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AFTER POCAHONTAS: INDIAN WOMEN AND THE LAW, 1830 TO 1934

*Bethany Ruth Berger**

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> *Let therefore this my well advised protestation . . . to condemn me herein, if my chiefest intent and purpose be not, to strive with all my power of body and minde, in the undertaking of so mighty a matter, no way led . . . with the unbridled desire of carnall affection: but for the good of this plantation, for the honour of our countrie, for the glory of God, for my owne salvation, and for the converting to the true knowledge of God and Jesus Christ, an unbelieving creature, namely Pokahuntas.*[1]

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*Youth Law Project Director, DNA-People's Legal Services, Window Rock, Arizona. J.D., 1996, Yale Law School. The author would like to thank Robert W. Gordon, Ulrich Haltern, Gail Johnson, and Martin Berger for comments and suggestions, and Steven C. Emery and Steve Gunn for the opportunity to work for the Cheyenne River Sioux Tribe.

1. John Rolfe, Letter to Sir Thomas Dale (Apr. 1614), *in* THE INDIAN AND THE WHITE MAN 22 (Wilcomb E. Washburn ed., 1964) (also available in RALPH HAMOR, A TRUE DISCOURSE OF THE PRESENT ESTATE OF VIRGINIA (London 1615)).

Walt Disney did nothing new in celebrating Pocahontas; she has long been the most famous Indian in non-Indian American culture. While the movie makers congratulate themselves on their selection of a nonwhite heroine, however, Pocahontas owes her fame to the fact that she married a white man, took a white name, and converted to the white man's religion — in effect, she became white. Any remaining threat her presence might have presented to the white European culture was contained by her early death from a European-derived disease. Pocahontas's "whiteness" was not only cultural but legal. As the Supreme Court pointed out in *Loving v. Virginia*,[2] her descendants (as long as they didn't dilute John Rolfe's blood by marrying outside the white race) were legally white under Virginia law.[3]

I. Introduction

The story of Pocahontas, simultaneously celebrated and contained, presents the favored path for Native American women in the newer legal culture: absorption into the Euro-American race and ultimate disappearance of the non-European element. The alternative path was reserved for women whose assimilation did not reach this level of absorption and disappearance but retained their allegiance to both the Indian and white society. Federal and state legislatures and courts marginalized such women, denied them the treaty rights accorded their male companions, and denied them stable marriages, rights of descent, and the power within the family that they had had within Indian culture. As white people and white values encroached ever further into formerly untouched Indian communities, and as the standards for acceptable assimilation grew higher, this second category came to include virtually all Indian women.

With few exceptions, no one has studied the ways in which the role of Indian women — as property owners, as wives, as heads of families, as members of their communities — was defined by American law throughout (and even before) the history of the United States.[4] Indeed, in Felix Cohen's

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2. 388 U.S. 1, 5 n.4 (1967) (holding law that voided marriage between a white person and "colored person" unlawful).

3. VA. CODE ANN. § 20-54 (1960 replacement vol.) ("[P]ersons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons."). This exception was designed to recognize "as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas." Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1202, n.93 (1966).

4. The great exception to this has been the numerous articles generated by *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (holding that the Indian Civil Rights Act could not be used to challenge a tribal law that excluded children of Santa Claran women — not men — who married outside the tribe). One of the best of these articles is Judith Resnik, *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989). The legal history discussed in the article, however, is focused almost exclusively on the five years

definitive treatise, the *Handbook of Federal Indian Law*, neither "women," "wives," nor "mothers" warrants even an index entry.[5] Francis Prucha's equally authoritative work on federal Indian policy similarly excludes Native American women from sustained consideration.[6]

This article attempts to begin to fill this gap. Starting from the federal and state[7] case law of the century preceding the Indian New Deal of 1934, I examine the ways judges and legislators perceived and treated Indian women in the century preceding this watershed in federal Indian law.

This is not an attempt to uncover what Indian tribes "really" thought of Indian women or how women were treated by the Native American legal tradition. Besides the obvious objections to such an attempt,[8] for the most

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surrounding passage of the discriminatory provision. *Id.* at 705-25; *see also* Catharine MacKinnon, *A Case Note on Santa Clara Pueblo v. Martinez*, *in* FEMINISM UNMODIFIED 63, 66 (1987) (acknowledging that *Martinez* is a hard case); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 593 (1990) (taking MacKinnon to task for her essentialist condemnation of the *Martinez* rule).

A good article using legal history in a different context is James W. Zion & Elsie B. Zion, *Hozho' Sokee' — Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 412 (1993), in which the authors discuss traditional ways of preventing domestic violence in Navajo common law. Other partial exceptions include Linda J. Lacey, *The White Man's Law and the American Indian Family in the Assimilation Era*, 40 ARK. L. REV. 327 (1986) (looking at assimilationist policy regarding the Indian family from 1880 to 1900), and Shirley R. Bysiewicz & Ruth E. Van de Mark, *The Legal Status of the Dakota Indian Woman*, 3 AM. INDIAN L. REV. 255 (1975) (considering federal laws affecting Dakota women until the time of the article). Both of the latter, however, focus solely on federal Indian law, and there largely on statutory law, and thus miss both the subtleties of the shaping of the definition of Indian women in the case law and the perhaps more interesting decisions which occurred at the state level.

The relatively few other legal works that concern the legal treatment of Indian women fail to adequately consider the complexities that the combination of gendered and racial/national oppression bring to their subject. An early article regarding the legal recognition of Indian marriage and divorce, for example, utterly ignores the gendered effect of the decisions discussed and accepts without question the long standing misconception that Indian marriage and divorce were completely without form or restraint. Henry H. Foster, *Indian and Common Law Marriages*, 3 AM. INDIAN L. REV. 83 (1975). On the other side of the spectrum, a recent piece generated in response to the *Martinez* decision responds to this decision completely on gender equality grounds, ignoring the struggle for sovereignty that undergirded both the decision and possibly the discriminatory law. Carla Christofferson, Note, *Tribal Courts' Failure to Protect Native American Women: A Reevaluation of the Indian Civil Rights Act*, 101 YALE L.J. 169 (1991).

5. FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 137 (Five Rings 1986) (reprint of Univ. of N.M. photo. reprint 1971) (1942).

6. 2 FRANCIS PRUCHA, THE GREAT FATHER (1984). The 40-page index of this massive work points to two pages on which Indian women are discussed, and another three on which intermarriage is mentioned. *Id.* at 1261-1302.

7. In contrast to much Native American legal history, many of the relevant documents for women are not federal cases or treaties but instead are generated by the state courts. It was often at the state level that judges combined the shifting national perception of the "Indian problem" with local exigencies of that problem, particularly in their treatment of traditional state law matters such as descent, marriage, and property law.

8. First, as there are over five hundred nations included in the title "Native American," such

part the sources necessary to identify an original Indian legal tradition simply do not exist. The Indian legal tradition was generally customary and oral, not fixed and written.[9] To the extent that written sources survive from the nineteenth century, they seem to reflect the will of the government officials who inspired them as much as that of the Indian people who enacted them.[10] Non-legal sources also suffer from the "problem of disentangling the viewer from the viewed."[11] Writings on the Native American woman suffer multiply from this entanglement, alternating between vilification and the recent uncritical adulation of gender relationships among Native Americans, eliding the middle which surely lay between. Like most Native American legal history, therefore, this article will "look primarily to conventional non-Indian sources," remembering that "[g]enerally, the relevant question under this colonially derived body of legal doctrine is not what Indian tribes or their governing institutions were doing at a particular time,"[12] but how federal and

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a project is well beyond the scope of any single work. Second, a student confined in a library should think twice about her competence to undertake such a task. See VINE DELORIA, JR., CUSTER DIED FOR YOUR SINS 5 (1969), on problematic yet all too quickly asserted claims to "understand" Indians. See also Resnik, *supra* note 4, at 709-12, for a thoughtful discussion of the problem of identifying the "real" early Indian culture to use to make arguments about the appropriateness of Indian laws.

9. *See, e.g.*, Ken Traisman, Note, *Native Law and Order Among Eighteenth-Century Cherokee, Great Plains, Central Prairie, and Woodland Indians*, 9 AM. INDIAN L. REV. 273, 274 (1983). A modern exception is the Navajo Nation, which has codified a body of Navajo common law and utilizes it as a significant element in the jurisprudence of the Navajo judicial system. *See* Daniel L. Lowery, Notes & Comments, *Developing a Tribal Common Law Jurisprudence: The Navajo Experience, 1969-1992*, 18 AM. INDIAN L. REV. 379 (1993); Zion & Zion, *supra* note 4. For a cursory discussion of early tribal legal systems, see Traisman, *supra*.

10. See, for example, the Code of Law established in 1875 by the Blackfeet, Blood and Piegan Tribes, of Montana. Notes of Council Meeting, Blackfeet Agency, Mont. (Apr. 23, 1875) (in Felix Cohen Papers and on file with author). Although the Code accords with tribal custom in forbidding rape or battery of a wife, female relative, or other woman (articles 6 and 8), the meeting at which the Code was established was called by the federal Indian agent, John S. Wood, and addresses central concerns of non-Indian reformers such as a prohibition on taking more than one wife (article 7), and on buying, selling, or keeping liquor (article 12).

11. Resnik, *supra* note 4, at 708 (noting that interpretations of gender roles among Indian tribes "may reflect more about the dualistic modeling of nineteenth and twentieth century anthropologists than the societies that they study"); *see also* MAJOR PROBLEMS IN AMERICAN WOMEN'S HISTORY (Mary Beth Norton & Ruth M. Alexander eds., 2d ed. 1996) [hereinafter PROBLEMS IN WOMEN'S HISTORY]. In introducing a section on Native American women, the editors write that

> [T]he vast majority of surviving accounts [of encounters between whites and Native Americans] exists only in the words of Europeans. Such sources reflect the bias of the authors, who were in the main elite, well-educated men with specific goals . . . The documents, accordingly, must be read creatively and with great care in order to avoid making the same cultural preconceptions as the men who produced them.

Id. at 20.

12. Robert N. Clinton, *The Curse of Relevance: An Essay on the Relationship of Historical*

state governments responded to the legal challenges posed by the clash between Indian and non-Indian societies.

These sources, although limited, are rich. Through the cases the courts, albeit often through a lens of bigotry and prejudice, present histories of women whose stories are rarely told, who often could not write, and who may not have spoken English.[13] Here, for example, is the story of a grandmother, repeatedly moved off her land yet struggling to remain,[14] of a white man who made a fortune in Indian country then abandoned his Indian wife to a convent in favor of a "reputable" white woman,[15] and the story of the mixed-blood Frank Camille, whom a federal judge declared "as much an Indian as a white person, and . . . classed with the one race as properly as the other. Strictly speaking, he belongs to neither."[16] But the cases are, of course, more than stories.[17] From each understanding of history the judge provides, comes a shaping of history. By articulating assumptions and rules regarding the relationships of Indian women to their partners and children, the judges transform those relationships.

Equally important, it has long been true that one cannot understand where American Indians legally are without understanding where they have been. As the Secretary of the Interior stated in 1941, "Federal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored."[18] The historical dimension of the legal status of Indian women has only recently been considered, and then only in the distorting context of hotly contested litigation. It is time to begin to uncover how non-Indian judges and legislators were thinking about Indian women and their children, to analyze their (mis)conceptions of how Indian law treated them, and to hypothesize the effects on the women and their communities of the legal rules thus created.

In part 2, I outline the two historical trends of the nineteenth and early twentieth centuries with the greatest impact on Native American women: the devastating path of federal Indian policy and the development of the "cult of true womanhood" in American culture. In part 3, I discuss the ways in which federal and state judicial decisions and legislation affected Indian women in

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Research to Federal Indian Litigation, 28 ARIZ. L. REV. 29, 44 (1986).

13. *See, e.g.*, Kalyton v. Kalyton, 74 P. 491, 494 (Or. 1903) (noting woman testified to facts of her marriage through an interpreter).

14. Rowland v. Ladiga's Heirs, 21 Ala. 9 (1852); *In re* Herne, 232 N.Y.S. 415 (Sup. Ct. 1928).

15. Connolly v. Woolrich, 17 R.J.R.Q. 75 (Que. Sup. Ct. 1867) (also reported at 11 L.C. Jur. 197 and in 1 CANADIAN NATIVE LAW CASES 70 (Brian Slattery et al. eds., 1980) (covering cases from the years 1763-1869)).

16. *In re* Camille, 6 F. 256, 258 (D. Ore. 1880).

17. Rather, as Robert Cover wrote, "[l]egal interpretation takes place on a field of pain and death." Robert M. Cover, *Violence and the Word*, 95 YALE L.J 1601, 1601 (1986). Judges are not critics, poets, or artists, and legal opinions do not merely interpret, but explicitly change, what happens to the people they concern. *Id.*

18. Nathan Margold, *Introduction*, *in* COHEN, *supra* note 5, at XXI.

the century prior to the Indian New Deal. I divide these cases and laws into three parts: those that decided the status of Indian women directly, diminishing the power and autonomy of women in tribal communities; those that decided the status of Indian women as wives, giving access to tribal property to white husbands while allowing Indian and white husbands to end their legal obligations to Indian women at will; and those that decided the status of Indian women as mothers, either facilitating the separation of children from their mothers and their assimilation into non-Indian culture, or using the identity of the mother to label and stigmatize the child. In part 4, I look at several instances in which tribes themselves force Indian women from tribal land or otherwise diminish their power, and discuss the ways in which nontribal policies may have influenced these actions. In conclusion, I reevaluate the legacy of Indian women in American culture and the paradoxical status of Pocahontas in light of that legacy.

II. The Nineteenth Century and Indian Women: Federal Indian Policy and the Cult of True Womanhood

Two separate threads helped to shape the cases and laws that affected Indian women in the nineteenth century. The first was the rapid development in federal Indian policy and control during this period. The second was the emergence of the cult of true womanhood or domesticity in the social realm.

The case and statutory law that I examine here begins with the Removal Period of the 1830s, spans the Reservationist period of the 1850s through the 1870s, and ends in the Assimilationist period of the 1880s through the 1920s. I stop at the brink of the Indian New Deal of 1934, long heralded as a sea change in federal Indian policy. Each of these periods significantly affected Native American women, often in the same ways that they affected Native American men, by pushing them off their land, bringing them into greater contact with whites, and confining them in ever smaller areas under every greater federal control. These developments also had distinctive effects on women, however, as federal Indian policy was often shaped with an eye to creating families and economies in which women's role was fundamentally altered.

Andrew Jackson's administration began the Removal Period, called by one nineteenth century lawyer a forty year "period of compulsory emigration under the form of consent by voluntary treaty."[19] With his ascent to the presidency in 1828, Jackson gained the means to implement his long held view that Indians should be removed from areas of white settlement by force rather than persuasion, and to end what he believed was the farce of treating with the Indian tribes as though they were sovereign nations.[20] Under the

19. Austin Abbot, *Indians and the Law*, 2 HARV. L. REV. 167, 171 (1888).
20. 1 FRANCIS PRUCHA, THE GREAT FATHER 191 (1984).

guise of treaty agreement and the guns of armed troops, almost all the eastern tribes, beginning with the Cherokee, Chickasaw, Choctaw, Creek, and Seminole tribes of the Southeastern states, were moved to the Indian Territory in what was to become Oklahoma. Thousands of Indians died walking this Trail of Tears, and many tribes were practically destroyed.[21]

With the national expansion of the 1840s, westward removal no longer sufficed to separate white from Indian. The federal government established reservations, then progressively whittled them away to open still more land for white settlement.[22] The loss of traditional hunting lands, the decimation and impoverishment of removal and war, created in the Indians a new dependence on American rations and bureaucracy. In 1871, after the Indian Wars and relatively favorable treaties of the late 1860s, Congress declared that Indian tribes were no longer to be dealt with through treaty.[23] This began the Reservation Period, a period of near-complete federal control over Indians on reservations. As the leader of an 1869 Smithsonian expedition down the Colorado River reported,

> The time has passed when it was necessary to buy peace. It only remains to decide what should be done with [the Indians] for the relief of the white people from their petty depredations, and from the demoralizing influences accompanying the presence of savages in civilized communities, and also for the best interests of the Indians themselves.[24]

The solution hit upon was to assimilate the American Indians. A wave of reformers calling themselves "Friends of the Indian" controlled federal Indian policy from the last quarter of the nineteenth century through the first quarter of the twentieth. The reformers fervently promoted the seductive doctrine that the Indian problem would disappear not through guns but through the force of Protestant American culture. In the words of Francis Prucha, "With an ethnocentrism of frightening intensity, they resolved to do away with Indianness and to preserve only the manhood of the individual Indian. There would then be no more Indian problem because there would be no more persons identifiable as Indians."[25]

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21. *See, e.g.*, Bob L. Blackburn, *From Blood Revenge to the Lighthorsemen: Evolution of Law Enforcement Institutions Among the Five Civilized Tribes to 1861*, 8 AM. INDIAN L. REV. 49, 62 (1980) (near-destruction of Seminole Indians).

22. PRUCHA, *supra* note 20, at 315-17.

23. 25 U.S.C. 71 (1994).

24. John Wesley Powell, *From Warpath to Reservation*, *in* THE INDIAN AND THE WHITE MAN, *supra* note 1, at 374, 377-78.

25. *Editor's Introduction* to AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE "FRIENDS OF THE INDIAN" 1880-1900, at 1 (Francis Paul Prucha ed. 1973) [hereinafter AMERICANIZING THE AMERICAN INDIANS].

The first step in this process of "Americanization" was to remove lands from communal tribal ownership into individual ownership by male heads of families.[26] The first and major piece of legislation of the Assimilationist Period, the Dawes or General Allotment Act of 1887,[27] was intended to do exactly that. The effects were devastating — of 138,000,000 acres Indians held when the Dawes Act was passed, only 48,000,000 were left in 1934, and nearly half of these were desert or semidesert.[28] The second step was cultural education — Indian children were to be removed from their parents, purged of the harmful influences of Indian language and religious belief, and inculcated with belief systems that would allow them to finally disappear into the white American mass. The Meriam Report of 1928, a surprisingly contemporary work credited with ending the Assimilationist Period, later condemned this practice for having devastated the Indian family in the same way that allotment had devastated Indian land wealth.[29]

The case law reveals, however, that the Assimilationist Period was only new in that the inculcation of non-Indian morality became a matter of unabashedly coercive federal policy. This goal had undergirded state and federal judicial decisions and federal treaties throughout the nineteenth century. Perhaps as much as the physical upheavals caused by the federal removal, reservation, and allotment policies, this moral vision had a profound impact on gender roles in Indian society. For by the first quarter of the nineteenth century, the promotion of a new, submissive role for women had been elevated to an almost religious quest. The traditional role of Indian women, which included a degree of political, legal, and marital autonomy unknown to most white women, was a convenient target for this quest.

Interestingly, this development, like the Removal Period in federal Indian policy, can be seen as the product of Jacksonian America. In the colonial period, the shortage of women and need for productive labor from each member of the family resulted in more equal legal status for women, and included the ability to contract, own property, work (at least within the home), and marry and divorce relatively easily.[30] With the industrial expansion of the 1830s, however, the proper sphere for woman shrank to the boundaries of

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26. *Id.* at 6.

27. Ch. 199, §§ 1-2, 24 Stat. 388 (1887).

28. *Editor's Introduction* to AMERICANIZING THE AMERICAN INDIANS, *supra* note 25, at 10. This material is also found in Frank Miller, *Introduction* to BROOKINGS INST., THE PROBLEM OF INDIAN ADMINISTRATION vii (reprint 1971) (1928) [hereinafter PROBLEM OF INDIAN ADMINISTRATION]. The Brookings study is commonly called the Meriam Report after the director of the study, Lewis Meriam.

29. PROBLEM OF INDIAN ADMINISTRATION, *supra* note 28, at 575-76.

30. Gerda Lerner, *The Lady and the Mill Girl: Changes in the Status of Women in the Age of Jackson, 1800-1840*, *in* A HERITAGE OF HER OWN: TOWARD A NEW SOCIAL HISTORY OF AMERICAN WOMEN 182, 183 (Nancy F. Cott & Elizabeth Peck eds., 1979) [hereinafter HERITAGE OF HER OWN].

the home,[31] and feminine idleness was transformed from a puritan sin to a Jacksonian status symbol.[32]

Barbara Welter discusses the elevation of the new woman in her seminal article, *The Cult of True Womanhood: 1820-1860*.[33] Analyzing books and magazines aimed at a middle-class female audience, Welter documented the emergence of a new vision of womanhood against the social and economic instability of the nineteenth century. "In a society where values changed frequently, where fortunes rose and fell with frightening rapidity," she writes, "one thing at least remained the same — a true woman was a true woman, wherever she was found. . . . It was a fearful obligation, a solemn responsibility, which the nineteenth century American woman had — to uphold the pillars of the temple with her frail white hand."[34]

Piety, chastity, and domesticity were the essential virtues of the true woman, and confinement and dedication to the home was the both the purpose of and the means to these qualities. To engage in activities outside the home — whether work, nondomestic education, or recreation — was to risk arousing sexual attention and forgetting one's submissive role.[35] Moreover, it was within the home that a woman's true mission was fulfilled. "From her home woman performed her task of bringing men back to God. . . . 'the domestic fireside was the great guardian of society against the excesses of human passions.'"[36] She performed this godly task through devotion to the newfound "science of housekeeping" and to the desires of her male relatives, ensuring "that brothers, husbands and sons would not go elsewhere in search of a good time."[37]

While these changes affected all women, Indian women were perhaps particularly ill-suited to conform with the emerging ideal, and particularly likely to be condemned for falling short rather than idolized for conforming. For even more than working class white women, Indian women did not fit the role of passive creatures devoted to the domestic comforts of the men with whom they lived.[38] But to the extent that Indian leaders desired to emulate white Americans, some of them came to expect Indian women to conform to the ideals of the cult of domesticity. As the members of the growing middle class could establish their still-insecure status through adherence to the

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31. *Id.* at 184.

32. *Id.* at 191.

33. Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966), *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 115.

34. *Id.* at 151-52, *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 115.

35. For example, one magazine cautioned young ladies to "read not out of the same book; let not your eagerness to see anything induce you to place your head close to another person's." Another approvingly quoted a young wife as saying a woman ought not "feel and act for herself." *Id.* at 117-18.

36. *Id.* at 118.

37. *Id.* at 119.

38. *See infra* notes 84-112 and accompanying text.

domestic ideal,[39] so among more wealthy Indian tribes "true womanhood came to be associated with civilization and progress. Any challenge to the precepts of the cult of true womanhood could be interpreted as a reversion to savagery."[40] Theda Perdue has examined the ways that this ideal influenced the role of women among the Cherokees, perhaps the tribe quickest to adapt to white civilization, in the first half of the century. "Of all the southern tribes," she concludes, "the Cherokees provide the sharpest contrast between the traditional role of women and the role they were expected to assume in the early nineteenth century."[41]

Of course the influence of the emerging ideal was not only internal. Indian women provided a convenient contrast with the demure "true" woman. Three paintings of Pocahontas illustrate the changes in the popular image of the Indian woman. A 1616 portrait painted while Pocahontas was in England bears the caption, "daughter to the mighty Prince Powhatan Emperour of Attanoughkomouck al's Virginia converted and baptized in the Christian faith."[42] In accord with this royal description, she is painted as a young woman with a slight smile, encased in heavy royal seventeenth century clothing that completely hides the shape of her body. In the early eighteenth century, a young woman at a Massachusetts finishing school pictured Pocahontas as young and virginal, clothed in a simple dress, hair neatly pulled back, holding a single flower in her tiny hand.[43] In the nineteenth century, by contrast, Robert Matthew Sully would depict Pocahontas with wild, loose hair, bare neck and shoulders, and a thick fur draped over her breasts. This Pocahontas smiles seductively at the viewer.[44] Over a period of three centuries, Pocahontas has been transformed from princess to virgin to primitive siren, reflecting the change from perceiving Indian women as native royalty to seeing them as the symbol of everything a good woman should not be.

The transformation of the feminine ideal had legal influence on Indian women as well. The concepts of "civilized" marriage that state courts would impose on Indian women were the products of the vision of marriage and family established during this era. Although nineteenth century state courts almost uniformly treat the Indian informality of marriage and divorce as foreign and barbaric, marriage by consent had been the rule in England

39. Christine Stansell provides a thorough examination of this theme of the class relations that underlay the cult of domesticity in CHRISTINE STANSELL, CITY OF WOMEN: SEX AND CLASS IN NEW YORK, 1789-1860 (1986).

40. Theda Perdue, *Southern Indians and the Cult of True Womanhood*, *in* THE WEB OF SOUTHERN SOCIAL RELATIONS 35 (Walter J. Fraser et al. eds., 1985), *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 132, 137.

41. *Id.* at 47, *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 136.

42. THE INDIAN AND THE WHITE MAN, *supra* note 1, at plate 3.

43. *Id.* at plate 4.

44. *Id.* at plate 5.

throughout most of the eighteenth century.[45] In America, it was not until the nineteenth century that state regulation of marriage and divorce was established.[46] Moreover, most states did not enact laws prohibiting miscegenation until the Civil War period.[47] But soon courts adopted these fairly recent developments as integral to white civilization and their absence as symbolic of Indian barbarism.

The middle class "true woman" also directly asserted her influence over Indian culture. Such women took an ever increasing role in reform and charity movements appropriate for their gender. Welter describes this as a consequence of the ideology of domesticity, stating that "if woman was so very little less than the angels, she should surely take a more active part in running the world, especially since men were making such a hash of things"[48] and Stansell declares this a way for bourgeois women to "refine[] their own sense of themselves as social and spiritual superiors . . . ."[49] Indeed, although the cult of domesticity flourished in the Northeast, Stansell has suggested that women traveling to the frontiers were particularly eager to establish a separate domestic sphere in the face of the nonconventional activities pioneer women had to assume.[50] Whatever the reason, middle class women suddenly took up the cause of the Indian in great numbers, seeking to inculcate their vision of the restorative nuclear home in their less fortunate sisters.

This undisguised meddling with Indian culture and property was not brought to a halt until 1934, when Congress adopted the Indian Reorganization Act under the leadership of Commissioner of Indian Affairs John Collier. The act finally repealed the General Allotment Act and espoused tribal self-governance in accord with Indian traditions and culture. Tribes adopting the act incorporated and enacted tribal constitutions under the guidance of the BIA. There are many questions about whether the IRA was about Indian tribes' vision of themselves or about Collier's own vision for them.[51] Less well known, however, is how the previous century affected the Indian vision of women by the time they were, supposedly, again allowed to

45. Henry H. Foster, *Indian and Common Law Marriages*, 3 AM. INDIAN L. REV. 83, 84-85 (1975).

46. *Id.* at 86.

47. *Id.* at 87 n.42.

48. Welter, *supra* note 33, at 174, *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 122.

49. STANSELL, *supra* note 39, at xii.

50. Johnny Faragher & Christine Stansell, *Women and their Families on the Overland Trail to California and Oregon, 1842-1867*, *in* HERITAGE OF HER OWN, *supra* note 30, at 246.

51. Francis Prucha, for example, has written that "despite the high-sounding rhetoric of Indian self-determination, it was a paternalistic program for Indians, who were expected to accept it willy-nilly." PRUCHA, *supra* note 6, at 945. Two of the largest and best organized Indian nations rejected the act in its entirety: the Navajo, *id.* at 965, and the New York Iroquois, LAURENCE M. HAUPTMAN, THE IROQUOIS AND THE NEW DEAL 9 (1981).

implement that vision. The rest of the article will begin to answer this question.

III. Federal and State Governments and Indian Women: As Themselves, as Mothers, and as Wives

A. The Beginning: Ladiga's Heirs and Indian Women in Their Own Right

In coming to the courts, Indian women confronted a system that was unaccustomed and often resistant to acknowledging the political, domestic, and economic power that they often held. The result was decisions that stripped women of this power, sometimes in the name of civilization and sometimes in the name of the law.

This process is exemplified in the earliest case I discuss, reported in a trilogy of opinions concerning an action brought by Creek woman Sally Ladiga and her children against the white man who purchased title to their land.[52] The three opinions turn on the question of whether Ladiga, the husbandless mother and grandmother of many, could be considered the head of a family for purposes of land distribution. Between the federally appointed Indian commissioners, the Alabama courts, and the United States Supreme Court, it took twenty years to conclusively decide that she was. At this point, however, the Alabama Supreme Court declared that Ladiga's heirs could not carry on the action in the now deceased plaintiff's name.

Sally Ladiga was enrolled as a Creek Indian when the Treaty of New Echota was enacted in 1832. Under the treaty, Indian heads of families were to be allotted 320 acres of land to live on and cultivate. Local federally appointed "locating agents" decided who was an Indian and who was the head of a family and allotted heads of families the land on which they resided and had made improvements. When Ladiga was enrolled, she had a cabin and a cultivated field on her land, had raised a family of several children, but had no husband of record.[53] The only people recorded as living with her were another Indian woman, Sarah Letter, and a boy named Ar-chee-chee.[54] In spite of evidence that Ladiga bought clothes for Ar-chee-chee,[55] as well as conflicting evidence that he was Ladiga's orphaned grandson,[56] the locating agent found that Ladiga was not the head of a family and was not entitled to a half section of land.[57]

52. The case was first reported by the Alabama Supreme Court as Rowland v. Ladiga, 9 Port. 488 (Ala. 1839) (*Ladiga I*). It was reversed and remanded by the United States Supreme Court as Ladiga v. Rowland, 43 U.S. (2 How.) 581 (1844) (*Ladiga II*). It was finally disposed of as Rowland v. Ladiga's Heirs, 21 Ala. 9 (1852) (*Ladiga III*).

53. *Ladiga III*, 21 Ala. at 11.

54. *Id.* at 11.

55. *Id.* at 13.

56. *Ladiga II*, 43 U.S. (2 How.) at 585. There is some suggestion in this opinion that Sarah Letter was her grandchild as well. *Id.*

57. *Ladiga III*, 21 Ala. at 12. The opinion notes that the agent apparently was influenced

Ladiga remained on the land until 1833 or 1834, when a white man named Smith entered her land and took over her cabin and field. Although she then left to stay with relatives, she made "continuous and repeated applications"[58] to different locating agents to be recognized as the head of a family and given the right to remain. Despite repeated denials, she kept returning until a soldier removed her from a shelter on the edges of the land in 1837 or 1838.[59] This was her last recorded attempt to return. Armed troops then forced her to emigrate to the newly established Indian Territory in Arkansas.[60] Like so many of those who walked this "Trail of Tears," she probably died during the journey. None of those writing the opinions actually knew what happened to her — the record said simply that she "never reached the banks of the Mississippi."[61]

In the first published opinion on the claim, the Alabama Supreme Court declared that its hands were tied. It found that Ladiga's right of possession depended not on whether she was indeed the head of a family but solely on her allotment of the land by the government.[62] The violation of justice, in essence, had not been with them: "If the United States should so far forget the obligations of good faith, as to grant these lands to other persons . . . the Indians are remediless in courts of law."[63]

The United States Supreme Court reversed in 1844. The Court noted that Sally Ladiga had lived on the land for many years and had raised "a numerous family of children" there.[64] Justice Baldwin, writing for the Court, firmly stated that it was the intent of the Indian and federal signatories to include Indians like Ladiga as allottees: "We cannot seriously discuss the question, whether a grandmother and her grandchildren compose a family, in the meaning of that word in the treaty, it must shock the common sense of all mankind to even doubt it."[65] The Court also dismissed the defendant's argument that Ladiga had abandoned her right to the land by leaving it within the five years stipulated by the treaty: "She has not slept on her rights, but from 1832 to 1837 has made continuous and repeated applications to the government officers to assert her rights to said land, and through them to the government itself in 1837. She has never abandoned her claim, but has insisted on her rights under the treaty."[66] The opinion expressed dismay that the Alabama court had suggested anything different and cited with approval

by the requests of white settlers in the region. *Id.*

58. *Ladiga II*, 43 U.S. (2 How.) at 585.
59. *Ladiga III*, 21 Ala. at 12.
60. *Ladiga II*, 43 (2 How.) U.S. at 585.
61. *Ladiga III*, 21 Ala. at 12.
62. *Ladiga I*, 9 Port. at 491.
63. *Id.* at 492.
64. *Ladiga II*, 43 U.S. (2 How.) at 583.
65. *Id.* at 590.
66. *Id.* at 591.

the contrary holdings and reasoning of two opinions from Tennessee and one from Alabama.[67] (The opinion did not note that these decisions were distinguishable in that the plaintiffs were all men.[68])

The man who at that time claimed ownership of the land won the first trial on remand. The action was then removed out of the county where the land was located. Upon the new trial, the plaintiffs won. Before this point, however, Sally Ladiga had died, and her children and grandchildren had continued the action as her heirs.[69] Reviewing the decision anew, the Alabama Supreme Court stated that the Supreme Court's decision was correct and that to characterize Ladiga's departure from the land as a voluntary abandonment would be "to allow lawless force to defeat individual rights."[70] The court spent several pages explaining that the heirs of an Indian allottee might sue to enforce a decedent's right to the allotted land.[71] Finding, however, that the only evidence that the plaintiffs were indeed Ladiga's heirs was a "common rumor amongst the tribe of the Creek Indians, that the plaintiffs were the children and grandchildren of Sally Ladiga" and that no proof of this was offered to the jury,[72] the court felt "constrained" to reverse the judgment and remand for another trial.[73]

The three opinions bring together several themes which recur throughout the cases of the century to follow. First, in contrast to the assumptions behind laws like that at issue in *Santa Clara Pueblo v. Martinez*,[74] the *Ladiga* opinions compellingly present the commitment of an Indian woman to remain on her tribal lands long after her male family had gone. A second theme is the handwashing the Alabama courts undergo to justify their decisions. They do not like it, they imply, but federal/state/Indian law has constrained the result. In this case, as discussed above, the Supreme Court decision and the dissent in *Ladiga III* show that the "constraint" is not,

67. *Id.*

68. *See* Cornet v. Winton's Lessee, 8 Tenn (2 Yer.) 143 (1826); Jones' Lessee v. Evans, 13 Tenn (5 Yer.) 323 (1833); Jones v. Inge, 5 Port. 327 (Ala. 1837). The opinion in *Jones v. Inge*, revealingly, was written by Judge Goldthwaite, author of the first *Ladiga* opinion.

69. *Ladiga III*, 21 Ala. at 10-11.

70. *Id.* at 30.

71. *Id.* at 28-32.

72. *Id.* at 31.

73. *Id.* at 34. Justice Phelan in dissent noted that although there was nothing in the record stating specifically that the jury had been instructed that they had to find that the defendants were Ladiga's heirs, the bill of exceptions read that "other charges" were given. *Id.* at 35. The court's reversal violated both the canon that the bill of exceptions should be construed in light most favorable to the regularity of judgment and the doctrine that a party seeking reversal must clearly show error. *Id.* Cast in this light, the court's decision was hardly a reaction to constraint.

74. 436 U.S. 49 (1978). The *Santa Clara Pueblo* decision justified the rule by claiming that children of Santa Claran women were more likely to be raised as cultural outsiders. Resnik, *supra* note 4, at 717. See *supra* note 4 for cites to some articles discussing *Martinez*, and *infra* notes 266-72 and accompanying text for a fuller discussion of the case.

perhaps, as inexorable as the courts suggest. The issues of proof regarding the family relationship between Sally Ladiga and Ar-chee-chee and Sarah Letter, and that between Sally and the children and grandchildren suing in her name, raise another continuing element in these cases: because the traditions of many of the tribes involved were oral and customary, the courts often acknowledge that they only have evidence of limited probative force. Decisions whether to act on such evidence often appear politically motivated.[75] The opinions also highlight the extent to which the law that affected Indians — particularly Indian women — was not only federal law. The manifestations of the "Indian problem" were at the most immediate level local ones: here, the non-Indian population of Alabama agitated for even more of the fertile, prosperous land of Southeastern Cherokee country[76] than became available after the Indian removal of 1832. Significantly, the federal court was the only one to note how valuable the land was; the land in question was worth over 3,000 dollars and had earned 2,000 dollars in rent since Sally Ladiga was ejected in 1832.[77]

Despite the reversal by the Supreme Court, the assumption that a woman was not the head of the family, and even the attempts to displace women who acted as the heads of families, were both reflections of a policy which appears in federal enactments of the period. Some treaties were as explicit as the 1861 Treaty with the Pottawatomie, which declared that when the President determined "that any adults, *being males and heads of families . . .* are sufficiently intelligent and prudent to control their affairs and interests," he might convey those Indians, land to them in fee simple and they would thereafter be citizens.[78] Though less explicit, an article inserted in all of the

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75. *See, e.g.*, United States v. Sanders, 27 F. 950 (D. Ark 1847) (holding that court didn't have jurisdiction to punish murderer of child based on rumor that mother of victim was Indian); Wall v. Williamson, 8 Ala. 48, 50 (1845) ("All of the testimony in relation to rights of husband and wife, under Choctaw law, may have been of a disreputable or doubtful nature."); Turner v. Fish, 28 Miss. 306 (1854) (stating that court will rely on Choctaw customs then assuming that government action was appropriate because no evidence of Choctaw customs).

76. David Brown, an educated Cherokee man, described the Cherokee land seven years before the treaty:

> This country is well watered; abundant springs of pure water are found in every part. A range of majestic and lofty mountains stretch themselves across the nation. The northern part of the nation is hilly and mountainous. In the southern and western parts, there are extensive and fertile plains, covered partly with tall trees, through which beautiful streams of water glide. These plains furnish immense pasturage, and numberless herds of cattle are dispersed over them. Horses are plenty . . . [N]umerous flocks of sheep, goats, and swine, cover the valleys and hills.

David Brown, Letter of September 2, 1825, *in* THOMAS L. M'KENNEY, MEMOIRS, OFFICIAL AND PERSONAL WITH SKETCHES OF TRAVELS AMONG THE NORTHERN AND SOUTHERN INDIANS 37 (1846) [hereinafter M'KENNEY, MEMOIRS].

77. Ladiga v. Rowland, 43 U.S. (2 How.) 581, 584 (1844) (*Ladiga II*).

78. Treaty with the Pottawatomie, art. 3, 12 Stat. 1191, 1192 (1861), *reprinted in* 2 INDIAN

major treaties with the Indians of 1868 clearly envisions assimilation through male heads of families:

> If any individual . . . being the head of a family, shall desire to commence farming, *he* shall have the privileges to select . . . a tract of land within the reservation not exceeding three hundred and twenty acres [which shall be] held in the exclusive possession of the person selecting it, and of *his* family.[79]

The gender-specific language was deliberate. Within the same article, such treaties used both male and female pronouns to refer to those who were not heads of families and were entitled to only one quarter of the land that male heads of families were entitled to: "Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him, *or her* . . . a quantity of land not exceeding eighty acres in extent. . . ."[80] The 1887 Dawes Act also initially excluded married women from allotments of tribal land. Only after much protest was it modified in 1891.[81]

Such legislation was often motivated by a desire to improve the lives of both the Indian people and of the women themselves. As expressed here by a prominent "Friend of the Indian," it was believed that this would improve the lot of both these "less-favored" women and of their race as a whole:

> The Indian woman has so far been only a beast of burden. . . . The Indian wife was treated by her husband alternately with animal fondness, and with the cruel brutality of the slave-driver. Nothing will be more apt to raise the Indians in the scale of civilization than to stimulate their attachment to permanent homes, and it is the woman that must make the atmosphere and form the attraction of the home.[82]

AFFAIRS: LAWS & TREATIES 825 (Charles J. Kappler ed., photo. reprint 1975) (1904) (emphasis added). The treaty was amended in 1867 to include female heads of families. Treaty with the Pottawatomie, art. 6, 15 Stat. 531 (1867), *reprinted in* 2 INDIAN AFFAIRS: LAWS AND TREATIES, *supra*, at 970.

79. *See, e.g.*, Treaty with the Cheyenne & Arapahoe, art. 6, 15 Stat. 593, 595 (1867) (emphasis added). Virtually identical language is found in the Treaty with the Ute, art. 7, 15 Stat. 619, 620-21 (1868), Treaty with the Sioux, art. 6, 15 Stat. 635, 637 (1868), Treaty with the Crows, art. 6, 15 Stat. 649, 650-51 (1868), Treaty with the Northern Cheyenne & Arapaho, art. 3, 15 Stat. 655, 656 (1868), Treaty with the Navajo, art. 5, 15 Stat. 667, 668 (1868), and Treaty with the Shoshonees & Bannacks, art. 6, 15 Stat. 673, 675 (1868). These treaties assume a significant role in contemporary litigation, because three years later Congress passed legislation banning further treaty making with the Indian tribes. Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566, 566 (codified as amended at 25 U.S.C. 71 (1994)).

80. *Id.* (emphasis added). The same treaties also provide that they could not be modified unless executed by a majority of the "adult male" Indians of the tribe. *See, e.g.*, Treaty with the Sioux, art. 6, 15 Stat. 635, 637 (1868).

81. Lacey, *supra* note 4, at 353 n.123; *see* Dawes Act §§ 1-2, ch. 383, 26 Stat. 794, 794-95.

82. Carl Schurz, *Present Aspects of the Indian Problem*, 133 N. AM. REV. 1 (1881),

Similarly, William Strong, a former Supreme Court Justice, spoke against allotting land to married women under the impending Dawes Act: "I want the Indians brought together in families. There can never be any civilization without families. I would have the head of the family have the land, and have it descend to his wife and children."[83]

No less than the (perhaps more disingenuous) holdings of the Alabama Supreme Court in *Ladiga*, however, such well-meaning policy makers were motivated by a misunderstanding of the role of the Indian woman within many tribes. Women were almost uniformly responsible for a greater share of the productive labor of American Indian communities than their white nineteenth century counterparts.[84] Ironically, despite the frustrated attempts of federal officials to turn Indian men into farmers, it was women who had responsibility for cultivating the land in most American tribes.[85] White observers and federal officials rejected such female participation in what they conceived of as the male sphere of work as a sign of ignoble savagery and of the debasement of the Indian male.[86]

These traditional responsibilities, however, gave Indian women a degree of autonomy unknown to their white counterparts. Women controlled what food would be grown, how it would be prepared, what clothes, shoes, and blankets would be made.[87] Sitting Bull, the powerful Chief of the Sioux,

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reprinted in AMERICANIZING THE AMERICAN INDIANS, *supra* note 25, at 20. Similarly, a policy statement of the Lake Mohonk conference urged lifting women "out of that position of servility and degradation which most of them now occupy onto a place where their husbands and men generally will treat them with the same gallantry and respect which is accorded their more favored white sisters." LAKE MOHONK FRIENDS OF THE INDIAN CONFERENCE SEVENTH ANNUAL REPORT 19 (1890), *quoted in* Lacey, *supra* note 4, at 366.

83. Proceedings of the Third Annual Meeting of the Lake Mohonk Conference 32-34 (1885), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 25, at 40.

84. *See, e.g.*, Robert A. Williams, Jr., *Feminist Jurisprudence Symposium, Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context*, 24 GA. L. REV. 1019, 1030-31 (1990) (discussing different understandings by whites and Indians of relatively greater share of work for which Indian women were responsible); Lacey, *supra* note 4, at 333.

85. *See, e.g.*, Williams, *supra* note 84, at 1041 (regarding women's responsibility for farming among the Iroquois); Perdue, *supra* note 40, at 36, *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 133 ("[Traditional southern Indian] women farmed in a society that depended primarily on agriculture for subsistence [and] performed most of the manual labor with men assisting only in clearing fields and planting corn.").

86. Williams, *supra* note 84, at 1029-30; Perdue, *supra* note 40, at 36, *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 133. A bizarre example of this resistance to "nontraditional" labor by Indian women is the Bureau of Indian Affairs' response to participation by women in the ritual killing of rationed beeves: in an executive directive, the Commissioner specified that killing and butchering was to be done by men. H.R. EXEC. DOC. NO. 51-1, at 166 (1890).

87. *See* Joseph J. Thompson, *Law Amongst the Aborigines of the Mississippi Valley*, 6 ILL. L.Q. 204, 206 (1924) (citing 1 HANDBOOK OF AMERICAN INDIANS 308 (Frederick W. Hodge ed., 1910) (entry titled "Property and Property Right," written by Alice C. Fletcher)).

well recognized the power that productive labor gave women when he pleaded with a white woman administrating the Dawes Act. "[T]ake pity on my women. . . . The young men can be like the white men, can till the soil, supply the food and clothing. They will take the work out of the hands of women. And the women . . . will be stripped of all which gave them power."[88]

Women's task-based responsibility translated into property rights. In contrast to the white nineteenth century woman whose property transferred by law to her husband upon marriage, it was a "maxim" that among the Indians, everything belonged to the women, "except the Indian's hunting implements and war implements, even the game the Indian brought home on his back."[89] The Cherokees memorialized this understanding in their earliest written laws.[90]

Indian women also exercised relatively greater control over the descent of property and the family name. The commonplace that all Indian tribes were matrilocal — or that couples lived with the woman's family — and matrilineal — or that kinship was traced and inherited from the woman — is probably somewhat overstated. The Navajo and Iroquois were matrilineal and matrilocal,[91] the Cheyenne and Arapaho were generally matrilocal, the

88. Quoted in Sara Deutsch, *Coming Together, Coming Apart — Women's History and the West*, 41 MONT. MAG. W. HIST. 58, 59-60 (1991).

89. Thompson, *supra* note 87, at 210. The passage quoted above provides an excellent example of the difficulty of relying on outsiders' accounts of gendered Indian customs and their frequently internally contradictory nature. Within the same paragraph, the author writes that "'[p]roperly speaking, the husband is the master, the wife the slave.'" *Id.* The earlier statement, however, has far more corroboration in the literature (and, incidentally, better supports the author's point). *See, e.g.*, Carol Devens, *Separate Confrontations: Gender as a Factor in Indian Adaptation to European Colonization in New France*, 38 AM. Q. 461 (1986), *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 25 (stating that Canadian Indian women controlled apportionment and distribution of meat that men brought home); Perdue, *supra* note 40, at 37, *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 134 (stating that home, buildings, garden plots, and sections of common field which the family used were owned by southern Indian wife); Williams, *supra* note 84, at 1041 (stating that Iroquois women owned longhouses, agricultural fields, and produce and surplus from fields while men owned only their knives and guns); *see also* ROBERT H. LOWIE, INDIANS OF THE PLAINS 80 (1963) (stating that despite "bride price," Plains Indian wife was not a chattel). A somewhat different formulation existed among the Navajo, who declared during the marriage ceremony that each spouse became the property of the other. Zion & Zion, *supra* note 4, at 412.

90. *See* LAWS OF THE CHEROKEE NATION: ADOPTED BY THE COUNCIL AT VARIOUS PERIODS 142-43 (1995 Scholarly Resources, Inc. reprint) (1852) [hereinafter LAWS OF THE CHEROKEE NATION]. Even in this rare case where Indian woman's property rights were committed to writing, however, the Tennessee Supreme Court ignored their existence. *See* Morgan v. McGhee, 24 Tenn. (5 Humph.) 13 (1844) (discussed at *infra* notes 187-89 and accompanying text).

91. James W. Zion and Elsie B. Zion contend that both matrilocality and polygamy were traditional ways of ensuring that husbands would not abuse their wives. Zion & Zion, *supra* note 4, at 414. Robert Lowie made the same claim regarding matrilocality among tribes of the plains. LOWIE, *supra* note 89, at 82.

Pamunkey were matrilineal, but the Blackfoot and many of the Great Lakes tribes were patrilineal and patrilocal, and the Crow and Sioux appear to have been either.[92] Nor were tribes perfect models of feminist culture. The double standard, for example, was alive and well among the Sioux and some other Plains tribes — adolescent girls spent their nights tied to their beds to preserve their chastity,[93] and unfaithful wives might have their noses cut off or be otherwise mutilated to discourage infidelity.[94] But while tribes might differ in the amount of autonomy given to women, women typically exercised legal and political powers that sat very uneasily with judges of the nineteenth and early twentieth centuries.

The reactions of New York state courts to the descent practices of the various Iroquois tribes evidence this unease. Scholars frequently cite the Iroquois — a confederacy of the Seneca, Mohawk, Cayuga, Tuscarora, Onondaga, and Oneida tribes — as a tribal culture in which women wielded great power. The Iroquois were organized socially, politically, and culturally by a matrilineal clan system. Property, titles, and names descended through the clan of one's mother. Although chiefs were typically men, clan mothers in consultation with other women of the clan selected new chiefs and had the power to impeach them. All titles, rights, and property descended through one's mother's clan through a Dead Feast, a ceremony feast held ten days after death in which the clan mother presided over the distribution of the decedent's property.[95] In an early New York state case, *Dole v. Irish*, the court reaffirmed the sovereignty of the Seneca law over descent of Seneca property.[96] But when the New York courts were confronted with the

92. *See also* Resnik, *supra* note 4, at 705-06 (discussing conflicting evidence of whether Santa Clara Pueblo were matrilocal, matrilineal, patrilocal or patrilineal and questioning significance of such evidence).

93. ROYAL B. HASSRICK, THE SIOUX: LIFE AND CUSTOMS OF A WARRIOR SOCIETY 45 (1964); PIERRE-ANTOINE TABEAU, NARRATIVE OF LOISEL'S EXPEDITION TO THE UPPER MISSIOURI 178-81 (Annie H. Abel ed., Rose A. Wright trans., Univ. of Okla. Press, 1939), *reprinted in* THE INDIAN AND THE WHITE MAN, *supra* note 1, at 92-93.

94. HASSRICK, *supra* note 93, at 48; TABEAU, *supra* note 93, *reprinted in* THE INDIAN AND THE WHITE MAN, *supra* note 1, at 91.

95. Williams, *supra* note 84, at 1039-40. Because chieftainships were inherited matrilineally, the king's son never succeeded him. Rather the next in line was a son of one of the king's sisters chosen by the head matron after consultation with the women of her group. In the absence of a son, the Tuscarora Iroquois of North Carolina had been reported to choose a daughter. 1 F. ROY JOHNSON, THE TUSCARORAS, MYTHOLOGY, MEDICINE, CULTURE 228 (1963).

96. Dole v. Irish, 2 Barb. 639 (N.Y. 1848) (upholding right of inheritor given property through Dead Feast over that of another granted letters of administration over property). The court there stated,

> We have not attempted to extend our laws to their domestic relations, or to regulate the manner of their acquiring, holding or conveying property among themselves. We have never applied our doctrines of descent or distribution to their property, nor subjected them to our laws relating to wills, intestacy or administration . . . .

gendered aspects of that method of property distribution, they tended to reach different results.

The shift began with *Peters v. Tallchief*,[97] a case involving Tuscarora Indians, who, although Iroquois, had moved to New York from North Carolina in the eighteenth century. The court found that it was competent to intervene because the Tuscarora "are farther advanced in civilization and their tribal relations less intact than that of the larger reservation."[98] Then, after stating that the record contained almost nothing regarding the Tuscarora, the court declared that "[t]his is not a case where the petitioner's right of action contravenes some custom or law of the tribe to which she belongs."[99] Confident of the advanced civilization of these North Carolina Iroquois, and relying on their assumptions regarding Tuscarora customs, the court found that the existing will was the valid method of distributing property.

There, the daughter of the decedent ejected his daughter-in-law, Linnie Peters, from her father's land after her brother, Peters' husband, died. Perhaps the specter of a widow with an infant daughter cast out of her marital home inspired the court's break with the precedent of *Dole v. Irish*. It seems clear that when another New York court rejected the validity of distribution of property by Dead Feast two years later, the court fancied itself in the role of protector of the hapless woman.[100] In *Hatch v. Luckman*, Thomas Skye, a Tonawanda Indian, had conveyed his lands to his son-in-law before his death. At the Ten Day Feast after his death, however, Skye's illegitimate son and three nephews were appointed administrators of Skye's estate. Because the mother of his daughter Phoebe Hatch was Cattaraugus rather than Tonawanda, "the rights of his legitimate daughter and natural heir at law . . . were ignored."[101] In response Hatch had herself appointed administrator in Surrogate's Court. The question was whether the surrogate court had jurisdiction.

What was important for the reviewing court was that "the Indians of this State have advanced in intelligence, education, and civilization, and we can see no reason why the common law of the land should not apply to and govern them and their affairs . . . ."[102] The court justified overruling Iroquois customary law with the "advancement" of the Iroquois people. They had become too civilized, in other words, for their own law.

In holding that the common law of paternal lines of descent should apply, the court hearkened to what it saw as the first incursion into the sovereignty

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Id. at 642.

97. 106 N.Y.S. 64 (App. Div. 1907).

98. *Id.* at 312.

99. *Id.*

100. *See* Hatch v. Luckman, 118 N.Y.S. 689 (Sup. Ct. 1909).

101. *Id.* at 691.

102. *Id.* at 695.

of the New York Indians. In the early nineteenth century, the court recounted, an Indian woman was tried and convicted on charges of sorcery by an Indian court in Buffalo. Two young Indians were directed to carry out her death sentence. When she was bound to the stake, the executors faltered, and an Indian named Soo-non-gize, or Tommy Jemmy, seized a tomahawk and sank it into the woman's skull.[103] Jemmy contended that in killing the woman he was carrying out judgment of the Indian court, so he could not be prosecuted. The court disagreed, and the state legislature codified its decision in ch. 204 of the laws of 1822, which stated that trying and punishing any person was within the jurisdiction of the state.[104]

Cast in the light of this history, the *Tallchief* and *Hatch* decisions seem part of a tradition of protecting Indian women against the injustice of their barbaric communities. Examination of the facts show that in both cases the courts were stepping in where the tribes might well have: the ejectment of Peters was not sanctioned by any tribal authority, and the practice under which Hatch had been disinherited had been abolished by the Tonawanda.[105] But the precedent established was soon used to prevent Onondaga women from asserting the rights of their husbands and daughters after their deaths.

In *Hill v. Shafty*,[106] the court found that an Onondaga woman assigned all of her husband's property and goods at a Dead Feast was not his administratrix such that she could maintain a wrongful death action on his behalf. The court relied on the fact that Martha Hill was not a duly appointed administratrix as required by state law.[107] The court ignored *Hill's* claim that she could not be appointed administrator by the surrogate court because it did not have jurisdiction over her as an Indian; it was unmoved by its recognition that "plaintiff is caught between the millstones and deprived of a chance to present her claim to a jury, simply because she is an Indian, instead of a white woman."[108] Rather, it found that to allow Hill to maintain her action would be to discriminate against the white woman who claimed the right to act as her husband's administratrix simply because she was his heir.[109] "It is true," Judge Edgcombe wrote, "that this court is open to plaintiff the same

103. *Id.*

104. *Id.*

105. Although the Tonawanda had declared that the Dead Feast was not a valid method of distributing property, abolishing the practice by resolution of council in 1888, the court declared this unimportant. *Id.* at 696.

106. 201 N.Y.S. 29 (Sup. Ct. 1923).

107. Under section 130 of New York's Decedent Estate Law, "[t]he executor or administrator duly appointed in this state, or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action" for wrongful death. *Id.* at 30.

108. *Id.*

109. *Id.*

as if she were a citizen. Indian Law, § 5. But the statute does not give the plaintiff any greater right than it gives its own citizens . . . ."[110]

The issue came back before the court two years later, when Susan Crouse, also Onondaga, sought to maintain a wrongful death suit against the railways on behalf of her daughter, Della Bucktooth.[111] Crouse, like Hill, had held a dead feast within ten days of the death of her daughter. There, however, she was proclaimed the administratrix of her estate, was appointed such legally, and was given a letter of administration. The court still found that Crouse was not the personal representative contemplated by decedent law. The opinion stated that *Hatch v. Luckman* had held "that the 'dead feast' according to Indian custom, has never been recognized in law as having any legal existence in this state, and that its attempt to administer and divide the lands and property of the deceased, as to which its power in any event must be limited, was wholly without warrant of law, and void."[112] The abrogation of Iroquois customary law that began in *Tallchief* and *Luckman* in the name of protecting the hapless woman, had become a precedent to deny both Indian law and the rights of Indian women formal recognition.

In like manner, regardless of good intentions the effect of such decisions and laws was to diminish the autonomy and sources of independent economic support which separated Indian women from their non-Indian counterparts. As a result, the status of Indian women would increasingly be derived from their relationships to their husbands and children. I proceed now to those cases which decide the nature of those relationships.

B. Indian Women as Wives and Mothers: Intermarriage and Beyond

White men soon filled the gaps left by the removal of the women as legal heads of Indian families. Two years after the Alabama Supreme Court decided *Ladiga III*, the Mississippi Supreme Court decided that a white husband of an Indian woman *was* the head of a family under the Treaty of Dancing Rabbit Creek.[113] Here, the white man whose treaty rights were affirmed exhibited none of the commitment of Sally Ladiga and her family

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110. *Id.* at 31.

111. Crouse v. New York State Rys., 209 N.Y.S. 264 (Sup. Ct. 1925).

112. *Id.* at 266. Eight years later, the same court partially reversed its position, holding that only wills ratified at a Dead Feast were valid for the disposition of Onondaga property. Lyons v. Lyons, 268 N.Y.S. 84 (Sup. Ct. 1933). The judicial reversal might well have been the product of the new federal policy that Indians were to be given sovereignty over their own affairs. In holding, however, that Iva Lyons might be ejected from her husband's land, the court displayed its belief that it was abandoning the Iroquois to the mercies of a barbaric practice. The court described the decedent Emmet Lyons as a "member of Beaver Clan . . . what is known to the white man as a pagan," *id.* at 85, and described the clan mother as "really the president and dictator of the affairs of the clan," *id.*

113. Turner v. Fish, 28 Miss. 306 (1854) (construing Treaty of Dancing Rabbit Creek, 7 Stat. 340 (1830)).

to remaining on tribal land. Freeman Smith, the white husband of Choctaw woman Eliza Smith, sold his allotment within three years of receiving it, and the successors to title challenged his right to it against that of Eliza and her children.[114] The court first stated that it would rely on Choctaw custom to decide the issue:

> When a white man married a woman who was a member of the Indian nation, and adopted her domicil, whether he became the head of the family or not, must depend upon the law or custom regulating the marital rights of the parties in such a case. And this is what we presume the treaty means, when it speaks of 'the head of a family;' one who is so in the Choctaw sense of the term, or according to the usages and customs of the nation.[115]

The record was silent, however, as to whether a white man could be the head of a Choctaw family under Choctaw law. The court therefore declared that it had to presume in favor of the government's action in locating Smith as the allottee of the land.[116] Although relatively few Indian women married white men, intermarriage was the context in which many of the conflicts concerning Indian women were litigated, and the law regarding Indian marriages, both in terms of allocation of legal status and in terms of the recognition of Indian custom, was often first developed in conflicts arising from Indian-white marriages. It is necessary, therefore, to understand the gendered nature of intermarriage to understand the transformations of the legal status of Indian women during this time.

1. A Not So Brief Note on Intermarriage

Marriages between white men and Indian women dominate the non-Indian popular and historical consciousness. In his sardonic debunking of popular perceptions of the American Indians, *Custer Died For Your Sins*, Vine Deloria writes that as an official with the National Congress of American Indians, although "it was a rare day when some white didn't visit my office and proudly proclaim that he or she was of Indian descent," all but one of these claimed Indian ancestors were women.[117] He explains this "Indian grandmother complex" as a product of the different racial connotations of marriage to a man as opposed to a woman of a different race: "A male ancestor has too much of the aura of the savage warrior, the unknown primitive, the instinctive animal, to make him a respectable member of the

114. *Id.* at 310.
115. *Id.*
116. *Id.*
117. DELORIA, *supra* note 8, at 3.

family tree. But a young Indian princess? Ah, there was royalty for the taking."[118]

Not all intermarriages were between Indian women and white men. A census taken in 1825 of the Alabama Cherokee, for example, found that fully one third of white people married into the tribe were women.[119] Among the members of the Iroquois Confederacy in New York, as well, several cases throughout the late nineteenth and early twentieth centuries concern white women marrying tribal men.[120]

There is, however, probably some factual basis for the perception that most of those Indians who intermarried were women. Both the Alabama Cherokee and the New York Iroquois had remained well established and relatively prosperous on their land after significant white settlement had taken place. Due to federal removal of Indians from their lands and later facilitation of the transfer of land to non-Indians under the General Allotment Act, few Indian societies could claim these conditions. The single whites in Indian country were typically men, including soldiers,[121] traders,[122] and missionaries.[123] By the time unmarried white women began to arrive, the Indian men of that area had probably been killed, removed, or so impoverished that they hardly made attractive prospective mates.[124]

But military force and Indian impoverishment were not the only forces behind Indian-white marriages. Equally important, particularly in the earlier years, seems to have been a practice of various Indian tribes of marrying into an extratribal group to establish ties to that group. Jacqueline Peterson, in her

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118. *Id.*

119. M'KENNEY, *supra* note 76, at 38. According to the census, 13,563 were native citizens, 147 were white men married in the nation, 73 were intermarried white women, and 1277 were African slaves. *Id.*

120. *See, e.g.*, Woodin v. Seeley, 252 N.Y.S. 818 (Sup. Ct. 1931), *aff'd*, *In re* Woodin, 261 N.Y.S. 1042 (App. Div. 1933) (holding that son of white woman and Indian man was not Indian so that he and his white wife could be ejected from Seneca land); Patterson v. Seneca Nation, 157 N.E. 734 (N.Y. 1927) (holding that state court had no jurisdiction to force Seneca Nation to enroll son of Seneca man and white woman); Seneca Nation v. Lehley, 8 N.Y.S. 245 (Sup. Ct. 1889) (holding that daughter of white woman and Seneca man was an Indian).

121. *E.g.*, Johnson v. Johnson's Administrator, 30 Mo. 72 (1860).

122. *E.g.*, *In re* Liquor Election in Beltrami County, 163 N.W. 988 (Minn. 1917); Connolly v. Woolrich, 17 R.J.R.Q. 75 (Que. Sup. Ct. 1867).

123. *E.g.*, Oakes v. United States, 172 F. 305 (1909).

124. John Wesley Powell noted the connection between removal and intermarriage in 1869, finding that two constant objections made to removal to reservations were first, "[w]e do not wish to desert the graves of our fathers," and second, "[w]e do not wish to give our women to the embrace of the soldiers." JOHN WESLEY POWELL, REPORT OF SPECIAL COMMISSIONERS J.W. POWELL AND G.W. INGALLS ON THE CONDITION OF THE UTE INDIANS OF UTAH; THE PAI-UTES OF UTAH, NORTHERN ARIZONA, SOUTHERN NEVADA, AND SOUTHEASTERN CALIFORNIA; THE GO-SI UTES OF UTAH AND NEVADA; THE NORTHWESTERN SHOSHONES OF IDAHO AND UTAH; AND THE WESTERN SHOSHONES OF NEVADA 23-26 (Gov't Printing Office, 1874), *reprinted in* THE INDIAN AND THE WHITE MAN, *supra* note 1, at 383.

excellent dissertation on women in the fur trade, writes that many of the Siouan and Alogonquin-speaking tribes of the Great Lakes region used intermarriage to form and stabilize commercial and political alliances.[125] Those tribes, she found, perceived "intermarriage as a means of entangling strangers in a series of kinship obligations. Relatives by marriage were expected not only to deal fairly, but to provide protection, hospitality, and sustenance in time of famine."[126]

While Europeans might be compelled to intermarry for commercial reasons,[127] Indian women were also an independent source of attraction for the untamed country. Reports of their beauty returned to the Old World, such as the following by John Lawson:

> As for the Indian Women which now happen in my Way, when young, and at Maturity, they are as fine shaped Creatures . . . as any in the Universe. They are of a tawny complexion, their Eyes very brisk and amorous, their Smiles afford the finest Composure a Face can possess, their Hands are of the finest Make, with small, long Fingers, and as soft as their Cheeks, and their whole Bodies of a smooth Nature. They are not so uncouth or unlikely and we suppose them, nor are they Strangers or not Proficients in the soft Passion.[128]

Such reports were accompanied by tales that Indian women were not only easy to love, but easy to leave. "They never love beyond Retrieving their first Indifferency," the same author wrote, "and when slighted, are as ready to untie the Knot at one end, as you are at the other."[129] Despite this encouragement of easy mating and leaving, stable relationships seem to have been the rule rather than the exception.[130] Lawson lamented that he often found that English men had "been so allured with that careless sort of Life,

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125. JACQUELINE LOUISE PETERSON, THE PEOPLE IN BETWEEN: INDIAN-WHITE MARRIAGE AND THE GENESIS OF A METIS SOCIETY AND CULTURE IN THE GREAT LAKES REGION, 1680-1830, at 87-88 (1981).

126. *Id.* at 88.

127. *See, e.g.*, Connolly v. Woolrich, 17 R.J.R.Q. 75, 120 (Que. Sup. Ct. 1867) (describing marriage between white furtrader and Cree woman to establish trading relationship).

128. JOHN LAWSON, HISTORY OF NORTH CAROLINA: CONTAINING THE EXACT DESCRIPTION AND NATURAL HISTORY OF THAT COUNTRY, TOGETHER WITH THE PRESENT STATE THEREOF AND A JOURNAL OF A THOUSAND MILES TRAVELED THROUGH SEVERAL NATIONS OF INDIANS, GIVING A PARTICULAR ACCOUNT OF THEIR CUSTOMS, MANNERS, ETC. 194 (Frances L. Harriss ed., 2d ed. 1952) (1937) (taken from the London edition of 1714), *reprinted in* THE INDIAN AND THE WHITE MAN, *supra* note 1, at 44.

129. *Id.* at 199, *reprinted in* THE INDIAN AND THE WHITE MAN, *supra* note 1, at 50.

130. *See* PETERSON, *supra* note 125, at 8 (describing community of stable intermarried couples of Green Baye, Wisconsin); *Connolly*, 17 R.J.R.Q. at 113-14 (quoting testimony by furtraders about sacredness and stability of marriages).

as to be constant to their Indian Wife, and her Relations, so long as they lived, without ever desiring to return again amongst the English . . . ."[131]

For the women, intermarriage might have been a source of increased power as broker between both worlds. The lovely but passive Indian woman, loved and then easily discarded, was certainly not the only existing model. Indian wives among the fur traders of the North American North West in particular gained prestige and acclaim from both Indians and whites, and often "exert[ed] as much influence within the fur trade household as their 'civilized' White spouses."[132]

The records of Colonial Virginia, for another example, present a Pamunkey woman whose relationship to her white lover was very different from that of Pocahontas and Rolfe. Thirty five years after Pocahontas died in England, a woman, probably a relative, ascended the Pamunkey throne. Queen Cockacoeske was chief of the Pamunkeys between 1656 and 1686, and worked within the Virginian colonial system to recapture some of the power her people had lost since Powhatan's chiefdom.[133] During this time she had a son by English Captain John West, whose first wife was rumored to have left him over the affair.[134] Although her half-white son attended the Queen in meetings with the colonial government, and seems to have been expected by the English to succeed her, upon her death the Pamunkey placed her niece on the throne.[135]

Neither the powerful Indian woman nor the Indianized white man, however, were comfortable figures for the lawmakers of the dominant society in its quest to eliminate the Indian problem by either removing or absorbing the Indians. Cockoeskie is an obscure figure of colonial history, and the white descendants of her son have never fought to prove their lineage. American history and culture celebrates Pocahontas's spirit because it benefitted and was ultimately contained by the white race. An early nineteenth century poem by "Miss F. Caulkins, of New London CT," is an extraordinary testament to the containment of the wild which we have celebrated in the intermarried Indian woman:

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131. LAWSON, *supra* note 128, at 196, *reprinted in* THE INDIAN AND THE WHITE MAN, *supra* note 1, at 46.

132. PETERSON, *supra* note 125, at 87. In a different context, the dual heritage of the mixed blood families of the preremoval Southeastern tribes gave them the ability both to lead their tribes to effectively hold off the encroachment of land hungry whites. Bob L. Blackburn, *From Blood Revenge to the Lighthorsemen: Evolution of Law Enforcement Institutions Among the Five Civilized Tribes to 1861*, 8 AM. INDIAN L. REV. 49, 50-52 (1980). The rise of Indian leaders with white fathers, however, may well have contributed to the death of matrilineality among these tribes.

133. Martha W. McCartney, *Cockacoeske, Queen of Pamunkey, Diplomat and Suzeraine*, *in* POWHATAN'S MANTLE: INDIANS IN THE COLONIAL SOUTHEAST 173 (Peter H. Wood et al. eds., 1989).

134. *Id.* at 176, 192 n.32.

135. *Id.* at 190.

> *Not though, the red-browed heroine, whose breast*
> *Screen'd the brave captive from the axe's gleam;*
> *Not Pocahontas, lov'd, renown'd, caress'd,*
> *But meek Rebecca, is my gentle theme*
>
> . . . .
>
> *Her — her I sing not — and yet her I sing —*
> *Freed from earth-worship, cleans'd from rites obscene;*
>
> . . . .
>
> *First Convert of the West! The Indian child*
> *A Christian matron stands — from whose sweet tongue*
> *Flows the pure stream of English, undefil'd —*
> *Flows the deep anthem, and eternal song.*[136]

Prominent figures among assimilationist "Friends of the Indians" even advocated intermarriage as a way both to assimilate the Indians and to improve the white race:

> Some prejudice, it is true, appears against the idea of admixture or mingling . . . . But . . . while ten grains of Indian to one hundred of white man might be injurious to the quality of the white race, half a grain to one hundred might supply exactly the element needed to improve it. . . . What happy result can there be to the lamb, but in absorption, digestion, assimilation in the substance of the lion. After this process he will be useful — as part of the lion.[137]

Both quotes reveal the duality of the white perceptions of the Indians. Unassimilated, they were "injurious," "defiled," and treated as such — denied citizenship, herded to reservations, and subject to miscegenation laws. Absorbed to the point of invisibility, on the other hand, they were beneficial, and even celebrated.

A primary site for this absorption was the women. Legal decisions and legislative enactments reinforced this bivalent view. Both judges and lawmakers encouraged white men to marry Indian women without assimilating into their tribes, interpreted Indian marital customs to permit their husbands

136. Reprinted in THOMAS L. M'KENNEY, ON THE ORIGIN, HISTORY, CHARACTER, AND THE WRONGS AND RIGHTS OF THE INDIANS, WITH A PLAN FOR THE PRESERVATION AND HAPPINESS OF THE REMNANTS OF THAT PERSECUTED RACE 66 (1846) [hereinafter M'KENNEY, WRONGS & RIGHTS].

137. PHILIP C. GARRETT, INDIAN CITIZENSHIP: PROCEEDINGS OF THE FOURTH ANNUAL LAKE MOHONK CONFERENCE 8-11 (1886), *reprinted in* AMERICANIZING THE AMERICAN INDIANS, *supra* note 25, at 61-62. Miscegenation laws reflect this concern with the proportion of Indian to white blood by permitting marriage between whites and those with a sufficiently small quantum of Indian blood.

to abandon them without legal obligation, and discouraged ties between mother and child so long as those ties included affiliation with tribal relations.

2. Indian Women as Wives

a) Federal Cases: Status of the Non-Indian Husband

The unique legal status of Indians as members of "dependent sovereign nations" attached a peculiar mix of privileges and liabilities to Indian status. Indians throughout the nineteenth century found their rights to independence on their own land repeatedly abrogated, and were persecuted when they refused to remain on the ever smaller pieces of land they were allotted. With the resulting constant upheaval and diminution of hunting lands, the Indian people were not only legally and militarily beset but economically impoverished. On the other hand, they were also immune from criminal prosecution for crimes against Indians committed on Indian land. In addition, as various treaties and then the Dawes Allotment Act divided and parcelled out tribal lands in efforts to "civilize" the Indians through ownership of private property, Indian status also equalled entitlement to often valuable property. In the century before the Indian New Deal, the federal courts considered a series of cases regarding which of the legal attributes of "Indianness" the white husbands of Indian women would hold.

The year after the Supreme Court decided *Ladiga II*, it held in *United States v. Rogers*[138] that a white man who had intermarried and been adopted into the Cherokee Nation was not exempt from federal criminal jurisdiction.[139] It appeared from the pleadings that Rogers had fully assimilated with the Nation:

> [Rogers] voluntarily and of his free will removed to the portion of the country west of the state of Arkansas, assigned and belonging to the Cherokee tribe of Indians and did incorporate himself with said tribe, and from that time forward became and continued to be one of them, and made the same his home, without any intention of returning to the said United States . . . [A]fterwards [in same month] he intermarried with a Cherokee Indian woman, according to the[ir] forms of marriage, and . . . continued to live with said Cherokee woman, as his wife, until September, 1843, when she died, and by her had several children,

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138. 45 U.S. (4 How.) 567 (1845).

139. At that time, Indians were not subject to state or federal prosecution for crimes against Indians on Indian land. *See Ex parte* Crow Dog, 109 U.S. 556 (1883). Congress altered this situation by enacting Indian Appropriation Act of Mar. 3, 1885, ch. 341, 23 Stat. 385, which gave the federal courts criminal jurisdiction over murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any territory in the United States. *See* United States v. Kagama, 118 U.S. 375 (1886) (holding that Indian Appropriation Act is constitutional and gives courts jurisdiction for crimes committed by Indians).

> now living in the Cherokee nation, which is his and their home.[140]

The decision was not necessary to prevent lawlessness in white communities; the crime occurred on tribal lands in the Indian Territory west of Arkansas, and the victim was another "white" man who had similarly joined the Cherokee Nation.[141] Nor was it necessary to protect the Cherokee community: Rogers had, through his adoption, subjected himself to the jurisdiction of Cherokee laws.[142] Rather, the decision was an exercise in line-drawing, prohibiting intermarriage from becoming a method through which a white man could renounce his allegiance to the United States and join an Indian nation.[143]

The decision is cited as the beginning of the end of jurisprudence treating Indians as foreign sovereigns. Justice Taney stated that the Cherokee Nation was not

> a separate and distinct government or nation, possessing political rights and powers such as authorize them to receive and adopt, as members of their state, the subjects or citizens of other states or governments . . . and thereby to sever their allegiance and citizenship from the states or governments to which they previously appertained . . . .[144]

But while this decision has obvious implications for Indian sovereignty, it effected the wives of intermarried white men as well. Their husbands could no longer fully assimilate themselves with their people, but remained subject to the authority of the white government, unable to regard an Indian nation as sovereign in the way that their wives could. Following *Rogers*, legal shifts in allegiance would occur only from the Indian, and almost always female, side.

After *Rogers* effectively determined that Indian women would not be vectors for *increasing* the size of the tribes, the federal government soon came to encourage the opposite process: intermarriage as a method to decrease adherence to tribal custom. This process probably began with local federal agents locating land to white husbands as the heads of families and state court approval of these locations, such as that in *Turner v. Fish*, discussed

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140. *Rogers*, 45 U.S. (4 How.) at 567-68.

141. *Id.* at 571.

142. *See* LAWS OF THE CHEROKEE NATION, *supra* note 90, at 92-94, (enacted Nov. 10, 1843). The statute stated that "[a]ny person so obtaining a license [to marry a Cherokee woman] shall freely alienate himself from the protection of all other governments, and take an oath to support the Constitution, and abide by the laws of the Cherokee Nation," or be subject to removal as an intruder. *Id.* at 93.

143. *Rogers*, 45 U.S. (4 How.) at 569.

144. *Id.* at 570.

above.[145] By the Assimilationist Period, however, this process was codified in federal statutes. The year after the Dawes Act was passed, Congress passed a statute declaring that Indian women who married white men would thereby become American citizens.[146]

The law was ostensibly designed to protect Indian women from unscrupulous white men who would marry them only to and gain rights to Indian land. Although the statute responded to a real problem,[147] it equally addressed the fear raised by *Rogers* that white men would assimilate with their wives' tribes. The amendment was intended to ensure that the effect of the Dawes Act would be to "mak[e] citizens of the United States instead of making Indians of our citizens."[148] The legislative history presents a unwitting contrast between the two paths for intermarriage, the approved path in which the Indian woman left her tribe for an allegiance with the United States, and that in which her husband joined her people:

> Mr. Ezra B. Taylor: Is not the object of this bill to prevent the marriage or miscegenation of these degenerate whites with the Indian squaws?
>
> . . . .
>
> Mr. Weaver: The effect of the bill is to encourage Indians to marry white men and become citizens of the United States.[149]

In gaining United States citizenship, intermarried Indian women were to lose their bonds with their tribes.

The amendment, however, did not affect the rights of those who had married into the tribe prior to 1888. And in the early 1890s, the federal government took action which effectively prevented the Five Civilized Tribes of the Indian Territory from protecting their communities from those without a commitment to tribal membership.

In 1894, the Senate established the Dawes Commission to investigate and report on the best means to extinguish tribal title and divide the land among

145. *See also supra* notes 113-16 and accompanying text; Wells v. Thompson, 13 Ala. 793 (1848) (holding that white husband owned and could sell Creek wife's land) (discussed at *infra* notes 204-05 and accompanying text).

146. Ch. 818, 25 Stat. 392 (1888). The act was titled, "An act in relation to marriage between white men and Indian women."

147. See, for example, the story published by a mouthpiece of the assimilationist contingent reporting a plot to marry off the children of a Creek man to get ownership and oil rights to his valuable land. *Marriage Plot Against Indian Boys and Girls Discovered*, INDIAN'S FRIEND, Nov. 1913, at 8 (vol. 26, no. 2). The children were sent to boarding schools for protection — the boys to the (in)famous Carlisle school and the girl to an equivalent school in Arizona. Ironically, such schools were the sites of enforced assimilation, often using cruelty to "kill the Indian to save the man."

148. 19 CONG. REC. 6885, 6886 (1888).

149. *Id.* at 6886.

individual Indians of those tribes.[150] The main problem addressed by the Commission was the status of the many whites claiming Indian citizenship among them.[151] The Commission condemned the efforts of the tribes to ensure that such whites would not be allotted tribal lands:

> [E]very treaty, from 1828 to and including the treaty of 1866, was based on this idea of exclusion of Indians from the whites and nonparticipation by the whites in their political and industrial affairs. . . . And, if now, the isolation and exclusiveness sought to be given to them by our solemn treaties is destroyed, and they are overrun by a population of strangers five times in number to their own, it is not the fault of the government of the United States, but comes from their own act in admitting whites to citizenship under their laws and by inviting white people to come within their jurisdiction . . . . They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time, it was abandoned forever.[152]

In light of this history and the condition of the tribal court systems, the Commission recommended that non-Indian tribunals determine who was eligible for tribal citizenship.[153] Upon their recommendation the Commission was empowered to review applications to tribal citizenship and prepare the rolls that would alone constitute the membership of the tribes they represented.[154]

In *Stephens v. Cherokee Nation*, the Supreme Court considered appeals of numerous decisions of the Commission, with 166 presented in printed briefs. If the three appeals described in the opinion are representative, the decisions represent a tremendous degree of interference with tribal definitions of community. Faced with such results, the tribes might well regret ever approving the marriage of a white to an Indian.

The first case concerned a William Stephens, who was born in Ohio to a mixed blood woman[155] and white man and had moved back to Cherokee

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150. *See* Stephens v. Cherokee Nation, 174 U.S. 445, 447 (1899).

151. The Report notes that an 1890 census found that of those claiming Indian citizenship 50,055 were Indians by blood, 18,636 were colored Indians and freedmen, and 109,393 were whites. The Commission estimated that in the four years since 1890, at least 250,000 whites had moved onto the tribal lands. *Id.* at 447-48.

152. *Id.* at 448-49. Few will miss the irony of the Commission's reference to the "solemn treaties" of the federal government, when each successive treaty constituted an abrogation of the promises of the prior one to make more room for white settlers hungry for Indian land. It is remarkable that in 1894 a branch of the federal government could chide the Indians for failing to maintain a community isolated from the whites.

153. *Id.* at 451.

154. Ch. 398, 29 Stat. 321, 339 (1896).

155. Stephens' mother Sarah was born in the Old Cherokee Country in Kentucky to William Ellington Shoe-Boots. She lost her Cherokee citizenship by removing off the Nation, according

country with his mother to seek readmission for both of them in 1873. The Chief of the Cherokees said he was convinced of the honesty and genuineness of Stephens' claim and wished the tribal council to pass a motion for his readmittance.[156] The Commission, however, denied Stephens' application because the Cherokee Council had not yet memorialized his readmission. The court of appeals for the Indian territory upheld the denial.[157]

The second appeal described was that of F.R. Robinson, a white man who applied to be enrolled on the basis of his marriage to a woman of Choctaw and Chickasaw blood in 1873. She had since died, and Robinson had remarried to a white women in 1884. The Choctaw Nation opposed his enrollment on the grounds that he had "forfeited his rights as such citizen by abandonment or remarriage."[158] The Dawes Commission, however, granted his application for citizenship, which was upheld in court.

The final case described concerned the application of Richard Wiggs, another white man, and his family for enrollment in the Chickasaw Nation. Wiggs had married Chickasaw woman Georgia Allen in 1875.[159] Allen died in 1876, and in 1886 Wiggs married Josie Lawson, a white woman, with whom he had a daughter. The Commission held that Wiggs should be enrolled. The appellate court directed that his wife and daughter were to be enrolled as well.[160]

In his opinion for the Court, Justice Fuller did not touch on the justice or wisdom of these federal decisions of citizenship, but simply reiterated that the government had the power to make them. Given paramount authority over Indian tribes, he wrote, Congress had the power to empower the Dawes Commission to determine who was entitled to citizenship and to make out correct rolls of citizens, "an essential preliminary to effective action in promotion of the best interests of the tribes."[161] In the single recognition of what this grant of power would mean for the Indian people, he noted that the

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to a Cherokee constitutional provision that

> whenever any citizen shall remove with his effects out of the limits of this Nation, and become a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease: *Provided, nevertheless,* That the National Council shall have power to readmit, by law, to all the rights of citizenship, any such person or persons who may, at any time, desire to return to the Nation, on memorializing the National Council for such readmission.

CHEROKEE CONST. OF 1839, art I. § 2, *quoted in* Cherokee Nation v. Journeycake, 155 U.S. 196, 198 (1894).

156. *Stephens*, 174 U.S. at 470.

157. *Id.* at 471.

158. *Id.* at 472.

159. One should note that both Wiggs's and Robinson's short lived marriages were during the period when the likelihood of allotments of Indian land to individuals was already common knowledge. *See* Cherokee Intermarriage Cases, 203 U.S. 76, 81 (1906).

160. *Stephens*, 174 U.S. at 473-74.

161. *Id.* at 488.

legislation made a distinction between admission to citizenship and allotment of property, as if "there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former."[162]

Justice Fuller returned to this distinction seven years later in the *Cherokee Intermarriage Cases*.[163] The Cherokee Code stated that the "rights and privileges herein conferred [through intermarriage] shall not extend to a right of soil or interest in the vested funds of this Nation," unless such intermarried persons contributed a specified sum to the general treasury.[164] The Court affirmed the appellate court's ruling that the law was valid, but only for those who had intermarried after the law's enactment in 1875.

Justice Fuller's opinion in the *Intermarriage Cases* is perhaps most interesting for its presentation of the ways in which Cherokee laws regarding intermarriage developed reactively, responding to federal laws and decisions of federal courts. For example, although the Cherokees had always had a treaty right to permit white persons to reside in the Nation subject to Cherokee laws, immediately after *United States v. Rogers*, the Cherokee council passed an act stating that the Cherokees would exercise jurisdiction over all those entering Cherokee lands.[165] The Court noted that the Act was aimed at regulating intermarriage with white men.[166] Further, the Cherokee Council adopted the law at issue in the *Intermarraige Cases* in 1874, when the "rapidly growing value of Cherokee lands" and the imminence of legislation making the land available to individual citizens was perceptible.[167] Moreover, although the Code had been enacted over twenty-five years before, the question of its enforcement was not brought to the courts until 1903, a few years after the *Stephens* decision. Then, faced with massive loss of Cherokee lands to those who had once been married to blood Cherokees, a large number of citizens by blood filed a protest with the Department of the Interior against the participation of intermarried persons in the distribution of the 4,420,406 acres then held communally by the Cherokee Nation.[168]

The opinion in the *Intermarriage Cases* is sensitive to the significance of various Cherokee declarations of membership. It distinguishes laws such as the 1855 law regarding jurisdiction over non-Cherokees and that permitting Cherokees by marriage to vote in tribal elections on the grounds that "[u]nder the polity of the Cherokees citizenship and communal ownership were distinct

162. *Id.*

163. 203 U.S. 76 (1906).

164. CHEROKEE CODE art. 15, § 75 (effective Nov. 1, 1875), *quoted in Intermarriage Cases*, 203 U.S. at 83.

165. *Intermarriage Cases*, 203 U.S. at 81.

166. *Id.*

167. *Id.* at 82.

168. *Id.* at 77.

things."[169] Despite this perceptiveness, however, the Court held that until the Cherokees codified this distinction in 1875, those who intermarried into the Nation gained a right to communal tribal property. No less than the other major federal decisions of the period, therefore, the decision helped to facilitate the loss of tribal lands to non-Indians and the disappearance of the tribal unit in favor of the male headed nuclear family.

b) States: Status of the Indian Wife

As the federal courts were effectively declaring that white husbands of Indian women could gain their wives' rights to tribal property, but not their national identity, state courts were creating a body of jurisprudence under which men, Indian or white, had almost no legal obligation to their Indian wives. The dominant view of judicial treatment of Indian marriage and divorce is that stated by Felix Cohen, that "Indian tribes have been accorded the widest possible latitude in regulating the domestic relations of their members."[170] This established doctrine, and the extension of the general rule that marriages would be upheld if valid where contracted, disguised the extent to which assumptions regarding the dissolute nature of sexual relations with Indian women often led courts to assume Indian marriages invalid without question. In 1832, for example, Circuit Judge James Duane Doty ended an era in the established Indian-white community of Green Bay, Wisconsin, by indicting thirty-six of its principal male inhabitants for fornication with their Indian and mixed-blood wives.[171] In 1917, moreover, only one year after the Supreme Court announced that Indians cohabiting without the benefit of marriage according to state law could not be prosecuted for adultery,[172] the Minnesota Supreme Court confidently declared that a majority of mixed blood Indians were not the issue of lawful wedlock.[173]

But more important, the dominant view disguises both the extent to which nontribal courts read and interpreted sex-neutral tribal customs as existing for the benefit of men at the expense of women and the extent to which recognition of Indian customs was reserved for those the courts labeled uncivilized and thus undeserving of the protection of law. This view also does not acknowledge that the judicial interpretations of Indian customs damaged women both by stigmatizing them as participants in what courts saw as illicit intercourse and by leaving them economically insecure due to easy abandonment. More objective descriptions of marriage among Indian tribes

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169. *Id.* at 85.

170. COHEN, *supra* note 5, at 137.

171. PETERSON, *supra* note 125, at 1.

172. United States v. Quiver, 241 U.S. 602 (1916) (holding that Sioux Indians cohabiting without benefit of state ceremony could not be prosecuted for adultery); *see also* Meister v. Moore, 96 U.S. 76 (1877) (holding marriage unsanctified by minister or justice of peace between Indian woman and white man valid for laws of descent).

173. *In re* Liquor Election in Beltrami County, 163 N.W. 988, 989 (Minn. 1917).

reveal that marriages were neither so easily entered, nor so frequently ended as the courts present them. Nor was the judicial vision that emerged during the nineteenth century inevitable even from the limited evidence of tribal customs that American courts had to work with. In the conclusion of this part, I present a Canadian opinion to demonstrate a very different approach to tribal marriage customs that the American courts rejected.

The earliest cases presenting the doctrine of divorce by abandonment were, like *Ladiga*, Alabama cases dealing with women remaining in the east after Indian removal. Throughout the next century, judges cited these cases as precedent in determining the effect of Indian marriages. Two of these opinions concerned the validity of promissory notes made by Delilah Wall, a Choctaw woman, in light of the common law rule against a married woman's ability to contract.[174] Delilah and David Wall had been married by a justice of the peace in 1831, and had lived together until 1839 when David left for the Choctaw country west of the Mississippi.[175] Although Delilah executed the note at issue in *Wall II* after David left her, and executed that in *Wall I* before, the court treated both as valid on the ground the husband took no part of the wife's property under Choctaw law. As a consequence of this "peculiarity," the court held, the wife must have the capacity to contract to protect her property.[176]

The gravamen of the opinions, however, is whether abandonment of an Indian woman would dissolve a marriage. After stating that "[a]ll the testimony in relation to rights of husband and wife, under Choctaw law, may have been of a disputable or doubtful nature,"[177] Justice Goldthwaite proceeded to make law on that same doubtful testimony. The court immediately cast the custom of relatively easy dissolution of marriage as one designed for the convenience of the husband: "By [Choctaw] law, it appears that the husband may at pleasure dissolve the relation. His abandonment is evidence that he has done so."[178] The court hearkens to various classical sources to justify the decision, stating that "[h]owever strange it may appear,

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174. Wall v. Williams, 11 Ala. 826 (1847) (*Wall II*); Wall v. Williamson, 8 Ala. 48 (1845) (*Wall I*). Although the cases are cast as involving "Indians," the opinions reveal that even at this point "Indian" did not necessarily mean one of full-blood. Delilah Wall was the daughter of a full blood Indian woman and a Frenchman. Her husband David was one quarter Indian. *Wall II*, 11 Ala. at 828. The court treated both as Indians, stating: "The ignorance of the half breed is in general quite equal to that of the Indian whose blood is unadulterated, and certainly requires the same protection for his rights." *Id.* at 836.

175. *Wall I*, 8 Ala. at 48. While the cases are evidence of the dislocation and separation of husband and wife that may have occurred during Indian removal, the facts here suggest that Wall's departure might have been a relief to his wife: Wall had killed a man in 1839 and left Alabama to escape prosecution; from Choctaw country he sent Delilah letters threatening to return and take away her child. *Wall II*, 11 Ala. at 828.

176. *Wall I*, 8 Ala. at 52.

177. *Id.* at 50.

178. *Id.* at 52.

at this day, that a marriage may thus easily be dissolved, the Choctaws are scarcely worse than the Romans, who permitted a husband to dismiss his wife for the most frivolous causes,"[179] and that "[m]arriages among the Indian tribes must be regarded as taking place in a state of nature. . . ."[180] The court's recognition of the custom, however, seems to stem from a disdain for the perceived barbarism of the Indians, and it is grouped together with various other privileges of state law also denied to them:

> Do our laws allow Indians to participate equally with us in our civil and political privileges? Do they vote at our elections, or are they represented in our legislature, or have they any concern as jurors or magistrates, in the administration of justice? Are they subject to our laws of marriage and divorce, and would we sustain a criminal prosecution for bigamy, if they should change their wives and husbands at pleasure, and according to their own customs, and contract new matrimonial alliances? I apprehend that every one of these questions must be answered in the negative . . . .[181]

The court also rejected the argument that because under the Treaty of Dancing Rabbit Creek those Choctaws who desired to become citizens would remain in Alabama and receive allotments of land, state law was applicable to them. "The treaty secures to them the right of resuming at pleasure their status in the tribe, without reference to time. . . . Considering the character of the Indians, their indisposition to renounce native habits and association . . . such an assumption cannot be indulged."[182] Because the tribe that Delilah Wall was part of had, in the eyes of the court, insufficiently renounced their Indian allegiance, her abandonment was equal to a divorce, dissolving any legal relation to her husband.

There is evidence that the Alabama court and the later courts that held abandonment to equal divorce under tribal law were misinterpreting that law. Several sources note that separation was relatively rare and usually occurred among childless couples,[183] and evidence from various tribes suggests that while informal divorce was allowed, stable marriages were encouraged and rewarded.[184] Indeed, according to the Meriam Report of 1928,

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179. *Id.*

180. *Wall II*, 11 Ala. at 839.

181. *Id.* at 837-38.

182. *Id.* at 840. The treaty itself is not so ambiguous regarding whether allottees actually become citizens. It states that "[e]ach Choctaw head of a family being desirous to remain and become a citizen of the States, shall be permitted to do so." Treaty of Dancing Rabbit Creek art. 14, 7 Stat. 333, 335 (1830).

183. *See* Thompson, *supra* note 87, at 208-09; PETERSON, *supra* note 125, at 203 (stating divorce most common among childless couples in Great Lakes tribes); 1 JOHNSON, *supra* note 95, at 228-29 (noting separation rare among Tuscarora Iroquois despite ease of divorce).

184. Among the Sioux, "[a] woman who had been married only once and been faithful was

> [I]t is among the educated, sophisticated, and presumably 'civilized' young Indians that the true moral delinquency exits. . . . With the younger educated Indians, no longer influenced by the old tribal domestic life and morals, the fluidity of Indian custom marriage and divorce may become simply an opportunity for license.[185]

Among more traditional Indians, complementary customs encouraging stability and obligations of familial support worked to prevent abandonment.

Indeed, many of the marital customs decried by white reformers as degrading to Indian women may have been created instead to benefit women. The practice of having more than one or two wives, for example, may frequently have been more a matter of sharing work than an accommodation of male sexual desire. As one elderly Omaha man said in response to white prohibition of polygamy, "I must take another wife . . . my old wife is not strong enough now to do all her work alone."[186] For this man at least, taking another wife was a sign of concern and respect as much as one of fungibility. In their study of domestic violence under Navajo common law, James and Elsie Zion suggest that the tradition of marrying sisters was also a way to ensure protection against domestic abuse where the couple would not live with her family.[187] They state that the presence of multiple wives created a woman-controlled family arrangement, in which a man would have difficulty in dominating the tight-knit group of women.[188] Certainly, the growing influence of non-Indian custom and law added little to the power or security of the Indian woman.

Alabama's judicial "recognition" of Indian divorce in the *Wall* cases prevented Delilah Wall from defending herself as a *femme couvert*. Ironically, within this same period, the Tennessee Supreme Court used its recognition of

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considered better than any other," and men were given the Wicasa award for male constancy. HASSRICK, *supra* note 93, at 44, 48 (quoting Blue Whirlwind). The traditional Navajo marriage ceremony was one at which clan elders would teach the newlyweds the law of marriage, saying, "Don't divorce each other" and "Stay together nicely." Zion & Zion, *supra* note 4, at 413. And among the Iroquois, the matrons of the tribe exerted their influence to keep divorce rare. 1 JOHNSON, *supra* note 95, at 229.

185. PROBLEM OF INDIAN ADMINISTRATION, *supra* note 28, at 765-66.

186. Quoted in LOWIE, *supra* note 89, at 82.

187. Zion & Zion, *supra* note 4, at 411. They tell the story of Hatot-cli-yazzi, son of Bi-joshi, a prominent Navajo medicine man who desired to marry a woman from Ship Rock but was unwilling to leave his land at Beautiful Mountain. The intended wife was reluctant to leave her family, so it was arranged that he would marry her two sisters as well. In 1913, however, the Indian agent William T. Shelton ordered two of the sisters to go away. Bi-joshi refused to comply, and the three sisters were arrested while the father and the son were away. When they came with several others to free the women, Shelton claimed it was a rebellion, and General Hugh Scott and Twelfth Cavalry came to his aid. Bi-joshi ultimately surrendered to prevent bloodshed, and the Navajo men who participated were jailed for twenty days for unlawful assembly. *Id.* at 409-10.

188. *Id.* at 414.

Cherokee marriage customs to declare that a separated woman *was* a *femme couvert* and as such could not bring an action to recover her property.[189] Margaret Morgan had married Gideon Morgan in 1813 according to the customs of the Cherokee tribe and had several children by him, but they were living apart at the time of the suit.[190] The "property" at issue was several slaves Margaret's mother had given Margaret in 1828, whom were sold to cover Gideon Morgan's debts.[191] Here, where an Indian woman was trying to assert her property rights independent from those of her husband, the court does not treat the separation as a "divorce by abandonment."

The *Morgan* court claimed that in recognizing the Cherokee marriage as the equivalent of a state marriage, it was upholding the right of the tribe to regulate marriage within its jurisdiction. This claim is patently hollow. One of the few tribes to have written laws at this period, Cherokee law had long established that "the property of Cherokee women after their marriage cannot be disposed of by their husbands, or levied upon by an officer to satisfy a debt of the husband's contracting, contrary to her will and consent, and disposable only at her option . . . ."[192] This was particularly true for Cherokee women marrying white men. A law enacted in 1819 declared that the property of any Cherokee woman who married a white man was not "subject to the disposal of her husband, contrary to her consent."[193]

Moreover, while courts framed their recognition of abandonment of an Indian woman as a divorce as an acknowledgement of tribal sovereignty over domestic relations, they also tended to imply that because informal dissolution was available, the prior "connexion" was not a marriage at all. Regarding the ten year cohabitation and parenting of three children by Colonel Johnson, a government agent in Indian country, with Tapissee, the daughter of a chief, a Missouri court declared:

> [I]t is clear that all such connexions, which have taken place among the various tribes of North American Indians, either between persons of pure Indian blood, or between half breeds, or between the white and Indian races, must be regarded as a mere illicit intercourse, and the offspring be considered as illegitimate . . . .[194]

In addition, because a majority of these cases involved white men[195] leaving

189. Morgan v. McGhee, 24 Tenn. (5 Humph.) 13 (1844).

190. *Id.* at 13-14. Although the Morgans were remarried by Tennessee law in 1818, the opinion rests on the validity of the 1813 Cherokee marriage agreement.

191. *Id.* at 13.

192. Act of Nov. 2, 1829, LAWS OF THE CHEROKEE NATION, *supra* note 90, at 142-43.

193. *Id.* at 10 (law enacted Nov. 2, 1819).

194. Johnson v. Johnson's Administrator, 30 Mo. 72 (1860).

195. Or, in at least two cases, "whiter" men. *See* Wall v. Williamson, 11 Ala. 826 (1847) (husband of one-quarter Indian blood leaves wife of three quarters Indian blood); La Framboise

Indian women when the possibility of return to civilization came along, judges often framed divorce by abandonment as a male privilege. See, for example, the language of the *Johnson* court: "[T]he understanding of the parties is that the *husband* may dissolve the contract at his pleasure."[196] The Alabama court described Indian marriage customs with an even greater gender slant: "When a *man* found a *woman* he wished to marry, he made her a present of a blanket and she became his wife — when he wished to dissolve the marriage, he abandoned her."[197]

The women, moreover, were presented as degraded by their acquiescence to this practice: they were concubines[198] or "article[s] of trade,"[199] they were "bought" and "abandoned."[200] The reservation of Indian divorce for uncivilized Indian women was made clear after, in a widely reported case, the Oklahoma Supreme Court seemed to suggest that a man could divorce a white woman by abandoning her and removing to Indian land.[201] Despite the limiting nature of the facts of that case, the courts soon modified the doctrine to suggest that Indian divorces would not be available if the court deemed the parties to be insufficiently Indian. As the Minnesota Supreme Court clarified in *La Framboise v. Day*,[202] a man might be the son of a white man, might speak English, might work as a clerk in a general store, yet still divorce his Indian wife by leaving her if he observed Indian customs, "particularly in the matter of buying and abandoning their women."[203]

Perhaps more important, husbands retained no legal obligations to their Indian wives if they decided to move on: "It is plain that among the savage tribes on this continent, marriage is merely a natural contract, and that neither law, custom or religion has affixed to it any conditions or limitations or forms other than what nature has itself proscribed."[204] Or, in the words of the North Carolina Supreme Court, "it can never be held that mere cohabitation,

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v. Day, 161 N.W. 529 (1917) (relatively assimilated half-blood man leaves full blood woman).

196. *Johnson*, 30 Mo. at 72 (emphasis added); *see id.* at 87.

197. Wall v. Williams, 11 Ala. 826, 828-29 (1847) (emphasis added). Compare these assertions with a more recent claim based on a study of domestic violence among the Navajo that informal divorce was intended to allow a woman to quickly escape an abusive relationship. Zion & Zion, *supra* note 4, at 419.

198. Roche v. Washington, 19 Ind. 53, 58 (1862) ("What occurred between Jane and George was not a marriage but a state of concubinage.").

199. Schurz, *supra* note 82, at 20.

200. *La Framboise*, 161 N.W. at 530.

201. Cyr v. Walker, 116 P. 931 (Okla. 1911) (also reported at 35 L.R.A. (n.s.) 795). The holding turned on the court's finding that Xavier Delonias, by birth a French Canadian, was not subject to the laws of the United States but only those of the Pottawatomie tribe through his first marriage and subsequent adoption into that tribe. *Id.* at 935.

202. 161 N.W. 529 (Minn. 1917).

203. *Id.* at 531.

204. Johnson v. Johnson's Administrator, 30 Mo. 72, 88 (1860).

with an understanding that it may cease at pleasure, can constitute a marriage, or carry with it the rights and disabilities of that relation."[205]

Revealingly, the one case in which a court held that an Indian divorce was invalid involved an Indian woman trying to abandon a white man. In *Wells and Wells v. Thompson*,[206] Creek woman Mary Wells took her children and moved to her father's home in Creek land after her white husband William took up with another woman. Mary was later allotted land under the Treaty of Dancing Rabbit Creek. After Mary's death in 1836, William sold her allotted land. Their children challenged his claim to ownership and his right to sell the land. The Alabama court held that William had inherited and lawfully conveyed the land; because the separation did not occur on Indian land, the marriage could not be dissolved by Creek custom.[207] The holding that the separation must occur on Indian land contrasts with that in *Cyr v. Walker*, discussed above, and with the low standards for finding abandonment to equal divorce seen elsewhere.

The only widely reported opinion which espoused a similar doctrine to that in *Wells* was the Canadian *Connolly v. Woolrich*.[208] There, however, it was employed to hold that a white man had not legally divorced his Indian wife. *Connolly* was brought by one of the six children of William Connolly, a white man who had made fortune in the fur trade of western Canada, and Susanne Pas-de-nom, daughter of a chief of the Cree tribe. The suit alleged that Susanne was entitled one-half of William's large estate as his wife under Canadian community property laws, and that the plaintiff, therefore, was entitled to one twelfth of the estate. The court held that William's marriage to Susanne was valid, and that his abandonment of Susanne did not constitute a legal divorce. The opinion by Justice Monk was unusual for its holding, but it is unique for the attention it brought to the facts and the moral framework within which it interpreted them.[209]

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205. State v. Ta-cha-na-tah, 64 N.C. 521, 523 (1870).

206. 13 Ala. 793 (1848).

207. *Id.* at 803.

208. 17 R.J.R.Q. 75 (Que. Sup. Ct. 1867), *aff'd*, Johnstone v. Connolly, 17 R.J.R.Q. 266, 1 R.L.O.S. 253 (Quebec 1869). The case was a cause célèbre of the time. Douglas Sanders, *Indian Women: A Brief History of their Roles and Rights*, 21 MCGILL L.J. 656, 660 (1975).

209. Justice Monk may well have been influenced by the French Canadian receptiveness to the amalgamation of peoples and cultures, reputed to be greater than that of the English-influenced Americans. *See, e.g.*, Douglas Sanders, *Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation*, *in* THE FORGOTTEN PEOPLE: METIS AND NON-STATUS INDIAN LAND CLAIMS 7-9 (Harry W. Daniels ed. 1979) (describing how the Northwest Company encouraged fur traders to take Indian wives and authorized company factors to perform civil marriages for them). We should not give Canada too much credit, however. Connolly was decided only seven years before the Canadian government codified an alleged Indian custom that an Indian women lost her tribal status by marrying an outsider. The Canadian Supreme Court rejected a challenge to this provision of the Indian Act in *Attorney-General of Canada v. Lavell*, 1974 S.C.R. 1349 (Can.). The U.N. Human Rights Committee later ordered the law repealed,

In 1803, when William was a young trader in Northwest territory, he married Susanne Pas-de-nom according to Cree custom. They lived together in various places in the territory until 1832 and had six children. During this time, William rose from clerk to chief factor and member of the Council of the Hudson Bay Company and accumulated great wealth. He always introduced Susanne as his lawful wife, and others always recognized her as such. In 1832, William moved with Susanne and some of the children to Montreal.[210] There, William married Julia Woolrich, his second cousin. Susanne soon returned to Red River settlement and was supported there in a convent until her death in 1862.[211] William died in 1849, leaving his estate to Julia and their two children.[212]

There was "no proof to show that any intimation was given to Mrs. Connolly of the occurrence which was about to take place" on the date Connolly married his cousin. "It would appear that the Indian wife felt very sensibly this desertion and Connolly's marriage to another woman."[213] The court specifically dismissed testimony that Susanne appeared to acquiesce, or not feel this desertion both because it was internally inconsistent and self-serving. Moreover, the court notes with remarkable perceptiveness that there was nothing to show that what would be an expression of indifference for a person of one culture might not be another's effort to maintain dignity in the face of despair.[214]

The facts of the opinion bring out the economic and social reasons a white man might have for first marrying an Indian woman and then discarding her for a white woman. Marriage to an Indian, particularly the daughter of an influential chief, was often the only means to establish a political or commercial relationship with the people of that tribe. Connolly's nephew testified that his uncle had told him that had he not "bought" Susanne, there would have been no trading with her people.[215] When William had become rich in the territories, however, he returned to Canada. There, Susanne was indeed "pas-de-nom," and her political connections were neither known or respected. William's second wife, in contrast, was not only white, but "a lady of good social position and of high respectability."[216] William exchanged wives when the first had become not a social asset but a liability.

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finding that the Act violated the right to freedom of association protected in article 27 of the International Covenant on Civil and Political Rights. *In re* Lovelace v. Canada, Communication No. R/24 (July 31, 1981), U.N. Doc. CCPR/c/DR(XIII) R.6/24, GAOR A/36/40.

210. *Connolly v. Woolrich*, 17 R.J.R.Q. at 78.

211. *Id.* at 79.

212. *Id.* at 76.

213. *Id.* at 78.

214. *Id.* at 144.

215. *Id.* at 120.

216. *Id.* at 78.

In a move unique to courts dealing with such abandonment, the court melodramatically pointed out the impact of divorce without obligation to the divorcee:

> It is really very difficult to conceive how . . . it is an understood thing, a man takes a squaw, lives with her as long as it suits him, and then discards her as he would a mistress. It is true he thereby bastardizes and makes outcasts of his children; it is also true that when youth and beauty have faded, when the purity and dignity of innocence have been sullied, destroyed by the contamination of unlawful passion, the trader consigns his Indian wife and offspring to the contempt of the world; dismisses her and leaves her to pass the wretched remnant of her life in solitude and despair.[217]

Further, perhaps with unconscious recognition that legal rules act not in isolation but in a general framework of rules designed to prevent such abandonment, the court suggested that, although adopting the Indian ceremony of marriage, Europeans could not leave behind the European framework of moral obligation: "That such is the custom of the country among the natives, may or may not be the case; but the European settler cannot act after this fashion."[218] Indeed, the opinion reprints testimony to show that they did not. For example, furtrader Pierre Marois testified that, "A man there cannot take more than one woman, and we regard this union as the union of husband and wife here, and the union is also sacred."[219] Mr. Herriot, who went to Hudson's Bay territory in 1808 and had also risen to the position of chief factor, testified that he considered marriage "according to the custom of the country" to be

> as binding as if celebrated by an Arch-bishop. . . . [I]t was not customary for the Europeans to take more than one wife; it was not customary for the Europeans to take one wife and discard her, and then take another. *The marriage according to the custom above described was considered a marriage for life.* I considered it so. I know hundreds of people living and dying with the woman they took in that way, and without any other formalities. According to my opinion this marriage lasted during the lifetime of the parties in as binding a manner as if married by a clergyman.[220]

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217. *Id.* at 118-19.
218. *Id.* at 78.
219. *Id.* at 113 (author's translation).
220. *Id.* at 114.

In further contrast to the American courts, the Canadian court recognized that the concubinage and marriage were conceptually distinct categories, and the court would not assume that an otherwise upstanding man would engage in the former.[221] Moreover, although the American courts also as a rule recognized the validity of Indian marriages, few would state, as this court did, that this form of marriage was

> [E]ntitled to the respectful consideration of this Court. It exacts the solemn consent of parents, and that of the parties who choose each other, for good or for evil, as husband and wife — it recognizes the tie and some of the sacred obligations of married life . . . a marriage according to the Crees would, in the opinion of the Court, be as solemn and as binding in the eye of the law, as many which the greatest English judges have declared valid.[222]

Despite this expansive language, the legal grounds on which the decision turned were relatively narrow. Justice Monk held, as did the Alabama court in *Wells v. Thompson*, that Connolly could not obtain an Indian divorce by abandonment while within the Canadian jurisdiction.[223] Justice Monk, however, was unique in placing the impact of this clash of cultures on the member of the insider culture rather than on the outsider. He recognized that marriage to an Indian woman did not absolve the white man from the moral obligations which underlie the legal obligation not to simply abandon a wife of thirty two years. He also saw beyond the strangeness of Indian marital customs — the absence of priest or justice of the peace, the giving of material goods to notarize the marriage — to the public and solemn nature of the event. American courts, blinded by their investment in conceptions of barbarism and civilization, and interested in encouraging white men to leave their Indian wives and renew their allegiance to the dominant society, could not.

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221. *Id.* at 109. The court distinguishes testimony that taking and discarding a woman was common in the territories by pointing out that according to the testimony this practice was generally confined to the lowest status members of the white fur trade. *Id.* at 119. The existence of dual levels of interactions between fur-traders and Indian women is confirmed by books on the subject. *See* Peterson, *supra* note 125, at 90; SYLVIA VAN KIRK, MANY TENDER TIES 32 (1981).

222. *Id.* at 115-16.

223. *Id.* at 96 ("[I]t was not competent . . . for Mr. Connolly to carry with him this common law of England to Rat River in his knapsack, and much less could he bring back to Lower Canada the law of repudiation in a bark canoe. . . . [H]e cannot . . . invoke the Cree law of divorce at will.").

3. Indian Women as Mothers

One might expect that as non-Indian lawmakers tried to encourage domesticity in Indian women, confinement to home and hearth, they would encourage the close bonds which existed between Indian families and children. The law regarding Indian mothers, however, shows that this was rarely the case. In 1709, John Lawson stated that

> [O]ne great Misfortune which often times attends those that converse with these Savage Women, is, that they get Children by them, which are seldom educated any otherwise than in a State of Infidelity; for it is a certain Rule and Custom, amongst all of the Savages of America . . . to let the Children always fall to the Woman's Lot . . . .[224]

This sentiment seems to have informed the case law of the nineteenth century. While some tribes fought for the rights of mixed blood children to have the rights of Indians,[225] nontribal authorities acknowledged the non-Indian heritage of children only when in the interest of their non-Indian fathers to do so. If fathers desired responsibility for their children, the courts would do all they could to effect such desires. The relationship of the child to the mother, however, was often treated with suspicion or resistance by the courts. If the mother had not renounced tribal ways, her status would often stigmatize the child and was viewed as an impediment to the child's interest in assimilation.

During the assimilationist era, it was federal policy to recognize mixed blood children as Indian for purposes of entitlement to benefits.[226] Legislation amending the Dawes Act explicitly stated that "all children born of a marriage . . . between a white man and an Indian woman" recognized by her tribe would have the same right to tribal property of other

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224. LAWSON, *supra* note 128, at 195, *reprinted in* THE INDIAN AND THE WHITE MAN, *supra* note 1, at 46.

225. Farrell v. United States, 110 F. 942, 945 (8th Cir. 1901); *see also* Treaty with the Ottawa and Chippewa, arts. 6, 9, 7 Stat. 491, 493-94 (1836); Treaty with the Menominies, art. 2, 7 Stat. 506, 507 (1836); Treaty with the Sacs & Foxes, art. 4, 7 Stat. 517, 518 (1836); Treaty with the Sioux, art. 2, 7 Stat. 538, 539 (1837) (referring to the desire of the tribes to make provision for their half-breed relatives and the reluctance of the federal government to grant reservation lands for such purpose); CHEROKEE CONSTITUTION OF 1839, art. 3, § 5, *quoted in* Cherokee Nation v. Journeycake, 155 U.S. 196, 198 (1894) ("[T]he descendants of Cherokee men by all free women, except the African race, whose parents may have been living together as man and wife, according to the customs and laws of this Nation, shall be entitled to all the rights and privileges of this Nation as well as the posterity of Cherokee women by all free men.").

226. *See, e.g.*, Agreement with the Indians of the Fort Belknap Indian Reservation in Montana, ch. 398, 29 Stat. 321, 352, art. 9 (1896) ("It is understood and declared that whenever the word Indian is used in this agreement it includes mixed bloods as well as full bloods."); Agreement with the Indians of the Blackfeet Indian Reservation in Montana, ch. 398, section 9, 29 Stat. 321, 356, art. 10 (1896) (same).

members.[227] Such laws, however, were based on the policy of encouraging Indians to abandon their tribal relations and of civilizing tribal communities through tribal allotments, rather than on any encouragement of the bonds with the maternal community.[228]

For other purposes, the Indian mother was acknowledged only to stigmatize the child. The common law rule was that the child followed the status of the father.[229] This rule, however, was often evaded, especially where a privilege of race was at issue. An early federal decision, for example, followed the jurisprudence regarding the children of a slave and a nonslave to rule that the child must follow the condition of the mother.[230] That court held that it had no jurisdiction to prosecute "the atrocious and willful murder . . . without provocation or excuse" of an "inoffensive idiot boy" based solely on conflicting testimony that his mother, whom no one had ever seen, was an Indian woman, or had Indian blood in her veins.[231]

Another federal court ignored this common law rule to hold that although the petitioner's father was a white Canadian, he was not white for purposes of a statute providing that white persons who had been residents of the United States for three years might apply for American citizenship. The court tersely denied his application: "As a matter of fact, he is as much an Indian as a white person, and might be classed with the one race as properly as the other. Strictly speaking, he belongs to neither."[232] Far from conferring any advantage, for this judge, the mixed parentage of the applicant placed him outside the privileges of any category.

Courts would violate established legal rules, however, to effect the will of a doting father. A court might hold a marriage void as a grounds for inheritance, yet acknowledge the legitimacy of their children for the same purpose. The Missouri Supreme Court in *Johnson v. Johnson's Administrator*, discussed above, found every evidence that the union of Colonel Johnson and Tapissee "was not a marriage, nor are the children of such union capable of inheriting from the father."[233] It ultimately held, however, that Johnson's two daughters could inherit his large estate because he brought them up and educated them

> in conformity to his circumstances and condition in life; [they] were introduced into society, after their education was finished, as his daughters; remained inmates of his household after his

227. Ch. 3, 30 Stat. 62, 90 (1897).

228. Oakes v. United States, 172 F. 305, 308-09 (1909).

229. *In re* Liquor Election in Beltrami County, 163 N.W. 988, 989 (Minn. 1917); State v. Nicolls, 112 P. 269 (Wash. 1910); Hatch v. Luckman, 118 N.Y.S. 689, 701 (Sup. Ct. 1909).

230. United States v. Sanders, 27 F. Cas. 950 (D. Ark. 1847) (No. 16,220).

231. *Id.* at 951.

232. *In re* Camille, 6 F. 256, 258-59 (D. Ore. 1880).

233. Johnson v. Johnson's Administrator, 30 Mo. 72, 84 (1860).

> removal to St. Louis in 1822, up to the period of their marriage, and were in all respects treated by him as a father would be expected to conduct himself towards his legitimate children, . . . and were finally provided for in a will, which left to them . . . the bulk of his fortune, which amounted to about one hundred thousand dollars.[234]

The court recognized their right to inheritance, simultaneously sanctioning both the wishes of the father and the girls' abandonment of their mother and her way of life.

The Washington Supreme Court, as well, held that the "so-called" marriage of John T. Wilbur and Swinomish woman Kitty Follansbee was void under the miscegenation acts in force at the time. Because Wilbur continually, openly, and publicly acknowledged the boys as his sons, however, they were his legitimate heirs.[235] A Texas court similarly held that Mary Sharpe was the legitimate heir of William Patterson.[236] The court found that "although there are some circumstances in evidence tending to show that it was not Patterson's intention to, and that he did not believe that he had, legally married [Mary's Creek mother]," his acknowledgement of their daughter Mary and contribution to her support legitimized the child for purposes of descent.[237]

By the beginning of the twentieth century, the courts had created two classes of mixed blood children for purposes of determining political status as well. Those in the first class were

> born under the sanction of marriage, the father being a white man and a citizen, and maintaining an independent home; and the mother, although an Indian, is by her marriage, and adoption of the habits of civilized life, entirely separated from her Indian tribal relatives. The half-breed children of such parents . . . are . . . entitled to all the rights and privileges, and immunities of other citizens; and they are as distinct from the other class of half-breeds which I have described as any other civilized people are distinct from savages.[238]

Attempts of the mother to change this status were resisted. In *United States v. Higgins*,[239] for example, a mixed blood Indian woman married a white man and moved with him off the reservation. When her son was seventeen,

234. *Id.* at 85.

235. Follansbee v. Wilbur, 44 P. 262, 263 (Wash. 1896)

236. First National Bank of Austin v. Sharpe, 33 S.W. 676 (Tex. Civ. App. 1896).

237. *Id.* at 677.

238. United States v. Hadley, 99 F. 437, 438 (D. Wash. 1900) (holding that child of white man and Indian woman could not be indicted under statute regulating crimes by Indians).

239. 110 F. 609 (D. Mont. 1901).

she moved with him back to the reservation where he grew to manhood and became chief of police.[240] In adjudicating whether Higgins was white or Indian, the court declared that "[t]he mother of Oliver Gibeau could not, by taking him with her to an Indian tribe, and securing his adoption into the same, deprive her sone [sic] of the rights of a white man and of a citizen."[241]

Those raised with the Indian tribe, on the other hand, were barred from these rights of citizenship. The Minnesota Supreme Court discusses this issue at length in *In re Liquor Election in Beltrami County*.[242] The court there considered whether numerous mixed-blood men were citizens entitled to vote under Minnesota law. It decided that they were not:

> It is true that a mixed blood Indian is a citizen if his father was. . . . And no doubt more mixed bloods spring from a white father and an Indian or mixed-blood mother than from a white mother and an Indian or mixed-blood father. But it is also probably true that very many of the mixed bloods of a white father are not the issue of lawful wedlock. An illegitimate child takes the status of the mother.[243]

The court acknowledged that the plaintiffs had "reached a degree of civilization superior to that manifested by many white men."[244] Their insufficient connection with their citizen fathers, however, made them ineligible to vote.

Courts also disparaged the matrilineal tradition of many tribes. In *Hatch v. Luckman*,[245] for example, one judge stated of matrilineality among the New York Seneca that, "[t]his ancient custom comes down from barbaric days, when the marital relations were loose and uncertain and it was often difficult to determine the paternity of a child."[246] He saw no reason to continue to observe this custom given the advances in education and civilization of the tribe.[247] In *Hatch*, the court overruled the custom of distributing property in a "Dead Feast" presided over by a clan mother. The court justifies the decision to do so in the name of "protect[ing] the interests of the family in reservation lands."[248]

But the court was reading "the interests of the family" to mean those of the male owner of the land in determining his heir. It is true that, in *Hatch*, a

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240. *Id.* at 610.
241. *Id.* at 611.
242. 163 N.W. 988 (Minn. 1917).
243. *Id.* at 989.
244. *Id.*
245. Hatch v. Luckman, 118 N.Y.S. 689 (Sup. Ct. 1909) (holding traditional Dead Feast void as method of determining descent of land).
246. *Id.* at 701.
247. *Id.*
248. *Id.* at 702.

woman, the daughter of the male decedent, benefitted from the court's decision to trump tribal custom. The distribution of the land authorized by the clan mother accorded with the Seneca custom of descent according to matrilineal clan membership, because the mother of the plaintiff Phoebe Hatch was not a member of the tribe or clan in whose name the property was passed down. The court claimed that to uphold this tradition of matrilineal descent and to deny patrilineal descent would be "a travesty of justice."[249] Notwithstanding tribal custom, in other words, fathers, not mothers, would have the last word on what would happen to family property after death.[250]

Courts even found it in the best interests of children to separate them their Indian mothers altogether. In so doing, they followed a practice in place well before and well after the Assimilation Period. In fact, the abduction of the twelve-year-old Pocahontas by Captain Smith may have been a romanticized implementation of an unexecuted 1609 plan to kidnap Indian children to thereby ensure their eventual conversion.[251] While taking children from their families was no longer an explicit federal goal after the 1930s, social services agencies continued to remove Indian children from their homes in shocking numbers until the passage of the Indian Child Welfare Act of 1978.[252]

While such removals were often too automatic to even appear in published opinions in the nineteenth century, the opinion in *In re Can-Ah-Couqua*[253] well presents the philosophy behind these tragic actions. *Can-Ah-Couqua* was a habeas action brought by an Alaskan native for the release of her eight year old son Can-ca-dach from a missionary school. She had voluntarily sent him to school in 1883, but she had not been allowed to see him in the four years since then. The court held that the child should remain in the custody of the school citing "the experience of those who have been engaged in these Indian schools that, to make them effectual as disseminators of civilization, Indian children should, at a tender and impressionable age, be entirely withdrawn from the camp, and placed under the control of the schools."[254] The judge suggested that the petitioning mother's very life was destructive of her love for her child, stating, "the profligate and dissolute life she has lived has not entirely extinguished the natural affection and love of a mother's heart . . . ."[255]

249. *Id.*

250. *Id.* at 703. Alice Lee Jemison, an outspoken Iroquois political figure, protested against this granting of rights to those whose mothers were not of the relevant tribe. Jemison herself was the child of a Cherokee father and a Seneca mother. HAUPTMAN, *supra* note 51, at 62-63.

251. *See* Patricia Kunesh-Hartman, Comment, *The Indian Welfare Act of 1978: Protecting Essential Tribal Interests*, 60 U. COLO. L. REV. 131, 135 n.18 (1989).

252. Pub. L. No. 95-608, 92 Stat. 3069 (codified as amended at 25 U.S.C. § 1901 (1994)).

253. 29 F. 687 (D. Alaska 1887).

254. *Id.* at 689.

255. *Id.* at 690.

Although denying her the right to take the child from the school, he granted Can-ah-couqua the right to see her son — under surveillance.[256]

The practice of removing Indian children to boarding schools far from their families actually encouraged the "profligacy" the court condemned in *In re Can-Ah-Couqua*. The authors of the 1928 Meriam Report found that "[n]ormally husband and wife have a strong bond in their common responsibility for children. To take away this responsibility is to encourage a series of unions with all the bad social consequences that accompany impermanence of marital relations."[257] Children might never return, but die of tuberculosis and other epidemics at the harsh boarding schools.[258] The effect of the schools, moreover, was that even those who survived would return strangers, ill at ease with the life they had been schooled to reject.

Nor did the schools prepare the girls for a better life outside the tribal community. Boarding schools not only deprived the girls of education in the traditional sources of strength for Indian women, they trained them to be servants to middle-class women pursuing the cult of domesticity. The Meriam Report condemned the so-called "outing system," a corner stone of the boarding schools, on these grounds. To ensure that the female pupils would not backslide into Indian ways, the girls were "placed out" during vacation to give them experience with a non-Indian family. The report found, however, that the system was "not so much a preparation for homemaking as an apprenticeship for domestic service."[259]

> The girls work for wages, mostly under city conditions; they are in demand with families whose regular maids want to go home or to do something more profitable during the summer; the work in practice often leads to a permanent job on leaving school. So far as any implicit intention can be perceived it is the fitting of Indian girls for domestic service, the one occupation where there is always a demand for labor because of the social stigma popularly attached to it.[260]

The section states, "[I]t is difficult to understand why the government, avowedly educating its wards for a place in white civilization, should have prepared the girls almost exclusively for the least desirable of the gainful occupations open to women."[261]

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256. *Id.*

257. PROBLEM OF INDIAN ADMINISTRATION, *supra* note 29, at 576.

258. *Id.* at 574-75.

259. *Id.* at 627.

260. *Id.* at 628.

261. *Id.* at 640. Karl Marx might have had less difficulty understanding this reinforcement of racial and class hierarchy.

Thus, while lawmakers espoused the nineteenth century vision of the family, their vision excluded strong tribal traditions of motherhood. Having an Indian mother, for one of mixed blood, mattered only if your non-Indian father had abandoned you. Whatever one's blood quantum, courts and policy makers saw the influence of an Indian mother as pernicious, a factor that would inhibit beneficial assimilation. They therefore resisted tribal tradition of strong bonds between mother and child. A better substitute, however, was not put in its place: denied the education and experiences important within the tribal community, children, particularly girls separated from their mothers, were prepared only to be servants in the non-Indian world.

IV. Tribal Treatment of Indian Women — The Influence of Non-Indian Law

The Pocahontas story presents a compelling allegory of the ways in which tribes were affected by government actions regarding Indian women, and of how some tribes ultimately responded. At the end of Walt Disney's story, both Indian and white are enriched and unharmed by the encounter. Captain Smith and all the Europeans sail away from the New World, leaving Pocahontas waving on the shore, intact in her Indian world and belief system, surrounded by her animal friends. In the full story, Pocahontas not only lost her belief system and national identity, but her position between the two cultures proved physically disastrous for the Indians of her region. By sparing first Captain Smith and then the fledgling Jamestown colony, (at least in John Smith's apocryphal account), her presence allowed the European colonists to take hold in Virginia and eventually throughout the South.[262] As the first Chief of the Bureau of Indian Affairs wrote in 1846, this was the beginning of the extinction of the Indians of that region.[263]

Indian tribes eventually took precautions against the negative results of marriage with outsiders. Pocahontas' own tribe now prohibits white husbands of Indian women from living on the reservation.[264] The effect of this prohibition is that this formerly matrilineal tribe[265] now forces Pamunkey women to abandon tribal land.

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262. Had Disney looked a little further down the line, they would have seen the Pamunkey, once the most powerful tribe in Virginia, now with only 60 people living on a 1250-acre reservation 40 miles from Richmond. Joe Volz, *Pocahontas' Legacy: Law on Mixed Marriages Threatens Tribe's Future*, CHI. TRIB., Apr. 9, 1989, at 7.

263. M'KENNEY, WRONGS & RIGHTS, *supra* note 136, at 60. M'Kenney points to the role of Massachusetts chief Massasoit in performing the same role in the North East:

> From the two points, Jamestown and Plymouth, went forth the element which, in the order of time, brought about this subjection of the Indian race. And now trace those elements back to their source, and in what, I ask, did they originate? In the humanity, I answer, and the generosity of Pocahontas and of Massasoit.

Id. at 73.

264. Volz, *supra* note 262, at 7.

265. See McCartney, *supra* note 133, at 173, on matrilineality among the Pamunkey.

In 1978, the Supreme Court considered a challenge under the Indian Civil Rights Act to a similar law. Under the constitution of the Santa Clara Pueblo Tribe, children of Santa Claran women and non-Santa Claran men were not eligible for tribal membership.[266] The children of Santa Claran men who married outside the tribe, however, were eligible for membership.[267] The Court declared hands off. In an opinion written by Justice Thurgood Marshall, the Court held that concern for tribal sovereignty prohibited the Court from interfering with the ability of the tribe to define its own community.

In her article *Dependent Sovereigns: Indian Tribes, States and the Federal Courts*, Judith Resnik provides an excellent examination of the way in which federal control in the drafting of such tribal constitutions may have influenced the insertion of this discriminatory provision.[268] She notes that the Bureau of Indian Affairs had a tremendous influence in the preparation of all of such Indian Reorganization Act constitutions. They prepared model constitutions, which were largely adopted without alteration, and commented on and approved all alterations by the tribes.[269] The constitution adopted by the tribe in 1935 did not discriminate as to gender and left the tribal council power to approve membership for those who did not meet the membership criteria. That same year, however, the BIA distributed a circular stating that Congress would limit application of federal benefits to tribal members, and planned "to urge and insist that any constitutional provision conferring automatic tribal membership upon children hereafter born, should limit such membership to persons who reasonably can be expected to participate in tribal relations and affairs."[270] In 1939, the tribe amended its constitution to limit membership to children of Santa Claran men.[271] And in 1978, the tribe defended this provision by stating that children of female members were more likely to be raised as cultural outsiders.[272]

There is little to support a conclusion that the discriminatory nature of this amendment was the direct result of federal pressure or encouragement. Only one of the other BIA constitutions examined in a recent survey of the 220 tribal constitutions[273] similarly discriminates against women, that of the Cachil Dehe Band of Wintun Indians of California. The provision there was clearly intended to punish and expel women who married non-Indians, providing that "[i]f a female member marries a non-Indian, she will automatically lose her

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266. Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978). There, the plaintiff had not married a white man, but a Navajo. *Id.* at 52.

267. *Id.* at 52 n.2.

268. Resnik, *supra* note 4, at 712-25.

269. *Id.* at 712-14.

270. *Id.* at 715.

271. *Id.* at 716.

272. *Id.* at 717.

273. Elmer R. Rusco, *Civil Liberties Guarantees Under Tribal Law: A Survey of Civil Rights Provisions in Tribal Constitutions*, 14 AM. INDIAN L. REV. 269, 284 (1990).

membership and will be required to leave the Community within ninety days after written notice has been served on her by the Business Committee."[274]

The three other comparable provisions cited in the survey actually discriminate against men. Until 1993, the Constitution of the Hopi Tribe of Arizona provided that members were those on the census roles in 1936, children whose parents are both Hopi, and those "whose mother is a member of the Hopi Tribe, and whose father is a member of some other tribe."[275] Children of Hopi men and non-Hopi women might only become members upon majority vote of the council. The constitution of the Creeks of the Kialegee Tribal Town similarly provided that "[a]ll children born of female Kialegee members shall become members of the Town regardless of the status of their fathers," while children of Kialegee men and non-Kialegee women might only become members upon a majority vote of the members at any Kialegee membership meeting.[276] And children of women of the Pueblo of Laguna in New Mexico automatically became tribal members regardless of marital status, while only children born in lawful wedlock to male members were entitled to automatic membership status.[277]

The discriminatory Santa Clara and Cachil Dehe provisions are simply too anomalous to make a strong case for direct federal pressure. The history discussed in the preceding sections, however, supports the argument that state and federal actions *were* responsible for the diminished view of Indian women in the eyes of their tribes. With the occupation of formerly Indian lands, the game hunting which had comprised much of the male economic role and social identity virtually disappeared.[278] Federal policy encouraged men to make up for this by taking the position of farmer and land holder that women had occupied. From the end of the century on, the federal government itself stepped in to replace Indian women's role in raising their children. As the case law shows, moreover, federal and state courts in the nineteenth century carved a role for women in which they were little more than a means for Indian lands to pass

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274. CONST. & BY-LAWS FOR THE CACHIL DEHE BAND WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY CALIFORNIA art. II, § 4.

275. CONST. & BY LAWS OF THE HOPI TRIBE ARIZ. art. II, § 1 (adopted 1936). The constitution was amended in 1993 to permit enrollment by persons with one-quarter Hopi or Tewa blood from either mother or father.

276. CONST. & BY-LAWS OF THE KIALEGEE TRIBAL TOWN OKLA. art. III, §§ 3-5 (adopted 1941).

277. CONST. & BYLAWS OF THE PUEBLO LAGUNA N.M. art. II, § 1(d)(1), (2) (adopted 1958).

278. Carol Devens argues that the greater receptivity to Christianity of seventeenth century Huron men may be attributable to similar causes. *See* Devens, *supra* note 89, at 461, 474-75, *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 26, 32-33. "Christianity apparently appealed to men who no longer identified themselves primarily as hunters. In precontact culture . . . [h]unting provided the very foundation of a man's social and religious identity. It seems likely that a spiritual crisis may have been the culminating factor in a man's decision to convert." *Id.* at 474, *reprinted in* PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 32.

to white husbands. Both through indirect influence and direct imposition, non-Indian family and political structures in which women were secondary began to replace those in which they had wielded significant power.

A 1928 New York state case, *In re Herne*, presents one example of this imposition.[279] *Herne* concerned the right of a St. Regis Mohawk Indian, Mary Lazore, to possess lands on the St. Regis reservation. The elected tribal chiefs sought to have her removed as an intruder on a reservation under New York law. Lazore said that she was a member of the St. Regis tribe, was grandmother and guardian "by Indian custom" of her grandson Robert Williams, the son of her deceased daughter, and was occupying the premises for him while he attended a school for the deaf. Lazore was born on the St. Regis reservation on the American side. All her life, however, she had received annuity money allotted to the Canadian St. Regis Indians and had never received any annuity money from the state of New York.[280] With little discussion, the court decided that the exclusive reception of benefits from Canada made Lazore a Canadian Indian removable as an intruder on American Indian land.[281]

Remember the *Ladiga* cases? Here, almost a century later, another grandmother is being kicked off her land. This time, however, it is at the hands of her own tribe. At least as much as in *Ladiga*, the court in *Herne* ignores the traditions of matrilineal descent and female land ownership of the tribe implicated. More important, the terse three page opinion completely fails to mention the conflict between the traditional, woman centered tribal government and the official state-imposed one that may well have inspired the tribal action.

As with most Iroquois tribes, the position of chief was hereditary, based on matrilineal clan membership, and chiefs were selected by the clan mothers with the advice of other women of the tribe.[282] New York state, however, had instituted a system of elected tribal government that broke this tradition. Many St. Regis Indians resisted the imposition of a foreign governmental system. Only about 25% of tribal members participated in the elections.[283] Many women, who had traditionally exercised their significant influence outside of electoral politics,[284] probably chose not to participate at all.

At the time *Herne* was decided, the elected government was in bitter rivalry with those supporting the traditional government.[285] It is not hard to imagine that the elected chiefs were prompted to remove Lazore out of desire to remove a troublesome matriarch from this heated political scene. In declaring her removal legal, therefore, the court supported a very limited segment of tribal

279. *In re* Herne, 232 N.Y.S. 415 (Sup. Ct. 1928).
280. *Id.* at 416.
281. *Id.* at 416-17.
282. *See supra* note 95 and accompanying text.
283. *See* HAUPTMAN, *supra* note 51, at 69.
284. *Id.* at 69.
285. *Id.* at 64.

opinion. Even more, it supported the government the State Legislature had itself imposed.

Tribal actions that negatively affected women's traditional status were not always so closely tied to the implementation of non-Indian goals. Cherokee law shows a gradual and deliberate adoption of non-Indian stereotypes regarding the role of women. Many of the early Cherokee laws evidence a desire to protect women both from abusive white husbands and from scornful state courts. While marriage by public declaration and ceremony was the rule for inter-Cherokee marriages, as early as 1819 a white man marrying a Cherokee women was required to do so "legally by a minister of the gospel or other authorized person, after procuring license from the National Clerk for that purpose, before he shall be entitled and admitted to the privilege of citizenship, and in order to avoid imposition on the part of any white man."[286] The law further declared that the property of any Cherokee woman who married a white man

> shall not be subject to the disposal of her husband, contrary to her consent, and any white man so married and parting from his wife without just provocation, shall forfeit and pay to his wife such sum or sums, as may be adjudged to her by the National Committee and Council for said breach of marriage, and be deprived of citizenship . . . .[287]

A few years later, the Cherokee council made clear that this law regarding property was simply an extension of Cherokee tradition for all Cherokee women with an explicit codification of the "established custom" of the Cherokee Nation that the property of a Cherokee woman could not be controlled by her husband or attached by his creditors.[288]

With these written affirmations of Cherokee women's independence, however, came other laws which decreased her status. In 1825, the tribe broke with the matrilineal Cherokee tradition by legislating that children of Cherokee men and white women, living in the Cherokee nation as man and wife are "equally entitled to all the immunities and privileges enjoyed by the citizens descending from the Cherokee race, by the mother's side."[289] In 1826, the tribe outlawed the traditional practice of abortion, providing for a punishment of 50 lashes to the woman committing "infanticide . . . during pregnancy" and accessories thereto.[290]

These changes may be traced to the Cherokees rapid adoption of white religion and government.[291] In the same month that the anti-abortion law was

286. LAWS OF THE CHEROKEE NATION, *supra* note 90, at 10 (enacted Nov. 2, 1819).
287. *Id.*
288. *Id.* at 142-43 (enacted Nov. 2, 1829).
289. *Id.* at 54 (enacted Nov. 10, 1825).
290. *Id.* at 79 (enacted Oct. 16, 1826).
291. A letter from David Brown, a member of the southeastern Cherokees, provides a good

enacted, the council also passed a law that "no person who disbelieves the existence of the Creator, and of rewards and punishments after death, shall be eligible to hold any office under the government of the Cherokee Nation, nor be allowed the privilege of his or her testimony in any court of justice."[292] In the constitutions of 1827 and 1839, the Cherokee adopted the dominant society's exclusion of women from politics: article 3, section 5 stated that only free Cherokee males were eligible for seats on the General Council, and section 7 provided that only free male citizens had the right to vote in Cherokee elections. Although the Cherokees used white forms of government and culture to maintain their sovereignty and independence from the United States — and were so successful that federal policy makers decided to move them to the remote Indian territory to decrease their power[293] — the empowerment of the Cherokee male leaders became a disempowerment of the women.

Sometimes measures oppressive to women were borrowed from white culture directly in quasi-religious efforts to ward off white encroachment. Although slightly before the chronological scope of this article, the Shawnee code of the early 1800s is such an interesting mixture of adoption and resistance that I report it here.[294] The code early reveals an adoption of the Christian value of monogamy, stating in article 2 that the Shawnee were not to have more than one wife in the future so as to please the Great Spirit. In article 6, moreover, the code declared that medicine bags were to be destroyed and medicine dances and songs to exist no more and that those who had used them were to make open confession to the Great Spirit of their wrong.

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picture of the extent of adoption of white ways by the 1820s.

> Butter and cheese are seen on Cherokee tables. There are many public roads in the nation, and houses of entertainment kept by natives. . . . Cotton and woolen clothes are manufactured here. Blankets, of various dimensions, manufactured by Cherokee hands, are very common. . . . Industry and commercial enterprise are extending themselves in every part. Nearly all the merchants in the nation are native Cherokees. Agricultural pursuits . . . engage the chief attention of the people. Different branches in mechanics are pursued.

David Brown, Letter of September 2, 1850, *in* M'KENNEY, MEMOIRS, *supra* note 76, at 37-38.

292. LAWS OF THE CHEROKEE NATION, *supra* note 90, at 77 (enacted Oct. 13, 1826).

293. *See* 2 THE GREAT FATHER, *supra* note 6, at 189 (stating that the adoption of the 1827 constitution caused great alarm and fanned desires for Indian removal); M'KENNEY, MEMOIRS, *supra* note 76, at 38 n. ("[W]hen a just appreciation of the Cherokees of their own advances in the mechanics and the arts, and religion, caused them to cling closer and closer to their beautiful country, and to refuse to sell or exchange it . . . they would be forced to cross the Mississippi . . . .").

294. The code was formulated by Tenskawatawa, known as the "Shawnee Prophet" and twin brother of Tecumseh. Thomas Forsythe recorded it in a letter to General William Clark of December 23, 1812. The code is reprinted in Thompson, *supra* note 87, at 214-18. Although fascinating, Forsythe's reporting should be regarded with some suspicion; Forsythe also claimed, for example, that the Sauk and Fox ate human flesh to make themselves brave. The charge of cannibalism was common among early Indian observers, but seems to have been more myth than reality.

Although the law thus codifies two of the major precepts of white missionaries, it is clearly inspired by vehement rejection of everything white: the Shawnee were not to eat anything cooked or raised by a white person,[295] were not to sell white people provisions and were to try not to buy merchandise from them,[296] and were to return all white people's dress as well as dogs and cats not of Indian breeds to the white people from which they came.[297] Those who did not follow this code were bad people who must be put to death.[298]

Within this code, so clearly a reaction to white American culture, are several startling provisions specifically directed at women. As in the Cherokee code, abortion was prohibited and barrenness was stated to be a reason for putting away a wife.[299] Article 4 sanctions domestic abuse of women and male control of the household:

> If any married woman was to behave ill by not paying proper attention to her work . . . the husband had a right to punish her with a rod and as soon as the punishment was over, both husband and wife were to look each other in the face and laugh, and to bear no ill will to each other for what had passed.[300]

Article 5 prohibits cohabitation between Indian women and white men and orders that mixed blood children be abandoned: "All Indian women who were living with white men were to be brought home to their friends and relations, and their children to be left with their fathers, so that the nations might become genuine Indians."[301] Although not explicitly stated, this juxtaposition makes one wonder whether female independence had itself become one of the evils to overcome to effectively ward off the depredations of the whites.[302] Although

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295. *Id.* at 215.

296. *Id.*

297. *Id.*

298. *Id.* Thompson states that in 1809 a Kickapoo man was burned for refusing to give back his medicine bag.

299. *Id.* at 216.

300. *Id.* at 215.

301. *Id.*

302. Reports of the Jesuit missionaries to New France in the early seventeenth century suggest that female independence had clearly become demonized there. Selected reports from *Jesuit Relations* are reprinted in PROBLEMS IN WOMEN'S HISTORY, *supra* note 11, at 22. Faced with the disappearance of their traditional way of life and the resistance of Indian women to conversion, Indian men came to blame them for their changing world. One priest reports a council at which the men berated the women that

> It is you women . . . who are the cause of all our misfortunes, — it is you who keep the demons among us. You do not urge to be baptized. . . . You are lazy about going to prayers; when you pass before the cross, you never salute it; you wish to be independent. Now know that you will obey your husbands . . . and, if any fail to do so, we have concluded to give them nothing to eat.

Id. Upon hearing this, one young woman fled into the woods. The men searched for her and, having found her, came to the Jesuits to ask if "it would not be well to chain her by one foot; and

the "Shawnee prophet" was clearly trying to fortify his people against white invasion, he had decided that the way to do so was to adopt white-derived monotheism and male domination of women.

Measures excluding women might also be inspired by non-Indian policies that distributed scarce tribal resources among designated "members," making it convenient to limit membership along gendered lines and thereby punish women who married outside the tribe. The membership provision at issue in *Santa Clara Pueblo* seems to be one example of this. The tribal actions described in *Vezina v. United States*[303] are another. There, in an opinion whose attention to the details of the lives of women living between white and Indian worlds recalls that in *Connolly v. Wool*,[304] the Eighth Circuit ruled on the "Indian-ness" of a woman who might easily have been a descendant of Susan Pas-de-nom. The *Vezina* court overruled repeated decisions of the White Earth Chippewa that Elizabeth Vezina had abandoned her tribal membership and found that Vezina was entitled to an allotment under the Dawes Act.

To reach this conclusion, the court describes three generations of Indian women. While Elizabeth's grandfather Kah-we-tah-wah-mo was a full blood Chippewa,[305] the blood quantum of her grandmother Therese was unknown. Therese, however, "looked like an Indian women; she had black hair, which she wore down her back, wore moccasins, and, besides doing her domestic duties, did a great amount of bead work and was an Indian doctor."[306] She and her husband lived in a teepee, where the plaintiff's mother Isabel was born.

Isabel married a Canadian Frenchman at fourteen and never lived on the White Earth Reservation. However, she also lived the life of an Indian woman. She lived in a teepee during much of her life and like her mother, "wore her hair down her back, made moccasins for sale, did bead work and sold the same . . . aside from domestic duties, was an Indian doctor and midwife; she walked pigeon-toed, as most Indian women do . . . ."[307] Furthermore, she "frequently went out with others on buffalo hunts, carrying a pack on her back; she smoked a red clay pipe."[308] Even towards the end of her life in Minneapolis, one witness testified, she "looked like an Indian squaw; she wore no stockings, but in winter wore cloths wrapped about her legs."[309]

The plaintiff was born in the mixed blood community of Red River, probably the third of ten or eleven children born to Isabel Delaney.[310] Although nearly

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if it would be enough to make her pass four days and four nights without eating, as penance for her fault." *Id.*

303. 245 F. 411 (8th Cir. 1917).

304. *See supra* notes 208-20.

305. *Vezina*, 245 F. at 413.

306. *Id.*

307. *Id.*

308. *Id.* at 414.

309. *Id.* at 413.

310. When the Delaneys moved from the Indian community of Fond du Lac to the mixed

all of her brothers and sisters married mixed bloods or Indians, Elizabeth married Canadian Frenchman Joseph Vezina.[311] The court says little about Elizabeth's Indian characteristics other than that she was issued mixed blood scrip in 1863 (later declared void due to fraud in its issuance),[312] had lived in tepees, and spoke French and broken Chippewa while her mother spoke Chippewa and broken French.[313]

On March 15, 1889, three months after Congress passed an act authorizing allotment of Chippewa lands in Minnesota in conformance with the Dawes Act,[314] Elizabeth and Joseph moved to the reservation town of White Earth.[315] In 1903, Elizabeth's husband moved back to Minneapolis and died there, but she remained.[316] She moved to reservation land outside of town and built a house and two barns, a barbed wire fence, and grubbed timber and brush from one and a half acres of land.[317] By the time of the decision, Elizabeth was 88 years old and had lived on the reservation for almost thirty years.

On November 21, 1889, after negotiations with the Chippewa, the allotment act was ratified.[318] The federal commissioners charged with determining how to allot the land decided to sell unallotted pine lands and divide the money among the enrolled Chippewas. Thus, although there was more than enough land for all those claiming Chippewa membership to receive allotments, "every member of the council acquired a direct personal interest adverse to any claimant to an allotment" as further allotments would reduce the revenue due to each member from sale of the unallotted lands.[319] The Chippewa were "much divided" regarding Elizabeth Vezina's claim to be listed with the commissioners and given an allotment. White Cloud, the principal chief, made a personal investigation and was in her favor as were many others.[320] The Chippewa council, however, never voted to have her added to the original membership list and refused to hear the matter again, ensuring that she would not become legally entitled to her land.[321]

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blood community of Red River, "they first traveled with a dog team, and when they came to the river they crossed it in bark canoes, and then carried the canoes to the next lake until they got through." *Id.* at 413.

311. *Id.*

312. *Id.* at 414.

313. *Id.* Elizabeth testified at her trial through an interpreter, and many of the witnesses at the trial were in part of Indian blood and "their English [was] not of that clearness which could be desired." *Id.* at 412.

314. Ironically, the act was titled, "An act for the relief and civilization of the Chippewa Indians in the state of Minnesota." Ch. 24, 25 Stat. 642 (enacted Jan. 14, 1889).

315. *Vezina*, 245 F. at 412.

316. *Id.*

317. *Id.*

318. *Id.* at 415.

319. *Id.*

320. *Id.*

321. In 1909, the lands Isabel Vezina lived on were allotted to Pah-dub. He apparently never

Several times between 1892 and 1907, the Commissioners considered her claim for membership and allotment, alternately deciding for and against her.[322] In 1907, the Acting Commissioner of Indian Affairs wrote to the Superintendent of the White Earth Chippewa Agency requesting that he present the matter of her allotment to the White Earth Council.[323] The Superintendent did this in January, 1908, and wrote back that "[i]n order that you may know how the Indians feel regarding enrollment, I will say that no one attended this council, or appeared, except one or two chiefs."[324] When these chiefs told the Superintendent that a general council was being held that month, he asked that these applications for allotment be presented then, and "was advised that they did not care to take up any of these applications." The council later refused to have the matter brought before them. In the opinion of the Superintendent, "this old woman has rights on this reservation; there is no doubt about her Indian blood . . . . It seems to me that it would be a good lesson to the Indians to enroll this woman, when they refuse to give her case the consideration it should have."[325]

The Eighth Circuit found that Isabel Vezina and her mother had not abandoned their tribal membership. First, the tribe had not consistently found abandonment in such circumstances: "The evidence shows a considerable number of persons born off the reservation, and who reached middle life before the treaty of January 14, 1889, and who then moved to the reservation, were recognized, enrolled, and secured allotments upon the reservation."[326] More important, the court held that it "should not find upon light and trifling circumstances that an Indian has forfeited his citizenship in his tribe and [has] in no method acquired any other citizenship, but has become literally a man without a country."[327] In a distinctly patriarchal conclusion, the court found that this was even more so in case of intermarried Indian women: "It should take especially strong evidence that an Indian woman has abandoned her tribe simply by living with her husband, which she ought to do by the laws of both God and man."[328]

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lived on the lands but sold them to a non-Indian. *Id.* at 412.

322. *Id.* at 416.

323. *Id.* at 417.

324. *Id.* at 418.

325. *Id.*

326. *Id.* at 419.

327. *Id.* at 420.

328. *Id.* In an ironic epilogue, the Eighth Circuit rejected the rights of her son and daughter to remain on the land that they had occupied for twenty years. Vezina v. United States, 284 F. 695 (8th Cir. 1922). Vezina had been given an allotment by the Indian Commissioner in 1902 pending his enrollment. He built a house, a barn and granary, grubbed 38 acres, and had lived there ever since. *Id.* at 697. When his buildings burnt down in 1918, he spent $2500 rebuilding because the commissioner and he believed that he would get his land. *Id.* at 698. He was then ejected by Luckman Land Company, to whom the legal allottees sold the land. *Id.* at 695. Although Vezina was enrolled in 1920 pending the appeal of his case, neither this nor the time

In *Vezina*, tribe and court have switched places, with the tribe rejecting and the court upholding an elderly woman's rights to right to the tribal property she had lived on for years. Perhaps the Chippewa were motivated simply by greed and the desire to increase the unclaimed land available for sale, perhaps they were also soured by years of Indian women intermarrying with wealthier traders, perhaps they were even resentful of the ability of mixed bloods like Elizabeth Vezina and her children to hold on to and cultivate their lands while less assimilated Chippewas quickly lost theirs to white speculators. Whatever the reason, the Chippewa decided to exclude a woman whose mother and grandmother were Indian doctors, who had grown up in tepees, from those who counted as Indian. To teach these Indians "a good lesson," and to affirm the obligation of women to follow their husbands, the Eighth Circuit overturned.

V. Conclusion: Beyond Pocahontas

The circle is complete. The stories in this article began with the displacement of Indian women from what lawmakers saw as a male role, that of the head of a family and the cultivator of land. They continued with an image of women as vectors for assimilation, conduits for tribal property who could be easily abandoned if they retained their adherence to tribal custom and the displacement of women from the traditionally female role of motherhood in favor of the father and civilizing influence of school. They end with tribes taking up where courts and the federal government had left off, denying Indian women land, rights to participate in politics, to pass their membership to their children, to control their own reproduction, even to get angry when their husbands beat them.

In summary, the cases reveal three ways in which Indian women became a particular focus for the regulation of the status of Indians. First, there are the cases which determine the status of Indian women in their own right. Indian women possessed a degree of autonomy in public life and control over those areas designated women's work that was foreign to the newer, non-Indian culture. State and federal judges and lawmakers either failed to recognize these sources of power and treated Indian women as they would the relatively powerless white women, or dismissed aspects of this power, such as matrilineal lines of descent and the role of clanswomen in the Iroquois nations, as the products of a primitive and inferior culture.

But the case law of this period perhaps more pervasively affected women through regulating their familial relationships, particularly those of marriage and motherhood. As wives, Indian women lost power in two ways during this period. First, the courts construed the Indian custom of divorce without formalities to mean that white or Indian men could dissolve marriages with

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and money he had spent on his land were held to establish collateral estoppel for his ejectment. *Id.* at 699. His appeal of ejectment was denied.

Indian women by simple abandonment, leaving no legal obligation to the abandoned wife or her children. Second, although preventing full assimilation of white husbands into Indian communities, the courts endowed non-Indian husbands with the right to own and to dispose of the Indian wife's share of tribal property. Taken together, these lines of decision made the marriage of Indian women to white men a practice through which the Indian community could only lose.

The case law regarding Indian women as mothers also evidences the displacement of Indian women who had not fully assimilated. While the common law rule was that children would follow the status of their father, courts tended to either ignore this rule, or to assume illegitimacy of the child to deny children of Indian women and white men the privileges of their fathers. While they might evade legal rules to effect a father's wishes for purposes of inheritance law, moreover, they would take a child from his mother to educate him, or deny a tradition of matrilineal descent as the hallmark of a profligate race. Ultimately, influence over children was a power that was discouraged in the unassimilated woman's hands.

In these stories we hear the crash of two sets of conflicting values. The first is that between white and Indian needs. The more powerful white society first tried to resolve this conflict by containing the Indians on reservations and then by absorbing them. The second is that between the Indian vision of womanhood and the vision developing in American culture. In this American vision, the good woman was a passive helpmeet, placed on a pedestal by a man, but not working beside him. The Indian woman was often selected as the target for both of these points of conflict.

At the level of cultural assimilation, the autonomy of the Indian woman had to be subordinated to that of the male head of the nuclear family. From being she who worked, who controlled lines of descent, who may even have ruled politically, she was to become she who inspired others to work and who depended on others for her support. As traditional sources of power were taken from Indian men, they may also have developed their own interest in taking power from the women. At the level of physical assimilation, the very body of the Indian woman became the locus for absorption of her descendants into the white race. Intermarried, she was not only the vessel for the dilution of Indian blood, but a method by which tribal property might leave Indian hands.

It is not surprising that some women took this path, ever intermarrying until they became no more than the legendary Indian princess in some white family tree. Nor is it surprising that some Indian tribes came to resent such women, if not for their actual status as vectors for assimilation, then for the appearance of being vectors that judges, lawmakers, and "reformers" had created. What is surprising is that so many women resisted the pressure to become vectors for assimilation, remaining strong independent figures in the fight to preserve tribal integrity.

Many Indian women emerged as strong independent voices in tribal and national politics in the early twentieth century. Sioux woman Gertrude Bonnin, or Zitkala-sa, returned to her native beliefs after a Catholic and European education, and became a significant influence in the Indian New Deal.[329] Lyda Burton Conley, a Wyandot woman, in 1910 successfully fought to save the Huron Indian Cemetery in Kansas from federal destruction and became the first person to argue for the sanctity of Native American burial grounds before the Supreme Court.[330] Mohawk women successfully resisted the vote for ratification of the Indian New Deal, an action which ultimately lead to New York becoming the only state not to participate in the plan.[331] Alice Lee Jemison, a Seneca woman, was one of the most prominent activists of her generation, repeatedly testifying before Congress against the Indian New Deal and for Iroquois sovereignty.[332]

Jemison was code-named "Pocahontas" in the surveillance files the government kept on her,[333] but the contrast with her namesake is stark. Pocahontas, whoever she might have become had she lived, died at twenty-two, killed by a disease of her husband's people. It is Pocahontas, however, who is remembered in Hollywood, in pop songs, and by the white people who claim her as an ancestor. She quickly became a malleable figure of myth, perhaps helping non-Indian Americans to assuage our guilt at what we have done to her people. It is time to acknowledge the other Indian woman in American history, who collided with and sometimes broke the boxes the law was making for her.

329. *See* Alison Bernstein, *A Mixed Record: The Political Enfranchisement of American Indian Women During the Indian New Deal*, 23 J. WEST 13 (1984).

330. *See* Kim Dayton, *"Trespassers, Beware!": Lyda Burton Conley and the Battle for the Huron Place Cemetery*, 8 YALE J.L. & FEMINISM 1 (1996).

331. HAUPTMAN, *supra* note 51, at 68-69. Interestingly, another powerful Indian nation that has retained elements of its tradition of female power, the Navajo, also chose not to adopt the IRA.

332. *Id.* at 35.

333. *Id.* at 53.