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A Strange Kind of Identity Theft: How Competing Definitions of "Indian" May Deny Individual Identity

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> When I was a little girl, I learned about my family's heritage the same way everyone else does—from my parents and grandparents. My mother, grandmother, and aunts were open about my family's Native American heritage, and I never had any reason to doubt them. What kid asks their grandparents for legal documentation to go along with their family stories? What kid asks their mother for proof in how she describes herself? My heritage is a part of who I am—and I am proud of it.
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> —U.S. Senate candidate Elizabeth Warren[1]

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[1] Charles P. Pierce, *Liz Warren Sets Herself Up for a Summer of Crazy*, ESQUIRE (May 31, 2012), http://perma.cc/W8RN-Q42T; *see also* Noah Bierman, *Warren Sends Letter to Supporters Trying to Calm Native American Controversy*, BOSTON GLOBE (May 31, 2012), http://perma.cc/789Z-MY6C.

I. INTRODUCTION

To the extent we think about it all, most of us believe what our parents tell us about where we came from—about who our grandparents are, who our ancestors were, our ethnic background, our family histories.[2] My own family story includes claims to Scottish, Irish, French, and English ancestry. It also includes the Cherokee great-grandmother so popular in American genealogical stories. I have not undertaken an extensive genealogical search to more accurately pinpoint the threads of my ancestral quilt; I have simply accepted the family lore without much thought to whether it was verifiable.[3]

My family's claimed link to the Cherokee is not unique. In fact, claims of Indian heritage have been called "one of the most common genealogical myths in the United States."[4] For most people, talking about their Indian grandmother or relying on family stories to self-identify as Indian—at least in part—is not particularly noteworthy. However, during the 2012 election season, a firestorm erupted over then-U.S. Senate candidate Elizabeth Warren's assertion that she had Cherokee and Delaware Indian ancestors.[5] Warren based her claim on family lore—i.e., she learned of her ancestry from comments about her grandfather's "high cheekbones" and from stories told to her by her mother and by her grandparents.[6] It was an identity she grew up believing about herself.[7]

Her opponent in the Senate race, Scott Brown, took exception to Warren's claim. Pointing to Warren during a debate, Scott explained, "Professor Warren claimed she was a Native American, a person of color

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[2] Other politicians have also discovered that family lore may not be a terribly reliable source of ancestry or history. For example, although U.S. Senator Marco Rubio grew up believing his family had fled Castro's Cuba, it was later revealed that his parents had emigrated from Cuba two years before Castro's takeover. Similarly, former Secretary of State Madeleine Albright was raised by Catholic parents who she later learned were actually Jewish refugees who hid their identity after escaping the Holocaust. Garance Franke-Ruta, *Is Elizabeth Warren Native American or What?*, THE ATLANTIC (May 20, 2012), http://perma.cc/6L37-4RTG.

[3] To be clear, I do not claim any Indian ancestry. Nor do I claim to have any special insight into Indian culture. Rather, in this article, I focus on the legal implications of Indian status.

[4] *Id.* For instance, both Barack Obama and Hillary Clinton have claimed Indian heritage, though none was found after extensive genealogical research. *See* Hillary Chabot, *Harvard Trips on Roots of Elizabeth Warren's Family Tree*, BOSTON HERALD (Apr. 27, 2012), *available at* http://perma.cc/AMT7-KM3T.

[5] Franke-Ruta, *supra* note 2. Interestingly, Warren reports that the reason her parents eloped was because her father's family objected to her mother's Indian ancestry. Brian McGrory, *Warren: 'I Won't Deny Who I Am'*, BOSTON GLOBE (June 1, 2012), http://perma.cc/8T2M-BLSV.

[6] Franke-Ruta, *supra* note 2.

[7] *Id.* ("Being Native American has been part of my story I guess since the day I was born, . . . These are my family stories, I have lived in a family that has talked about Native American [*sic*] and talked about tribes since I was a little girl."). Growing up in Oklahoma, Warren's experience was not atypical. *See* Sarah Burris, *Elizabeth Warren's Native American Roots No Surprise in Oklahoma*, POLITICO (May 6, 2012), http://perma.cc/T3KY-4WVV.

— and as you can see, she is not."[8] Brown was not the only skeptic. While largely limited to partisans, the anger and doubt included protests by Cherokee Indians who associated Warren's claim with a "history of people coming in and trying to get the benefits of being an Indian without having faced the hardships that their family might have experienced in the past and their ancestors might have experienced."[9]

In the ensuing kerfuffle, Warren was accused of everything from lying, to fraud, to "ethnic identity theft."[10] The anger directed at Warren was visceral. There was an underlying assumption that Warren had somehow "gamed the system"; that she had materially gained by asserting Indian heritage. In the words of Brown, Warren had "claimed something she wasn't entitled to."[11]

While much of the controversy can be attributed to political posturing in a hotly contested Senate race, it also brought to light conflicting notions of self-identity and ethnic authenticity.[12] When Scott Brown complained that Elizabeth Warren did not "look" Indian, he suggested that identity is something visibly determined. He was not alone in this suggestion. Many press accounts and op-ed articles fixated on supposed defining features of "Indian" as a matter of physical characteristics,[13] singling out Warren's "fair skin," "blue eyes," and "blond hair" as proof that her claim could not

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[8] Sean Sullivan, *The Fight over Elizabeth Warren's Heritage, Explained*, WASH. POST (Sept. 27, 2012), http://perma.cc/LX4R-7DDL. However, given the Cherokee's history of intermarriage, there is no reason a Cherokee member could not look just like Warren. Franke-Ruta, *supra* note 2.

[9] *Who Gets To Decide Who Is Native American?*, NPR (August 9, 2012), http://perma.cc/D8PB-9J2W.

[10] *See, e.g.*, David Yeagley, *Warrant for Warren: Indian Identity Theft is a Crime* (May 3, 2012), BAD EAGLE JOURNAL, http://perma.cc/Z8W2-KYKP.

[11] David Treuer, *Kill the Indians, Then Copy Them*, N.Y. TIMES (Sept. 29, 2012), *available at*, http://www.nytimes.com/2012/09/30/opinion/sunday/kill-the-indians-then-copy-them.html?_r=0.

[12] There's a reason the summer months before an election are referred to as "the silly season" (See e.g., Hope Lewis, Transnational Dimensions of Race in America, 72 ALB. L. REV. 999, 1019-20 (2009) (noting that "'[s]illy season' was at its peak" as demonstrated by "controversies about whether Michelle Obama's Blackness would be a political boon or problem for her husband's racial authenticity . . . ."); Nicholas W. Allard, Commentary: "Copyright from Stone Age Caves to the Celestial Jukebox," 17 HASTINGS COMM. & ENT L.J. 867, 878 (1995) (commenting that "Congress will be very slow to act and will likely not take up the issue before the politically silly season of 1996 presidential politics destroys any potential for productive legislative work"), and it is impossible to shake the notion that this was nothing more than a manufactured outrage for political gamesmanship, but this article will take Warren's detractors as sincere in their criticisms.

[13] Anthropologists have long pointed out that race is a human construct, a myth, that has no basis in biology. *See* Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 305–08 (1995). Nonetheless, physical features were often taken as proxy or indicators of "race." *Id.* at 271–72.

be true.[14] Such an argument makes sense only if we believe Indian identity is determined by physical appearance.[15]

Dismissing any suggestion that Warren's claim was nothing more than pride of ancestry, her critics focused on the "privileges" she supposedly gained by invoking Indian heritage.[16] For his part, Brown charged that Warren wrongfully "checked the box"[17] and "claimed something she wasn't entitled to."[18] Contrary to her critics' suggestion, however, Warren had not tangibly benefitted from her purported ancestry.[19] Warren never claimed that she was an enrolled member of any tribe, nor had she ever sought tribal membership.[20] Likewise, Warren never attempted to secure any benefits accorded to tribal members or to legally-defined Indian persons.[21] Contrary to the main charge from her critics, Warren had not

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[14] *See, e.g* Charlotte Allen, *She's a Blond, Blue-Eyed Cherokee?*, PITTSBURGH POST GAZETTE (May 31, 2012), *available at*, http://perma.cc/33HS-579T ("*Naturally*, though, when there is something to be gained from racial self-creation . . . there are going to be jeers when a blond with a taste for French cuisine checks off the box marked Cherokee.") (emphasis added); George F. Will, *Identity Politics*, WASH. POST, (May 24, 2012), *available at,* http://perma.cc/EXZ4-LMGF ("Blond, blue-eyed Elizabeth Warren, the Senate candidate in Massachusetts and Harvard professor who cites "family lore" that she is 1/32nd Cherokee, was inducted into Oklahoma's Hall of Fame last year."); Tom Thurlow, *Why The Elizabeth Warren Controversy Continues*, BREITBART.COM, (June 6, 2012), http://perma.cc/66SF-RDBM ("Her features are almost the exact opposite of Native American features: fair skin, blond hair, blue eyes."); Michael Graham, *Elizabeth Warren's Goose is Cooked*, BOSTON HERALD, May 18, 2012, http://bostonherald.com/news_opinion/opinion/op_ed/2012/05/elizabeth_warren%E2%80% (comparing Warren's physical features to the members of the Swedish band ABBA); Debra J. Saunders, *Elizabeth Warren is Not a Dumb Blonde*, TOWNHALL.COM (May 29, 2012), http://perma.cc/CJ33-4ULN ("Why would a blue-eyed blonde who looks very white and who belongs to no tribe (who can only claim a great-great-great-grandmother Cherokee ancestor) nonetheless designate herself as a Native American?"). However, given the Cherokee's history of intermarriage, there is no reason a Cherokee member could not look just like Warren. Franke-Ruta, *supra* note 2. According to Lenzy Krehbiel-Burton, a spokesperson for the Cherokee Nation in Oklahoma, "'There are a lot of folks who are legitimately Cherokee who are not eligible for citizenship,' . . . because, for example, their ancestors lived in distant states or territories when the rolls were drawn up, or because they are direct descendants of people left off the rolls for other reasons." *Id.*

[15] Of course, by citing her grandfather's cheekbones, Warren herself invoked physical appearance as proof of identity.

[16] NPR, *supra* note 9.

[17] Josh Hicks, *Everything You Need to Know about Elizabeth Warren's Claim to Native American Heritage*, WASH. POST (Sept. 28, 2012), http://perma.cc/H4A7-BE9L.

[18] Treuer, *supra* note 11.

[19] Hicks, *supra* note 17; Franke-Ruta, *supra* note 2. She did, apparently, submit recipes to an Indian cookbook and signed her name "Elizabeth Warren—Cherokee." *Id.*

[20] *See* Franke-Ruta, *supra* note 2.

[21] Initially it was reported that Warren was 1/32 Cherokee, and it was pointed out that was the same ratio as the current principal Cherokee chief. Michael Tomasky, *Michael Tomasky on the Media's Foolish Elizabeth Warren Witch Hunt*, THE DAILY BEAST (May 26, 2012), http://perma.cc/SS4G-TURE; Suzan Harjo, *What's the Deal with Elizabeth Warren, Cherokee?*, INDIAN COUNTRY TODAY (May 15, 2012), http://perma.cc/Q7TX-57YF. While the largest Cherokee tribe does not have a blood quantum requirement, the two other Cherokee nations do have such a requirement. Thus, someone with less than 1/32 blood quantum could be enrolled member of the Cherokee Nation of Oklahoma, but not qualify for membership in the Eastern Band, which requires 1/16 Eastern Cherokee blood quantum, or

used Indian ancestry to obtain any preference in school admission or hiring.[22]

Although she received no material benefit, Warren nonetheless maintained her unwavering belief in her family history in the face of vocal and often harsh criticism. She held to her Indian ancestry despite a dearth of genealogical evidence, tribal membership, or legal eligibility for any material benefit.[23] Indeed, it does not appear that Warren ever attempted to

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the United Keetoowah Band of Cherokee, which requires 1/4 Keetoowah Cherokee blood. Franke-Ruta, *supra* note 2. While all three Cherokee tribes require a direct line to the Dawes Rolls, the latter two tribes also require certification by the Bureau of Indian Affairs as having the requisite blood quantum through a "Certificate of Degree of Indian Blood." *Id.* This makes it difficult to prove fractional Indian heritage, at least using a "citizen-based" definition of Indian heritage. Furthermore, unlike Warren, the chief is an enrolled member. But for many people, this similarity (until it disappeared, Chabot, *supra* note 4) seemed to settle the case because too often tribal membership is equated with race or ethnicity. *See* Harjo, *supra* note 21. And, unlike Warren, the Cherokee chief can trace his ancestry to the Dawes Roll and he was born and raised in Cherokee County. Franke-Ruta, *supra* note 2. Thus far, no ancestor of Warren's has been traced to the Dawes Rolls, an inalterable requirement for Cherokee tribal membership. Rather, all Warren's ancestors self-identify as "white." *Id.* The possible ancestor identified by genealogists was O.C. Sarah Smith, who—even assuming she was Cherokee—died before the Dawes Rolls were created. *Id.* None of Smith's descendants were listed on the rolls. *Id.*

[22] Warren's detractors acknowledged that she did not disclose any Indian ancestry prior to being admitted to a school. Franke-Ruta, *supra* note 2. During a debate, Warren's opponent, Senator Scott Brown, did accuse Warren of improperly "checking the box" to gain an advantage in applying to Penn and Harvard Law. According to Brown, "[Elizabeth Warren] checked the box. She had an opportunity, actually, to make a decision throughout her career. When she applied to Penn and Harvard, she checked the box claiming she was Native American, and, you know, clearly she's not." Hicks, *supra* note 17. However, contrary to Brown's claims, Warren did not list herself as a minority when applying to law school even though her law school had a program for minority students. Elizabeth Hartfield, *Elizabeth Warren Did Not List as Minority on Law School Application, Was Touted as One by U. Penn*, ABC NEWS (May 10, 2012), http://perma.cc/Y92K-6T4W. Nonetheless, critics did question Warren's motives in later claiming Indian status by listing herself as a minority in AALS Directory of Faculty from 1986 to 1995. *See* Noah Bierman, *Records Shed More Light on Elizabeth Warren's Minority Status*, BOSTON GLOBE, (May 31, 2012), http://perma.cc/6A2X-RGAA; McGrory, *supra* note 5. Before 1986, Warren was listed in the Directory as Caucasian; after starting at Harvard, she no longer listed herself as minority in the Directory. *Id.* Nonetheless, both Harvard and University of Pennsylvania law schools indicated she was Native American in school literature. Franke-Ruta, *supra* note 2; Elizabeth Hartfield, *Elizabeth Warren Did Not List as Minority on Law School Application, Was Touted as One by U. Penn*, ABC NEWS (May 10, 2012), http://perma.cc/Y92K-6T4W. Harvard's affirmative action plan defines "Native American" as "[a] person having origins in any of the original peoples of North America and who maintains cultural identification through tribal affiliation or community recognition." Mary Carmichael, *Filings Raise More Questions on Warren's Ethnic Claims*, BOSTON GLOBE, (May 25, 2012), http://perma.cc/BTE9-6Q92 (citing Harvard University Affirmative Action Plan 1999 at 15). However, it was widely reported and acknowledged that Warren did not inform either school of her claimed Native American status until after she was hired. Indeed, both schools stated that her Indian status was not a factor in recruiting or hiring her. *E.g.* McGrory, *supra* note 5; Mary Carmichael, *Filings Raise More Questions on Warren's Ethnic Claims*, BOSTON GLOBE, (May 25, 2012), http://perma.cc/BTE9-6Q92; Hicks, *supra* note 17; Chabot, *supra* note 4; Franke-Ruta, *supra* note 2.

[23] According to the New England Historic Genealogical Society, an initial search revealed no evidence that "Warren's great-great-great-grandmother O.C. Sarah Smith either is or is not of Cherokee descent." NEHGS, *NEHGS Statement on Elizabeth Warren Ancestry*, AMERICAN ANCESTORS: NEW ENGLAND HISTORICAL GENEALOGICAL SOCIETY, (May 15, 2012), http://perma.cc/DW3L-ZGCN. The Society expressed no intent to further research Warren's ancestry, instead referring to the availability of

document her claim.[24] Perhaps it would have been easier for Warren to claim a mistake and try to move past the controversy. Instead, she steadfastly maintained her ancestry: "'I know who I am,'...'I know my heritage.'"[25] While legally-speaking, Warren was not Cherokee, she held to the more intangible benefits of cultural belonging and personal identity.

The preoccupation with what Warren stood to gain by claiming Indian ancestry appears to conflate family lore with the legal consequences of Indian status. It is that conflict between legal and social implications of "Indianness" that is the focus of this article. Part II will discuss the legal and social consequences that flow from Indian status in the United States. Part III will then discuss the myriad legal definitions of "Indian" and how the application of a particular definition can determine the status of an individual as part of a cultural group. Because federal law includes more than thirty definitions of Indian, the purpose for which the claim is made can affect whether a person is considered legally "Indian." Consequently, an individual could be considered Indian under one area of federal law, but not under another. While most people are unlikely to encounter significant problems under this scheme, for some the effect can be profound. Part IV will look at three circumstances where the application of a particular definition can determine an individual's Indian status, resulting in concrete legal consequences. Specifically, it will consider how definitions work to include or exclude individuals in criminal prosecutions, sharing of gaming revenue, and the adoptive placement of Indian children. Part V then considers whether, given the real life consequences, a cohesive definition of Indian is possible or desirable.

II. BEING "INDIAN"

For many, claims of Indian ancestry rest on the same foundation on which Americans lay claim to other ethnic or racial ancestries. The claims are not a precise genealogical exercise, but an expression of family history and lore. My red hair doesn't prove my Irish heritage any more than Warren's grandfather's cheekbones prove her Indian heritage. Nevertheless, saying I'm Irish does not prompt similar calls for proof or charges of theft as those directed at Warren.[26] This difference is perhaps a consequence of the unique place Indians occupy in American history,

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public records while noting such research could take months or even years before any definitive answer could be reached. *Id.*

[24] NPR, *supra* note 9.

[25] McGrory, *supra* note 5.

[26] In one debate, Warren's opponent, then-Senator Scott Brown, contended that Warren had wrongfully "checked the box" to achieve some benefit to which she was clearly not entitled. The charge was not true, but nonetheless, the suggestion that Warren stood to gain permeated the criticism.

culture, and law. Simply put, unlike a claim of Irish or Italian ancestry, a claim of Indian heritage can implicate myriad legal consequences. Federal statutes specifically drafted to apply to Indian people rely on Indian status to determine jurisdiction, trigger federal oversight, or ensure access to certain benefits.[27] It is perhaps because of the benefits that some have suggested that Indian status is itself a "'property interest.'"[28]

Much of the preoccupation with Indian status stems from a "shared misconception . . . that 'a little Indian blood' gives rise to vast privileges—a share of immense gambling riches, broad exemptions from all taxes, and other rights not shared by those without it."[29] While there may be benefits that accompany Indian status, they are not nearly as vast or "special" as is too often assumed or asserted.[30] Moreover, the criteria for receiving any benefits are more complicated than the phrase "checking a box" suggests. Further, there are intangible benefits of cultural belonging that may motivate individual claims to Indian status far more than any desire for material gain.

First, being an Indian can mean access to certain federal programs not available to non-Indians. As part of its trust relationship with tribes, the federal government operates several programs designed to protect tribal lands, assist tribal governments, and assist the educational and health needs of individual Indians through agencies such as the Bureau of Indian Affairs and the Indian Health Service.[31] In addition, Indians and Indian-owned businesses may have immunity from state taxation in certain circumstances.[32] In those respects, Indians have access to government

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[27] *See, e.g.*, Indian Civil Rights Act, 25 U.S.C. § 1301 (2012); Indian Child Welfare Act, 25 U.S.C. § 1901 (2012); 20 U.S.C. § 7401 *et. seq.* (2002) ; Indian Arts & Crafts Act, 18 U.S.C. § 1159 (2012); Indian Healthcare Improvement Act, 25 U.S.C. § 1601 (2012); Indian Alcohol Substance Abuse Act, 25 U.S.C. § 2403 (2012).

[28] *See* GAIL K. SHEFFIELD, THE ARBITRARY INDIAN: THE INDIAN ARTS AND CRAFTS ACT OF 1990 138 (1997).

[29] Bethany R. Berger, *Race, Descent, and Tribal Citizenship*, 4 CAL. L. REV. CIR. 23, 27 (2013), *available at* http://perma.cc/YLW-7H9P.

[30] And are oftentimes offset by the burdens and perils of being Indian in America.

[31] *See* BUREAU OF INDIAN AFFAIRS, *What We Do*, http://perma.cc/J48G-2JWX; INDIAN HEALTH SERVICES, *Basis for Health Services*, http://perma.cc/WJ7B-FRJY.

[32] *See* Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 480–81 (1976) (finding that supremacy clause bars states from imposing property taxes on property owned by tribal members on reservations, business license fees on Indian-owned businesses operated on reservations, and state cigarette taxes on cigarettes sold on reservations by Indians to Indians); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 181 (1973) (holding no state income tax on income earned on reservation by tribal members). *But see also* County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 270 (1992) (finding that Indians not immune from state-imposed ad valorem tax on reservation land patented in fee pursuant to General Allotment Act); Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 160–61 (1980) (finding that on-reservation Indians who were not members of tribe were not immune from state cigarette taxes because they were not tribal constituents).

services not available to non-Indians. For instance, the Indian Health Service provides health care services to Indians and their family members.[33] The Tribally Controlled Colleges and Universities Act provides resources for educational institutions that serve tribal members and their biological descendants.[34] Indian students may also have access to scholarships or admissions for diversity. Likewise, Indian persons enjoy preferential treatment in hiring in some federal agencies such as the Bureau of Indian Affairs and the Indian Health Service.[35]

Further, Indian status can mean broader or preferential access to natural resources as a consequence of treaty-based fishing and hunting rights.[36] Tribes may have priority on water resources, which includes a right to enough water to meet the tribes' needs even where water is scarce, such as in the Southwest. Tribes may also retain rights to natural resource deposits on tribal lands and, in some cases, on lands ceded by earlier treaties.[37] Indians are the only ethnic group that Congress has agreed to act in furtherance of their cultural survival. For instance, the Indian Arts and Crafts Acts works specifically to protect Indian cultural property.[38] Likewise, the Native American Graves Protection and Repatriation Act protects Indian cultural items, including human remains, funerary objects, sacred objects, and items of cultural patrimony.[39]

However, many of the policies affecting Indians and Indian tribes did not grow out of any special consideration for Indian people, but rather as a reaction to a history of maltreatment, cultural appropriation, and attempts to undermine tribal governments and tribal societies.[40] Moreover, many benefits received by Indians are similar to those available to non-Indians, although the programs may be authorized and administered separate from the general programs. For instance, Indians may be eligible for food stamp, job training and placement programs, as well as housing assistance

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[33] Indian Health Service, 42 C.F.R. § 136.12 (2014).

[34] 25 U.S.C. §§ 1801(7)(B), 1802 (2012).

[35] *See* Morton v. Mancari, 417 U.S. 535, 555 (1974).

[36] *See* United States v. Dion, 476 U.S. 734, 738 n.4 (1986) (recognizing that individual Indians are protected by rights negotiated by tribes); FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 419–27 (1994).

[37] Courts have upheld tribal claims to up to fifty percent of salmon and steelhead from fisheries in some of the most hotly contested cases brought before the Supreme Court.

[38] 18 U.S.C. § 1158 (2012).

[39] *See* 25 U.S.C. §§ 3001–13 (2012).

[40] *See* Suzianne D. Painter-Thorne, *Contested Objects, Contested Meanings: Native American Grave Protection Laws and the Interpretation of Culture*, 35 U.C. DAVIS L. REV. 1261 (2002) (detailing historical abuse of Indian cultural and funerary items); 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 (2009) (discussing historical basis for Congress's passage of ICWA).

separate from the programs available to non-Indians.[41] The Bureau of Indian Education provides operational support for reservation elementary and secondary schools.[42]

While much of the discussion around the Warren's identity was preoccupied with the "benefits" of Indian status, Indians also experience unique obligations and responsibilities. One consequence of tribal sovereignty is that individual tribal Indians are more regulated than other United States citizens. Tribes have their own body of tribal law—codes, constitutions, regulations, zoning, taxation, tradition, custom—that apply to tribal members. In addition, tribal Indians are still subject to federal and state law.[43] Consequently, tribal Indians are subject to the rules of three sovereigns—the United States, their individual tribes, and (with some limitations) the state in which their reservation resides.

These overlapping sovereigns create unintended consequences, such as an ineffective law enforcement scheme that leaves reservation residents vulnerable to crime.[44] Indian status results in perhaps its most profound and perplexing consequence with respect to criminal jurisdiction determinations.[45] Under the current federal criminal jurisdiction scheme, whether the tribe, federal prosecutors, or both can prosecute an accused offender depends upon whether the victim or alleged perpetrator is defined as "Indian".[46] Under the Major Crimes Act (MCA), if the alleged perpetrator is deemed "Indian," federal jurisdiction applies if the charged offense is one enumerated in the MCA without respect to the Indian status of the victim.[47] Federal jurisdiction may still apply under the Indian Country Crimes Act (ICCA) if either the victim or accused is deemed "Indian."[48] When both the accused and victim are Indian and the charges do not include offenses under the MCA, the tribe has jurisdiction if the

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[41] 7 C.F.R. § 273.4(a)(3)(ii) (2014); 25 C.F.R. §§ 26.1, 26.5 (2014); 25 U.S.C. §§ 4221–43 (2012).

[42] 25 U.S.C. § 2007(f) (2012); 25 C.F.R. § 39.2 (2014).

[43] *See* Vanessa J. Jimenez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627, 1639–49.

[44] *See generally,* Suzianne D. Painter-Thorne, *Tangled Up in Knots: How Continued Federal Jurisdiction Over Sexual Predators on Indian Reservations Hobbles Effective Law Enforcement to the Detriment of Indian Women*, 41 N.M.L. REV. 239 (2011).

[45] *See id.* at 240–59.

[46] *See id.*

[47] 18 U.S.C. § 1153 (2006); 25 U.S.C. § 1301(4) (2006) (defining "Indian" for purposes of section 1153); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 9.02, at 742–43 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK].

[48] 18 U.S.C. § 1152 (2006); COHEN'S HANDBOOK, *supra* note 48, at 738. The ICCA is aimed at interracial crime; thus it does not apply when both the victim and accused are Indian. *Id.* at 738. Further, the ICCA does not apply if the Indian accused has already been punished by the tribe. *Id.*

offense took place in Indian Country.[49] In those situations, the accused faces punishment limited to a maximum penalty of three years imprisonment, $15,000 fine, or both.[50] Once the tribe imposes its punishment, federal authority to punish the accused ceases.[51] This can mean an Indian convicted of an offense under the ICCA can receive a lesser punishment than a non-Indian prosecuted for the same offense.[52] However, if neither the victim nor the accused is Indian, and the offense is not an MCA offense, state jurisdiction applies.[53]

Separate from the legal consequences of Indian status, Indian identity may confer equally important social benefits. For those Indians who are also tribal members, acceptance in the tribe is often closely linked to ancestry and descent. "Indian tribes reflect the most intimate associations in the human experience: they are, by definition, families. Indian tribes are bound by bloodlines, clan identifiers, and kinship. Ancestry or descent often constitutes the dominant factor in determining whether one belongs to an Indian tribe."[54] Being defined as "Indian" permits an individual to fully participate in the tribal community of their family and ancestors. For day-to-day living, tribal membership determines whether an individual can participate in tribal life at all and the extent of that participation. Tribal membership:

> may include voting rights, the right to run for and hold tribal office, preferential hiring by the tribe, access to tribal courts and subjection to tribal law, the right to receive tribal social services, the right to receive revenues generated by tribally-owned businesses, or the right to share in distributions derived from the exploitation of natural resources on or beneath tribal lands.[55]

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[49] *See* United States v. Wheeler, 435 U.S. 313, 328–29 (1978), *superseded by statute*, 25 U.S.C. § 1301(2) (2006), *as recognized by* United States v. Lara, 541 U.S. 193, 210 (2004); Duro v. Reina, 495 U.S. 676, 694 (1990), *superseded by statute*, 25 U.S.C. § 1301(2) (2006) (*as stated in* United States v. Lara, 541 U.S. 193, 210 (2004)); *see also* COHEN'S HANDBOOK, *supra* note 48, at 756.

[50] 25 U.S.C. § 1302(a)(7)(c) (2012).

[51] *See* 18 U.S.C. § 1152 (2012) (noting that provision shall not apply "nor any Indian committing any offense in the Indian country who has been punished by the local law of the tribe").

[52] *See* United States v. Bruce, 394 F.3d 1215, 1222 (9th Cir. 2005); *see also* Painter-Thorne, *supra* note 45, at 281–82.

[53] *See* COHEN'S HANDBOOK, *supra* note 48, at 509.

[54] S. Alan Ray, *A Race or a Nation? Cherokee National Identity and the Status of Freedmen's Descendants*, 12 MICH. J. RACE & L. 387, 453 (2007) (citing Angela L. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L.REV. 799 (2007)).

[55] *Id.* at 403–04.

That is not to say, however, that those persons who self-identify as "Indian" without official recognition have no reason for doing so. Rather, like with other culture or ethnic identity claims, Indian heritage or status can carry other intangible, or "fuzzy," benefits that are often far more important to individual satisfaction and self-identity. Broadly speaking, cultural affiliation is often at the heart of how we see and define ourselves—how we arrive at who we believe ourselves to be.[56] Human beings seek belonging and individual identity. This sense of belonging is often linked to—and informed by—presumed membership in or ancestry from a particular ethnic, religious, or racial group.[57] It is through these cultural affiliations that we—in part—create our individual identities.[58] There is a sense of belonging to a culture group,[59] and a feeling of kinship and cohesion with relatives and ancestors.[60] Beyond these feelings of belonging, perceived cultural identity and connection to others shapes individual self-definition.[61] It is that sense of community or tie to others that helps define our place in society and reinforces our self-definition.[62] As suggested by Warren's reliance on her family stories, often these cultural labels begin in childhood and build on familial ties.[63] Family lore often shapes how "people feel about themselves and their past."[64]

III. DEFINING "INDIANS"

The Warren controversy highlights the general confusion between an ethnographic or family-history-based claim of identity and a legal claim of identity. But more than that, it also brings to light legitimate questions regarding the authority to determine the authentic indicia of "Indianness." Warren claimed the right to define her own identity based on her family history and personal sense of self. To her detractors, Warren was doing nothing more than claiming a heritage based on "high cheekbones" and family lore. For that perceived transgression, critics accused her of ethnic identity theft by claiming membership in a group to which she did not belong. In seeking to bar her claim, however, her critics sought to impose their own definition of authenticity. Consequently, those denying

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[56] *See* Karst, *supra* note 13, at 306–08.

[57] *Id.* at 306; *see also* Judy Scales-Trent, *Commonalities: On Being Black and White, Different, and the Same*, 2 YALE J.L. & FEMINISM 305, 306 (1990).

[58] Karst, *supra* note 13, at 308.

[59] NPR, *supra* note 9.

[60] Berger, *supra* note 29, at 26, 37.

[61] Karst, *supra* note 13, at 307.

[62] *See id;*. Carole Goldberg, *Descent into Race*, 49 UCLA L. REV. 1373, 1373 (2002).

[63] *See* Karst, *supra* note 13, at 309.

[64] NPR, *supra* note 9.

Warren's claim assert the authority to repossess something that is not theirs to give or take.

Aside from politically manufactured outrage, the episode does expose flaws in the current legal framework for authenticating Indian status and allocating the benefits and burdens of being Indian in America. Ultimately, how "Indian" is defined determines whether an individual is eligible for government benefits, subject to tribal jurisdiction, or even eligible to participate in various aspects of tribal life.[65] However, from the first contact with Europeans, the meaning of "Indian" has been beset with imprecision, misunderstanding, and conflicting notions of authenticity. Indeed, as every school child knows, even the term "Indian" itself is a misnomer resulting from Columbus's mistaken belief that he had landed in the Indies.[66]

This imprecision continued past the colonial period, resulting in definitions generated without input from indigenous people and a distortion of Indian people and their lives. In early court decisions, the Supreme Court variously referred to Indian people as "savage Indians," and "wild uncivilized Indians," "an inferior race of people," and "fierce savages."[67] Not just culturally insensitive and racist, these definitions resulted in the deprivation of Indians' rights and justified "practices of genocide, exploitation, and colonization policies."[68] While more recent definitions are more likely to look to Indians themselves for meaning, misunderstanding and incomplete information continue to confuse the definition of Indian in U.S. law and culture.[69]

One reason for this continued confusion is the lack of a unified or comprehensive definition of "Indian."[70] Rather than one definition, Indian status is dependent upon myriad definitions throughout federal and tribal law, as well as lay definitions that sometimes creep into legal opinions.[71] Moreover, Indian status can often depend on a combination of both federal and tribal law. For instance, while tribes determine individual

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[65] Sheffield, *supra* note 28, at 4; Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 80–81 (1993).

[66] Larry Sager, *Rediscovering America: Recognizing the Sovereignty of Native American Indian Nations*, 76 U. DET. MERCY L. REV. 745, 759 (1999); James B. Wadley, *Indian Citizenship and the Privileges and Immunities Clauses of the United States Constitution: An Alternative to the Problems of the Full Faith and Credit and Comity?*, 31 S. ILL. U. L.J. 31, 52 (2006).

[67] Sager, *supra* note 67, at 754.

[68] *Id.* at 759.

[69] *See id.* at 754–62; *see also* Dussias, *supra* note 65, at 81.

[70] Dussias, *supra* note 65, at 80.

[71] *See* Ray, *supra* note 55, at 399. Indian status may also depend on state laws. *Id.* However, that topic is beyond the scope of this article, which is focused primarily on the interplay between federal and tribal law.

membership, federal law determines which tribes are recognized with full tribal status.[72] Similarly, while federal law determines which individuals may qualify for benefits reserved for tribal members, tribal citizenship is dependent on each tribe's laws.[73]

Despite the significance federal recognition of Indian status, there is no single definition of "Indian" that spans all federal law.[74] In fact, there are more than thirty definitions of the term "Indian" in various federal statutes.[75] While ancestry is always important when "Indian" is used ethnographically, its importance in legal determinations of Indian status depends on the particular statute at issue.[76] Thus, federal definitions vary depending on the relevant statute and the purpose for which Indian status is claimed or alleged.[77] Some statutes use a "racial" classification, or biological definition, by defining Indian in terms of blood quantum.[78] Others rely on a political basis, defining "Indian" based on membership in a federally recognized tribe.[79] Still others provide no definition, leaving the courts to cobble together a definition as necessary.[80] While most people are unlikely to encounter significant problems under this scheme, for some the effect can be profound, resulting not only in concrete legal consequences but also in a denial of ancestry and self-identity as the law defines individuals in or out of Indian status. That denial can result in a fractured identity where the legal question posed can render an individual "Indian" in one circumstance, but not in another.

A. Self-Identification

As the Bureau of Indian Affairs ("BIA") notes, "there are major differences . . . when the term 'American Indian' is used in an ethnological sense versus its use in a political/legal sense."[81] And generally speaking, the legal consequences of Indian status do not flow from individual self-

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[72] Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native Americans: Redressing the Genocidal Act of Forcing American Citizenship Upon Indigenous Peoples*, 15 HARV. BLACKLTR. L.J. 107, 140 (1999); *see* Ray, *supra* note 55, at 399.

[73] *See* Ray, *supra* note 55, at 399; Margo S. Brownell, *Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law*, 34 U. MICH. J.L. REFORM 275, 278 (2001).

[74] *See* Brownell, *supra* note 73, at 278.

[75] *Id.*

[76] *See* Dussias, *supra* note 65, at 80–84.

[77] Sheffield, *supra* note 28, at 4; Dussias, *supra* note 65, at 81–84.

[78] *See* Dussias, *supra* note 65, at 81–84.

[79] Brownell, *supra* note 73, at 278.

[80] *See id.*

[81] *Frequently Asked Questions*, DEPT. INTERIOR, BUREAU OF INDIAN AFFAIRS, http://perma.cc/S9T4-2D6Y (last visited Sept. 5, 2014).

identification but from a legal determination of Indian status.[82] Nevertheless, self-identification is recognized in a few areas of federal law.

For instance, racial discrimination can be based on self-identification or even the perception of "Indianness." Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against an employee based on the "individual's race, color, religion, sex, or national origin."[83] Courts seem indifferent whether an American Indian seeks protection under Title VII as a member of a race or on grounds of national origin and adjudicate claims of discrimination on both grounds.[84] While claims between Indians and non-Indians appear to be based more on racial discrimination, courts allow claims of bias based on distinct tribal affiliation on the grounds of national origin.[85]

Under either basis, anti-discrimination statutes do not necessarily require that the plaintiff be a member of the protected group.[86] Rather, a claim may proceed where the discrimination arose from the defendant's perception that the plaintiff is a member of a particular group.[87] Consequently, adjudication of such claims can depend on the defendant's definition of the group and whether that defendant thinks the plaintiff meets that definition.[88] Under this scheme, the plaintiff must then "persuade the courts, not just that they have been subjected to discrimination on the basis of someone's characterization of them in, say, racial terms, but also that they are qualified members of a group that, in truth, qualifies as a race."[89]

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[82] *See id.*

[83] 42 U.S.C. § 2000e-2(b) (2012).

[84] *See* Smith-Barrett v. Potter, 541 F. Supp. 2d 535, 539 (W.D.N.Y. 2008) (concluding "the fact that American Indian status has been protected on multiple grounds does not erode the viability" of an American Indian's Title VII claim as a protected class member).

[85] *See, e.g.*, Dawavendewa v. Salt River Project Agr. Imp. and Power Dist., 154 F.3d 1117, 1124 (9th Cir. 1998) (holding hiring preferences given to members of the Navajo Nation over a member of the Hopi Tribe was impermissible discrimination due to national origin).

[86] Karst, *supra* note 13, at 326; *see, e.g*,. Perkins v. Lake Cnty. Dept. of Utilities, 860 F. Supp. 1262 (N.D. Ohio 1994); *see also Smith-Barrett*, 541 F. Supp. 2d at 539 (citing the "dearth of case law" regarding the required amount of "blood relationship" for membership in a protected class to support a prima facie case of discrimination as reason not to impose "arbitrary threshold for tribal membership"). In *Perkins*, the court determined that the plaintiff held himself out as American Indian and perhaps faced the "impossibility," as many Native Americans do, "of establishing unquestionable genetic/hereditary classification." *Perkins*, 860 F. Supp. at 1278. Ultimately, the fact the plaintiff's employer believed the plaintiff to be a Native American was the most important reason in the District Court's holding. *Id.*

[87] Karst, *supra* note 13, at 326.

[88] *Id.*at 326–27.

[89] *Id.* at 326.

Furthermore, the Census relies entirely on self-identification and does not require validation of the racial category.[90] The Census defines American Indian or Alaska Native as "a person having origins in any of the original peoples of North and South America and who maintains tribal affiliation or community attachment."[91] As might be expected, Census data reveal that more people self-identify as "Indian" than the numbers reflected in tribal rolls. For instance, in the 2010 Census, nearly 5.2 million people self-identified as "American Indian" or "Alaska native" on Census forms.[92] However, more than two thirds of those self-identified persons did not live on American Indian reservations, trust lands, Alaska Native Villages, or other tribal lands.[93] Of course, persons living apart from Indian land may still be participating in tribal life.[94] However, in 2005 fewer than half of those who identified as "American Indian" or "Alaska Native" were enrolled members of any federally recognized tribe.[95] The numbers from the 2010 Census appear to support the notion that more people claim Indian heritage than actually participate in tribal life.[96]

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[90] Brownell, *supra* note 73, at 276–77. Census data reveal that more people self-identify than the numbers reflected in tribal rolls. For instance, in the 2010 Census, nearly 5.2 million people identified "American Indian" or "Alaska Native." TINA NORRIS, PAULA L. VINES, & ELIZABETH M. HOEFFEL, THE AMERICAN INDIAN AND ALASKA NATIVE POPULATION: 2010, 2010 CENSUS BRIEFS, C2010BR-10, at 1 (Jan. 2012). The report noted that "2.9 million identified as American Indian and Alaska Native alone." *Id.* The remaining 2.3 million people identified "in combination with one or more other races." *Id.* However, more than two-thirds of those self-identified persons did not live on American Indian reservations, trust lands, Alaska Native Villages, or other tribal lands. Tina Noris, Paula Vines, Elizabeth Hoeffel, *Facts for Features: American Indian and Alaska Native Heritage Month, November 2013*, U.S. CENSUS BUREAU (Oct. 21, 2013), http://perma.cc/SB2W-QHUK . Of course, persons living apart from Indian land may still be participating in tribal life. Bill Donovan, *Census: Navajo Enrollment Tops 300,000*, NAVAJOTIMES, (July 7, 2011) http://perma.cc/S5NY-ZH74UqDLnWRDvCE. According to the Census, there are 332,129 Navajo, but the Navajo Nation estimates its own population as 300,048; there are 819,105 Cherokee according to the Census, but the Cherokee counts approximately 302,000 members. *Id.*; NORRIS, VINES, & HOEFFEL, *supra*, at 18.

[91] *See* NORRIS, VINES, & HOEFFEL, *supra* note 90, at 2. "[T]he American Indian and Alaska Native population includes people who marked the 'American Indian or Alaska Native' checkbox or reported entries such as Navajo, Blackfeet, Inupiat, Yup'ik, or Central American Indian groups or South American Indian groups." *Id.*

[92] *Id.*at 1 The report noted that, "2.9 million identified as American Indian and Alaska Native alone." *Id.* The remaining 2.3 million people identified "in combination with one or more other races." *Id.*

[93] *Id.* at 20.

[94] Donovan, *supra* note 90.

[95] U.S. DEPT OF INTERIOR, BUREAU OF INDIAN AFFAIRS, *2005 AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT* (2005); For example, according to the Census, 819,105 people identified themselves as Cherokee on Census, but the Cherokee Nation estimates that it has less than half (approximately 302,000) that number of members. Donovan, *supra* note 90.

[96] NORRIS, VINES, & HOEFFEL, *supra* note 90, at 18. Less dramatically, there are 332,129 Navajo according to Census numbers, but the Navajo Nation estimates its own population as 300,048. *Id.*

Controversy over self-identification-based claims of Indian identity is not limited to political gamesmanship.[97] A naked claim to Indian ancestry, without any proof, can rankle those who have been forced to prove their status to the government or to a tribe.[98] The idea that someone can opt to be Indian may be contrary to the viewpoint of those Indian people who consider being Indian "not [as] an affirmative choice of the individual, but rather a condition of one's birth."[99] Perhaps even more importantly, self-identification can make unclear what—if any—obligations the person has towards Indian peoples or tribes.[100] For example, those Indians who reside on reservations and participate in their tribe's social and cultural life may view their efforts as ensuring tribal survival while other "wannabees" claim Indian identity without the burden of contributing to tribal survival.[101] This willingness to claim Indian heritage while avoiding the difficulties that can accompany living in tribal communities has led to some resentment from Indians.[102]

Moreover, self-identification claims may be rife with inaccuracies or driven by nothing more than a desire to belong to a particular culture group. Worse, those self-identifying as Indian could be guilty of the very "box checking" of which Elizabeth Warren was accused. According to the Coalition of Bar Associations of Color, "box checking, or the fraudulent claims of Indian identity in applications for higher education, has been rampant in undergraduate and law school admissions."[103] Based on the Coalition's study, approximately 2,500 self-identified Indian students graduated from law school between 1990 and 2000; but the 2000 Census only reported an increase of 228 Indian lawyers during that same time

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[97] *See, e.g.*, Lee Romney, *Abuses Mar Minority Contracting Programs: Many firms are suspected of falsely claiming special status. But enforcement is lax, punishment rare*, L.A. TIMES, Sept. 9, 1998 (describing controversy over company claiming status of ownership by an Indian woman under a federal program that provides bidding preferences to minority-owned businesses); Richard Leiby, *The Legend of Lone Star Dietz: Redskins Namesake, Coach — and Possible Impostor?*, WASH. POST, Nov. 6, 2013 (noting that "Indian imposters were not unheard of at Carlisle [Indian Industrial School], particularly once it gained renown as a football school" and that, despite its infamy, school "was a destination for financially strapped but ambitious kids looking for a free education and a path to a job"); Linda M. Waggoner, *On Trial: The Washington R*dskins' Wily Mascon: Coach William "Lone Star" Dietz*, MONT.: MAG. OF W. HIST., Spring 2013 (describing trial of William "Lone Star" Dietz for falsely claiming Indian identity to avoid military service during World War I, when Indian non-citizens were exempt from military draft).

[98] NPR, *supra* note 9, at 3.

[99] Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 KAN. L. REV. 437, 464 (2002).

[100] *See* Henry L. Chambers, Jr., *Slavery, Free Blacks and Citizenship*, 43 RUTGERS L.J. 487, 489–91 (2013).

[101] Goldberg, *supra* note 99, at 465–66.

[102] *Id.*

[103] Francis Wilkinson, *Elizabeth Warren's Cherokee Nation*, BLOOMBERG (June 4, 2012), http://perma.cc/8KBS-G683

period.[104] From this, the Coalition concluded "that a large percentage of individuals in law school who identified themselves on their law school applications as Native American, were not of Native American heritage and in fact had no affiliation either politically, racially, or culturally with the Native American community."[105]

B. Biological Definitions

Generally, federal law does not rely on unsubstantiated claims of Indian identity. Rather, federal benefits are generally contingent on an Indian person meeting the more rigorous definition of "Indian" embodied in the U.S. Code. The Indian Reorganization Act of 1934 ("IRA") was an early legislative attempt to provide a comprehensive definition of "Indian", which defined "Indian" to include:

> [A]ll persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.[106]

Through this definition, the IRA created three separate criteria by which an individual could qualify for Indian status under federal law.[107] While only the last criteria explicitly included blood quantum, the requirement of Indian "descent" in the first two criteria codified the notion that Indian status is determined at least in part by biology.[108] The first criterion relies on political affiliation through tribal membership, but pairs that with a descent requirement. Similarly, the second criterion recognizes those nonmember Indians who reside on reservation lands but who nonetheless have some degree of Indian ancestry. By relying on descent or blood quantum, the IRA effectively excluded those persons without the requisite degree of blood quantum from the definition of "Indian".[109] In this way, federal law codified blood quantum as proxy for Indian identity with the passage of the IRA.[110]

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[104] *Id.*

[105] COALITION OF BAR ASSOCIATIONS OF COLOR RESOLUTIONS 2011, RESOLUTION ON ACADEMIC ETHNIC FRAUD (July 20, 2011), http://perma.cc/BU8C-QWQB.

[106] 25 U.S.C. § 479 (2012).

[107] *See* Brownell, *supra* note 73, at 285.

[108] *See* Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 4, 10–11 (2006).

[109] *Id.* at 47.

[110] Indian Reorganization Act (1934) 48 Stat. 984, 984–88 (codified as amended 25 U.S.C. §§ 461–79 (2006)). Indian Reorganization Act of 1934, Pub. L. No. 383, 48 Stat. 984, 984–88 (codified

Following the IRA, many federal statutes incorporated blood or ancestry in whole or in part in defining Indian status.[111] Today, the BIA and other federal regulations rely—to varying degrees—on blood quantum to determine Indian status.[112] Generally, federal benefits require one-quarter to one-half Indian "blood" for eligibility.[113] The "ticket" to many BIA services is an identity card—called a Certificate of Degree of Indian Blood—that lists the person's blood quantum.[114] Consequently, the requirement for federal benefits often comes down to a set percentage of Indian blood.[115]

One advantage of relying on blood quantum to determine eligibility for benefits is that it permits people of Indian descent who are not enrolled tribal members to receive benefits designed for Indian persons. For instance, nontribal members might receive education benefits based on blood quantum without respect to their tribal enrollment status, thus granting a traditionally marginalized group access to higher education they might otherwise be unable to afford.

Despite the appearance of scientific authority, reliance on biological markers is also troubling. First, genetic markers do not necessarily confer a "shared culture or historical narrative."[116] Thus, blood quantum criteria may be inconsequential to tribal identity.[117] Further, if the federal blood quantum is higher than what is required by any individual tribe, then reliance on a federal blood quantum can exclude Indians who have otherwise been accepted as tribal members. Many tribes do not have a blood quantum requirement. Thus, reliance on such a measure would exclude those tribes' members.

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as amended 25 U.S.C. §§ 461–79 (2006)). Prior to the IRA's passage, blood quantum had been used in some treaties to determine certain rights under the treaty, but even in those cases, it was not used to determine tribal membership. Spruhan, *supra* note 108, at 10–11. It was with passage of the IRA that its use became widespread to determine eligibility for federal benefits. *Id.* at 46–47. Blood quantum was also used in earlier federal statutes. For instance, in 1918, the Indian Appropriations Act prohibited the use of nontreaty appropriations "to educate children of less than one-fourth Indian blood whose parents are citizens of the United States." 25 U.S.C. § 297 (1918).

[111] *E.g.*, Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1603(c) (1988) (including ancestry as possibly qualifying individual for participation in health professions recruitment or scholarship programs); The Indian Education Act of 1988, 25 U.S.C. § 2651(4) (1988) (defining Indian to include "a descendant, in the first or second degree, of" a tribal "member (as defined by an Indian tribe, band, or other organized group) of such Indian tribe, band, or other organized group of Indians"); The Native American Languages Act of 1990, 25 U.S.C. § 2902(2); *see also* Brownell, *supra* note 73, at 280.

[112] *See, e.g.*, 25 C.F.R. §§ 5.1, 40.1, 151.2(c)(3), 31.1, 32.4(z), 36.3, 81.1(i) (2014).

[113] Spruhan, *supra* note 108, at 47; Porter, *supra* note 72, at 140.

[114] Brownell, *supra* note 73, at 281.

[115] Spruhan, *supra* note 108, at 47; Porter, *supra* note 72, at 140.

[116] Carl Elliott & Paul Brodwin, *Identity and Genetic Ancestry Tracing*, 325 BRIT. MED. J. 1469, 1469–70 (2002).

[117] *Id.*

Moreover, reliance on blood quantum raises questions about equal protection when benefits are seemingly allocated on the basis of racial or ethnic descent. The tendency to link race to blood quantum is understandable given the use of blood quantum in the racial history of the United States.[118] Nevertheless, despite the importance of blood quantum or ancestry in defining Indian status, the Supreme Court has rejected the argument that benefits are race-based and violate equal protection.[119] In *Morton v. Mancari*, the Supreme Court upheld an Indian hiring preference that required tribal membership and one-quarter blood quantum against an equal protection claim.[120] The case involved a section of the IRA that granted a hiring preference for "Indians" over equally qualified "non-Indians" in filling vacancies in the BIA.[121] The purpose of this and similar preferences "has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life."[122]

Finding that the hiring criteria were based on political rather than racial classification, the Court held that Indians were granted a preference "as members of quasi-sovereign tribal entities."[123] According to the Court, the preference was not a racial preference but an "employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."[124] In that way, it was similar to residency requirements for political office-holders.[125] Consequently, the Court held that the criteria "[w]as not directed toward a 'racial' group consisting of 'Indians'" but "only to members of 'federally recognized' tribes."[126] In reaching this conclusion, the Court noted that the BIA procedure manual required that only those with "one-fourth or more degree Indian blood and . . . member[s] of a

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[118] Karst, *supra* note 13, at 271.

[119] Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974) (finding hiring preference political, not racial classification, because it applied only to Indians who were members of federally recognized tribes, and not to persons who were not members of a recognized tribe who might be classified racially as Indians); United States v. Antelope, 430 U.S. 641, 646 (1977) (concluding that "respondents were not subjected to federal criminal jurisdiction because they are of the Indian race but because they are enrolled members of the Coeur d'Alene Tribe").

[120] *Mancari*, 417 U.S. at 554.

[121] *Id.* at 537.

[122] *Id.* at 541–42.

[123] *Id.* at 554.

[124] *Id.*

[125] *Id.* ("The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be 'an Inhabitant of that State for which he shall be chosen,' Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council.").

[126] Morton v. Mancari, 417 U.S. 535, 553 n.24 (1974).

Federally-recognized tribe" were eligible for the preference.[127] Despite the clear inclusion of a particular blood quantum requirement, the Court concluded the criteria would "exclude many individuals who are racially to be classified as 'Indians,'" because they were not enrolled tribal members.[128] Thus, "the preference [was] political rather than racial in nature."[129]

C. Political Definitions

Reflecting *Mancari*'s description of "Indians" as "members of discrete, recognized, political entities" as opposed to "members of a particular race,"[130] most federal statutes define "Indian" based on membership in a federally recognized tribe.[131] Under this definition, benefits flow from tribal membership on account of the "special trust and government-to-government relationships [that] entail certain legally enforceable obligations and responsibilities on the part of the United States to persons who are enrolled members of such tribes."[132] It is that government-to-government relationship, including the federal trust responsibility and treaty obligations that give rise to Indians' benefits and obligations under federal law.[133] Consequently, many federal statutes incorporate tribal membership in their definitional criteria for "Indian" status.[134]

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[127] *Id.* at 553 n.24. Interestingly, this definition expanded the number of persons eligible for the preference by lowering the blood-quantum requirement to one-quarter, from the IRA's one-half. *See id.*.

[128] *Id.*

[129] *Id.*; *see also* Brownell, *supra* note 73, at 295–98 (discussing use of blood quantum in definition of "Indian" in regulations regarding hiring preference). Similarly, in an appeal of the dismissal of a violation of the Migratory Bird Treaty Act ("MBTA"), the Eighth Circuit ruled on a claim of selective racial prosecution by a non-member of a recognized tribe. U.S. v. Eagleboy, 200 F.3d 1137, 1138 (8th Cir. 1999). The Court held membership in a recognized tribe was the deciding factor in bringing the charges rather than race. *Id.* Members of recognized Indian tribes are allowed to hunt protected birds under the MBTA. *Id.* However, the exemption did not apply to all Native Americans and was contingent upon tribal membership. *Id.* As a result, no racial discrimination occurred. *Id.* at 1139.

[130] Wadley, *supra* note 66, at 53.

[131] It is important to recognize that federal programs benefitting Indian people are not premised on remediating past discrimination or ill treatment. Rather, these benefits and obligations flow from the government-to-government relationship, as exemplified in various treaties that set out specific rights and obligations, and the federal government's trust responsibility.

[132] U.S. DEP'T OF THE INTERIOR BUREAU OF INDIAN, *supra* note 81; Dussias, *supra* note 65, at 80.

[133] U.S. DEP'T OF THE INTERIOR, *supra* note 81; Dussias, *supra* note 65, at 80.

[134] *E.g.*, Indian Health Care Improvement Act of 1976, 25 U.S.C. § 1603(13) (2012); Indian Education Act, 25 U.S.C. § 2651(4) (A) (repealed 1994); Native American Languages Act, 25 U.S.C. § 2902(2) (2012); Indian Financing Act of 1974, 25 U.S.C. § 1452(b) (2012); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450b(b) (2012); Tribally Controlled Colleges and University Assistance Act of 1978, 25 U.S.C. § 1801(a)(1) (2012); National Indian Forest Resources Management Act, 25 U.S.C. § 3103(9) (2012); Indian Child Protection and Family Violence Prevention Act of 1990, 25 U.S.C. § 3202(6) (2012). Other statutes accept membership as establishing Indian status, but also include individuals recognized as Indian by, for example, the Interior Secretary,

For federal statutes that rest on tribal membership, the criteria vary from tribe to tribe.[135] Absent congressional intervention, the Supreme Court has recognized a tribe's right to employ whichever criteria it deems appropriate to determine membership.[136] Tribes may base membership on blood quantum, "maternal or paternal descent, residency on the reservation, community participation, vote of the tribal council, community recognition or parental enrollment, performance of certain annual duties to the tribe, appearance of ancestors on specified base rolls, and marriage to or adoption by a tribal member."[137]

Unfortunately, reliance on tribal membership does not necessarily clarify matters. Just as tribal enrollment criteria differ from tribe to tribe, "[e]ligibility requirements for federal services...differ from program to program."[138] As important as tribal membership can be in determining Indian status, it is not necessarily dispositive or clear-cut. For instance, persons who are members of terminated tribes or unrecognized tribes will fail to qualify as "Indian" under most federal laws.[139] Similarly, those who are not ethnically Indian but are nonetheless tribal members through adoption may be able to participate in some aspects of tribal life, while still not being sufficiently "Indian" under federal statutes.[140] Further, a person can be deemed "Indian" under federal law even if she or he is not recognized by a tribe. Thus, while most benefits are available to members of federally-recognized tribes, some benefits are available to Indians who are not enrolled tribal members.[141] For example, the Indian Arts and Crafts Act of 1990 ("IACA") makes it illegal to market or sell arts and crafts items by falsely claiming the items were crafted by an Indian artisan or were the product of a particular Indian tribe, Indian arts and craft

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Indian Land Consolidation Act, 25 U.S.C. § 2201(2) (2012), or certified by an Indian tribe, Indian Arts and Crafts Act, 25 U.S.C. § 305e(a)(1) (2012). Regulatory definitions also rely on tribal membership to define Indian status. *E.g.*, 25 C.F.R. §§ 32.2(m), 39.2(n), 45.4(r), 271.2(i), 272.2(k), 273.2(j), 274.3(k), 275.2(g) & 277.3(h) (1992) (cited in Dussias, *supra* note 65, at 83 n.346).

[135] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) (recognizing tribes' sole authority to determine own membership as consistent and legitimate exercise of tribal sovereignty); Ray, *supra* note 54, at 399.

[136] This authority is not reviewable by the federal courts, even if the membership criteria would otherwise violate the equal protection clause. *See Martinez*, 436 U.S. at 72 (1978) (refusing to intervene in tribe's membership decision that excluded children of female members who married outside tribe while admitting children born to male tribal members who married outside tribe); Ray, *supra* note 54, at 403.

[137] Ray, *supra* note 54, at 403.

[138] U.S. DEP'T INTERIOR, BUREAU OF INDIAN AFFAIRS, *supra* note 81.

[139] Brownell, *supra* note 73, at 277.

[140] *Id.*

[141] *See* United States v. Bruce, 394 F.3d 1215, 1225 n.6 (9th Cir. 2005) (noting "that unenrolled Indians are eligible for a wide range of federal benefits directed to persons recognized by the Secretary of Interior as Indians *without statutory reference to enrollment.*") (emphasis in original).

organization, or Indian person. While the IACA defines "Indian" to include tribal members, it also includes individuals certified as Indian artisans by an Indian tribe. Other statutes similarly include membership as a partial or optional criteria.

Nevertheless, even defining Indian status through tribal membership can implicate race—or at least its proxy; blood quantum.[142] First, "[t]he federal government . . . possesses power to define tribal membership . . . [and] [w]hile numerous federal regulations accept membership in a federally recognized tribe as a sufficient indicum [sic]of Indian ethnicity, others require a minimum blood quantum" as well.[143] Consequently, for tribes without a minimal blood quantum requirement, blood quantum became proxy for tribal status in federal law.[144] Furthermore, federal recognition of tribal status requires Indian tribes to make "descen[t] from a historical Indian tribe" a condition of membership.[145] However, under the federal recognition process, while a group seeking recognition must be comprised of "American Indians, groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations—a political relationship—is indispensable."[146]

Further, tribal membership rules often incorporate some minimal blood quantum requirement.[147] In 1991, the BIA reported that more than four-fifths of federally recognized Indian tribes outside of California and Oklahoma "conditioned membership on proof of tribal blood."[148] The requisite blood quantum can range from one-half to one sixty fourth degree of Indian blood.[149] In addition, "even among tribes that the BIA reports as not requiring proof of a particular blood quantum, membership nonetheless requires evidence that either or both parents are tribal members, or that the applicant's forebears appeared on tribal rolls."[150] Consequently, tribes are comprised of members whose eligibility may rest on biological or cultural conditions.[151] In other words, tribes may be political entities, but they can also be racial or ethnic groups in their reliance on biology to determine membership.[152]

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[142] *See* Goldberg, *supra* note 62, at 1389.

[143] L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 723 (2001).

[144] Spruhan, *supra* note 108, at 47.

[145] *See* 25 C.F.R. § 83.7(e) (2013).

[146] 43 Fed. Reg. 39, 361 (Aug. 24, 1978) (codified as amended at 25 C.F.R. § 83).

[147] No tribe requires one hundred percent blood quantum. Brownell, *supra* note 73, at 309.

[148] Gould, *supra* note 143, at 721.

[149] Brownell, *supra* note 73, at 308.

[150] Gould, *supra* note 143, at 722.

[151] *See* Ray, *supra* note 54, at 39–95.

[152] *See id.* It is also true that some tribes admit members through adoption and others have no

Despite the role of ancestry in determining tribal membership conflicts still arise in which individuals of Indian ancestry have been denied legal status because they were not enrolled members of a recognized tribe.[153] For instance, those tribes that trace membership to the Dawes Rolls must contend with the likelihood that those rolls are incomplete. In some cases, individual Indians deliberately chose not to be included.[154] In others, the government may have simply been unable to reliably include every eligible person spread across the continental United States using data collection techniques available in the 1800s.[155] Still others may have been intentionally excluded by a Dawes's census worker.[156] As Rennard Strickland explained, whether someone is deemed an Indian under federal law "may have nothing to do with who you are, how you live, what you do, what your beliefs are; it has to do with the marriage and tribal enrollment patterns of your parents or grandparents as interpreted by federal bureaucrats."[157]

As a consequence of the gaps in the Dawes Rolls and reliance on tribal membership, ethnic Indians who are not affiliated with a tribe are ineligible for tribal-based benefits. For the purposes of *Mancari*, this solidifies the Court's notion that race is not, in fact, the basis on which tribal benefits are conferred. Thus, those persons claiming Indian identity may be denied benefits as a consequence of not being enrolled tribal members. This is because, broadly speaking, benefits are conferred on the basis of tribal membership as part of the government-to-government relationship between various Indian tribes and the United States..[158] Thus, while many

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descent or blood quantum requirement at all. Brownell, *supra* note 73, at 308.

[153] Wadley, *supra* note 66, at 53.

[154] *See* Ray, *supra* note 54, at 440 ("To the extent that biological Cherokees refused to grant legitimacy to the Dawes Rolls by participating in enrollment, the Rolls are incomplete and therefore cannot serve as an accurate resource for identifying all Cherokees by 'blood.'").

[155] NPR, *supra* note 9.

[156] *See* Ray, *supra* note 54, at 395 ("[A]lthough many of the Freedmen or their descendants at the time of enrollment may in fact have had Native American ancestry, such lineage was not recognized by the agents of the Dawes Commission, who consistently enrolled these '[B]lack Indians' under the Freedmen Roll."); *id.* at 437 ("[T]he Freedmen's roll systematically excluded evidence of Native American ancestry, and agents refused to record it, even when proffers of proof of 'Indian blood' were made by enrollees themselves."); *id.* at 438 ("Because the Freedmen's roll systematically omits proof of Cherokee ancestry where such ancestry could be established by independent evidence, and because there is no other Dawes roll on which such ancestry can appear, the Dawes Rolls are incomplete and therefore cannot serve as an accurate resource for identifying all Cherokees by 'blood.'").

[157] Brownell, *supra* note 73, at 302 (quoting Rennard Strickland, *The Genocidal Premise in Native American Law and Policy: Exorcising Aboriginal Ghosts*, 1 J. GENDER RACE & JUST. 325, 330 (1998)).

[158] COHEN'S HANDBOOK § 1.01, at 8 (Nell Jessup Newton ed., 2012) ("The centuries-old relationship between the United States and Indian nations is founded upon historic government-to-government dealings and a long-held recognition of Indians' special legal status.").

individuals may identify as ethnically Indian, without tribal membership they are ineligible for tribal benefits.

Moreover, because tribal membership decisions are largely the result of a political process, those who are culturally or biologically Indian may nonetheless be excluded for reasons that have nothing to do with ancestry. Simply put, they may be subjected to decisions that are based more on politics than any neutral criteria. This has often been the charge made by many groups removed from tribal rolls or declined enrollment status. Tribal membership decisions have been a well-publicized source of controversy for more than a decade.[159]

Most recent disputes over membership—in particular the exclusion of tribal members by enrollment committees—have arisen under the Indian Gaming Regulatory Act (IGRA). Under IGRA, individuals may challenge a tribe's decision to admit or exclude someone who has applied for tribal membership. IGRA does not include any definition of Indian and[160] federal courts have generally accepted the tribe's membership determination in disputes arising under IGRA.[161] For instance, Indian tribes in California have removed thousands of people from their membership rolls.[162] As a consequence of these membership decisions, Indian families have been divided and individuals separated from their tribe and culture.[163] Many have also lost their jobs, homes, and their share in the revenues generated by the billion-dollar Indian casino industry.[164] Repeatedly, federal courts hold that they have no jurisdiction to review the tribe's enrollment decision.[165] This is true even in troubling cases where applicants appear to meet enrollment criteria and the denial of their

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[159] *See generally*, Suzianne D. Painter-Thorne, *If You Build It, They Will Come: Preserving Tribal Sovereignty in the Face of Indian Casinos & the New Premium on Tribal Membership*, 14 LEWIS & CLARK L. REV. 311 (2010).

[160] *See* 25 U.S.C. § 2703 (1992).

[161] In contrast, the Department of Interior has asserted that it has "broad and possibly nonreviewable authority" to review tribal membership criteria. According to the Department, it would reject a tribe's attempt to define membership to include those persons of Indian descent who did not maintain any tribal connection. Brownell, *supra* note 73, at 307.

[162] Kevin Fagan, *Tribes Toss Out Members In High-Stakes Quarrel*, S.F. CHRON., Apr. 20, 2008, http://perma.cc/A6LK-MMP2.

[163] Marc Cooper, *Tribal Flush: Pechanga People "Disenrolled" en Masse*, LA WEEKLY, Jan. 3, 2008, http://perma.cc/8ED8-BY8S; David Kelly, *Clan Says Tribe Dealt It a Bad Hand; A Family Finds Itself Cut Off from the Pechanga Group and Its Casino Wealth Despite Long Ties to the Reservation*, L.A. TIMES, Sept. 9, 2007, at 1; *see also* Painter-Thorne, *supra* note 159; Onell R. Soto, *Tribe Denies 50 Members Profits from Casino: San Pasqual Band Says Some Lack Indian Blood*, SAN DIEGO UNION-TRIB. (June 28, 2008), *available at* http://perma.cc/5VDC-9MVS; James May, *State Capitol Rally Protests Disenrollments*, INDIAN COUNTRY TODAY, July 21, 2004, http://http://perma.cc/GF2L-S9W6.

[164] *See generally* Painter-Thorne, *supra* note 159.

[165] *See generally id.*

enrollment separates families. For instance, in *Lewis v. Norton*, the plaintiffs who met the tribe's blood quantum requirement were the children of an enrolled member of the Table Mountain Rancheria.[166] The district court found, and the Ninth Circuit agreed, that the children indeed met the tribe's membership criteria.[167] Nonetheless, the court refused to intervene, finding that the plaintiffs could not "survive the double jurisdictional whammy of sovereign immunity and lack of federal court jurisdiction to intervene in tribal membership disputes."[168]

D. Undefined

Finally, many federal statutes do not define "Indian" at all. In the absence of a statutory definition, courts are left to define Indian without legislative guidance. More concerning, many courts craft definitions without tribal input and irrespective of tribal beliefs or custom. Consequently, court-generated definitions may rest on racial, political, or cultural grounds that may have little to no relevance to the particular Indian tribe.[169] Furthermore, when identity is left to legal decision-making, "legal pronouncements undermine the Indian identities of individuals who cannot satisfy outsiders' notions of cultural participation."[170] The failure to meet non-Indian criteria for "Indianness" can mean the loss of legal rights and obligations derived from tribal membership and Indian status.[171]

In two early cases addressing the definition of "Indian," the Supreme Court relied on a cultural definition of Indian, reaching two contrary conclusions whether the Pueblo people of New Mexico are an Indian tribe.[172] In the first case, *United States v. Joseph*, decided in 1876, the Court found that the Pueblo were not Indian.[173] *Joseph* involved a land dispute, specifically whether the Trade and Intercourse Acts that prohibited settlement of non-Indians on "Indian" land applied to the Pueblo.[174] To answer that question, the Court first had to determine whether "the people who constitute the pueblo or village of Taos [are] an Indian tribe within the meaning of the statute."[175] According to the Court, the Pueblo people were

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[166] Lewis v. Norton, 424 F.3d 959, 960–961 (9th Cir. 2005).

[167] *Id.*

[168] *Id.*

[169] *See* discussion, *infra*, p. 13.

[170] Goldberg, *supra* note 62, at 1373.

[171] *Id.* at 1375.

[172] United States v. Joseph, 94 U.S. (4 Otto) 614, 615–16 (1877); United States v. Sandoval, 231 U.S. 28, 39 (1913).

[173] Joseph, 94 U.S. (4 Otto) at 614.

[174] *Id.*

[175] *Id.* at 615.

"Indians only in feature complexion, and a few of their habits," but not actually Indians for the purposes of the Nonintercourse Act.[176] Thus, non-Indians could settle on Pueblo land as part of westward expansion.[177]

Thirty-seven years later, in *United States v. Sandoval*, the Court reached the opposite conclusion.[178] The federal government prosecuted Sandoval for bringing alcohol into the Santa Clara Pueblo in violation of federal law prohibiting the introduction of intoxicating liquor into Indian Country.[179] Sandoval challenged his conviction on the ground that he could not have violated the Act because the Pueblo were not an Indian tribe.[180] Relying on *Joseph*, the territorial court agreed with Sandoval and held the Pueblo were not "Indian" within the meaning of a statute regulating liquor sales to Indian tribes.[181] After that decision, Congress passed the New Mexico Enabling Act of 1910 requiring that New Mexico prohibit alcohol sales in Indian Country, which it defined as including Pueblo lands.[182] In reviewing the territorial court's decision, the Court relied on that congressional action to find that Congress intended the Pueblo peoples to be included in the definition of Indian.[183] Nevertheless, the Court went beyond that conclusion to consider whether the Pueblo met the definition of Indian.[184] Consequently, the Court rejected its decision in *Joseph*, concluding that it incorrectly rested on the factual impressions of the territorial court.[185] Instead, the Court held that the Pueblo were "Indians in race, customs, and domestic government."[186] Because the

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[176] *Id.* at 616.

[177] *Id.* at 619.

[178] United States v. Sandoval, 231 U.S. 28, 48 (1913). Sandoval was, of course, reasonable in this assertion given the Court's holding in *Joseph*. However, the Court explained away any seeming contradiction. Acknowledging that its decision was "not in accord" with what was said in *Joseph*, the Court distinguished the two cases. First, it contended that *Joseph*—which involved a prohibition on the sale of Indian land without federal approval—did not turn on Congress's authority to regulate Indians or their property. *Id.* Second, the Trade and Intercourse Acts involved in *Joseph* were not nearly as comprehensive as the statute prohibiting alcohol sales on Indian lands at issue in Sandoval. *Id.* at 48–49. Further, according to the Court, *Joseph* was undermined by its reliance on the opinions of the territorial court, which the Court found were at odds with new information on the habits of the Pueblo now available in Washington, DC. *Id.* at 49. Thus, the Court could not say that the Pueblo were beyond Congress's reach. Accordingly, it was illegal to sell alcohol to the Pueblo because, "although industrially superior, they are intellectually and morally inferior to many of them; and that they are easy victims to the evils and debasing influence of intoxicants." *Id.* at 41.

[179] United States v. Sandoval, 231 U.S. 28, 36 (1913).

[180] *Id.* at 47–48.

[181] *Id.* at 32–33.

[182] *Id.* at 36–37.

[183] *Id.* at 38; *see also* Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana, 472 U.S. 237, 241 n.8 (1985).

[184] *Sandoval*, 231 U.S. at 38–46.

[185] *Id.* at 48–49.

[186] *Id.* at 39.

Pueblo were Indians, the Court deemed them an "inferior race," in need of special consideration and protection like other Indian communities.[187] Thus, the defendant's conviction for selling liquor on Indian lands stood.

One reason courts rely on culture is to avoid equal protection concerns if Indian status were solely determined on the basis of race.[188] Nevertheless, while supposedly avoiding race as a determination for Indian status, "state and federal courts continue to characterize Native North Americans as a racial group and still use this characterization to justify and support denying them their rights."[189] Because the use of race triggers strict scrutiny,[190] individuals are thus forced to prove their "Indianness" by meeting cultural indicia identified by the court.[191] Otherwise, their rights as Indians will be lost.[192]

More broadly, courts have been left to define Indian in cases with far-reaching consequences. Despite the importance of Indian status in determining jurisdiction over crimes in Indian Country, neither statute establishing federal jurisdiction actually includes a definition of Indian.[193] Criminal jurisdiction in Indian Country largely depends whether an individual—either the victim or the accused—is "Indian" within the meaning of the Indian Major Crimes Act (MCA) or the Indian Country Crimes Act (ICCA).[194] The MCA granted federal jurisdiction over certain major crimes[195] committed by Indians in Indian Country.[196] Thus, the defendant's Indian status is an element of the offense under section 1153, and must be alleged by the prosecution and established beyond a

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[187] *Id.*

[188] *See generally* Morton v. Mancari, 417 U.S. 535 (1974); *see also* discussion *supra* pp. 158-59

[189] *See* Goldberg, *supra* note 62, at 1375.

[190] *See e.g.*, In re Santos Y., 110 Cal. Rptr. 2d 1, 37 (Cal. Ct. App. 2001) (concluding that strict scrutiny applies "[a]bsent social, cultural, and political relationships [between an Indian child and its tribe], or where the relationships are very attenuated"); *see generally* Goldberg, *supra* note 62.

[191] *See* Goldberg, *supra* note 62, at 1375.

[192] *See id.*

[193] *See* 25 U.S.C. §§ 1152, 1153 (2006); *see also* Dussias, *supra* note 65, at 81.

[194] United States v. Cruz, 554 F.3d 840, 842 (9th Cir. 2009).

[195] The Major Crimes Act grants federal jurisdiction over the following offenses:

> [M]urder, manslaughter, kidnapping, maiming, a felony under chapter 109A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country[.]

18 U.S.C. § 1153(a) (2006).

[196] 18 U.S.C. § 1153 (2006); *see* Amanda M.K. Pacheco, *Broken Traditions: Overcoming the Jurisdictional Maze to Protect Native American Women from Sexual Violence*, 11 J.L. & SOC. CHALLENGES 1, 6 (2009).

reasonable doubt.[197] The ICCA[198] confers federal jurisdiction on all violations of "the general laws of the United States" in Indian Country committed either by or against a non-Indian.[199] Because the ICCA seeks to address "interracial crime," it does not apply when both victim and accused are Indian.[200] In a prosecution under section 1152, Indian status is an affirmative defense generally raised by a defendant seeking to avoid federal jurisdiction by proving that neither or both the victim and accused are Indian.[201] Under section 1152, Indian status must be established by a preponderance of the evidence.[202]

Because neither section 1153 nor 1152 defines "Indian,"[203] courts have determined Indian status on an ad hoc basis. To determine whether jurisdiction is proper, courts have generally followed the test first set out in 1846, in *United States v. Rogers*.[204] There, the defendant, William Rogers, sought to avoid federal prosecution on charges of murdering Jacob Nicholson.[205] Rogers contended that, because he voluntarily resided on the Cherokee land, had no intention to return to the United States, was able to exercise all the rights and privileges as any tribal member, and had been incorporated and adopted by the tribe, he was "Indian."[206] Rogers used similar facts to allege that his victim, Nicholson, was also Cherokee.[207] According to Rogers, because the statute at issue[208] did not provide

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[197] United States v. Bruce, 394 F.3d 1215, 1229 (9th Cir. 2005).

[198] Also known as the General Crimes Act. COHEN'S HANDBOOK, *supra* note 47, § 9.02, at 731, n.5 (2005).

[199] 18 U.S.C. § 1152 (2006).

[200] COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 47, § 9.02, at 734. If both the victim and accused are non-Indian, state jurisdiction applies. *See* United States v. McBratney, 104 U.S. 621, 624 (1881) (finding that despite ICCA initial recognition of federal jurisdiction over crimes committed by non-Indians, state jurisdiction took over upon statehood); *accord* COHEN'S HANDBOOK, *supra* note 47 § 9.02, at 738, 754–55.

[201] United States v. Hester, 719 F.2d 1041, 1043 (9th Cir. 1983); United States v. Beasley, 346 F.3d 930, 935 (9th Cir. 2003) (noting that affirmative defense elements must be established by preponderance of evidence absent specific statutory standard).

[202] *Hester*, 719 F.2d at 1043; *Beasley*, 346 F.3d at 935.

[203] *See* 18 U.S.C. §§ 1152, 1153 (2006); *see also* United States v. Stymiest, 581 F.3d 759, 762 (8th Cir. 2009).

[204] United States v. Rogers, 45 U.S. (4 How.) 567, 572–73 (1846).

[205] *Id.* at 571.

[206] *Id.*

[207] *Id.*

[208] The specific statute at issue in *Rogers* was § 25 of the Act of June 30, 1834, a precursor to the Indian Country Crimes Act, 18 U.S.C. § 1152, which was enacted twenty years later. COHEN'S HANDBOOK, *supra* note 47, § 9.02, at 731.

jurisdiction when both the accused and victim were "Indian," federal jurisdiction was improper.[209]

Disagreeing, the Supreme Court held that a white adult could not become "Indian" through adoption even if, through that adoption he became "entitled to certain privileges in the tribe, and [had made] himself amenable to their laws and usages."[210] Rather, Indian status was reserved for those persons "belonging to [the Indian] race."[211] In so ruling, the Court rejected any implication that Congress would have intended for the jurisdictional exemption to apply to persons who would likely seek out its protection to avoid responsibility to the laws of the United States.[212]

Under *Rogers*, an individual is considered an "Indian" if she (1) has some quantity of Indian blood and (2) is recognized as an Indian by a federally recognized tribe or by the federal government.[213] The first prong of the *Rogers* test appears to incorporate a biological basis through the use of blood quantum.[214] Under the first prong, it is not enough to show that an individual is an enrolled tribal member. Rather, there must be some connection of that individual's bloodline to a federally-recognized tribe. For instance, in *Zepeda*, the Ninth Circuit considered only the first prong—whether the defendant had a sufficient blood tie to a federally-recognized tribe in a prosecution under the MCA. The circuit court concluded that an enrollment certificate was insufficient to establish the requisite blood tie under the first prong of the *Rogers* test. At trial, prosecutors had entered a "Gila River Enrollment/Census Office Certified Degree of Indian Blood" certificate as evidence of Indian status. The certificate indicated that the defendant had a "Blood Degree" of "1/4 Pima [and] 1/4 Tohono O'Odham" for a total of 1/2 blood quantum (his Indian blood was from father, his mother was Mexican). This certificate was sufficient to establish

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[209] *Rogers*, 45 U.S. (4 How.) at 572; *see also* 18 U.S.C. § 1152 (2012); COHEN'S HANDBOOK, *supra* note 47, § 9.02, at 738, 741.

[210] *Rogers*, 45 U.S. (4 How.) at 573.

[211] *Id.*

[212] *Id.* ("And it would perhaps be found difficult to preserve peace among them, if white men of every description might at pleasure settle among them, and, by procuring an adoption by one of the tribes, throw off all responsibility to the laws of the United States, and claim to be treated by the government and its officers as if they were Indians born. It can hardly be supposed that Congress intended to grant such exemptions, especially to men of that class who are most likely to become Indians by adoption, and who will generally be found the most mischievous and dangerous inhabitants of the Indian country.").

[213] *Id.* at 572–73. While this definition was crafted with respect to criminal prosecutions under sections 1152 and 1153, courts have also applied it to cases involving the Indian Civil Rights Act. *See e.g.*, Connecticut v. Sebastian, 701 A.2d 13 (Conn. 1997); Brownell, *supra* note 73, at 284. This is because the ICRA defines Indian as "any person who would be subject to the jurisdiction of the United States as an Indian under section 1153, title 18, [United States Code] if that person were to commit an offense listed in that section in Indian country to which that section applies." 25 U.S.C. § 1301 (2012).

[214] *See Sebastian*, 701 A.2d at 24.

Zepeda was eligible for tribal benefits and federal benefits based on tribal membership. Nevertheless, tribal enrollment was deemed insufficient to satisfy the second prong of the *Rogers* test.[215] According to the Ninth Circuit while "tribal enrollment is 'the common evidentiary means of establishing Indian status,'...it is not the only means nor is it necessarily determinative."[216]

The second prong of the *Rogers* tests suggests that an individual does not have to be an enrolled tribal member, but merely "recognized" as Indian by a federally-recognized tribe or by U.S. government.[217] However, the relevant tribe must be federally recognized for a person to be deemed Indian for purposes of criminal jurisdiction.[218] Further, the Department of Justice requires that a defendant be an enrolled tribal member to fall under section 1153.[219]

The purpose of the second prong is to discern "whether the Native American has a sufficient non-racial link to a formerly sovereign people."[220] Indeed, the Ninth Circuit expressly rejected the notion that tribal enrollment alone was sufficient to establish criminal jurisdiction.[221] Acknowledging that reliance on enrollment would "provide[] a simpler framework within which we might judge Indian status as a political affiliation with a formerly sovereign people," the court nevertheless concluded that it was "bound by the body of case law which holds that

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[215] Somewhat confusingly, the court did find that both "Gila River Indian Community of the Gila River Indian Reservation, Arizona" and the "Tohono O'odham Nation of Arizona" were federally-recognized. However, because the record did not include evidence that "Tohono O'odham" referenced in the enrollment certificate was the same as the "Tohono O'odham Nation of Arizona" the court concluded the two were not the same. The BIA had only recognized the "Tohono O'odham Nation of Arizona." In contrast, "Tohono O'odham" was not recognized, but was simply a term used to refer to a collective population, some of whom reside in Mexico. Because the record did not contain facts to support finding that Zepeda had bloodline from federally-recognized tribe, no rational juror could have found him guilty beyond a reasonable doubt under section 1153.

[216] *See* United States v. Bruce, 394 F.3d 1215, 1224 (9th Cir. 2005); *see also* United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009); United States v. Driver, 755 F.Supp. 885, 888 & n.7 (D.S.D. 1991), *aff'd*, 945 F.2d 1410, 1416 (8th Cir. 1991).

[217] United States v. Antelope, 430 U.S. 641, 647 n.7 (1977) (noting that "enrollment in an official tribe has not been held to be an absolute requirement for federal jurisdiction, at least where the Indian defendant lived on the reservation and 'maintained tribal relations with the Indians thereon.'"); *Bruce*, 394 F.3d at 1232 (applying *Rogers* test to 18 U.S.C. § 1152); United States v. Cruz, 554 F.3d 840, 842 (9th Cir. 2009) (noting that *Bruce* test also applies to 18 U.S.C. § 1153).

[218] *See Sebastian*, 701 A.2d at 33.

[219] Brownell, *supra* note 73, at 283.

[220] *See Bruce*, 394 F.3d at 1224.

[221] *See id.*. at 1225.

enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status."[222]

Thus, in determining whether an individual meets the second prong of the test, courts generally rely on the following four factors: "(1) tribal enrollment; (2) government recognition formally and informally through receipt of assistance reserved only to Indians; (3) enjoyment of the benefits of tribal affiliation; and (4) social recognition as an Indian through residence on a reservation and participation in Indian social life."[223]

It can be enough that the person is treated as an Indian by the tribe.[224] Proof of sufficient ties to permit jurisdiction might include being subject to tribal police or court jurisdiction, receiving medical care from a tribal hospital,[225] participation in sacred tribal rituals, being born and/or residing on an Indian reservation, having children who are enrolled tribal members,[226] asserting Indian identity to government officials,[227] or publicly holding oneself out as Indian.[228] However, it does not include mere eligibility for tribal benefits because eligibility alone would make tribal status dispositive, which *Bruce* precludes.[229] Further, minimal participation in tribal social life may not be sufficient to establish Indian status under section 1153.[230]

In a state court ruling, a defendant appealed his conviction under state law on the ground that Wyoming lacked jurisdiction over him on as an Indian acting on a reservation.[231] In the facts stipulated to by both parties,

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[222] *See id.* In contrast, the Eighth Circuit has held enrolled tribal membership is dispositive while non-enrollment is not necessarily determinative. United States v. Stymiest, 581 F.3d 759, 764 (8th Cir. 2009).

[223] United States v. Cruz, 554 F.3d 840, 846 (9th Cir. 2009); *Stymiest*, 581 F.3d at 763; United States v. Ramirez, 537 F.3d 1075, 1082 (9th Cir. 2008); *Bruce*, 394 F.3d at 1224; United States v. Prentiss, 273 F.3d 1277, 1280 (10th Cir. 2001) (noting circuit and state courts use *Rogers* test); United States v. Keys, 103 F.3d 758, 760–61 (9th Cir. 1996); United States v. Lawrence, 51 F.3d 150, 152 (8th Cir. 1995); St. Cloud v. United States, 702 F.Supp. 1456, 1461 (D.S.D. 1988).

[224] *See Bruce*, 394 F.3d at 1225–26.

[225] *E.g., Stymiest*, 581 F.3d at 766; *Keys*, 103 F.3d at 761.

[226] *E.g., Bruce*, 394 F.3d at 1226–27 (finding prior arrests by tribal police sufficient to meet defendant's burden of production affirmative defense under section 1151). *But see Cruz*, 554 F.3d at 851 (noting that exercise of tribal jurisdiction was insufficient to satisfy government's burden under section 1153 to prove Indian status beyond reasonable doubt).

[227] *Stymiest*, 581 F.3d at 766 (finding it relevant that defendant indicated to Indian Health Service clinic that he was Indian).

[228] *Id.* (finding it relevant that defendant "lived and worked on the Rosebud reservation and repeatedly held himself out as a non-member Indian to his Indian girlfriend and in socializing with other Indians.").

[229] *Bruce*, 394 F.3d at 1225 (holding that tribal enrollment, and therefore *a fortiori* descendant status is not dispositive of Indian status, and rejecting the argument that mere descendant status with the concomitant eligibility to receive benefits is effectively sufficient to demonstrate tribal recognition).

[230] *Cruz*, 554 F.3d at 848.

[231] *See generally* Vialpando v. State, 640 P.2d 77 (Wyo. 1982).

Vialpando was described as a "man of the distinct facial and racial characteristics of Indians and...fairly dark skinned."[232] He regularly attended the yearly Shoshone Powwow and similar tribal events.[233] Though Vialpando was one eighth Shoshone Indian, he was not an enrolled member of the tribe.[234] He received certain benefits from the tribe including living on Wind River Indian Reservation, being treated at the BIA hospital for free, and provided hunting and fishing rights on the reservation with a non-enrolled fishing permit.[235] Nevertheless, the Wyoming court determined Vialpando's "life style is that of a non-Indian except for recreation purposes and visitation."[236] In so deciding, the court relied on a test promulgated by the Seventh Circuit in *Ex parte Pero*.[237] Under the *Pero* test, an "Indian" is defined as having a "[s]ubstantial amount of Indian blood plus racial status in fact as an Indian."[238] Though the Seventh Circuit held a woman of less than one-fourth Indian blood was an Indian for "legal purposes" in a civil action, the court held Vialpando's "one-eighth Indian Blood was not a 'substantial amount of blood'" for the purposes of major crimes under 18 U.S.C. § 1153.[239]

Perhaps more disturbing than court-crafted definitions arising from statutory silence are instances when a statute provides a definition of Indian but courts nevertheless impose further criteria than contemplated by the statute. For instance, the Indian Child Welfare Act (ICWA) applies to "Indian children," which ICWA defines as tribal members or one eligible for membership in an Indian tribe and the biological child of a member of an Indian tribe.[240] Despite ICWA's clear dependence on tribal membership as the defining criteria, some state courts have refused to recognize a child as "Indian" where the court finds that the child is not part of an "existing Indian family." Courts relying on the court-created "existing Indian family exception" will only apply ICWA if it finds that the Indian child is part of a recognizable Indian family or a family where the child has been exposed to Indian culture.[241] Still other states graft on a biological component,

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[232] *Id.* at 81.

[233] *Id.*

[234] *Id.*

[235] *Id.*

[236] *Id.* at 80.

[237] Vialpando v. State, 640 P.2d 77, 79 (Wyo. 1982) (citing *Ex parte* Pero, 99 F.2d 28, 29 (7th Cir. 1938)).

[238] *Id.* at 79–80 (quoting *Pero*, 99 F.2d at 29).

[239] *Id.* at 80 (quoting State *ex rel.* Peterson v. Dist. Ct. of Ninth Jud. Dist., 617 P.2d 1056 (Wyo. 1980)).

[240] 25 U.S.C. §§ 1901–1903 (2012).

[241] *In re* Baby Boy L., 643 P.2d 168, 175 (Kan. 1982); *see also* Angela Monguia, *Mississippi Band of Choctaw Indians v. Holyfield*, 14 CONTEMP. LEGAL ISSUES 297, 302 (2004) (citing B.J. Jones,

requiring that the child's parents must be of Indian heritage *and* have significant ties to their tribe for IWCA to apply.[242] Thus, ICWA is circumvented if a state court finds that the parents failed to measure up to the court's expectations regarding their participation in tribal life or that the parents lacked significant political, social, or cultural ties to the tribe.[243] Sufficient ties may be found where the parents have

> privately identified themselves as Indians and privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained social contacts with other members of the Tribe.[244]

Contrary to the statutory definition, state courts—rather than tribal membership—determine whether a particular family is sufficiently Indian for ICWA to apply. This is troubling for several reasons, aside from the courts' willingness to ignore congressional intent and Supreme Court precedent.[245] First, the requirement that the parent or child adhere to a state court's expectation of "Indian culture" creates a definition of "Indian" that may bear little resemblance to tribal realities. Further, such a definition cannot capture the diversity that exists among the more than 500-federally recognized tribes, resulting in a definition that can make establishing "Indianness" difficult because the defining criteria are not only defined by outsiders but are premised on an incorrect view of the homogeneity of Indian cultures.[246]

Second, by defining their biological parents—and thus the child—as outside Indian, these courts deny Indian children their legal status, as well as their family lore and ethnographic identity. Denying ICWA application most often paves the way for the child's adoption into non-Indian homes—the very thing ICWA was designed to protect against.[247] Congress enacted ICWA to ensure the survival of Indian tribes by removing Indian family

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THE INDIAN CHILD WELFARE ACT HANDBOOK 15 (1995)).

[242] *See* Painter-Thorne, *supra* note 40, at 371 & n.333.

[243] *See In re* Baby Boy L., 643 P.2d at 175; *In re* Bridget R., 49 Cal. Rptr. 2d, at 515–16.

[244] *In re* Bridget R., 49 Cal. Rptr. 2d at 531.

[245] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989).

[246] *See* Goldberg, *supra* note 62, at 1373–74.

[247] *See generally* Painter-Thorne, *supra* note 40.

issues from state control after concluding that abusive state practices had created an "Indian child welfare crisis." The existing Indian family exception directly subverts this goal by giving states, rather than tribes, the power to determine who is an Indian child. Now, nearly all states, including Kansas, recognize this problem with the existing Indian family exception and view the exception as erroneous. Thankfully, most states have rejected existing family exception doctrine, but a few states still retain it. For Indian children in those states, state court decisions can rob them of their ancestry before they even have an opportunity to know it.

IV. IDENTIFYING "INDIANS"

To varying degrees, both sides in the Warren controversy seemed to accept "Indian" as a racial classification. That approach, however, ignores the complexity of Indian identity in the United States.[248] Just like other groups, "Indian" encompasses what may be viewed as an ethnicity, a culture, a political entity, and a "race." However, unlike other groups in the United States, the complexity of Indian identity is often confused to suggest that a claim of ancestry is an assertion of a legal right or acceptance of a legal obligation. It would be incorrect to assume U.S. law provides much clarity. Legally, while "Indian" might count as race for one purpose, it might count as political status in another. But even in the law, "Indian" is often treated as if there were a unified meaning. Of course, Indians themselves have not settled on one definition that makes someone "Indian."[249] "Indian identity, in other words, continues to have an ambiguous legal meaning."[250]

As discussed above, whether a person is legally considered Indian largely depends on the purpose for the claimed status. Consequently, an

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[248] It also assumes that "race" is a fixed characteristic rather than a social construct. For instance, in the United States, a racial distinction between Indians and African Americans was used to justify slavery. *See* Gregory Ablavsky, *Making Indians "White": The Judicial Abolition of Native Slavery in Revolutionary Virginia and its Racial Legacy*, 159 U. PA. L. REV. 1457, 1473–76 (2011). Children of Indian mothers were presumptively free, while the children of African American mothers were presumptively enslaved. Thus, being "Indian" was quite literally the difference between being free and being a slave—giving Indian status an elevated value. *Id.* at 1478.

[249] Kevin Noble Maillard, *Elizabeth Warren's Birther Moment*, NY TIMES, (May 4, 2012), http://perma.cc/RXW7-A7F4. Further complicating matters is the reality that there are more than five hundred recognized Indian tribes, each with its own distinct cultural, social, and political practices. Thus it is misleading to lump all Indian peoples into a single classification as does the Census. Prior to colonization, Indian tribes did not consider themselves one homogenous group. Goldberg, *supra* note 62, at 1373–74. Rather, European colonists lumped all Indians into a single group while "the aboriginal inhabitants of North America understood themselves solely in terms of their particular social, cultural, and language groups, corresponding only very roughly to modern-day tribes." *Id.* (internal quotations omitted).

[250] Ablavsky, *supra* note 248, at 1480.

individual could be considered Indian for one purpose, but not another. For instance, a tribe's membership criteria might deem an individual Indian—and thus eligible to participate in tribal governance and social activities and to qualify for BIA or IHS services. Tribal membership, however, might be insufficient to determine Indian status for purposes of federal prosecution under the Major Crimes Act or to ensure tribal jurisdiction over an Indian child under the ICWA. As a consequence of an unnecessarily complex diversity of definitions, individuals are deemed Indian for some purposes, but not for others, resulting in a fractured identity that depends on legal context more than citizenship, ethnology, or ancestry.

With this in mind, the federal code could be viewed as an attempt to codify all the nuances of identity into a system that seeks to ensure the benefits and burdens of Indian identity are borne by those Congress and individual tribes intended. Nonetheless, each definition has resulted in over or under-inclusion. That is, each definition can result in some type of identity "theft." Indian children adopted away from their tribe on the basis of a state court's determination that their family is insufficiently Indian may never know their heritage. Given the sovereign right of tribes to define its citizens, tribes too are denied that right when courts impose the existing Indian family exception, or when they find tribal membership inadequate to classify a defendant as "Indian" in a criminal prosecution. As Angelique EagleWoman commented on the Ninth Circuit's decision in *Labuff*:

> I find it entirely inconsistent that tribal sovereignty/enrollment is being overridden in federal criminal prosecutions through the ability of non-Indian juries to establish that a person is "Indian" under federal Indian law for the purpose of prosecution but not eligible for educational benefits as an "Indian" by failing to meet the requirements of tribal enrollment or the 1/4th blood quantum standard under federal regulations. Apparently, criminalizing a person as "Indian" is easier than supporting a person's ability to attain an education as an "Indian."[251]

As EagleWoman's comment suggests, the lack of definitional consistency creates unnecessary confusion and threatens to undermine confidence in legal decision-making. Nevertheless, to prevent such a rigid line that a person's individual pride of heritage is silenced or dismissed as illegitimate requires some flexibility. Assuming there could be one unified

[251] Angelique EagleWoman, Comment to *Ninth Circuit Decides Indian Status Case Under Major Crimes Act*, TURTLE TALK (Oct. 11, 2011, 12:13 PM), http://perma.cc/34T7-G5AU.

definition of Indian under federal law, the question would remain whether any definition would provide clarity without excluding legitimate claims to Indian identity. What is needed is a clear line between claims of ethnicity and claims of legal right or obligation—that is, a demarcation between ethnicity and citizenship. The most obvious answer—and the one supported by principles of sovereignty—is that individual tribes should decide based on tribal citizenship. That is, to actually have tribal membership be treated as citizenship, and embrace the spirit and letter of *Mancari* by basing Indian status entirely on political membership in a tribe. Such an approach would reflect the government-to-government relationship cited by *Mancari* as the basis for the myriad laws that directly affect Indian people.

Equating legal Indian status with tribal citizenship would have several repercussions. Depending on the tribe's citizenship criteria, citizenship—and thus tribal and federal benefits and obligations—could extend to those who were not ethnographically Indian. For instance, citizenship based on residency could apply to anyone residing on reservation lands, which, for most reservations includes a high percentage of residents with no Indian ancestry. However, a tribe that extended citizenship to nonresidents, would then ensure that those Indian persons residing outside Indian Country would be eligible for tribal and federal benefits. On the other hand, it would also mean that nontribal citizens who are ethnographically Indian would lose any benefits that are currently not tied to tribal membership.

Furthermore, the historical hesitancy to completely rely on tribal membership may reflect a reluctance to allow tribal membership criteria to determine who is governed by various federal laws. There is some reason for concern. Under *Santa Clara Pueblo v. Martinez*, tribes can exclude individuals from citizenship using discriminatory criteria. [252] Moreover, a tribe that relied on some level of participation in tribal life or where political decisions have led to the ouster of individual members, linking citizenship to federal benefits could have a chilling effect on dissenting voices in the tribe if individuals fear a loss of citizenship could also mean the loss of those benefits. Nevertheless, as the Supreme Court explained in *Martinez*, "[a] tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."[253] To the extent we believe that the government-to-government relationship between tribes and the federal

[252] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978) (finding that tribal rule that granted membership to children of male members who married outside tribe but denied membership to children of female members who married outside tribe was not subject to federal review).

[253] *Id.*

government is the basis for tribal benefits, then it is well past time to incorporate *Mancari*'s reasoning into federal law defining Indian status.

Finally, relying on a legal definition based on citizenship might also influence the way Indian ancestry is perceived by creating a clearer distinction between legal Indian status and ancestry or family history. That is, in much the same way that millions of Americans claim ancestry in other nations without implicating any legal obligation or incurring any benefit, those persons of Indian descent could be recognized as having ancestry without citizenship. That would allow those individuals claiming Indian identity for the intangible benefits—for the sense of belonging, ancestral history—to do so without implicating any tangible benefits that would be conferred through tribal citizenship.

V. CONCLUSION

Unlike other cultural groups, whether one is an "Indian" has not been treated as a simple matter of genealogy, but as a matter of law that carries implications beyond personal identity.[254] Although most people asserting a particular identity—even a lawyer like Warren—are not necessarily making a legal claim to any tangible benefits, critics of Warren conflated her self-stated genealogical identity with a legal status that may confer legal benefits. Legal status or legal definitions are unlikely to satisfy those who base their identity on family history. Like Elizabeth Warren, these individuals know who they are, they know their own heritage. Requiring that such claims meet a legal definition subjects the claimants to requirements not found in claims to other ethnic identities and seems patently unfair. Nonetheless, when benefits and obligations as tribal citizens attach to that identity, there must be something more than a naked claim of kinship. While allowing tribal law to determine citizenship based on individual tribal criteria might seem to create more confusion, the solution necessarily calls out for just that type of flexibility, due to the diversity of tribes and the diversity of legal implications.

[254] *See* Ray, *supra* note 54, at 399.