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In Defense of the Indian Child Welfare Act In Aggravated Circumstances

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The Indian Child Welfare Act (ICWA) affords various protections to Indian families throughout child welfare proceedings. Among them is the duty imposed upon the state to provide rehabilitative services to families prior to the outplacement of an Indian child, or termination of parental rights. An analogous provision for non-Indians in the Adoption and Safe Families Act (ASFA) excuses rehabilitative services in "aggravated circumstances" of child abuse. The ICWA contains no such exception, and that absence has been controversial.

In 2002, the Alaska Supreme Court applied ASFA's aggravated circumstances exception to the ICWA, thereby excusing services when a father severely abused his three Native children. In 2005, the South Dakota Supreme Court addressed the same issue, but expressly refused to engrave such an exception into the ICWA. This Note defends South Dakota's position on policy grounds. It chiefly argues that an aggravated circumstances exception would do violence to the ICWA and its family preservation goals, and further that such an exception is unnecessary to protect Native children from dangerous parents.

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INTRODUCTION

When a child is removed from her home for neglect or abuse, the State must provide remedial services to the child's parents. These services seek to address the problems that caused the child to be removed in the first place, and can range anywhere from alcohol recovery support to financial management services. For cases involving non-Indians, these services are governed by the federal Adoption and Safe Families Act (ASFA), and are called “reasonable efforts.” In cases involving Indian children, however, reunification services are mandated by the Indian Child Welfare Act (ICWA), and are called “active efforts.”

Now consider a troubling scenario. A father has been convicted of severe sexual abuse of his three sons, and sentenced to nineteen years in prison. The three boys are promptly put in the custody of the State, which then moves to terminate the father's parental rights. The State argues that no reunification services are necessary since the family has been irreconcilably sundered by sexual abuse. The father, however, argues that the State must still provide rehabilitative services to attempt to maintain his family.

So now what? The State will be excused from offering services, right? If the three boys are non-Indian, then ASFA's reasonable efforts are excused. If the boys are Indian children, however, ICWA's active efforts (in almost all states) are still mandated.

The facts above are based on a 2002 Alaska Supreme Court case, J.S. v. State. J.S. was an ICWA case in which a father's parental rights to his three Indian boys were terminated after he sexually abused them. The imprisoned father appealed to the Alaska Supreme Court, arguing that the

3. Id. at 321-22 (citing 42 U.S.C. § 671(a)(15) (2000)).
6. Id.
State had failed to provide him with active reunification services as re-
quired by the ICWA. The State countered, however, that the ICWA
should not be interpreted to require services in cases involving “aggrava-
ted circumstances.” This Note addresses that conflict.

The term “aggravated circumstances,” which is derived from the
ASFA, includes: abandonment, torture, chronic abuse, sexual abuse, or any
additional circumstances defined in a particular state as “aggravated.”
When such circumstances exist, under the ASFA, states are free to termi-
nate parental rights without even considering a family service plan. In
J.S., the Alaska Supreme Court sided with the State, and ruled that even
though the ICWA provided no exception to its active efforts requirement,
those efforts should nonetheless be excepted in cases of sexual abuse.

Three years after the Alaska decision, the South Dakota Supreme
Court addressed the same question in Ex rel. J.S.B.: whether ASFA’s ag-
gravated circumstances exception should override the ICWA. There,
South Dakota reached the opposite result, holding that the ASFA did not
supersede the ICWA. The decision in J.S.B. prevented State courts in
South Dakota from summarily dismissing active efforts in ICWA cases,
even in the worst instances of abuse.

Many observers hailed J.S.B. as a victory for both the ICWA and
Indian Country. But others asked why. Why require active rehabilitative
services to parents in cases of severe sexual abuse, as in J.S., or chronic
substance abuse, as in J.S.B.? Wouldn’t children’s lives be threatened if re-
united with dangerous parents?

Clearly influenced by these concerns, the Alaska Supreme Court
justified carving its exception largely on policy grounds. Indeed, why
should Alaska agencies consider treatment plans to parents in aggravated
circumstances? Contrastingly, when the South Dakota Supreme Court
refused to create such an exception, it relied less on policy and more on
commonly-accepted rules of statutory construction, as the ICWA pro-
vides no exception to its active efforts requirement.

This Note defends J.S.B. from a policy standpoint, arguing that absent
a carefully-crafted federal amendment, ASFA’s aggravated circumstanc
esthe ICWA at 391.

7.  Id.
8.  Id.
not be provided when a parent has “[1] committed murder . . . of another child of the
or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary
manslaughter; or [4] committed a felony assault that results in serious bodily injury to the
child or another child of the parent; or [5] . . . the parental rights of the parent to a sibling
have been terminated involuntarily.” 42 U.S.C. § 671(a)(15)(D)(i)–(iii).
13.  Id. at 620.
should not apply in ICWA cases. This position is bolstered not only by the ICWA’s history and purpose, as discussed in J.S.B., but also concerns regarding ICWA compliance and the encompassing nature of the aggravated circumstances exception. This Note further argues that the lack of an exception will not endanger Indian children, nor is it unreasonable, as the standard for determining what active efforts are required is necessarily fact-specific and can be adjusted based on the circumstances.

Part I of this Note provides an overview of the Indian Child Welfare Act. The ICWA was enacted in response to a long history of federal and state policies that targeted Native children and undermined their families. The Act was designed to counter these policies by establishing certain requirements for states before Native children could be removed. Notably, the Act requires that states provide active efforts to Indian families prior to foster care placements and parental rights terminations. In this way, Congress sought to maintain Indian families where possible.

Part II briefly discusses the 1980 Adoption Assistance and Child Welfare Act (AACWA), which was the precursor to the ASFA. The AACWA created the reasonable efforts requirement, which is the reunification standard for non-Indians.

Part III discusses the 1997 Adoption and Safe Families Act, which represented a departure from its predecessor, the AACWA. The ASFA, among other things, allowed states to eliminate reasonable efforts to families in aggravated circumstances. This section shows that the respective histories, policy goals, and standards of the ICWA and ASFA are fundamentally different, so that one Act should not override the other.

Part IV examines the decisions in Alaska’s J.S. and South Dakota’s J.S.B. In J.S., the Court held, almost entirely on policy grounds, that ASFA’s aggravated circumstances trumped ICWA’s active efforts. In J.S.B., the Court leaned more heavily on rules of statutory construction to rule that the ASFA did not disturb the ICWA.

Part V argues that J.S.B. was the correct outcome, showing that the open-ended character of the aggravated circumstances exception could potentially stifle the active efforts requirement in Indian Country. Further, this section argues that the result in J.S.B. does not endanger Indian children, as the requirements for active efforts are not fixed, and are adjustable based on the circumstances. This section also shows that the ICWA and its active efforts requirement remain important, as many of the problems that led to its enactment persist today; notably, the high rate of Indian children involved in the child welfare system.

Part VI then briefly examines the possibility of a federal amendment incorporating a severe child abuse exception, and warns that such an exception, while desirable, should be carefully designed so not to unnecessarily excuse state services to Native families.
Finally, Part VII reviews options for states to revamp their active efforts requirements to prevent the occurrence of aggravated circumstances in the first place.

I. THE INDIAN CHILD WELFARE ACT

"[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 14

The ICWA is likely "one of the most important and far-reaching pieces of legislation protecting Indian tribes." 15 It was enacted by Congress in 1978 in response to the "rising concern ... over the consequences to Indian children, Indian families, and Indian tribes of abusive [state and federal] child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption and foster care placement." 16 The ICWA, therefore, was designed:

to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which [would] reflect the unique values of Indian culture, and ... provid[e] ... assistance to Indian tribes in the operation of child and family service programs. 17

The ICWA's aim was thus to limit states' power to separate Indian children from their parents, and also to provide affirmative services to help preserve Native families. 18

A. A Background

To appreciate the importance of ICWA's "minimum federal standards," it's crucial to understand the historical periods that led to its enactment. Commonly referred to as the "Boarding and Mission School Era" (1880s–1950s) and the "Indian Adoption Era" (1950s–1970s), these

periods were marked by active government efforts to remove Indian children from their families and assimilate them into the dominant White culture. It was a remarkable time, as “[p]robably never before in this country has there been such a concerted effort to transform a group of people by legally manipulating their children.”

1. The Boarding and Mission School Era

The Boarding and Mission School Era began in the mid-nineteenth century with progressive politicians, churchmen, and educators seeking to better the lives of Indians by “raising” them into civilization. Although it is contended that many of these early reformers were genuinely concerned with achieving justice for Native people, the movement was extremely ethnocentric. To them, Indians needed saving, not only from the government’s oppression, but also from “tribal languages, values, religions, societal models, communal ownership of land, [and] the aboriginal lifestyle.”

In 1867, the Commissioner of Indian Services declared to Congress that the best way to “save” future generations of Native people was to “separate the Indian children completely from their tribes.” What followed was the establishment of boarding schools to assimilate Indian children into the dominant Anglo culture. These boarding schools were characterized by “military type discipline,” and children were forbidden from using their Native languages. Reformers and government officials were especially fond of the off-reservation boarding school, which removed children from the influence of their aboriginal home environments for long periods of time.

By 1900, more than twenty thousand children were attending Indian boarding schools, and during this time many Native parents lived in terror that their children would be stolen away.

20. SOUTH DAKOTA REPORT, supra note 16, at 11. “I can remember (the welfare worker) coming and taking some of my cousins and friends. I didn’t know why and I didn’t question it. It was just done and it had always been done.” H.R. REP. No. 95–1386, at 8 (1978).
22. GIBSON, supra note 21, at 491.
23. Id.
25. Id.
26. GIBSON, supra note 21, at 432.
27. Id.
The Indian Child Welfare Act

In typical bureaucratic fashion, to protect the annual congressional appropriation of each school, agents and agency police, even United States cavalry, every autumn seized children and hauled them off to school, over their parents’ protests, thereby filling the quotas at each institution. Agents punished uncooperative parents by placing them in the reservation jail, or withholding their rations and annuities.28

Even as late as 1910, federal policies led to the kidnapping of Indian children from their families.29 For instance, “bonuses were used to encourage boarding school workers to take leave of absence and secure as many students as possible from surrounding reservations. . . . [and] these ‘kid snatchers’ received no guidelines regarding the means they could use.”30 And though Congress later addressed the kidnapping problem, Indian boarding schools still flourished, and assimilation remained the government’s key focus through the 1950s.31 “The Indian children who lived at these boarding schools were torn from their families, tribes, norms, beliefs, language, religion, and ultimately, their sense of selves” as Indians.32

2. The Indian Adoption Era

In the 1950s, as boarding schools waned, “the Bureau of Indian Affairs . . . became concerned about the number of Indian children” who faced lives of poverty on the reservation.33 This concern culminated in the establishment of the Indian Adoption Project in 1959.34 “The Indian Adoption Project was premised on the view that Indian children were better cared for in non-Indian homes,” and over 395 Indian children were so placed within the first year.35 The Indian Adoption Project’s effect then was to “place Indian children with Caucasian families far from the reservation,”36 and throughout this period, “the adoption of Indian children into non-Indian homes . . . was widespread.”37 It is also notable that little attention was paid during this time “to providing services on reservations that would strengthen and maintain Indian families.”38

28. Id.
30. Id.
31. Id.
32. Hazeltine, supra note 15, at 60.
33. Id. at 61.
35. Id.
36. Hazeltine, supra note 15, at 61
38. Id.
By the 1970's, though some of the most blatant assimilation programs had ended, Indian children were still being removed from their homes and tribes at very high rates. Now, however, they were taken "by [often] well-meaning [state] social workers" who had little to no knowledge of tribal childrearing practices. The children were then placed by state agencies in White homes.

Tribes, alarmed by these trends, argued to Congress that removing Indian children not only hurt tribes, but also the children themselves, who were unable to develop a sense of "identity within [the] tribal network." Tribal leaders maintained that Indian children were better off with their families and Native communities, where they could form a sense of Indian identity, which was important to the child's "emotional and psychological well-being."

Finally, in 1978, "after many years of congressional hearings, letters to Congress, and studies showing the widespread and unnecessary removal of Indian children," Congress passed the Indian Child Welfare Act. The legislation directly addressed the "alarmingly high percentage" of Indian children taken from their homes by non-Indian child welfare workers, and who were then "placed in non-Indian foster and adoptive homes and institutions." Congress found that "because of cultural differences and biases and the dominating authority of state courts, Indian children were too easily removed from their families and tribes altogether."

Many of Congress's findings were listed in House Report 95-1386. The report, which documented "surveys of states with large Indian populations ... in 1969 and again in 1974," was stunning. It "indicate[d] that approximately 25-35 percent of all Indian children [were] separated from their families and placed in foster homes, adoptive homes, or institutions." The Report also expressed "shock" at the disparity in placement

41. Id.
42. Id. at 61–62.
43. Id. at 61.
44. Id. at 59.
48. Id. In Minnesota, the Report found that "one in every eight Indian children under 18 years of age [was] living in an adoptive home; and, in 1971–72, nearly one in every four Indian children under 1 year of age was adopted." Id.
rates for Indian and non-Indian children.\textsuperscript{49} For example, Montana's ratio of Indian foster-care placement "[was] at least thirteen times greater" than its placement of non-Indian children.\textsuperscript{50} In "South Dakota, 40 percent of all adoptions made by the State's Department of Public Welfare . . . [were] of Indian children, yet Indians [made] up only seven percent of the juvenile population."\textsuperscript{51} And "in sixteen states surveyed in 1969, approximately 85 percent of all Indian children in foster care were living in non-Indian homes."\textsuperscript{52}

Congress was particularly concerned that the disproportionate rates of parental rights terminations of Native families was caused by an insensitivity to "Indian cultural values and social norms," leading to mismevaluations of parenting skills and to unequal considerations of such matters as parental alcohol abuse.\textsuperscript{53} Thus, Congress enacted the ICWA in an effort to undo the cultural and familial mayhem wrought on tribes by a century of discriminatory state and federal child welfare practices.

B. Requirements

The Indian Child Welfare Act was designed to prevent the unnecessary breakup of Indian families, and does so by granting special rights to tribes and parents involved in child custody proceedings.\textsuperscript{54} Among other provisions, the ICWA: (1) establishes either exclusive or presumptive jurisdiction in tribal courts; (2) grants special intervention rights to Indian tribes; (3) mandates that before an Indian parent's or custodian's rights to a child can be terminated, a finding must be made that active efforts have been made to prevent the breakup of the Indian family; and (4) guarantees that no parental rights will be terminated without a finding beyond a reasonable doubt that "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."\textsuperscript{55}

The Act also establishes a hierarchy for foster care and adoptive placement preferences for Indian children, putting the child "[first with] a member of the child's extended family; [second with] other members of the Indian child's tribe; or [third with] other Indian families."\textsuperscript{56} These preferences support the Act's goals of keeping Indian children within Native culture.

\textsuperscript{49.} Id.
\textsuperscript{50.} Id.
\textsuperscript{51.} Id.
\textsuperscript{52.} Id.
\textsuperscript{53.} H.R. REP. No. 95-1386, at 10 (1978).
\textsuperscript{54.} Hazeltine, supra note 15, at 62.
C. Active Efforts

ICWA's active efforts requirement is unique in American law. It contrasts, for example, with states' obligation to non-Indian families, where only reasonable efforts are required to receive federal funds. The active efforts requirement was designed to prevent the unnecessary breakup of Indian families involved in child custody proceedings. The ICWA provides that:

any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.

House Report 1386 explained that before 1978 families were rarely (if ever) provided remedial services prior to parental rights terminations. ICWA’s active efforts thus required state agencies to take affirmative steps to keep troubled Native families together, and, as mentioned above, there is no exception to the active efforts mandate.

Although the Act does not directly define active efforts, many states have interpreted the provision to mean that caseworkers should provide extra assistance, such as transportation assistance or culturally-relevant services to Native families, and may spend more time trying to reunify them. In Alaska, “active efforts have been interpreted to include working with parents through each step of the reunification plan, rather than requiring the parents to navigate the child welfare system on their own.” The active efforts requirement thus serves an important function in accomplishing ICWA’s goal of maintaining and strengthening Native families.

59. Id.
61. Id.
63. Andrews, supra note 1, at 92.
64. U.S. Gov’t Accountability Office Rep. 05-290, supra note 57.
Two years following the passage of the ICWA, Congress passed The Adoption Assistance and child Welfare Act of 1980.66 “The AACWA created both the goal of reunification of non-Indian children with the family and the ‘reasonable efforts’ requirement,” which remains the federal standard.67 The AACWA provided that:

[i]n order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides that . . . reasonable efforts shall be made to preserve and reunify families—(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home; and (ii) to make it possible for a child to safely return to the child’s home.68

The AACWA required that these case plans include a plan of services that would improve family conditions and facilitate returning children to their homes.69 The reasonable efforts requirement was thus the beginning of a “second efforts test” that was separate from the reunification requirements under the ICWA.70

Specifically, reasonable efforts have been interpreted as requiring services that are crafted to address the parents’ problems that led to their child being removed in the first place.71 Offered services vary by state and can include anything from drug treatment to homemaker services,72 and their aim is to rehabilitate parents so that their children might be returned home.

III. The Adoption and Safe Families Act

Today, child custody law for non-Indians is governed chiefly by the Adoption and Safe Families Act. The ASFA, enacted in 1997, represented a departure from its predecessor, the AACWA.73 “The new law was the

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67. Id.
69. Andrews, supra note 1, at 108.
70. See id.
71. See Bean, supra note 2, at 345.
72. Id. at 345–46. Examples of other services include: housing assistance, counseling, transportation, parenting education, anger management classes, mental health care, child-development classes, home visits by nurses, day care, referrals to medical care, domestic violence counseling, financial management services, alcohol recovery support, stress management services, nutritional guidance, and arrangements for visitation. Id.
73. Hazeltine, supra note 15, at 64.
congressional response to suggestions that the AACWA had resulted in children languishing in foster care too long, or moving repeatedly without finding a permanent home."\textsuperscript{7} Whereas the AACWA sought to protect the best interests of children by providing remedial services to parents and families, the ASFA subordinated the rights of parents and families "to the [ultimate] concern for the health and safety of the child."\textsuperscript{75} The ASFA provides that when "determining reasonable efforts to be made with respect to a child . . . the child's health and safety shall be the paramount concern."\textsuperscript{76} Notably, the ASFA maintained, but altered, AACWA's reasonable efforts test\textsuperscript{77} by excusing reasonable efforts in certain "aggravated circumstances."\textsuperscript{78}

A. The Aggravated Circumstances Exception

Under the ASFA and its implementing state statutes, social service agencies are relieved from providing rehabilitative services to families when aggravated circumstances are present.\textsuperscript{79} The rationale being that state agencies should not waste state resources attempting to rehabilitate parents when those parents have subjected their children to serious abuse or neglect.\textsuperscript{80} Specifically, the ASFA provides that:

reasonable efforts . . . shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that . . . the parent has subjected the child to aggravated circumstances (as defined in state law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse)\textsuperscript{81}

The aggravated circumstances exception was key to the ASFA's passage into law. A major criticism of the AACWA was the threat to the health and safety of children when reasonable efforts were made to reunite them with dangerous parents.\textsuperscript{82} This concern was voiced on the Senate floor when the ASFA was debated in Congress. As Senator DeWine argued:

\begin{footnotesize}
\begin{itemize}
  \item Id.
  \item In the Interest of D.B., III, Minor Child, 670 N.W. 2d 67, 70 (S.D. 2003).
  \item See Bean, supra note 2, at 345.
  \item Id.
  \item Bean, supra note 2, at 326.
\end{itemize}
\end{footnotesize}
Too often, reasonable efforts, as outlined in the statute, have come to mean unreasonable efforts. It has come to mean efforts to reunite families which are families in name only. I am speaking now of dangerous, abusive adults who represent a threat to the health and safety and even the lives of these children. This law has been misinterpreted in such a way that no matter what the particular circumstance of a household may be, it is argued that the State must make reasonable efforts to keep the family together and to put it back together if it falls apart. Clearly, the Congress of the United States in 1980 did not intend that children should be forced back into the custody of adults who are known to be dangerous and known to be abusive.  

The ASFA, by excusing rehabilitative services in aggravated circumstances, answered these criticisms. The term “aggravated circumstances” was left mostly vague to be defined by the states, and this ambiguity, as explained later, led to a clash between the ICWA and the ASFA.

B. ICWA vs. ASFA

The ICWA and ASFA are fundamentally different, their distinctions evident in their respective policy goals and standards.

1. Policy Distinctions

Congress’s motivations in enacting the ICWA and ASFA were poles apart in most respects. While the ICWA sought to ensure the best interests of Indian children by maintaining and strengthening their familial, tribal, and cultural ties, the “ASFA identifie[d] ‘permanency’ as a major consideration in promoting the best interests of children.” The ASFA accomplishes its goal of permanency by, among other things, making it easier to terminate parental rights to “free” up children for adoption. Thus the result of the ASFA has been to greatly increase the number of parental rights terminations generally. For instance, after the Alaska legislature redrafted its child custody laws to comply with the ASFA in 1998, “the number of statewide parental rights termination proceedings more than doubled, and the number of [actual] terminations . . . increased dramatically:

83. Hazeltine, supra note 15, at 65 (citing 143 CONG. REC. S.12669 (1997) (Comments of Sen. DeWine)).
84. Id. at 64.
86. Hazeltine, supra note 15, at 76.
87. Id.
151 parental rights terminations in 1997; 210 in 1998; 260 in 1999; and 564 in 2000.88

Furthermore, many states have interpreted the ASFA as limiting states' responsibility to provide reunification efforts, which has meant that state agencies have reduced the rehabilitative services they offer.89 As the New Jersey Supreme Court summarized, "[o]n the federal level, the recent trend has been to limit the reasonable efforts social service agencies must undertake to reunite families."90

These trends stand in stark contrast to the policy goals of the ICWA, which were aimed at rehabilitating and preserving Native families.91 Whereas the ASFA was enacted to promote adoption and permanency, the ICWA is instead part of a "congressional 'restitution policy,'" enacted to help maintain and repair Native families and communities after a century of government actions aimed at destroying them.92

Furthermore, the ICWA demands a more complex look at the best interests of Indian children. As one observer noted, the concept of best interests in ICWA cases requires looking not only at the child's psychological bond with the parent, but also considering the interests of the family and the community.93 The ICWA acknowledges that Indian child-rearing is unique.94 In enacting the ICWA, Congress made findings that the best interests of Indian children were inextricably linked with the welfare of their families and tribes.95 So while the health and safety of the child is clearly crucial, the child's best interests may not necessarily be best served by a swift termination of parental rights.96

2. A Higher Threshold

ICWA's active efforts and ASFA's reasonable efforts are separate standards, and while both provisions aim to rehabilitate families, ICWA's

88. Id. at 70.
89. See Bean, supra note 2, at 334.
90. Id. (citing In re Guardianship of D.M.H., 736 A.2d 1261, 1273 (N.J. 1999).
92. Maltby, supra note 46, at 215.
93. See id. at 218–19.
94. Id. at 217.
95. See id. at 217–18.
96. Studies showed that Indian children often suffered emotional harm as a result of being taken from Indian families and placed in white homes where they lost their sense of "Indian" (and overall) identity. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989) (quoting Indian Child Welfare Program: Hearing before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, 93rd Cong. 46 (1974) (statement of Dr. Joseph Westermeyer, Dep't of Psychiatry, Univ. of Minn.).
active efforts demand a more assertive approach.\textsuperscript{97} As Iowa law has interpreted it, active efforts require “a [more] vigorous and concerted level of casework beyond the level that typically constitutes reasonable efforts.”\textsuperscript{98} Iowa law further provides that “reasonable efforts shall not be construed as active efforts.”\textsuperscript{99}

In Alaska, the courts have adopted three substantive distinctions between active and reasonable efforts. One scholar summarized Alaska’s active efforts standard as:

affirmative effort[s] to offer programs and services to facilitate reunification; as simply stating the need for the parent to take advantage of and making the parent aware of such services is insufficient. Second, ‘active efforts’ is a more stringent standard than ‘reasonable efforts.’ Finally, there is a distinctly Indian character to active efforts; therefore, the State must search for reunification services uniquely offered by the Indian community itself.\textsuperscript{100}

Since the ICWA’s overall goal is family preservation, these intensive family reunification requirements make sense.

Another important distinction between the two Acts, of course, is that the ICWA provides no exception to the active efforts requirement.

IV. State Litigation

The ICWA demands that states make active efforts findings in all cases, even in aggravated circumstances. This has been controversial. In fact, the requirement has been challenged in several states, perhaps most notably in Alaska and South Dakota.

A. The J.S. Decision

In \textit{J.S. v. State}, the Alaska Supreme Court held that ICWA’s active efforts were not required to an Indian father after he was convicted of sexually abusing his three sons.\textsuperscript{101} The abuse in \textit{J.S.} was severe.\textsuperscript{102} The trial

\textsuperscript{99} Id.
\textsuperscript{100} Andrews, supra note 1, at 87.
\textsuperscript{101} J.S. v. State, 50 P.3d 388, 388 (Alaska 2002).
\textsuperscript{102} See id. at 389–90. The father was convicted of four counts of first degree sexual abuse, which included charges of both digital and penile penetration. Id.
court sentenced him to nineteen years in prison with four years sus-
pended, and the Alaska Court of Appeals affirmed.\textsuperscript{103}

With the father in prison, the State petitioned for the termination of
his parental rights to his three boys, and the trial court ruled beyond a
reasonable doubt that the terminations were appropriate.\textsuperscript{104} The court also
found, however, that the State failed to offer any remedial or rehabilitative
services as required by the ICWA.\textsuperscript{105} In response, the State developed a
case plan that required the father to admit to the charges of his indict-
ment, take responsibility for his behavior, write a letter of apology to each
of his three sons, direct his attorneys to terminate his appeals, and enroll
and be accepted into a sex offender treatment program.\textsuperscript{106} The father re-
fused to admit his guilt or cease his appeals, and thus rejected the plan.\textsuperscript{107}
The trial court then found that active efforts were satisfied, and the fa-
ther's rights to his three sons were terminated.\textsuperscript{108}

The father appealed the terminations to the Alaska Supreme Court,
arguing that the State's case plan didn't satisfy ICWA's active efforts.\textsuperscript{109} The
State countered that active efforts were met, and further argued that even
if they were not met, ICWA should not be interpreted as requiring active
efforts "once a family is irrevocably sundered by parental sexual abuse."\textsuperscript{110}

In addressing the question, the Court initially observed that the
State's duty under the active efforts requirement is not affected by a par-
ent's motivation or prognosis before remedial efforts have commenced.\textsuperscript{111}
Thus, no matter how dire the circumstances of abuse, or weak the pros-
spects for reunification, active efforts are never summarily excused.
Nevertheless, the Alaska Supreme Court ruled that active efforts were not
required, and justified its departure from the ICWA with the ASFA.\textsuperscript{112}

[The ASFA] convinces us that it is the policy of Congress to
not require remedial measures in situations where a court has
determined that a parent has subjected his or her child to sex-
ual abuse . . . [and] [a]lthough this case is not governed by
ASFA, that act is useful in providing guidance to congressional
policy on child welfare issues. It suggests that in situations of
adjudicated devastating sexual abuse, such as this one, a person's

\begin{footnotes}
\footnotetext[103]{Id. at 390.}
\footnotetext[104]{Id.}
\footnotetext[105]{Id.}
\footnotetext[106]{Id.}
\footnotetext[107]{Id. at 390–91.}
\footnotetext[108]{Id. at 391.}
\footnotetext[109]{Id.}
\footnotetext[110]{Id.}
\footnotetext[111]{Id.}
\footnotetext[112]{Id. at 392.}
\end{footnotes}
fundamental right to parent is not more important than a child's fundamental right to safety.\textsuperscript{113}

The Court then held that ASFA's aggravated circumstances trumped ICWA's active efforts in cases of sexual abuse.\textsuperscript{114}

B. The J.S.B. Decision

Almost three years later, the South Dakota Supreme Court addressed the same question. The Court there, though, reached the opposite result.

J.S.B. involved a young boy, J.S.B., who was eligible for membership in both the Oglala Sioux and Cheyenne River Sioux Tribes. Born in 1999, J.S.B. had been removed from his parents three times by 2002.\textsuperscript{115} He was first adjudicated abused and neglected in 2000, after an investigation confirmed that the mother had been using both marijuana and alcohol and that the father had left J.S.B. in his mother's care.\textsuperscript{116} There was also evidence of past domestic violence and chemical dependency.\textsuperscript{117}

The Department of Social Services ("DSS") provided various services to the father, including anger management classes and parenting lessons, until he gained full legal custody of J.S.B. in 2001.\textsuperscript{118} During the next year, J.S.B.'s father cared for him, purchased a home, and was gainfully employed.\textsuperscript{119} J.S.B.'s father also "took J.S.B. to sweats and sun dances, ensuring that J.S.B. would be acquainted with tribal ways and ceremonies."\textsuperscript{120} But J.S.B.'s father again lost custody to him in 2002 when he was found highly intoxicated and walking down the street with J.S.B. lagging sixty to seventy feet behind, the father "yelling at J.S.B., age two, to keep up with him."\textsuperscript{121} DSS then contacted the mother and gave her physical custody.\textsuperscript{122} Shortly after, though, the mother was arrested for driving under the influence, and DSS placed J.S.B. in foster care.\textsuperscript{123}

After a series of unsuccessful communications between DSS and J.S.B.'s father, an abuse and neglect petition was filed in August 2002.\textsuperscript{124} The petition alleged that the ASFA applied and rehabilitative services

\begin{footnotes}
\item[113.] Id.
\item[114.] Id.
\item[116.] Id. at 613.
\item[117.] Id.
\item[118.] Id.
\item[119.] Id.
\item[120.] Id.
\item[121.] Id. at 613–14.
\item[122.] Id. at 614, n.1.
\item[123.] Id.
\item[124.] Id.
\end{footnotes}
were not required.\textsuperscript{125} Then, in a December 2002 hearing, the trial court agreed that the ASFA “applie[d] and [DSS was] under no obligation to provide services to try and reunite the minor child with his parents.”\textsuperscript{126} Finally, at the final dispositional hearings in 2003, the court terminated the rights of both parents, and found that (1) DSS had made reasonable and active efforts in the case, and (2) that ASFA applied.\textsuperscript{127} J.S.B.’s father appealed the termination to the South Dakota Supreme Court, arguing, among other things, that the trial court erred when it held that the ASFA overruled provisions of the ICWA.\textsuperscript{128}

The South Dakota Supreme Court upheld the trial court’s termination of the father’s parental rights, and also upheld its finding that DSS had made reasonable and active efforts.\textsuperscript{129} But the Court rejected the lower court’s conclusion that the ASFA superseded the ICWA.\textsuperscript{130} As the Court explained, Congress had “assumed the responsibility for the protection and preservation of Indian tribes and their resources,”\textsuperscript{131} and that ICWA’s policy goals were different from the ASFA’s.\textsuperscript{132} Whereas the ICWA sought to ensure that Indian children “retain[ed] familial, tribal, and cultural ties,”\textsuperscript{133} the ASFA identified permanency as a major consideration, and thus excused states from providing services in circumstances where reunification seems doubtful.\textsuperscript{134} Unlike the ASFA, the Court explained, the ICWA provides no exception to its active efforts obligation.\textsuperscript{135}

The Court then turned to the State’s contention that ASFA’s aggravated circumstances should nonetheless trump the ICWA. The State specifically cited two South Dakota statutory provisions that excused reasonable efforts to families. These included “a parent who [1] [h]as a documented history of abuse and neglect associated with chronic alcohol or drug abuse,” and [2] a parent who “[h]as exposed the child to or demonstrated an inability to protect the child from substantial harm or the risk of substantial harm . . . [and] the child or another child has been removed from the parent’s custody because the removed child was adjudicated abused and neglected by a court on at least one previous oc-

\begin{itemize}
  \item \textsuperscript{125} Id.
  \item \textsuperscript{126} Id. at 615.
  \item \textsuperscript{127} Id.
  \item \textsuperscript{128} Id.
  \item \textsuperscript{129} Id. at 621.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id. at 616.
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} Id.
  \item \textsuperscript{134} Id. at 617.
  \item \textsuperscript{135} Id.
\end{itemize}
The State argued that under these provisions active efforts should be excused. The Court disagreed, explaining that the ICWA clearly offered no exception to the active efforts requirement, and then applied well-accepted rules of statutory construction that dictated that the ICWA provisions control.

The State also pointed to Alaska’s decision in J.S. v. State, arguing that the decision there lent support to the conclusion that the ASFA modified the ICWA. But the South Dakota Court “respectfully disagree[d] with the Alaska Supreme Court,” noting that the Court itself had acknowledged that the ASFA was not controlling in an ICWA case, and that its remarks on the point were “dicta.” The J.S.B. Court then held that since “ASFA [did] not override ICWA . . . that the trial court erred in ruling that DSS was relieved of making active efforts to reunite J.S.B. with his father.”

C. Reaction to J.S.B.

Many who followed J.S.B. in Indian Country applauded the decision. One activist quoted in Oklahoma’s Native American Times called the case a victory both for the Indian Child Welfare Act and for “Indian people who are trying to keep families together.”

Support for J.S.B., however, wasn’t necessarily reflective of the belief that every Indian parent, no matter the circumstances, should get a second chance. Indeed, the intervening tribes in J.S.B only joined the father on the issue of whether the ASFA superseded the ICWA, and not in his second contention that DSS’s efforts were not “active” as required by the ICWA. This is despite the fact that DSS’s efforts arguably were not active. Instead, J.S.B. was likely hailed as a victory because it prevented
an ICWA exception that would have done violence to the active efforts requirement, and weakened the Act itself by making it vulnerable to future state exceptions.

V. J.S.B. WAS THE CORRECT OUTCOME

Judicial awareness and the continued viability of the ICWA are crucial, as “[i]t is mere existence naturally forces judicial recognition of Native American concerns.” J.S.B. was the correct outcome because it prohibited state-defined exceptions to active efforts that could have severely limited that provision’s potency.

A. The Problem with Aggravated Circumstances

Whether ASFA’s encompassing view of aggravated circumstances is good policy for troubled families is debatable. However, allowing state courts to deny rehabilitative services so easily in ICWA cases is certainly not appropriate.

The primary concern is that the definition of “aggravated circumstances” is amorphous. The ASFA explicitly lists “abandonment”, “torture”, “chronic abuse”, and “sexual abuse” as examples of aggravated circumstances, but does not define those terms.

Further, states can create any additional aggravated circumstances they deem necessary. The result has been a laundry list of aggravated circumstances used throughout the U.S., some that fall particularly hard on American Indians.

not made to the level that they could or should have been. But the important thing is that the ruling was not allowed to stand...”). Id.

146. Maltby, supra note 46, at 220.
149. See NATIONAL CONGRESS OF STATE LEGISLATURES, Child Welfare: Aggravated Circumstances, available at http://www.ncsl.org/programs/cyf/aggravat.htm. The NCSL lists dozens of categories of aggravated circumstances utilized by various states, including: “abandonment”; “torture”; “chronic abuse”; “physical abuse”; “assault or battery”; “rape, sexual assault or other sexual abuse”; “parental substance abuse”; “failure to comply with or make progress under treatment plan”; “parent cannot be located after diligent search”; “mental illness or deficiency precluding parent from caring for child, even with services”; “child previously removed due to physical or sexual abuse, was returned and has now been removed again because of physical or sexual abuse”; “serious or chronic neglect”; “child removed on at least two prior occasions”; “services offered, and parent still unable to protect child”; “parental incarceration or institutionalization”; “mental or emotional abuse”; “child conceived during sex offense”; “kidnapping or abduction of child”; “parent declines services”; “crimes generally”; “another child physically or sexually abused or assaulted”; “general descriptors of conduct or harm”; “violent crimes against parent of child”; “other crimes or status”; and “court discretion.” Id.
Notably, six states excuse services based on a parent’s abuse of drugs or alcohol and based on their refusal or failure of treatment.\textsuperscript{150} South Dakota, for example, excuses services when a parent “has a documented history of abuse and neglect associated with chronic alcohol or drug abuse.”\textsuperscript{151} Since substance abuse is widespread in Indian Country, and 70–90 percent of child abuse cases there involve alcohol,\textsuperscript{152} South Dakota’s provision could potentially eviscerate the active efforts requirement. Indeed, as noted by the Oglala Sioux Tribe in \textit{J.S.B.}, a mere examination of ICWA cases argued before the South Dakota Supreme Court show numerous instances where a parent’s alcohol dependence was the principal basis for the removal of children.\textsuperscript{153} And since the ICWA was enacted to protect Indian families from state abuses, it makes little sense to allow states to so easily ignore ICWA’s requirements.\textsuperscript{154}


\textsuperscript{152} \textit{Center on Child Abuse and Neglect, University of Oklahoma Health Sciences Center, IHS/BIA Child Protection Handbook} 4 (2005), \textit{available at} \url{http://devbehavpeds.ouhsc.edu/assets/pdf/CPT/relationship%20betwn%20ca%20&%20sa-ppt.pdf}.

\textsuperscript{153} Intervenor Oglala Sioux Tribe’s Brief at 23, \textit{Ex rel. J.S.B., Jr., Minor Child}, 691 N.W.2d 611 (S.D. 2005) (No. 22907), 2003 WL 24090901 (citing \textit{In the Interest of D.B., III, Minor Child}, 670 N.W. 2d 67 (S.D. 2003); \textit{ex rel. D.M.}, 661 N.W.2d 768 (N.D. 2003); \textit{ex rel. S.G.V.E.}, 34 N.W.2d 88 (S.D. 2001); \textit{In re S.D.}, 402 N.W.2d 346, 346 (S.D. 1987). The Oglala Sioux Tribe argued that if the aggravated circumstances exception had been applied here, these “parents would not have been entitled to active efforts to rehabilitate them.” Intervenor Oglala Sioux Tribe’s Brief at 23, \textit{Ex rel. J.S.B., Jr., Minor Child}, 691 N.W.2d 611 (S.D. 2005) (No. 22907), 2003 WL 24090901. Peg Eagan, attorney for the Cheyenne River Sue Tribe, predicted that had J.S.B. allowed South Dakota’s substance abuse provision to trump ICWA’s active efforts, it would certainly have increased the number of parental rights terminations of Indian parents. Steinberger, \textit{supra} note 145.

\textsuperscript{154} “Contributing to the problem [that led to ICWA’s passage was] the failure of State officials, agencies, and procedures to take into account the special problems and circumstances of Indian families and the legitimate interest of the Indian tribe in preserving and protecting the Indian family as the wellspring of its own future.” \textit{Miss. Band of Choc-taw Indians v. Holyfield}, 490 U.S. 30, 45 n.18 (1989) (quoting 124 \textit{Cong. Rec.} 38103 (1978) (letter from Rep. Udall)).
Would a judicially-created aggravated circumstances exception protect Indian children? Does the lack of one endanger them? The answer to both questions is no. Just as in non-Indian cases, when an Indian child is removed from her parents, Courts make fact-specific, careful determinations before reuniting them. Nothing in the active efforts provision, or the ICWA itself, requires that courts reunite children with dangerous parents. Instead, the active efforts standard serves as a procedural safeguard to ensure that state courts give extra consideration, and, where possible and appropriate, additional services, to Native families.

It is important to note that there is no single standard for active efforts. The types of services offered, and the extent to which they are offered, vary widely. A parent’s situation, whether they are incarcerated, severely mentally ill, or generally unwilling to participate in treatment, will obviously play a role in determining the sufficiency of the state’s services. J.S.B., again, provides a helpful example.

There, the father argued that the services provided by DSS fell far short of the active efforts required by ICWA. In analyzing the challenge, the Court explained that “[w]hether DSS complied with the ‘active efforts’ requirement of ICWA is a mixed question of fact and law.” The Court then reviewed DSS’s history with the father, and found that the social worker did provide active efforts under the circumstances. The Court found that DSS had attempted to contact the father several times, but was hindered by the fact that he had “voluntarily absented himself and could not be located.” The father admitted that he had been on the reservation for several months and had not contacted DSS, and that he was later arrested. A DSS social worker then met the father in prison, and offered him a “Family Services Agreement,” which he signed. The father then failed to meet the requirements of the agreement, and ap-

155. Andrews, supra note 1, at 92.
156. See e.g., A.M. v. State, 891 P.2d 815 (Alaska 1995) (holding that doubtful prospects of reunification are no excuse for not providing active efforts, but incarceration, or a parent’s non-responsiveness can be taken into account), overruled on other grounds; In re Nicole B, 927 A.2d 1194 (Md. 2007) (ruling that the active efforts required to a mentally ill Indian mother depended not only on the particular facts of the case, but also on what resources the State Department has). See also Andrews, supra note 1, at 95 (explaining that in Alaska, courts have generally found that the active efforts standard was met when the Department offered services but the parent showed an unwillingness to accept parental duties).
158. Id.
159. Id.
160. Id.
161. Id.
162. Id.
The Indian Child Welfare Act appeared at a later review hearing intoxicated. The Court then held that "when [active] efforts prove to be 'unsuccessful,' they are no longer re-
quired." Arguably, DSS's efforts were not active, as the services there were neither very assertive nor culturally relevant. Still, J.S.B. serves as an example of how courts take several factors into account to determine what active efforts are appropriate under the circumstances.

Of course, one concern is that state agencies will reduce services too frequently, effectively short-changing Native families by claiming more often than necessary that active efforts would be futile. A similar issue has been raised in the ASFA context. As one Court of Appeals warned, "the appearance of futility may be furthered by agency acts or omissions," and thus trial courts should "be cautious in finding that reasonable efforts would have been futile where an agency ignores a natural parent." This illustrates that even without an aggravated circumstances exception, state trial courts and agencies still wield significant control in the process. The lack of an exception, perhaps then, at the very least, forces state courts to think harder about ICWA's active efforts, which in itself is a positive outcome.

C. The Continued Need for the ICWA, Active Efforts

J.S.B. is still the only state high court to rebuff the contention that the ASFA superseded certain provisions in the ICWA. Had the State prevailed in J.S.B., the active efforts requirement would have been weakened, and the ICWA itself would have become more vulnerable to future state exceptions. The ICWA remains important because many of the problems that led to its enactment are still prevalent; notably, the high rate of Indian children involved in the child welfare system.

Today, Indian children are nearly three times as likely to be placed in out-of-home care than Caucasian children. In Alaska, where the situation is particularly bad, nearly one in ten Indian children are reported to the State as possibly mistreated. Alaska records further show that in 1996, half of the children taken from their parents were Indian, although

163. Id.
164. Id. at 621.
165. Steinberger, supra note 145 (Cheyenne River Sioux Tribe attorney arguing that services offered to D.B.'s father were not active enough).
166. Bean, supra note 2, at 340.
167. Id. (quoting In re Norris, Nos. 00CA038, 00CA041, 2000 WL 33226187, at *5 (Ohio Ct. App. Dec. 12, 2000)).
169. Lisa Demer, Focus Falls on Native Kids—Foster Care: They are Far More Likely than Whites to be Taken from Parents, ANCHORAGE DAILY NEWS, Sept. 1, 2002, at B1.
Indians make up only a quarter of the population, and as of July 1, 2002, that proportion jumped to sixty percent.

If properly enforced, ICWA's active efforts could help curb these trends. Scholars, though, note that states often don't increase their efforts on behalf of Indian parents. Indeed, the evidence indicates that the ICWA is now, and has always been, "the victim of entrenched state court hostility." ICWA workers continually complain that state welfare agencies either (1) do not know about ICWA requirements, (2) know about the requirements, but do not increase their efforts, or (3) intentionally ignore the requirements. Reports of cultural bias, too, continue to emerge.

And among the many under-enforced ICWA provisions, the active efforts requirement has been particularly neglected. In a recent Government Accountability Office survey, several tribal leaders complained that "state caseworkers simply refer parents to services without providing any additional assistance, essentially providing the same level of services as they would for a non-American Indian family."

Precedents like J.S.B. are helpful, then, because they demand that states at the very least pay attention to the ICWA and active efforts.

170. Id.
171. Id.
172. See, e.g., Andrews, supra note 1, at 85 (arguing that the Alaska Supreme Court "has consistently applied a single standard for both active and reasonable efforts").
174. U.S. Gov't Accountability Office Rep. 05-290. See also Steinberger, supra note 143 ("[w]e see time and time again where the states do not recognize [the ICWA] as a federal law .... We observe in court, and hear social workers treat ICWA as if it were a minor obstacle that they have to get around for child placement. We are still trying to educate judges, lawmakers and social workers that ICWA was put in place to preserve and bring back our extended family system that was nearly destroyed through adoption and foster care.") (quoting Sandy White Hawk).
175. Demer, supra note 169, at B1. One state social worker in Alaska called a Native family's home messy because of drying fish, laundry hanging in the living room, and puppies on the porch, said Jamison Cole of the Eklutna Center, which works with Native families involved with the Division of Family and Youth Services. Id; See also State of Michigan Department of Human Services, Report from the Michigan Advisory Committee on the Overrepresentation of Children of Color in Child Welfare 20 (2006) [hereinafter Michigan Report] (recommending that state social workers undergo additional cultural sensitivity training to decrease the high outplacement of minority children in general).
VI. Amending the ICWA

While judicially-created exceptions are clearly problematic, a federal aggravated circumstances amendment to the ICWA could potentially provide a better solution. Federal legislators should tread carefully, however, to avoid undermining active efforts. First, tribes should be consulted to gain an understanding of what exceptions should be included, and what exceptions could potentially be too broad (e.g., chronic alcohol abuse). Further, any exceptions should include strict federal definitions, which would avoid the problem of states providing their own over-inclusive ones. A federal amendment, then, containing carefully selected and strictly defined exceptions, would allow states to automatically forego treatment in truly heinous instances of abuse as in J.S., and yet require services when an Indian family could still be assisted. Any amendment less carefully crafted, however, could lead to problems.

For instance, if Congress excluded all state exceptions and simply applied those explicitly listed in the federal ASFA (e.g., abandonment, torture, chronic abuse, sexual abuse, etc.), without defining those terms, active efforts could be subverted. This is because, as mentioned above, the exceptions listed in the ASFA were left vague to be defined by states. Thus, terms like “chronic abuse” would inevitably become an umbrella for situations of “chronic parental substance abuse,” and therefore still allow states to summarily dismiss treatment in cases where families might still be helped. Any federal amendment then should involve tribal input, and include only carefully-defined federal terms.

VII. The Future of Active Efforts

In 2005, the State of Michigan appointed a special advisory committee to gather data regarding the disproportionate representation of minorities in the child welfare system. The committee found that Indian children, as well as other minorities, were still largely overrepresented. The Committee then developed several recommendations which it submitted to the State Legislature. These included, among others, 1) the expansion of “innovative prevention and family support programs” to minority families, and 2) ensuring “culturally proficient practices” among State social workers.

As J.S.B. influences other states, and the active efforts provision becomes more difficult to ignore, the challenge for states and tribes, as the
State of Michigan recognized, will be to develop more effective, culturally relevant services. Active efforts shouldn’t only go so far as assertive treatment programs to parents. Instead, they should be as ambitious and creative as the ICWA itself, operating to both prevent aggravated circumstances from occurring, and serving families when the worst cases do emerge.

To prevent the occurrence of aggravated circumstances, states and tribes might begin by focusing services at the front-end of the child welfare system. The Cook Inlet Tribal Council in Alaska exemplifies this approach. Council workers there serve as the first responders to some minor reports made to Alaska welfare agencies involving Native children. In the past, some of these reports, usually involving neglect, were shelved by State agencies without anyone checking. "The families later may have experienced even worse problems." Now, according to Council records, "about 450 families have gotten assessments and help through the program," which seeks to bolster families with "housing, counseling, job opportunities—all areas of their life." The “main goal is to try to keep the family intact.” By addressing domestic problems at the front-end, the Cook program has successfully assisted and preserved Native families, which is consistent with the ICWA’s goals.

The types of services offered should also be carefully considered. Family group conferencing, for one, has been suggested as a front-end service that could help rehabilitate troubled Native families. Family group conferencing allows the extended family and tribal community members to come together to discuss the wellbeing of the child, which incorporates the near-universal indigenous understanding that everyone

182. See Mimi Laver, Reconciling ASFA and ICWA, 21 ABA CHILD LAW PRACTICE 91 (2002–03). “As in any child welfare case, frontloading services to the family improves the chances of a safe and permanent reunification. In the case of an Indian child, finding culturally appropriate services and delivering them promptly is an important part of providing active efforts to the child and her family and increases the chance of an agreeable permanent outcome.” Id.
184. Id.
185. Id.
186. Id.
187. Id.
188. Id.
189. Id. (internal quotations omitted).
190. Hill, supra note 65, at 90. The 2004 South Dakota ICWA Commission reported that the state and at least two tribes have recently entered into agreements to implement “Group Family Decision Making to families involved with Child Protection Services.” South Dakota Report, supra note 16, at 93. The goal is to “facilitate the preservation and stability of families by providing a forum for families to make plans that are designed to ensure the safety, permanency, and well-being of their children and youth when the child has entered or is at risk of entering the child welfare system.” Id.
The Indian Child Welfare Act shares responsibility for children. This holistic approach is seen by many as running counter to the existing adversarial child welfare system.

It is sad, though, that truly heinous abuse can never be fully prevented, and in some cases, like J.S., states will confront situations where services to a parent will do little to maintain the Indian family. In those situations, as discussed above, state courts will create their own constructive exceptions to active efforts by claiming that services would be futile. But interestingly, even in many of those instances, active efforts can still be reasonably maintained by shifting services to other Indian family members, as opposed to excusing them. As one scholar suggested:

[S]ince ICWA and Indian cultures define family as much broader than just parents and children, ICWA would not require active efforts to parents who are incapable of safely caring for the child, but may require that those efforts be targeted at other family members who may be more appropriate. Under ICWA, preserving families is not always the same thing as preserving parental rights.

By shifting services to other extended family members, and thus preventing the breakup of the Indian family, the overall purpose of the ICWA is served.

CONCLUSION

The lack of an aggravated circumstances exception in the ICWA will not cause Indian children to be reunified with dangerous parents. As demonstrated in J.S.B., a judicial determination of the sufficiency of active efforts is inherently fact-specific, and courts have an obligation to keep dangerous parents apart from their children in any event.

The lack of an exception, instead, strengthens the ICWA and its goals. It safeguards and bolsters active efforts, and forces state courts to take better notice of the ICWA, a federal Act wholly separate from the ASFA, with its requirements of additional, culturally-sensitive services to Native families.

191. Id.
192. Id.
193. Laver, supra note 182, at 91 (emphasis added).