

CULTURAL INTEGRITY AND AMERICAN INDIAN EDUCATION

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The Pretty Colored Snake**

A long time ago there was a famous hunter who used to go all around hunting and always brought something good to eat when he came home. One day he was going home with some birds that he had shot, and he saw a little snake with all pretty colors all over it, and it looked friendly too. The hunter stopped and watched it for a while. He thought it might be hungry, so he threw it one of his birds before he went on home.

A few weeks later he was coming by the same place with some rabbits he had shot, and saw the snake again. It was still very beautiful and seemed friendly, but it had grown quite a bit. He threw it a rabbit and said "hello" as he went on home.

Some time after that, the hunter saw the snake again. It had grown very big, but it was still friendly and seemed to be hungry. The hunter was taking some turkeys home with him, so he stopped and gave the snake a turkey gobbler.

Then one time the hunter was going home that way with two buck deer on his back. By this time that pretty colored snake was very big and looked so hungry that the hunter felt sorry for him and give him a whole buck to eat. When he got home he heard that the people were going to have a stomp-dance. All the Nighthawks came, and that night they were going around the fire, dancing and singing the old songs, when the snake came and started going around too, outside of where the people were dancing. That snake was so big and long that he stretched all around the people and the people were penned up. The snake was covered all over with all pretty colors and he seemed friendly; but he looked hungry too, and the people began to be afraid. They told some boys to get their bows and arrows and shoot the snake. Then the boys got their bows. They all shot together and they hit the snake all right. That snake was hurt. He thrashed his tail all around and killed a lot of the people.

They say that snake was just like the whitemen.

INTRODUCTION

Every few years the American public is indignantly shocked to discover that there are "forgotten Americans" submerged in the territorial vastness of the country: citizens who are untouched by the bounty or the

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** SPADE & WALKER, CHEROKEE STORIES 22-23 (1966).

business of the United States of America, who are sick, hungry, illiterate, politically and socially impotent—and invisible.¹ These people live in various kinds of environmental deprivation, to varying degrees. The American Indians are one such group of citizens² and the spectacle of Indian education is one such deprivation—a deprivation now the subject of another periodic revelation to the American public.³

This article is primarily concerned with the problems of American Indian education, but will also deal with the more general problem of maintaining the cultural integrity of ethnic minorities and preserving cultural pluralism in the face of great pressures for cultural homogenization.

This writer's concern with American Indian education was first motivated by the vociferous demands and complaints of some of the Negro

¹ It is thought unnecessary here to document the facts which the War on Poverty has succeeded in making generally known.

The term "invisible" is used intentionally to evoke Ralph Ellison's fortunate phrase from his book, *INVISIBLE MAN* (1952). All "forgotten" groups share, to some degree, the invisibility of the Negro. They, like him, are discriminated against because they are all-too-identifiable—and yet remain "unseen" when their humanity is at issue.

² To speak of the American Indians as a "group" is something of an oversimplification. The Bureau of Indian Affairs [hereinafter abbreviated BIA] recognizes at least 100 Indian tribes with enrollment in BIA schools, and each tribe may have different clans or sects that vary markedly from each other. U.S. DEP'T OF INTERIOR, *STATISTICS CONCERNING INDIAN EDUCATION, FISCAL YEAR 1968 35-36* (1968) [hereinafter cited as *STATISTICS CONCERNING INDIAN EDUCATION 1968*]. In 1962, 350 distinct "groups" of Indians, speaking more than 150 "languages," populated the country. SENATE COMM. ON THE JUDICIARY, *CONSTITUTIONAL RIGHTS*, S. REP. No. 1455, 87th Cong., 2d Sess. 20 (1962).

There are many definitions of the designation "Indian," and the "Indian" population at any given moment depends upon the definition used. The BIA defines an "Indian" as having "one-fourth or more degree of Indian blood." *STATISTICS CONCERNING INDIAN EDUCATION 1968, supra* at 4. Accordingly, it listed the Indian population in 1962 as 367,179. The Census Bureau also includes as "Indians" those "regarded as an Indian in the community in which he lives." Their 1962 estimate was 552,220. S. STEINER, *THE NEW INDIANS* 322, 323 (1968). Professor Sol Tax (U. of Chicago) counted 571,824 "Indians" in 1956. W. BROPHY & S. ABERLE, *THE INDIAN—AMERICA'S UNFINISHED BUSINESS* 11 (1966) [hereinafter cited as *THE INDIAN*]. Other estimates by Indian experts range as high as 1,500,000. S. STEINER, *supra* at 323.

Nevertheless, in spite of these and other obstacles, it does make sense to speak of the American Indian as a person and as a group. One is led, in justifiable desperation, to adopt the following heuristic:

Probably the most reasonable working definition for us is this: An Indian is somebody of Indian descent who continues to think of himself as an Indian and whom the community thinks of as an Indian. Shotwell, *Who Are the American Indians?*, in *AMERICAN INDIANS* 11 (Daniels ed. 1957).

The terms "American Indian" and "Indian" are used interchangeably in the text and notes that follow.

³ Henninger & Esposito, *Indian Schools: Regimented Non-Education*, 160 *NEW REPUBLIC* 18 (1969); *Washington Post*, Feb. 19, 1969, at A-2, col. 4. ("Let Indians Control Their Schools, Nader Urges Senators at Hearing"). The most exhaustive contemporary catalogue of "horrors" of Indian education is contained in *Hearings on Indian Education Before the Special Subcommittee on Indian Education, Senate Committee on Labor and Public Welfare*, 90th Cong., 2d Sess. (1968) [hereinafter cited as *1968 Hearings*]. The most recent volume was published in February, 1969. As of this writing, the hearings were continuing under the leadership of Senator Edward Kennedy, who replaced his brother, the late Senator Robert Kennedy, as chairman of the Special Subcommittee.

factions regarding the course of educational development for the Negro. The writer was much interested in the talk about "Black power," "decentralization," "community control," and "Afro-American studies." It seemed, however, that while the talk was vigorous and sincere, it was without an appreciable legal base or even concern for legal principles to support the demands. The writer began to wonder whether, notwithstanding the pronouncements of the Supreme Court in both *Brown* cases⁴ and the categorical elaboration in *Green*,⁵ and the warnings against the dangers of "cultural pluralism" by writers such as Glazer and Moynihan,⁶ there was, somewhere, a legal underpinning for the claims of the Negro to "self-determination," "community control," and "compensatory education and assistance" in our multiracial, equalitarian society. This writer was persuaded, however, that to develop legal support for Black demands in the Black context might be confusing and difficult, precisely because of the furor, interest, and political velocity that had attached to them in the contemporary situation. It seemed that an objective analysis could best be carried out where the argument should be theoretically strongest and the data most striking: among the American Indians.⁷ It was hoped that the analysis could shed some light on some of the problems of Indian education as well as clarify thinking with respect to the Negroes.

Education would seem to constitute one of the most important influences on the development of a "culture," which may be defined as "the sum total of the knowledge, attitudes, and habitual behavior patterns shared and transmitted by the members of a particular society."⁸ When a minority ethnic group insists on preserving its culture in the face of majority demands for conformity, one is led to consider the necessary accommodation that must be struck with the antagonistic, although legitimate, claims of the state to its own self-preservation. It is the writer's opinion that forcing a White man's education on the Indian culture may

⁴ *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (*Brown I*); *Brown v. Board of Educ.*, 349 U.S. 294 (1955) (*Brown II*).

⁵ *Green v. County School Bd.*, 391 U.S. 430 (1968) ("freedom-of-choice" plan unacceptable as means of eliminating traditional state segregation policy, without showing of actual effectiveness as means of achieving public school integration).

⁶ N. GLAZER & D. MOYNIHAN, *BEYOND THE MELTING POT* 12-13 (1963):

Perhaps the meaning of ethnic labels will yet be erased in America. But it has not yet worked out this way in New York. . . . The initial notion of an American melting pot did not, it seems, quite grasp what would happen in America. At least it did not grasp what would happen in the short run, and . . . it is not something we can ignore.

⁷ It will be argued that the American Indians, by virtue of their occupation of a unique position in the history and legal scheme of the United States, have the best claim to "unique" treatment, with regard to education. The documentation of past and present physical oppression, violent coercion, enslavement, and social stigmatization is quite as lurid as that which obtains for the Negro, while the tactics used to "civilize" the Indians, under the rubric of "education," are more blatantly repugnant than those employed against other groups.

⁸ R. LINTON, *Acculturation and the Processes of Culture Change*, in *ACCULTURATION IN SEVEN AMERICAN INDIAN TRIBES* 463, 466 (1940).

raise questions of constitutional dimensions. However, these and other questions may be dealt with more coherently if we first examine the process of cultural change.

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PRESERVATION OF CULTURAL INTEGRITY

ACCULTURATION: THEORIES AND CONCEPTS OF CULTURE CHANGE

The term "cultural integrity"⁹ embodies two ideas that may conflict with each other. On the one hand is the concept of *culture*—a definable body of "knowledge, attitudes, and habitual behavior patterns"¹⁰ of a particular society.¹¹ Such an idea conveys a notion that the people of the particular culture tend to think, act, and react to things in a distinctive

⁹ So far as the writer can determine, this term is novel with him, in the context in which it is used.

¹⁰ See note 8 *supra* and accompanying text.

¹¹ "Society" is used in a loose, rather than a scientific, sense. The term expands on contracts according to the focus of the inquiry. Thus, it makes sense to speak of an "American" society, as well as an "Indian" society, even as it does to speak of a "Navajo" society.

fashion. On the other hand is integrity, which conveys the sense that forces of change and alteration are met within the culture by resistance—the urge to self-preservation when confronted by forces felt to be incompatible with the existing culture. Such forces are often generated when two distinctive cultures come into contact with one another. When this occurs, each culture usually seeks to maintain its own cultural integrity, but in the course of this culture conflict, the urge toward integrity inevitably results in a culture change, *i.e.*, a change in the distinctive fashion of reactions. The process of change each culture normally undergoes during this contact is termed *acculturation*. As defined by Linton,

Acculturation comprehends those phenomena which result when groups of individuals having different cultures come into continuous first hand contact, with subsequent changes in the original culture patterns of either or both groups.¹²

ACCULTURATION AND THE INDIAN

The concept of acculturation is based on the tendency of cultures to borrow from one another, with a resulting social fusion creating a new culture. Quite often one culture is dominant either because of physical or numerical force or desirable cultural traits, or both. In these cases, the borrowing may be mostly onesided and quite heavy, as was the case with many European groups immigrating to the United States. Here, the acculturation process was relatively rapid and accomplished with little forced direction from the existing dominant culture, primarily because these immigrants desired to become "American."¹³ However, forceful direction of acculturation by a dominant culture may result when a physically or numerically weak culture is perceived to be more different and less amenable to "borrowing" from the dominant culture,¹⁴ thus posing a threat to the "integrity" of the latter. Acculturation may then become a

¹² R. LINTON, *supra* note 8, at 463-64, citing Redfield, Linton & Herskovits, *Memorandum for the Study of Acculturation*, 38 AM. ANTHROPOLOGIST 149-52 (1936).

¹³ R. LINTON, *supra* note 8, at 512-13. To the admonition that the Indian should be like the immigrant groups who have made their way across the "culture gap," it may be answered that this is the fallacy of using unlike analogies, of comparing inherently different phenomena. The Indians, like the Negroes, but unlike the Irish, Italians, Jews, or other immigrant groups, were forced into joining American society: the Indians were booted out of their homeland, the Negroes wrenched from theirs and brought here, all with legislative sanction and encouragement. They were given inferior legal status and opportunities, enslaved, officially harassed, and impoverished and degraded in the process. The immigrant groups whose assimilation is held up as a model for the future pattern of racial adjustment in this country came, it is true, because of "coercion" in the sense of escaping economic hardship, ostracism, or political persecution in their homes. Their choice to come to America, however, was a true one. Moreover, these groups desired to "make it," precisely because of the evils they were escaping: they desired a chance to gain economic rewards under a capitalist system of enterprise; a chance to share in the other rewards offered by American democratic life; a chance, in short, to become like Americans generally, with the recognition of the cultural implications of that opportunity.

¹⁴ *Id.* at 509-10.

painful process for the inferior culture if it resists the forced acculturation and seeks to retain its own cultural integrity.

This was the case with the American Indian culture¹⁵ when confronted with that of the White man. On the one hand was the Indian with his intense generosity and aversion to acquisitiveness; disdain and fear of economic competition; "aristocratic" benevolence and altruism; communality of material possession, political representation, and response to aggression; fierce independence and self-reliance in youth; and absolute acceptance of community praise and disfavor.¹⁶ This can be contrasted with the familiar value system of American society: emphasis on economic and social achievement; work and activity as goods in themselves; efficiency and progress at the cost of irrational personal relationships; supremacy of material comfort; and pressure toward individual conformity.¹⁷

The White American culture, dominant at least with respect to physical force, perceived these fundamental differences and the consequent threat to the maintenance of its own culture. When the Indian failed to follow the acculturation pattern of the European immigrant, the White man reacted by trying to force this acculturation.¹⁸ However, to date the Indian for the most part remains unassimilated into the American system.¹⁹ The failure of the Indian to follow the European pattern has now at least been explained and justified,²⁰ but this non-acculturation now raises a very important question.

Given that the acculturation process does occur, and that it often operates to the benefit of both cultures, does it necessarily follow that a dominant culture has, legally speaking, a right to accelerate this process

¹⁵ Although it may not be technically correct to speak of an "Indian culture," since each of more than 100 tribes has its own distinctive culture, there are enough basic similarities to make the term "Indian culture" a useful one.

¹⁶ See generally B. BERRY, *THE EDUCATION OF AMERICAN INDIANS: A SURVEY OF THE LITERATURE* (Comm. Print, Special Subcomm. on Indian Educ. of the Senate Comm. on Labor and Pub. Welfare, 1969) 50-54, and authorities there cited.

¹⁷ *Id.* at 52-53.

¹⁸ See *infra* notes 49-57 and accompanying text.

¹⁹ Individual change must be distinguished from system change. The fact that some Indians leave reservations and move to cities does not necessarily mean that *all* Indians can, or wish, to do the same. Some Indians, of course, are more "civilized" than others from the same tribe or community. A culture can change only as fast as the majority of its members.

It must also be noted that cultural changes in individuals vary from the superficial to the pervasive. Onlookers may be led to very wrong conclusions about the profundity of cultural "borrowing" that apparently occurs. For example, replacement of household goods and possessions with American products by the Zuni does not indicate anything about the Zuni readiness to abandon their kinship obligations or give up dancing Katchina dances. Indeed, radical movement in material culture generally tells very little about the rate of change in social organization and religion in the same community.

²⁰ N. GLAZER & D. MOYNIHAN, *BEYOND THE MELTING POT* 1-23 (1963). E. McDONAGH & E. RICHARDS, *ETHNIC RELATIONS IN THE UNITED STATES* chs. IX, XII (1953), presents a good side-by-side analysis of Indians and immigrants in terms of social, legal, educational, and economic status.

of acculturation (by civilized means) with respect to an inferior culture which resists it? Conversely and more specifically, do the American Indians have a legal right to maintain their cultural integrity and to maintain it by taking control of the primary means by which culture is transmitted—the educational process?

CONSTITUTIONAL DIMENSIONS OF THE FIGHT AGAINST CONFORMITY

Fourteenth Amendment

The question of whether there is a constitutional right to cultural integrity has been touched upon in the narrower context of religious integrity. The Old Order Amish, followers of Menno Simons, founder of the Mennonite Church, have long opposed various state compulsory education laws that require their children to attend school beyond the eighth grade. Such objection, although ultimately stemming from a broader concern for preservation of cultural integrity, has always been cast, and answered by the courts, in terms of freedom of religion.

The visitor to Pennsylvania, particularly in Lancaster County, is apt to see droll horsedrawn buggies whose occupants are dressed in somber black competing with speeding automobiles on the throughways, and barns decorated with highly-colored "hex" signs to ward off bad fortune. These peculiarities, as well as the rejection of advanced formal schooling, are dictated by the chief Amish doctrinal pronouncement, the Dortrecht Creed of 1632 (Holland).²¹ That creed is basically an attempt to defend against worldly temptation, and has been interpreted by the Amish as a flat ban on most of the amenities and improvements of contemporary life. It is feared by the parents in these Pennsylvania farming communities that "[e]xposure to cars, to teachers with short skirts, to students with modern clothes and ideas will sway the Old Order young, make them envious and dissatisfied."²²

The fourteenth amendment challenges brought by the Amish against compulsory education statutes followed several earlier decisions which should first be examined. In *Meyer v. Nebraska*²³ the United States Supreme Court held that a state statute prohibiting the teaching of any

²¹ The section of the Dortrecht Creed bearing on education reads in part: And since it is a known fact that a lack of faithful ministers, and the erring of the sheep because of the lack of good doctrine, arise principally from the unworthiness of the people; therefore, the people of God, [h]eeding this, should not turn to such as have been educated in universities, according to the wisdom of man, that they may talk and dispute, and seek to sell their purchased gift for temporal gain; and who according to the custom of the world do not truly follow Christ in the humility of regeneration.

As cited in *Commonwealth v. Beiler*, 168 Pa. Super. 462, 465, 79 A.2d 134, 136 (1951).

²² Note, *The Right Not To Be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925, 940-41 (1967). Much of the discussion of the Amish that follows relies heavily on this note.

²³ 262 U.S. 390 (1923).

subject in a foreign language could not prohibit the teaching of German in a parochial school. The Court relied on the fourteenth amendment's²⁴ guarantees of "liberty" and "due process," since the first amendment had not yet been incorporated into the fourteenth so as to apply to the states. The Court reasoned that a state could not arbitrarily and irrationally abrogate "the right of the individual . . . to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience"²⁵

Although the Court seemed to be groping for some conceptualization that would insure a parental right to bring up a child as he saw fit, including the right to expose the child to the parents' desired religious training,²⁶ it also recognized the state's interest in compulsory education, and hinted at the legitimacy of inspiring uniformity:

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . .

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned.²⁷

However, two years later the Court warned that a state could not "standardize its children" by effectively eliminating parochial schools.²⁸

It was against this background that the Pennsylvania court considered Amish objections to compulsory attendance at public schools beyond the eighth grade.²⁹ In *Commonwealth v. Beiler*,³⁰ the court overrode the freedom of religion-parental right amalgam where the state's cultural preservation was concerned and rejected the Amish position that state compulsory education laws violated their fourteenth amendment rights.

The life of the Commonwealth—its safety, its integrity, its independence, its progress,—and the preservation of the demo-

²⁴ U.S. CONST. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law"

²⁵ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

²⁶ Ostensibly relying on *Meyer*, the Court in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), invalidated an Oregon compulsory education act which required all children to attend public schools. It was held that it was constitutionally necessary to permit satisfaction of educational requirements in parochial schools as well. However, although the Court evoked *Meyer* by name, *Id.* at 534, part of its holding rested on the finding of an arbitrary deprivation of the parochial schools' "property right" to have pupils—there could be no pupils if all children were forced to attend public schools.

²⁷ *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923). In a companion case, *Bartels v. Iowa*, 262 U.S. 404 (1923), Holmes, J., dissenting, expressed the belief that since "[y]outh is the time when familiarity with a language is established . . . I am not prepared to say that it is unreasonable to provide that in his early years he shall hear and speak only English at school." *Id.* at 412.

²⁸ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

²⁹ *Commonwealth v. Beiler*, 168 Pa. Super. 462, 79 A.2d 134 (1951). See also Note, *The Right Not To Be Modern Men: The Amish and Compulsory Education*, 53 VA. L. REV. 925 nn. 115-30 (1967).

³⁰ 168 Pa. Super. 462, 79 A.2d 134 (1951).

cratic way of life, depend upon the enlightened intelligence of its citizens.³¹

First Amendment

a. Freedom of Religion

At the time of the Pennsylvania cases, only the establishment clause of the first amendment³² had been made applicable to the states.³³ Incorporation of the free exercise clause into the fourteenth amendment did not take place for another dozen years, when the Supreme Court decided *Sherbert v. Verner*.³⁴ However, it is unlikely that the cases involving the Amish would have turned out differently under *Sherbert*, since the Pennsylvania decisions were probably correct, as long as the view of religion as fragmented and separate from "culture" is retained. It is fairly easy to demonstrate that a particular religious conviction must bend before enormous interests and policies of the state. But, as was argued by the Amish, and made abundantly clear to the courts, the key issue was the maintenance of an integral, complex social order that grew out of specific religious doctrine. The ultimate questions presented, and not faced, were these: Does modern public education³⁵ completely disrupt and in effect destroy the Amish way of life? If so, does the Constitution afford protection for the continued existence of this culture, or does it require its abolition?

Much the same pervasion of culture by religion is found among the Indians.³⁶ It is impossible to divide Indian society into the "sacred" and the "secular." Although not all Indian communities are blatantly theocratic, most have standardized communal ceremonies crucial to the lives of all its members. The beliefs in mana (an invisible force pervading the universe) and tabor (the untouchable or forbidden elements of the universe), the Indian vision, and the rites of passage—these things pervade all that the Indian does, feels, and knows, and all are based on a deep religious commitment.³⁷ It would be impossible to sift out this or that

³¹ *Id.* at 469, 79 A.2d at 137. It should be noted that the Amish have not acquiesced in the result of this decision, however. A Mennonite farmer in Lancaster County was recently sentenced to three days in jail after refusing to pay a fine and court costs levied because he refused to send his 15-year-old daughter to school or sign a statement that she was needed on the farm. *Arizona Daily Star*, Dec. 14, 1969, at 10, col. 5.

³² U.S. CONST. amend. I: "Congress shall make no law representing an establishment of religion, or prohibiting the free exercise thereof"

³³ *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

³⁴ 374 U.S. 398 (1963).

³⁵ The Amish have no real alternative to public education, since "parochial" schools do not escape compliance with state educational standards and required course content. It is precisely this sort of curriculum that the Amish find offensive.

³⁶ See D. ABERLE, *THE PEYOTE RELIGION AMONG THE NAVAJO* (1966); R. HUNT, *PERSONALITIES AND CULTURES* (1967); C. KLUCKHOHN & D. LEIGHTON, *THE NAVAJO* (1946); Underhill, *Religion Among American Indians*, 311 *ANNALS* 127 (1957).

³⁷ In *United States v. Seeger*, 380 U.S. 163 (1965), the Supreme Court inter-

"doctrine" and weigh it in the balance against state concerns for minimal conformity, and it would be futile to expect anything but cultural disintegration to result from a coerced, standard formal education whose bias and content daily "exploded" the Indians' religious training.

One can readily agree that the state is correct, and wise, in planning for a "functional citizenry." But the accommodation of unusual minority cultures within modern society is easily achieved. The Amish, the Indians, and other such groups are not very populous. Even in the Southwest Indians comprise less than 20 percent of the total population. Further, these sociocultural deviants are territorially isolated. The Amish are found in several rural areas of Pennsylvania and some midwestern states, and the Indians, for the most part, on reservations which are physically and somewhat politically distinct from the states containing them. Of the Indians that have moved to urban centers, most are at least nominally Christians, minimizing this potential source of friction.

Thus, it is hard to see any real need to force cultural uniformity by the imposition of a standard education upon these people. They are numerically few, politically fragmented, and for most purposes lost to the sight of the majority. There is hardly justifiable fear that the educational exceptions made for the Amish and the Indian, and perhaps for other religiously oriented cultures, will make possible a counter-cultural revolution that will spread among the inhabitants, and cause modern society to crumble. The fear that religious sects will be formed merely for the purpose of avoiding public education seems equally unjustifiable. No one questions the sincerity, pervasiveness, and historical record of the beliefs explored here. Spurious claims to cultural "differentness" allegedly springing from religious scruple should be easily detected.

This, it seems, is sufficient answer to the anxiety that once the courts have given constitutional recognition to a prerogative to be educationally "backward," they will be unable to curtail the practices of other sects which fail to educate their children well enough to make them useful members of society. The position advanced here is fairly restricted, and cast in the form of a negative command. No group, which is culturally distinct and substantially dissimilar from the majority culture, and whose difference is in fact demanded by adherence to an embracing religious doctrine, may be compelled to risk destruction of their culture by sub-

preted the phrase "Supreme Being" in the Universal Military Training and Service Act. While the holding was narrowly directed to the definition of a "conscientious objector," the decision contains much broad and general discussion as to the sources of "religion," indicating that the Indian belief in "mana" may well be subsumed in the idea of a "Supreme Being." It is not going too far, I suggest, to read this opinion as illustrating an awareness that accustomed cultural dictates about religion are not the only ones permissible, and protectible, under the constitutional umbrella.

For a more controversial discussion of the thin line between "religion" and "sincere moral conviction," see *United States v. Sisson*, 297 F. Supp. 902 (D. Mass.), *jurisdiction postponed to hearing on merits*, 38 U.S.L.W. 3127 (U.S., Oct. 13, 1969) (No. 305).

mission to the majority's standard of education. Enlightenment may not be the pretext for snuffing out the flame of a culture, however poor or feeble it be adjudged.

b. Freedom of Speech

The notion that primitive societies may have a "right to be different" or a "right to be left alone" surprises many.³⁸ This is true because of the rather smug and self-appreciative attitude of American society that the benefits of its civilization should be welcomed with open arms by all, that anyone who refuses them is a fool, and that no one has the right to be such a fool. But it is also true that Americans are vociferous in their belief that the Government cannot dictate the views of its citizens, and that the right of dissent is the cornerstone of individual freedom. It is submitted that the first amendment's guarantee of freedom of speech includes the right of a different culture to remain different from the majority culture, so long as the rights of others are not infringed upon.³⁹

It is acknowledged that those who disagree with our laws or even our Constitution may publicly air such views and advocate their acceptance. The only qualification is that the advocacy must not pose realistic dangers of creating violence or insurrection, or encroach upon the rights of others. When a culture claims a right to remain different, however, it is asserting more than just a particular cause, political persuasion, or social philosophy. The Amish and the Indian, by their mere existence, are asserting a total scheme of life which conflicts at many points with accepted behavior.

Life, it may be urged, is not speech. Speech is speech, and, grudgingly, perhaps, certain acts are speech, where they are symbolic expression. But a way of life, almost every component of which protests the majority experience, may be viewed as a series of such symbolic expressions, or speech. It can be argued that an Indian "speaks" when he does what his culture prescribes. Must he stand on a soapbox and orate on Navajo values in order to keep them intact? Why may he not *be* a Navajo, on his reservation or in his urban community, and say nary a word in public?

It must be remembered that the focus here is on education, and that

³⁸ One author notes that Americans decry the extinction of wildlife:

But who ever shed a tear over the loss of native American cultures? Who laments the Pequot of Connecticut, the Beothuk of Newfoundland, the Mandan of the plains, the bands of Baja California, all now extinct?

All over the world today primitive cultures are disappearing and at an accelerating pace. . . . Even should peace come immediately to Vietnam, its culture has already been destroyed by the same means by which Americans also destroyed the Indian cultures—military assault, famine, disease, and pacification. P. FARB, *MAN'S RISE TO CIVILIZATION AS SHOWN BY THE INDIANS OF NORTH AMERICA FROM PRIMEVAL TIMES TO THE COMING OF THE INDUSTRIAL STATE* 293-94 (1968).

³⁹ See Comment, *Private Morality and the Right to be Free: The Thrust of Stanley v. Georgia*, p. 731 *infra*.

the antagonist is seen as the state, intent on prescribing a standardized program of education for a minority culture. Only negative restraints are sought. Thus, if we agree that a particular minority culture constitutes no "clear and present danger," then to the extent that such education makes impossible the "speech" of maintaining that culture, it is suggested that it is an impermissible violation of the first amendment.

It is important to note that this suggestion does not apply in cases where the culture has the opportunity to fend against cultural dissolution through its own efforts. Thus, if it were possible for the group to establish schools of its own which meet state standards, and thereby preserve its culture, state educational requirements would be acceptable. In that case, a fortiori, the "speech" of the group would not be threatened. But, as we shall see, such an alternative is probably not feasible for the Indians in the absence of external aid. Furthermore, the creation of other types of non-school supportive institutions to counteract the cultural disintegration caused by formal education is equally unlikely.

Thirteenth Amendment

In *Jones v. Alfred H. Mayer Co.*,⁴⁰ the Supreme Court decided that the thirteenth amendment's prohibition of slavery⁴¹ also prohibited private racial discrimination in the sale of private housing. The decision was surprising, because previous discrimination cases had been based upon the equal protection clause, which could be applied only when there was some form of state action. The Court in *Jones* eschewed these traditional notions in outlawing private discrimination, even though the facts of *Jones* presented at least an argument of state action.

Instead, the Justices indulged in a lengthy and historically questionable investigation into the motives of the legislators in drafting the thirteenth amendment, concluding that it was meant to eradicate anything which was a vestige of the Negro slave condition, or as they phrased it, a "badge of slavery." Racial discrimination in the housing marketplace was found to be just such a badge of slavery, and therefore the Court held that racial discrimination in the sale of private homes violated the Constitution even without state action.

There is reason to believe that the decision was ill-advised, overbroad, unnecessary in the light of prior doctrine, and inaccurate in its analysis of the past. Nevertheless, *Jones* seems to indicate a movement away from simplistic formulae such as state action to invalidate discrimination against Negroes. If this is so, and if *Jones* is to take on a life of its own, its applicability to other previously enslaved peoples may merit serious attention.

⁴⁰ 392 U.S. 409 (1968).

⁴¹ U.S. CONST. amend. XIII, § 1: "Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction."

The Indian, for example, was enslaved at various times, and may even have antedated the Negro as a slave in this country. In addition, Indian slavery continued well into the 19th century on the west coast.⁴² Although Indian slavery was practiced on a much smaller scale than Negro slavery; although it is unlikely that the legislators had the Indian slave in mind when drafting the thirteenth amendment; and although *Jones* is confined to a discussion of Negro slavery, there is no reason, in law or morals, for limiting *Jones* to the Negro. "Involuntary servitude" is firmly established in American jurisprudence as invidious and unlawful, and badges of slavery, worn by whatever people, must also be stripped away by the reasoning of the *Jones* opinion.

A badge of slavery must certainly include the sustained and officially sanctioned inferior position of a formerly enslaved people. As the history of Indian education has shown, the Indian has always been treated as a dependent, childlike savage that should be civilized and cultivated. Prolonged attempts have been made to make the Indian revile his own values, despise his heritage, rebel against his traditional community, and accept the superiority and desirability of the White culture. Formal education has been the primary method used in these attempts. If it is accepted that a forcibly imposed education is a badge of slavery for a minority group when it teaches contempt and disrespect for the culture of that minority group, then it is clear that such an education is a violation of the thirteenth amendment as interpreted by *Jones*.

The attempt has been made to block out possible constitutional theories upon which a claim for the preservation of cultural integrity

⁴² Columbus probably discovered the Indian as a fit subject for enslavement along with his exploration of the New World, and the Spanish slave-raiders who followed him plucked a forced-labor crop from the Bahamas, Florida, and Mexico. THE INDIAN IN AMERICA'S PAST 88 (J. Forbes ed. 1964); J. COLEMAN, THE FIRST FRONTIER 15-17 (1948); P. FARB, *supra* note 38, at 89-90. During the first half of the 18th century, Indian slave-trading was common along the southeastern seaboard, so that in 1708, South Carolina had 1,400 Indian slaves out of a total population of 9,580. CRANE, THE SOUTHERN FRONTIER 1670-1732 17-19 (1929), reissued 1956).

However, New England rapidly took the lead in enslaving Indians during the colonial period, ADAMS, PROVINCIAL SOCIETY 1690-1763 101 (1927), and during the 18th century Boston and New York newspapers and posters advertised for run-aways and warned others not to be found on the streets after dark. CRANE, *supra*, at 114; CRAVEN, THE COLONIES IN TRANSITION 1660-1713 123 (1967); Ordinance of The Common Council of the City of New York, April 22, 1731 (on file in New York Public Library).

Towards the end of the 19th century slavery gradually disappeared from the East and flourished primarily in the Southwest where its roots were almost as deep. The Navajo people were entirely in bondage following their surrender at Fort Defiance and were not fully "liberated" until 1885. BAILEY, INDIAN SLAVE TRADE IN THE SOUTHWEST 113-125 (1966). In California, Indians were sold in Los Angeles until at least 1869. Guinn, *The Passing of the Old Pueblo*, 5 PUBLICATIONS OF THE HISTORICAL SOC'Y OF S. CAL. 117 (1901). New Mexico's authorization of "qualified slavery" in 1866 caused congressional alarm. U.S. DEP'T OF INTERIOR, ANNUAL REPORT 33 (1865-1866). It is not clear whether the sale of Apaches as slaves in Arizona after 1868 was met with similar concern. POWERS, AFOOT AND ALONE 234 (1872).

could be built. Although the Amish and the Indians have served as examples for purposes of analysis, absolute reliance has not been placed on their particular characteristics in developing these theories. The attempt has been made to explore the constitutional arguments which would accommodate any minority cultural group which might legitimately seek its survival.

In the section that follows, the Indian and Indian education are discussed in detail. The history of the Indian's relationship to the federal government—including the wars, the treaties, the statutes, the creation of bureaus and agencies, and the attempt to end that relationship altogether—is examined. An attempt will be made to demonstrate that even in the absence of constitutional arguments for the preservation of cultural integrity, the federal government has a unique and special responsibility to the Indian to supply him with a special kind of education. This right is based on the duty of the Government to make some reparation for past actions which tended to destroy Indian culture.

FEDERAL RESPONSIBILITY FOR INDIAN EDUCATION

HISTORY OF GOVERNMENT PARTICIPATION IN THE DESTRUCTION OF INDIAN CULTURE

Dispossession and War: Destruction of the Indian Territorially and Physically

Conquest, depredation, forcible eviction, land swindle—all are familiar themes in the history of the American Indian.⁴³ However, it is not the intention here to rehearse the tragedy of these acts for its own sake. Instead, the object of this discussion is to illustrate some of the attitudes towards, and tactics employed against, the Indians in the most intense era of their dispossession—the 19th century. What emerges is an indication of the appalling treatment that is the legacy of the American Indian today.

⁴³ Some of the earliest and best material on this subject is that written by Helen Hunt Jackson. The choicest of these is her classic, *A CENTURY OF DISHONOR; A SKETCH OF THE UNITED STATES GOVERNMENT'S DEALING WITH SOME OF THE INDIAN TRIBES* (1881). See also H. JACKSON & J. KINNEY, *REPORT ON THE CONDITIONS AND NEEDS OF THE MISSION INDIANS OF CALIFORNIA* (1883). Cf. E. SPICER, *CYCLES OF CONQUEST: THE IMPACT OF SPAIN, MEXICO, AND THE UNITED STATES ON THE INDIANS OF THE SOUTHWEST, 1533-1960* (1962), a good bet to become the modern successor to Jackson's work. A fine, short treatment of various "real estate transactions" and their unsightliness is contained in W. BLUMENTHAL, *AMERICAN INDIANS DISPOSSESSED: FRAUD IN LAND CESSIONS FORCED UPON THE TRIBES* (1955). F. COHEN, *FEDERAL INDIAN LAW* (2d ed. 1958), still represents the finest, most scholarly and complete collection and analysis of decisions, statutes, and treaties bearing on the Indian's relationship to the federal government.

Valuable social and political history may be found in W. MACLEOD, *THE AMERICAN INDIAN FRONTIER* (1928); W. MOOREHEAD, *THE AMERICAN INDIAN IN THE UNITED STATES: 1850-1914* (1914).

It is some cause for surprise to learn that Thomas Jefferson, a man made gentle by history, began the process that eventually herded the Indians onto America's wastelands.

Jefferson ordered his lieutenants (especially Governor William Henry Harrison of Indian territory) to begin acquiring . . . all Indian lands east of the Mississippi. By 1809, more than 100 million acres were acquired by intimidation, bribery, questionable treaties, and dubious procedures. Jefferson's policy . . . favored removal of the tribes west of the Mississippi. . . . Thus, for all of Thomas Jefferson's well-known liberalism and humanitarianism, his administration saw the beginning of what might be termed a 'harsh' Indian policy.⁴⁴

And by 1812, during a war that was "largely an outgrowth of this ruthless policy toward the aborigines,"⁴⁵ Jefferson could write:

[T]he Indians backward [in civilization] will yield, and be thrown further back. They will relapse into barbarism and misery . . . and we shall be obliged to drive them with the beasts of the forest into the Stony Rocky mountains.⁴⁶

Subsequently, President Andrew Jackson successfully urged the adoption of the Indian Removal Act of 1830,⁴⁷ which paved the way for great gains in depopulation.

In the succeeding ten years the Atlantic and Gulf States were cleared of the Cherokees, Choctaws, Chickasaws, Creeks, and Seminoles. Some went resignedly, others at bayonet point. Only the Seminoles resisted as a group and in their Florida swamps fought a war that lasted from 1835 to 1842 and cost the United States some 1500 soldiers and an estimated \$20 million.⁴⁸

But these pre-Civil War campaigns were pale intimations of what was to follow in the second half of the 19th century. Only then, when it became clear that America was to extend "from sea to shining sea," did Indian extirpation begin in earnest so that "useful" citizens could be settled in between. Everyone wanted to be through with the Indians, so that

⁴⁴ G. HARMON, *SIXTY YEARS OF INDIAN AFFAIRS* 59-93 (1941).

⁴⁵ *Id.*

⁴⁶ THE INDIAN IN AMERICA'S PAST 102 (J. Forbes ed. 1964), quoting from letter of Jefferson's to John Adams, March, 1812, in THE JEFFERSON CYCLOPEDIA 422-23 (J. Foley ed. 1900).

⁴⁷ Act of May 28, 1830, ch. 148, 4 Stat. 411.

⁴⁸ D. McNICKLE, THE INDIAN TRIBES OF THE UNITED STATES: ETHNIC & CULTURAL SURVIVAL 40 (1962). Much the same forcible procedure was used to clear the Ohio River and Great Lakes tribes, "with the Sauk and Fox Indians making a last desperate stand in Illinois against overwhelming numbers." *Id.*

General William Tecumseh Sherman decried the ejection of the Indians from Florida, because they moved only to take up "valuable" lands elsewhere. W. SHERMAN, I MEMOIRS 26 (2d ed. 1886).

We at Fort Pierce made several other excursions to Jupiter, Lake Worth, Lauderdale, and into the Everglades, picking up here and there a family, so that it was absurd any longer to call it a 'war.' These excursions, however, possessed to us a peculiar charm, for the fragrance of the air, the abundance of game and fish, and just enough of adventure, gave to life a relish. *Id.* at 27.

America could go on about its proper business, which of course, was business.⁴⁹ Tensions arose between military personnel, who wanted the Indians penned up and out of the way, and settlers, who demanded that the Indians be exterminated so that the threat of recurrent attack would be foreclosed.⁵⁰ Some officers, like Custer and Gibbon, openly shared the settlers' views, and saw the Indians as a vanishing race, to be annihilated in toto.⁵¹

Most military commanders, however, were more sophisticated, disguising their genocidal views if they held them. Thus, General Philip Sheridan patronizingly declared that

an Indian, like a wild horse, needed breaking to make him useful With the wild uncultivated savage, no half measure will answer; you must subdue them before you can compromise with them, and it is in the end charity to them to do so. The sooner these wild tribes are made to feel they are dependent on the Government for their support, the sooner they will be susceptible of being civilized.⁵²

In July, 1867, President Andrew Johnson appointed a commission of military generals and civilian Indian Affairs officials to settle the wars being waged for self-preservation by the Crow, Shoshone, Navajo, Cheyenne, and Arapaho Indians.⁵³ General Sherman, as a member of the commission, wrote:

We all agreed that the nomad Indians should be removed from the vicinity of the two great railroads then in rapid construction, and be localized on one or another of the two great reservations south of Kansas and north of Nebraska⁵⁴

Sherman's plan was ultimately rejected, and one proposing multiple reservations was instead adopted.⁵⁵ However, the spirit of Sherman and the military advisers who ran the Department of the Interior prevailed in the end. Wrote Sherman:

Still, the Indian Peace Commission of 1867-'68 did prepare the way for the great Pacific Railroads, which, for better or worse, have settled the fate of the buffalo and Indian forever. There have been wars and conflicts since with these Indians up to a recent period too numerous and complicated in their detail for me to unravel and record, but they have been the dying struggle of a singular race of brave men fighting against destiny, each less and less violent, till now the wild game is gone, the whites too numerous and powerful; so that the Indian question

⁴⁹ See generally H. FRITZ, *THE MOVEMENT FOR INDIAN ASSIMILATION, 1860-1890*, at 120-67 (1963).

⁵⁰ *Id.* at 121.

⁵¹ *Id.* at 122.

⁵² Letter from Gen. Philip H. Sheridan to Adj. Gen. of the Army, E.D. Townsend, July 12, 1869, War Records [cited in H. FRITZ, *supra* note 49, at 125-26].

⁵³ W. SHERMAN, *supra* note 48, at 434-36.

⁵⁴ *Id.* at 435.

⁵⁵ *Id.* at 436.

has become one of sentiment and charity, but not of war.⁵⁶

Indian history contains many incidents similar to those described above. A small sampling of attitudes, policies, and actions toward the Indian is presented merely to suggest the kind of place America was for the ubiquitous Indian. Shunted across the continent, forced into reservations that were substitutes for concentration camps, living day-to-day on a Government dole, continually harassed and baited until he suicidally struck back, the Indian was treated much like an inanimate object, a thorn in the underbelly of a nation anxious to grow rich and fat.

This is not to say that the picture of the past has been all black, or that the men concerned with Indian affairs have always shared the sentiments of a Sherman or Sheridan.⁵⁷ But the picture has not been terribly photogenic. Enough has been said to illustrate that the federal government has a special responsibility to the modern Indian to ameliorate the accumulated scars of dispossession and warfare.

Wardship and Citizenship: Destruction of the Indian in Terms of Legal Rights and Status

The legal status of the Indian historically has been unclear. He was one thing, several things, nothing. Little coherence or consistency attended his incorporation into the American political structure. Even though a detailed historical analysis of that status is beyond the scope of this article, a brief review is in order because it illustrates the attempts made to define legally the Indian "differentness."⁵⁸

The power of Congress "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes"⁵⁹ contains the basis for much of the confusion regarding the Indian's status. The Constitution purports to view the "Indian Tribes" as sovereign states, rendered subject to the power of Congress by conquest.⁶⁰ The capacity for Indian self-government was thus seen as unaffected by military victory alone, although it could be confined by legislation.

Chief Justice Marshall termed Indian tribes "domestic dependent nations" and "wards."⁶¹ The term "ward" became something of a catchword for later Supreme Court decisions, so that, in *United States v. Waller*,⁶² the Court felt free to speak indiscriminately about the power of

⁵⁶ *Id.*

⁵⁷ See generally THE INDIAN IN AMERICA'S PAST 98-141 (J. Forbes ed. 1964), for waves of attitudes among BIA Commissioners and Secretaries of the Interior, alternating wildly between benevolent despotism and stern paternalism, with some authoritarianism mixed in for good measure.

⁵⁸ "Differentness" is the expression hit upon in Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1352 (1968), to imply the impossibility of adequately pinpointing the genesis and development of the novel Indian condition.

⁵⁹ U.S. CONST. art. I, § 8, cl. 3.

⁶⁰ F. COHEN, *supra* note 43, at 398.

⁶¹ *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831).

⁶² 243 U.S. 452 (1917).

Congress to grant the Indians varying degrees of emancipation at its pleasure. The federal courts in one breath would describe Indian tribes as sovereign nations or states, and in the next designate them wards of the Government, who had to be treated as the beneficiaries in a trustee relationship with the Government. They could not manage their own property, which they had held for thousands of years; they could not manage their own health or welfare services; they could not even provide education for their children, so that treaty after treaty contained provisions for Government schools. Thus, the Indians were separate, and quasi-equal; they were citizens as well as wards, residents as well as aliens; they could vote and serve in the armed forces, but they could not serve on local school boards because they were not part of a town or school district. They did not pay taxes on the land on which they lived, but they paid income taxes on money they earned. They seemed to straddle a fence along an uneasy border between two worlds.⁶³

There has never been a consensus among Indians as to what the most desirable status for themselves really would be. They have at times seemed to desire wholesale incorporation into the American mainstream, particularly when economic and health conditions have become unbearable on their parched and barren reservations. At other times they have been intensely separatist and nativistic, putting great faith in Ghost Dance revivals and Peyote Cults⁶⁴—perhaps the reflex reaction of an oppressed people. Often, however, it seems that they have sensed that the compromise of straddling fences, of being neither White nor Indian, has been on sum the best of two worlds. After all, living on reservations and keeping a semblance of tribal autonomy is better than living in suburbia, at least for those Indians whose hearts belong to the old ways. Going to BIA schools and using Indian Health Service hospitals is better than being

⁶³ Where that fence was placed with respect to citizenship was not judicially determined until 1884. Individual Indians had become citizens by marriage to Whites, military service, receipt of land allotments, and through special treaties and statutes. F. COHEN, *supra* note 43, at 517-26. Whether the fourteenth amendment, passed in 1868, extended citizenship to Indians per se was a question of great importance. The answer was that it didn't. The Supreme Court, in *Elk v. Wilkins*, 112 U.S. 94 (1884), held that Indians who owed allegiance to tribes were not "subject to the jurisdiction" of the United States, and hence, not within the purview of the fourteenth amendment, and further, that they could not voluntarily sever this tribal relationship by moving to a town with the intent of becoming a citizen. The Court's decision may very well be historically correct, since the midwifery of the fourteenth amendment's birth is sufficiently confused to allow many interpretations of its coverage. At any rate, the Court added further fuel to the fire with the pronouncement that, for individual Indians, the ward relation might continue even after citizenship. Finally, in 1924, Congress declared:

That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States Act of June 2, 1924, 43 Stat. 253.

⁶⁴ See generally P. FARB, *supra* note 38, at 273-94; E. WILSON, *APOLOGIES TO THE IROQUOIS* 76-88 (1960); D. ABERLE, *THE PEYOTE RELIGION AMONG THE NAVAJO* (1966).

totally ignorant and completely without medical care.⁶⁵

HISTORY OF GOVERNMENT CONTROL OF INDIAN EDUCATION

Mission Schools

Various Christian denominations have been involved in the business of Christianizing the Indians since the 17th century.⁶⁶ Dartmouth College, for example, was originally founded by the Reverend Eleazer Wheelock as a school for the reformation of Indians. His ecclesiastical zeal to save them was merely a refinement of the attitudes that the Spanish missionaries had shown in similar work in the South and Southwest. Wheelock's Puritan brethren joined the cause in such great numbers that it can be truly said that missionaries were the first and most influential educators among the Indians, and, in fact, continued to be the dominant influence until the late 1800's.⁶⁷

Such activities coincided perfectly with the objectives of the federal government, because a Christianized Indian was a civilized Indian, and one less likely to obstruct the growth of the nation. In the early 1880's, "Indian education consisted of a considerable number of schools conducted by twenty or more different churches, all drawing substantial sums from the government,"⁶⁸ and up until 1906, the federal government was actively involved in the business of supporting denominational education for Indians.

Treaty Stipulations: The Drive for Compulsory Education

Educational provisions have been inserted in Indian treaties since 1794, when the Government reached such an agreement with the Oneida, Tuscarora, and Stockbridge Indians.⁶⁹ Treaty provisions for education

⁶⁵ The attitude of the Indians was demonstrated in 1953 when the federal government announced a termination of special treatment for the Indian. H.R. Con. Res. 108, Aug. 1, 1953, 67 Stat. B132. The reaction among Indians was strong, and favored continuation of existing programs. Congress, of course, patted itself on the back for daring and sweeping reform of long tradition. The plan was to give matters back to the Indians; to make them like anyone else in the United States; to terminate special federal supervision; to attach no more special status to being an "Indian"; and in short, to treat them as equals in an equal world. Fortunately, termination seems to have lost its impetus and the trend now is apparently to work with the Indians in planning the future role of the Government in Indian affairs. See, e.g., remarks of President Johnson before Congress, March 6, 1968, as reprinted in BUREAU OF INDIAN AFFAIRS, INDIAN RECORD, SPECIAL ISSUE—PRESIDENT JOHNSON PRESENTS INDIAN MESSAGE TO CONGRESS—THE FORGOTTEN AMERICAN (1968). The President announced that the Indians would have the choice "to remain in their homelands, if they choose, without surrendering their dignity" *Id.* at 2.

⁶⁶ See generally B. BERRY, *supra* note 16, at 59-63.

⁶⁷ See Thompson, *Education Among American Indians: Institutional Aspects*, 311 ANNALS 95 (1957).

⁶⁸ Mitchell, *Church-State Conflict: A Little-Known Part of the Continuing Church-State Conflict Found in Early Indian Education*, 2 J. AM. INDIAN EDUC. 7, 7-14 (1963).

⁶⁹ F. COHEN, *supra* note 43, at 270.

became standard practice, and continued until the cessation of treaty-making in 1871.⁷⁰ Treaties generally provided for "technical education in agriculture and the mechanical arts, support of reservation schools, boarding schools, schools and teachers generally, and contributions for educational purposes."⁷¹ Indian education turned out to be an intensely practical sort of education under the treaties, but this was perhaps to be expected when the official attitude of Congress was expressed as the following:

In the present state of our country one of two things seems to be necessary. Either that those sons of the forest should be mortalized or exterminated. . . . Put into the hands of their children the primer and the hoe, and they will naturally, in time, take hold of the plow.⁷²

This sentiment ultimately resulted in the manual training philosophy which dominated boarding schools for many years. As a result, from 1870-1910, Indian children were educated as little more than mechanics.⁷³

The frequency with which provisions for formal education appeared in treaties might suggest that it was looked upon with favor by the Indians. Additional support for this idea comes from the fact that Indian tribes had taken the initiative, in some instances, in maintaining their own educational systems.⁷⁴ There may be, in fact, a certain amount of truth in the suggestion that the Indians actually desired provisions for Government education. Appraising the conditions for survival in the world of their conquerors, many may have felt the necessity of securing for their children the benefits of an Anglo education. However, several factors lead to quite another conclusion.

For one, the notion of free public education caught on rather late in the United States, and it was not until the end of the 19th century that a basic education came to be recognized as a necessity. Compulsory education laws were not passed in most states until 1918,⁷⁵ and it is unlikely that the Government would have prophetically secured for the Indians what a good many of its White citizens did not have.

Secondly, it is clear that the United States had very definite motives of its own in inserting treaty provisions for Indian education—to expose the Indian to White culture, and thereby civilize him. The following statute, enacted in 1819, was used in conjunction with treaty stipulations to achieve this end.

The President may, in every case where he shall judge improvement in the habits and conditions of such Indians practicable,

⁷⁰ *Id.*

⁷¹ *Id.* at 271, and citations collected there. Such treaty provisions were made principally between 1830-1869.

⁷² Thompson, *supra* note 67, at 96, quoting from a report of the HOUSE COMM. ON APPROPRIATIONS, EXEC. DOC. NO. 95, 15th Cong., 2d Sess. 162 (1818).

⁷³ B. BERRY, *supra* note 16, at 62-63.

⁷⁴ F. COHEN, *supra* note 43, at 273.

⁷⁵ See R. BUTTS & L. CREMIN, A HISTORY OF EDUCATION IN AMERICAN CULTURE (1953); E. CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 563-65 (1934).

and that the means of instruction can be introduced with their own consent, employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties. A report of the proceedings adopted in the execution of this provision shall be annually laid before Congress.⁷⁶

Chief Justice Marshall wrote of the statute:

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters to agriculturists.⁷⁷

However, the Supreme Court of Montana, in 1881, upheld the Indians' right to consent or not to consent to Government-provided education.⁷⁸ Interpreting the 1819 statute as it applied to a treaty with the Blackfoot Indians that provided for a Government school on the reservation, the Montana court held that Indian parents could not be compelled, by a writ of habeas corpus, to send their children to school.

The treaty and statute fairly illustrate the policy of the government towards the Indians. The purpose is to civilize and educate them. But the government does not assume to force upon the Indians an education, nor to compel them to adopt the modes of civilized life. The fundamental idea is that whatever is done in the premises must be by consent of the Indians.⁷⁹

The problem thus became one of securing consent. It appears that Indian Agents withheld food and clothing rations, guaranteed by treaty, from Indians reluctant to consent,⁸⁰ even before this form of coercion was legitimized in 1893.⁸¹ Authorization for withholding annuities from parents of truants was given in 1913.⁸² The statute allowing the withholding of rations was repealed after one year⁸³—but the repealing statute prohibited withholding rations only when the purpose was to secure consent “to the removal of any Indian child beyond the limits of any reservation.”⁸⁴ Thus, it did not prohibit withholding rations to secure consent for

⁷⁶ Act of March 3, 1819, ch. 85, 3 Stat. 516, 25 U.S.C. § 271 (1964).

⁷⁷ See E. DALE, *THE INDIANS OF THE SOUTHWEST: A CENTURY OF DEVELOPMENT UNDER THE UNITED STATES* 182-84 (1949).

⁷⁸ *United States ex rel. Young v. Imoda*, 4 Mont. 38, 1 P. 721 (1881); *accord, In re Lelah-puc-ka-chee*, 98 F. 429 (N.D. Iowa 1899).

⁷⁹ *United States ex rel. Young v. Imoda*, 4 Mont. 38, 44-45, 1 P. 721, 723 (1881).

⁸⁰ E. DALE, *supra* note 77, at 180-84.

⁸¹ Act of March 3, 1893, ch. 209, § 1, 27 Stat. 628, 635; 25 U.S.C. § 283 (1964).

⁸² Act of June 30, 1913, ch. 4, § 18, 38 Stat. 96; 25 U.S.C. § 285 (1964).

⁸³ Act of August 15, 1894, ch. 290, § 11, 28 Stat. 313; 25 U.S.C. § 286 (1964). See also Act of March 2, 1895, ch. 188, § 1, 28 Stat. 906. *But cf.* Act of June 10, 1896, ch. 398, § 1, 29 Stat. 348; 25 U.S.C. § 287 (1964).

⁸⁴ Act of August 15, 1894, ch. 290, § 11, 28 Stat. 313; 25 U.S.C. § 286 (1964).

attendance within the limits of a reservation.

It seems clear that the federal government may not compel school attendance at reservation schools without consent, even though it may legally apply various pressures in order to secure this consent. However, many reservation children attend state public schools located on or near Indian reservations, and the question arises as to whether that particular state may compel Indian attendance at these schools, just as the state compels non-Indians to attend.

A federal statute, passed in 1929,⁸⁵ permits the Secretary of the Interior to allow state enforcement officers entrance to reservations to secure compliance with state compulsory school attendance laws, provided that a "duly constituted governing body" of the tribe "has adopted a resolution consenting to such application" of the laws. The Indian Reorganization Act (Wheeler-Howard Act) of 1934⁸⁶ allows Indian tribes to incorporate as governing bodies and business entities. For those tribes that do incorporate, their duly constituted governing body is the resulting tribal council or tribal government. Since the constitutions of some of these incorporating tribes expressly provide for tribal control of education⁸⁷ it is conceivable that some tribal governments might withdraw their consent to federal and state education laws, and substitute some form of tribal education. In that event, the consensual theory of extending education and civilization to the Indians would once more be sorely tested. Although such a development is difficult to imagine for purely economic reasons, it is well to recognize the degree of mutual accommodation that should be involved in all programs designed to advance Indian education. The White man, by his own legal design, is still a guest or visitor in the Indians' domain. It is therefore technically, as well as morally, wrong for him to decide unilaterally questions of their educational future.

Development of the Contemporary Structure

It is difficult to determine when the Government took over the complete operation of Indian schools from the various religious groups that had been running them with Government aid. Although "[i]n 1842, there were 37 Indian schools in operation and by 1881 the number had increased to 106,"⁸⁸ it is not clear how many of them were operated by private or religious groups. One writer suggests that the first truly federal school was not built until 1860.⁸⁹

⁸⁵ Act of February 15, 1929, ch. 216, 45 Stat. 1185, as amended, Act of August 9, 1946, ch. 930, 60 Stat. 962, 25 U.S.C. § 231 (1964).

⁸⁶ Act of June 18, 1934, ch. 576, § 17, 48 Stat. 984, 988; 25 U.S.C. § 461 *et seq.*, § 477 (1964).

⁸⁷ CONST. & BYLAWS SEMINOLE TRIBE FLA. art. V, § 7; CONST. & BYLAWS SAC & FOX TRIBE OF THE MISSISSIPPI IN IOWA art. X, § 4; CONST. & BYLAWS OMAHA TRIBE NEB. art. IV, § 4.

⁸⁸ STATISTICS CONCERNING INDIAN EDUCATION, *supra* note 2, at 2.

⁸⁹ Thompson, *supra* note 67, at 97.

The Government began building boarding schools in the 1880's, and continued to build them until 1920.⁹⁰ The concept of the boarding school as a useful method of enforced acculturation had been proposed long before; in fact, Reverend Eleazer Wheelock had used the boarding school "to remove children from parental influence as a means of supposedly speeding up the process of civilization."⁹¹ It is still being used today, although the BIA has abandoned fealty to its future existence.

Military discipline and rigidity, even in personal relationships and social activity, were the trademarks of the early boarding schools.⁹² Punishment was severe, and when added to the otherwise intolerable conditions imposed upon the confused young aliens, the necessity for greater punishment became almost automatic. It is not surprising that there were many runaways, who were committed to lockups in large schools after their recapture.⁹³ Unfortunately, contemporary reports of boarding school conditions indicate that many of the same practices are carried on even today, although conditions are slowly changing.⁹⁴

Beginning about 1925, the popularity of using boarding schools to achieve forced culture change began to fade. This growing disenchantment was accelerated by the Meriam Report three years later.⁹⁵ More money and attention was spent on the development of day schools, which permit the return of children to their families at night. The isolation of many reservation homes, of course, precludes many students from attending day schools,⁹⁶ but at least an attempt had been made to alter the shipment of children out of sight, and out of mind. In addition, the prohibitions against the use of native languages⁹⁷ and the practicing of Indian customs⁹⁸ in the schools were gradually relaxed.

⁹⁰ Havighurst, *Education Among American Indians: Individuals and Cultural Aspects*, 311 ANNALS 105, 106 (1957).

⁹¹ Thompson, *supra* note 67, at 95-96.

⁹² In boarding school atmosphere and structure, see 1968 Hearings, *supra* note 3, at 2000 *et seq.* For an overall psychological evaluation, see R. Bergman, *Boarding Schools and the Psychological Problems of Indian Children, 1967* (paper presented at annual meeting of American Academy of Pediatrics, Indian Health Committee, Washington, D.C.).

⁹³ E. DALE, *supra* note 77, at 185.

⁹⁴ See generally 1968 Hearings, *supra* note 3, at 2000-336.

⁹⁵ Thompson, *supra* note 67, at 98-99.

⁹⁶ THE INDIAN, *supra* note 2, at 150.

⁹⁷ Thompson, *supra* note 67, at 99. Such a prohibition was formally announced by the Commissioner of Indian Affairs in 1887:

It is also believed that teaching an Indian Youth in his own barbarous dialect is a positive detriment to him. The impracticability, if not impossibility, of civilizing the Indians of this country in any other tongue than our own would seem obvious. E. Dale, *supra* note 77, at 185-86.

Cf. Meyer v. Nebraska, 262 U.S. 390 (1923), where the Supreme Court held against the prohibition on teaching foreign languages in public schools.

⁹⁸ "[T]he Indian Bureau, at that time [1901], always went on the assumption that any Indian custom was, per se, objectionable, whereas the customs of whites were the ways of civilization." A. KNEALE, INDIAN AGENT 41 (1950). This is an excellent source of firsthand anecdotes and observations of life in boarding, day, and mission schools, by one who served as an Indian Agent in the Southwest for over 35 years. Interestingly, it is highly critical of BIA educational policies generally,

Within a decade, the Government had begun a program of integrating Indian children into state public school systems. But even in cases where public schools were located near Indian reservations, the schools could not enroll Indian children without financial hardship. Since reservation land is tax-exempt, and school systems are generally financed by property assessments, the Indians generally bear none of the extra expense created by the influx of their children into public school systems.⁹⁹

The Johnson-O'Malley Act of 1934¹⁰⁰ and subsequent amendments¹⁰¹ sought to meet this problem, and thereby encourage the states to assume more responsibility for the education of the Indians within their borders. The Act simply provided federal funds for the construction and operation of public schools on the basis of average daily attendance by Indians. The more Indian children enrolled in a state's schools, the more money that state became eligible to receive.

Shifting the responsibility for Indian education to the states,¹⁰² however, cannot erase the history of the federal government's conduct of Indian education. The history remains, and must be sifted to determine the extent of the federal responsibility to affirmatively correct past actions. Nor does the assumption by the states of the responsibility for Indian education moot the question for the boarding and day schools that continue to exist, and to serve vital social interests of the Indians.¹⁰³ The Indian population is growing at a rate two and a half times that of the United States as a whole,¹⁰⁴ and there will be 175 percent¹⁰⁵ more school-age Indian children in the next 10 years. Clearly, what goes on in federal

and reaffirms the comments and conclusions drawn here.

⁹⁹ Thompson, *supra* note 67, at 110.

¹⁰⁰ Act of April 16, 1934, ch. 147, § 1, 48 Stat. 596; 25 U.S.C. §§ 452-54 (1964).

¹⁰¹ Act of June 4, 1936, ch. 490, 49 Stat. 1458; 25 U.S.C. §§ 452-54 (1964). See also Act of September 23, 1950, 64 Stat. 967; Act of September 30, 1950, 64 Stat. 1100.

¹⁰² In 1966, the BIA transferred 24 schools to public school systems. Marburger, *New Directions in Indian Education*, 44 INDIAN TRUTH 1, 2 (1967).

¹⁰³ We do not . . . plan on transferring schools just for the sake of transferring them to the public schools. Unless the Indian tribal leadership agrees, and unless the public schools can provide a quality educational program for Indian children, there will be no transfers. Marburger, *supra* note 102, at 2.

But cf. Bennett & Coombs, *Effective Education to Meet Special Needs of Native Children*, 3 J. AM. INDIAN EDUC. 21 (1964), to the effect that, at least in Alaska, the change from "an ancient culture" to a "modern world" "must be done in a greatly shortened period of time," necessitating change from BIA to state control of education.

¹⁰⁴ For this and other information I am grateful to Ward Henevald, who has been directing part of an elaborate investigation and appraisal of the whole school system supervised by the BIA. His work has been in conjunction with ABT Associates, Inc., Cambridge, Mass., which has been conducting the research and evaluation for the BIA. ABT Associates, Inc., is in the process of compiling its findings and recommendations for the BIA, and the final report has not yet been published. I was, however, given permission to read and quote from the report [hereinafter cited as ABT] in its preliminary form, and appreciatively acknowledge the cooperation of ABT Associates in that regard.

¹⁰⁵ *Id.*

schools will continue to be of significant importance in the near future.

Although it might seem indulgent to be greatly concerned with boarding schools, which affect only slightly more than 35,000 out of 143,000 Indian children attending school on or near the reservations,¹⁰⁶ it is in the boarding schools that the worst practices of psychological and cultural disintegration have occurred, and furthermore, the educational experiences provided in the day schools often closely resemble those in the boarding schools.¹⁰⁷ It appears that boarding schools will remain for a long while, if only because they ease the economic strain on impoverished reservations attempting to care for so many children.¹⁰⁸ Unfortunately, another kind of reservation impoverishment—evidenced by the disintegration of the family organization and chaos in the social structure—will ensure the maintenance of the boarding school system even longer.¹⁰⁹ In the words of former BIA Assistant Commissioner for Education Marburger,

[W]e will have boarding schools, particularly for our social case problems where there are broken homes and where conditions in homes make necessary some type of foster home care.¹¹⁰

This is an important statement, because it indicates a subtle shift in the admissions criteria and the philosophy of the boarding schools. One of the original purposes of the boarding schools was to take the children away from home in order to destroy traditional family influence over them.¹¹¹ That policy ironically created a new need for the schools. Successful forced culture change often made the children despise their parents and become culturally disoriented, and the parents in turn tended to reject the "Anglified" children.¹¹² The result of several decades of this deliberate social disintegration has been the proliferation of problem children which families cannot handle.¹¹³ Thus, they are sent to the boarding schools.

Today it is not the Indian Agent who must coerce consent from parents to send their children away, but the social worker who more likely than not easily obtains it.¹¹⁴ The social worker now *chooses* which chil-

¹⁰⁶ STATISTICS CONCERNING INDIAN EDUCATION 1968, *supra* note 2.

¹⁰⁷ Cf. Wax, *Formal Education in an American Indian Community*, in SOCIAL PROBLEMS 100-15 (1964).

¹⁰⁸ See remarks of Mrs. Annie Wauneka, Navajo Tribal Councilman, at American Association on Indian Affairs conference, March 6 and 7, 1969, New York City.

¹⁰⁹ Cf. 1968 Hearings, *supra* note 3, at 2016-2200, for general descriptions of social disintegration on various Indian reservations, including suicides, petty crimes, high divorce rates, delinquency, etc. See also Graves, *Acculturation, Access, and Alcohol in a Tri-Ethnic Community*, 69 AM. ANTHROPOLOGIST 306 (1967), for a discussion of the problem of chronic alcoholism and public drunkenness that is common to too many Indian reservations.

¹¹⁰ Marburger, *supra* note 102, at 2.

¹¹¹ See notes 90-91 *supra*.

¹¹² See Bergman, *supra* note 92.

¹¹³ *Supra* note 110.

¹¹⁴ The following exchange between Dr. O'Connell and Senator Kennedy indicates that parental consent is not absolutely necessary:

Senator Kennedy of New York: What if the parent does not want the child to go to school and they think the boarding school is unsatisfactory?

dren shall go to boarding schools, signing a warrant before each child is admitted. What kind of children does she choose, and why do the parents agree?

The chosen explain the consent—if the child has done something intensely antisocial or quasi-criminal, if he has run away from home, or destroyed property, if his parents have lost complete control of their own lives and are they unable to control or discipline him, the child is a good candidate for boarding school. By and large, the worst children end up there, having been preselected for social failure. One little girl in a spanking new, \$1 million demonstration school in Concho, Oklahoma, said, "This is really a reformatory, isn't it?"

The importance of studying the boarding schools now becomes more apparent. They are among other things, an example of how an institution intended to serve one purpose has been made to serve many others, and quite poorly at that. The little girl's comparison of boarding schools to reformatories is illuminating, because it suggests the confusion of the educational and the criminal law systems that has taken place. The attempt of the boarding schools to respond in some way (largely penal) to the social disorientation that they, for the most part, caused, has diminished their educational value and made them caricatures of prisons and the like.

One must resist the temptation to blacken all boarding schools. While there are indeed reports of beating, handcuffing behind the back for 18 hours, and torture,¹¹⁵ it is more likely that the majority of schools refrain from such gross practices. Indeed, many of them have excellent plants and facilities,¹¹⁶ affording great material comforts to the students. It even has been said that

The boarding school, which (compared to the homes) is a place of physical luxury and of rich opportunities for varied interests, affords the pleasantest years in the child's life¹¹⁷

The primary evils of the boarding school are not physical, however; they are mental. The boarding school environment contains many factors tending to produce severe mental health problems.¹¹⁸ Foremost is acute understaffing—there may be as many as 150 students in a dormi-

Dr. O'Connell: They do not have any choice.

Senator Kennedy of New York: What happens under the option we have set up is that the Federal Government can come in and take the child away from the home and send him to a school the parents might think pretty unsatisfactory.

1968 *Hearings, supra* note 3, at 53.

¹¹⁵ N.Y. Times, Apr. 7, 1969, at 71 (Abuses Alleged at School for Indians) (report by Senator Lee Metcalf on irregularities in Chilocco Indian School, Oklahoma).

¹¹⁶ ABT, *supra* note 104.

¹¹⁷ E. ERIKSON, CHILDHOOD AND SOCIETY 159 (2d ed. 1963).

¹¹⁸ R. Bergman, A Second Report on the Problems of Boarding Schools, paper delivered at a meeting of American Academy of Pediatrics, Indian Health Committee, held in conjunction with the Division of Indian Health, Albuquerque, N.M., May 22-24, 1968.

tory under the supervision of one male attendant or matron. Classes are overcrowded. Parents are rarely encouraged to visit children at school, and few ever do. Thus, the students uniformly "lack the help of individual adults in their emotional and intellectual growth."¹¹⁹ The staff members that are available are in primarily custodial relationships to the children.

Oppressive rules, rigid time schedules, closely regulated activities, and little freedom to experiment independently add to the foreboding atmosphere.¹²⁰ There is little privacy; as many as six students may share one room, without a lock on the door, and school personnel usually enter at will.¹²¹ Some schools have large barracks-type dormitories. The sexes are rigidly separated, and heavy penalties may be inflicted for the most casual physical contacts among young boys and girls. Ironically, promiscuity among teenagers is abnormally high compared with other student communities.¹²²

Few teachers are Indian, and obvious problems with language barriers arise. But even more importantly, cultural barriers prevent effective communication. Because the students are poor, display alien behavior, and tend to fit urban-ghetto notions of cultural deprivation, a "vacuum ideology"¹²³ develops among the teachers. This notion supposes that the Indian culture and environment is bankrupt of meaningful content—that because it differs vastly from middle-class expectations, it is therefore empty.¹²⁴ Thus, education consists largely of stuffing students with morals and manners that are quite fatuous and unreal given the facts of their reservation lives. Indian resistance to this sort of education is often viewed by teachers as a confirmation that Indians are "shy," "slow," "backward," and "hostile." It is

the disposition of administrators and school officials to support policies and programs . . . with the assertion that the Indian home and the mind of the Indian child are meager, empty or lacking in pattern.¹²⁵

¹¹⁹ *Id.* at 3.

¹²⁰ ABT, *supra* note 104.

¹²¹ *Id.* Students frequently complained, in ABT interviews, that they were always fearful of being barged in upon or "caught" in their own rooms.

¹²² Private conversations with Dr. Robert L. Bergman, Chief Mental Health Unit, Division of Indian Health, U.S. Public Health Service, Window Rock, Ariz., and Dr. Harry L. Saslow, Department of Pediatrics, University of Nebraska College of Medicine, Omaha, Neb., at the Fifth National Conference on Indian Health, American Association on Indian Affairs, March 6 and 7, 1969, New York City.

¹²³ Wax, *supra* note 107, at 67-70.

Children who come from lower class and impoverished ethnic groups are regarded as empty and culture-less rather than as having a culture and social life of their own which educators must learn about in order to be competent in their jobs. Children from lower class Negro homes are especially subject to this mishandling, since many 'liberals' refuse on political grounds to recognize that their families have a distinct subculture. *Id.* at 17.

¹²⁴ *Id.*

¹²⁵ *Id.* at 70.

What is supplied to enrich, fill, and structure his mind is woefully inadequate. Course content is dictated by state educational standards, designed primarily for white students. Books are old and obsolete, as are the teaching techniques which were inherited from civilizing days. But worst of all, the curriculum is extremely boring to most students. The pace is slow, the same ground is gone over again and again, and intricate ideas are avoided. There is little intellectual challenge, and students are rarely expected to excel or even succeed in their work.¹²⁶

And of course, they do not. The prophecy, as one might expect, is self-fulfilling. Indian achievement is well behind that of both the White and the Oriental student.¹²⁷ Indian dropout rates¹²⁸ are higher than those for any other racial or ethnic group, and there are extremely large numbers of runaways from school. Because their teachers are convinced of their mental inferiority and lack of ability, the students tend to be withdrawn and reticent in class, seeking to escape the scene of their failure.¹²⁹

By the time they reach high school—if they are one of the comparatively few who do¹³⁰—their miserable self-concept has been confirmed. Tragic corroboration of this is a suicide rate more than 10 times the national average in at least one community.¹³¹ The shortage of trained mental health personnel is deplorable. The BIA reported that there were only two social workers and one psychologist in the entire school system in 1968.¹³² By 1974, it hoped to increase the number of school psychologists to 154, or one for every 500 students, and to increase the number of social workers to 231, or three per thousand.¹³³ These improvements, if carried out, would help, but would hardly seem to compensate for the lack of personal attention from the school staff, as described above.

There are signs of change, however; the mere fact that the BIA has commissioned a social science consulting firm¹³⁴ to review current prac-

¹²⁶ ABT, *supra* note 104.

¹²⁷ J. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 219 (1966).

¹²⁸ "Dropout rates vary greatly and data is incomplete or inaccurate, however the average seems to be about 40-45% with extremes of 90% or more noted." *1968 Hearings, supra* note 3, at 1912. M. MIZEN, *FEDERAL FACILITIES FOR INDIANS: TRIBAL RELATIONS WITH THE FEDERAL GOVERNMENT 155-65, 216-23, 335-64, 411-38, 708* (1966), further documents the severity of the dropout problem.

¹²⁹ ABT, *supra* note 104.

¹³⁰ In 1968, there were 2,041 high school graduates from federal Indian schools. *STATISTICS CONCERNING INDIAN EDUCATION 1968, supra* note 2, at 1.

¹³¹ Watson, *The Etiology of Suicide at Fort Hall* (1968), in *1968 Hearings, supra* note 3, at 2367; Dizmang, *Observations on Suicidal Behavior Among the Shoshone-Bannock Indians*, (March 20, 1968), in *1968 Hearings, supra* note 3, at 2351. It must be cautioned, however, that these "rates" do not indicate mass self-annihilations. Even though the "rate" is high, the number of actual suicides is quite small. Thus, in a population of 2,600 at Fort Hall, in the period 1960-1967, 15 suicide deaths were recorded, or 98/100,000, which is "ten times the national average." *Id.*

¹³² *1968 Hearings, supra* note 3, at 2202.

¹³³ *Id.*

¹³⁴ ABT, *supra* note 104.

tices and to suggest improvements indicates concern. One example of the coming change is a BIA program to teach "‘English as a Second Language’ (ESL)."¹³⁵ Public schools across the country have long realized that certain language groups—notably the Spanish-speaking—experienced difficulty in learning when confronted with an entire curriculum in a foreign tongue. Although the BIA was slow to recognize the problem, it is now attempting to remedy it by organizing language materials around Indian speech and speech patterns, proceeding gradually to English.

Another development incorporating this new sense of direction is "cross-cultural education."¹³⁶ This is simply the creation and use of textbooks, materials, and educational programs that draw heavily upon the Indian history, traditions, and cultural heritage. The story of the colored snake that prefaced this article is drawn from a book of short stories constructed by the Cross-Cultural Education Project of the University of Chicago, and financed by the Carnegie Corporation in connection with the BIA.¹³⁷ The materials are presented in both the Indian and English languages, much like books printed in other foreign tongues. These books contain the traditional stories of the culture, but are also being written in subjects such as history, science, and elementary economics. Regardless of the subject, the books are based on experiences with which Indian children are likely to be familiar.

In addition, course materials are being developed that tackle the problems of acculturation head-on. For example, a course called "Acculturational Psychology" has been created in an ambitious attempt to teach the Sioux Indian to recognize and use his old values in a new world.¹³⁸ The contrasting values of the Sioux and the Anglo are illustrated and discussed, and the Sioux is taught to appreciate his own inherited attitudes and to understand why they are modified in White culture. Thus, White acquisitiveness is juxtaposed with Sioux sharing or generosity, and the student hopefully learns the virtues, and limitations, of each.¹³⁹ The hope is that the Indian child will consider himself a worthy member of a distinct culture, and will develop an ability to make conscious behavioral and cultural choices. Although the Indian child finds he must adapt some of his behavior to get along in the world today, he will hopefully understand what may be retained, as well as what must be given up. The experiment, in short, is designed to prevent the Indian from unwittingly changing himself into an imitation Anglo.

ESL and cross-cultural education can be valuable components in a comprehensive program designed to preserve the cultural integrity of the

¹³⁵ U.S. DEP'T OF INTERIOR, INDIAN AFFAIRS 1967, at 5 (1968).

¹³⁶ See 1968 Hearings, *supra* note 3, at 643-841, for samples of materials developed in this regard.

¹³⁷ *Id.* at 762-64.

¹³⁸ *Id.* at 29 *et seq.*

¹³⁹ *Id.* at 31-32, 38-39.

Indian. But they are only parts of a larger whole. In order for the Indian to regain a strong self-concept and sense of community, he must have a real Indian educational community in which to live.

Rough Rock Demonstration School,¹⁴⁰ on the Arizona Navajo Reservation, is a fine example of such an integrated educational community. It is to the credit of the BIA that it greatly assisted and supported this model school, whose mere existence is a point-by-point indictment of the ordinary federal school.¹⁴¹

The personnel are primarily Indian, teachers as well as administrators. The governing board is composed exclusively of Indians elected by the community. The placing of control in the hands of the Navajo people is the result of finally recognizing "that education of the Indian must be given to the Indian."¹⁴² Exciting curriculum changes have been made. English is indeed taught as a second language, and cross-cultural books have been written—but beyond that ingenuity and innovation have taken charge. "The Rough Rock Demonstration School believes that children belong to the parents, not to the school."¹⁴³ Thus, the students are encouraged to go home on weekends; their parents are encouraged to visit them and to take turns working in the dormitories; and students and teachers are urged to visit the homes together. The social and physical isolation of children prevalent at other Indian schools is not found at Rough Rock.¹⁴⁴

One of the difficulties in teaching a culture is that one cannot avoid the artificiality inherent in the educational structuring of the material. Some culture may of course be formally learned, but the vital elements of a living culture may be perpetuated only by personal association. Thus, at Rough Rock the emphasis is on a maximum of personal contact between the student, the school, and the home. This, however, is not all. Rough Rock has built into its curriculum the other living experiences necessary to the preservation of a culture. Students learn the ancient arts and crafts by watching and helping master artists-in-residence. They learn the old songs, chants, and tribal mysteries by actually listening to the revered, professional singers and storytellers of the tribe, whose secrets would otherwise be lost.¹⁴⁵ One of the most fascinating examples of this apprenticeship process is that regarding the medicine men. Students are permitted to study with them through a lengthy course of pupilage, observing their practice and absorbing the subtleties and complexities of their

¹⁴⁰ JOHNSON, *NAVAHO EDUCATION AT ROUGH ROCK* (1968); 7 J. AM. INDIAN EDUCATION 2-43 (1968).

¹⁴¹ Fuchs, *Learning to Be Navaho-Americans: Innovation at Rough Rock*, SATURDAY REVIEW, Sept. 16, 1967, at 82.

¹⁴² JOHNSON, *supra* note 140, at 15.

¹⁴³ *Id.* at 206.

¹⁴⁴ Wax, *supra* note 107, at 102-04.

¹⁴⁵ Conversation with Mr. Cam Pfeiffer, assistant to the Director, Rough Rock Demonstration School.

art.¹⁴⁶ This is not without utility, for the training of young Navajo in traditional medicine ways is one method of easing the chronic shortage of social and mental health workers. Psychiatrists have found the medicine men to be almost as effective as modern professionals in working with Indians.¹⁴⁷ At the same time, members of the tribe are encouraged to teach the medicine men to recognize serious physiological conditions that they cannot deal with, and to refer those cases to the Public Health Service.¹⁴⁸

It would be wrong to assume that all Indians desire an intensely Indian education. Many are uncertain as to the proper mix of traditional and White elements in Indian education, while some wish to reject all things Indian and become Anglos as best as they are able.¹⁴⁹ Suggestions from the experts for improving Indian education are just as varied. Most are less concerned with curriculum, however, than with the quality of whatever instruction finally is offered. One recent study sounds a warning against substituting Indian ethnocentricity for White racism, finding the real problems to be functional ones associated with "problem-solving skills applicable in all cultures."¹⁵⁰

Unfortunately, the fact that some Indians may not want an Indian education is easily transmogrified into the proposition that no Indian can have such an education. Only a few short years ago, a program analyst with the Indian section of OEO declared:

Well, then, why don't we put into practice some of our psychological knowledge about human beings and proceed with a plan of deliberate conditioning for specific purposes. First, we must decide as members of the dominant culture what we want of these Reservation Indians and then, secondly, we must draw our plans, and third, proceed without hesitation to shape the behaviors which in combination will give us the kind of people we want.¹⁵¹

Opposed to this is the progressive outlook at Rough Rock, where there is

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* E. ERIKSON, *supra* note 117, at 171-75, describes Yurok child psychiatry, which bears out the effectiveness of medicine men for psychiatric ailments. He explains the efficacy of "Fanny," an Indian "doctor," in the following manner:

Having an exalted position in a primitive community, Fanny is, of course, in possession of enough gossip to know her patients' weaknesses even before she sees them and is experienced enough to read her patients' faces while she goes about her magic business. If she, then, connects a feeling of guilt derived from a secret aggression or perversion with the child's symptoms, she is on good psychopathological grounds, and we are not surprised to hear that neurotic symptoms usually disappear after Fanny has put her finger on the main source of ambivalence in the family and has provoked a confession in public. *Id.*

¹⁴⁸ Cf. remarks of Mrs. Annie Wauneka, Navajo Tribal Councilman, at AAIA conference, March 6 and 7, 1969, New York City.

¹⁴⁹ *Id.* ABT, *supra* note 104, also indicates that the students themselves are not terribly interested in "Indian" matter.

¹⁵⁰ ABT, *supra* note 104.

¹⁵¹ Wilson, *Social Reconstructionism and Indian Reservation Cultures*, 5 J. AM. INDIAN EDUC. 18, 21 (1965).

no forced culture change in either direction. The school at Rough Rock is guided by the philosophy that the Indian can, and should, be educated to retain his identity with his native values and culture while, at the same time, learning to master the Anglo culture and to take his place in the Anglo world, if he so desires.¹⁵²

Further, and more significantly, the Navajo himself is responsible for education at Rough Rock,

and the supremely important aspect of this local control is to prove that the Indian has the interest, desire and capacity to provide real leadership, direction and self-determination in education.¹⁵³

CONCLUSION

The entire "Indian problem" is very much a political problem of the kind that courts tend to avoid. Although it is now clear that Indian tribes are not sovereign nations, it is not clear how they are to be ultimately worked into the American scheme of things. Indians are citizens; they therefore vote in national elections, are drafted into the armed forces, attend public schools, and receive welfare payments. But they are also outsiders; they do not vote in many state elections, do not pay certain property taxes, and are not subject to the ordinary jurisdiction of courts while on their reservations. The problem of the Indian is political, then, in the sense that the United States has never really resolved the question of their status. Nor is it likely that such a resolution will be accomplished in the near future.

Unique questions of public policy pervade any discussion of Indian rights or claims to special status. Questions of preferential treatment cannot be met by ordinary applications of constitutional law, because the Indian has never relinquished his claim to special services from the Government, nor has the Government, until recently, made overt moves to cut back on those claims. In this respect, the problem is still one of integrating the Indian into the federal system, one which will not become a strictly judicial matter until the uniqueness of the Indian has terminated and his legal status has been firmly established.

Nevertheless, several constitutional arguments have been suggested that could be used to support the right to cultural integrity in the face of governmental pressures for cultural change. Compulsory education was seen to be one of the most common forms of such governmental pressure. However, nothing significant was found to indicate that the Government need do anything more affirmative than let minority cultural groups alone to work out their own destinies.

Nothing, that is, unless there is a responsibility for past practices that

¹⁵² JOHNSON, *supra* note 140, at 15.

¹⁵³ *Id.*

deliberately sought to undermine and destroy the group's cultural existence. In the case of the Indian, it has been argued that this responsibility clearly exists, and requires compensation for wrongs perpetrated and damages caused. Where these are remediable through affirmative educational programs, the obligation exists to provide them.

It seems clear that in the federal schools the Indians should have the right to determine the courses, the techniques of instruction, and the methods of operation, so that they will have the choice of preserving as much or as little of the traditional culture as they desire. And there would seem to be no reason why they should not have the same rights with regard to state public schools located on the reservation. Since the BIA has indicated that it would prefer to transfer all educational responsibility to state systems, there is an even greater need for Indian self-determination in the public schools, which are rapidly increasing, than in federal schools, which are gradually disappearing. In view of the federal government's acknowledged responsibility for Indian education, it would seem anomalous to require one result where it actually runs the school, and another when it supports the school financially while leaving the operation to the state.

Two possible difficulties may arise when Indians are given the right of self-determination in education. The first is that not all tribal governments are capable of exercising control over education, and the second is that not all parents will agree that their children should have the type of education decided upon by the tribal government.

The first possibility is of little concern where the tribal government has the confidence and support of its people. The constituency, through representation, can effectively influence educational policy, and the tribal government can work with federal or state officials in carrying it out. The problems, of course, would arise where the tribal government is claimed to be a sham or nonrepresentative, or where it simply lacks the necessary organization to effectively run a school.

The second problem arises where parents do not want to abide by the tribal decision as to the type of education that will be offered, and claim denial of their "equal protection" to a *White* education. Were the tribal governments subject to the board sweep of the Constitution and the Bill of Rights, this might well be an intricate problem for a court to decide. However, they are not. Tribal governments have always been regarded as fairly autonomous. Congress has recognized that tribal autonomy is important to the maintenance of reservation tradition,¹⁵⁴ and this autonomy could not be maintained if the tribal governments were subject to all the restraints of the Constitution and Bill of Rights.¹⁵⁵ The Indian Bill of

¹⁵⁴ See generally Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Government*, 82 HARV. L. REV. 1343 (1968).

¹⁵⁵ *Id.*; cf. *Hearings on the Rights of Members of Indian Tribes Before the*

Rights,¹⁵⁶ recently passed to remedy alleged abuses by the tribes, merely requires tribal governments to ensure to its members "the equal protection of *its* laws."¹⁵⁷ Thus, neither the Indian Bill of Rights nor the United States Constitution should apply to frustrate Indian attempts at educational self-determination.

The very purpose and nature of a reservation is another factor militating against a finding that reservation Indians have a minority right to a White education. The reservation is intended as a last resort for the preservation of Indian culture. A tribe that decided to adopt a White education would be dooming its culture by deliberate choice—an individual protester would then be seeing to preserve a culture that had no adherents. But a tribe that chose an Indian education would be seeking to preserve the culture—and the individual protester would be seeking to join a society which already exists outside the reservation, and to which he is free to go.¹⁵⁸

Life after all is a pretty complicated business. There is a good deal about it that none of us understands. Customs as horrible, at first sight, as burning weeds and inhaling the smoke sometimes turn out to have a universal appeal. None of us

Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. 40-49, 111-14 (1968), to the effect that governmental and judicial systems of the Indians are "interwoven with their whole way of life."

¹⁵⁶ Act of April 11, 1968, 82 Stat. 77; 25 U.S.C. §§ 1301 *et seq.* (Supp. IV 1965-1968). See Reiblich, *Indian Rights Under the Civil Rights Act of 1968*, 10 ARIZ. L. REV. 617 (1968).

¹⁵⁷ 25 U.S.C. § 1302(8) (Supp. IV 1965-1968) (emphasis added).

¹⁵⁸ An interesting question is posed by Indians who leave the reservations. Have they a right to cultural integrity, and if so, to what extent? The problems of administering any kind of program of "self-determination" certainly are more difficult once the Indian leaves the reservation, because of his dispersion. However, the urban population of Indians is increasing quite rapidly. In the period from 1954-1964, "[m]ore than 60,000 American Indians . . . immigrated to large urban centers . . . to seek stable employment and a new life." Ablon, *American Indian Relocation: Problems of Dependency and Management in the City*, 26 PHYLON 362 (1964). The BIA has actively encouraged many Indians to relocate in the urban centers so that they can enjoy better living and working conditions.

Thus, it is not unreasonable to suppose a continuing federal responsibility for assisting in the cultural self-determination of Indians who live in cities. However, such Indians are scattered and ill-organized, compared with reservation Indians. Programs that can be instituted on the reservations make little sense for small groups.

The federal responsibility might more realistically be fulfilled in the cities by supporting the various "clubs" that Indian groups have formed. Ablon, *Relocated American Indians in the San Francisco Bay Area: Social Interaction and Indian Identity*, 23 HUMAN ORGANIZATION 296 (1964). The Department of Health, Education and Welfare already furnishes assistance to cultural centers in Negro ghettos, *Hearings on the Comm'n on Negro History and Culture Before the Special Subcomm. on Arts and Humanities of the Senate Comm. on Labor and Public Welfare, 90th Cong., 2d Sess., 146-49 (1968)*, in an attempt to build pride and confidence in Black children by teaching them about their cultural heritage. There is no reason why the government could not similarly strengthen the Indian organizations, thereby making cultural preservation a viable alternative.

It is likely that after an initial nursing of these "clubs," Indian communities in the cities will become more cohesive and "visible," so that they could eventually exercise some control over their children's education. This might be done by influencing or controlling a local school board, or perhaps the desired cultural education could be provided by extracurricular activities in local community centers.

knows enough about the other fellow's way of life to have a right to wipe it out. We are not gods to make other men in our own image. Is it not in our own best selfish interest to let our fellow men plant their corn and cultivate it as they think best, while we watch and learn? When we have gathered the last golden grain of knowledge from the harvest of the Indian summer, then we can talk about Americanizing the Indian. Until then, we might do better to concentrate our attention on the real job of the New World, the job of Americanizing the white man.¹⁵⁹

¹⁵⁹ F. COHEN, *supra* note 43, at 327.

