

**DANGEROUS GAMBLE: CHILD SUPPORT, CASINO  
DIVIDENDS,  
AND THE FATE OF THE INDIAN FAMILY**

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## I. INTRODUCTION

When Blue Jay Jumper and Carla Lena Cypress were teenagers they fell in love. By nineteen they were parents,<sup>1</sup> by twenty-five they had four children,<sup>2</sup> and by thirty they were in court fighting over custody and child support. In Carla's March 2006 Petition for Paternity she sought residential responsibility for their four children as well as "retroactive, temporary and permanent child support" from Blue Jay.<sup>3</sup> Support requests like Carla's are hardly unique. However, what was different about Carla's request is that even though there was no question that Blue Jay could afford to make these payments, her request was denied.<sup>4</sup>

Carla and Blue Jay are both members of the Florida Seminole tribe,<sup>5</sup> one of the wealthiest Indian tribes in the country.<sup>6</sup> As a result of their Seminole membership, both Carla and Blue Jay are well off. Each month they receive tribal dividend checks of more than ten thousand dollars.<sup>7</sup> In addition, each of their children receives

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1. Telephone Interview with Michael Hymowitz, Attorney, Braverman & Hymowitz (May 18, 2009).

2. *Id.*; see also Brief of Appellee at 1, *Cypress v. Jumper*, 990 So. 2d 576 (Fla. Dist. Ct. App. 2008) (No. 4D07-3336).

3. Brief of Appellant at 1, *Cypress*, 990 So. 2d 576 (No. 4D07-3336).

4. See *Cypress*, 990 So. 2d at 576.

5. *Id.*

6. Sally Kestin et al., *The Seminole Tribe is Suddenly Wealthy, But Little Oversight Means Potential Abuses*, S. FLA. SUN-SENTINEL, Nov. 25, 2007, <http://www.sun-sentinel.com/news/local/southflorida/sfl-semday1newsbnov25,0,5727424.story>.

7. *Cypress*, 990 So. 2d at 576. Such dividends are their share of the profits from seven tribally-owned casinos including two Hard Rock hotels and casinos which generated more than one billion dollars of revenue in 2007. Amy Driscoll & Mary

monthly dividend checks as well.<sup>8</sup> Blue Jay objected to Carla's support petition based on his children's receipt of these dividends.<sup>9</sup> Blue Jay contended that he should not be required to pay any child support<sup>10</sup> because the tribal distributions were "more than adequate to meet the needs of the children."<sup>11</sup> Both the trial court and the court of appeals agreed.<sup>12</sup>

Specifically, in *Cypress v. Jumper*,<sup>13</sup> the Florida Court of Appeals upheld the trial court's decision finding that because the Jumper children received significant per capita distributions as a result of their membership in the Seminole tribe, additional child support contributions from Blue Jay were unnecessary.<sup>14</sup> Accordingly, the court relieved Blue Jay of his entire child support obligation.<sup>15</sup>

The *Cypress* court was the first court to reach a decision regarding the appropriateness of child support for Indian children receiving casino dividends, but it is a decision that will likely be followed by courts throughout the country. Although issues of child support are domestic matters and as such are arguably internal matters for a tribe to address, Indian child support cases are routinely heard in state courts.<sup>16</sup> Further, for a variety of different reasons, the number of

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Ellen Klas, *Federal Probe Won't Affect Seminole Deal*, MIAMI HERALD, Nov. 27, 2007, at 1B.

8. *Cypress*, 990 So. 2d at 576 (noting that each child also receives more than \$10,000 per month, however, \$7,600 is put into trust and only the remaining \$2,625 is sent to the child). Clearly, the amount the children receive is substantial, and probably should have supported a significant reduction in Blue Jay's child support obligation. However the court entirely relieved Blue Jay of any financial responsibility to his children. It is this decision, which the article addresses, rather than the question of whether it is proper to consider children's income as part of the child support calculus in general.

9. *Id.*

10. Brief of Appellee, *supra* note 2, at 4. According to the Florida child support guidelines, Blue Jay's presumptive child support obligation is \$1,930.52. *Id.*

11. *Id.* at 2.

12. *Cypress*, 990 So. 2d at 576.

13. *Id.*

14. *Id.* at 577.

15. *Id.*

16. In *Fisher v. District Court*, 424 U.S. 382, 389–91 (1976), the Supreme Court recognized that Indian tribes have exclusive authority to regulate the domestic relations and affairs of both member and non-member Indians arising in Indian country. However, despite this holding, state courts have frequently exercised jurisdiction over child support actions regarding Indians. See, e.g., *County of Inyo v. Jeff*, 277 Cal. Rptr. 841, 845–46 (Ct. App. 1991) (concluding that state court had subject matter jurisdiction over child support matter regardless of the fact that both the defendant-mother and custodian-grandmother were Indians); *First v. State ex rel. LaRoche*, 808 P.2d 467, 471 (Mont. 1991) (finding the state court had subject matter jurisdiction over the state's action to enforce a child support order against an Indian

such cases heard in state courts is likely to increase.

Gaming has increased tribal membership,<sup>17</sup> and it has also increased tribal wealth. This means that there are more people to enter into relationships and more money to fight about when such relationships end. Consequently, one can expect to see more of these types of cases. Second, greater membership means that the reservations may not have enough housing to accommodate all members who wish to reside there.<sup>18</sup> Greater wealth means members have more freedom to decide where to live, and many choose to live off the reservation.<sup>19</sup> The location of members' residences is important because members living off the reservation are more likely to fall under state jurisdiction. Third, intermarriage is an increasingly frequent occurrence among wealthy tribes.<sup>20</sup> *Cypress* involved two Indian parents, but it is likely that a growing number of dividend child support cases will involve only one Indian parent.<sup>21</sup> As with domicile, state versus tribal jurisdiction is intimately connected with issues of ethnicity and intermarriage. These changes may greatly impact a tribe's ability to

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parent residing on the reservation, and emphasizing the importance of the AFDC program); *Harris v. Young*, 473 N.W.2d 141, 145–46 (S.D. 1991) (finding concurring tribal and state court jurisdiction over a non-Indian's petition to modify an out-of-state child custody decree, based on a change of circumstances occurring on the reservation where the Indian mother and child lived); *State ex rel. Joseph v. Redwing*, 429 N.W.2d 49, 51 (S.D. 1988) (determining that the state court had subject matter jurisdiction over child support action where both parents were Indians and where previous orders had been entered in tribal court, based on the minor's "inherent right" to parental support). *But see* *Byzewski v. Byzewski*, 429 N.W.2d 394, 397, 399 (N.D. 1988) (finding the exercise of jurisdiction would infringe on tribal sovereignty).

17. Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 255 (2007) (describing how gaming increased tribal membership rolls from zero to more than 600 but also noting that although many members live on the reservation, many others simply live "near" it).

18. JESSICA R. CATTELINO, *HIGH STAKES: FLORIDA SEMINOLE GAMING AND SOVEREIGNTY* 156 (2008).

19. *Id.*

20. In fact, amongst tribes with significant casino operations there is the widespread belief that intermarriage is likely to increase. "Seminole worry that casino wealth will lead to 'inappropriate' reproduction if outsiders marry into the Tribe or have children with tribal members as a way to take advantage of Seminoles' prosperity." *Id.* at 90. It is rumored among the Seminole that many of their non-Indian neighbors "counsel[] their children on the financial benefits of marrying a Seminole." *Id.* at 91.

21. According to the 2000 U.S. census, more than 1.6 million Indians reported themselves as racially mixed. U.S. CENSUS BUREAU, *OVERVIEW OF RACE AND HISPANIC ORIGIN*, 8 (2000), available at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.

assume jurisdiction over child support cases.<sup>22</sup> Moreover, in Public Law 280 states, of which Florida is one, state assumption of jurisdiction in child support actions is already common.<sup>23</sup> In many Public Law 280 states, the state's assumption of criminal and civil jurisdiction is so pervasive that tribes, including the Florida Seminoles, have chosen not to create their own judicial system.<sup>24</sup> For all of these reasons, state assumption of jurisdiction in child support cases is likely to grow.<sup>25</sup> It is likely that *Cypress* is simply the first of many Indian

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22. See generally WILLIAM CANBY, FEDERAL INDIAN LAW IN A NUTSHELL 251–52 (5th ed. 2009) (charting the different jurisdictional results in civil litigation and divorce cases depending on the ethnicity of the parties and the source of the claim/domicile of the parties).

23. See 94-95 Op. Att'y Gen. (1994), available at <http://myfloridalegal.com/ago.nsf/Opinions/385CA4AFBD9F33368525622000722E64> (explaining the state's jurisdiction over the Seminole Indian reservation). See, e.g., Becker County Welfare Dep't v. Bellcourt, 453 N.W.2d 543, 544 (Minn. Ct. App. 1990). But see State ex rel. Dep't of Human Servs. v. Whitebreast, 409 N.W.2d 460, 464 (Iowa 1987) (recognizing that federal and tribal interests preempt state law in areas of tribal regulation and taxation).

24. See Seminole Tribe of Florida, available at <http://www.semtribe.com/Government/Today.aspx> (noting that “[t]he Tribe does not have a court system; legal and criminal matters not resolved on the community level are referred to the proper state or federal authorities”). However, it should also be noted that the ICWA allows tribes subject to Public Law 280 to “reassume” jurisdiction over child custody matters upon a tribal petition and approval by the secretary. 25 U.S.C. § 1918 (2006). There is no indication that the Seminole tribe ever attempted to assert jurisdiction over this case, and given their lack of a judicial system, their ability to decide such cases would be severely limited. However, it should be recognized that even in P.L. 280 states tribes may be able to take jurisdiction over such cases, limiting the importance of the *Cypress* decision. See Fisher v. District Court, 424 U.S. 382, 389–91 (1976).

25. The facts of *Cypress v. Jumper* are not particularly unique. According to Michael Hymowitz, the lawyer who represented Carla Cypress, Carla's case is one of three Seminole child support cases his firm is currently handling. Interview with Michael Hymowitz, *supra* note 1. Whether such petitioners would choose to bring their cases in tribal courts if that was an option remains to be seen. Further, one can expect these facts will become even more common as more and more tribes establish gaming enterprises. “According to a recent report from the National Indian Gaming Commission, revenues from over 400 Indian casinos brought in over \$22.6 billion in 2005, representing a 315% increase in the last ten years.” Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247, 255 n.44 (2007). See also *Lincoln v. Saginaw Chippewa Indian Tribe of Michigan*, 967 F. Supp. 966, 967 (E.D. Mich. 1997) (acknowledging that tribe distributed gaming revenue to its members). Similarly, dividend payments now total millions of dollars. See, e.g., *Smith v. Babbitt*, 100 F.3d 556, 557 (8th Cir. 1996) (noting that complaint alleged that an Indian tribe disbursed four hundred thousand dollars a year in gaming revenues to each tribal member); *Saratoga Co. Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1069 n.4 (N.Y. 2003) (Read, J., dissenting) (noting that Oneida Indian Nation's casino payroll exceeded seventy million dollars). See also

child support cases that will be decided by state courts and will significantly impact these future cases.

In this article, I examine the consequences of permitting casino dividends to eliminate an Indian parent's child support obligation.<sup>26</sup>

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Press Release, National Indian Gaming Commission, National Indian Gaming Commission Announces Indian Gaming Revenue for 2005 (July 11, 2006), *available at* <http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/pressreleases/nigc1gamingrevenues2005.pdf>.

It should be noted, however, that although many tribes have been able to profit from Indian gaming and thus end centuries of poverty, many others have not been able to benefit from gaming and thus still live in some of the poorest, most destitute conditions in the United States. Gaming is not an option for all tribes. Some tribes, such as those in Utah, are prohibited from operating casinos since all gaming in the state is outlawed. Eric Henderson, *Ancestry and Casino Dollars in the Formation of Tribal Identity*, 4 RACE & ETHNIC AN. L.J. 7, 12 n.70 (1998). Other tribes, such as the Navajo, made the personal choice not to engage in gaming. Felicia Fonseca, *1st Navajo Gaming Chief Say Tribe Can Still Cash In*, NEWS FROM INDIAN COUNTRY, Sept. 2007, *available at* [http://indiancountrynews.net/index.php?option=com\\_content&task=view&id=1437&Itemid=33](http://indiancountrynews.net/index.php?option=com_content&task=view&id=1437&Itemid=33) (noting that the tribe only approved gaming in 2004). Lastly, the location of many tribal reservations precludes the possibility of profitable gaming enterprises. See Alan P. Meister et al., *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375, 388 (2009); see also Heidi McNeil Staudenmaier & Anne W. Bishop, *The Three-Billion-Dollar Question*, 57 DRAKE L. REV. 323, 327-28 (2009) (discussing the Mohawk attempt to build casino in Catskills and the multiple legal impediments they have faced in their efforts to take non-tribal land into trust).

26. As numerous other scholars have noted, tribes are still adjusting to the consequences of their newly acquired wealth. This article is not the first to point out the unforeseen and potentially negative consequences of tribal gaming. Other scholars have explored gaming's arguably detrimental influence on tribal culture, traditions, and membership. Gaming has led to dramatic increases in tribal membership rolls and corresponding demands for tribal benefits, causing many tribes to reconsider their membership and benefits eligibility criteria in less than egalitarian ways. Kunesh, *supra* note 17, at 256 n.46 (noting that fewer members means bigger individual payouts); see also Eric Reitman, *An Argument for the Partial Abrogation of Federally Recognized Indian Tribes' Sovereign Power Over Membership*, 92 VA. L. REV. 793, 817 (2006). Eric Reitman has written:

When a tribe that is particularly small and/or has recently moved from categorical poverty to casino-related prosperity makes guideline changes that remove native-born citizens from the tribal rolls, or suddenly and drastically raises the bar to putative citizens, the changes should probably be regarded with a degree of skepticism. The inference is almost inescapable that such changes have less to do with preserving the cultural integrity of an ancient nation than with minimizing the payout denominator.

*Id.* Professors Light and Rand have also argued that "IGRA's gaming revenue provisions . . . create a very real incentive for tribes to limit their members . . . . Obviously, the fewer members, the bigger the pot." Kathryn R. L. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 421 (1997). For a comprehensive study of contemporary tribal membership issues, including the impact of gaming, see Carole

In Part II, I look at the case law permitting the consideration of the child's income and when a child's income may be used for a parent's benefit. I conclude that even though the consideration of a child's income when calculating support is statutorily permissible, the case law demonstrates that in practice such uses are rarely granted. In Part III, I argue that there is no legal reason to depart from these well-established precedents simply because a case involves Indian parents. I then attempt to explain why the court ignored these precedents and instead determined it was compelled to grant Blue Jay's motion. In Part IV, I explore the historical and legal perceptions of the Indian family and conclude that the *Cypress* court's decision was a result of this history and not the law. I argue that the court's decision is based on historical negative stereotypes regarding Indian families and that its decision perpetuates these stereotypes and will negatively impact Indian families. In Part V, I examine the current state of the Indian family and why money cannot easily solve many of the problems facing Indian families. In Part VI, I examine the importance of child support and argue that the benefits of child support extend beyond mere support. I explain why the *Cypress* decision, which denies these benefits to Indian children, can be expected to continue to harm the Indian family.

## II. THE ROLE OF CHILDREN'S INCOME ON CHILD SUPPORT

The *Cypress* court explained its decision by stating that because the children's distribution checks could clearly meet their "needs . . . it would be inappropriate for the Court to assess child support."<sup>27</sup> The court of appeals then affirmed the trial court's

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Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002). Goldberg argues that:

[g]aming success magnifies [membership] conflicts, because it presents Indian nations with the choice between per capita distribution of revenues and investment in tribal infrastructure and services, primarily benefiting those living on or near the reservation. Thus, those currently enrolled may have an incentive to exclude potential citizens who are unlikely to live and participate within the reservation community. Furthermore, longtime contributors to reservation life may view more recent applicants for citizenship as securing windfalls, regardless whether these applicants demonstrate willingness to return to the reservation. In the view of existing citizens, the proper solution may seem to be closing the rolls.

*Id.* at 465 (citation omitted). Despite significant discussion of these gaming repercussions, there has been little discussion of gaming's impact on the Indian family.

27. Brief of Appellant at 5, *Cypress v. Jumper*, 990 So. 2d 576 (Fla. Dist. Ct. App.

decision based on the fact that the Florida child support statute permits courts to consider the child's income when calculating support obligations.<sup>28</sup> However, neither courts' explanation is satisfactory. A quick search of the case law reveals that the Florida child support statute is far from unique. In fact, similar versions are present in nearly every state.<sup>29</sup> Numerous courts have heard chal-

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2008) (No. 4D07-3336).

28. FLA. STAT. § 61.30(11)(a)(2) (West 2005) (allowing consideration of "[i]ndependent income of the child, not to include moneys received by a child from supplemental security income").

29. See, e.g., ALA. R. JUD. ADMIN. 32(A)(1)(d) (permitting consideration of "[a]ssets of, or unearned income received by or on behalf of, a child or children"); ALASKA R. CIV. P. 90.3(c)(1) cmt. VI(B) (listing "significant income of a child" as an exception to the normal support calculus). In fact only North and South Dakota do not consider a child's income in child support calculations. See N.D. ADMIN. CODE § 75-02-04-01 (2009). But see ALA. R. JUD. ADMIN. 32(A)(1)(d) (stating "assets of, or unearned income received by or on behalf of, a child or children" as a reason for deviation from the guidelines); ALASKA R. CIV. P. 90.3(c)(1) (explaining that child support may be modified for good cause if an unjust result would otherwise occur. The rule states "good cause may include a finding that unusual circumstances exist which require variation of the award in order to award an amount of support which is just and proper for the parties to contribute toward the nurture and education of their children." Further, the commentary to the rules identifies "significant income of a child" as an unusual circumstance); ARIZ. REV. STAT. § 25-320(D) (Supp. 2009) ("The supreme court shall base the guidelines and criteria for deviation from them on all relevant factors, including . . . the financial resources and needs of the child."); ARK. CODE ANN. § 9-14-106(a)(1)(A) (2009) ("In determining a reasonable amount of support initially or upon review to be paid by the noncustodial parent or parents, the court shall refer to the most recent revision of the family support chart," which takes into consideration any other income or asserts available to support the child); COLO. REV. STAT. § 14-10-115(2)(b)(I) (West Supp. 2009) (including the "financial resources of the child" in determining the child support obligation); CONN. GEN. STAT. § 46b-84(d) (West 2009) ("In determining whether a child is in need of maintenance . . . the court shall consider . . . amount and sources of income, . . . estate and needs of the child."); DEL. CODE ANN. tit. 13, § 514(1) (2009) (setting out that in determining child support, the court shall consider "income, including the wages, and earning capacity of the parties, including the children"); FLA. STAT. ANN. § 61.30(11)(a)(2) (West 2005) ("The court may adjust the total minimum child support award . . . based upon . . . [i]ndependent income of the child, not to include moneys received by a child from supplemental security income."); GA. CODE ANN. § 19-6-15(b)(8)(L) (Supp. 2009) (allowing discretion to the court or jury for "nonspecific deviations"); IDAHO CODE ANN. § 32-706(1)(a) (Supp. 2009) (the court may consider all relevant factors, including "the financial resources of the child"); 750 ILL. COMP. STAT. ANN. 5/505(a)(2)(a) (West 2009) (allowing the court to consider "the financial resources and needs of the child" when determining the proper application of the child support guidelines); KAN. STAT. ANN. § 38-1121(f)(7) (Supp. 2008) (stating that in a child support determination, "a court shall consider all relevant facts including, but not limited to . . . [t]he financial resources and earning ability of the child"); KY. REV. STAT. ANN. § 403.211(3) (LexisNexis Supp. 2009) (allowing an "adjustment of the guideline award if based upon one (1) or more of the following criteria: . . . (d) The

independent financial resources, if any, of the child or children”); LA. REV. STAT. ANN. § 9:315.7(A) (2008) (“Income of the child that can be used to reduce the basic needs of the child may be considered as a deduction from the basic child support obligation.”); ME. REV. STAT. ANN. tit. 19-A, § 2007(3)(d) (Supp. 2009) (“Criteria that may justify deviation from the support guidelines” include “the financial resources of the child.”); MINN. STAT. § 518A.43 subd. 1(2) (2008) (“[T]he court must take into consideration the following factors in setting or modifying child support . . . the extraordinary financial needs and resources, physical and emotional condition, and educational needs of the child to be supported.”); MISS. CODE ANN. § 43-19-103(b) (2004) (stating that exceptions to the child support guidelines include “[i]ndependent income of the child”); MO. ANN. STAT. § 452.340(1)(1) (West Supp. 2009) (stating that relevant factors in determining child support include “[t]he financial needs and resources of the child”); MONT. CODE ANN. § 40-4-204(2)(a) (2009) (“The court shall consider all relevant factors, including: the financial resources of the child.”); N.J. STAT. ANN. § 2A:34-23(a)(7) (West Supp. 2009) (stating that the court shall consider “[i]ncome, assets and earning ability of the child” in determining child support); N.Y. DOM. REL. LAW § 240(f)(1) (McKinney Supp. 2010) (stating that the court shall consider “[t]he financial resources of the custodial and non-custodial parent, and those of the child”); N.C. GEN. STAT. § 50-13.4(c) (2009) (“Payments ordered for the support of a minor shall be in such amount as to meet the reasonable needs of the child . . . having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties . . .”); OHIO REV. CODE ANN. § 3119.23(F) (West 2005) (allowing the court to consider “[t]he financial resources and the earning ability of the child” in determining a deviation from the guidelines”); R.I. GEN. LAWS § 15-5-16.2(a)(1) (Supp. 2008) (stating that among the factors the court shall consider are “the financial resources of the child”); S.C. CODE ANN. § 63-17-470(c)(10) (2008) (stating that possible reasons for deviation from the guidelines include “significant available income of the child or children”); TEX. FAM. CODE ANN. § 154.123(b)(3) (Vernon 2008) (“In determining whether the application of the guidelines would be unjust or inappropriate under the circumstances, the court shall consider evidence of all relevant factors, including . . . any financial resources available for the support of the child.”); VT. STAT. ANN. tit. 15, § 659(a)(1) (2002) (the court may consider the “financial resource of the child” when adjusting the amount of child support); VA. CODE ANN. § 20-108.1(B)(8) (Supp. 2009) (in determining whether to deviate from the guidelines, the court shall consider, among other factors, “[i]ndependent financial resources of the child or children.”); WASH. REV. CODE ANN. § 26.19.075(1)(a)(vii) (West Supp. 2010) (“Extraordinary income of a child” is a reason to deviate from the standard guidelines); WIS. STAT. ANN. § 767.511(1m)(a) (West 2009) (listing the “financial resources of the child” as a factor to consider when deviating from the standard); *In re Marriage of Drake*, 62 Cal. Rptr. 2d 466, 479 (Ct. App. 1997) (“[I]n suitable circumstances, the trial court may adjust parental support obligations in light of a child’s independent income.”); *Nabarrete v. Nabarrete*, 949 P.2d 208, 211 (Haw. Ct. App. 1997) (“[A] child’s income may reduce the reasonable needs of the child.”); *Drummond v. Maryland*, 714 A.2d 163, 171 (Md. 1998) (“[T]he receipt of income by a child may be a relevant factor in determining whether ‘the application of the guidelines would be unjust or inappropriate.’”) (citing Md. CODE ANN. FAM. LAW § 12-202 (LexisNexis Supp. 2009)); *Pedersen v. Pedersen*, 1 P.3d 974, 974 (N.M. Ct. App. 2000) (“[T]he child’s income (whether from Social Security, his own earnings, from a trust established by grandparents or other sources) is relevant solely as a ground for deviating from the guidelines . . .”).

lenges almost identical to *Blue Jay's*, yet until *Cypress*, courts have had little difficulty denying them.

Prior to the *Cypress* decision, courts appear to have universally rejected the idea of permitting a child's income to eliminate a parent's support obligation.<sup>30</sup> Such decisions are based on the conclusion that child support is a parental duty and that requiring such support is in the child's best interest. These decisions also reflect the courts' aversion to permitting parents to exploit their children for financial gain. Such reasoning appears unassailable, yet *Cypress* chose not to adopt it.<sup>31</sup>

Florida, like most states, allows a child's income to be considered when calculating child support obligations.<sup>32</sup> However, *Cypress* appears to be the first case to entirely relieve a parent of his or her support obligations due to the child's income.<sup>33</sup> One of the curious aspects of the trial court's opinion is that the trial court describes its decision as unfortunate but unavoidable. The trial judge explained his decision, stating:

This court strongly wishes to assess child support against the Respondent but is unable to come up with any reasonable amount of child support that is not covered by the amount of money which the children receive from the Seminole tribe. In other words, under no stretch of the imagination are the children's [sic] needs anywhere near the \$2625 that each receives per month. . . . Regretfully, at this time it would be inappropriate for the Court to assess child support.<sup>34</sup>

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30. See, e.g., *Fitzgerald v. Fitzgerald*, 362 A.2d 889, 892 (Conn. 1975).

31. *Cypress*, 990 So. 2d at 576.

32. See FLA. STAT. § 61.30(11)(a)(2) (West 2005).

33. *Cypress*, 990 So. 2d at 576. In *In re Wolfert*, the father made the argument that "he should be allowed to use a portion of the income from the children's funds to reduce his court ordered support obligation," but neither he nor the court were able to find authority to support this position. *In re Wolfert*, 42 Colo. App. 433, 435 (1979). Similarly, *Blue Jay* cites no authority for this position other than the Florida statute permitting courts to consider the income of the child when fashioning support award. See Brief of Appellee, *supra* note 2. *But see* *M.S. v O.S.*, 176 Cal. App. 4th 548, 561 (2009) (The court held that the father's bonus income from his Indian tribe could be included in his gross annual income for purposes of determining child support, but that the tribe's payment of the father's attorney fees could not be included in the father's gross annual income for purposes of child support. The court did not consider the question as to whether the father's Indian status and his children's presumable receipt of tribal dividends exempts his from child support obligations).

34. Brief of Appellant, *supra* note 3, at 5.

The court's statements reveal that it incorrectly focused on the amount of support rather than the source of such support. The question the court should have addressed was not whether the children's monthly expenses exceeded \$2625, but rather whether they should have had to use their own money to meet these expenses. Although the trial court states there is no theory under which it could have required Blue Jay to pay support, there are in fact some very well established theories. In the non-Indian context, courts have repeatedly required non-custodial parents to pay child support regardless of their children's independent income.<sup>35</sup>

A. *Duty of Child Support*

It is well established that parents have a legal duty to support their children. William Blackstone described this obligation as a "principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world."<sup>36</sup> According to Blackstone, "[b]y begetting them therefore, they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved."<sup>37</sup> Under this definition of support, a parent's duty to provide for their child is not contingent on the child's ability or inability to support herself, but instead stems from the parent's obligation to the child as her parent.<sup>38</sup>

Initially, the *Cypress* court appeared to have a similar understanding of the source and scope of a parent's support obligation. The court stated that "clearly under no circumstances . . . [is] it appropriate for a parent not to pay any child support."<sup>39</sup> However, despite this

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35. See, e.g., *Fitzgerald v. Fitzgerald*, 362 A.2d 889, 892 (Conn. 1975).

36. 1 WILLIAM BLACKSTONE, COMMENTARIES 343 (Wayne Morrison ed., 2001).

37. *Id.* While one may question the voluntariness of this contract, Blackstone's is a widely accepted explanation for the duty of support. See, e.g., *Drummond v. Maryland*, 714 A.2d 163, 172 (Md. 1998) (refusing to grant a father's child support request by finding that "[t]o relieve a parent entirely of his or her support obligation because the child receives a benefit to which he or she is entitled from some other source would not ordinarily be consistent with this fundamental principle [the Blackstonian conception] of family law").

38. In fact, if this duty is contingent on anything, it is whether the parents have the ability to support the child rather than whether the child has the ability to support herself. See 59 AM. JUR. 2D *Parent and Child* § 63 (2009) (explaining that "[s]upport liability should not ordinarily be affected by the earnings or the amount of the separate estate of a minor child, unless it is established that the parents are unable to support the child adequately").

39. Brief of Appellant, *supra* note 3, at 5.

initial reaction, the court ultimately relieved the father of his entire child support duty.<sup>40</sup> The court's departure from its initial reaction, as well as the fact that other courts have not reached the same conclusion regarding the effect of children's income, indicates there may be more influencing the trial court's decision than first appears.<sup>41</sup>

*B. Case Law Concerning Children's Income*

The analysis conducted by other courts considering the impact of a child's independent income differs from *Cypress* in two important ways. First, these courts nearly uniformly recognize the Blackstonian concept of support as an unconditional parental duty stemming from the parent-child relationship and second, most of these decisions include a best interest of the child analysis, in which the court considers whether a shifting of the burden of support to the children would be in their best interest.<sup>42</sup> The *Cypress* court failed to take either one of these steps.<sup>43</sup>

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40. *Id.*

41. Interestingly, many courts have found this duty so strong that they will even enforce it against incarcerated parents, who do not have the ability to pay. The reasoning behind these decisions is the belief that "[c]riminal conduct of any nature cannot excuse the obligation to pay support." *Topham-Rapanotti v. Gulli*, 674 A.2d 650, 653 (N.J. Super. Ct. Ch. Div. 1995); *see also* *Davis v. Vance*, 574 N.E.2d 330 (Ind. 1991); *In re Marriage of Phillips*, 493 N.W.2d 872 (Iowa Ct. App. 1992); *Mooney v. Brennan*, 848 P.2d 1020 (Mont. 1993); *Noddin v. Noddin*, 455 A.2d 1051 (N.H. 1983); *Koch v. Williams*, 456 N.W.2d 299 (N.D. 1990). Similarly, courts have been unwilling to suspend this duty even when children have been removed from parental custody and are receiving state support. *See, e.g., In re Katherine C.*, 890 A.2d 295, 305 (Md. 2006) (explaining that parents "have a responsibility and obligation to provide child support if they are capable of doing so" and that the "obligation [to support one's child] does not disappear when a child is adjudicated CINA and removed from parental custody and care").

42. The Connecticut Superior Court explained this two-step analysis by stating, "A parent has both a statutory and common law duty to support his minor children [because] the primary duty of support of minor children, even those owning property, falls on their parents . . . [a]bsent a finding of reasonable necessity for such a drastic dislocation and absent a finding that it would be in the children's best interest to do so." *Gary v. Butler*, No. FA010165427S, 2005 WL 589838, at \*2 (Conn. Super. Ct. Feb. 3, 2005).

43. For example, in *Fitzgerald v. Fitzgerald*, 362 A.2d 889, 892 (Conn. 1975), the Supreme Court of Connecticut explained that "[t]he primary duty of the parent to support his minor children if he is able to do so, is not relieved by the fact that they may have income from a trust created in their favor." *See also In re Quat v. Freed*, 254 N.E.2d 765, 765 (N.Y. 1969) ("We agree with the appellate Court's determination that the father should not have been credited for the withdrawals from the children's trust fund . . . . The fact that the children had this fund effects no diminution of the father's primary obligation to support his children."); *Seigel v. Hodges*, 15 A.D.2d

C. *The Hoak Case*

The Iowa Supreme Court's decision in *In re Hoak*<sup>44</sup> provides a particularly illuminating comparison given its factual similarities with *Cypress*. In 1983 the Hoaks were a married couple that had decided to divorce.<sup>45</sup> During their marriage, the Hoaks had become quite wealthy. The father, James Hoak, was one of the founders of a company called Heritage Communications and earned more than \$180,000 per year.<sup>46</sup> In addition, James, his wife Willa, and their children had all acquired significant stock in the company.<sup>47</sup> The value of this stock was substantial. At the time of the divorce, the children's stock was worth nearly \$363,000,<sup>48</sup> which, if invested, would have produced an income of more than \$36,000 per year or about \$68,500 per year when adjusted for inflation.<sup>49</sup>

During the divorce, Willa sought child support from James.<sup>50</sup> James objected and argued that he had no obligation to pay support because the stock he had given each of the children could more than provide for their needs.<sup>51</sup> He contended that "a parent should not be compelled to provide support when he has previously conveyed assets,<sup>52</sup> the income from which is more than sufficient to afford the minor children a luxurious standard of living."<sup>53</sup> In support of his position he cited Iowa Code subsection 598.21(4), which specifically permitted the court to consider the "financial resources of the child."<sup>54</sup>

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571 (N.Y. App. Div. 1961).

44. *In re Marriage of Hoak*, 364 N.W.2d 185 (Iowa 1985).

45. *Id.* at 188.

46. *Id.* It should also be noted that these figures are in 1985 dollars. *Id.* Adjusted for inflation, this would now translate to more than \$350,000 per year. See The Inflation Calculator, <http://www.westegg.com/inflation> (last visited Nov. 5, 2009) [hereinafter *The Inflation Calculator*].

47. *In re Hoak*, 364 N.W.2d at 187.

48. Again, adjusted for inflation this comes out to more than \$717,000. See *The Inflation Calculator*, *supra* note 46.

49. *In re Hoak*, 364 N.W.2d at 188; see also *The Inflation Calculator*, *supra* note 46.

50. *In re Hoak*, 364 N.W.2d at 188.

51. *Id.*

52. When comparing this case to *Cypress*, it should be noted that the *Hoak* father had a much stronger argument due to the fact that he gave his children the assets that made them independently wealthy. *Id.* at 190. In comparison, Blue Jay was not responsible for his children's wealth. *Cypress v. Jumper*, 990 So. 2d 576, 576 (Fla. Dist. Ct. App. 2008).

53. *In re Hoak*, 364 N.W.2d at 190.

54. *Id.* at 189 ("Upon every judgment of annulment, dissolution or separate maintenance, the court may order either parent or both parents to pay an amount

Despite the language of the Iowa support statute, and the children's possession of an income more than adequate to cover their needs, the court denied James's request.<sup>55</sup> In explaining its decision, the *Hoak* court first focused on the parent's duty of support stating that "[p]arents have a statutory and common law duty to contribute to the support of their children."<sup>56</sup> The court then turned to a multi-factor test to determine whether income from the children's trust funds could be used for their support.<sup>57</sup> This test allowed the court to consider whether relieving the father of his support obligation would be contrary to the children's best interest.<sup>58</sup> It evaluated the impact that granting the father's request would have on the children and looked at whether there were any facts that justified deviating from this duty of support.<sup>59</sup> Although the court agreed that the income of the child is a consideration, it refused to consider it in isolation.<sup>60</sup> Instead, the court held that the child's income is "only one factor" and that the income of the parents and the "standard of living the child would have enjoyed had there not been a[] . . . dissolution" must also be considered.<sup>61</sup>

The *Hoak* children had considerable assets, but so did their father. "Ordinarily, a parent who has sufficient means will not be entitled to compensation for a child's support from the child's estate," the court stated.<sup>62</sup> The court explained that where parents have

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reasonable and necessary for the support of a child. Consideration shall be given to the child's need for close contact with both parents and recognition of joint parental responsibility for the welfare of a minor child. In any order requiring payments for the support of a minor child the court shall consider the following: (a) The financial resources of the child." (emphasis omitted)).

55. *Id.* at 191.

56. *Id.* at 189.

57. *Id.* at 189–90. Earlier in the opinion the court explained that it had jurisdiction over the children's assets to ensure that it was able to "protect the children's financial interests." *Id.* at 188.

58. *Id.*

59. *Id.* at 190–91.

60. *Id.* at 189–90.

61. *Id.* In *Hoak*, the court also considered what the children's financial position would have been absent the divorce and found that "the children would have continued to be supported by their parents, and the gifted assets would not have been used for their support." *Id.* at 191. Although the *Hoak* parents were married, this is not a significant difference from *Cypress*. One can assume that Blue Jay was supporting the children during the relationship, similar to the *Hoak* father, because it was only after the relationship ended that *Cypress* sought monetary support from Blue Jay. *Cypress v. Jumper*, 990 So. 2d 576 (Fla. Dist. Ct. App. 2008).

62. *In re Hoak*, 364 N.W.2d at 190.

“significant assets and income to support their children,” the children’s income should not be used for their support.<sup>63</sup> The court also noted that the stock was not intended to provide day to day support for the children and that had the parents remained married, the children would have continued to receive support from their father and the stock income would have remained untouched.<sup>64</sup> Consequently, the court concluded that it would be contrary to the Hoak children’s best interest to require them to expend their own funds for their support when he was financially capable of supporting them and would have continued to do so had the marriage not broken down.<sup>65</sup>

*Hoak* is particularly interesting because the facts are so similar to *Cypress*: a father with considerable assets attempts to avoid his child support obligation based on his children’s significant, independent wealth.<sup>66</sup> The *Hoak* court’s analysis however, is far from unique. For example, in *In re Wolfert*,<sup>67</sup> the Colorado Court of Appeals used the same analysis. As in *Hoak*, the father in *Wolfert* argued that he should receive a reduction in his child support obligation because, during his marriage, he had provided his children with a trust account that would be sufficient to cover their support needs.<sup>68</sup>

The *Wolfert* court disagreed.<sup>69</sup> The court pointed out that the father’s argument “ignores the duty which is imposed upon the

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63. *Id.* at 191. In *Drummond v. Maryland*, the court explained when such a reduction is appropriate. *Drummond v. Maryland*, 714 A.2d 163 (Md. 1998). *Drummond* concerned whether a child’s receipt of social security benefits justified a reduction or elimination of a parent’s child support obligation. *Id.* at 164. While rejecting the petitioner father’s request for a downward departure, the court explained that such a departure could serve the child’s interest

if, for example, the child was in foster care and the court found that such an adjustment was necessary for the parent to obtain the economic stability necessary to regain custody and properly care for the child. . . . Similarly, a downward departure could benefit the child if the child’s needs were being met by the lower award and the lower award permitted the noncustodial parent to maintain a better household for extended visitation.

*Id.* at 171 (citing *In re Joshua W.*, 617 A.2d 1154 (Md. Ct. Spec. App. 1993)).

64. *In re Hoak*, 364 N.W.2d at 190.

65. *Id.* at 191.

66. Compare *In re Marriage of Hoak*, 364 N.W.2d at 187, with *Cypress*, 990 So. 2d at 576.

67. *In re Marriage of Wolfert*, 598 P.2d 524 (Colo. App. 1979).

68. As in *Hoak*, this trust was not created with the intention of providing daily support for the children. Rather the “primary purpose in establishing the trust was to provide for the children’s college education.” *Id.* at 525.

69. *Id.* at 525–26.

parents to provide support for their minor children”<sup>70</sup> and found that permitting a parent to “disburse the [children’s] funds as a means of fulfilling the parent’s obligation of support,”<sup>71</sup> would violate this obligation. The court next considered the father’s request with regard to its effect on the children’s best interest and held that given the father’s ability to support the children and the fact that the trusts were established as gifts and “not in fulfillment of a court order of support,”<sup>72</sup> a reduction in the father’s support obligation was not warranted.

Similarly, in *Sutliff v. Sutliff*,<sup>73</sup> the Superior Court of Pennsylvania refused to let a wealthy father satisfy his support obligation out of his children’s trust funds.<sup>74</sup> Like the *Hoak* and *Wolfert* courts, the *Sutliff* court found that the duty of support is the parent’s and a father “may not evade his obligation to support his children by applying to that obligation the children’s funds.”<sup>75</sup> According to the *Sutliff* court, one of the obligations of parenthood is that a “parent is required to sacrifice personal luxuries to provide his or her children with their needs.”<sup>76</sup> The court made clear that the duty of support is to be “borne by the parents,” not their children, regardless of whether the “child itself has independent means.”<sup>77</sup> The court further explained that its decision was bolstered by important policy concerns. The court stated that, “[c]hildren have always been objects of special concern to the courts, entitled to protection from exploitation even by their parents. Absent evidence of need, children should not be forced unwittingly to use their funds or diminish their assets to support themselves.”<sup>78</sup>

#### D. Policy Concerns

The policy concerns noted by the *Sutliff* court with regard to the

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70. *Id.* at 525 (citing Colorado Uniform Gifts to Minor Act, COLO. REV. STAT. § 11-50-101 (1973)).

71. *Id.* at 526.

72. *Id.*

73. *Sutliff v. Sutliff*, 489 A.2d 764 (Pa. Super. Ct. 1985).

74. *Id.* at 771.

75. *Id.*

76. *Id.* (citing *Conway v. Dana*, 318 A.2d 324 (Pa. 1974); *Commonwealth ex rel. Williams v. Williams*, 364 A.2d 410 (Pa. Super. Ct. 1976); *Commonwealth ex rel. Ulmer v. Sommerville*, 190 A.2d 182 (Pa. Super. Ct. 1963)).

77. *Sutliff*, 489 A.2d at 771–72 (quoting *Commonwealth ex rel. Byrne v. Byrne*, 243 A.2d 196, 197 (Pa. Super. Ct. 1968)).

78. *Id.* at 772 (quoting *Gold v. Gold*, 409 N.Y.S.2d 114, 116 (Sup. Ct. 1978)).

use of children's income for their support are significant and strongly weigh against allowing parents to benefit at the expense of their children. The importance of these concerns is perhaps most clearly demonstrated in cases where the parents have been denied the use of their children's funds despite the parent's indigency.

In *In re Franchina (Emily F.)*,<sup>79</sup> the court was presented with the issue of whether a child's trust fund could be used in cases where a parent is unable to adequately support his or her child.<sup>80</sup> The court concluded it could not.<sup>81</sup> Like the courts in the above cases, the *Emily F.* court noted that it "is axiomatic that a parent has a duty to support his or her children" and that "the existence of a trust fund for the child does not diminish the primary obligation of the parent to support such minor child."<sup>82</sup> However, in contrast to cases like *Hoak*, in *Emily F.* there was no question that the mother was unable to fulfill her support obligation.<sup>83</sup> The question for the court was whether, given the mother's poverty, the child's funds could be used to provide housing for her and her mother.<sup>84</sup> The court expressed grave misgivings with allowing the infant child to support her mother.<sup>85</sup> The court noted that when a "parent lacks the resources necessary to

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79. *In re Franchina*, No. 028041-I-05, 2008 WL 4754177 at \*1 (N.Y. Sup. Ct. Oct. 7, 2008). In *Shinkoskey v. Skinkoskey*, the Utah Court of Appeals ordered a father to repay funds he had used from his children's custodial accounts to pay for their support even though he argued that his own funds were insufficient to pay for his children's support. 19 P.3d 1005, 1009 (2001). The court denied the father's request finding that, despite the children's ability to provide for their support, it was the father's duty to provide this support. *Id.* at 1009-10 (citing *In re Marriage of Wolfert*, 598 P.2d 524, 526 (1979)). Thus, the court prohibited the father from using his children's funds to satisfy his child support obligations. Specifically, the court cited the Utah Uniform Transfers to Minors Act as providing that "a custodian may not use custodial funds to satisfy a child support obligation." *Id.* at 1009.

The Florida Uniform Transfers to Minors Act (FUTMA) contains a similar prohibition. See FLA. STAT. § 710.116 (West 2000 & Supp. 2010). Under the FUTMA, once the trust is set up and a custodian has been nominated, the custodian is supposed to manage the custodial property for the benefit of the minor, "without regard to the duty or ability of the custodian personally or of any other person to support the minor." *Id.* § 710.116(1). The section specifically states that any expenditure made from the trust cannot be used as a substitute for any obligation to support the child: "A delivery, payment, or expenditure under this section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor." *Id.* § 710.116(4) (emphasis added).

80. *In re Franchina*, 2008 WL 4754177 at \*1.

81. *Id.*

82. *Id.* at \*3 (citing *Quat v. Freed*, 306 N.Y.S.2d 462 (1969)).

83. *Id.* at \*1.

84. *Id.*

85. *Id.* at \*3.

support his or her children,” other courts have permitted the children to “bear some of the burden of their support.”<sup>86</sup> However, the court also noted that when courts have permitted children’s funds to be invaded “such funds may not be used to support the parent but only shall be accessed for the use and benefit of such child.”<sup>87</sup> As a result, the *Emily F.* court denied the mother’s request to use the child’s funds.<sup>88</sup>

*E. The History of Parental Financial Exploitation*

*Emily F.* demonstrates that even in cases where the parent is truly in need of financial assistance, courts are still extremely reluctant to permit such help to come from their children’s assets. Consequently, when parents have the ability to pay, the courts find it particularly unjust to require a minor to expend their own funds for their support.<sup>89</sup> The concern with possible financial exploitation of children by their parents noted by the *Emily F.* court is not a recent development. It was developed in response to a series of events that brought this concern to the attention of the courts and legislatures nearly a century ago.<sup>90</sup>

Parents have long benefited from the significant income earned by their children and for most of history the law was untroubled by this fact. At common law, the earnings of a minor child belonged entirely to the parent(s).<sup>91</sup> This law changed in response to the rise of

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86. *Id.* (citing *In re Kummer*, 461 N.Y.S.2d 845 (N.Y. App. Div. 1983)).

87. *Id.*

88. *Id.* at \*4 (citing *Quat v. Freed*, 306 N.Y.S.2d 462 (1969)). In *Emily F.*, the court ultimately did not have to address the issue of whether this was a situation where the parent lacked the necessary funds to support the child because, due to a separate decision the court was able to secure money for the mother from another source.

89. See, e.g., *In re Marriage of Pollock*, 881 P.2d 470 (Colo. App. 1994) (affirming trial court’s determination that the child’s assets should be preserved and used for education expenses after age twenty-one and personal expenses while in college rather than for educational expenses or basic support needs during the child’s minority); see also *In re Marriage of Ludwig*, 122 P.3d 1056 (Colo. App. 2005) (holding that gifts by the parents to the child need not be used to reduce the parental legal obligation of support if the parents have sufficient income to meet their support obligations independently).

90. See *infra*, note 91.

91. Ben Davis, *A Matter of Trust for Rising Stars: Protecting Minors Earnings in California and New York*, 27 J. JUV. L. 69, 71 (2008) (citing Erika D. Munro, *Under Age, Under Contract, and Under Protected: An Overview of the Administration and Regulation of Contracts with Minors in the Entertainment Industry in New York and California*, 20 COLUM. J.L. & ARTS 553, 559 (1996)).

the film industry and the recognition that child stars had the potential to amass a fortune through their roles in films and that this fortune could also be entirely dissipated by unscrupulous parents.<sup>92</sup>

In the 1930s, child star Jackie Coogan had earned thousands of dollars from his roles in films such as *The Kid*.<sup>93</sup> However, by 1938 Jackie's mother had squandered nearly all of Jackie's earnings.<sup>94</sup> The result was the passage of Coogan's law<sup>95</sup> by the California state legislature, which required the "establishment of a trust fund or other savings plan for the minor."<sup>96</sup> Over time, nearly every state adopted some version of Coogan's law.<sup>97</sup> These Coogan's laws demonstrated the widespread need for legal means to protect a child's earnings from his/her parents' greed. The need for such laws has not dissipated over time. The criticisms of Coogan's law since its passage have not been that it did too much, but rather that it did not do enough.<sup>98</sup> In 2000<sup>99</sup> and 2004,<sup>100</sup> the California legislature passed bills

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92. *Id.* at 71.

93. IMDb, Jackie Coogan: Mini Biography, <http://www.imdb.com/name/nm0001067/bio>. (last visited January 7, 2010).

94. Davis, *supra* note 91, at 71–72.

95. *Id.* at 71 (describing the passage and contents of California Civil Code Section 36.1).

96. See Randy Curry, *The Employment Contract With the Minor Under California Civil Code Section 36: Does the "Coogan Law" Adequately Protect the Minor?*, 7 J. JUV. L. 93, 96 (1983).

97. See Marc Staenberg & Daniel K. Stuart, *Children as Chattels: The Disturbing Plight of Child Performers*, 32 BEVERLY HILLS BAR ASS'N J. 21, 29–30 (1997). Almost all states have some version of Coogan's law enacted to protect children from financial exploitation. However, only a handful, such as California, Florida, Georgia, Missouri, and New York specifically address the issues presented by the original Coogan's case. See FLA. STAT. ANN. § 450.132 (West 1997) (delineating the conditions under which a child can be employed in the entertainment industry); GA. CODE ANN. § 39-2-18(a) (1995) (stating that "[n]otwithstanding any other provisions of this chapter to the contrary, nothing in this chapter shall apply to any minor employed as an actor or performer in motion pictures or theatrical productions, [or] in radio or television productions"); MO. ANN. STAT. § 294.022 (West Supp. 2000) (ordering, in part, that the child working in the entertainment industry must obtain an entertainment work permit, a parent must be present at all times during the work, and the employer must meet additional safety requirements in regards to the child's performance); N.Y. ARTS & CULT. AFF. LAW § 35.01 (McKinney 1984) (establishing permit and safety requirements for children working in the entertainment industry).

98. See, e.g., Davis, *supra* note 91, at 72 (arguing that Coogan's law did not offer enough protection for child actors "[s]ince it was only voluntary to seek court approval, 'if neither the producer nor the parent [sought] court approval of a contract . . . the child performers [were] denied any of the slim protections afforded them by Coogan's law'" (quoting Staenberg & Stuart, *supra* note 97, at 27); Staenberg & Stuart, *supra* note 97, at 26 (noting that the law only protected children with long term contracts).

to strengthen the protections of Coogan's law,<sup>101</sup> and other states have begun to strengthen their Coogan's laws as well.<sup>102</sup>

Given this historic concern with financial exploitation, it is not surprising that prior to *Cypress*, courts had uniformly rejected parental requests to use a child's income to pay for their support.<sup>103</sup> In these cases, courts consistently found that granting such petitions would violate both the parents' duty of support and would not serve their child's best interests.<sup>104</sup> These decisions reflect the courts' extreme and increasing wariness towards permitting parents to use their children's income for their own financial benefit.

### III. THE *CYPRESS* DIFFERENCE

Unlike virtually every case that preceded it, the *Cypress* court granted the father's request to use his children's income for their support.<sup>105</sup> The only plausible reason for this difference in outcome is the difference in ethnicity of the parties. Blue Jay specifically argued that because of his Indian identity and tribal membership, his support obligation was different than that of non-Indians.<sup>106</sup> Although the

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99. In 2000, the California Legislature passed Senate Bill 1162 "to bring Coogan's law into the next millennium and to ensure children and not the industry are the protected parties under the law." Jessica Krieg, *There's No Business Like Show Business: Child Entertainers and the Law*, 6 U. PA. J. LAB. & EMP. L. 429, 437 (2004) (citing S.B. 1162, (Cal. 1999)) (enacted)).

100. This law was still not considered sufficient, and in 2004 it was amended again by Senate Bill 210 to remedy the problem of a minor's earnings being in possession of her employer and not accumulating interests in the minor's own bank accounts. Davis, *supra* note 91, at 74.

101. These changes provide that an income generated under a Coogan's law contract are the sole property of the child and the family no longer has the right to claim a portion of the child's earnings for family use. See CAL. FAM. CODE § 771(b) (West 2000).

102. In 2004, for example, New York began requiring judicial approval of minor's contracts and established a savings plan for minors similar to that of Coogan's law. Child Performer Education and Trust Act, N.Y. ARTS & CULT. AFF. LAW § 35.03 (McKinney 1998). Section 35.03(3)(a) states that courts must withhold approval of the contract until the filing of consent from parents stating that a part of the earnings "be set aside and saved for the [child] . . . until he attains his majority or until further order of the court."

103. See, e.g., *Fitzgerald v. Fitzgerald*, 362 A.2d 889, 892 (Conn. 1975); *Slaughter v. Slaughter*, 313 S.W.2d 193, 196 (Mo. Ct. App. 1958).

104. See *Fitzgerald*, 362 A.2d at 892.

105. *Cypress v. Jumper*, 990 So. 2d 576, 576 (Fla. Dist. Ct. App. 2008).

106. See Brief of Appellee, *supra* note 2, at 9–13 (discussing Blue Jay's argument that because he is a member of an Indian tribe, his support obligations should be evaluated differently than support obligations pertaining to non-Indians and their

*Cypress* court appears to have accepted this argument, it is a questionable and potentially detrimental argument. There is little support for the position that Indian tribes do not expect Indian parents to provide for their children. In fact, tribal customs and practices demonstrate that if anything, the Indian conception of parental responsibility imposes a greater obligation on Indian parents.<sup>107</sup>

A. *The Indian Difference*

In cases like *Hoak* and *Wolfert*, the courts recognized that the duty of support is a parental obligation and that allowing parents to avoid this obligation will rarely serve their child's best interest.<sup>108</sup> These courts were concerned that granting the parents' requests would amount to an exploitation of their children's wealth and they also appeared, at least implicitly, to recognize the psychological importance of requiring parents to pay child support.<sup>109</sup> However, none of these concerns are discussed in the *Cypress* decision.<sup>110</sup> Blue Jay is clearly the father of his children, but unlike the courts in *Hoak* and *Wolfert*, there is no discussion of the responsibilities and obligations that attach to this relationship. In addition, there is no discussion regarding whether having the children pay for their own support is in their best interest. Instead, the court focuses on whether it is fair to make Blue Jay pay support.<sup>111</sup> There is also no acknowledgement of the fact that this decision will hurt the children financially.<sup>112</sup> Based

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children).

107. See *infra* Part III.C-D (regarding the Seminole and other tribes' understandings of parental responsibility).

108. *In re Marriage of Wolfert*, 598 P.2d 524, 526 (Colo. App. 1979); *In re Marriage of Hoak*, 364 N.W.2d 185, 191 (Iowa 1985).

109. *Wolfert*, 598 P.2d at 526; *Hoak*, 364 N.W.2d at 191.

110. See generally *Cypress*, 990 So. 2d at 576.

111. Blue Jay, unlike the fathers in *Hoak* and *Sutliff*, did not expend any of his own money to create the children's funds. In *Hoak*, the father made the ultimately unsuccessful argument that because he already provided significant funds for his children in the form of stock he should not be held to a "double accounting" by being forced to pay child support as well. *Hoak*, 364 N.W.2d at 190. Blue Jay cannot even make this argument since the income his children receive is from the tribe and not Blue Jay. *Cypress*, 990 So. 2d at 576. Interestingly, Blue Jay does make the inverse of this argument. In his answer brief Blue Jay argues that because both he and his children receive their income from the tribe, requiring Blue Jay to pay part of his income to the children would be requiring the tribe to pay for the children twice. See Brief of Appellee, *supra* note 2, at 11-13.

112. There is no question that the court was aware of this argument; Carla made this argument explicitly in her appellate brief. According to Carla, as long as the father "is able to support the child, the parent's legal duty to support their child

on the text of the opinion, the court appears unconcerned that it has permitted Blue Jay to financially exploit his children. Although the facts of *Cypress* are substantially similar to *Hoak* and the other child income cases, the outcomes could not be more different. The question is why? Why are all the concerns discussed in the *Hoak* and *Wolfert* line of cases absent from *Cypress*? The obvious difference is the Indian ethnicity of the Jumper children and their parents. None of the other child income cases concern Indian families and, although this difference may initially appear an unlikely explanation for the difference in outcomes, an examination of the historical treatment of Indian families demonstrates that Indian ethnicity may very well explain the *Cypress* decision.

*B. The Role of the Indian Family in the Cypress Decision*

The *Cypress* opinion does not mention the parties' Indian ethnicity as a factor in its decision, but Blue Jay's appellate brief demonstrates it was his primary argument on appeal.<sup>113</sup> It is a well-established legal precept that parents owe a duty of support to their children by virtue of their parental relationship.<sup>114</sup> Courts have found this duty in cases like *Hoak*, where the children are independently wealthy,<sup>115</sup> but also in cases where the parents are indigent<sup>116</sup> or incarcerated,<sup>117</sup> and

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should not be shifted onto the child." Brief of Appellant, *supra* note 3, at 13. As Carla notes, making children pay for their own support does not serve the best interest of the child. "Why" asks Carla, is the father "permitted to save his money, but the children are not?" *Id.* at 14.

113. Brief of Appellee, *supra* note 2, at 6–13.

114. See *supra* notes 36–38 and accompanying text (discussing Blackstonian concept of this support duty).

115. *In re Marriage of Hoak*, 364 N.W.2d 185, 187–88 (Iowa 1985).

116. See, e.g., *In re Franchina*, No. 028041-I-05, 2008 WL 4754177 at \*1 (N.Y. Sup. Ct. Oct. 7, 2008). However, it should be noted that under the guidelines of every state, parents who earn below a certain threshold amount may be relieved of their support obligation due to their inability to pay as long as such inability to pay is not voluntary. See e.g., FLA. STAT. § 61.30(6) (setting the minimum monthly combined income at \$650 and stating that "[f]or combined monthly net income less than the amount set out on the above guidelines schedule, the parent should be ordered to pay a child support amount, determined on a case-by-case basis"). However, courts will impute income to voluntarily unemployed or underemployed parents. See, e.g., FLA. STAT. § 61.30(2)(b) (2008) (providing a two-step analysis for imputation of income). In *Faircloth v. Faircloth*, 339 So. 2d 650 (Fla. 1976), the Florida court explained that in order to satisfy the requirements of due process a parent may not be adjudicated guilty of failure to pay child support unless the trial court finds that the person has both the ability to make payments and willfully refuses to pay. Consequently, a truly indigent parent may not be punished for failure to pay child support,

even in cases where the children have been removed from their parents' care.<sup>118</sup> In addition, in Florida, the law specifically recognizes that "parents have a legal duty to support their children" and that the "paramount concern in this situation is to act in the best interest of the supported child."<sup>119</sup> Despite this seemingly impenetrable wall of precedent regarding parental support obligations, Blue Jay argued that such support obligations do not apply to him because, as an Indian, he is exempt from these obligations. Amazingly, the court agreed.<sup>120</sup>

Specifically, Blue Jay argued that because he is a member of the Seminole Indian tribe and the tribe pays dividends to its members, it is the tribe that has the duty to support his children, not Blue Jay.<sup>121</sup> According to Blue Jay, the "tribal support model" of paying dividends to members "does not mesh analytically with the parental support model that underlies the guidelines paradigm."<sup>122</sup> Blue Jay further explained his position, stating:

The theme underlying the statutory guidelines is the notion that a child should be supported by both parents . . . . The guidelines do not take into account—indeed they were not designed to consider—the situation where both parent[s]

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but that does not mean that indigent parents are never saddled with obligations they have no means of paying. See e.g., Elizabeth Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U. L. REV. 397, 426 n.98 (2008) (noting that "[i]n 1998 about fifty percent of non-custodial parents in the child support enforcement system had earnings below the poverty line").

In addition, a number of courts consider criminal conduct, and thus a subsequent arrest and incarceration for a voluntary action will not reduce a parent's child support obligation. See *supra* note 41 (citing courts that have refused to relieve parents of their support duty despite incarceration).

117. See e.g., *Davis v. Vance*, 574 N.E.2d 330 (Ind. 1991); *In re Marriage of Phillips*, 493 N.W.2d 872 (Iowa Ct. App. 1992); *Mooney v. Brennan*, 848 P.2d 1020 (Mont. 1993); *Noddin v. Noddin*, 455 A.2d 1051 (N.H. 1983); *Topham-Rapanotti v. Gulli*, 674 A.2d 650, 653 (N.J. Super. Ct. Ch. Div. 1995); *Koch v. Williams*, 456 N.W.2d 299 (N.D. 1990).

118. See, e.g., *In re Katherine C.*, 890 A.2d 295, 305 (Md. 2006). Unless parental rights have been terminated, the fact that a child has been removed from her parent's custody does not typically eliminate that parent's duty of support. *Id.*

119. Brief of Appellant, *supra* note 3, at 10 (citing *Dep't of Revenue v. Jackson*, 846 So. 2d 486, 492–93 (Fla. 2003)).

120. *Cypress v. Jumper*, 990 So. 2d 576, 577 (Fla. Dist. Ct. App.) (holding that because the children's obligations were met by income from the tribe, support from the father was unnecessary).

121. Brief of Appellee, *supra* note 2, at 9–13.

122. *Id.* at 11.

are supported by the tribe, and all the children are likewise equally supported by the tribe in a similar manner and an equivalent amount.<sup>123</sup>

Blue Jay's argument is that Indian families are different. According to Blue Jay, only non-Indian parents have the duty of support, while in Indian families, the obligation of supporting children belongs to the tribe.<sup>124</sup> To demonstrate his point, Blue Jay contrasted the obligation of supporting Indian children with the obligation to support non-Indian children. He noted that in a typical non-Indian support case the state will only provide support when the parents possess "insufficient financial resources to support a family"<sup>125</sup> and that the state will expect and attempt to recoup these funds from the child's parents.<sup>126</sup> Blue Jay concluded that this arrangement demonstrates that, although the state is supporting the child, the true duty of support belongs to the parent.<sup>127</sup>

Blue Jay then contrasted this non-Indian support arrangement with that of the Seminole Tribe. As Blue Jay noted, the tribe does not limit its support to children who are being inadequately provided for by their parents. Rather, according to Blue Jay, the tribe supports its children (through the payment of dividends), regardless of need, because the duty of support belongs to the tribe.<sup>128</sup> He further argued that, unlike state support payments, the tribe never expects to recoup these expenditures.<sup>129</sup> Blue Jay contended that the guidelines do not contemplate "this set of facts."<sup>130</sup> He therefore concluded that child support awards have no place "under the current system of tribal support provided by the Seminole tribe of Indians to its tribal members," and that they would "serve no purpose other than to . . . transfer a portion of the Father's distribution to the mother."<sup>131</sup> Although the court's opinion makes no reference to Blue Jay's "Indian families are different" argument, the court's decision demonstrates that it likely had an impact.<sup>132</sup>

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123. *Id.*

124. *Id.* at 9–13.

125. *Id.* at 12.

126. *Id.*

127. *Id.*

128. *Id.* at 10.

129. *Id.* at 12.

130. *Id.*

131. *Id.*

132. *Cypress v. Jumper*, 990 So. 2d 576, 577 (Fla. Dist. Ct. App. 2008) (holding that because the children's obligations were met by income from the tribe, support

C. *The Seminole View of Parental Obligations*

Blue Jay argued that Indian families are different and should, therefore, be treated differently with regard to support obligations. Blue Jay is correct that Indian families can differ quite significantly from non-Indian families. He was also correct that historically, such differences might bear on a Seminole father's support obligation. However, he was dead wrong when he argued that by paying dividends to their members, the Seminole tribe intended to relieve Seminole men of their financial obligations to their families. Further, his attempts to hoard more money for himself at the expense of his family are particularly "un-Seminole."

The traditional Seminole family structure differed significantly from Anglo-American families in both organization and responsibility. Seminole families were arranged in matrilineal clans.<sup>133</sup> Husbands lived with their wives' clans and children were considered members of their mothers' clans.<sup>134</sup> Tribal members lived in extended families rather than nuclear families and women were frequently the heads of these kinship networks.<sup>135</sup> One of the results of this family structure was that it was frequently the child's uncle, his or her mother's brother, who had primary family authority and responsibility for the children and such responsibility could include support.<sup>136</sup>

Over time, traditional family arrangements eroded. Like other Indian tribes, the Seminoles were pressured to "Americanize." They were encouraged to live in nuclear families with the father/husband as the head of the household.<sup>137</sup> Consequently, authority and responsibility within Seminole families was transferred from maternal uncles to fathers. As Carla's support petition aptly demonstrates, Seminole mothers now consider child support a paternal obligation.

Despite such significant changes, Blue Jay would have had some basis for claiming that given the historic structure of Seminole families he did not owe support to his children.<sup>138</sup> This however, was

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from the father was unnecessary).

133. CATTELINO *supra* note 18, at 140–41.

134. *Id.* at 142.

135. *Id.* at 145.

136. *Id.* at 146, 156. "[P]reviously, maternal uncles, not fathers, passed clan specific knowledge, discipline, and (often) property to their sisters' children." *Id.* at 146.

137. *Id.* at 146.

138. However, even under this traditional structure, men were not relieved of the obligation to provide for their families. "Husbands were responsible for building

not what Blue Jay argued. He did not suggest that his children's support should be paid for by their uncles, or that his support obligations should flow to his sisters' children. He simply argued that he had no support obligations, because the tribe assumed his duty.

Blue Jay's argument was solely an attempt to keep more money for himself. Seminole people do not condemn wealth, but they do disparage its accumulation.<sup>139</sup> Traditionally, the purpose of becoming wealthy was so that one could have more to distribute to others.<sup>140</sup> Sharing one's wealth was how one earned honor and prestige among the tribe.<sup>141</sup> Hoarding one's wealth and refusing to share it with one's family in particular, are actions not likely to be approved of by Seminole members.<sup>142</sup> Further, the tribe has been quite concerned about the impact high dividends<sup>143</sup> have on their members' work ethic<sup>144</sup> and their dependence on the tribe.<sup>145</sup> These concerns<sup>146</sup> have

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chickees (the traditional Seminole home) and for contributing to the household economy." *Id.* at 142. *See also infra* note 140 (discussing how men were expected to provide for their families). In addition, if the marriage ended, the men provided their families with support. This was done by leaving the chickees he had built for his family with the wife as her property. CATTELINO, *supra* note 18, at 142.

139. "The Seminoles despise the man who lives rich. They conside[r] him selfish for he should have shared with his kin." CATTELINO, *supra* note 18, at 107 (citations omitted).

140. Seminole men are traditionally expected to share their wealth with the tribe. For example, as part of the Corn Dance (the most important Seminole festival) the men go hunting and when they return to camp they distribute all of the meat to tribal members until nothing remains. However, they are also expected to provide for their families. This obligation is illustrated in the Seminole legend regarding how the turtle got its red eyes. "The male turtle stood by while the others claimed the nice cuts of meat during the post-hunt distribution, leaving him only blood to bring home to his wife. Disgusted by his failure, she threw the blood in his face, and this is why the turtle has red eyes." *Id.* at 106-07.

141. *Id.* at 107-08 (noting that it is considered the "obligation of leaders to ensure the material well-being of the collectivity through distribution").

142. *See supra* notes 139-40.

143. It should be noted that the Seminoles have made the deliberate decision to distribute enough of the casino dividends such that their members can live in relative comfort but have chosen not to distribute the type of funds that would make members millionaires. CATTELINO, *supra* note 18, at 103-04. Their choice can be contrasted against the Pueblo tribes of New Mexico, which redistribute casino wealth only through social services such as scholarships and loans, and the Shakopee Mdewakanton Sioux tribe which distributes a large percentage and has made tribal citizens millionaires. *Id.* at 103-04.

144. *Id.* at 88 (noting that "the most common worry about gaming and children was that casino wealth would discourage Seminole youth from valuing work" and that it would "erode[] long-standing Seminole values of hard work and self-reliance").

145. In fact, one of the primary reasons the tribe decided to distribute per capita dividends was so members could "lead more independent lives . . . dividends are a

led the tribe to specifically discourage members from becoming too dependent on the tribe.<sup>147</sup> It is the tribal members and not the tribe who are charged with the primary responsibility for taking care of their families.<sup>148</sup> Consequently, had Blue Jay made his argument before a Seminole judge it is unlikely to have been so well-received.

*D. Tribal Conceptions of the Family and Parental Obligations*

Blue Jay argued that Indian families are different and should, therefore, be treated differently with regard to support obligations.<sup>149</sup> To assess Blue Jay's argument it is useful to look at tribal cases and laws concerning parental obligations. Although one must recognize that hundreds of tribes possess different ideas about family, certain important similarities emerge. For example, the widespread existence of tribal child support enforcement divisions is arguably very significant.

*1. The creation of tribal child support divisions*

Child support is a frequent occurrence in Indian country, and tribes are often quite aggressive in enforcing child support obligations against Indian obligor parents.<sup>150</sup> It should also be noted that tribes had to fight extremely hard for the right to establish these enforcement programs. For twenty years tribal child support advocates worked tirelessly to "establish a tribal child support initiative."<sup>151</sup> Although states have been able to provide child support enforcement

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mechanism for wealth distribution that honors and reinvigorates a long-standing Seminole value of noninterference in one another's affairs." *Id.* at 105.

146. "For Seminoles who remember the days before gaming, dividends represent a welcome contrast to dependency; on the other hand, dividends raise the specter of a new form of dependence of the *tribal* government . . . . Indeed, some Seminole express concern that people depend too much on the tribal government." *Id.* at 106.

147. "I think we're finally getting to where, you know, we're doing what our elders used to do: depend on yourself. You don't depend on other people to do things for you." *Id.* at 160 (quoting former tribal council liaison Elaine Aguilar).

148. One of the important purposes of per capita distributions is to help Seminole parents "provide for their children," and to take pride in their ability to do so. *Id.* at 106.

149. See *supra* notes 121–31 and accompanying text.

150. See *infra* notes 155–57 (describing tribal child support programs).

151. Tom Wanamaker, *Child Support Unit First Step in Forming Tribal Court*, WATERTOWN DAILY TIMES, Apr. 23, 2009, available at <http://www.watertowndailytimes.com/article/20090423/NEWS01/304239954/-1/NEWS> (describing the St. Regis Mohawk Tribe's creation of a child support enforcement unit).

services since 1975,<sup>152</sup> tribes were not authorized to operate tribal child support enforcement services until 1996,<sup>153</sup> and the final rule was not issued until 2004.<sup>154</sup> However, even before the final rule was passed, tribes began to create “interim regulations on tribal child support enforcement and tribal partnerships with local, state, and federal governments.”<sup>155</sup> The First Annual Tribal Child Support Enforcement Conference to discuss the issues surrounding tribal child support enforcement was held in August 2001. This conference then resulted in the formation of the National Tribal Child Support Association (NTCSA), which was created “to provide a national resource for tribal efforts to serve Native American children through child support programs.”<sup>156</sup> Currently, at least thirty-four federally recognized tribes have child support programs and nine more are in the process of establishing their own programs.<sup>157</sup>

2. *What types of tribes have support enforcement divisions?*

Tribal child support enforcement divisions are not limited to poor tribes. Tribes with gaming enterprises frequently have child support enforcement divisions. The Puyallup Tribe of Washington is a good example. The Puyallup Tribe owns the Emerald Queen casinos. In recent years, these casinos have seen annual profits of \$125 million or more.<sup>158</sup> Due to its financial success, the Puyallup Tribe, like the

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152. See National Tribal Child Support Association, <http://www.supporttribalchildren.org/about.htm> (last visited Jan. 7, 2010).

153. *Id.* The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) allowed tribes to join in the federal Child Support Enforcement (CSE) program under Title IV, Part D of the Social Security Act (IV-D), authorizing the operation of tribal CSE programs and tribal cooperative agreements with state IV-D agencies. *Id.*

154. Memorandum from the U.S. Dep’t of Health & Human Servs. Admin. for Children & Families to Federally Recognized Indian Tribes, et al. (March 30, 2004), available at <http://www.acf.hhs.gov/programs/cse/pol/AT/2004/at-04-01.htm>.

155. See *supra* note 151.

156. National Tribal Child Support Association, *supra* note 152.

157. GLORIA HOWARD & TAMI J. LORBECKE, NAT’L TRIBAL CHILD SUPPORT ASS’N, TRIBAL CHILD SUPPORT PROGRAM INFORMATION & RESOURCE GUIDE 2 (2009). In addition, the number of tribes offering such services is growing. See, e.g., Tom Wanamaker, *Child Support Unit First Step in Forming Tribal Court*, WATERTOWN DAILY TIMES (Albany, N.Y.), Apr. 23, 2009, available at <http://www.watertowndailytimes.com/article/20090423/NEWS01/304239954/-1/NEWS> (describing the St. Regis Mohawk Tribe’s creation of a child support enforcement unit).

158. Rob Carson, *Study Critical of Two Emerald Queen Casinos*, NEWS TRIBUNE (Tacoma, Wash.), May 17, 2009, at A1.

Seminole Tribe, distributes large monthly dividends to its members.<sup>159</sup> Nevertheless, despite the tribe's wealth and these monetary distributions, the Puyallup tribe has created a strong child support enforcement program.

The Puyallup Child Support Program explains its mission with the following statement:

Children are the most vital resource to the continued existence and integrity of the Puyallup Tribe. Therefore, the Tribe has a compelling interest in promoting and maintaining the health and well-being of all Puyallup children. By establishing a Child Support Program, the Puyallup Tribe has reaffirmed Puyallup customs and traditions, which recognize that both parents are obligated to provide support for their children as the respective incomes, resources and abilities allow.<sup>160</sup>

As this statement makes clear, the Puyallup tribe believes that parental payment of child support promotes the well being of Indian children. In addition, it demonstrates the tribe's strong belief that child support is an obligation that belongs to the parents<sup>161</sup> and that this conception of child support is consistent with the tribe's "customs and traditions."<sup>162</sup>

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159. *Id.* The Puyallup tribe distributes \$2000 dividend checks to its members monthly. *Id.*

160. Puyallup Tribe of Indians Child Support Program, <http://www.puyallup-tribe.com/index.php?nav=programs&id=8> (last visited Nov. 23, 2009).

161. *Id.* The program website further explains that the tribe is committed to helping obligor parents reduce their child support obligations when payments were set too high or if, due to changes in circumstances, a parent can no longer meet their original child support obligation. However, nowhere on the program's website does it imply that the duty of support belongs to anyone other than the parents. *Id.*

162. *Id.* This makes sense given the fact that for many tribes the idea of personal property and, particularly, the emphasis on the accumulation of individual wealth is a foreign concept. See Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327, 339 (1986-87). In fact, one of the primary goals of Indian reformers in the nineteenth century was to instill values of property ownership among the tribes. FIFTEENTH ANNUAL REPORT OF THE BOARD OF INDIAN COMMISSIONERS 69-70 (1883) ("The last and the best agency of civilization is to teach a grown up Indian to *keep*. When he begins to understand that he has something that is his exclusively to enjoy, he begins to understand that it is necessary for him to preserve and keep it . . . and so on, step by step, the individual is separated from the mass, set upon the soil, made a citizen and instead of a charge he is a positive good, a contribution to the wealth and strength and power of the nation."). Unfortunately, cases such as *Cypress* demonstrate that this lesson may have been learned too well.

*E. The Role of Children in Tribal Cultures*

The fact that numerous tribes have enforcement operations should not be surprising given the particular importance placed on children by many tribal cultures. An examination of tribal codes and case law reveals that significant weight is given to children's interests and that the best interest tests applied by tribal courts is often more stringent than those applied in state courts.<sup>163</sup> Consequently, when compared with non-Indian conceptions of the family and parental obligations, Indian ideas about family and familial obligations actually counsel more strongly against relieving parents of child support obligations.<sup>164</sup>

*1. Indian case law regarding family obligations*

In the Navajo case of *Naize v. Naize*,<sup>165</sup> the Navajo Supreme Court upheld an award of modern spousal maintenance. The *Naize* court explained its decision and the source of its power to award spousal maintenance as "justified by the Navajo People's traditional teachings admonishing members not to 'throw one's family away.'"<sup>166</sup> Similarly, in *Alonzo v. Martine*,<sup>167</sup> the Navajo Supreme Court granted an award of back child support, explaining that "Navajos do not view children as property or possessions but value them as individuals in a communi-

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163. Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 608–13 (2000) ("The centrality of children in many tribal cultures does not have an exact counterpart in Anglo-American jurisprudence. Indeed some critics argue that American family law blatantly marginalizes the interests of children . . . . One need not endorse the view that Anglo-American law is overtly hostile to children to recognize that the child in Anglo-American law occupies a role that is often qualitatively distinct from the child's role in tribal jurisprudence."); see also *Burbank v. Clarke*, 26 Indian L. Rptr. 6078, 6079 (1999) (stating that "[c]hildren are viewed as the future, ensuring the existence and survival of the Navajo people in perpetuity").

164. Many tribal codes also demonstrate the special importance of children to Indian tribes and the particular importance of protecting the best interests of these children above all else. For example, the purpose of the Cherokee Nation Children's Code is described as protecting "the interest of the Cherokee Nation in preserving and promoting the heritage, culture, tradition and values of the Cherokee Nation for its children." Atwood, *supra* note 145, at 610 n.151 (citing CHEROKEE NATION CHILDREN'S CODE § 1 (E) (1993)). Similarly, the tribal code of the Mille Lacs Band of Indians expresses a similar sentiment, stating that "[t]here is no resource that is more vital to the continued existence and integrity of the Band than our children." *Id.* (citing TRIBAL CODE OF MILLE LACS BAND OF CHIPPEWA INDIANS tit. 8, § 1 (1996)).

165. 24 Indian L. Rptr. 6152 (Navajo 1997).

166. Atwood, *supra* note 163, at 599.

167. 18 Indian L. Rptr. 6129 (Navajo 1991).

ty . . . . [T]here is a fundamental Navajo belief that children are wanted and must not be mistreated in any way.”<sup>168</sup> Most relevant for this discussion is the Navajo case *Yazzie v. Yazzie*<sup>169</sup> in which the Navajo court refused to allow a father to advance the defense that he had not been properly served in an attempt to avoid his support obligation. In rejecting the father’s argument, the court emphasized that “[t]he child’s best interests are paramount” and that “[a]llowing the father to avoid his obligation to his child due to a non-prejudicial, procedural error is contrary to the common law of the Navajo people.”<sup>170</sup> The court added that, under Navajo custom, “a father of a child owes the child . . . the duty of support.”<sup>171</sup> The above cases reveal the importance the Navajo place on familial support and demonstrate that the Navajo view such support not as an Anglo imposed construct, but rather as an obligation consistent with Navajo customs and beliefs regarding the importance of family and particularly children.

## 2. *How tribal understandings of support differ*

In cases like *Yazzie*, the tribal court reached a decision that would be easily recognizable by state family courts. However, even in cases in which tribal understandings of the family and family obligations produce outcomes different from state family law cases, the importance of parental provided support remains constant. For example, in *Attikai v. Thompson*,<sup>172</sup> the Crow Creek Sioux Tribal Court refused to apply state standards when assessing child support against a father who had children from more than one relationship.<sup>173</sup> Although state law would have given priority to the first born, the tribal court refused to assume the tribe had the same priorities. The court explained:

the cultural differences between the non-Native American population of the state of South Dakota and the Native American population of the Crow Creek Sioux Tribe may be

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168. *Id.*; see also Atwood, *supra* note 163, at 609 (quoting *Alonzo*, 18 Indian L. Rptr. at 6129).

169. See Atwood, *supra* note 163, at 613 (citing *Yazzie*, Navajo Rptr., No. SC-CV-29-94 (1994)).

170. See *id.*

171. See *id.* (citing Navajo Report No. SC-CV-29-34 (1994); see also *Lente v. Notah*, 3 Navajo Rptr. 72, 76 (1982) (explaining that tribal judges “will look to the welfare of the child before the rights of the natural parent”).

172. 21 Indian L. Rptr. 6001 (N. Plns. Intertr. Ct. App. 1993).

173. *Id.* at 6002.

such that the proposition that the “first born child has priority in regard to support” does not fit within the acceptable cultural standards of the Crow Creek Sioux Tribe.<sup>174</sup>

In *Attakai*, the court disagreed with state understandings of the priorities of support, but there was no disagreement as to whether the father owed a duty of support.

*F. Indian Reactions to Cypress*

Given the sentiments expressed in the above cases, it is not surprising that Indian reactions to the *Cypress* decision have been far from positive. After the American Indian Report<sup>175</sup> posted the *Cypress* decision on their website, the reactions of the readers were overwhelmingly unfavorable. These commentators repeatedly expressed their belief that “[t]he father is responsible to pay child support regardless of per capita!”<sup>176</sup> and that “the court ruling is not in the best interest of the children”<sup>177</sup> and that just “[b]ecause natives get a per capita, this should not exclude the father from his responsibilities in financially supporting his children.”<sup>178</sup> Although such comments are far from an authoritative source to gauge Indian beliefs regarding support, they do at least anecdotally indicate disagreement with Blue Jay’s conception of the responsibilities of Indian parents.

The Indian ethnicity of the parties is the only reasonable explanation for the *Cypress* court’s drastic departure from well-established case precedent. However, the court’s reliance on Blue Jay’s argument that Indian parents have fewer obligations to their children was misguided. An examination of tribal customs and actions demonstrates that Indian tribes expect Indian parents to assume responsibility for the support of their children and will force them to support

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174. Barbara Ann Atwood, *Identity and Assimilation: Changing Definitions of Tribal Power over Children*, 83 MINN. L. REV. 927, 964 (1999) (citing 21 Indian L. Rptr. 6001).

175. The American Indian Report is a publication of the Falmouth Institute, a non-profit institute founded to provide quality and comprehensive education and information services to the North American Indian community. See Falmouth Institute, <http://www.falmouthinstitute.com/about.html> (last visited Jan. 8, 2010).

176. Posting by Anonymous to American Indian Report Blog, <http://falmouth-air.blogspot.com/2008/08/per-caps-enough-court-says-mom-doesnt.html#comments> (Aug. 11, 2008, 11:38 EST).

177. Posting by Anonymous to American Indian Report Blog, <http://falmouth-air.blogspot.com/2008/08/per-caps-enough-court-says-mom-doesnt.html#comments> (Aug. 8, 2008, 17:54 EST).

178. *Id.*

their children if necessary. When Blue Jay argued that he had no such obligation, he was not speaking as an Indian but simply as a selfish individual.

#### IV. NEGATIVE CONCEPTIONS OF THE INDIAN FAMILY

Although Blue Jay's conclusions are mistaken, there is truth to the argument that Indian conceptions of the family are different. Generations of white reformers and government agencies concluded that such differences demonstrated that Indian families were generally bad.<sup>179</sup> These differences were used to justify the forced removal of Indian children from their parents and led to the decimation of the Indian family.<sup>180</sup> Finally, in the 1970's, Congress attempted to reverse the effects of these policies and perceptions, but even thirty years later, Indian children are still being removed at shockingly high rates.<sup>181</sup> The stereotype of the unfit Indian parent has endured with appalling tenacity. The *Cypress* court's decision both reflects this stereotype and helps to further perpetuate it.

Blue Jay's argument that Indian families are different and that Indian fathers do not owe a duty of support to their children has roots in the old and pernicious stereotype about the unfitness of Indian parents. Stripped of its flowery language about Indian sovereignty and culture differences, Blue Jay essentially argued that Indian parents are irresponsible and lazy and thus someone other than the Indian parents must assume the responsibility for their children's support.<sup>182</sup> If it seems unlikely that a court would be receptive to such an argument, one need only examine the historical treatment of Indian families to understand why the court was so willing to embrace it.

##### A. *Historical Treatment of the Indian Family*

There is a long and terrible history in this country of looking down on the Indian family and the *Cypress* decision is simply one of the most recent manifestations of societal beliefs regarding the inferiority of Indian parents and families. As the preceding discussion demonstrates, Indian tribes are aggressive in enforcing the duty of support against non-custodial parents and arguably even more vigilant

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179. See *infra* Part IV.A.

180. See *infra* note 209 and accompanying text.

181. See *infra* notes 229–30 and accompanying text.

182. Brief of Appellee, *supra* note 2, at 3, 9–13.

in protecting the best interests of the child than state courts. Nonetheless, two centuries of negative stereotypes about Indian parents and families left the *Cypress* court perfectly primed to accept Blue Jay's argument.

1. *The Indian family*

Many of the negative stereotypes regarding the Indian family originated from the fact that the Indian family was structured differently than the nineteenth-century white family. Consequently, it was viewed as "bad."<sup>183</sup> Unlike white families, which were primarily small "nuclear families" with a patriarchal family structure,<sup>184</sup> the Indian family was an extended family.<sup>185</sup> Further, Indian family life was communal, "tasks and rewards were freely shared, particularly among members of a kinship group."<sup>186</sup> For example, it was common for child rearing duties to be shared by other family members, particularly grandparents and aunts or uncles.<sup>187</sup> Such structure and philosophy was extremely different from white families, which were

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183. See *infra* notes 197–202 and accompanying text.

184. Lacey, *supra* note 162, at 331 ("The typical white family was a 'nuclear' family, consisting of husband, wife, and at least two children. Grandparents occasionally lived with the family, but other relatives, such as cousins, aunts, or uncles seldom did. The family structure was patriarchal. The woman took the husband's name and property was passed from father to son. Divorce was rare and generally granted only for adultery. Family privacy was highly valued."); see also Ladiga II, 43 U.S. 581, 590 (1844) (stating that "[w]e cannot seriously discuss the question whether a[n] (Indian) grandmother and her grandchildren compose a family"); Bethany Berger, *After Pocahontas: Indian Women and the Law*, 21 AM. INDIAN L. REV. 1, 11 (1997) (describing how in the nineteenth century "middle class women suddenly took up the cause of the Indian in great numbers, seeking to inculcate their vision of the restorative nuclear home on their less fortunate sisters").

185. Lacey, *supra* note 162, at 331 ("American Indians perceived their family identity in terms of their tribe and their clan. Most tribes had elaborate kinship networks, although those networks varied greatly from tribe to tribe."); see also Grace Tsai & Luisa Alanis, *The Native American Culture: A Historical and Reflective Perspective*, 32 NASP COMMUNIQUE 8 (June 2004), available at <http://www.nasponline.org/publications/cq/cq328native.aspx>.

186. Lacey, *supra* note 162, at 342.

187. *Id.* at 347. For example, most Plains Indian children "referred to potential parents, i.e. paternal uncles and maternal aunts, as 'mother' and 'father' and responded to supervision accordingly." *Id.*; see also Marie Corcoran, *Rhetoric versus Reality: The Jurisdiction of Rape, the Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L. 415, 430 (2009) ("Native families rely on an entire kinship community composed of non-nuclear family members for the raising and education of children. In certain tribal cultures, these family members even assume specific child-rearing responsibilities.") (citations omitted).

expected to be autonomous and thus were highly isolated.<sup>188</sup> The result was that the differences observed among Indian families were viewed with great alarm.

## 2. *The Indian father*

In particular, the negative stereotypes of the Indian father began to emerge as especially severe in the nineteenth century.<sup>189</sup> During this period, portrayal of Indian fathers was that of a lazy and irresponsible<sup>190</sup> drunk, and there “was almost universal agreement among observers that the Indian male did not work hard enough.”<sup>191</sup> This stereotyped Indian male was then contrasted against the “‘hard-working’ white male family head.”<sup>192</sup> Such stereotypes of the lazy and irresponsible Indian male were further reinforced by the fact that in many tribes Indian women did significant amounts of physical work<sup>193</sup> and were often considered the owners of the family residence<sup>194</sup> and

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188. During this period, “even ‘poor relatives’ who wished to share its wealth were scorned.” Lacey, *supra* note 162, at 342.

189. The original stereotype of the Indian male was that of the “wild savage.” However, as Indian men began to become less of a threat to the lives of white men, this image was “replaced in popular Eastern culture by the ‘lazy drunk’ Indian whose only threat to the white man was as a drain on his financial reserves.” *Id.* at 340.

190. One of the most damning criticisms of the Indian husband and father stemmed from the fact that it was not uncommon in many tribes for women to be heads of families. The Anglo-American disgust at such an arrangement was so severe that many Indian treaties and federal enactments contained provisions explicitly designed to diminish the practice. Berger, *supra* note 184, at 15 (noting the example of the treaty “with the Pottawatomie, which declared that when the president determined ‘that any adults, being males and heads of families . . . are sufficiently intelligent and prudent to control their affairs and interests,’ he might convey those Indians, land to them in fee simple and they would thereafter be citizens”).

191. *Id.*; see also Joanna M. Wagner, *Improving Native American Access to Federal Funding for Economic Development Through Partnerships with Rural Communities*, 32 AM. INDIAN L. REV. 525, 539 (2008) (stating “[t]he most vicious stereotypes of Indians [were] that they [were] lazy, savage, [or] drunk”).

192. Lacey, *supra* note 162, at 330.

193. Berger, *supra* note 184, at 17 (noting that Anglo society greatly “misunderstood the role of the Indian woman within many tribes. Women were almost uniformly responsible for a greater share of the productive labor of American Indian communities than their white nineteenth [century] counterparts . . . it was women who had the responsibility for cultivating the land in most American tribes. White observers and federal officials rejected such female participation in what they conceived of as the male sphere of work as a sign of ignoble savagery and of the debasement of the Indian male”); see also Lacey, *supra* note 162, at 340 (noting that this arrangement gave rise “to an additional stereotype of the industrious (although degraded) Indian ‘squaw’ who slaved away while her husband played”).

194. Indian women’s different work responsibilities resulted in different property

heads of the families.<sup>195</sup>

### 3. Other “bad” differences

Indian families differed from white families in numerous other ways as well. The Indian home was frequently an impermanent structure that contained little furniture.<sup>196</sup> This impermanence was “abhorrent to white reformers who believed the Indian ‘cannot become civilized until he loses the desire to live like a deer.’”<sup>197</sup> In addition, these differences caused white observers to frequently describe Indian homes as “dirty and squalid.”<sup>198</sup> Similarly, the fact that corporal punishment was uncommon and that most tribes taught their children to be “non-competitive and to learn group cooperation” was disturbing to many white observers.<sup>199</sup> These methods of child-rearing were viewed as “overly permissive and unstructured,”<sup>200</sup> and the fact that child-rearing tasks were shared was “viewed as evidence that the mother did not care about her children’s welfare.”<sup>201</sup> Such significant differences led white reformers to conclude that “every facet of Indian [family] life directly opposed the civilized family

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rights as compared to their white counterparts. “In contrast to the white nineteenth century woman whose property transferred by law to her husband upon marriage, it was a maxim that among the Indians, everything belonged to the women, except the Indian’s hunting implements and war implements, even the game the Indian brought home on his back.” Berger, *supra* note 184, at 18 (internal quotations omitted); *see also* Lacey, *supra* note 162, at 344.

195. Anglo society was unwilling and unable to recognize the significant power traditionally wielded by Indian women and viewed this as simply another aspect of uncivilized Indian culture that needed to be reformed. Berger, *supra* note 184, at 12 (noting the difficulties women had in the legal system and that when they attempted to use the judicial system, “Indian women confronted a system that was unaccustomed and often resistant to acknowledging the political, domestic, and economic power that they often held. The result was decisions that stripped women of this power, sometimes in the name of civilization and sometimes in the name of the law.”); *see also supra* notes 193–94.

196. Lacey, *supra* note 162, at 343.

197. *Id.* at 344 (quoting BOARD INDIAN COMM’R, SIXTH ANNUAL REPORT (1875)).

198. *Id.* (“[T]his stereotype can be attributed to the different cultural viewpoints as to how a home should look.”).

199. *Id.* at 347; *see also* Clarke Historical Library, Central Michigan University, Indian Treaties: Their Ongoing Importance to Michigan Residents <http://clarke.cmich.edu/indian/treatyeducation.htm#nas> (last visited Jan. 9, 2010) (“There was no ‘school’ . . . [and] children were allowed to roam freely throughout the community . . . Physical punishment was rare and modest . . .”).

200. Lacey, *supra* note 162, at 347.

201. *Id.*

unit,”<sup>202</sup> and as a result, “[m]ost observers refused to even recognize the existence of an Indian family.”<sup>203</sup> Eventually, these conclusions were used to justify the removal of thousands of children from their Indian parents.<sup>204</sup>

*B. Reforming the Indian Family*

Indian reformers spent most of the nineteenth and early twentieth centuries actively attempting to “reshape the American Indian family in the white family’s image.”<sup>205</sup> Such reformers believed that as long as Indian children were “associating all their highest ideals of manhood and womanhood with fathers who are degraded and mothers who are debased,”<sup>206</sup> they would never become healthy, productive members of society. The reformers solution was to remove these children from their families.<sup>207</sup>

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202. *Id.* at 348.

203. *Id.*

204. In an appalling case from 1904, a group of Irish orphans were adopted by a number of Mexican Indian families in Arizona. The white residents of the community were appalled at the idea of “half breed” Indians raising these white children and abducted them from their adoptive families at gun point. The case went all the way to the Supreme Court, which affirmed the white settlers’ actions in removing the children. LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 150, 293–94 (1999).

205. Lacey, *supra* note 162, at 348; see also Ronald M. Walters, *Goodbye to Good Bird: Considering the Use of Contract Agreements to Settle Contested Adoptions Arising Under the Indian Child Welfare Act*, 6 U. ST. THOMAS L.J. 270, 276 (2008) (“The differences in Indian family structure, gender roles, . . . work ethic, housekeeping, and religion conflicted with white ideals and gave rise to policies that ‘reflected a determined effort to reshape the Native American family into the nineteenth-century Anglo-American model.’”) (quoting Lacey, *supra* note 162, at 329).

206. Lacey, *supra* note 162, at 360 (quoting *AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY THE “FRIENDS OF THE INDIAN” 1880–1900*, at 243 (Francis Paul Prucha ed., 1973)). This period coincided with the rise of the cult of “true womanhood.” In the nineteenth century, a new vision of womanhood emerged against the “social and economic instability” of the period. Berger, *supra* note 184, at 9. “Piety, chastity[,] and domesticity were the essential virtues of the true woman and confinement and dedication to the home was both the purpose and the means to these qualities.” *Id.* Unfortunately for Indian women they “were perhaps particularly ill-suited to conform with the emerging ideal, and particularly likely to be condemned for falling short rather than idolized for conforming.” *Id.*

207. Although the removal of Indian children from their parents was the biggest intrusion into the Indian family during this period, other efforts were also undertaken to reform the Indian family. For example, the Bureau of Indian Affairs “repeatedly attempted to regulate Indian marriages, divorces and adultery.” Lacey, *supra* note 162, at 364–65. The courts of Indian offenses were created to punish Indians for domestic acts considered inappropriate by Anglo-society, which included

Dozens of Indian boarding schools were established for this purpose and thousands of Indian children were sent to these schools after being removed from their parents.<sup>208</sup> Children would typically spend years at these schools with little or no contact with their families.<sup>209</sup> The goal of such schools was to eliminate all the Indian elements from the children's lives and replace them with the values and culture of Anglo society.<sup>210</sup> The effects of this removal were devastating for Indian families.

By the time of the 1928 Merriam Report,<sup>211</sup> these educational

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"adultery, cohabitation, licentiousness, bastardry, and fornication." *Id.* at 366; *see also* Annette Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 147 n.38 (2004) ("For example, in the late nineteenth and twentieth centuries, Indian Courts and police intervened into marital relations, gender roles, dress, hairstyles, rituals regarding death and other passages, and even names."). *See generally* Berger, *supra* note 184 (discussing the legal treatment of Indian marriages and divorces).

208. "In 1879, federal boarding schools came into existence . . . . Many considered the schools to be the best possible method of saving the Indian child. Children who attended were physically removed from their families, often for years at a time." Lacey, *supra* note 162, at 356–57. "Many of these institutions housed more than a thousand students ranging in age from three to thirteen." Appell, *supra* note 207, at 147 n.41 (citing H.R. REP. NO. 104-808, at 15 (1996)).

209. *See* Lacey, *supra* note 162, at 357. These children were often sent to school hundreds of miles from their families. Although an 1894 regulation prohibited sending children out of state without parental consent, "child-snatching was a common practice until the 1930's." *Id.* at 359 (quoting DANE COOLIDGE, *KID CATCHING ON THE NAVAJO RESERVATION* (1930)).

210. The assimilationist efforts of these schools included requiring all conversations to occur in English and forbidding any child from speaking in his or her native language, and requiring children to "wear white man's clothing, cut their hair short, and pay strict attention to personal cleanliness." *Id.* at 357. They were taught "sex roles, based upon the white man's perceptions," and the schools attempted to instill in them "the [Anglo] work ethic and a love of property." *Id.* at 357–58. Reformers noted with pride the "success" of these efforts. An admirer of Richard Pratt's Carlisle Indian boarding school made the following observation:

Anyone who has seen a group of Apache children as they arrived at Carlisle, with all the characteristics of the savage, not only in their dress and manner, but visually stamped on their features in hard lines of craft, ferocity, suspicion and sullen obduracy, and has also seen a year later the same children neatly dressed, with their frank intelligent faces, not unlike in expression those of wholesome and happy boys and girls of our own race, must be convinced that education under suitable conditions is the true solution to the Indian problem.

*Id.* at 357 (citing BRIAN W. DIPPLE, *THE VANISHING AMERICAN: WHITE ATTITUDES AND THE U.S. INDIAN POLICY* 109, 118–19 (1982)).

211. *See* BRETT LEE SHELTON, HENRY J. KAISER FAMILY FOUND., *LEGAL AND HISTORICAL ROOTS OF HEALTH CARE FOR AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES* 8 (2004), available at <http://www.kff.org/minorityhealth/7021.cfm>.

policies had greatly “weaken[ed] Indian family life.”<sup>212</sup> The loss of their children frequently destroyed the parents’ relationship with each other, as well as any incentive to work hard and provide for the future.<sup>213</sup> In addition, it “eroded parental discipline and tribal unity” because the older Indians were “increasingly forced to rely on their children” for help dealing with governmental laws and policies.<sup>214</sup>

For the children, removal and placement in boarding schools resulted in a “severe loss of self esteem” as they were repeatedly told the Indian “way of life was savage and barbaric.”<sup>215</sup> It robbed them of their right to experience family life and permanently deprived them of a sense of belonging.<sup>216</sup> After graduating from these boarding schools the Indian children were still not given a place in main stream Anglo society, yet they had been denied the knowledge and culture they needed to be active members of their tribes.<sup>217</sup> The eventual acknowledgement of these numerous problems led to the closing of these schools,<sup>218</sup> but did not herald the end of the government’s anti-Indian family policies. These policies continued, in large part, because the perceptions regarding the unfit Indian parent had, by this point, become deeply ingrained. By the mid-twentieth century, “many children’s welfare workers believed that only non-Indian homes were suitable for Indian children,”<sup>219</sup> and the child welfare policies created during this period reflected this belief.<sup>220</sup>

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212. See Lacey, *supra* note 162, at 370 (quoting LEWIS MERRIAM, INST. FOR GOV’T RESEARCH, THE PROBLEM OF INDIAN ADMINISTRATION 15 (1928)).

213. See *id.* at 361 (“The 1928 Merriam Report . . . claimed that parents robbed of responsibility for children lost an ‘incentive to industry and to provision for the future.’ Moreover, the absence of the children loosened the marital bond.”) (quoting MERRIAM, *supra* note 212, at 576).

214. *Id.* at 368.

215. *Id.* at 361.

216. JOHN G. RED HORSE ET AL., FAMILY PRESERVATION CONCEPTS IN AMERICAN INDIAN COMMUNITIES 16 (2000), available at <http://www.nicwa.org/research/01.FamilyPreservation.pdf> [hereinafter FAMILY PRESERVATION CONCEPTS].

217. Lacey, *supra* note 162, at 361–62.

218. Carolyn Marr, Assimilation through Education, available at [http://www.english.illinois.edu/maps/poets/a\\_f/erdrich/boarding/marr.htm](http://www.english.illinois.edu/maps/poets/a_f/erdrich/boarding/marr.htm).

219. Lacey, *supra* note 162, at 376.

220. “The AAIA studies and legislative hearings revealed how deeply ingrained the assimilative attitudes of the past had become in American society. The cultural values and social norms of Native American families—particularly indigenous child rearing practices—were viewed institutionally as the antithesis of a modern-day ‘civilized’ society. Indeed, in a number of the child welfare cases examined, American Indian communities were shocked to learn that the families they regarded as ‘excellent care-givers’ had been judged ‘unfit’ by caseworkers.” Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 56

C. *The Long Legacy of Reform Efforts*

Long after the boarding schools closed, Indian children continued to be removed from their parents at astounding rates. These removals were often the result of deliberate government policies, such as the 1959 Indian adoption project, which removed Indian children from their Indian homes and placed them for adoption with non-Indian families.<sup>221</sup> Such policies were extremely successful. In the 1960s and 1970s, surveys indicated that approximately twenty-five to thirty-five percent of all Indian children were separated from their homes and placed in foster homes, adoptive homes, or in institutions.<sup>222</sup> As Senator James Abourezk, a Democrat from South Dakota, remarked, during this period, “[p]ublic and private welfare agencies seem to have operated on the premise that most Indian children would really be better off growing up non-Indians.”<sup>223</sup>

The modern assault on the Indian family however, was not limited to removing children; it also included policies to prevent their very existence. At the same time Indian children were being adopted into white families, the federal government was also actively encouraging Indian women to undergo abortions.<sup>224</sup> Even more shockingly, many Indian women were forcibly sterilized. It is believed that between 1972 and 1976 more than 3400 Indian women were sterilized and some estimate the number at more than 10,000.<sup>225</sup> These women

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(2008).

221. The project was a joint collaboration between the BIA and the Child Welfare League. Appell, *supra* note 207, at 147–48 (citing H.R. REP. NO. 104-808, at 16 (1978)); *see also* FAMILY PRESERVATION CONCEPTS, *supra* note 216, at 16.

222. Appell, *supra* note 207, at 148. In addition, “in 1971 and 1972, nearly one out of every four Indian children under one year old was adopted.” *In re* Adoption of Child of Indian Heritage, 529 A.2d 1009, 1010 (N.J. Super. Ct. App. Div. 1987). In Montana, there were over thirteen Indian children placed in foster care for every white child. *See* ICWA, H.R. REP. NO. 95-1386, at 9 (1978) (noting that Montana’s ratio of Indian foster-care placement “[was] at least thirteen times greater” than its placement of non-Indian children). “In Wisconsin, Indian children ran a 1600 percent greater risk of being removed from their parents than white children.” Graham, *supra* note 202, at 55 n.42.

223. Graham, *supra* note 220, at 56 (quoting Hon. James Abourezk, *The Role of Federal Government: A Congressional View*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 1, 12 (Steven Unger ed., 1977)).

224. Jane Lawrence, *The Indian Health Service and the Sterilization of Native American Women*, 24.3 AM. INDIAN Q. 414 (2000); Helen Temkin-Greener et al., *Surgical Fertility Regulation Among Women on the Navajo Indian Reservation, 1972–1978*, 71 AM. J. PUB. HEALTH 403, 405 (1981).

225. The impact of these sterilization procedures on the American Indian community was enormous. According to Senator Abourezk, who assumed responsibil-

were frequently sterilized immediately after child birth when their doctors determined they had “had enough children and it was time they stopped having children.”<sup>226</sup> When some of the women objected, they were told they were bad mothers and that their children would be placed in foster care if they did not agree to the surgery.<sup>227</sup>

In an effort to stem these assaults on the Indian family, Congress passed the Indian Child Welfare Act (ICWA).<sup>228</sup> Congress recognized that Indian children were being removed from their Indian families at alarmingly high rates, and that many of these removals were unjustified.<sup>229</sup> As the congressional discussion regarding the ICWA demon-

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ity for investigating the sterilization claims, “given the small American Indian population, the 3,400 Indian sterilization figure [out of 55,000 Indian women of childbearing age] would be compared to sterilizing 452,000 non-Indian women.” Statement of Sen. Abourezk, Michael Sullivan DeFine, *Native Americans Secretly Sterilized Under Bush Sr. Program*, NATIONAL EXPOSITOR, June 23, 2008, available at <http://nationalexpositor.com/News/1285.html>.

226. See Brint Dillingham, *American Indian Women and IHS Sterilization Practices*, 3 AM. INDIAN J. 27, 28 (1977) (internal quotation omitted).

227. *Sterilization of Young Native Women Alleged at Indian Hospital*, AKWESASNE NOTES, July 1974, at 22. In addition, some women were simply lied to and told they would still be able to have children after the surgery. See Dillingham, *supra* note 226, at 28.

228. 25 U.S.C. §§ 1901–1963 (2006). Although the passage of the ICWA was the most significant federal recognition of the devastation caused by decades of governmental policies towards Indian families, there have been other acknowledgments as well. The Administration for Children and Families, which is part of the U.S. Department of Health and Human Services, has begun recognizing the need for creating programs to actively support Indian families. The Administration for Native Americans (ANA), which is part of the Administration for Children and Families (ACF), recently created the Family Preservation Initiative to “promote culturally suitable strategies that strengthen Native American communities.” See ANA—Native American Healthy Marriage Initiative (NAHMI), <http://www.acf.hhs.gov/programs/ana/programs/NAHMI/Index.html> (last visited Nov. 12, 2009). Programs include premarital and marital education, resources for grandparents raising grandchildren, relationship skills for youth, programs to combat domestic violence and programs providing assistance to parents. Tribes can apply to the department for funds to help support such efforts. *Id.*

An example of a program created under the initiative is the Chippewa tribe’s “Fatherhood Initiative” which was created to “help meet the needs of fathers on the reservation.” The program recognizes the need to involve fathers more meaningfully in the lives of their children, as well as the fact that “[y]oung fathers, who are often struggling with issues of survival, have not had an easy transition to active involvement in raising their children.” Cecelia Godfrey, *Working With Native American Fathers*, [http://edlkc.ohs.acf.hhs.gov/hslc/For%20Parents/Everyday%20Parenting/Fatherhood/edudev\\_art\\_00111\\_072305.html](http://edlkc.ohs.acf.hhs.gov/hslc/For%20Parents/Everyday%20Parenting/Fatherhood/edudev_art_00111_072305.html).

229. 25 U.S.C. § 1901(4) (“[T]he Congress finds . . . 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

strates, Congress recognized that many of these removals were based on cultural bias regarding the inferiority of Indian families and Indian childrearing practices.<sup>230</sup> Many of the children judged neglected were simply being raised in a manner that did not conform to Anglo-American norms regarding childrearing. One example Congress noted was the fact that many welfare officials considered the traditional Indian practice of using extended family members to provide childcare as constituting parental neglect.<sup>231</sup> Another example concerned parental drinking and drug use. Testimony before Congress revealed that “in areas where rates of problem drinking among Indians and non-Indians were the same, the Indian family was more likely to have their children removed from the home.”<sup>232</sup> In addition, it was also discovered that American Indian families with substance abuse problems “were less likely than non-Indian families with substance abuse problems to receive supportive services as an alternative to removal of their children.”<sup>233</sup>

As Congress recognized, the legacy of the Indian reform efforts was a belief in the inferiority of the Indian way of life so ingrained that it would take much more than the elimination of the boarding schools and other reform efforts to reverse the damage done to the Indian family.<sup>234</sup> Affirmative steps needed to be taken to restore and strengthen the Indian family, and the result was the enactment of

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alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions.”)

230. *See id.* § 1901(5) (“[T]he States . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.”).

231. Graham, *supra* note 220, at 56 (“[M]any [s]ocial workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, considered leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.”) (quoting Abourezk, *supra* note 225, at 3). “Yet in many indigenous communities, extended family members play an important role in child-rearing. For instance, in the Blackfoot community, it is not uncommon for grandparents to raise one of their grandchildren. This is how cultural knowledge is passed from community to child and from generation to generation.” *Id.*

232. *Id.*

233. *Id.* In addition, caseworkers and teachers also ignored the disciplinary practices of Indian families, alleging that American Indian children lacked close parental supervision and strong discipline. Indigenous forms of discipline—alternatives to physical punishment, including teasing, ostracism, peer pressure, and storytelling—were seen as too permissive. Yet, as evidenced by the legislative history of the ICWA, “[w]hat is labeled as ‘permissiveness’ may often, in fact, simply be a different but effective way of disciplining children.” *Id.* at 57.

234. *See infra* Part IV.D.

ICWA, which grants special rights and protections to Indian families in the context of adoption and termination.

*D. Continuing Negative Perceptions and the Consequences*

The ICWA was passed to help combat and negate the effects of the negative perceptions regarding the Indian family.<sup>235</sup> However such views are so strong they have continued to reveal themselves in the decades since the ICWA's passage.<sup>236</sup> A 2000 study by the National Indian Child Welfare Association found that "mainstream child welfare practice continues to approach Indian families from a perspective of deficient models" and that "[v]alue conflicts persist between mainstream service providers and Indian communities in several areas, including the definition of family preservation."<sup>237</sup>

One of the most notable examples of the persistence of this bias against Indian families is the existing Indian family doctrine. This doctrine is a judicially created exception to the ICWA, which allows courts to bypass the ICWA standards if the court determines that the Indian child at issue is not being removed from an existing Indian family.<sup>238</sup> In such cases, the courts hold that unless the Indian child has what the court determines are sufficient ties to his or her tribe, the ICWA will not apply and the court is not required to seek placement with an Indian family.<sup>239</sup> The exception allows courts to avoid the ICWA's requirement that priority of placement for Indian

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235. Graham, *supra* note 220, at 82 ("Moreover, the ICWA is necessary both because American Indian children and their families remain in a 'stigmatized position' and because the law provides some guarantees against repetition of abuse, in part by recognizing an Indian nation's right to self-determination where child welfare matters are concerned.").

236. Professor Vine Deloria notes that as an official with the National Congress of American Indians, "it was a rare day when some white didn't visit my office and proudly proclaim that he or she was of Indian descent." VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 3 (1969). However, Deloria also notes that in all but one of these instances the claimed Indian ancestor was a woman. According to Deloria, even today the negative perceptions of the Indian male are extremely strong. "A male ancestor has too much of the aura of the savage warrior, the unknown primitive, the instinctive animal, to make him a respectable member of the family tree." *Id.*

237. FAMILY PRESERVATION CONCEPTS, *supra* note 216, at 8.

238. Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v. Holyfield*, 17 COLUM. J. GENDER & L. 1, 28 (2008).

239. *Id.* This exception avoids the requirements of 25 U.S.C. § 1915(a), which states that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."

children must be with Indian families.<sup>240</sup> This exception does not appear in the ICWA, and is arguably a violation of the act.<sup>241</sup> Consequently, its creation and frequent use demonstrates the continuing and strong perception that Indian families are undesirable.<sup>242</sup>

Even more indicative of the persistence of this bias against Indian families is the fact that thirty years after the passage of the ICWA, Indian children are still removed at astronomically high rates.<sup>243</sup> In 1997, “more than 50,000 Indian children were living in non-Indian adoptive homes.”<sup>244</sup> In fact, “data suggests that in a manner similar to the days before passage of ICWA, adoption still serves as a preferred option in the delivery of support services to American Indian families.”<sup>245</sup> “Mainstream social workers remain ignorant about Indian

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240. See Maldonado, *supra* note 238, at 28.

241. This is a controversial exception and there is widespread disagreement on its validity. Kansas just eliminated its exception this past year. Marie Price, *Kansas Supreme Court Decision Abandons Existing Indian Family Exception*, OKLA. CITY J. REC., June 24, 2009; see also, Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 CAP. U. L. REV. 239, 245 n.25 (2008) (The judicially-created “existing Indian family exception” that has been endorsed by more than a dozen state courts has no statutory basis and directly conflicts with the federal policy of tribal self-determination”); Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the “Existing Indian Family” Exception (Re)imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 329 (2008–09) (“State courts have thwarted ICWA’s full potential through the judicially created ‘existing Indian family exception,’ which denies ICWA application in defiance of the Act’s plain language, Supreme Court precedent, and congressional intent.”).

242. Another potentially negative development was the passage of the Adoption and Safe Families Act which “mandates provisions of permanency planning that may be contrary to ICWA and creates conflict in the arena of Indian family preservation.” FAMILY PRESERVATION CONCEPTS, *supra* note 216, at 7. The act places an emphasis on adoption as the primary form of permanency placement despite the fact that this may not comport with American Indian views and is reminiscent of earlier assimilation policies. Moreover, it is “often—and mistakenly—seen to supercede [sic] ICWA.” *Id.*

243. For example, in Minnesota, with an American Indian population of 1.9% of Minnesotan children, they make up 11% of out-of-home placements. See *id.* at 9. In Alaska, twelve years after passage of the ICWA, native children were being removed from their homes at five times the rate of their non-Indian peers and 93% were then placed in non-Indian homes. Maldonado, *supra* note 238, at 6 n.30. Similarly, “sixty-one percent of the children in foster care in South Dakota in 2003 were Native American even though less than nine percent of the state’s population at the time was Native American.” *Id.* at 27.

244. Maldonado, *supra* note 238, at 27–28 (citing International Indian Treaty Council, *Rights of the Child*, E/CN.4/2001/NGO/43, Jan. 23, 2001, available at [http://www.treatycouncil.org/section\\_211417131.htm](http://www.treatycouncil.org/section_211417131.htm) (written statement submitted to U.N. Economic and Social Council, Commission on Human Rights)).

245. FAMILY PRESERVATION CONCEPTS, *supra* note 216, at 10.

cultural experiences, and their knowledge deficit is deleterious to tribal children, families, and communities.”<sup>246</sup>

*E. The Meaning of the Cypress Decision*

The court’s decision in *Cypress* appears to reflect many of the historic stereotypes regarding Indian families discussed above.<sup>247</sup> The

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246. *Id.* at 8. The Department of Health and Human Services continues to advocate placement in a nuclear family as “the ideal social unit” and adoption as the “optimal form of permanence” which conflicts with the Indian familial systems based on extended family networks and clans as optimal support networks rather than adoptions.” *Id.* at 13; see also Lacey, *supra* note 162, at 378 (noting that “[s]ocial workers continue to expect Indian families to conform to middle class norms” and are likely to remove their children if they do not).

247. The decision may also reflect the new stereotype of the rich Indian and gaming tribes’ limitless wealth and that such gaming money is permanent. Although this is a widely held belief, it is a myth and one which the current economic climate is demonstrating more and more each month. During the seven months preceding June, 2008, gambling stocks had fallen 43%. See Ian Davis, *This “Recession-Proof” Industry Just Fell 43%*, THE GROWTH STOCK WIRE, June 9, 2008, [http://www.growthstockwire.com/archive/2008/jun/2008\\_jun\\_09.asp](http://www.growthstockwire.com/archive/2008/jun/2008_jun_09.asp). Many Indian casinos are suffering double-digit declines in business due to the lingering recession. See Indianz.com, *Tribal Casinos in Trouble amid Economic Woes*, July 15, 2009, <http://64.38.12.138/IndianGaming/2009/015512.asp>. Casinos are being forced to reduce salaries, fire employees, and cut back on spending. Some casinos are even being forced to close. See, e.g., Rob Capriccioso, *Tribal Casino Closes due to Poor Economy*, INDIAN COUNTRY TODAY, July 14, 2009, available at <http://www.indiancountrytoday.com/national/50484622.html>. Consequently, it is becoming very likely that per capita distributions are going to decline as well.

The long-term fate of Indian casinos is similarly uncertain. The success of most Indian casinos is due to the gaming monopoly they enjoy within a state. However such a monopoly is not permanently guaranteed. It is based upon a tribal-state compact, which is of limited duration. Further, it currently seems unlikely state mores could change, such that all gaming within the state is prohibited, which would similarly eliminate tribal casinos. Lastly, the tribes themselves may decide to change how the profits are distributed. Many tribes are concerned about the effect such “easy” money has on its members. Although no action has been taken thus far, the Seminole tribe has been considering various changes to its dividend policy for more than a decade. See, e.g., Mike Clary, *A Centuries-Old Struggle for Survival has Become a New Challenge in a New Century: How to Survive Success*, S. FLA. SUN-SENTINEL, Nov. 25, 2007, available at <http://www.sun-sentinel.com/news/local/southflorida/sfl-semilifesbnov25,0,2397714.story> (Proposals have included withholding dividends from high school dropouts until they reach twenty-five or imposing financial penalties on students who have grades below a C average).

Finally, it should be noted that there is an increasing backlash against Indian casinos. See, e.g., Renee A. Cramer, *The Common Sense of Anti-Indian Racism: Reactions to Mashantucket Pequot Success in Gaming and Acknowledgment*, 31 LAW & SOC. INQUIRY 313, 332 (2006) (“Even friendly journalistic accounts of the Mashantucket Pequot’s success invariably make distinctions between them and other Indians in ways that impugn their authenticity as Indians, reinforce stereotypes about what ‘authentic Indians’ are,

court's refusal to find Blue Jay responsible for the support of his children is highly reminiscent of the nineteenth century reformers' perceptions of Indian fathers as lazy and irresponsible. By refusing to hold Blue Jay responsible for his children's support, particularly when similarly situated white fathers have been held accountable, the court is helping to foster the continuing perception of the lazy, irresponsible Indian father.

Second, the court's decision reflects the even more detrimental belief that Indian children are better off without their Indian parents, especially if their parent does not conform to Anglo conceptions of a good parent.<sup>248</sup> Blue Jay's brief made this conclusion all too easy for the court. Blue Jay presents himself as the antithesis of the "good" Anglo-American father, who is both head of the household and the family provider. Instead, Blue Jay disclaims these roles and instead assigns them to the tribe.<sup>249</sup> By agreeing with Blue Jay's characterization, the court's decision sends the message that not only is it acceptable for an Indian father not to support his family, but it also implies that it is in the children's best interest not to even require this minimum level of contact with their father.

Tens of thousands of Indian families were decimated due to racial prejudice and stereotypes regarding the fitness of Indian parents. Such beliefs have shown a remarkable endurance and continue to harm Indian families even today. The *Cypress* decision may simply be the latest example.

## V. THE INDIAN FAMILY IN PERIL

### A. *The Current State of the Indian Family*

Racist policies targeting Indians nearly succeeded in destroying Indian families, and the Indian family has yet to recover. In fact, its survival remains in jeopardy. Nearly one in three Indian children lives in poverty, and Indian children are nearly twice as likely as their non-Indian peers to have no parent in the work force.<sup>250</sup> It is common

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and equate indigeneity with primitivism and poverty.”).

248. “It is important to note that historically many elements of society tended to minimize the importance of the parent-child relationship for Native-American and African-American families.” Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 171 n.192 (2007) (citing Appell, *supra* note 189, at 145).

249. Brief of Appellee, *supra* note 207, at 3.

250. See THE HARVARD PROJECT ON AMERICAN INDIAN ECONOMIC DEVELOPMENT, THE

for Indian children to live in homes that lack plumbing or have other physical problems, and are overcrowded.<sup>251</sup> Indian parents are also likely to have more children and at younger ages than their non-Indian peers.<sup>252</sup> The Indian population's birth rate is nearly seventeen percent greater than that of the population as a whole, and their teen pregnancy rate is fifty percent greater.<sup>253</sup> In addition, when compared with the non-Indian population, a higher share of Indian births are to never married mothers, and Indian children are almost fifty percent more likely to live in a single parent household.<sup>254</sup>

These bleak statistics reveal an American Indian population consisting primarily of youth<sup>255</sup> who were raised in extreme poverty, with single parents,<sup>256</sup> absent parents, and teenage parents. It is also a population with disproportionately high rates of suicide,<sup>257</sup> drug use,<sup>258</sup> and other diseases, as well as distressingly high incidences of family trauma, such as domestic violence.<sup>259</sup>

Poverty is a significant cause of many of these hardships,<sup>260</sup> and money should help alleviate many of the immediate effects of Indian poverty.<sup>261</sup> Nevertheless, the problems facing the Indian population

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CONTEXT AND MEANING OF FAMILY STRENGTHENING IN INDIAN AMERICA 6 (2004), [http://www.aecf.org/upload/PublicationFiles/fs\\_indian\\_america.pdf](http://www.aecf.org/upload/PublicationFiles/fs_indian_america.pdf) [hereinafter THE HARVARD PROJECT].

251. *Id.*

252. *See id.*

253. *Id.*

254. *Id.*

255. Currently, Indian children make up a disproportionately large percentage of the Indian population. "Thirty-three percent of all Indians are younger than fifteen [sic] years of age, compared to twenty-two percent for the general population." B.J. Jones, *In Their Native Lands: The Legal Status of American Indian Children in North Dakota*, 75 N.D. L. REV. 241, 244 (1999) (analyzing the federal, state, and tribal laws that apply to Indian children in North Dakota). In fact, in some states the number of Indian children is nearly a majority of Indian people. *Id.*

256. More than any other group, Indian children are likely to live in single parent homes. The majority of such homes consist of a single mother and absent father. *See, e.g., id.* at 245 (noting that 24% of Indian families in North Dakota were headed by a single mother).

257. *See* THE HARVARD PROJECT, *supra* note 232, at 7.

258. *See id.*

259. *See id.* at 7, 13.

260. *See generally* Kathryn R.L. Rand, *There are No Pequots on the Plains: Assessing the Success of Indian Gaming*, 5 CHAP. L. REV. 47 (2002) (discussing the policy and effects of Indian gaming on the Indian population).

261. There "have been marked improvements for many Native American communities, largely due to gaming revenue." *Id.* at 53. An interesting study of North Carolina Cherokee children vividly illustrates these improvements. In 1996, a group of impoverished Cherokee Indian children were participating in a mental

are deeper than money.<sup>262</sup> They are the legacy of policies aimed at destroying the Indian people and their way of life and thus may be the hardest to reverse.<sup>263</sup> In fact, the circumstances surrounding Blue Jay and Carla's relationship vividly demonstrate that the acquisition of wealth may do little to solve the problems facing Indian families.

*B. Money is Not Enough*

The Seminole tribe is now one of the richest tribes in the country,<sup>264</sup> but the problems facing its members are surprisingly similar to

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health study in Western North Carolina. See Molly Townes O'Brien, *Brown on the Ground: A Journey of Faith in Schooling*, 35 U. TOL. L. REV. 813, 838 (2004) (arguing that *Brown v. Board of Education* was a disappointment which stems from a misconception of the power of schooling and a disconnect between America's faith in its schools and their operational reality). When their families began receiving payments from the reservation's casino, many of the children's families were suddenly lifted out of poverty. See *id.* "The children in the study, all of whom had exhibited high rates of mental disturbances and behavioral problems when their families were poor, showed dramatic mental health improvement after their families began receiving the casino payments." *Id.* Within four years, the "behavior problems—everything from getting in trouble at school to breaking the law—fell by 40 percent" and "the poor children were no more symptomatic than children who had never been poor." *Id.*

262. It should also be noted that although the advances in tribal economics, education and standard of living are significant, a study conducted by Jonathon B. Taylor & Joseph P. Kalt of the Harvard Kennedy School indicates that the significant gains made by tribes with gaming enterprises in the 1990s "did not eliminate the socioeconomic disparities between Indian Americans and other Americans. Much remains to be done to close the gap: If U.S. and on-reservation Indian per capita incomes were to continue to grow at their 1990s' rates, it would take half a century for tribes to catch up." JONATHAN B. TAYLOR & JOSEPH P. KALT, AMERICAN INDIANS ON RESERVATIONS: A DATABOOK OF SOCIOECONOMIC CHANGE BETWEEN THE 1990 AND 2000 CENSUSES (2005), available at <http://www.hks.harvard.edu/hpaied/pubs/documents/AmericanIndiansonReservationsADatabookofSocioeconomicChange.pdf>. As Taylor and Kalt note, "[t]he Census data make it clear that, on average, Indians on both gaming and non-gaming reservations have a long way to go to with respect to addressing the accumulation of long-enduring socioeconomic deficits in Indian Country." *Id.*

263. THE HARVARD PROJECT ON AM. INDIAN ECON. DEV., THE CONTEXT AND MEANING OF FAMILY STRENGTHENING IN INDIAN AMERICA 1 (Aug. 2004), [http://www.aecf.org/upload/PublicationFiles/fs\\_indian\\_america.pdf](http://www.aecf.org/upload/PublicationFiles/fs_indian_america.pdf).

Even on reservations where tribal governments are proactively addressing economic under-development through much-publicized gaming operations and less-publicized, but growing, non-gaming businesses, the particular history of Indian America has left a legacy of dependence on federal and state antipoverty, education, and social "progress" programs when it comes to addressing the needs of children and families to work together to improve communities so that families can do well.

*Id.*

264. Kestin et al., *supra* note 6.

those plaguing members of the poorest tribes.<sup>265</sup> The Seminole tribe has an “alarming high-school dropout rate, persistent drug and alcohol abuse, [and] free-spending ways that can lead to unmanageable personal debt.”<sup>266</sup> Similarly, despite their wealth, the circumstances of Carla and Blue Jay’s relationship have more in common with the poor than the rich.<sup>267</sup> Carla and Blue Jay were teenagers when their first child was born.<sup>268</sup> They never married,<sup>269</sup> and as soon as their relationship ended, Blue Jay abandoned his parental role.<sup>270</sup> Out of wedlock births, teenage pregnancies, and single-parent households are facts disproportionately present among low-income populations.<sup>271</sup> They are also especially prevalent among poor Indian communities.<sup>272</sup>

Given the long history of Indian poverty, coupled with the repeated and deliberate assaults on the Indian family, it is not surprising that gaming revenue has not been an immediate cure-all. However, if the Indian family is to recover and thrive, affirmative steps are needed to help strengthen and protect it. The *Cypress* decision does the

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265. This is not to imply that gaming revenue has not had a significant and positive impact on tribes and tribal members. Revenue from tribal casinos reached nearly \$23 billion in 2005 and \$26 billion in 2006. NAT’L COUNCIL FOR LEGISLATORS FROM GAMING STATES, MINUTES OF STATE-FEDERAL RELATIONS COMMITTEE, (June 8, 2007), <http://www.nclgs.org/Minutes/8000812.pdf>. It also brings much needed employment opportunities to reservations. An estimated 310,000 jobs have been created to support the 420 tribal casinos currently operating in the United States. *Tribal Casinos’ Revenue Climbs to \$23 Billion*, GAMBLING MAG., June 21, 2006, available at <http://gamblingmagazine.com/ManageArticle.asp?C=360&A=18326>. Nevertheless, the poverty among Indian peoples remains significant and widespread.

Indians are generally thought to be the most impoverished minority in the United States: Thirty-one percent live below the poverty line, and the annual per capita income of \$8,300 for Indians is the lowest of all minorities in the country. On certain Indian reservations, the unemployment rate equals or exceeds forty-five percent, a figure reflective of both the abject poverty on many reservations and the strikingly young population of many Indian reservations, where the young often constitute the majority population.

Jones, *supra* note 255, at 244.

266. Mike Clary, *A Centuries Old Struggle for Survival has Become a New Challenge in a New Century: How to Survive Success*, S. FLA. SUN-SENTINEL, Nov. 25, 2007, at 1.

267. Many studies have indicated that income is one of the biggest risk factors for divorce, teen pregnancy, alcoholism, etc. See, e.g., Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J. L. & FAM. STUD. 279, 315 n.181 (2008).

268. Interview with Michael Hymowitz, *supra* note 1.

269. *Id.*

270. *Id.* (stating that Blue Jay has little contact with his children). See generally Brief of Appellee, *supra* note 2 (seeking to avoid child support payments).

271. Ann Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 190–91 (2002).

272. See THE HARVARD PROJECT, *supra* note 250.

opposite. Rather than using the Tribe's newly acquired wealth as a basis for encouraging renewed parental responsibility, the decision permits, and arguably encourages, the abandonment of parental responsibility by Indian parents.

#### VI. THE IMPORTANCE OF CHILD SUPPORT

The *Cypress* court's decision permits Indian fathers to disclaim responsibility for their children.<sup>273</sup> This decision is particularly disturbing because the payment of child support could potentially alleviate many of the problems that continue to affect Indian tribes, regardless of money. Many of these problems stem from the breakdown of the Indian family. Children are deeply and negatively affected by parental abandonment. However, the payment of child support can both decrease the likelihood of such abandonment and lessen its effects on children.

In most cases, children benefit from the presence of two parents in their lives and they also benefit when parents acknowledge their parental responsibilities and obligations. Similarly, they are harmed by a lack of parental involvement and interest. There is wide consensus that involved fathers are important to the health and well being of children, and there is increasing acknowledgement regarding the numerous negative effects that occur when fathers disappear from their children's lives.<sup>274</sup> Research has found that children who have infrequent contact with their fathers are more likely to experience "academic, social, and emotional problems than children who grow up with two parents."<sup>275</sup> In addition, such children also "tend to have lower levels of cognitive development and lower self-esteem than children who share close relationships with their nonresident

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273. Non-custodial fathers disengage from their children at alarmingly high rates. Only 25–35% of children see their nonresident fathers one or more times a week and 40% see them less than once a year or never. Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 996 & n.23 (2006). Moreover, fathers that were never married to their children's mother, such as Blue Jay, "are even less likely to be involved in their children's upbringing or share a close relationship with them." *Id.* at 993 n.2 (citing ELAINE SORENSEN & MARK TURNER, BARRIERS IN CHILD SUPPORT POLICY: A LITERATURE REVIEW 14 (1996), available at <http://www.ncoff.gse.upenn.edu/litrev/sb-litrev.pdf> (finding that only 60% of non-marital children had seen their nonresident fathers in past year, as compared to 82% of marital children whose parents were separated or divorced)).

274. *Id.* at 997.

275. *Id.* (noting that these studies indicate that such children are "more likely to engage in early sexual activity, abuse drugs, and engage in delinquent behavior").

fathers.”<sup>276</sup> Given the fact that Indian children already have a much higher incidence of many of these problems,<sup>277</sup> the fact that the *Cypress* decision facilitates actions that will further exacerbate these problems is particularly concerning.<sup>278</sup>

A. *Why Child Support is More Than Money*

The payment of child support can combat parental disengagement as well as the negative effects that stem from it. Fathers who pay child support are more likely to have increased contact with their children.<sup>279</sup> This increased contact also results in increased academic achievement and fewer behavioral problems.<sup>280</sup> Paying child support “encourage[s] non-custodial parents to establish and maintain loving relationships with their children. Non-custodial parents who do not

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276. *Id.* at 997–98.

277. See discussion *supra* Part V.A.

278. Although these problems may be greater for tribes with few financial resources, they continue to be disproportionately high among Indian communities in general, regardless of whether or not a tribe may own a casino. For example, the Colleville Tribe of Washington, which operates the Mill Bay Casino, has a suicide rate “20 times the national average.” Press Release, Sen. Maria Cantwell, Suicide Prevention Demonstration Project (May 19, 2009) (on file with the William Mitchell Law Review), available at <http://cantwell.senate.gov/news/record.cfm?id=313164>. Similarly, the unemployment rate for these tribes is extremely high. See generally ROBIN J. ANDERSON, TRIBAL CASINO IMPACTS ON AMERICAN INDIAN HOUSEHOLD WELLBEING (2009), <http://www.census.gov/hhes/www/poverty/paa09-abstract.pdf> (examining the impact of tribal casinos on a variety of aspects of the American Indian, including employment). Even the Seminole tribe, which has one of the most profitable casinos in the country, has an unemployment rate of nearly 45%. Rand, *supra* note 260, at 56 n.59. In addition, drug use is rampant among both gaming and non-gaming tribes. See Onell R. Soto, *Tribal Youth Summit to Offer Cultural Awareness as Solution*, SAN DIEGO UNION TRIB., Mar. 28, 2008, available at [http://legacy.signonsandiego.com/uniontrib/20080328/news\\_1m28youth.html](http://legacy.signonsandiego.com/uniontrib/20080328/news_1m28youth.html) (noting that drug use is just as rampant on reservations with casinos as those without, and the school dropout rates may actually be higher for casino owning tribes).

279. Contact with non-custodial fathers is important and “fathers who pay support also visit more.” Scott Altman, *A Theory of Child Support*, 17 INT’L J. L. POL’Y & FAM. 173, 190 (2003). Social science research indicates that “children raised in two-parent homes do better than children raised in single-parent homes.” Maldonado, *supra* note 273, at 994. However, many of the “negative effects associated with growing up in a single parent family can be reduced by nonresident fathers’ significant involvement with their children.” *Id.* (citing *Welfare Reform Reauthorization Proposals: Hearing on H.R. 14 Before the H. Comm. on Ways & Means*, 107th Cong. § 2 (2002) (statement of Elaine Sorensen, Principal Research Associate, Urban Institute)).

280. Valarie King, *Variation in the Consequences of Nonresident Father Involvement for Children’s Well-being*, 56 J. MARRIAGE & FAM. 963, 969 (1994) (noting studies that have shown “the payment of child support has beneficial effects for children in the domain of educational achievement and behavioral adjustment”).

pay child support tend to withdraw from their children generally.<sup>281</sup> In addition, children who grow up with absent fathers typically “feel rejected when their fathers are not involved in their lives.”<sup>282</sup> However, the payment of child support counteracts this perception of rejection.<sup>283</sup> “Children whose fathers pay child support have fewer academic, emotional, and behavioral problems than children whose fathers do not pay support, regardless of the amount paid.”<sup>284</sup> Importantly, the benefits of paying child support appear to occur even in situations of forced support.<sup>285</sup>

### B. *The Meaning of Support*

The non-monetary benefits that accrue from the payment of support are not surprising when one examines the meaning of support. As discussed previously, supporting one’s child has long been recognized as an essential aspect of the parent-child relationship. William Blackstone attempted to describe the contours and source of this obligation as far back as the eighteenth century, but even today, courts and jurists continue to grapple with the questions surrounding this obligation.

More than two centuries after Blackstone described a parent’s duty to support his or her child as “a principle of natural law,”<sup>286</sup> the Supreme Court struggled with the nature of this obligation. In *Bowen v. Gillard*,<sup>287</sup> the Court struggled with the question of whether the obligation to support one’s child is not only a duty, but whether it is also a right. According to the dissent, parents have a fundamental right to make child support payments.<sup>288</sup> In a dissent authored by Justice Brennan and joined by Justice Marshall, Brennan explained:

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281. Altman, *supra* note 279, at 191 (noting that some studies suggest that even coerced child support would increase visitation by the non-custodial parent).

282. Maldonado, *supra* note 273, at 998 (“[B]ecause children want to have a relationship with both parents, nonresident fathers’ involvement is likely to contribute to children’s happiness and well-being.”).

283. Studies show that children who receive support feel less rejected, have fewer behavioral problems, and perform better in school. Altman, *supra* note 279, at 190. Such benefits were not observed in children who received similar levels of support from non-parental sources. *Id.* One might think these benefits are simply the result of money in general but these studies also demonstrate that child support dollars “provide a larger benefit on these measures than dollars from other sources.” *Id.*

284. Maldonado, *supra* note 273, at 998–99.

285. Altman, *supra* note 279, at 190.

286. BLACKSTONE, *supra* note 36, at 343.

287. *Bowen v. Gillard*, 483 U.S. 587 (1987).

288. *Id.* at 624–25 (Brennan, J., dissenting).

[T]he Government [could not] forbid the father to support his child without some powerful justification. A father is entitled to support his child, and the child is entitled to look to the father for this support. To prohibit paternal support would deny the father a crucial means of participating in the upbringing of the child, and deny the child its entitlement to receive support from a biological parent who has a deep-rooted interest in seeing that the particular needs of that child are met. The argument that other forms of connection might remain likewise would be unavailing, *for a father's support of his own child is integral to sustaining the parent-child relationship.*<sup>289</sup>

Both Blackstone and Justices Brennan and Marshall recognized the importance of support. They understood that support is more than money; it is an integral part of the parent-child relationship.<sup>290</sup> Accordingly, the symbolic importance of paying or not paying child support cannot be understated.

The failure to pay child support (*i.e.*, refusing to share resources with one's child), demonstrates indifference in a way that measurably harms a child.<sup>291</sup> Failure to pay displays a parent's preference for their own desires over the needs of their children,<sup>292</sup> and studies demonstrate that children attach this meaning to child support. Studies show that:

[C]hildren view non-payment of support as showing indifference to the child's welfare—or at least a strong preference for spending on other concerns. This indifference violates the expectation of parental love, and the need for being the object of special concern. Non-payment is thus at once betrayal of a social norm, and deprivation of a strong psychological need.<sup>293</sup>

Loving parents “typically want their children to live as well as they do. By not visibly prospering more than the child, the parent

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289. *Id.* at 619 (emphasis added).

290. In addition to this legal duty to consider the child's best interest, one could also argue that there is a duty under natural law. Altman, *supra* note 279, at 189. If we have a duty under natural law to provide for our children as a result of begetting them, then perhaps we also have a duty to ensure their emotional welfare as well, and thus we may have a duty of love to our children. “Perhaps parents owe children demonstrations of love that are psychologically important for child welfare and not adequately provided by delegates.” *Id.* at 190.

291. *Id.* at 175.

292. *Id.* at 189.

293. *Id.* at 190.

demonstrates love to the child.”<sup>294</sup> Consequently, children view payment of child support as demonstrating love<sup>295</sup> and the refusal to pay as indifference.

Such results make intuitive sense. Imagine what Blue Jay’s children must think of him. Even though their father receives more than \$10,000 a month, he went to court in order to make sure he would not have to share any of this income with his children.<sup>296</sup> Such actions do not strike one as the actions of a loving parent, but rather as the behavior of a selfish and indifferent one. In fact, Blue Jay’s actions are the types of actions that typically receive the most severe forms of societal disapproval. A quick glance through the many newspaper articles on the subject will reveal society’s deep revulsion towards “dead-beat dads.”<sup>297</sup> It is hard to imagine that, despite their sizable dividend checks, Blue Jay’s children will be unaffected by his actions.

Parental abandonment can significantly and detrimentally effect children. The payment of child support has been shown to lessen these effects. However, the *Cypress* decision denies this benefit to Indian children. Consequently, the *Cypress* decision can be expected to demonstrably harm Indian children and families.

## VII. CONCLUSION

For the first time in generations, Indian tribes are beginning to extricate themselves from the depths of poverty. Gaming revenues have dramatically improved the circumstances of many Indian tribes and have, for the first time in generations, allowed Indian people to envision a brighter future. It is therefore extremely distressing that this money is now being used to harm Indian families. The *Cypress*

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294. *Id.* at 196.

295. *Id.* at 189.

296. See generally Brief of Appellant, *supra* note 3.

297. See *Role of the Father in Desperate Need Among Children*, OKLA. DAILY, June 25, 2009, <http://oudaily.com/news/2009/jun/25/column-role-father-desperate-need-among-children> (“As much as we need these fathers to do the right thing, for some it may be best that they stay gone. These ‘dead-beat dads’ that are choosing to leave families probably have little to offer their children anyhow . . .”); John Tierney, *The Big City; A New Look at Realities of Divorce*, N.Y. TIMES, July 11, 2000, at B1 (“Journalists . . . and politicians of all persuasions have righteously condemned ‘deadbeat dads.’”); Melinda Vickerman, *Deadbeat Dads Cheat Children Out of Necessities*, JERSEY J., June 11, 2009, <http://www.nj.com/columns/jjournal/index.ssf?/base/living-0/1244701581262240.xml&coll=3> (stating that children of deadbeat dads “are being cheated out of the necessities they require because these men cannot meet their most basic obligations as fathers”).

decision creates a terrible precedent. It permits the perpetuation of dangerous stereotypes that nearly destroyed the Indian family and now may slow the recovery of these families by denying them a proven benefit. If we are truly committed to reversing the effects of centuries of U.S. anti-Indian policy, then courts must refuse to issue opinions based on the lingering effects of such policies. *Cypress* was a bad decision, and one can only hope it is not a harbinger of future Indian child support decisions.