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*Symposium on Diversity*

# The Invisible Elder: The Plight of the Elder Native American

*This article reveals the circumstances of many Native American elders. It reviews various causes and attempts at rectification and, in particular, one of the most recent efforts—high-stakes gaming. In keeping with a long history of failure of government intervention programs, this newest effort may be aggravating already difficult circumstances for the elderly.*

**By Lora A. Kaelber**

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Each generation is dependent upon the other. The people, the last creation, are the weakest and most dependent. Yet, it is us pitiful people who are destroying all the other creations. We have forgotten both the vision and where we fit in our relationships. Once we destroy the other creations, we destroy ourselves.<sup>1</sup>

## Introduction

This article examines the plight of the Native American (“Indian”) elder. Once revered as the life’s blood and the center of tribal life, Indian elders, now forgotten, are sometimes called the invisible elders.<sup>2</sup> In general, the plight of the elderly has stepped to the forefront in many different areas—government, psychology, sociology, and medical arenas. While the result has been the amelioration of conditions for many elderly, the Indian elders continue to struggle for a better life and some sense of dignity in deplorable conditions on the reservations. None of this, of course, is new to anyone significantly involved in either Indian law or elder law. The influx of gaming to the reservations has caused many to doubt that there is a positive effect on the treatment of Indian elders by and among the tribe and its members. Has the life of the Indian elder changed at all on the gambling reservations? In general, has life on the reservation changed? These are some of the questions I hope to answer in this paper.

To get a clearer view of the plight of the Indian elder, I first turn to the relationship of the federal government and the Indian tribes. Next, I examine the Indian Gaming Regulatory Act and its positive effects

on tribal life. And finally, I look at the conditions of the Indian elder on gaming reservations.

### **Destruction of Life**

In order to determine whether life has changed for better or worse for the Indian elderly on gaming reservations, it is important to understand the intertwined history of the Native American and the United States government. A complete analysis of the history of the acts and policies of the United States government with respect to Native Americans would be a paper in and of itself. Therefore, this article gives a brief overview of the efforts made by the government to control Indians. It will, in part, explain and put into perspective the current deplorable conditions of life on the reservations.

Prior to the Indian Gaming Regulatory Act of 1988, many acts and policies of the federal government were enforced with respect to the Indians. We all know the basic textbook history: when Columbus and the Pilgrims arrived, the Indians were, according to the white man, very intrigued and somewhat helpful. After all, the Indians came to the first Thanksgiving. However, later it was determined that the Indians were very bad, very mean people. According to history, the scalping of pioneers, settlers, and explorers was commonplace. But as Sitting Bull of the Hunkpapa Sioux wrote,

I am a red man. If the Great Spirit had desired me to be white he would have made me so in the first place. He put in your heart certain wishes and plans, in my heart he put other and different desires. Each man is good in his sight. It is not necessary for Eagles to be Crows. We are poor . . . but we are free. No white man controls our footsteps. If we must die . . . we die defending our rights.<sup>3</sup>

The reaction of the Indians was understandable; they were defending their land, honor, and people from desecration.

However, in subjective opinions of the time, the Indians were viewed as hostile and violent. They were thought of as savages. Despite the pledge of the First Continental Congress that the United States would "secure and preserve the friendship of the Indian nations,"<sup>4</sup> the United States did not do so. This policy was merely superficial. In 1819, Congress passed one of the first acts that tried to assimilate the "savages" into the new Euro-Ameri-

can way of life.<sup>5</sup> The Indian Civilization Fund Act of 1819 provided for "financial support to missionary groups willing to provide for the 'moral' education of American Indian children."<sup>6</sup>

In 1830, President Andrew Jackson instituted a policy that relocated Native Americans to Oklahoma.<sup>7</sup> He actually "gave" the Indians the state of Oklahoma.<sup>8</sup> He did this by privatizing the land and giving the Indians "allotments" of land.<sup>9</sup> This relocation was the beginning of the end of life as the Native Americans had known it for hundreds, perhaps thousands of years. President Jackson's policy became known as the "Trail of Tears."<sup>10</sup> Every step of the trail was covered with them—tears for the loss of Indian lives and the loss of their way of life, and tears for the prejudice that still prevails today.

In 1832, Congress established the post of Commissioner of Indian Affairs.<sup>11</sup> The commissioner's job was to tie up the loose ends in the federal Indian policies and to centralize "the control and management of Indian affairs."<sup>12</sup>

Not only did the Indians have to cope with displacement, they also had to deal with widespread disease brought by the Europeans. Originally unknown to the indigenous Indians, disease ravaged the Indian populations. Because of this, the responsibility for Indian health care was passed from the Department of War to the newly created Bureau of Indian Affairs in 1849.<sup>13</sup>

In 1898, the Curtis Act came into existence.<sup>14</sup> This act terminated all territorial sovereignty rights of the Indian nations. The Curtis Act effectively deprived all tribal governments of any governing function, leaving them perfunctorily defunct.

The Snyder Act was the next to follow in 1921. This act provided basic authorization for Indian health care. For the first time, a broad-based Indian health care policy was formulated. It allowed for "relief of distress and conservation of health . . . of Indians throughout the United States."<sup>15</sup>

In 1924, the Indian Citizenship Act (ICA) was enacted in an effort to assimilate the Indians into the culture of the "new" Americans.<sup>16</sup> The ICA unilaterally conferred United States citizenship upon all Indians.<sup>17</sup> In 1927, the Grand Council of American Indians had this to say about the Indian Citizenship Act:

The white people, who are trying to make us over into their image, they want us to be what they call "assimi-

lated,” bringing the Indians into the mainstream and destroying our own way of life and our own cultural patterns. They believe we should be contented like those whose concept of happiness is materialistic and greedy, which is very different from our way.

We want freedom from the white man rather than to be integrated. We don't want any part of the establishment, we want to be free to raise our children in our religion, in our ways, to be able to hunt and fish and live in peace. We don't want power, we don't want to be congressmen, or bankers . . . we want to be ourselves. We want to have our heritage, because we are the owners of this land and because we belong here.

The white man says there is freedom and justice for all. We have had “freedom and justice,” and that is why we have been almost exterminated. We shall not forget this.<sup>18</sup>

Not exactly a ringing endorsement or a gracious thank you for conferring United States citizenship upon a population that wanted nothing to do with the white man. By the late 1920s, it became evident that the allotment programs had failed to assimilate Native Americans into the “New America” as had been intended.<sup>19</sup> At this time, several studies and congressional hearings demonstrated the extreme poverty of most Native Americans and the persistence of the tribal identity.<sup>20</sup>

By 1932, the designated land base of 139 million acres that the Indians held had shrunk to 52 million acres—all in just 45 years.<sup>21</sup> However, the year 1934 marked the first year of some semblance of reasonable thought by the United States government with respect to Indians. Sadly, it was an effort given over to the old adage “too little and much too late.” The Indian Reorganization Act of 1934, also known as the IRA, halted further allotment, or displacement, of Indians.<sup>22</sup> It also authorized the tribes to develop tribal constitutions and governments. In essence, it allowed the tribes to rebuild what was destroyed by the previous acts and policies of the federal government. However, the constitutions that were authorized by the IRA had to be first approved by the Bureau of Indian Affairs.<sup>23</sup> These constitutions were essentially “form documents that provided for the election by the people of a single branch of government [for the tribe] called a ‘council.’ The council was to have only a few members, usually five and was responsible for all legislative affairs.”<sup>24</sup> However, these constitutions were only approved if

they mirrored the Constitution of the United States.

It is important to note that the U.S. Constitution was diametrically opposed to any shape or form of government the Indians had prior to the interference of the federal government. George Copway, an Ojibwa Chief, stated

Among the Indians there have been no written laws. Customs handed down from generation to generation have been the only laws to guide them. Every one might act different from what was considered his right did he choose to do so, but such act would bring upon him the censure of the Nation . . . This fear of the Nation's censure acted as a mighty band binding all in one social, honorable compact.<sup>25</sup>

This policy of what could be called a modified *laissez-faire* attitude toward Indians lasted for the next 15 years. In 1949, the government issued a report that again recommended the total assimilation of Indians into American society.<sup>26</sup> The report recommended the termination of legal recognition of any and all tribal organizations. Thus, the report repeated the Reconstruction Era attempts to achieve assimilation.

Three years later, the Termination Act passed both houses of Congress.<sup>27</sup> The passage of this act resulted in the dissolution of 109 indigenous Indian nations. The remaining tribes in existence were slowly placed under the control of the states. Eventually, the remaining tribes, who once roamed the whole of North America, were pushed onto 278 federal reservations.<sup>28</sup>

In 1955, responsibility for Indian health care was passed again, this time from the Bureau of Indian Affairs to the Public Health Service.<sup>29</sup> This service is part of the Department of Health, Education, and Welfare.<sup>30</sup>

The second attempt at forced assimilation failed miserably. Thus, in 1956, Congress passed the Indian Relocation Act.<sup>31</sup> They may have figured if they could not force it, they could pay for it. This act funneled monetary support to any “Native American willing to move to a selected urban center.”<sup>32</sup> This, in turn, caused a drain on the reserves of Indians who could potentially step up and take leadership positions on the reservations.

By the 1960s, the Kennedy and Johnson administrations finally realized that all attempts to force or pay for assimilation were unsuccessful. The Kennedy and Johnson presidencies marked the end

of the anti-tribal era. However, far too many tribes had already been dissolved by government intervention. Every reservation faced problems of severe poverty. Once again, it was too little, too late. However, to their credit, the government and the presidents tried to make up for past acts.

Throughout the 1960s and 1970s, a series of acts were passed in an attempt to repair the havoc of more than 200 years of disastrous anti-Indian policies. To say that these failed is a bit of an understatement. In 1968, the Indian Civil Rights Act (ICRA) was passed.<sup>33</sup> The ICRA gave Indians, for the first time, standing to sue the federal government.<sup>34</sup> In 1975, the Indian Self-Determination Act (ISDA) became law.<sup>35</sup> The ISDA permitted “tribes to administer a full spectrum of Indian health care services, including both direct care and contract care programs, facilities construction, community health representative programs, mental health and drug abuse services, and health education initiatives.”<sup>36</sup> Under the ISDA, some control over tribal governmental affairs was given back to the tribes. In 1976 the Indian Health Care Improvement Act was passed.<sup>37</sup> The Indian Health Care Improvement Act was enacted to “assure the highest possible health status for Native Americans.”<sup>38</sup> The final federal Indian acts of the 1970s were passed in 1978. The Indian Child Welfare Act was designed to stop the “wholesale separation of Indian children from their families.”<sup>39</sup> When the act was passed, Congress noted that the separation of Indian children from their parents was “perhaps the most tragic and destructive aspect of American Indian life.”<sup>40</sup> The American Indian Religious Freedom Act, also passed in 1978, purported to “protect and preserve the inherent right of the freedom to believe, express and exercise the traditional tribal religions.”<sup>41</sup> However, from 1980 through 1990, ten consecutive cases decided by the Supreme Court denied Indian claims for religious freedom.<sup>42</sup>

On a positive note, the 1980s brought the shut down of all Indian relocation programs. However, the 1980s also brought severe cutbacks.<sup>43</sup> “During the late 1980’s, due to federal budget cuts, the Navajo tribe lost over \$100 million in revenue.”<sup>44</sup> In part, I believe this is due to President Reagan’s policy toward the Indians. Reagan believed that it was necessary to shift the funding for Indian programs away from the federal government and onto the states. Apparently, he did this in an effort to give the Indians some independence.

The last congressional act important to this article was passed in 1988—the Indian Gaming Regulation Act (Gaming Act). In brief, the Gaming Act allowed for certain types of gaming revenues to go directly to the Indian tribes without first passing through the federal or state governments.<sup>45</sup> However, the Gaming Act actually takes away from the independence of gaming tribes and imposes federal and state restrictions upon the tribes that are sometimes harsh. This limits the ability of Indians to prosper and affects the treatment of Indian elders.

### Uniquely Native American

Placed in context, it is not difficult to see exactly why reservation Indians struggle on a daily basis to survive. The Indians who once prospered throughout the United States now number only 800,000. The unemployment rate on the reservations is about 70 percent, and two-thirds of the Indians are living in poverty. Because of this, not only do Indian elders face all the “normal” pitfalls that accompany the aging process, they also face problems that are unique to reservation life and Native Americans. For example, on the Navajo reservations, about 60 percent of the Indians living travel an hour to reach any type of health care facility.<sup>46</sup> Because of this, “[i]n inclement weather, rural roads can become impassable, making it impossible for elders to keep appointments or to be on time for appointments.”<sup>47</sup> Failure to keep appointments leads to further degeneration in an Indian elder’s overall health. Figures estimate that about 73 percent of Indian elders are mildly to totally impaired in coping with the basics of daily life.<sup>48</sup> In turn, the incidents of depression among the Indian elderly are significantly higher than those of non-Indian elderly.

Due to these problems, about “three-fourths of rural American Indians between ages sixty-five and seventy-four live with their families. . . . However, twice as many rural Indian families with aged members are below the poverty line. . . . Thus, while about two-thirds of rural American Indians over seventy-five are likely to be living in a family environment, more than a third of them can expect to live below the poverty level.”<sup>49</sup> Indian elders face isolating circumstances that prevent them from seeking medical treatment. In addition, the majority faces a life of poverty. Indian gaming, it was hoped, would alleviate these problems.<sup>50</sup>

## Indian Gaming: A General Overview

The Indian Gaming Regulatory Act of 1988 defines the purpose of Indian gaming as “a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.”<sup>51</sup> The Gaming Act sounds like a laudable goal in which the country can finally give back some of what was taken from the Indians. District courts have even upheld the sovereignty of Indian gaming to be free from state control.<sup>52</sup> However, the Gaming Act itself does not come without restrictions.

The Gaming Act defines three types or classes of gaming: Class I, Class II, and Class III.<sup>53</sup> Class I gaming on Indian lands falls within the exclusive jurisdiction of the tribes.<sup>54</sup> It is, therefore, not subject to any type of state regulation. Included in Class I gaming are “two distinct types of gaming: (1) social games for prizes of minimal value, and (2) ‘traditional forms’ of gaming performed in connection with a tribal ceremony or celebration.”<sup>55</sup>

Class II gaming is the only type of gaming specifically defined in the Gaming Act.<sup>56</sup> Class II gaming includes “(1) bingo, and (2) card games that state law either authorizes or does not explicitly prohibit.”<sup>57</sup> In order for the tribe to be involved in Class II gaming, “the tribe must have enacted an ordinance which has been approved by the Chairman of the National Indian Gaming Association and the state in which the tribe is located must permit such gaming for any purpose by any person, organization or entity.”<sup>58</sup>

Finally, Class III gaming is defined as a catch-all provision that includes “all forms of gaming that does not fall within Class I or Class II gaming.”<sup>59</sup> It is often called high-stakes gaming, and it includes things such as slot machines, off-track betting, blackjack, and lotteries. “Because Class III gaming is the greatest source of tribal revenues, it cannot be practiced outside of a tribal-state compact.”<sup>60</sup> Thus, any tribe wishing to engage in Class III gambling must compact with the state in which the tribe wishes to game.<sup>61</sup> As one can imagine, the disadvantage belongs to the Indians. After all, the states have no need for Class III gambling. In its infinite wisdom, Congress thought about this and built provisions into the Gaming Act imposing a duty of good faith on the states when compacting with the tribes.<sup>62</sup> However, the Supreme Court has held that the states are not subject to any litigation for a failure to compact in good faith by virtue of the Tenth Amendment.<sup>63</sup>

Thus, any tribe wishing to participate in high stakes gaming is forced to give up much of its sovereignty when compacting with the states. This is not exactly the ringing endorsement for sovereignty the tribes had hoped to receive.

In addition to the division of various types of gaming into classes and the compacting with the states, the spending and investment of gaming revenues are also regulated by the Gaming Act.<sup>64</sup> As stated previously, Class I gaming revenues, if any, belong exclusively to the tribes. However, Class II and Class III gaming revenues are subject to government regulation. Although the regulation of the revenues was Congress’s way of doing what it thought was best for the tribes, regulation is “inconsistent with the political sovereignty of the tribes, simply because the decisions are not left wholly to the tribes.”<sup>65</sup>

The Gaming Act severely limits the spending of revenues. The “net revenues from any tribal gaming may not be used for purposes other than: (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies.”<sup>66</sup> These regulations seem to be an effort by Congress to alleviate the severe conditions of poverty on the reservations, but as we shall see later, this is not necessarily the case. Statistics show that currently only 12 percent of Class II and III gaming revenues go toward social services.<sup>67</sup>

Further, the Gaming Act also limits a tribe’s ability to make per capita distributions. A tribe is allowed to make per capita distributions “to its members only under a number of conditions, including approval of the tribe’s distribution plan by the Secretary of the Interior.”<sup>68</sup> The Gaming Act also “implicitly require[s] that a tribe have some membership criteria in place.”<sup>69</sup> This implicit membership requirement leads to conflicts, as well. Thus, only about 23 out of an estimated 260 gaming tribes<sup>70</sup> make per capita distributions to their tribal members.<sup>71</sup>

## Benefits of Indian Gaming

The Gaming Act, despite all its good intentions, may have failed the Indian elders. However, before we discuss the treatment and living conditions of the elders, there are benefits to Indian gaming that must

be mentioned. Admittedly, some tribes are doing well with the revenues from gaming. There are tribes that “have used revenue that their gaming operations have generated to support scholarships; construct health clinics, day-care centers, and teenage runaway and halfway houses; build new schools and hospitals; open hotels, restaurants, gas stations and flower shops; fund retirement programs; and invest in hydroelectric plants.”<sup>72</sup> The Coeur D’Alene tribe, for example, has created jobs for all of its 1,490 members at its casino in the state of Washington.<sup>73</sup> Also, prior to the casino’s opening in 1993, 60 percent of the Oneida nation’s members in New York were unemployed. Many of them lived on a “thirty-two-acre plot in rusted trailer homes.”<sup>74</sup> The Oneida nation, through its gaming revenues, has mobilized a 43-member police force, purchased a cattle farm, and financed the construction of a T-shirt factory, tribal housing, two hotels, an arena, a golf course, five gas stations, and community buildings.<sup>75</sup>

The Mille de Lacs tribe in Minnesota is one of few tribes distributing gaming revenues on a per capita basis.<sup>76</sup> According to Marge Anderson, Chief Executive of the tribe, “every cent of Indian gaming revenue goes right back into services for tribal people.”<sup>77</sup> The quality of life for every tribal member has significantly increased since the advent of gaming by the tribe. The unemployment rate in the tribe “went from forty-five percent to zero in two years.”<sup>78</sup> Some tribes do truly concentrate on the betterment of the tribal members.

In addition, the National Indian Gaming Association cites gaming as the reason for the reduction in “crimes of poverty: spousal and child abuse, domestic violence, small thefts, assaults and batteries, and other violations which spring from poverty, unemployment and alcoholism.”<sup>79</sup> Gaming, admittedly, has improved tribal life in some instances. This, however, is not the case in all situations.

### **The Federal Government and Elderly Indians**

Before we move on to discuss the interrelatedness of the treatment of elderly Indians and gaming, a general discussion of the government programs designed to ameliorate the deplorable conditions of the Indian elderly is necessary. In general, the accepted premise is that the federal government is responsible “to Native Americans based upon the destruction of Native American civilization and the poverty and disease which followed in its wake.”<sup>80</sup>

Indian health care, including the health care of the elderly Indians, is now in the hands of the Indian Health Service, a part of the Department of Health and Human Services. The Indian Health Care Improvement Act (IHCIA) passed by Congress in 1976, was intended to:

- (i) assure Native Americans access to high-quality comprehensive health services in accordance with need;
- (ii) assist tribes in developing the capacity to staff and manage their own health programs to provide opportunities for tribes to assume operations authority for IHS programs in their communities; and
- (iii) be the primary federal advocate for Native Americans with respect to health care matters and to assist them in accessing programs to which they are entitled.<sup>81</sup>

The IHCIA was a great leap forward in the amelioration of the condition of the Native American elderly. However, almost as quickly as it was ushered in, so was President Reagan. His Indian policy of laissez-faire severely affected the IHCIA. Reagan “sought to shift the functions of federal Indian programs to ‘more general, often state administered . . . programs, or to eliminate federal funding altogether.’”<sup>82</sup> During the Reagan years, “the Indian Health Service (IHS) cut its field health staff in half, doubling the area of responsibility for the remaining staff.”<sup>83</sup>

Title VI of the Older Americans Act<sup>84</sup> (OAA) is another governmental program that specifically provides for Indian elders. For tribes that have more than 50 Indians over the age of 60, the act allows for grants to be given to those tribes to fund nutrition and support of the Indian elders.<sup>85</sup> Before the monies are distributed, the tribes must “submit applications, describing their proposed plans for nutritional and supportive service for older Indians” for a projected period of time.<sup>86</sup> This is a fairly standard request from the federal government—forms, forms, and more forms.

The problem with Title VI of the OAA is that the plan submitted must be almost incomprehensibly detailed. The tribe must “describe the methods, facilities, and staff to be used in preparing, serving, and delivering the meals and the estimated number of persons to be served.”<sup>87</sup> The nutrition services provided, either directly or by way of a grant or con-

tract, must be substantially in compliance with the provisions of Part C, Title III, which include:

1. Provid[ing] at least one hot or other appropriate meal a day, 5 or more days a week in a congregate setting, any additional meals which the recipient of a grant may elect to provide. A "meal," as used in sections 307(a)(13), 308(b)(7), 311(a)(4), 331(1), 336, 338(a)(1), 339, and 339A of the Act and Sec. 1321.17, Sec. 1321.59, and Sec. 1321.64, is a planned event in a day at which a variety of prepared foods are provided to an individual. These meals shall comply with the U.S. Dietary Guidelines for Americans published by the Secretary of the Department Agriculture. Additionally, the meals must provide the nutrients specified in the current, daily Recommended Dietary Allowances, as established by the Food and Nutrition Board of the National Research Council of the National Academy of Sciences as specified in Section 339(2) unless the meal is a special meal provided to meet the health, religious, or ethnic considerations of eligible individuals. Snacks, partial meals, and second helpings are not considered meals.

2. Provid[ing] at least one home delivered hot, cold, frozen, dried, canned or supplemental food (with a satisfactory storage life) meal per day, 5 or more days a week, and any additional meals which the recipient of a grant may elect to provide. . . .<sup>88</sup>

This program grant sounds very solid until one realizes that the monies only go to tribes with 50 or more Indians over the age of 60. Further, the average payout in 1998 for a tribe with 50 to 100 elders over the age of 60 was \$57,180.<sup>89</sup> In a tribe with 100 elders, this works out to about \$1.57 per elder per day. This is hardly enough to provide two meals a day to each Indian elder, to pay for meal preparation, to pay for transportation costs, and to pay the lowest number of workers minimum wage to prepare, package, and transport the meals.<sup>90</sup> The majority of Indian elders cannot travel by themselves. Any grant allocation that requires that the elderly must have one meal a day, five or more days a week in a congregate setting implicitly requires that the Indian tribes provide transportation for the Indian elderly to and from the congregate area. While this is a valiant attempt to alleviate the problem, the costs to receive and apply for the grant are prohibitive when each elder only receives \$1.57 a day.

This is generally the situation with most government programs respecting the Indian elderly. They are cost prohibitive to even initiate. Thus, it falls to the tribes to take care of their own. Many say this is the way it should be. However, if the federal government is responsible for the Indians' condition in the first place, why should it not fix the problem? As stated previously, the Gaming Act was enacted to give the Indian tribes back their rightful sovereignty and to help the Indians become financially independent of the federal government. On some levels, the goals of the Gaming Act have been met. However, the Gaming Act and the influx of gaming into the tribes has not been without its problems.

### Gambling and Its Pitfalls

Despite the benefits described above, Indian gambling has its drawbacks, many of which directly or indirectly affect the Indian elderly. In the introduction to this paper, I posit the theory that Indian gaming, instead of ameliorating the condition of Indian elders, actually worsens it. Although I have facts and statistics regarding the condition of the elderly and the negative effects of gambling on the tribes in general, I have no offer of proof other than deductions from these side effects to prove the worsening condition of the Indian elderly.

Of the 560 recognized Indian tribes in the United States, around 220 of them are involved in some type of gaming.<sup>91</sup> In general, because of the high revenues brought in by gaming each year, about \$7 billion in 1996, the general public operates under the assumption that every Indian tribe is thriving. This is not true; not every tribe is successful in its gaming endeavors.<sup>92</sup> Also, many gaming tribes face the dilemma of what to do with the monies brought in by gaming under the restrictions of the Gaming Act.

This is where the plight of the elderly Indians fits in. Many of the Indian elderly are homebound. On many reservations, including the Navajo reservations, many elderly Indians live alone. One reason for their reluctance to move is that the Indian elderly are "so spiritually rooted to their family land that they would rather endure hardships than leave."<sup>93</sup> This is true throughout the tribes, not just the Navajo. "Although culture varies widely among tribes, most tribal cultures are marked by a connectedness to a particular place, and by a set of sacred narratives and rituals that sustain individual iden-



tity as well as obligations among tribal members to each other and to the group.”<sup>94</sup> Therefore, it is ironic that “federal policies designed to eradicate tribalism often promoted increased poverty. When impoverished reservation families pooled resources according to established principles of reciprocity, they reinforced an ethos of sharing resources. . . . [P]overty perpetuated, or even extended the ideology of reciprocity.”<sup>95</sup> Thus, over the last two centuries, the extended family unit became the norm of life on the reservations. Due to the extended family unit and the mentality of reciprocity, elderly Indians, although living in poverty with their sons or daughters, were at least provided with care. They were not forgotten.

Now, however, with the influx of gaming in many tribes, the elderly Indian is often forgotten. As mentioned earlier, some tribes do distribute the gaming revenues on a per capita basis to every member of the tribe, including the elderly. Even this, while perhaps improving the elders’ bank accounts, may leave them without redress for their increasing health problems due to aging. For example, an Indian elder does not benefit from money if he or she cannot leave the home to buy groceries for himself or herself or keep important and necessary doctors’ appointments. “[P]er capita distributions tacitly promote individualistic ends over communal concerns.”<sup>96</sup>

It is in the tribes that do not distribute monies on a per capita basis where one can most clearly see the destruction of the extended family unit and the further degradation of the Indian elderly. It is important to note that nearly two-thirds of Indian elders live in an extended family unit.<sup>97</sup> Any threat to the extended family unit is a threat to the very survival of Indian elders.

First, because the success of gaming tribes depends on Class III, high-stakes gaming, there exists very little Class I gaming among the tribes. Class I gaming, remember, is the traditional, festival, and celebratory gaming. Due to this, most tribes continue to see a “decline in the number of fluent speakers in their communities. Because they are necessarily linked, the number of individuals knowledgeable of the traditional religious and spiritual practices has declined.”<sup>98</sup> This decline in the traditional practices necessarily means a depreciation in the usefulness of many elders.

Further, the lure of making millions has caused a sort of exodus by urban Indians back to the reserva-

tions.<sup>99</sup> This would not be viewed as a problem for the Indian elderly if these Indians were coming back for the betterment of the tribe and the amelioration of the conditions on the reservation. Sadly, though, many are returning only for the potential prospect of money. In fact, the return of the money-seeking Indians has caused many tribes to relinquish significant jurisdictional authority under compacts to the states.<sup>100</sup> This loss of power caused by the returning Indians affects the condition of the elders. Again, remember that without the compacts, Indians cannot engage in Class III gaming. Mostly what the compacts do is allow for a certain tax rate on the gaming revenues, which takes away from tribal sovereignty. Also, the higher the taxes, obviously, the less revenue that could possibly be fed into programs for the elderly.

Further, the returning Indians also bring other problems with them. First, because these returning Indians do not understand life on the reservation, some having never lived on a reservation, they generate conflict beyond just encouraging the gaming compacts.<sup>101</sup> They seek to carry out their aggressive business development plans. Moreover, by seeking to participate in tribal politics, these Indians participate with considerable ignorance of the long-standing political customs and unwritten laws governing life on the reservations.<sup>102</sup> Second, returning Indians who decide to stay on the reservations, will one day become elderly Indians themselves. This increases the percentage of Indian elders who need to be taken care of and provided with care. Therefore, they will push up the cost of ameliorating the conditions of the elders.

For many gaming tribes, the rising incomes derived ultimately from gaming fundamentally alter the cooperative pattern within the family groups.<sup>103</sup> What does this mean? Quite simply, gambling tears apart the family unit and promotes the concept of advancement of individual rights, or individual rights mentality.<sup>104</sup> For example, B.H., an elderly Indian, suffers from Parkinson’s disease. He lives with his wife in a “one room, earth-covered hogan without electricity or running water.”<sup>105</sup> B.H.’s wife suffers from a debilitating form of diabetes whereby she is unable to use her legs, not even with the aid of a walker. B.H.’s daughter-in-law is paid minimum wage through a tribal assistance program to “spend four hours a day with them, helping with cooking, washing, and other chores.”<sup>106</sup> Her wages help

support her four children and B.H.'s son, who works only sporadically. In turn, the son hauls in firewood and water for his parents. B.H.'s son and daughter-in-law would probably take care of B.H. and his wife without the wages from the assistance program. However, the entire family depends on the salary from the tribal assistance program that binds them all together.

With the influx of gaming and the increase of the individual rights mentality, much of this extended intergenerational dependence is lost. The individual rights mentality focuses on the betterment of communities through the strengthening of individuals, rather than on the traditional understanding of individual betterment through the strengthening of the community.<sup>107</sup> Despite the fact that in a few successful gaming tribes many of the jobs generated by the gaming are filled by non-Indians,<sup>108</sup> many gaming jobs *are* filled by Indians. So, it is in gaming tribes, that B.H. and his wife would lose the assistance of their son and his wife. Take for example, an eighty-year-old Navajo woman who was found outside freezing and suffering from a broken hip when she fell on her way to her outhouse.<sup>109</sup> She lay outside all night in the cold because no one was there to hear her cries. Her children were gone in search of money. She died a week later. This useless death was ultimately caused by the effects of gaming.

## Conclusion

As one can see, the Indian elder has been let down on so many levels by the federal government beginning with the first anti-tribal policies. It seems that 200 years of poor judgment led to the crises among not only Native American elders, but also Native Americans in general. Because the federal government pushed the Indians onto reservations and took away their territorial and sovereignty rights, it may be necessary to go above and beyond the Indian Gaming Regulatory Act to ameliorate the situation.

The Indian Health Care Improvement Act and Title VI of the Older Americans Act have also failed the Indian elder. The Indian Health Care Improvement Act fails to take into account things like traditional tribal healing ceremonies and medicines and the reluctance of elders to submit to Western medicine. When the Native American must go into a nursing home, his or her tribal customs and beliefs are completely discounted and lost. The Older Americans Act, whose grant program looks like a great step in the right direction, also falls short. Each

elder Indian receives approximately \$1.57 a day. Out of that the tribes are supposed to not only deliver one federally approved meal a day, five or more days a week, but are supposed to bring the elder Indian to a congregate place for another meal, five or more days a week, a nearly impossible feat on such a small daily allocation of funds.

The Indian Gaming Regulatory Act only seems to increase these problems. Not only does it encourage nonreservation Indians to return and "take over," it leads to an individualistic mentality that cuts across the extended family norm. No longer are so many Indians living in this extended family where reciprocity was the key to survival. They may have lived in poverty, but the extended family shared important resources. Individualism does not subscribe to this way of thinking. Thus, gaming leaves the Indian elder to fend for himself or herself.

What can be done? There have been so many mistakes in the past, to say the least. Indian tribes, in many cases, scarcely resemble the tribes of two centuries ago. The decentralized form of government that predominated among these long-ago tribes was replaced by a centralized, mirror-form of the federal government, completely foreign to the Indians. It seems that now is the time to step up and take responsibility, not only by the federal government, but by the respective states, as well. Federally mandated programs specifically aimed at the Native American elder need to be instituted. The Indian Health Service must be revitalized and utilized to its maximum potential. It is fair to blame the tribes as well and ask them to take responsibility for their elders. However, the tribes are in this position because of the federal government's and various states' policies. Thus, I believe that, even though the federal government would be again impinging upon the sovereignty of the Native American, new programs are the key to ameliorating the deterioration of the Native American elder. Perhaps, these programs can be skewed with an eye toward gradually turning over control to the Indians themselves. First and foremost, though, someone needs to take charge and fix the problems brought on the elders by Indian gaming.

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## Endnotes

1. John Randolph Prince, *Indian Country: A Different Model of Sovereignty*, 33 GONZ. L. REV. 103, 111 (1998)

2. *Id.*
3. *Quotes From Our Native Past*, at *Sitting Bull, Hunkpapa Sioux*, at <http://www.ilhawaii.net/~stoney/quotes.html> (visited Mar. 25, 2001).
4. FELIX S. COHENS' HANDBOOK OF FEDERAL INDIAN LAW 58 (Rennard Strickland et al. eds., 1982).
5. Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Family Doctrine*, 23 AM. INDIAN L. REV. 1, 13 (1999).
6. *Id.* at 14.
7. Kathryn R. Rand & Steven A. Light, *Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity*, 4 VA. J. SOC. POL'Y & L. 381, 386 (1997).
8. *Id.*
9. Kevin J. Worthen & Wayne R. Farnsworth, *Symposium: The Dilemma of American Federalism: Power to the People. The States, or the Federal Government? Who Will Control the Future of Indian Gaming? A Few Pages Are Worth a Volume of Logic*, 1996 BYU L. REV. 407, 420.
10. Rand & Light, *supra* note 7, at 387.
11. Graham, *supra* note 5, at 15.
12. *Id.*
13. Worthen & Farnsworth, *supra* note 9, at 432.
14. Laura Nader & Jay Ou, *Interdisciplinary Perspective: Anthropological Perspective: Idealization and Power: Legality and Tradition in Native American Law*, 23 OKLA. CITY U. L. REV. 13, 18 (1998).
15. Rose L. Pfefferbaum et al., *Providing for the Health Care Needs of Native Americans: Policy, Programs, Procedures and Practices*, 21 AM. INDIAN L. REV. 211, 215 (1997).
16. Nader & Ou, *supra* note 14, at 18.
17. *Id.*
18. *Quotes From Our Native Past, From the 1927 Grand Council of American Indians* at <http://www.ilhawaii.net/~stoney/quotes.html> (visited Mar. 25, 2001).
19. Worthen & Farnsworth, *supra* note 9, at 430.
20. *Id.* at 429.
21. *Id.* at 430.
22. *Id.*
23. Carole Goldberg-Ambrose, *Pursuing Tribal Economic Development at the Bingo Palace*, 29 ARIZ. ST. L.J. 97, 105 (1997).
24. Robert B. Porter, *Strengthening Tribal Sovereignty Through Government Reform: What Are The Issues?* 7 KAN. J.L. & PUB. POL'Y 72 (1997).
25. *Quotes from Our Native Past, George Copway, Ojibawa Chief*, at <http://www.ilhawaii.net/~stoney/quotes.html> (visited Mar. 25, 2001).
26. Worthen & Farnsworth, *supra* note 9, at 432.
27. Nader & Ou, *supra* note 14, at 19.
28. Rand & Light, *supra* note 7, at 394.
29. Pfefferbaum et al., *supra* note 15, at 215.
30. *Id.*
31. Nader & Ou, *supra* note 14, at 18.
32. Pfefferbaum et al., *supra* note 15, at 223.
33. Nader & Ou, *supra* note 14, at 18.
34. *Id.*
35. Pfefferbaum et al., *supra* note 15, at 216.
36. Nader & Ou, *supra* note 14, at 18.
37. *Id.*
38. Pfefferbaum et al., *supra* note 15, at 221.
39. Graham, *supra* note 5, at 10.
40. *Id.*
41. See Nader & Ou, *supra* note 14, at 22.
42. *Id.*
43. *Id.* at 23.

44. HANDBOOK ON ETHNICITY, AGING AND MENTAL HEALTH 133 (Deborah K. Padgett ed., 1995).
45. Karen S. McFadden, *The Stakes Are Too High to Gamble Away Tribal Self-Government, Self-Sufficiency, and Economic Development When Amending the Indian Gaming Regulatory Act*, 21 IOWA J. CORP. L. 807, 822 (1996).
46. PRIMARY CARE OF NATIVE AMERICAN PATIENTS 323 (James M. Galloway et al. eds., 1999).
47. *Id.*
48. *Id.*
49. HANDBOOK ON ETHNICITY, AGING AND MENTAL HEALTH, *supra* note 44, at 133.
50. McFadden, *supra* note 45, at 822.
51. 25 U.S.C. §§ 2701–2721.
52. *See* California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (superseded by 25 U.S.C. §§ 2701–2722) (holding upholds the Cahuilla sovereignty by stating that California could not enforce civil or regulatory gaming laws to prohibit gaming on Indian lands within the state).
53. McFadden, *supra* note 45, at 812.
54. *Id.*
55. Eric Henderson, *Indian Gaming: Social Consequences*, 29 ARIZ. ST. L.J. 205, 211 (1997).
56. *Id.* at 212.
57. *Id.* at 211.
58. *Id.* (citing 25 U.S.C. § 2710(b)).
59. *Id.*
60. McFadden, *supra* note 45, at 825.
61. *See* Rebecca Tsosie, *The Consent Principle and Tribal State*, 29 ARIZ. ST. L.J. 25, 50 (1997) (compacting is contracting between states and Indian tribes to allow for Class III gaming on Indian reservations).
62. McFadden, *supra* note 45, at 826.
63. *Id.* at 813.
64. *Id.* at 824–25.
65. Rand & Light, *supra* note 7, at 421.
66. *Id.* at 418.
67. *Id.*
68. *Id.* at 419. *See also* Ross v. Flandreau Santee Sioux Tribe, 809 F. Supp. 738 (D.S.D. 1992) (holding that the tribe had disbursed funds in violation of the Indian Gaming Regulatory Act because the tribe's distribution plan of per capita payments had not been approved by the Secretary of the Interior).
69. *Id.* at 421.
70. McFadden, *supra* note 45, at 814.
71. Rand & Light, *supra* note 7, at 418.
72. Nicolas S. Goldin, *Casting a New Light on Tribal Casino Gaming: Why Congress Should Curtail the Scope of High Stakes Gaming*, 84 CORNELL L. REV. 798, 820 (1999).
73. *Id.*
74. *Id.*
75. *Id.* at 821.
76. Rand & Light, *supra* note 7, at 421.
77. *Id.* at 403.
78. *Id.*
79. *Id.* at 403–04.
80. Holly T. Kuschell-Haworth, *Jumping Through Hoops: Traditional Healers and the Indian Health Care Improvement Act*, 2 DEPAUL J. HEALTH CARE L. 843, 847 (1999).
81. *Id.* at 846.
82. Worthen & Farnsworth, *supra* note 9, at 433.
83. HANDBOOK ON ETHNICITY, AGING AND MENTAL HEALTH, *supra* note 44, at 134.
84. Title VI of the Older Americans Act, at <http://www.aoa.dhhs.gov/AIN/t6history/default.htm> (visited May 21, 2001).

85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.*
90. Eva Leslie, Director of Elderly Services for the Hopi. *See generally* <http://www.sunsinger.com/global/tradition.html> (visited Mar. 25, 2001). (Some Indian tribes do try to provide transportation for their elderly outside of any government funding. For example, the Hopi Tribe “sends a van around once a month to remote areas to pick up elderly residents and take them shopping and socializing. . . . Because of limited space, each senior can take only two bags of groceries. In many cases, that must last them until the van comes around again.” But then, “even these services are limited to those who can walk to the van stop. . . . We barely reach 300 of our elderly. We aren’t reaching at least 1200 others who need personal care.”)
91. Worthen & Farnsworth, *supra* note 9, at 419.
92. *See* Henderson, *supra* note 55, at 231. In order to be successful in gaming, the following factors must be analyzed:
  1. The density of the non-Indian population in the region surrounding the gaming hall;
  2. How large is the tribal population;
  3. The distance between other Indian gaming halls; and
  4. The location of the tribe within a state that has a lottery.
93. *See* Betty Reid, *Old and Alone on the Reservation*, at <http://www.sunsinger.com/global/tradition.shtml/html> (visited Mar. 25, 2001).
94. Goldberg-Ambrose, *supra* note 23, at 111–12.
95. Henderson, *supra* note 55, at 234–35.
96. *Id.* at 243.
97. HANDBOOK ON ETHNICITY, AGING AND MENTAL HEALTH, *supra* note 44, at 134.
98. Porter, *supra* note 24.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. HANDBOOK ON ETHNICITY, AGING AND MENTAL HEALTH, *supra* note 44, at 133.
106. *Id.*
107. Porter, *supra* note 24.
108. Brian Patterson, *Remarks on Tribal History and Culture*, 11 ST. THOMAS L. REV. 5, 5 (1998). (For example, over eighty-five percent of the Oneida of New York’s 2,400 workers are non-Indians.)
109. Reid, *supra* note 93.