompanying text (noting how the law regarding child placement decisions has responded to social and constitutional concerns and discussing how using race and culture as factors in the best interests determination leaves much room for judicial discretion).

[18] McElroy, supra note 7, at 235-41 (noting that while transracial placements used to be prohibited, this policy changed in response to things such as war, shifting cultural values, pressure from interest groups, and adjustments to the child services system).

[19] *Transracial Adoption, supra* note 7, at 1353 (stating not only were transracial adoptions prohibited by law, but also they were viewed as "socially and morally repugnant."); see also Aurelija Juska, Statistically Speaking: Inconsistencies in American Transracial Adoption Policies, 29 Child. Legal Rts. J. 71, 71 (2009) (noting that in 2004, just over one quarter of black children in the child services system were placed with white families).

[20] Pfeil, supra note 6, at 35 (stating that proponents of race-matching thought this outward appearance of a matched race would replace the biological bond adoption did not otherwise provide).

[21] Id. (explaining how race-matched adoption allowed the adoptive family to "pretend to the world and even to the child" that the adopted child was theirs, thereby hiding the fact the child was adopted).

[22] Id. (discussing how the desire of white infertile couples to adopt a racially-matched baby was very strong during the 1950s and adoption resources were geared to satiate this desire). Non-white babies were turned away and sent to social services, as it was presumed that white parents would not want them because of the difference in outward appearances. Id.; see also Naomi Cahn, Perfect Substitutes or the Real Thing? *52 Duke L.J. 1077, 1148-49 (2003)* (noting that race-matching was common in mid-twentieth century adoptions to avoid the stigma of adoption).

[23] Pfiel, supra note 6, at 35 (explaining the effect birth control had on adoptions).

[24] Id. at 35-36 (noting not only did these changes make trans-racial adoptions easier, but also, white parents who adopted non-white children, especially Korean refugee children, were seen as "saviors" of these "hard to place children," and from social

2. Advocating for Black Race-Matching and Its Effect on Black Children

These social changes and the increasing popularity of transracial adoptions led to an unprecedented number of non-white children being placed with white families. [26] Black communities became increasingly concerned that if child protection agencies continued to remove black children from their families and place them with white families at such alarming rates, a sort of "cultural genocide" would result. [27] In 1972 the National Association of Black Social Workers (NABSW) published a position paper which vigorously advocated against the placement of black children with white families. [28] The NABSW argued that black children should only be placed with black families if removed from their biological parents. [29] The NABSW's justification for race-matching was based on its belief that

Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept **[*735]** within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people. [30]

Beyond fear of what transracial placements would do to black communities, the NABSW was concerned that black children being raised by white parents would struggle to develop a healthy racial identity. [31] The family is the

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standpoint, these transracial adoptions were seen by some as a symbol of a "colorblind idealism" that was supposed to embody the Civil Rights Movement). Id.; see also Jane Patterson Auld, Racial Matching vs. Transracial Adoption: Proposing a Compromise in the Best Interests of Minority Children, 27 Fam. L.Q. 447, 449 (1993) (explaining how the Civil Rights movement caused organizations to form to assist with promotion and completion of transracial adoptions).

[25] Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 451 (2003). Minnesota social workers were pioneers of transracial adoptions and worked with adoption agencies and parents to facilitate twenty of these adoptions in 1965, which was a great feat at the time. Id.

[26] See *Transracial Adoption, supra* note 7, at 1353 n.11 (noting that from 1968 to 1971, the number of transracial adoptions grew from 733 to 2,574 in the United States).

[27] See McElroy, supra note 7, at 239. There was also concern among Indian tribes that a similar cultural genocide was occurring. See infra notes 80-88 (describing the effect transracial placements were having on Indian tribes).

[28] Kennedy, supra note 25, at 393-94. The theory behind this paper was that black communities had the right to self-determination. Id. When black children were removed from black communities, these children no longer identified themselves as black, thereby depriving themselves and black communities of this right. Id.

[29] Id. at 394. Black communities characterized the removal of their children from their communities as genocide. Id. Thirteen years after this paper's publication, the NABSW president said, "We view the placement of Black children in white homes as a hostile act against our community. It is a blatant form of race and cultural genocide." Id.

[30] McElroy, supra note 7, at 239.

[31] Kim Forde-Mazrui, Note, Black Identity and Child Placement: The Best Interests of Black and Biracial Children, *92 Mich. L. Rev. 925, 945-50 (1994).* The NABSW's position was that it was necessary for black children placed with white families to be able to develop a proper racial identity. *Id. at 945.* In order to do so, black children needed cultural support. *Id. at 946.* However, the NABSW did not make it clear what it meant by a "proper racial identity" or how that differed from cultural support. Id. A proper racial identity "could mean simply that the child identifies as a Black person, or it could mean something more-namely, that the child identifies with Black culture." Id. This ambiguity makes it clear that race and culture are different. Id. Race refers to biological and genetic differences in groups of people or having a "shared genetic heritage based on external physical characteristics such as facial features, skin color, and hair texture." Nancy E. Hill et al., Sociocultural Contexts of African American Families, in African American Family Life: Ecological and Cultural Diversity 21, 22 (Vonnie C. McLoyd et al. eds., 2005). While race is a biological trait, in this country it has also been used to delineate political groups. Id. Thus, while the definition of race does not necessarily connote culture, in practice, it has been used to show one is politically "different." Id. at 22-23. Culture, on the other hand, refers to the a wide set of learned variables-ranging from family life, means of communication, style, social norms, belief systems, and shared values-which are passed on to subsequent generations. Id. at 23. Culture comes not from biology or genetics, but from experiences. Id. Culture recognizes that the social, political, and economic use of "race" in

primary resource for child socialization. [32] For black families, parents must not only socialize their children to function in society, but also, parents must help their children develop a positive racial identity-both **[*736]** personal and communal-in a prejudice-laden world. [33] Black children who have been racially socialized by parents tend to have higher self-esteem and a positive outlook about their cultural group. [34] A parent sharing his or her experiences is the primary method through which black children are racially socialized. [35]

Generally, white parents do not have the shared experiences to racially socialize black children in their care. [36] They do not possess the wisdom and coping skills learned from experience which are necessary to pass such knowledge on to black children in their care. [37] Even when white parents make efforts toward cultural education and racial socialization, the fact remains that white parents simply do not have the experience of being a racial minority in this country. [38] Alternatively, some white parents make no attempt at racial socialization whatsoever,

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most circumstances is connected to historical considerations, group customs, and current socio-economic conditions. Eric K. Yamamoto, Carly Minner, & Karen Winter, Contextual Strict Scrutiny, *49 How. L.J. 241, 291 (2006).*

[32] Stephanie I. Coard & Robert M. Sellers, African American Families as a Context for Racial Socialization, in African American Family Life: Ecological and Cultural Diversity 264, 264 (Vonnie C. McLoyd et al. eds., 2005). The family is where children learn about their culture. Id. "For families of color, part of this process is preparing children to recognize their position within the larger social structure." Id. Racism and all of its evils, such as "poverty, unemployment, incarceration, and crowded urban environments" is still a part of this county. *Id. at 265.* This context places a vital responsibility on black families to raise their children with the ability to cope with this reality. Id. This is not to say all black parents will have the same methods of teaching their children these skills. Id. But, as the authors say: Although there is great diversity within the African American community, one commonality is that African Americans must make psychological sense of the dominant culture's openly disparaging view of them and negotiate racial barriers in an environment that marginalizes them. That is, as a group, African Americans, regardless of class, are forced to grapple with the significance of race in defining themselves as well as deciding what it means to be Black within their own life experiences. *Id. at 264-65.*

[33] Coard & Sellers, supra note 32, at 265. This practice is called "racial socialization," whereby black parents teach their children about how the child's race affects the child's: "(1) personal and group identity, (2) intergroup and interindividual relationships, and (3) position in the social hierarchy. . . . [R]acial socialization involves parents' instruction to their children about racism in society, educational struggles, importance of extended family, spiritual and religious awareness, African American culture and pride, and transmission of childrearing values." Id. at 266. Racial socialization in this context involves three types of experiences: mainstream, minority, and cultural. Id. Black parents have to teach their children how to operate in mainstream "White" America, how to do so as a minority, and how to do so while preserving what is unique to the child's culture. Id. at 266-67.

[34] Ellen E. Pinderhughes & Brenda Jones Harden, Beyond the Birth Family: African American Children Reared by Alternative Caregivers, in African American Family Life: Ecological and Cultural Diversity 285, 298 (Vonnie C. McLoyd et al. eds., 2005) (noting these children also see lower rates of depression and better performance in school).

[35] Coard & Sellers, supra note 32, at 270. Other methods black parents have used to racially socialize their children are: to expose their children to black culture; model appropriate behavior; explain what it means to be a member of a black community; or engage their children in positive events going on in her black neighborhood. Id.; see also Kennedy, supra note 25, at 407 ("Black and other minorities develop survival skills for coping with such racism, which they can pass to their children expressly, or, more importantly, by unconscious example.").

[36] Pinderhughes & Harden, supra note 34, at 292. Even when transracial foster parents are engaged in learning about the child's culture, the parents are still struggling on the other end to bring that child into their family and community. Id. Despite the necessity of maintaining this cultural link, white foster parents often either cannot provide it or do not know that they should. Id.; see also Kennedy, supra note 25, at 407 ("Parents of interracial families may attempt to learn these lessons and then teach them, but most authorities recognize that this is an inferior substitute for learning directly from minority role models. . . . Few white parents even claim they can teach such skills.").

[37] Kennedy, supra note 25, at 463-64 (describing the experience of a white woman who attempted to educate herself about black cultures in order to racially socialize a black child in her care, but ultimately failed due to her lack of experience as a black person in society).

[38] Id. at 464. Kennedy describes the experience of a white parent who raised a black child. Id. The white parent made many attempts to educate herself about black culture, but admitted that she was ultimately, as a white person, an "inadequate[] dispenser of racial wisdom," partly because she admitted she was a racist because she came from white privilege. Id.

and raise black children in their **[*737]** care according to the white parents' social customs. [39] By making this choice, these parents fail to teach black children how to deal with racism. [40]

As a result of the NABSW's paper, the adoption of their position by many child services agencies, and concerns about the effect of transracial adoptions on black children and black communities, the number of transracial placements dropped thirty- nine percent in one year. [41] While the NABSW was successful in reducing transracial placements, thereby arguably giving black children in the system a better chance at forming a proper racial identity, its recommendations were simultaneously detrimental to these very same children. [42]

After 1995, many black children who were removed from their parents remained in the system for up to twice as long as non-minority children because there were not enough black placement families with which these children could be racially matched. [43] Child advocates claimed that the practice of race-matching was to blame for this extreme delay in the placement of minority children. [44] This was because the number of black **[*738]** parents who were placement options did not match the number of black children in the system to allow race-matching to be a viable possibility. [45]

Furthermore, even when black parents did attempt to be considered as placement options, they were discouraged; they reported biased social workers and unreasonable fees, which these black families could not pay with their incomes. [46] In comparison, white families were available and ready to take in black children. [47] Child advocates argued that languishing in the system after removal was more detrimental to the children than transracial

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[39] Id. at 469-473. For example, a black child was raised by white parents who failed to teach this child about racism, and instead raised him as white. Id. at 469. This child grew up to deny his cultural heritage and hate his black features. Kennedy, supra note 25, at 470. His friends and family saw him as white, but when he left that community, others saw him as black. Id. This child did not know where he fit in; he would sit in a college classroom and feel shame when white students would say "nigger" before realizing his presence. Id. He finally realized the world was not "color-blind" as his white parents had raised him. Id. The child stated he "had no one to turn to in order to help [him] understand what it meant to be an African American man in our society." Id. He felt his upbringing did not prepare him for the societal complexities of what it means to be a person of color. Id. at 470-71.

[40] Pfiel, supra note 6, at 40. While these white parents did not teach the black children about racism for fear of being racist, even if they did teach racism, these black children still struggled to achieve a positive racial identity. Id. Some of these children claimed they perhaps would not have become as smart had they been raised by black parents. Id. Another such child would not identify herself as black, but said she was "white with very, very dark skin." Id.

[41] McElroy, supra note 7, at 238-39 (stating that the number of white families adopting black children in 1971 was 2,574, but by 1972, this figure dropped to 1,569, and by 1973, it dropped to 1,091).

[42] See George L. Opie, Comment, The Multiethnic Placement Act: A Critical Analysis of Why the Act Is Not in the Best Interests of Children, *20 S. Ill. U. L.J. 605, 606-12 (1995)* (noting that while the intent of black race-matching was to preserve the culture of black communities and help black children develop a sense of racial identity, in reality, the practice of race-matching caused black children to languish in the system because there were not enough black families for these children to be placed with, thereby causing these children to be without security or stability).

[43] Policy Guidance on the Use of Race, Color or National Origin as Considerations in Adoption and Foster Care Placements, *60 Fed. Reg. 20272-01, 20272* (Apr. 12, 1995) [hereinafter Policy Guidance] (stating that by 1995, the average waiting period for a child available for adoption was up to two years, whereas for minority children, the average waiting period was twice as long).

[44] Pfeil, supra note 6, at 37 (reporting that child advocates at this time claimed that allowing race to be a factor in determining placement was causing the extended stay in foster care for black children).

[45] McElroy, supra note 7, at 240-41 (noting that the disproportionate number of black children in need of homes compared to the number of black families willing or able to take them in made race-matching nearly impossible).

[46] Id. at 240.

[47] Id. at 241 (stating that black families and white families were in opposite circumstances in this regard).

placements, as the children were denied a permanent home and the associated benefits. [48] A balance had yet to be struck as to how race and culture could factor into child placement decisions in a manner that actually served the best interests of the child. [49]

3. Equal Protection Concerns

The policy of race-matching was controversial not only for causing children to languish in the system after they had been removed from their parents, but also because of potential equal protection concerns. [50] The Supreme Court has ruled on the use of race as a consideration only in child custody proceedings. [51] In Palmore v. Sidoti, the Court held race may never be a determinative factor in removing a child from his or her natural parent who is otherwise fit to have custody. [52] The Court has not issued a similar holding for child protection.

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While courts may consider race among a penumbra of other factors when making a child placement determination, [53] an equal protection problem arises when considerations of race go beyond a "mere factor" and are given too much weight. [54] To avoid equal protection violations, courts are required to find an appropriate middle ground when using race as a factor in all stages of child placement proceedings, however, there exists no guidance for judges on how to do so. [55]

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[48] Opie, supra note 42, at 606 (quoting statement during hearings to pass the Multiethnic Placement Act regarding concern that black children who were stuck in the system "fail[ed] to form a family identity and a sense of security that comes from having loving parents and a stable home environment"). Those who challenged using race and culture as factors in a child placement decision operated under the notion a child's best interests were served solely by having a permanent home, thereby effectively failing to consider the role race and culture play in today's society. Id. at 616-17.

[49] Id. at 611-12 (arguing that the policy of race-matching had the opposite of its intended effect; it was actually contrary to a child's best interests).

[50] See generally Timothy P. Glenn, Note, The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute, *77 Minn. L. Rev. 925 (1993)* (explaining how when race is used as a factor in child placement proceedings, the applicable statute must pass strict scrutiny to avoiding violating the equal protection clause of the Constitution).

[51] *Palmore v. Sidoti, 466 U.S. 429, 434 (1984).*

[52] Id. The mother and father in Palmore were white, but the mother lived with a black man whom she later married. *Id. at 430.* The Court reasoned that even though racial bias and prejudice might make life difficult at times for a child raised in a bi-racial household, societal failings do not justify a racially based custody decision. *Id. at 433-34.* While race can still be a factor in making the decision, it cannot be dispositive. Id. See also Glenn, supra note 50, at 933-34 (stating that although transracial adoptions cannot be categorically banned, "[f]acially neutral laws or policies which courts and administrative bodies apply in a manner that makes race automatically determinative are also unconstitutional").

[53] Id. at 935; see e.g. *Jones v. Jones, 542 N.W.2d 119, 123-24 (S.D. 1996)* ("We hold that it is proper for a trial court, when determining the best interest of a child in the context of a custody dispute between parents, to consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it.").

[54] *Drummond v. Fulton Cnty, Dep't of Family & Children Servs., 563 F.2d 1200, 1205 (5th Cir. 1977)* (holding that race can be a factor in bi-racial adoption context so long as race is not an automatic tipping point).

[55] Glenn, supra note 50, at 939-40 (noting the lack of consensus as to how trial judges should allow race to weigh into their decisions).

Because of the lack of judicial guidance, courts have used race as one of the best interests factors in child removal and placement decisions both broadly and inconsistently. [56] After the Palmore decision, most courts generally reason that using race as the sole criterion for their decisions violates equal protection. [57] Furthermore, it violates equal protection for the courts to utilize a presumption that automatically grants custody of the child to the same-race parent. [58] Beyond these bright-line exceptions, how race is utilized as a factor is a matter given great judicial deference. [59]

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4. The Law Responds: The Multi-Ethnic Placement Act

In response to this gross disparity in the amount of time children of color remained in the care of the state waiting for a racially-matched placement home after being removed from their parents, and the lack of consensus regarding equal protection concerns, Congress enacted the Multi-Ethnic Placement Act (MEPA) in 1994 with the intent of reducing these racial barriers. [60] The official purposes of MEPA were to decrease the amount of time children of color waited to be placed after removal, to prevent racial discrimination in child placement decisions, and to expand the number of placement families to meet the needs of children in the system. [61]

MEPA prohibited adoption or child placement agencies that received federal funds from making categorical denials of child placements solely based upon the race of either the child or the prospective adoptive or foster care parent. [62] However, MEPA did not completely end race-matching in practice, as child placement agencies were still free to use the culture, ethnicity, and race of the prospective placement family as factors in considering the family's ability to meet the needs of the child. [63] While MEPA intended to reduce the amount of time children of color spent in the

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[56] Decisions nationwide give race a broad scope of value in the placement determination. Some courts have held race should not be "over-emphasized." See *In re R.M.G., 454 A.2d 776, 791 (D.C. 1982)* (affirming the use of race as a "mere factor" in a custody determination is sufficiently narrowly tailored to pass constitutional muster). But see *Drummond, 565 F.2d at 1205* (affirming the use of race as a factor if it is not automatic). Based on this spectrum of opinions, scholars on the topic have concluded that "[n]o consensus has emerged on how trial judges should weigh race in [child removal and placement] decisions and how much discretion the law should leave to judicial or administrative decision makers." Glenn, supra note 50, at 939-40.

[57] *Palmore, 466 U.S. at 434* (providing the court's holding); see also Kathryn Beer, An Unnecessary Gray Area: Why Courts Should Never Consider Race in Child Custody Determinations, *25 J. Civ. Rts. & Econ. Dev. 271, 280-81 (2011)* (interpreting the holding in Palmore).

[58] *In re R.M.G., 454 A.2d at 787* (holding that when there is a presumption in favor of granting custody to the same race parent, race is no longer a factor but an automatic decision).

[59] *In re Adoption No. 2633, 646 A.2d 1036, 1048 (Md. Ct. Spec. App. 1994)* (noting thebreadth of manners in which different courts have used race as a factor).

[60] Id. MEPA was part of the Improving America's Schools Act of 1994, Pub. L. No. 103-382, ***108 Stat. 3518*** (codified at *42 U.S.C. § 5115a* (1994)) (repealed 1996).

[61] Opie, supra note 42, at 605-06 (listing the purposes of MEPA).

[62] Id. at 609 (describing how MEPA was implemented through the regulation of state funding).

[63] Policy Guidance, supra note 43, at 20,273-75. According to the policy guidance provided by the Office of Civil Rights of the Department of Health and Human Services, agencies were supposed to use cultural and ethnic considerations on an individual, case-by-case basis. Id. Agencies were supposed to consider factors affecting the child, including his or her behavioral characteristics, history, cultural and racial needs, interests, and any attachment to his or her current placement. Id. Agencies were also supposed to individually evaluate the prospective placement option, considering a parent's capacity to meet "psychological needs that are related to the child's racial, ethnic, or cultural background," including attitudes, background, preferences, and ability to "nurture, support, and reinforce the racial, ethnic, or cultural identity of the child and to help the child cope with any forms of discrimination the child may encounter." Id.

system waiting for racially matched placement homes by removing this racial obstacle, because it allowed considerations of "cultural identity" it, in effect, perpetuated the racial-matching scheme. [64]

[*741]

5. Current Minnesota Law

Minnesota has a comprehensive child placement system with multiple deadlines and parties, including families, the courts, and county services. [65] In response changing federal law, during the 1997 legislative session, the Minnesota Legislature made numerous changes to the child placement statutes, including eliminating the consideration of the child's race in making a placement decision. [66] One of Minnesota's juvenile justice laws was amended to provide that the child's best interests were no longer served by giving due consideration of the child's race, but instead, they were served by making "an individualized determination of the needs of the child and of how the selected placement will serve the needs of the child being placed." [67] **[*742]** The amendment also eliminated the statutory preference for placement with a family of the same race or ethnic heritage as the child. [68]

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[64] See Opie, supra note 42, at 606 (arguing that it was the language of MEPA which undermined its very goal). In response to MEPA's practical failure to achieve its intended purpose, two years later Congress passed the Small Business Jobs Protection Act (SBJPA). *Transracial Adoption, supra* note 7, at 1352; see also Small Business Jobs Protection Act, Pub. L. No. 104-188, ***110 Stat. 1755, 1808 (1996).*** The Act explicitly prohibited child placement agencies from using race to delay or deny adoptive placement. ***Id. at 1808***(a)(3)(A)-(B). The SBJPA provides that an adoption or foster care agency which receives federal funds may not deny a potential parent the opportunity to be a foster parent solely based on "race, color, or national origin of the person, or of the child, involved." Nor may such an agency "delay or deny the placement of a child or adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved." Id.

[65] See generally Minn. R. Juv. Prot. P. 21. For example, parties to a child protection matter include the parent (legal custodian), the child protection social worker (generally the petitioner in a child protection matter), and the guardian ad litem. Minn. R. Juv. Prot. P. 21.01. All have the right to legal representation and to present evidence and examine witnesses. Minn. R. Juv. Prot. P. 21.02. The child who is the subject of the petition, as a participant, or as a party if he or she moves to intervene, also has the right to counsel. Minn. R. Juv. Prot. P. 22.01 (explaining the child's role in the proceedings); see also Minn. R. Juv. Prot. P. 25.01 (providing the right to counsel to parties and participants in a juvenile protection matter); see also *Minn. Stat. § 626.5591* (2011) (explaining the role of a child protection social worker and the interaction the worker has with the child); *Minn. Stat. § 260C.163*, subd. 5 (explaining the role of the guardian ad litem). If a child protection petition is filed and not dismissed, the case must follow specific deadlines. See generally Minn. R. Juv. Prot. P. 4 (providing the timeline for a child protection matter). The typical child protection case begins when a report alleging abuse or neglect is made and the child is removed from the home (although not all cases begin with child removal). Minn. R. Juv. Prot. P. 4.03 Advisory Comm. Cmt. (providing an example of how a non-ICWA child protection matter should proceed when the child is removed from the home). Three days after the child is removed, the court must conduct an emergency protective care hearing and determine if the petition should be dismissed or, alternatively, if the child protection petition establishes a prima facie case, if the child should be returned home to the care of his or her parents, or stay in out-of-home placement. Minn. R. Juv. Prot. P. 30. The timeline differs depending of a multitude of factors, including whether the child is placed at home with the parent or in out of home placement, the age of the child, the grounds for the petition, and whether ICWA applies. See generally Minn. R. Juv. Prot. P. 4 (2011) (noting the different deadlines a case must satisfy depending on a multitude of variables).

[66] Act of May 6, 1997, ch. 86, 1997 Minn. Laws 86. Beyond the changes regarding how race and culture could factor into a child placement decision, the 1997 Amendments also affected the Commissioner of Human Services' duty regarding recruitment of adoptive and foster families. Id. Recruitment of placement parents was no longer to focus on race, but instead on what the particular needs of the child were and how that prospective placement family could attend to those needs. Id. This individual, child-centered approach did not require the Commissioner to recruit "minority" adoptive and foster families per se, but instead to find families who reflected the varied pool of children in need of permanent homes. Id.

[67] Id. The heading of the statute changed from "Protection of Heritage or Background" to "Placement Decisions Based on Best Interest of the Child." Id.

[68] Act of May 6, 1997, ch. 86, 1997 Minn. Laws 86. The amendment replaced this preference with language which barred delaying or denying placement based on "race, color, or national origin of the foster parent or the child." Id. Language of "race" was almost entirely eliminated, and instead the focus was on culture and heritage. Id. For example, foster parents needed to

In child protection proceedings, the state cannot deny or delay placement because of race. [69] Also, culture is only one best interests factor in determining the appropriateness of removal or placement of a child. [70] However, the child protection statutes do not provide guidance to the court regarding how to make cultural best interests determinations. [71] Case law demonstrates that the best interests standard, while child focused, is unclear, and permits the court great discretion. [72] Without more guidance regarding how to consider culture, psychologists and lawyers claim judges often let personal bias and values unduly influence their decision-making. [73] These **[*743]** scholars conclude this combination of discretion and bias can at times lead to a decision which is not actually in the child's best interests. [74]

B. The Indian Child Welfare Act

At the same time the NABSW was fighting to maintain black culture by insisting black children should be placed only with black families when removed from their parents, [75] Indian tribes were facing a similar concern over removal of their children into white families. [76] Indian tribes were greatly concerned about the effect child removal

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attend training on understanding the importance of both culture and heritage, although the emphasis was no longer on protecting the heritage, which gave foster parents and placement agencies a great deal more leniency. Id. at subd. 7(1).

[69] *Minn. Stat. § 260C.193*, subd. 3(d) (2011); see also *Minn. Stat. § 260C.001*, subd. 2(a) (2011) (stating in all child protection matters, the best interests of the child are of paramount concern).

[70] *Minn. Stat. § 260C.212*, subd. 2(b)(4) (2011). Other best interests factors include the child's behavior, medical and health needs, history, religious needs, connection with community and faith, interests, talents, relationship to current caretakers and siblings, and the reasonable preference of the child. § 260C.212, subd. 2(1)-(8) (2011). The court must consider these factors at two points: (1) when ordering the child into protective care of the child services agency after the emergency protective hearing when determining if removal of the child from his or her parents was appropriate, and (2) when issuing a disposition order regarding a child who is removed from his or her parents and placed into some form of out-of-home placement at any time after there is a finding by the court that the child is in need of protection or services. Minn. R. Juv. Prot. P. 30.10 Advisory Comm. Cmt.; *Minn. Stat. § 260C.212*, subd. 2(b)(1) - (8) (2011).

[71] See generally *Minn. Stat. § 260C.001-.501* (noting that the only guidance provided is that the determination must be based on the individual needs of the child). See also McElroy, supra note 7, at 241 (arguing that this general best interests standard, without guidelines, gives judges too much discretion to rely upon their own personal judgments, morals, and values when making the determination).

[72] *In re Custody of K.A.R., No. A08-2165 2009 WL 4573746* at *6 (Minn. Ct. App. Dec. 8, 2009) (noting the great deference given a trial judge to make a best interests determination).

[73] McElroy, supra note 7, at 241-42 (arguing that the unique nature of individual child protection proceedings combined with this ambiguous standard requires judges to speculate as to what is in the child's best interest); see also Kimberly Hold Barrett & William H. George Psychology, Justice, and Diversity: Fives Challenges for Culturally Competent Professionals, in Race, Culture, Psychology, & Law 3, 12-13 (Kimberly Holt Barrett & William H. George eds., 2005). The authors reference an instance in which a judge defended another judge's improper conduct in the courtroom toward a minority by cheerfully responding the old retort "justice is 'just-us!'" Id. at 12. While the phrase is supposed to signify that judges are merely human beings prone to imperfect interpretations of what is just, in this context, it means judges are "empowered authorities administering the system," while minorities are "disempowered people of color and immigrants disproportionately represented as defendants, inmates, and supervisees." Id. at 13. Such a comment demonstrates the lack of understanding amongst judges how race and culture impact the justice system. Id. According to the authors, "[i]t also reveals a form of cultural bias that refuses to acknowledge the discriminatory impact created by the lack of minority group representation and how this lack of representation sways the distribution of power in legal and political institutions." This bias serves to perpetuate white supremacy and reinforce "notions of the inferiority of people of color." Id.

[74] McElroy, supra note 7, at 241-42 (stating that despite the child's need for a loving home, bias of a judge can lead to a situation in which a child is placed contrary to that child's best interests).

[75] See supra notes 26-49 and accompanying text (discussing the concerns regarding placing black children with white families).

[76] See infra notes 79-82 and accompanying text (explaining the effect of child removal on the Indian community).

would have on the children and the tribe as a whole, and in response, Congress passed the Indian Child Welfare Act (ICWA) in 1978. [77] ICWA was passed with the intention of preserving Indian culture through different procedural court mechanisms, including the requirement of testimony from a qualified expert witness as to how the parents' child-rearing practices were contrary to both the acceptable cultural standards of the tribe and the best interests of the Indian child. [78]

1. History and Enactment of ICWA

The removal of children from black communities and the resulting hardships were not suffered alone; at the same time, Indian tribes were experiencing a comparable situation. [79] During hearings on the proposed ICWA legislation, the United States Senate heard testimony characterizing "[t]he wholesale removal of Indian children from their homes, . . . [as] the **[*744]** most tragic aspect of Indian life today," and was given statistics that around one third of Indian children had been removed from their parents and placed into homes away from their families and away from their tribes. [80] Advocates of ICWA further testified that this removal was often based not on actual child neglect or abuse, but instead on a misunderstanding of tribal cultural practices regarding child-rearing. [81] A University of Minnesota social psychiatrist presented research at these hearings which demonstrated the problems Indian children faced when removed from their parents and placed with white families. [82] The psychiatrist testified that these removed Indian children were raised to have a white cultural and social identity, and understood little about Indian culture and behavior. [83] According to the psychiatrist, these children lacked any semblance of an Indian identity. [84]

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[77] The Indian Child Welfare Act of 1978, Pub. L. No. 95-608, *92 Stat. 3069* (codified at *25 U.S.C. §§ 1901*-1963 (2006)). See infra notes 84-88 and accompanying text (describing the formation of ICWA).

[78] See *25 U.S.C. § 1912* (providing for expert testimony). See infra notes 89-114 and accompanying text (analyzing how ICWA is applied in Minnesota and describing the qualified expert witness as a procedural mechanism to further the preservation of Indian culture).

[79] *Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32-35 (1989)* (describing how the removal of Indian children from their tribes deprived these children of their culture and hurt the tribes' chances for future survival).

[80] *Id. at 32.* "Studies undertaken by the Association on American Indian Affairs in 1969 and 1974, and presented in the Senate hearings, showed that 25 to 35% of all Indian children had been separated from their families." Id. Statistics from Minnesota were also presented, which stated that "one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption." Id. This rate of adoption for "Indian children was eight times that of non-Indian children. Approximately 90% of Indian placements were in non-Indian homes." Id.

[81] *Id. at 34-35* (providing testimony that the failure of the current child services system was that those charged with the decision to remove a child were ignorant of Indian culture, or even contemptuous of the Indian way of life).

[82] *Holyfield, 490 U.S. at 33 n.1* (providing the testimony of the psychiatrist).

[83] Id. (describing the situation of Indian children placed with white families as one in which the children attended white schools and churches and were not exposed to Indian culture).

[84] Id. The psychiatrist further elaborated that when these children grew up, they were confused in that the larger society did not recognize these children as the white persons they were raised to be. Id. A common experience shared by these Indian children was that they would date white children, but the parents of the white children would pressure the white children to get out of these relationships. Id. According to the psychiatrist, these Indian children "were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess." Id.

In response to the harm removal of Indian children had on the children and their respective tribes, Congress enacted ICWA. [85] Much of the focus was on the damage removing Indian children from their biological parents and the tribe and placing them with white families caused the children, although the Act also considered how the removal of Indian children was detrimental to the tribes. [86] Both ICWA and state substantive **[*745]** children's law make the best interests of the child predominant, however under ICWA the tribe's interest in its continued existence is of equal, if not paramount, importance. [87] This is because, as a sovereign nation within the United States, Indian tribes have a right to self-determination, and as such have the inherent right and need to determine who raises Indian children. [88]

2. Application of ICWA to Minnesota Child Protection Laws

ICWA is not about substantive law, but rather is "an evidentiary and procedural code which establishes the minimum procedures for child protection proceedings in each state under each state's substantive law." [89] **[*746]**

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[85] *Holyfield, 490 U.S. at 30* (stating ICWA was passed to remedy the problems experienced by children, their parents, and the tribe when these children were taken away and placed into non-Indian homes).

[86] See The Indian Child Welfare Act, *25 U.S.C. § 1901*(3)-(5) (2006) (stating "(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe; (4) that an 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 percentage 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.").

[87] Christine M. Metteer, A Law Unto Itself: The Indian Child Welfare Act as Inapplicable and Inappropriate to the Transracial/Race-Matching Adoption Controversy, *38 Brandeis L.J. 47, 57-58* (1999-2000) (arguing because Congress has a unique obligation to protect Indian tribes, courts are justified in finding that the tribe's interest is at times superior to that of its individual members); see also *Holyfield, 490 U.S. at 34* (stating much of the intent behind ICWA was to remedy the impact of child removal on the tribe, itself). Tribal leaders testified that: [c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities. Probably in no area is it more important that tribal sovereignty be respected than in an area as socially and culturally determinative as family relationships." Id.

[88] Kennedy, supra note 25, at 486 (discussing the right of tribal self- determination as one of the harms sought to be remedied by ICWA). Furthermore, the removal of Indian children from their tribal homes is of great significance to the tribe because of the meager numbers of the tribe in comparison to other minority communities. Id. at 513. Compared to black communities, the Indian population is relatively much smaller, thus the removal of Indian children is disproportionately more significant. Id.

[89] Peter W. Gorman & Michelle Therese Paquin, A Minnesota Lawyer's Guide to the Indian Child Welfare Act, 10 Law & Ineq. 311, 313 (1992) (explaining how ICWA does not entirely usurp state substantive law on child placement matters); see also Kennedy, supra note 25, at 498 (claiming that ICWA is "a procedural statute for a substantive problem"). For example, The Juvenile Court Act contains the substantive law for Minnesota Child Protection and requires the child protection statutes to be construed in accordance with ICWA. ***Minn. Stat. § 260C.168*** (2011). Some examples of minimum procedures that ICWA requires are a higher standard for efforts by the child services agency to reunify families or find kinship, and a higher burden of proof and testimony from a qualified expert witness for termination of parental rights. Mia L. Kern, Note, A Generation Later: Reservations with the Indian Child Welfare Act, 29 Child. Legal Rights. J. 47, 57 (2009); see also *25 U.S.C. § 1912*(d) (requiring active efforts toward reunification); §1912(f) (requiring proof beyond a reasonable doubt and testimony by a qualified expert witness for termination of parental rights). ICWA also requires that certain placement preferences be followed when a child is removed from his or her home. *25 U.S.C. § 1915*(a)-(c) (setting forth the placement preferences by which agencies must abide when placing an Indian child, specifically listing: (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families, respectively).

ICWA applies to child custody proceedings, including termination of parental rights. [90] Because of the nature of the definition ICWA provides for child custody proceedings, ICWA analogously applies to most juvenile protection matters in which eligibility is established. [91] To establish eligibility, when the court has "reason to believe" a child who is subject to that court's proceeding may be Indian, the court must notify the tribe and seek verification from either the Bureau of Indian Affairs (BIA) or the tribe itself. [92] The respective tribe, as opposed to the parent, has final say as to whether a child is an eligible member so as to trigger ICWA's application. [93]

If the tribe determines a child is eligible for membership, ICWA sets forth procedural standards which the juvenile court and child services agencies must follow. Under ICWA, when a child is removed from his or her parents, this placement status cannot continue for more than ninety days without a finding by the court, which is supported by testimony from a qualified expert witness, that custody by the parent will likely cause a significant amount of physical or emotional harm to the child. [94] Termination of parental rights petitions must be proved beyond a reasonable doubt. [95] The BIA guidelines suggest that a court undertaking such a matter use a two-part **[*747]** inquiry to determine whether this heightened burden has been met. [96] The court should first ask if the conduct demonstrated by the parent is likely to result in serious physical or emotional harm to the child. [97] If the answer is yes, the court should next ask if the parent can change his or her conduct. [98] The proof required under this two-part inquiry must also be supported by the testimony of a qualified expert witness. [99]

3. The Qualified Expert Witness: A Procedural Mechanism for Preserving Culture

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[90] *25 U.S.C. §1903* (1)(ii) (defining "child custody proceeding" to mean and include "'termination of parental rights' which shall mean any action resulting in the termination of the parent-child relationship").

[91] Gorman & Paquin, supra note 89, at 328-29 (stating that juvenile protection matters are child custody proceedings under ICWA).

[92] Id. at 334-35; see also *25 U.S.C. § 1912*(a) (describing how eligibility is established).

[93] Gorman & Paquin, supra note 89, at 335 (noting the discretion of the tribe in verifying eligibility). Once eligibility is determined, the tribal court has presumed jurisdiction over the matter. Id. at 339; *25 U.S.C. § 1911.* While generally the matters initially stay within the county court, absent good cause to the contrary, upon request of the parent, custodian, or tribe, the matter must be transferred to the tribal court. Gorman & Paquin, supra note 89, at 339-40; see also *25 U.S.C. § 1911.* ICWA does not define what is "good cause" to deny a petition to transfer jurisdiction, so Minnesota courts have looked to the Bureau of Indian Affairs for guidance. *In re Welfare of Children of R.M.B., 735 N.W.2d 348, 351 (Minn. Ct. App. 2007).* The BIA Guidelines state: "Good cause not to transfer the proceeding may exist if [t]he proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing." Guidelines for State Courts: Indian Child Custody Proceedings, 44 Reg. 67,584-67,595, 67,591 (Nov. 26, 1979) [hereinafter BIA Guidelines]. The burden of showing good cause lies on the party opposing the petition to transfer. *In re Welfare of Children of R.M.B., 735 N.W.2d at 351.*

[94] Minn. R. Juv. Prot. P. 49.01 (explaining the role of a qualified expert witness when the child is in emergency protective custody).

[95] *25 U.S.C. 21* § 1912(f); see also *Minn. Stat. § 260C.193*, subd. 1(a) (2011); Minn. R. Juv. Prot. P. 39.04 (explaining that the standard of proof when ICWA does not apply is clear and convincing evidence).

[96] BIA Guidelines at 67,593; see also Gorman & Paquin, supra note 89, at 361 (describing the two part inquiry).

[97] BIA Guidelines at 67,593.

[98] Id.

[99] Gorman & Paquin, supra note 89, at 362. See also Minn. R. Juv. Prot. P. 49.03 (requiring a qualified expert witness to testify in support of a termination of parental rights petition under ICWA). If the tribe does not support the petition and refuses to provide a qualified expert witness, the county can satisfy this requirement by brining in a person who qualifies as an expert under Minn. R. Juv. Prot. P. 2.201(21)(b) or (c). Minn. R. Juv. Prot. P. 2.201(21) Advisory Comm. Cmt. The qualified expert witness is explained in the subsequent section. See infra notes 100-114 and accompanying text (explaining what a qualified expert witness is and how it is utilized under ICWA).

Either ninety days after the Indian child has been removed from his or her parents, or during trial on a petition to terminate parental rights, ICWA requires "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." [100] Testimony often includes how the Indian child's parents' behaviors are not in accordance with acceptable Indian cultural practices, and what the child's cultural needs are. [101]

Generally, whether a witness qualifies as an expert is an issue within the broad discretion of the court. [102] And although ICWA does not define "qualified expert witness," in ICWA cases, judicial discretion regarding whether or not a witness qualifies as an expert is controlled in large part by the Minnesota Tribal/State Agreement on Indian Child Welfare (the Agreement). [103] According to the Agreement, an expert is someone who is:

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(a) a member of the Indian child's tribe, who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child rearing practices; (b) a lay expert witness who has substantial experience in the delivery of child and family services to Indians and extensive knowledge of prevailing social and cultural standards; or (c) a professional person who has substantial education and experience in the area of his/her specialty and substantial knowledge of prevailing social and cultural standards and child rearing practices within the Indian community. [104]

Since 1990, the Minnesota Court of Appeals has reasoned trial judges should not depart from this definition when exercising their discretion as to who qualifies as an expert witness under ICWA unless good cause exists for the departure. [105] Underlying the court's reasoning was the premise that the definition was consistent with the purpose of ICWA to provide a "cultural lens" for non-Indian lawyers, social workers, and judges. [106]

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[100] *25 U.S.C. § 1912*(f).

[101] See, e.g., *In re Custody of S.E.G., 521 N.W.2d 357, 360-61 (Minn. 1994)* (providing testimony from a qualified expert witness as to whether white adoptive parents could provide cultural needs for Indian children); *In re Adoption of M.T.S., 489 N.W.2d 285, 287 (Minn. Ct. App. 1992)* (providing testimony from a qualified expert witness as to whether placement with an Indian child's extended family would better suit the emotional and cultural needs of the Indian child than placement with a non-relative, non-Indian foster family); *In re Welfare of M.S.S., 465 N.W.2d 412, 415 (Minn. Ct. App. 1991)* (providing testimony from a qualified expert witness that it was in the best interests of an Indian child to be placed within Indian culture).

[102] *In re Welfare of Children of J.B., 698 N.W.2d 160, 166 (Minn. Ct. App. 2005)* (describing the discretion a district court judge has in determining if a witness is an expert).

[103] Id. (holding that the Agreement controls who is an expert witness). The Agreement also mandates that each Indian tribe which "participates in [the] Agreement shall maintain a tribally approved list of qualified experts and qualified expert witnesses for that tribe." Minnesota Tribal/State Agreement On Indian Child Welfare 19 (Aug. 25, 1999), available at *http://www.d.umn.edu/sw/TSA%20resources/MN%20Tribal%20State%20* Agreement.pdf. The child services agency cannot challenge an expert who is listed as qualified under the Agreement. Id.

[104] Minnesota Tribal/State Agreement On Indian Child Welfare at 9; *In re Welfare of Children of S.W., 727 N.W.2d 144, 150-51 (Minn. Ct. App. 2007).*

[105] *In re Welfare of B.W., 454 N.W.2d 437, 443-44 (Minn. Ct. App. 1990).* The B.W. Court used the definition of a qualified expert witness provided in Bureau of Indian Affairs Guidelines and the Minnesota Department of Human Services Manual to define a qualified expert witness. Id. The definition of a qualified expert witness used in B.W. is substantively the same as the one provided for in the *Agreement. In re Welfare of Children of J.B., 698 N.W.2d 160, 167* (noting the definitions are similar).

[106] Id. at 444 (explaining the court's reasoning).

As a matter of procedure, failing to call the qualified expert witness who properly qualifies and who supports termination of parental rights or placement away from the parent may be grounds for remand. [107] However, while this testimony is indispensable, a trial judge has discretion as to how much weight he or she will give the testimony. [108]

Testimony from a qualified expert witness also has value as a guide for trial judges who are otherwise unfamiliar with Indian culture. [109] It must **[*749]** be remembered that ICWA sought to address the problems regarding bias of judges who are inexperienced with Indian culture, and the judge's inability to recognize when bias is affecting his or her decision. [110] According to Indian tribes, this bias not only comes from the judge's own personal views and lack of understanding of Indian culture, but also because judges often rely on the opinion of social workers who may also be deficient in knowledge of Indian culture and child- rearing practices. [111]

For example, in a child protection case in Oregon, an Indian child was removed from the mother's care because the mother left the child with her neighbor for a prolonged period of time. [112] The trial court was unaware that, within Indian culture, the entire tribe as an extended family was responsible for the upbringing of children, and instead the court assumed the mother had abandoned her child. [113] On appeal, the case was remanded for the trial judge to hear and reconsider evidence from a qualified expert witness to determine whether removal of the child was in

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[107] *25 U.S.C. § 1912*(f) (mandating the testimony and support from a qualified expert witness); see also *In re Welfare of M.S.S., 465 N.W.2d 412, 417* (ordering remand because the trial court improperly qualified testimony as that of an expert).

[108] *In re Welfare of Children of J.B., 698 N.W.2d 160, 167 (Minn. Ct. App. 2005)* (explaining that "[q]ualifying a witness as an expert, however, does not require the court to admit any and all testimony from that witness, nor does it require the court to find such testimony persuasive. The weight to be given any testimony, including expert testimony, is ultimately the province of the fact- finder.").

[109] *In re Custody of S.E.G., 521 N.W.2d 357, 366 (Minn. 1994)* (explaining the difficulties trial court judges have in making placement determinations for Indian children).

[110] Paul David Kouri, Note, In re M.J.J., J.P.L., & J.P.G: The "Qualified Expert Witness" Requirements of the Indian Child Welfare Act, *29 Am. Indian L. Rev. 403, 408-09* (2004-2005). Kouri makes the argument that one of the purposes of the ICWA was to reduce the likelihood cultural bias and a lack of cultural understanding would lead to a significant, and oftentimes unjustified, removal of Indian children from their homes. *Id. at 410-11.* This being such, one of the purposes of the qualified expert witness was to provide expert guidance in making cultural determinations. Id. He finds support for this deduction of congressional intent in an Oklahoma Supreme Court case, In re N.L., which states expert testimony is supposed to "provide the court with knowledge of the social and cultural aspects of Indian life to diminish the risk of any cultural bias." *754 P.2d 863, 867 (Okla. 1988).*

[111] *Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34-35 (1989)* (quoting the testimony of Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians: "[o]ne of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing. Many of the individuals who decide the fate of Indian children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child."); see also Minn. H.R. Rep 95-1386, 7532 (1978) (discussing the general lack of knowledge child protection workers have about Indian family practices).

[112] *In re N.L., 754 P.2d at 865* ("The petition alleged that N.L. was neglected due to his mother's 'pattern of leaving the said child in the care of various neighbors for indefinite periods of time.'").

[113] Id. The trial court found the mother "left the county with her present whereabouts unknown." Id.

accordance with acceptable extended family practice within Indian culture as testified to by the qualified expert witness. [114]

Some states have begun to use testimony from a qualified expert in non-ICWA cases and apply the testimony beyond removal decisions to **[*750]** placement decisions, as well. [115] In In re Marriage of Gambla, an Illinois dissolution case involving a black mother, white father, and biracial daughter, the court heard testimony from a university professor with a background in multiculturalism and family development as to which parent would be most fit to attend to and develop the child's cultural needs. [116] On appeal, the court reasoned it was not an abuse of discretion to admit the testimony as it guided the trial court's discretion in using race and culture as best interests factors. [117]

C. Black Communities and Indian Tribes: Differences and Similarities

Gambla provides an example of how one of the procedural mechanisms of ICWA has been utilized outside of the Indian community to guide judges in making cultural best interests decisions. [118] Some scholars have argued all procedural mechanisms of ICWA can be applied to black communities, while others have rejected this idea based on the inherent differences that exist between these two groups. [119] While these differences are notable, similarities also exist between the two groups which lend themselves to support a Gambla-like extension of one of ICWA's procedural devices, that being the qualified expert witness. [120]

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1. Unique to Indian Tribes: Sovereignty and Membership

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[114] *Id. at 868.* The appellate court affirmed that the purpose of the qualified expert witness testimony is to remove the chance cultural bias will affect the court's determination. *Id. at 867.* Because the trial court failed to find how the mother's conductwould seriously injure the child, a remand was required. *Id. at 868.*

[115] See, e.g., *In re Marriage of Gambla, 853 N.E.2d 847 (Ill. App. Ct. 2006).*

[116] *Id. at 857-58.* Dr. Thomas was a psychologist and associate professor with a background in family counseling and development, multiculturalism, child development, professional identity, and ethics. *Id. at 857.* She also had experience studying and writing about the racial socialization of black families. Id. The court, within its wide discretion on the matter, reasoned this experience qualified her as an expert to provide testimony. *Id. at 858.* Dr. Thomas testified black families have extended families, which include kin, friends, and community members, and a child's connection to that family is a matter of social support. Id. She also testified black women often are spontaneous and freely express themselves, but face a stereotype from that freedom as being loud, aggressive, rude or even sexually promiscuous, and that black women deal with these stereotypes by repressing feelings. *In re Marriage of Gambla, 853 N.E.2d at 858.* In the doctor's professional opinion, it was vital for the child to be socialized into black culture, and living with her mother, who was also black, would best enable the child to develop a healthy racial identity. Id.

[117] *Id. at 865-70.* In Illinois, race can be a factor in a child placement decision so long as it does not outweigh the other "best interests" factors. *Id. at 868.* Because the court properly considered all other relevant factors and utilized race only to find the black mother could provide the daughter with a "'breadth of cultural knowledge' as to her African American heritage" as the doctor had testified, the trial court's use of race was permissible. Id.

[118] See supra notes 115-117 and accompanying text (describing how an expert testified in a non-ICWA case as to how a proffered placement was in the cultural best interests of the child).

[119] Metteer, supra note 87, at 50-52 (exploring the different arguments regarding whether or not ICWA can be applied to the black community).

[120] See infra notes 142-174 and accompanying text (explaining the similarities between Indian tribes and black communities); see also infra notes 175- 258 (arguing that ICWA's qualified expert witness concept can be extended to black communities as a device to provide guidance to judges in making cultural best interests decisions).

Two primary distinctions exist between Indian tribes and black communities: sovereignty and membership qualities. [121] Indian tribes, with their special relationship to the federal government, exist as quasi-sovereign entities. [122] While tribes are still subject to control by the federal government, [123] the federal government considers each federally recognized Indian tribe to be its own independent nation. [124] Implicit within this notion of sovereignty is that Indian tribes have the right to self- determination. [125] However, the concept of a nation as it is used in the context of an Indian tribe differs from the term's ordinary meaning. [126] For Indians, nation does not mark a group of people bound together by land boundaries, but instead a group of people who are separate from others as their own community. [127] Within a tribal community's boundaries, there are distinct people who are not bound by the rules of the state. [128]

Additionally, Indian tribes set their own standards for membership, [129] and tribal members have the option to renounce membership. [130] The tribal government determines enrollment qualifications **[*752]** and may change them at will. [131] By including the right to determine membership as an element of sovereignty, the federal government has, in essence, conferred a dual political status upon Indians. [132] Hence, ICWA is not directed at a racial group, but at members of a federally recognized political group. [133]

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[121] See infra notes 122-137 and accompanying text (explaining the differences between Indian tribes and black communities).

[122] *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 71 (1978)* ("Although we early rejected the notion that Indian tribes are 'foreign states' for jurisdictional purposes under Art. III, we have also recognized that the tribes remain quasi-sovereign nations which, by government structure, culture, and source of sovereignty are in many ways foreign to the constitutional institutions of the Federal and State Governments.").

[123] Metteer, supra note 87, at 53 (noting that tribes recognized by the United States Government are considered to be "domestic dependent nations").

[124] Kennedy, supra note 25, at 481 (noting that while Indian tribes are free from the control of states, they still must abide by restrictions and regulations placed upon them by the federal government).

[125] Walter Kawamoto & Tamara Cheshire, American Indian Families: Resilience in the Face of Legal, Economic, and Cultural Assault, in Race, Culture, Psychology, & Law 299, 302 (Kimberly Holt Barrett & William H. George eds., 2005). This right to self determination was re-affirmed by President Johnson and is intended to limit the ability of states to exercise authority over Indian tribes without the tribe's consent. Id.; see also Metteer, supra note 87, at 53-54 (explaining as a mark of this right to self-determination, each tribal unit has its own self-government council).

[126] Hawkins-Leon, supra note 4, at 208 (describing the different meaning "nation" has for an Indian tribe).

[127] Id. (describing the Indian nation as a distinct community).

[128] Id.; see also *Worcester v. Georgia, 31 U.S. 515, 559 (1832)* ("The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil").

[129] See *Wis. Potowatomies of Hannahville Indian Cmty. v. Houston, 393 F. Supp. 719, 723 (W.D. Mich. 1973)* (providing an example of a tribal constitution's membership standards and affirming that the right of tribal sovereignty includes the right to set the tribe's own boundaries and membership qualities).

[130] Metteer, supra note 87, at 56 ("[A] member of any Indian tribe is at liberty to terminate the tribal relationship whenever he or she so chooses.").

[131] Kawamoto, supra note 125, at 304 (setting forth the quandary that what it means to be considered an Indian by the federal government is different than what it means to be an Indian under tribal standards, which becomes more confusing when one considers tribes can change qualifications standards at whim).

[132] Metteer, supra note 87, at 56 (comparing "tribal membership" to "political status").

[133] Id. ("This ability to renounce tribal affiliation distinguishes the status of an Indian from other racial classifications subjected to review under the Equal Protection principle, since other class members cannot voluntarily escape their racial status. Therefore, because the race-matching preferences of the ICWA apply only to members or children of members of federally recognized

In contrast, members of black communities are not subject to two governments like members of Indian tribes are. [134] The jurisdictional and procedural aspects of ICWA are dependent upon Indian tribes having their own court systems with the ability to take jurisdiction, and black communities simply do not have the equivalent judicial structure. [135] Further, being a member of the black race is not something community members can verbally renounce in the same manner that Indians can renounce tribal affiliation. [136] An Indian person meets membership qualities to be in a tribe, whereas one is born into a race. [137] While these are marked differences, that does not mean commonalties do not exist between the two groups.

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2. Similarities: The Extended Family, Valuing Culture, and Minorities in a White System

Extended family structures continue to exist as smaller units within Indian tribes and black communities. [138] The extended family goes far beyond the traditional model of the nuclear family of married parents with two or three biological children. [139] Parents in an extended family are not simply one's biological parents, but may include anyone who assumes the role and responsibility of the parent. [140] An extended family relies greatly on community resources for the upbringing of children. [141]

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tribes, rather than to all who might be racially classified as 'Indian,' these preferences are also 'political rather than racial in nature.'").

[134] Hawkins-Leon, supra note 4, at 211-12 (stating that members of black communities do not have the same relationship with the federal government as members of Indian tribes do).

[135] See supra notes 89-99 and accompanying text (explaining the procedural and jurisdictional aspects of ICWA); Metteer, supra note 87, at 53 (noting how sovereign Indian tribes have their own judicial systems); see also Hawkins-Leon, supra note 4, at 212 (explaining that for ICWA to be applicable to black communities, the definition of tribe would have to change to confer this same quasi-sovereign status to ethnic groups as defined by a shared culture as opposed to the political entity Indian tribes are considered to be).

[136] Metteer, supra note 87, at 56.

[137] Id. (explaining the difference between tribal membership standards and being born into a race); see also Hill, supra note 31, at 22-23 (noting race is biological and genetic, and represents a "shared genetic heritage" around which social differences are constructed). Some scholars would argue race, also, can be a choice. Darren Lenard Hutchinson, Progressive Race Blindness?: Individual Identity, Group Politics, and Reform, *49 UCLA L. Rev. 1455, 1459-62 (2002).* However, such arguments are based on the premises of race as a social construct that can be abandoned with radical societal changes in perspective, as opposed to a biological trait one is born with. Id. As mentioned, for purposes of this article, this author is using the biological definition of race, which cannot be abandoned. See supra note 30 and accompanying text (defining race as biological and culture as societal).

[138] Marian S. Harris & Ada Skyles, Working with African American Children and Families in the Child Welfare System, in Race, Culture, Psychology, & Law 91, 93 (Kimberly Holt Barrett & William H. George eds., 2005) (noting that in black families, the extended family can consist of relatives and non-relatives which span multiple generations); see also Hawkins-Leon, supra note 4, at 208 ("An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family.").

[139] M. Belinda Tucker & Angela D. James, New Families, New Functions: Postmodern African American Families in Context, in African American Family Life: Ecological and Cultural Diversity 86, 87-88 (Vonnie C. McLoyd et al. eds., 2005) (putting forth the idea the nuclear family is typically the favored structure in the United States).

[140] Harris & Skyles, supra note 138, at 93 (explaining the different meaning of "parent" in an extended family).

[141] Shirley A. Hill, African American Children: Socialization and Development in Families 129-32 (1999) (stating that the extended family relies not only on blood relatives for the care of children, but also on neighbors, churches, and schools); see also Peggye Dilworth-Anderson & Paula Y. Goodwin, A Model of Extended Family Support: Care of the Elderly in African American Families, in African American Family Life: Ecological and Cultural Diversity 211, 218 (Vonnie C. McLoyd et al. eds., 2005) (supporting the conclusion that much support for the extended family comes from churches).

Failure to recognize the extended family structure as a viable means of child- rearing was one of the primary reasons for enacting ICWA. [142] Before ICWA was enacted, child protection workers did not understand that it was common within Indian tribes for children to be raised not just by their parents, but by grandparents, aunts, uncles, close friends, neighbors, and the tribe as a whole. [143] Instead, child protection workers saw this type of care as a form of neglect or abandonment and removed children from their parents as a result. [144]

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The notion of an extended family is not unique to Indian tribes, but is also present within black communities. [145] Whether by custom, tradition, or necessity, extended family members, such as grandparents, cousins, aunts, or uncles, blood relatives or non-blood relatives, take on the role of the parent-the duties and responsibilities of raising children and arranging daily familial life. [146] This is because, like Indian families, families in black communities are also child centered; both groups view children as the resource for survival of their culture. [147]

Today, families in black communities remain, at least to some degree, complex structures with "fictive kin and familial relations." [148] In the early 1990s, it was estimated nearly forty-four percent of families in black communities lived in a somewhat extended family situation. [149] Black communities have a prevailing sense of duty towards ones family, a push for survival of the group, and a sense of "familial reciprocity" which naturally lends itself to the extended family structure. [150]

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[142] *Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 35 n.4 (1989)* (noting a concern raised was that child services workers did not "understand the role of the extended family in Indian society.").

[143] Id. In the Indian community, there is not concept of "an abandoned child" because someone in the community will always take the child in. Id.; see also *Wis. Potowatomies of Hannahville Indian Cmty. v. Houston, 393 F. Supp. 719, 726 (W.D. Mich. 1973)* (providing an example of the extended family structure in Indian tribes).

[144] *Holyfield, 490 U.S. at 35 n.4* ("Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.").

[145] Harris & Skyles, supra note 138, at 93; Hill, supra note 141, at 129-38 (stating that a common proverb among black communities is "[i]t takes an entire community to raise a child").

[146] Hawkins-Leon, supra note 4, at 210 (explaining the structure of the extended family); see also Gilbert A. Holmes, The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy, *68 Temp. L. Rev. 1649, 1658-69* (detailing the history of the extended family in black communities and describing how it continues to exist today).

[147] *Holyfield, 490 U.S. at 34* (describing the child centered nature of Indian tribes); see also Homes, supra note 146, at 1665 ("[T]he Black extended family operated as a complex family and in a child-centered manner. Children were raised in families other than their birth families as circumstances required. However, they also learned about and had contact with their birth family, so that they would know who they were. The retention of the children's connection to their birth families was essential to the child-centered nature of the complex Black extended family structure."); Hawkins-Leon, supra note 4, at 210 (noting how in the black family structure,children were raised for the benefit of the whole community).

[148] Hawkins-Leon, supra note 4, at 210 (noting the perseverance of extended families in black communities).

[149] Id. (comparing this statistic to the statistic that only ten percent of white families lived in a similar structure at the time).

[150] Dilworth-Anderson & Goodwin, supra note 141, at 211. The extended family can consist of youth caring for the elderly or vice versa. Id. It can include immediate relatives, next-of-kin, and those not related by blood or marriage. Id. The mark of an extended family is its "fluid and flexible boundaries," as opposed to the typical nuclear family structure. Id.

Another reason for enacting ICWA was the threat child removal had to the preservation of Indian culture. [151] Indian tribes have a unique and shared culture marked by tradition, ceremonial religious practices, sacred roles within the tribe, kinship structures, speech mannerisms, and child-rearing practices. [152] While members of black communities do not share a **[*755]** unique and binding culture to the same degree as Indian tribes, [153] it is equally true that commonalities exist amongst members in black communities that bind the people as a culture. [154]

One theory is that black culture, while a constantly evolving concept, does exist with shared traditions, common familial practices, a binding language, and residential patterns. [155] While there is no one "black culture," one example is that some under this theory of community choose to name their children African names, dress in African garb, and embrace African styles of art and music. [156] Under this theory of black culture, members who choose to emphasize their African roots can choose to celebrate the African holiday of Kwanzaa or have their children attend African-centered schools. [157] These traits are not based on how the majority views black people, but on aspects of black culture relating to traditional African roots that individuals in this black community choose to preserve. [158]

A second example of black culture within this first theory based on shared practices is those smaller subsets within African culture, and a prime illustration is Somali culture. [159] Most Somalis are Sunni Muslims and observe the religious holiday of Ramadan. [160] Many of their social customs derive from Islamic origin and are not commonly accepted in the United States, such as practices that divide men and women. [161] Regarding family structures, marriage often occurs at a young age, and a man may even be able to have multiple wives. [162] Somalis also have large, extended families, as a **[*756]** woman's social value increases with every child she has, and these women depend upon one another for support. [163]

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[151] See supra note 87 and accompanying text (explaining the harm child removal had on the preservation of tribal culture and how IWCA was enacted to remedy this harm).

[152] Kennedy, supra note 25, at 487 (noting aspects of Indian culture and the Indians' desire to preserve it).

[153] *Transracial Adoption, supra* note 7, at 1357.

[154] McElroy, supra note 7, at 257 (recognizing that a sort of "black culture" exists, but that does not mean that all black families identify with it).

[155] Hill, supra note 31, at 29-31 (describing black culture as a moving target which may no longer encapsulate all black people due to shifting social and economic considerations).

[156] Id. at 34 (describing elements of black culture).

[157] Id. (describing the choices some black families make to preserve an African black culture).

[158] Id. Hill notes that some scholars argue the only culture black people share is that of being a minority in a white majority. Id. However, some black families have made the conscious decision to maintain an African identity unique to their heritage by incorporating these practices into theirfamily life. Id. at 34-35.

[159] See generally University of Minnesota-Academic Health Center, Minnesota's Somali Community, available at *http://www.dhs.state.mn.us/main/groups/disabilities/* documents/pub/dhs id 051157.pdf. (discussing the Somali community within Minnesota).

[160] Id. at 4 (describing Ramadan and other religious practices, such as abstaining from eating pork or drinking liquor).

[161] Id. For example, men generally only shake hands with other men, and vice versa for women. Id. Women in Somali culture are also required to wear veils which cover their faces, and it is generally not acceptable for women to wear pants. Id. Men and women are also split in the workforce and the educational sphere. Id. at 5.

[162] Id. (explaining how marriages usually occur around age fourteen or fifteen and having multiple wives is more common amongst rich men, who often keep these multiple families separate).

[163] Id. at 5-6 (discussing child-rearing practices in Somali culture).

A second theory of black culture is "street" culture. [164] "Street" culture is associated with rap music and urban neighborhoods, and has been used interchangeably with "gangsta culture," although it generally stands for a culture that is oppositional to white-ness. [165] Members of this black culture choose to distinguish themselves from "white America" by focusing on and valuing those behaviors that white society denigrates, and on denigrating those behaviors that the white society has historically honored. [166]

A third theory is that black culture is connected through a shared experience of a historical political struggle in this country. [167] In fact, it is this trait that binds black and Indian people, as both share the experience of being a minority within a predominantly white society. [168] Within American history, both groups have experienced egregious segregation and discrimination at the hand of a white majority. [169] Status as a racial minority has made both groups relatively powerless in comparison to whites. [170] This shared experience of being discriminated against and socially disadvantaged often encourages internal group camaraderie and unity in the same way shared racial backgrounds or cultural tendencies do. [171]

Furthermore, as minorities, both groups are over-represented in a child services system operated predominantly by whites. The Minnesota **[*757]** Department of Human Services statistics demonstrate that non-white children represent a disproportionate amount of children in the child services system when compared to their make-up of the general population. [172] In Minnesota, relative to white children, non-white children and children affiliated with a tribe are grossly over-represented in child protection, adoption, and out-of-home placement court matters. [173] The

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[164] Eleanor Brown, Black Like Me? "Gangsta" Culture, Clarence Thomas, and Afrocentric Academies, *75 N.Y.U. L. Rev. 308, 321-22 (2000)* (defining "street" culture as a type of a black community).

[165] *Id. at 321 n.37* ("Along with the formation of an oppositional social identity, subordinate minorities also develop an oppositional cultural frame of reference which includes devices for protecting their identity and for maintaining boundaries between them and white Americans. . . . [T]hey emphasize other forms of behavior and other events, symbols, and meanings as more appropriate for them because these are not a part of white Americans' way of life.") (quoting Signithia Fordham & John U. Ogbu, Black Students' School Success: Coping with the "Burden of Acting 'White'", 18 Urb. Rev. 176, 181 (1986)).

[166] *Id. at 326.* According to Brown, this model of black culture often leads to the incarceration of men and the impregnation of women at an early age, as these behaviors mark a form of rebellion. *Id. at 325-27.*

[167] *Id. at 314* (noting the existence of a black culture bound by political struggle).

[168] Metteer, supra note 87, at 50 ("[b]oth groups have suffered a history of extreme segregation, severe discrimination and tremendous oppression in America; both have been considered discrete and insular racial minorities; both have been viewed as, and in fact have been, politically powerless vis-a-vis [sic] the dominant white majority." (quoting James S. Bowen, Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child, 26 J. Fam. L. 487, 522 n.185 (1987-88)).

[169] Hill, supra note 31, at 32-33 (arguing that minority status creates its own culture).

[170] Id. (stating that groups who have experienced being the "out- group" have reacted similarly to the experience, and this reaction is what forged a common bond amongst those groups).

[171] Id. at 34 (describing the bond created amongst minority groups).

[172] Id. at 12. Particularly, in the child protection context, "children are placed in out-of-home care if they are found to be unsafe in the parent/caregiver's home. American Indian children and those with two or more races were the most likely to be removed from their home during the course of a child protection Family Assessment or Family Investigation. Once reported to child protection, an American Indian child was twice as likely as a White child to be removed from his home and placed in out-of-home care for one or more days." Id. at 27. "Overall, African American children comprised more than 20 percent of children in all placements." Id. at 28.

[173] Minnesota Department of Human Services, Minnesota Child Welfare Disparities Report iii (2010), available at *https://edocs.dhs.state.mn.us/lfserver/Public/DHS-6056-ENG*. Some significant statistics include the fact that "American

groups most over-represented are Indian and black children. [174] These non-white children are the subject of more maltreatment determinations, case openings, and longer adoption processes. [175]

Much research and data on the race of children in the system focuses on the race of the child, not the race of the child services workers or judges who are responsible for placing the child in that particular placement. [176] For example, within the Hennepin County Juvenile Justice court system, six of the eight judges and referees are of a Caucasian decent. [177] Consider this in the context that judges are making life-altering decisions as to the placement of a disproportionate number of non-white children without any guidance as to how these cultural differences should be remedied. [178] Without a statutory **[*758]** solution like ICWA, black children and families may experience very uneven treatment due to unrecognized biases or a lack of knowledge or understanding by the court. [179]

III. ANALYSIS

Allowing judges to weigh culture as a best interests factor without direction as to how to do so entails too many risks to minority children's wellbeing. [180] Completely ending transracial placements at all stages of a child protection matter is not a practical solution, because there simply are not enough non-white families either capable or willing to take in these children, and doing so allows race to be a predominant factor in violation of equal protection. [181] Minnesota law has progressed in the right direction by banning the use of race as a dispositive factor and replacing race with culture as a best interests factor. [182] But the law's silence as to how to consider culture, combined with

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Indian children were more than eight times more likely to be a subject of a neglect report; with African American children nearly five times more likely." Id.

[174] Id. at iv-v. ("American Indian children were placed in out-of- home care for one or more days in 2008 at a rate more than twice that of any other group, and were 12 times more likely than a White child to spend time in placement. African American children were the next highest risk group at 5.3 times the rate of placement.").

[175] Id. at iii. (noting the disparities between white and non-white children in the system).

[176] See generally id. The entire disparities report issued for by the Minnesota Department of Human Services extensively covers statistics about the race of children in Minnesota's child services system. However, not once, nor in any of its multitude of charts and graphs, does the report make mention of the racial make- up of child protection workers, investigators, judges, or judicial referees responsible for the ultimate determination as to whether the child should be removed or where the child will be placed. Id.

[177] See generally Minnesota Judicial Branch, Fourth District, Judges and Referees, available at *http://www.mncourts.gov/district/4/?page=358* (last visited July 24, 2012).

[178] See Minn. R. Juv. Prot. P. 7 (allowing a judge or referee to make final determinations in child protection proceedings); see also *Minn. Stat. § 260C.212*, subd. 1(c)(1) (2011) (requiring the court make a specific finding as to how a placement is in the best interests of the child); subd. 2(b)(4) (including culture as a factor to consider in determining best interests without defining how it should be considered beyond an "individualized determination").

[179] See supra notes 80-117 and accompanying text (explaining how ICWA applies to Indian children).

[180] See supra notes 172-175 and accompanying text (providing statistics about children in the child services system); see also supra notes 43-45 and accompanying text (discussing the impracticability of race-matching because there were not enough black families with whom black children could be placed); see also supra notes 31-40 and accompanying text (describing how black children who were placed with white families struggled to develop a positive racial identity because the white parents were not able to teach these children how to deal in a racist society).

[181] See supra notes 42-48 and accompanying text (explaining how the policy of race-matching was not a practical solution because there were not enough black families who were placement options and, as a result, black children became stuck in the system and deprived of the benefits of a permanent home); see also supra notes 50-59 and accompanying text (noting the constitutional problems of allowing race to be a dispositive factor in a child placement decision).

[182] See supra notes 65-74 and accompanying text (discussing current Minnesota child protection laws).

the ambiguity of what a child's cultural needs are, allows a judge to let his or her own bias about a culture factor into the judge's broad discretion in a manner inconsistent with a child's best interests. [183]

Contrary to what some scholars have advocated, ICWA, as a legislative remedy to the problems of child removal and transracial placements, is not applicable in its entirety to black communities as a solution for the lack of judicial guidance surrounding culture as a best interests factor. [184] This is because black communities neither have sovereign status nor the separate court system Indians do. [185] However, because of the **[*759]** commonalities and analogies that can be drawn between the two groups, provisions of ICWA-particularly the concept of a qualified expert witness-should be utilized by the courts and child services system as a procedural device which provides judicial guidance when making cultural best interests decisions.

A. Culture Should be Considered in Child Protection Matters to Properly Serve the Child's Best Interests

Culture should be considered in child removal and placement decisions because, despite opposing viewpoints, the potential harms of ignoring culture are, in fact, contrary to a child's best interests. [186] On one hand, some scholars argue a child's best interests are met simply by being placed in a loving home as quickly as possible, regardless of the color of the parties' skin or their cultural background, because the immediate placement avoids keeping minority children in the child services system any longer than necessary. [187] Alternatively, some scholars argue that race and culture must be dispositive considerations, because otherwise, minority children will fail to develop a positive sense of identity and will not be able to cope in a racist society. [188] Because the disproportionate number of minority children in the system affects the minority communities, and because of the possible detrimental effects transracial placements have on these children, culture must be a factor in these child protection matters.

1. The Disproportionate Representation of Non-White Children in the System Demands Culture Be an Informed Factor to Protect Minority Communities

In Minnesota, minority children make up a disproportionate number of children in the child services system. [189] While the disproportionate number of removals on its face raises concern, this concern is amplified considering the fact that the majority of decision-makers in the system are **[*760]** white and do not always have a comprehensive understanding of minority cultures. [190] If culture is ignored, these non-white children are at the mercy of decision-

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[183] See supra notes 65-74 and accompanying text (discussing current Minnesota child protection laws).

[184] See supra note 119 and accompanying text (putting forth the idea that all of ICWA is applicable to black communities).

[185] See supra notes 121-137 and accompanying text (highlighting the differences between Indian tribes and black communities).

[186] See supra notes 26-49 and accompanying text (explaining that there are advocates for race-matching who claim that white parents are unable to raise black children with the skills to cope in a racist society and there are also opponents to race-matching who claim it is more harmful for black children to languish in the adoption system because they are deprived of the benefits of a permanent home).

[187] See supra notes 43-44 and accompanying text (discussing how the practice of race-matching prolonged the time black children spent in the system); see also supra note 48 and accompanying text (describing the harm suffered by children who do not have a permanent home).

[188] See supra notes 26-35 and accompanying text (supporting the notion that failure to consider race and culture is detrimental to a black child and black communities).

[189] See supra notes 172-175 and accompanying text (providing statistics that demonstrate the gross disparity between white and non-white children in Minnesota's child services system).

[190] See supra notes 109-117 and accompanying text (illustrating the difficulties judges experience when attempting to make cross-cultural placement decisions); see also supra note 177 and accompanying text (explaining the racial make-up of the child services system in Minnesota).

makers with no understanding or background regarding the child's cultural needs. [191] This is because cultural practices, which may seem like abuse or neglect to the uninformed court, can lead to unwarranted removals of children from their families. [192] Additionally, the ratio of non-white placement options to non-white children in the child services system is not even. [193] Culturally-matched placements are ideal, but they are not always possible given these disproportionalities. [194]

Having culture as a best interests factor will help alleviate concerns that minority cultures will effectively be wiped out (or at least progressively diminished) because minority children are being taken away at alarming rates and placed outside of their respective cultures. [195] By ensuring that a child is not removed for arbitrary reasons based on cultural misunderstandings, or by placing the child with parents who will raise the child in a manner consistent with the child's cultural background and educate the child about the racial realities of the world, that child's culture can continue to live on in the child, regardless of the color of the placement parent's skin. [196]

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2. The Potential Detrimental Effects on Children from Removal and Transracial Placements Require Informed Cultural Decisions

Minority children placed into white families often face emotional, psychological, and social struggles. [197] Opponents of considering culture in placement decisions advocate that we live in a color-blind, race-neutral society, but that stance is not representative of reality. [198] Minority children in white families often question their identities;

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[191] See supra notes 71-74 and accompanying text (noting the broad and unguided discretion judges have in making placement decisions); see also supra notes 109-114 and accompanying text (explaining the lack of guidance provided to decision- makers in the juvenile system on issues of culture and race).

[192] See supra notes 112-114 and accompanying text (providing an example of when child services removed a child from a parent because the child protection workers did not understand the concept of the extended family within Indian culture and instead assumed the parent had abandoned her child).

[193] See supra note 45 and accompanying text (explaining that there simply are not the same amount of non-white placement options to meet the demand presented by non-white children in the system, so as a practical matter, pure race- matching is a statistical impossibility); see also supra note 66 and accompanying text (noting the change in recruitment efforts of placement parents).

[194] See supra notes 33-44 and accompanying text (explaining the benefits a black child experiences through being raised by a parent who can educate the child about his or her culture in comparison to the harm these children experience when a parent cannot provide this education); see also supra note 45 and accompanying text (discussing the disproportionately high number of non-white children in need of permanent homes to non-white placement options).

[195] See supra note 27 and accompanying text (discussing how both black communities and Indian tribes feared the forced removal of their children from their homes would effectively destroy the communities); see also supra notes 80-87 and accompanying text (outlining the concerns of Indian tribes that their culture was facing genocide because of the significant rate at which their children were being taken by the child services system and raised to be unaware of their Indian culture).

[196] See supra notes 31-35 and accompanying text (explaining the role that parents play in culturally educating their children); see also supra notes 84-87 and accompanying text (demonstrating the negative effects on children and their respective culture of failing to have cultural considerations affect the child's placement).

[197] See supra notes 39-40 and accompanying text (illustrating some of the personal challenges faced by black children raised in white homes).

[198] See supra notes 1-5 and accompanying text (describing an incident in 2011 in which a mixed-race family still faced challenges because society could not comprehend them as a cohesive family unit because of their different skin colors); see also supra note 48 and accompanying text (explaining how the concept that a child's best interests are served by placement in a permanent home regardless of race or culture necessarily ignores the role race and culture place in society and child- rearing).

[199] have negative views about the culture from which they were removed; [200] and at the same time are ostracized by the white culture in which they were raised. [201]

The NABSW argues that only black families can provide the appropriate coping mechanisms for a black child to survive in a racist society. [202] However, assuming that transracial adoptions are per se harmful makes an overarching assumption that all black families identify with a form of black culture. [203] This assumption ignores individual parenting abilities and the wide array of cultural options available to individuals within black communities. [204] Furthermore, contrary to the NABSW's position, other scholars have argued that race-matching is detrimental to the child because the policy prolongs a minority child's time spent in the system, thereby **[*762]** depriving these children of the benefits of a permanent home. [205] This contrary overarching assumption ignores the fact that non-white children placed into white homes face internal and external struggles concerning their racial and cultural identity. [206] Hence, regardless of whether culture negatively or positively affects a child placement proceeding, from the moment a child is removed from his or her parents, culture is always present and always has an effect.

B. The Ambiguous Nature of Culture Demands Guidance When a Judge Is Weighing Culture as a Best Interests Factor

The paramount consideration in any child protection proceeding is the best interests of the child. [207] Each case is unique and calls upon the finder of fact to speculate as to whether the child should be removed from his or her parents and how the potential subsequent placement will serve the child's best interests. [208] Culture is one undefined best interest factor in these overall decisions. [209] Yet, the law is silent as to how culture should be considered. [210] This silence gives judges unbridled discretion to make decisions on cultural concepts with which they may have little or no personal experience or knowledge. [211]

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[199] See supra note 5 and accompanying text (illustrating the internal struggle such a child faces).

[200] See supra notes 39- 40 and accompanying text (noting some minority children raised by white parents thought they would not have been as smart had they been raised by black parents or refused to identify with the culture they were born into).

[201] See supra note 84 and accompanying text (illustrating the struggle Indian children faced in that they were being raised by white parents but white culture refused to accept them).

[202] See supra notes 26-30 and accompanying text (discussing the NABSW's position that transracial placements are detrimental to black children because only black parents can properly racially socialize a black child).

[203] See supra notes 155-171 and accompanying text (exploring many theories of black culture and explaining how there are different types of black culture with which a black family can choose to associate).

[204] See supra note 63 and accompanying text (putting forth the notion a child's best interests are met by making individualized determinations based on a parent's ability); see also supra notes 155-171 and accompanying text (providing different examples of black culture).

[205] See supra notes 43-48 and accompanying text (discussing the delay that race-matching policy caused minority children in finding a permanent home).

[206] See supra notes 35-44 and accompanying text (describing the difficulties black children experienced when placed with white families).

[207] See supra note 69 and accompanying text (providing the Minnesota statutes which mandate the best interests of the child as paramount).

[208] See supra notes 72-74 and accompanying text (explaining the lack of guidance behind the best interests standard).

[209] See supra notes 70-71 and accompanying text (listing culture as a best interests factor without providing any guidance as to how it should be considered).

[210] See supra note 71 and accompanying text (noting the lack of guidance as to how cultural considerations should come into play in a child protection proceeding).

Courts need guidance because culture is an ambiguous concept. [212] Culture is a unique and ever-changing set of learned behaviors, values, and traditions. [213] Culture is not necessarily about one's race, but instead is composed of values from that person's heritage that he or she is taught and chooses to adopt. [214] For example, within black communities, there is no one "black culture," but instead a multitude of options derived from either experiences which a parent chooses to pass on to a child, or values with **[*763]** which one chooses to align. [215] Given that culture is a choice and includes a multitude of options, a child's culture is not always as facially apparent as a child's race. [216] Because of the variety that exists within and amongst cultural groups, it would be nearly impossible for an outside party to know either acceptable parenting practices according to cultural standards or an individual child's cultural needs without expert guidance. [217]

The courts should not ignore the risk that black children who are either arbitrarily removed from their parents due to cultural misunderstandings and subsequently placed into white families will struggle because of cultural differences. [218] Nevertheless, assuming a judge will always be able to properly address a child's cultural needs without more information as to what those cultural needs are ignores the ambiguity of culture. [219] Judges should consider culture in child protection proceedings so long as they are provided guidance as to how to consider the culture of each individual child. [220]

C. The Entire ICWA Is Not Applicable to Black Communities as a Method for Providing Cultural Guidance to the Court

While ICWA has served as a procedural remedy for Indian tribes to resolve the harm child removal had on children and tribes, this remedy cannot be analogously applied to black communities as a means for providing guidance, for two reasons. [221] First, ICWA is not directed at a racial group, but at a political one. [222] Because Indian tribes are quasi-sovereign entities, they can set their own membership qualifications, which can equally be renounced. [223] While members of black communities have the option to partake in their culture, these members do not share the

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[211] See supra notes 72-74 and accompanying text (discussing the great and unguided discretion judges have in making placement decisions).

[212] See supra note 31 and accompanying text (defining culture).

[213] See supra notes 31-35 and accompanying text (noting the unique nature of culture).

[214] See supra notes 31-35 and accompanying text (providing examples of various ways in which parents choose to educate their children about culture).

[215] See supra notes 155-171 and accompanying text (discussing different examples of black culture and the element of choice involved in each).

[216] See supra note 31 and accompanying text (providing definitions of race and culture).

[217] See supra notes 155-171 and accompanying text (noting the different varieties of culture).

[218] See supra notes 31-40 and accompanying text (explaining the harmful effects black children experience when placed with white families).

[219] See supra notes 212-245 and accompanying text (analyzing the ambiguity of culture).

[220] See supra note 73 and accompanying text (noting the potential harms from lack of guidance provided to the court regarding culture as a best interests factor).

[221] See supra notes 85-125 and accompanying text (discussing the purpose of ICWA and explaining its application regarding Indian tribes).

[222] See supra note 134 and accompanying text (describing Indians as a political entity because of their unique relationship with the federal government and membership qualifications).

[223] See supra notes 129-133 and accompanying text (explaining a tribe's authority to set membership qualifications).

same political status **[*764]** that Indians do. [224] However, it is this political status which allows the provisions of ICWA to intentionally use culture without violating equal protection: because the provisions are directed at a political group, as opposed to a racial group, a strict scrutiny analysis is not required. [225] If ICWA were applied to black communities, the provisions would no longer be directed at a political group, but a racial one, thereby violating equal protection. [226]

Second, ICWA's procedural devices are generally dependent on an independent tribal court system that can take jurisdiction over the matter when eligibility is established. [227] As sovereign entities within the United States, Indian tribes have their own court system. [228] Black communities simply do not have the equivalent legal structure, thereby making the procedural devices of ICWA ineffective for black communities. [229] Instead, black communities operate within the larger legal and social framework of the white child services system. [230]

While these differences make the entirety of ICWA inapplicable to black communities, because of notable similarities between the two groups, the analogous application of provisions of ICWA to black communities should not be dismissed too quickly. [231] Because both groups preserve unique cultural traditions and see the perseverance of the extended family structure, both Indian tribes and black communities are focused on preserving their culture through children and families. [232] In addition, black communities face the same high rates of child removal as Indian communities do, oftentimes because of a lack of understanding of cultural practices regarding child-rearing within the community, and thus black communities' interests in preventing arbitrary removal and preserving their children's culture is **[*765]** equally at stake. [233] Use of a qualified expert witness can go a long way toward providing the same qualitative cultural protections for black children as Indian children are provided under ICWA. [234]

D. Using ICWA as a Model: How the Qualified Expert Witness Should Be Used in Non- ICWA Child Removal and Placement Decisions to Provide Cultural Guidance

The absence of judicial guidance regarding the cultural best interests factor, combined with the potentially devastating effects that uninformed child removal and transracial placements can have on black children's socialization, and on black communities as a whole, demands a procedural safeguard to truly protect the best interests of these children. [235] The history of using racial and cultural considerations in child placement

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[224] See supra notes 134-135 and accompanying text (discussing the difference between being a member of an Indian tribe and being born into a black community).

[225] See supra notes 50-59 and accompanying text (explaining how equal protection requires a strict scrutiny analysis when race is a dispositive factor in child placement determinations).

[226] See supra notes 50-59 and accompanying text (explaining how racial classifications violate equal protection).

[227] See supra notes 92-93 and accompanying text (setting forth how eligibility is established under ICWA); see also supra note 135 and accompanying text (discussing ICWA as a procedural statute and the need for a tribal court system to take jurisdiction).

[228] See supra notes 128-132 and accompanying text (describing the quasi-sovereign status of Indian tribes).

[229] See supra note 135 and accompanying text (noting the lack of a separate court system within black communities).

[230] See supra note 65 and accompanying text (describing Minnesota's child services system).

[231] See supra notes 121-175 and accompanying text (identifying the similarities between Indian and black communities).

[232] See supra notes 138-175 and accompanying text (describing the shared trait of the extended family and the value both communities place on preserving culture).

[233] See supra notes 172-179 and accompanying text (providing statistics as to the rate of removal of non-white children in Minnesota).

[234] See supra notes 100-117 and accompanying text (discussing ICWA's qualified expert witness).

[235] See supra notes 71-74 and accompanying text (noting child placement decisions must be made in the "best interests" of the child, but the statutes are unclear as to what that means, thereby giving judges a great deal of discretion in applying this

demonstrates several things. First, mandated placement based solely on the race of the child not only makes over-arching, stereotyped generalizations about the effect of race on a child's personal and social development, but it may also raise constitutional equal protection concerns by making race a dispositive factor. [236] Second, complete failure of the judicial system to consider culture altogether has caused detrimental effects to black children by allowing either arbitrary removals from their homes because of cultural misunderstandings, or thoughtless transracial placements into white families. [237] A balance needs to be reached between completely ignoring these considerations and giving them too much weight. [238] This balance should come through a procedural mechanism that judges can use when making best interests determinations to avoid arbitrary or inaccurate decisions based on the judge's own bias that may find its way into a judge's discretionary decision- making. [239]

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ICWA's qualified expert witness concept would provide procedural direction for judges in weighing culture as a best interests factor. First, having a witness who is an expert in the child's culture testify in court, either at the removal stage regarding acceptable cultural parenting practices, or at the termination of parental rights stage as to how a prospective placement is in the child's best cultural interests, will provide guidance for a judge who may not otherwise have knowledge of that particular culture. [240] Second, receiving testimony from such an expert avoids culture becoming a determinative factor in a removal or placement decision, and instead will serve to further clarify how a decision is in the child's best interests while still allowing the court to consider practical factors, such as the ratio of non-whites in the system to non-white placement options. [241] Finally, walking the race/culture line often touches upon political correctness, as prospective parents of a non-white child may wonder whether they should raise the child according to the child's race and culture, raise the child according to the parents' own race and culture, or raise the child racially and culturally neutral. [242] Incorporating expert testimony regarding acceptable cultural parenting practices and a child's cultural needs will serve to educate the judge, the prospective parents (if they are known at the time), and the child protection social worker as to how these needs can be included in the child's socialization and upbringing, and the prospective parents can potentially transform their behavior.

1. What a Non-ICWA Qualified Cultural Expert Witness Would Look Like

The Minnesota Court of Appeals adopted the BIA Guidelines regarding who is eligible as a qualified expert witness under ICWA. [243] These guidelines generally include being knowledgeable about customs among the culture

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standard); see also supra notes 31-40 and accompanying text (detailing how children depend on their families to be racially socialized and how white parents lack the personal experiences to properly do so for black children).

[236] See supra notes 42-48 and accompanying text (noting a strong policy of race-matching caused black children to languish in the child services system, deprived of the benefits of having a permanent family); see also supra notes 50-58 and accompanying text (outlining the potential equal protection concerns of considering race when placing a child).

[237] See supra notes 36-40 and accompanying text (illustrating the negative affects experienced by black children who are placed with white families).

[238] See supra note 48-53, 73-76 and accompanying text (noting the different ways in which culture is used).

[239] See supra notes 71-74 and accompanying text (explaining how the predominant best interests standard offers no statutory guidance to judges in its application, thereby allowing judges to make decisions which may not be actually in the child's best interests).

[240] See supra notes 109-111 and accompanying text (noting how one of the purposes of ICWA was to provide guidance to judges who were otherwise unknowledgeable about Indian culture).

[241] See supra notes 172-176 and accompanying text (providing statistics as to the racial make-up of the Minnesota child welfare system).

[242] See supra notes 36-40 and accompanying text (explaining the struggle white placement parents face when deciding how and to what extent they should teach non-white children about their culture and racism).

[243] See supra note 103-105 and accompanying text (providing the definition of a qualified expert witness according to the BIA guidelines).

pertaining to family structure and child-rearing practices, and having knowledge of prevailing social and cultural standards. [244] The expert can be a member of the culture, a lay person with extensive knowledge of the culture, **[*767]** or a professional with education or experience in the culture. [245] Most importantly, a qualified expert witness is someone who provides a "cultural lens" for those individuals in the child services and judicial systems who are responsible for making the removal and placement decisions. [246] A qualified expert witness's role as a cultural lens has the result of providing information to a court which may otherwise be uninformed about the child's cultural traditions, specific behavioral practices, and cultural beliefs which affect the child's upbringing. [247]

As applied to non-ICWA proceedings, particularly those affecting members of black communities, a qualified expert witness could be a member of the community proven to have extensive knowledge about or experience with the community's child- rearing practices and familial structures, or a sociologist who has studied these issues. [248] He or she could provide testimony regarding specific behaviors, practices, and beliefs exhibited by that culture, and how removal or a prospective placement would best enable the child to continue those traditions despite being raised in a different setting. [249] A non-ICWA qualified expert witness could take many forms and would be case and fact specific, as each child placement matter is unique and requires an individualized decision. [250]

One difference in implementing qualified expert witness testimony into non-ICWA child protection matters compared to ICWA matters is that the Tribal/State Agreement requires participating tribes to maintain a list of qualified expert witnesses, and black communities lack the same central authority to compile such a list. [251] While the lists required by the Agreement do provide some consistency for the courts, because of the varying character of culture and the individualistic nature of child protection matters, not having a list would allow a judge to continue to make individualistic **[*768]** decisions in the best interests of the child. [252] In fact, In re Marriage of Gambla provides an example of how a judge can look at the background and education of a witness, and subsequently qualify the witness to testify regarding the cultural needs of the child based on the child's individual cultural needs. [253]

2. Options for Implementation: Mandatory or At Request?

Unlike an ICWA proceeding where expert testimony is required, making the expert testimony optional at the request of the parent, child protection social worker, child's attorney, or guardian ad litem is the better option in non-ICWA

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[244] See supra note 104 and accompanying text (describing the three ways in which a person can qualify as an expert witness).

[245] See supra note 104 and accompanying text (describing the three ways in which a person can qualify as an expert witness).

[246] See supra note 106 and accompanying text (describing the role of a qualified expert witness).

[247] See supra note 101 and accompanying text (providing examples of testimony given by qualified expert witnesses).

[248] See supra note 104 and accompanying text (describing the three ways in which a person can qualify as an expert witness).

[249] See supra note 101 and accompanying text (providing examples of cultural best interests testimony); see also supra note 106 and accompanying text (explaining the purpose of testimony from a qualified expert witness); see also supra notes 145-171 and accompanying text (explaining cultural traditions and behaviors that exist amongst black culture).

[250] See supra note 67 and accompanying text (requiring individualized determinations in child protection matters).

[251] See supra note 103 and accompanying text (noting the Agreement's requirement of a list of expert witnesses); see also supra notes 134-135 and accompanying text (explaining that one of the differences between Indian tribes and black communities is that black communities lack sovereign status and their own governing authorities).

[252] See supra notes 155-171 and accompanying text (describing the many different ways black culture can be defined); see also supra note 67 and accompanying text (noting that child protection matters require a judge to make an individualistic decision in the best interests of the child).

[253] See supra note 116 and accompanying text (discussing how the judge in a non-ICWA child custody matter qualified a person to provide expert testimony regarding the child's cultural best interest).

child placement matters. [254] There are two ways in which the qualified expert witness could be incorporated into non-ICWA child protection proceedings. One option is that, like in ICWA, having testimony from a qualified expert witness as to how a prospective placement would be in the cultural best interests of the child could be mandatory during any child placement proceeding, or at least when culture was at issue. [255] The other option is that a parent, child protection social worker, child's attorney, or guardian ad litem could request such testimony if he or she was concerned the child was removed from the parents for arbitrary reasons or was in danger of being placed into an environment which would not nurture the child's cultural needs. [256]

If testimony from a qualified expert witness was mandatory, it would be required in every child placement proceeding. [257] However, the purpose of this testimony would be to eliminate the cultural bias that may factor into the decisions of judges who have an extraordinary amount of discretion in juvenile matters. [258] If such testimony were always mandatory, this would mean even when a child protection matter came before the court involving **[*769]** placement parents, children, and a judge all from a similar cultural background, the testimony would still be required. [259] However, in such an instance, the testimony would be arguably worthless, as the judge would presumably be informed about the cultural background from which the child came. [260] Because the purpose would not be served by such testimony, having cultural testimony be mandatory is not the most efficient use of judicial resources. [261]

To increase efficiency, another option could be to make the expert testimony mandatory only when culture is at issue in a child protection proceeding. [262] However, while a statute would be the most logical way to implement this procedural device, it is unclear how it would be worded and put into practice. [263] The language might include provisions stating that when either the judge or prospective placement parents and the child who is the subject of the petition are of different cultural backgrounds, the testimony becomes mandatory. [264] This naturally raises the question of how the court would determine if the cultural backgrounds of these persons were similar or different. [265] Culture is different than race; culture is comprised of things such as tradition, economics, sociology, and ethnic

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[254] See supra note 100 and accompanying text (explaining the mandatory nature of a qualified expert witness to support a petition under ICWA); see also supra note 65 and accompanying text (describing the roles that a parent, child protection social worker, and guardian ad litem have in a child protection matter).

[255] See supra notes 100-114 and accompanying text (discussing the qualified expert witness under ICWA).

[256] See supra note 65 and accompanying text (explaining the Minnesota child protection system).

[257] See supra note 107 and accompanying text (noting how under ICWA, expert testimony is mandatory and failure to provide it is ground for remand).

[258] See supra notes 109-111 and accompanying text (describing the purpose of providing testimony from a qualified expert witness).

[259] See supra notes 172-178 and accompanying text (providing statistics regarding the Minnesota child services system).

[260] See supra note 177 and accompanying text (describing the cultural backgrounds of most juvenile court judges).

[261] See supra note 109-111 and accompanying text (noting the purpose of qualified expert witness testimony).

[262] See supra notes 115-117 and accompanying text (providing an example of how a trial court used expert testimony when culture was an issue in a child placement determination).

[263] See supra notes 115-117 and accompanying text (illustrating how expert testimony can be used by failing to give a statutory example beyond a best interests factor).

[264] See supra note 178 and accompanying text (describing the amount of discretion given juvenile courts).

[265] See supra note 31 and accompanying text (comparing the facially apparent nature of race to the more covert nature of culture).

background, and is not always as facially apparent as race. [266] Such a statute would require the court to determine whether cultural testimony is necessary by forcing unfounded assumptions about a child or a culture about which the court may otherwise know little. [267] Requiring this kind of decision by the court once again undermines the very purpose of including cultural testimony by effectively **[*770]** requiring cultural bias to factor into a decision. [268] Making expert testimony mandatory in all stages of child placement decisions, or even just for instances when culture is at issue, is neither a feasible nor a practical option as it completely contradicts the purpose of the testimony.

The best option is to have the cultural testimony provided upon the request of the parent, child protection social worker, child's attorney, or the guardian ad litem. [269] First and foremost, having the testimony be optional circumvents equal protection concerns. [270] To avoid an equal protection violation, race and culture can only be a factor amid a penumbra of other concerns when making a child placement decision. [271] The equal protection problem arises when these considerations are given too much weight. [272] By having cultural testimony from a qualified expert witness at a party's request, not only does the optional nature of including the procedural device avoid mandating cultural assumptions, but also, the testimony will lend itself to curb bias that may enter a judge's discretion when weighing culture as a best interests factor. [273]

Second, allowing for cultural testimony to be heard on the request of a party aligns with the general character of child placement matters that require individualized determinations. [274] Cultural testimony will enable the judge to avoid having to make the decision as to the necessity of testimony based on generalized observations and stereotypes. [275] The parent who raised the child or the child protection social worker, the child's attorney, or a guardian ad litem who works closely with the parent and child are in the position to best gauge a child's cultural needs and voice concerns as to whether or not removal is necessary or whether a prospective placement may be able meet the child's cultural needs. [276] As parties to the matter, these individuals would be able to make an

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[266] See supra note 31 and accompanying text (establishing how culture is a learned set of behaviors and traditions encompassing a variety of factors); see also supra notes 151-171 and accompanying text (providing examples of Indian and black cultural traits).

[267] See supra notes 50-59 and accompanying text (noting the equal protection concerns that arise when cultural decisions are based on stereotypes); see also supra notes 177-178 and accompanying text (explaining the lack of guidance a judge generally has in making a best interests cultural determination).

[268] See supra note 109 and accompanying text (explaining that the purpose of testimony from a qualified expert witness is to guide a judge in an area in which he or she may otherwise be unfamiliar).

[269] See supra note 65 and accompanying text (identifying these persons as parties to child protection matters and defining their roles).

[270] See supra notes 50-59 and accompanying text (discussing the equal protection concerns that arise when race and culture become mandatory considerations).

[271] See supra note 53 and accompanying text (identifying how race and culture can be considered without violating the Constitution).

[272] See supra note 54 and accompanying text (explaining the problem when race and culture become dispositive in a child placement determination).

[273] See supra note 55 and accompanying text (noting the need for guidance to balance the amount of discretion a judge has when making a cultural determination).

[274] See supra note 67 and accompanying text (explaining how Minnesota law changed in response to equal protection concerns to require individualized determinations as opposed to glossed decisions based on race in juvenile protection matters).

[275] See supra notes 72- 74 and accompanying text (explaining the speculative inferences judges are allowed when making cultural determinations without guidance).

[276] See supra note 65 and accompanying text (describing the role these persons have in a child protection matter).

informed request for cultural testimony **[*771]** when culture concerns are at risk during either a removal or a prospective placement decision. [277]

3. Fitting into the Procedural Timeline: Including Expert Testimony for Removal and Placement Decisions

Like in ICWA child protection matters, there are two stages, which sometimes coincide, at which expert testimony regarding culture would be critical: removal and placement. [278] Testimony is mandatory at these stages to satisfy ICWA's dual purposes of preventing arbitrary child removal because of cultural misunderstandings and, when removal is in fact necessary, ensuring that an Indian child is placed into an environment which will serve the child's cultural needs to guarantee the preservation of Indian culture. [279] Because children in black communities encounter the same dilemmas, expert testimony in non-ICWA cases will likewise be extremely valuable to the court in these same stages. [280]

Expert testimony at the removal stage will be beneficial to the court, the child, and black communities for two reasons. First, the testimony will help the court identify what are acceptable parenting practices within black communities so as to properly decide whether a child protection case needs to be opened, if a child needs to be removed from his or her home or placed into protective supervision at home, or if the child protection petition can be dismissed. [281] Second, the testimony will be beneficial to the child and black communities by hopefully preventing arbitrary removals, as there are times when parenting practices can seem like neglect or abuse, but within that specific culture they are in fact acceptable, if not encouraged. [282] Like the NABSW's concern that high removal rates would lead to cultural genocide **[*772]** of black communities, if children are removed from their families simply due to cultural misunderstandings, the chance of cultural genocide is heightened. [283] Having expert testimony clarify to the court what are acceptable parenting practices according to cultural standards may serve to prevent some unnecessary removals. [284]

If a child protection case is opened but the child is not immediately removed (for example, the child is placed at home with his or her parents under protective supervision of the county), but the court later decides the child must temporarily or permanently be removed and placed with alternate parents, expert testimony will again be beneficial to the same parties. [285] The court will benefit again by hearing testimony as to what the child's cultural needs are

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[277] See supra note 65 and accompanying text (discussing the role these persons have in a child protection matter).

[278] See supra note 70 and accompanying text (noting that culture as a best interests factor must be considered at the removal and placement stages of a child protection proceeding); see also supra note 100 and accompanying text (identifying the point along the procedural timeline of an ICWA child protection matter at which qualified expert testimony is required).

[279] See supra notes 79-111 and accompanying text (discussing the purpose of ICWA and describing how expert testimony serves to further these purposes).

[280] See supra notes 18-49 and accompanying text (discussing the similar problems faced by children in black communities).

[281] See supra note 65 and accompanying text (explaining the different placement options if a child protection case is opened); see also supra notes 109-111 and accompanying text (noting the purpose of the testimony under ICWA); see also supra notes 155-166 and accompanying text (providing examples of different cultural standards within black communities).

[282] See supra notes 112-114 and accompanying text (providing an example of an ICWA child protection case where a child was removed from his or her parent because the court did not understand the Indian concept of extended family child-rearing and instead assumed the child had been abandoned); see also supra notes 147-150 (discussing how black communities also exist within extended family structures).

[283] See supra note 29 and accompanying text (describing the NABSW's concerns regarding how the removal of black children from black families would lead to a cultural genocide).

[284] See supra note 101 and accompanying text (providing examples of how qualified expert testimony has helped clarify cultural concerns to the court).

[285] See supra note 65 and accompanying text (explaining the child protection timeline).

so as to make a decision that best fits those needs, if the placement home is known to the court at this time. [286] The child and the child's community will benefit by ensuring placement into a home that understands the child's cultural needs and will serve to nurture and develop those needs, thereby allowing that culture to live on in the child regardless of child protection involvement. [287]

4. Expert Guidance Would Help Prevent Bias from Entering Judicial Discretion

The most important role a qualified cultural expert witness would play is, rather than evaluating the child's culture in a cultural vacuum, providing an added layer of guidance which demystifies the ambiguity of culture by informing judges who may not have this knowledge themselves. [288] Considering the importance culture has on a child's upbringing and development, giving the court unfettered and indeterminate discretionary power as to how to apply this factor presents grave risks to the child. [289] **[*773]** When the parent, child protection social worker, child's attorney, or guardian ad litem recognizes the possibility of these risks developing, he or she could request the testimony from a qualified expert witness as to what the child's cultural needs are, and how a prospective placement will best serve them. [290] The judge need not base the decision solely on this testimony, as culture remains only one factor among many others, but the testimony will simply serve to guide and educate the judge where the statutes are otherwise silent. [291]

Testimony from a non-ICWA expert witness has successfully been implemented in other states such as Illinois. [292] The Gambla case provides an excellent example of how qualified expert testimony has been used in non-ICWA child placement decisions to guide a judge when weighing culture as a best interests factor. [293] Like the expert brought in to testify in Gambla, a qualified expert witness in non-ICWA cases could be anyone with experience in child-rearing, family development, and the relative culture, and the trial court can use its broad discretion to qualify such a person as an expert. [294] Similarly, like the expert in Gambla who testified about cultural stereotypes and how a parent of the same culture is best able to raise a child to cope with these stereotypes, a qualified expert witness in non-ICWA cases can testify about behaviors and social stigmas specific to the child's culture and how a prospective placement will help the child deal with these issues. [295]

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[286] See supra notes 101, 115-117 and accompanying text (examining how expert testimony has helped the court in deciding how a placement is in the child's best cultural interest).

[287] See supra notes 101, 115-117 and accompanying text (illustrating how expert testimony is beneficial to children).

[288] See supra notes 71-74 and accompanying text (explaining how the predominant best interests standard offers no statutory guidance to judges in its application, thereby allowing judges to make decisions which may not be actually in the child's best interests); see also supra notes 108-111 and accompanying text (noting the need for judicial guidance in child protection matters).

[289] See supra notes 31-39 and accompanying text (explaining the importance of culture on a child's upbringing, yet also illustrating the vague nature of culture).

[290] See supra note 101 and accompanying text (providing examples of testimony given by a qualified expert witness); see also supra note 106 and accompanying text (explaining the purpose of testimony from a qualified expert witness is to provide a cultural lens).

[291] See supra notes 70, 108 & 110 and accompanying text (explaining culture as a best interests factor and the lack of guidance given judges in making such a determination).

[292] See supra notes 115-117 and accompanying text (discussing the court's decision in In re Marriage of Gambla).

[293] See supra notes 115-117 and accompanying text (providing an example of how a marriage dissolution case between a white man and black woman used expert testimony as to which parent would be best able to raise the child according to the child's cultural needs).

[294] See supra note 116 and accompanying text (explaining how the trial court in Gambla found the witness qualified as an expert).

[295] See supra notes 115-117 and accompanying text (detailing the use of the testimony of the expert witness in Gambla).

Expert testimony can be used to make the cultural best interests factor a more guided and meaningful one, transforming the decision into one which is truly in the best interests of the child. [296] Furthermore, the testimony may serve to highlight cultural traditions that are not acceptable in the American legal system, as it cannot be assumed that all cultural traditions benefit the child's welfare or can be practiced in the United States. [297] Finally, **[*774]** expert testimony would not necessarily control the judge's decision, as the judge would still be afforded discretion as to how much weight to give the testimony. [298] Because this testimony would reach a balance by offering guidance as to cultural needs while still affording the court the ability to fairly weigh all the relevant best interests factors, the placement decision would not be delayed or denied based on culture, thereby following current Minnesota law. [299]

5. Hearing Testimony May Make the Placement Parents More Aware of Their Cultural Responsibilities

Beyond the guidance that expert cultural testimony will provide for judges, expert testimony may make prospective placement parents more aware of the child's cultural needs. When white parents receive a black child into their custody, both the child and parents will inevitably face many issues. [300] These issues include: whether the parents should raise the child according to the parent's white cultural background or according to the child's cultural background; whether these parents should teach the child about racism or not; and to what extent the parents should teach the child about the values of race and culture, versus raising the child with a neutral perspective as to these social constructs. [301] These issues raise the tone of political correctness, as parents may wonder if they, themselves, are being racist by teaching the child he or she is different simply because of where the child came from. [302]

Having an expert witness testify regarding what are culturally acceptable parenting practices or what are the cultural needs of the child will expose these parents, or at least the social worker placing the child, to these ideas at an early stage in the placement decision, thereby giving all parties involved a better grasp as to the difficulties they and the child will potentially face, and how to minimize these difficulties. [303] Through this testimony, the **[*775]** child's caregivers will be exposed to specific cultural traditions, behavioral practices, and familial needs specific to that child, and then will be able to identify their own strengths which will enable the caregivers to provide these needs. [304] Furthermore, this testimony will serve to put the caregivers on notice as to the possible struggles the child will

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[296] See supra notes 115-117 and accompanying text (noting how the judge in Gambla was able to make an informed decision regarding culture as a factor through the use of testimony provided by the expert).

[297] See supra note 162 and accompanying text (providing an example of a cultural tradition whereby children are married at the age of fourteen, which contradicts Minnesota law).

[298] See supra notes 115-117 and accompanying text (describing how the judge in Gambla used the expert testimony); see also supra note 108 and accompanying text (explaining the discretion a trial judge has in weighing expert testimony).

[299] See supra notes 66-72 and accompanying text (discussing current Minnesota child placement law).

[300] See supra notes 5, 31-40 and accompanying text; see also supra notes 31-40 and accompanying text (explaining the difficulties non-white children placed into white homes face).

[301] See supra notes 40-44 and accompanying text (illustrating the issues white parents who raise non-white children inevitably face).

[302] See supra note 40 and accompanying text (explaining the balancing act a white parent raising a non-white child undergoes when deciding whether or not to teach the child about racism).

[303] See supra note 66 and accompanying text (explaining the recruitment of placement parents); see also supra notes 115-117 and accompanying text (providing an example of how expert testimony as to a child's cultural needs raised awareness about those needs).

[304] See supra notes 100-117 and accompanying text (describing the qualified expert witness and the role and purpose of the witness's testimony); see also supra notes 151-171 and accompanying text (providing examples of cultural traditions of Indians and the black community).

face in the future as he or she grows in a diverse familial setting surrounded by a social world which may not understand that setting. [305]

IV. CONCLUSION

Having the option of including testimony from a qualified expert witness at a child protection hearing will not serve to entirely eliminate the ambiguity of culture. Nor will the court always be enabled through this testimony to make perfect decisions as they relate to a child's best cultural interests. The individualistic nature of these decisions combined with the varying faces of culture make perfection by the court an impossible standard. However, at one of the most sensitive times in the judicial process-when a child is being removed either temporarily or permanently from his or her family-having this testimony available serves to ensure that attempts are made to knowledgably preserve the child's culture.

Hearing expert cultural testimony will truly serve the child's best interests. Cultural traditions and practices can be laden with mystery, unknown to those not experienced in that culture. The white judicial system must begin to recognize different cultural practices and family structures that exist in black communities. It is not in the child's best interests to run the risk the child will either be arbitrarily removed from his or her parents because of cultural misunderstandings or will be raised ignorant of his or her culture because of an uninformed placement decision. Allowing cultural testimony from an expert witness will serve to guide the court in weighing culture as a factor and help alleviate these risks to black children.

These children will likely still ask the questions like "what am I?" or look at their family and ask, "what is going on here?" However, having expert cultural testimony is a step toward making all parties involved in child removal and placement decisions more aware of an area of the law that is silent about issues which have potentially detrimental effects on already distraught children and their respective cultural communities. It is probable these children will eventually still face struggles due to social stigmas, but at least the next time these children or their placement parents are asked the **[*776]** snide question, "Isn't it awful?" both parent and child will be better prepared to respond.

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[305] See supra notes 1-6 and accompanying text (explaining the struggles a non-white child raised by white parents may face due to social stigmas).