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# Born Native, Raised White: The Divide Between Federal and Tribal Jurisdiction with Extra-Tribal Native American Adoption

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## I. INTRODUCTION

In 1978, Congress passed the Indian Child Welfare Act ("ICWA") in response to the alarming rate at which Native American children were being removed from their homes by both private and public agencies and placed with white families.<sup>1</sup> In a 1976 study, Steven Unger found that twenty-five to thirty-five percent of Native American children were being placed in "out-of-home care," and eighty-five percent of these children were in a "non-Indian" home.<sup>2</sup> Congress determined that there was a "special relationship between the United States and the Indian tribes and their members" and that there was a "Federal responsibility to Indian people."<sup>3</sup> Out of this responsibility came the ICWA. This Act deals with various aspects of Indian child welfare, but the pertinent sections for this note are those dealing with custody and court proceedings, parental rights and termination of those rights, placement of children, court jurisdiction, and the protection of rights for tribal affiliation.

This note will explore the tension between two seminal Supreme Court cases dealing with child placement and court jurisdiction as it pertains to the ICWA as well as the implications these holdings have for cultural preservation of Native American traditions and bloodlines. Generally, the ICWA mandates that "[i]n any adoptive

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<sup>1</sup> *Indian Child Welfare Act of 1978*, NAT'L INDIAN CHILD WELFARE ASS'N, [http://www.nicwa.org/indian\\_child\\_welfare\\_act/](http://www.nicwa.org/indian_child_welfare_act/) (last visited Oct. 28, 2013).

<sup>2</sup> *History of the Indian Child Welfare Act*, NAT'L INDIAN CHILD WELFARE ASS'N, [http://www.nicwa.org/Indian\\_Child\\_Welfare\\_Act/history/](http://www.nicwa.org/Indian_Child_Welfare_Act/history/) (last visited Oct. 28, 2013).

<sup>3</sup> 25 U.S.C. § 1901.

placement of an Indian child . . . , a preference shall be given . . . to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."<sup>4</sup> The ICWA makes very clear that the top three preferences for placement in the event of adoption are with members of the child's own tribe. Furthermore, in these adoption proceedings, "[a]ny Indian tribe which became subject to State jurisdiction pursuant to the Act of August 15, 1953 (67 Stat. 588), . . . may reassume jurisdiction over child custody proceedings."<sup>5</sup> Tribes have the right to jurisdiction over custody proceedings involving their members; however, the ICWA does authorize a tribe to hold concurrent jurisdiction with a state on a case-by-case basis.<sup>6</sup>

Strictly following the tenets of the ICWA, the Supreme Court decided *Mississippi Band of Choctaw Indians v. Holyfield* in 1989.<sup>7</sup> In *Holyfield*, twin babies, known as B.B. and G.B., were born on December 29, 1985, in Gulfport, Mississippi, about two hundred miles from the reservation to which their parents belonged.<sup>8</sup> After both parents signed consent-to-adoption forms, a couple from the same county petitioned to adopt the twins.<sup>9</sup> After the adoption, the Tribe moved to vacate the decree on the grounds that it had exclusive adoption jurisdiction

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<sup>4</sup> 25 U.S.C. § 1915(a).

<sup>5</sup> 25 U.S.C. § 1918(a).

<sup>6</sup> 25 U.S.C. § 1919(a).

<sup>7</sup> *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

<sup>8</sup> *Id.* at 37.

<sup>9</sup> *Id.* at 37-38.

under the ICWA.<sup>10</sup> The Court ultimately held that the twins were domiciled with the Tribe under the terms of the ICWA, and the Mississippi Chancery Court did not have the jurisdiction to award the adoption decree.<sup>11</sup> The details and holding of this case will be discussed later in this note; however, the overview is important to acknowledge here as a contrast to a more recent Supreme Court decision.

In *Adoptive Couple v. Baby Girl*,<sup>12</sup> the Court again looks to the domicile of the child in question to determine to the jurisdiction of court: state or tribal. *Baby Girl* poses a slightly different scenario from *Holyfield* because there is also the questionability of parental rights termination; however, the basic principle still exists. In *Baby Girl*, the non-Indian birth mother ("B.M.") and Cherokee birth father ("B.F.") separated prior to the birth of their daughter in September 1999.<sup>13</sup> While B.M. was still pregnant, she sent B.F. "a text message asking if he would rather pay child support or relinquish his parental rights. [B.F.] responded via text message that he relinquished his

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<sup>10</sup> *Id.* at 38 (This motion was denied for two main reasons: 1) the mother gone to "'some efforts to see that [the twins] were born outside the confines of the Choctaw Indian Reservation[,]'" and 2) the twins never "'resided on or [had] physically been on the Choctaw Indian Reservation.'" ).

<sup>11</sup> *Id.* at 53 ("Since, for purposes of the ICWA, the twin babies in this case were domiciled on the reservation when adoption proceedings were begun, the Choctaw tribal court possessed exclusive jurisdiction pursuant to 25 U.S.C. § 1911(a). The Chancery Court of Harrison County was, accordingly, without jurisdiction to enter a decree of adoption." ).

<sup>12</sup> *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552 (2013).

<sup>13</sup> *Id.* at 2558.

rights.”<sup>14</sup> B.M. put Baby Girl up for adoption through a private agency in South Carolina, and the agency selected Adoptive Couple, non-Indians who also lived in South Carolina.<sup>15</sup> B.F. challenged this adoption, arguing that “he did not consent to Baby Girl’s adoption” and that he wanted custody of his daughter.<sup>16</sup> *Baby Girl* involved a long trial, beginning with South Carolina Family Court and ending with the United States Supreme Court, with the Court all the while trying to balance the best interests of the child with the mandates of the ICWA. Unlike *Holyfield*, the Court in *Baby Girl* ultimately held that the non-Indian couple could adopt the Baby Girl and that tribal jurisdiction does not apply to a situation where the child was never domiciled on tribal grounds or with a registered member of the tribe.<sup>17</sup> For all intents and purposes, B.F. is a parent, but a non-custodial parent who is not entitled to ICWA protection.<sup>18</sup>

*Baby Girl* does not overrule *Holyfield*; rather, it operates alongside *Holyfield* with a starkly different outlook on child domicile and court jurisdiction. This note will argue that *Baby Girl* substantively overrules *Holyfield* while essentially rewriting and

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2559.

<sup>17</sup> *Id.* at 2559-64.

<sup>18</sup> *Id.* at 2562 (“[W]hen an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent’s legal or physical custody, there is no ‘relationship’ that would be ‘discontinu[ed]’—and no ‘effective entity’ that would be ‘end[ed]’—by the termination of the Indian parent’s rights. In such a situation, the ‘breakup of the Indian family’ has long since occurred, and § 1912(d) is inapplicable.”).

misapplying various sections of the ICWA, particularly those dealing with the domicile of the child. Moreover, this note will argue that the *Baby Girl* Court grants far too much deference to the state court system, particularly to South Carolina in this case, to handle a custody matter that should explicitly and exclusively belong to the tribes.

South Carolina's adoption statutes disfavor an unwed biological father, so much so that he "must proactively seek to maintain and protect [his] natural parental rights."<sup>19</sup> Under the South Carolina Adoption Act, to which *Baby Girl*'s adoption was original subject, B.F. was not required to give his consent to *Baby Girl*'s adoption because the adoption took place fewer than six months after birth *and* because he did not maintain regular communication or visitation with the child.<sup>20</sup> In also relying heavily on *Baby Girl*'s perceived lack of Indian domicile and the lack of parental efforts of B.F., the *Baby Girl* Court defers, possibly implicitly, to the statutory structure of South Carolina's adoption policies of disregarding the ancestry of the child.<sup>21</sup> Furthermore, a South Carolina father must actively register with the Responsible Father Registry in order to obtain notice of a

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<sup>19</sup> Robert S. Ingram III, *Article: Charleston Adoptive Couple Impacts Federal Adoption Law: Supreme Court of the United States Clarifies Parental Rights Under ICWA*, 25 S. CAROLINA LAWYER 32, 34 (2013).

<sup>20</sup> S.C. CODE ANN. § 63-9-310 (2008).

<sup>21</sup> *Baby Girl*, 133 S.Ct. at 2565 (2013) ("The [ICWA] was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would put certain vulnerable children at a great disadvantage solely because an ancestor—even a remote one—was an Indian.").

pending adoption so as to assert his biological claim to the child.<sup>22</sup> This background of the South Carolina Adoption Act works toward both understanding of the judicial history of the *Baby Girl* case as well as offering an insight into the considerations of the Court.

## II. ICWA AND THE ISSUE OF DOMICILE

The ICWA is very specific as to its goals and the purpose of its existence:

. . . [T]o protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . .<sup>23</sup>

The Act's intent was to preserve Native American families and cultures and to reserve to the tribal council their governmental autonomy with as little federal interference as possible. Within this tribal autonomy is exclusive jurisdiction over Indian child custody proceedings. Section 1911 of the ICWA states,

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child *who resides or is domiciled within the reservation of such tribe*, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, *notwithstanding the residence or domicile of the child*.<sup>24</sup>

The interpretation of domicile is a key difference in the holdings in both *Holyfield* and *Baby Girl*; however, both cases do agree on the

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<sup>22</sup> S.C. CODE ANN. § 63-9-820(c) (2010).

<sup>23</sup> 25 U.S.C. § 1902.

<sup>24</sup> 25 U.S.C. § 1911(a) (emphasis added).

importance of the ICWA. The majority in *Holyfield* spends a great deal of time on the impact and necessity of the ICWA, noting, "'One of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing.'" <sup>25</sup> *Baby Girl* echoes this sentiment by quoting *Holyfield's* description for the reasoning behind the ICWA's enactment <sup>26</sup>; however, the reasoning is the only point of agreement for the two cases.

On the issue of domicile, the Act is silent except for section 1911, merely noting that tribal jurisdiction is exclusive when the child is domiciled within the reservation. <sup>27</sup> Interpretation of the domicile element, in practice, has been left to the courts, a situation which puts cases in a precarious situation since the applicability of the ICWA often rests on the domicile of the child in question. Further, the Act has a special provision for the improper removal of a child from custody. The ICWA indicates that if a

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<sup>25</sup> *Holyfield*, 490 U.S. at 34-35 (quoting *Hearing on Before the Senate Select Comm. on Indian Affairs*, 95th Cong., 1st Sess. (1977) (statement of Calvin Isaac, Tribal Chief of the Miss. Band of Choctaw Indians)).

<sup>26</sup> See *Baby Girl*, 133 S.Ct. at 2557 (quoting *Holyfield*, 490 U.S. at 32 ("The [ICWA] . . . was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes.")).

<sup>27</sup> 25 U.S.C. § 1911(a) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe. . . .").



petitioner before a state court has improperly removed the child from custody, "the court shall decline jurisdiction over such petition and shall forthwith return the child to his parent or Indian custodian" unless returning the child would cause a danger to him or her.<sup>28</sup> The Court in *Baby Girl* misapplies this provision to the case and overrides B.F.'s right to contest the custody of his daughter in, what should be, a tribal court.<sup>29</sup>

The ICWA has sections conditioning the voluntary and involuntary termination of parental rights for an Indian child. For involuntary termination, the ICWA asserts that termination can take place only if "continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."<sup>30</sup> The *Baby Girl* Court holds that this provision does not apply where the Indian parent never had custody.<sup>31</sup> The requirement that the party seeking to terminate the parental rights must satisfy the court that active efforts were made to prevent the breakup of an Indian family does not apply in the event that the Indian parent abandoned the child.<sup>32</sup> For voluntary termination, the ICWA mandates that "such consent shall not be valid unless executed in writing and recorded

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<sup>28</sup> 25 U.S.C. § 1920.

<sup>29</sup> *Baby Girl*, 133 S.Ct. at 2562-64.

<sup>30</sup> 25 U.S.C. § 1912(f).

<sup>31</sup> *Baby Girl*, 133 S.Ct. at 2562 ("Under our reading of § 1912(f), Biological Father should not have been able to invoke § 1912(f) in this case, because he never had legal or physical custody of *Baby Girl* as of the time of the adoption proceedings.).

<sup>32</sup> *Id.* at 2562-63.

before a judge of a court of competent jurisdiction. . . . Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.”<sup>33</sup> The Court does not give this tenet the weight it appears to deserve, particularly since B.F. terminated his rights via text message, and holds that, like the other provisions, it offers protection only in the situation where the parent had custody of the child.<sup>34</sup> The traditional placement preferences for the adoption of Indian children do not bar non-Indian families from adopting the child when no other eligible candidates came forward.<sup>35</sup> In *Baby Girl*, the Court focuses on the break-up of a family versus the lack of a family unit to begin with and notes that the removal standard does not apply when a family unit never existed<sup>36</sup>; however, this aspect will be discussed in greater length in Part Three.

As per *Holyfield*, the Court holds that the ICWA does not clearly define “domicile,” but Congress did intend for a uniform federal law and did not consider the definition to be a matter of state law.<sup>37</sup> Furthermore, that Court is clear that the ICWA’s purpose was to

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<sup>33</sup> 25 U.S.C. § 1913(a).

<sup>34</sup> *Baby Girl*, 133 S.Ct. at 2574 (Sotomayor, J., dissenting) (“The majority does not and cannot reasonably dispute that ICWA grants biological fathers, as ‘parent[s],’ the right to be present at a termination of parental rights proceeding and to have their views and claims heard there. But the majority gives with one hand and takes away with the other. Having assumed a uniform federal definition of ‘parent’ that confers certain procedural rights, the majority then illogically concludes that ICWA’s *substantive* protections are available only to a subset of ‘parent[s]. . . .’”).

<sup>35</sup> *Id.* at 2564-65.

<sup>36</sup> *Id.* at 2562-63.

<sup>37</sup> *Holyfield*, 490 U.S. at 43-44.

completely remove the state courts from having jurisdiction in certain situations regarding child custody.<sup>38</sup> The Court firmly establishes that

. . . [the] domicile of minors, who generally are legally incapable of forming the requisite intent to establish a domicile, is determined by that of their parents, which has traditionally meant the domicile of the mother in the case of illegitimate children. . . . This result is not altered by the fact that they were "voluntarily surrendered" for adoption.<sup>39</sup>

*Holyfield* makes clear that the feelings of the Court as to their preference for *where* the child should live should not matter; what drives the case is "*who* should make the custody determination concerning these children. . . . The law places that decision in the hands of the Choctaw tribal court."<sup>40</sup>

For the Court in *Holyfield*, domicile means the domicile of the birth parents, regardless of whether or not the child or children in question had ever set foot on tribal soil.<sup>41</sup> In *Holyfield*, the mother's domicile was, for all relevant times, the Choctaw Reservation, and by that reasoning, "it is clear that at their birth the twin babies were also domiciled on the reservation, even though they themselves had never been there."<sup>42</sup> Moreover, the issue of voluntary termination of

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<sup>38</sup> *Id.* at 43 (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943) ("We start . . . with the general assumption that 'in the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.'").

<sup>39</sup> *Id.* at 49.

<sup>40</sup> *Id.* at 53.

<sup>41</sup> *Id.* at 48-49 ("It is undisputed in this case that the domicile of the mother (as well as the father) has been, at all relevant times, on the Choctaw Reservation. . . . Thus, it is clear that at their birth, the twin babies were also domiciled on the reservation, even though they themselves had never been there.").

<sup>42</sup> *Id.*

parental rights does not affect the domicile issue for the Court. The Court reads the ICWA for this section as though voluntary surrender of the child "was not meant to be defeated by the actions of the individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves . . . ." <sup>43</sup>

### III. ISSUES WITH ICWA ENFORCEMENT

With all the well-intentioned features of the ICWA, it fails as a statute to provide adequate protection for the rights of the tribes against unilateral decisions on the part of a non-Indian parent. As Ronald Walters observes, "Most often, these cases arise as a result of ignorance of the law, outright fraud on the part of private adoption agencies and adoption attorneys, or as a result of informal arrangements between a Native parent and non-Native foster parents of which the tribe has no knowledge." <sup>44</sup> However, fraud and ignorance are not the only issues with ICWA enforcement. Courts have, although not formally, also instituted use of the "Good Cause Exception" <sup>45</sup> and

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<sup>43</sup> *Id.* at 49.

<sup>44</sup> Ronald M. Walters, *Goodbye to Good Bird: Considering the Use of Contact Agreements to Settle Contested Adoptions Arising under the Indian Child Welfare Act*, 6 U. ST. THOMAS L.J. 270, 287-88 (2008).

<sup>45</sup> See generally Hassan Saffouri, *Comment--The Good Cause Exception to the Indian Child Welfare Act's Placement Preferences: The Minnesota Supreme Court Sets a Difficult (Impossible?) Standard--In Re the Custody of S.E.G.*, 521 N.W.2d 357 (Minn. 1994), 21 WM. MITCHELL L. REV. 1191 (1996) (for a basic overview of the "Good Cause Exception" as it pertained to one custody case in Minnesota).

"Existing Indian Family Exception,"<sup>46</sup> both of which have been detrimental to tribal parent and tribal government interference in extra-tribal adoption.

A. Good Cause Exception

Hassan Saffouri outlines the "Good Cause Exception" as it applies to the ICWA in general and the Minnesota courts in particular.<sup>47</sup> As Saffouri articulates, Minnesota enacted a number of statutes, in 1985, which incorporate elements of the ICWA to provide "higher tribal protection by requiring earlier tribal notification and additional provisions for tribal intervention."<sup>48</sup> In 1993, the Minnesota Supreme Court's Task Force on Racial Bias in the Judicial System ("Task Force") studied data from the Minnesota Department of Human Services to examine the possibility of racial bias in the foster care system.<sup>49</sup> What the Task Force found was that in a small sample size of Indian children, there were frustrations and problems with dealing with Social Services and the judicial system and that there was a real problem with cultural sensitivity within the foster homes.<sup>50</sup>

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<sup>46</sup> See generally Wendy Therese Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381 (1997); see also Daniel Albanil Adlong, *The Terminator Terminates Terminators: Governor Schwarzenegger's Signature, SB 678, and How California Attempts to Abolish the Existing Indian Family Exception and Why Other States Should Follow*, 7 APPALACHIAN J. L. 109 (2007).

<sup>47</sup> Saffouri, *supra* note 45, at 1192.

<sup>48</sup> Saffouri, *supra* note 45, at 1199-1200.

<sup>49</sup> Saffouri, *supra* note 45, at 1200-01.

<sup>50</sup> Saffouri, *supra* note 45, at 1201-02.

After the Task Force conducted this study and made its recommendations, the Minnesota Supreme Court heard *In re Custody of S.E.G.*<sup>51</sup> In *S.E.G.*, the Minnesota Court of Appeals affirmed the lower court's holding that "the children's needs and the unavailability of suitable families provided good cause to deviate from the Act's placement preferences provision."<sup>52</sup> As stated in the introduction to this Note, the ICWA's placement preferences mandate that "[i]n any adoptive placement of an Indian child . . ., a preference shall be given . . . to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."<sup>53</sup> The Minnesota Supreme Court applied three elements, set forth by the Bureau of Indian Affairs, to determine good cause for not applying the ICWA:

1) The request of the biological parents or the child when the child is of sufficient age; 2) The extraordinary physical or emotional needs of the child as established by the testimony of a qualified expert witness; and 3) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.<sup>54</sup>

According to Saffouri, only one of these elements needs to be present for the court to establish good cause.<sup>55</sup> With these guidelines, the Court also applies the ICWA placement preferences in a blend that opens a subjective door through which the Court can determine that it

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<sup>51</sup> Saffouri, *supra* note 45, at 1202.

<sup>52</sup> Saffouri, *supra* note 45, at 1205-06.

<sup>53</sup> 25 U.S.C. § 1915(a).

<sup>54</sup> Saffouri, *supra* note 45, at 1207.

<sup>55</sup> Saffouri, *supra* note 45, at 1207.

is in the child's best interests, perhaps emotionally or physically, to stay with a non-Indian family.<sup>56</sup>

#### B. Existing Indian Family Exception

The latest holding with *Baby Girl* is not the first time the ICWA has had little to no enforcement or a misapplication of the principles. Wendy Parnell's article addresses a method by which the courts can side-step application of the ICWA: the "Existing Indian Family Exception."<sup>57</sup> Courts have traditionally applied the Exception in three main types of cases:

Courts applying the existing Indian family exception focus on either (1) the bond between the Indian parent and child, or (2) the parents' or child's ties to the reservation or tribal culture. . . . Courts have also applied the exception in cases where an Indian mother attempts to revoke a voluntary relinquishment of custody. Finally, the exception is increasingly applied in cases where the court determines the Indian parent is detached from tribal culture or the reservation.<sup>58</sup>

The basic premise of the exception is that the "ICWA only applies when an Indian child is removed from an existing Indian family unit. To support this basic premise, courts applying the exception conclude that Congress' prevailing purpose in enacting the ICWA was to prevent the removal of Indian children from Indian families."<sup>59</sup> This technique is precisely what the majority in *Baby Girl* employs: by asserting that there is not an Indian family in existence because the couple had separated prior to the birth of Baby Girl, the Court can find that no

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<sup>56</sup> Saffouri, *supra* note 45, at 1208.

<sup>57</sup> Parnell, *supra* note 46, at 383-84.

<sup>58</sup> Parnell, *supra* note 46, at 384.

<sup>59</sup> Parnell, *supra* note 46, at 384.

family ever existed and thus avoid the sections of the ICWA that could restore B.F.'s parental rights to his daughter.<sup>60</sup>

Daniel Adlong's article also addresses the existing Indian family exception and outlines California's attempt to abolish the family exception.<sup>61</sup> Adlong argues that the exception "violates the core principles of the ICWA and deprives tribes of certain fundamental rights."<sup>62</sup> Adlong further asserts that what the courts have done through this exception is create "another requirement that Indian children must meet for the ICWA to apply. They look for a level of 'Indian-ness' determined by the activity a child's parents have with an Indian tribe. However, such an examination completely disregards one group the ICWA is supposed to protect: Indian tribes."<sup>63</sup> The majority in *Baby Girl* does precisely this; in fact, the first line of the opinion states, "This case is about a little girl (Baby Girl) who is classified as an Indian because she is 1.2% (3/256) Cherokee."<sup>64</sup> This first line serves to immediately downplay and disregard Baby Girl's, and by proxy B.F.'s, Indian bloodlines; less than two percent Indian blood is all that keeps this case from following simple South Carolina family law. Further, the Court appears almost disdainful

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<sup>60</sup> *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2562-63 (2013).

<sup>61</sup> Adlong, *supra* note 46, at 135.

<sup>62</sup> Adlong, *supra* note 46, at 135.

<sup>63</sup> Adlong, *supra* note 46, at 130.

<sup>64</sup> *Baby Girl*, 133 S.Ct. at 2556.



toward B.F.'s ICWA protections.<sup>65</sup> In this analysis, the Court appears to have far too much favoritism toward the state court rather than strictly applying the tenets of the ICWA.

Determining the future of a child's welfare on the existence of what each court deems a family to be is extremely problematic. In giving an overview of the history of the ICWA and the appearance of the existing family exception, Brian D. Gallagher's article asserts that state courts avoid following the ICWA regardless of Congress's intent in implementing the statute.<sup>66</sup> In spite of the majority's holding in *Holyfield* that the ICWA should be strictly implemented to avoid the trauma for the children and maintain deference to the tribal courts for "experience, wisdom, and compassion . . . to fashion an appropriate remedy[,]"<sup>67</sup> courts continuously exercise the existing Indian family exception to circumvent application of the ICWA.<sup>68</sup>

The case of *In re Adoption of Baby Boy L.*<sup>69</sup> is another example of failing to apply the ICWA that, like *Baby Girl*, takes into

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<sup>65</sup> *Id.* at 2559 ("It is undisputed that, had Baby Girl not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law. See Tr. of Oral Arg. 49 ('Under state law, [B.F.'s] consent to the adoption would not have been required').").

<sup>66</sup> Brian D. Gallagher, *Indian Child Welfare Act of 1978: The Congressional Foray into the Adoption Process*, 15 N. ILL. U. L. REV. 81, 94 (1994) ("Despite the aggressive stance taken by Congress in its passage of the ICWA, 'state courts frequently avoid its application.'").

<sup>67</sup> *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (quoting *Matter of Adoption of Halloway*, 732 P.2d 962, 972 (1986)).

<sup>68</sup> Gallagher, *supra* note 66, at 97 ("The Existing Family exception has been exercised in a wide variety of circumstances by both Indians and non-Indians, as a means of circumventing the ICWA and effectively removing the tribe from the equation.").

<sup>69</sup> 231 Kan. 199 (1982).

consideration the bloodlines argument. Baby Boy L. was born out of wedlock: his mother was a non-Indian, and his father was five-eighths Native American blood belonging to the Kiowa tribe.<sup>70</sup> Like *Baby Girl*, Baby Boy L.'s mother made the unilateral decision to consent to his adoption to a specifically named couple.<sup>71</sup> At the time of the mother's decision, Baby Boy L.'s father was incarcerated at the Kansas State Industrial Reformatory.<sup>72</sup> The lower court determined two key factors: 1) the father was "an unfit person to have the care or custody of Baby Boy L."<sup>73</sup> and that his parental rights could, therefore, be terminated, and 2) that the Kiowa tribe did not have the right to intervene in either the custody proceedings or the father's character and fitness assessment.<sup>74</sup> As with *Baby Girl*, the Kansas court showed no consideration for the right of the tribe to intervene, a right that is granted by the ICWA.<sup>75</sup>

As in all the other cases, *Baby Boy L.* addresses and reiterates the purpose behind the ICWA, yet in understanding the guiding principals behind the Act, the Kansas Supreme Court still held that the ICWA did not apply in Baby Boy L.'s case.<sup>76</sup> The court's reasoning

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<sup>70</sup> In the Matter of the Adoption of Baby Boy L., 231 Kan. 199, 201 (1982).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 202.

<sup>73</sup> *Id.* at 203.

<sup>74</sup> *Id.*

<sup>75</sup> 25 U.S.C. § 1915(a).

<sup>76</sup> *Baby Boy L.*, 231 Kan. at 207 ("We conclude the trial court was correct in its determination that the ICWA, by its own terms, does not apply to these

behind affirming the lower court's decision comes back to bloodlines and domicile:

In this case *Baby Boy L. is only 5/16ths Kiowa Indian*, has never been removed from an Indian family and so long as the mother is alive to object, would probably never become a part of the [father's] or any other Indian family. While it is true that this Act could have been more clearly and precisely drawn, we are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress rather than uphold them.<sup>77</sup>

By looking at the bloodline of Baby Boy L., which is far greater than Baby Girl's mere 3/256ths blood, as well as the family status at the time of birth, the court determined not only that the ICWA did not apply, but also that to apply it would be a disservice to the intent of the Act.<sup>78</sup> In affirming the lower court's decision, the Kansas Supreme Court relied on eight main points to circumvent application of the ICWA: 1) the child is the illegitimate child of a non-Indian woman; 2) the mother voluntarily consented to the adoption by a non-Indian family on the child's date of birth; 3) the attorney for the Kiowa tribe was notified of the proceedings pursuant to the ICWA; 4) Baby Boy L. has never been in the custody of his Indian father; 5) preservation of the Indian family is not a concern in this case since the child has never been a part of that family; 6) Baby Boy L. is

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proceedings and therefore its rulings on the various petitions filed by appellants were correct.").

<sup>77</sup> *Id.* at 206 (emphasis added).

<sup>78</sup> *Id.* ("In this case *Baby Boy L. is only 5/16ths Kiowa Indian*, has never been removed from an Indian family and so long as the mother is alive to object, would probably never become a part of the Perciado or any other Indian family. While it is true that this Act could have been more clearly and precisely draw, we are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress rather than uphold them.").

simply not a member of an Indian family; 7) the child was enrolled as a member of the Kiowa tribe against the mother's wishes; and 8) no State or Federal agency is attempting to break up an Indian home.<sup>79</sup>

For the court in *Baby Boy L.*, exposure to the Indian tribe is key to determining application of the ICWA. As Gallagher's article asserts, the court in *Baby Boy L.* looks at the ICWA as a tool for

the maintenance of the family and tribal relationships in existing Indian homes[,] . . . [n]ot to dictate that an illegitimate *infant who has never been a member of an Indian home or culture, and probably never would be*, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.<sup>80</sup>

Thinking of the ICWA in these terms affords courts the ability to formulate their own theories on family, continuity, the potential for tribal relationships, and the potential impacts on self-identification as the child grows. Part of the self-identification problem stems from the invalidation of adoptions after the child has grown to know the adoptive family as his or her own but is being returned to his or her biological parents.<sup>81</sup>

A series of *New York Times* ("NYT") articles highlights the emotional custody battle between Adoptive Couple and B.F. as the *Baby Girl* case unfolded. The emotional aspect of the custody proceedings really takes priority in these news articles. Statements illustrating

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<sup>79</sup> *Id.* at 204-05.

<sup>80</sup> Gallagher, *supra* note 66, at 98 (emphasis added).

<sup>81</sup> Gallagher, *supra* note 66, at 98 ("[I]n many instances, adoptive parents run the risk that their seemingly legitimate state court adoptions may be invalidated due to the court's failure to abide by the jurisdictional requirements of the ICWA.").

that Adoptive Couple was "ordered to turn over a 27-month-old girl they had cared for since birth to her biological father, an Indian, whom the girl had never met" emotionally connect the reader to the adoptive couple from the start of the article while at the same time suggesting a negativity to the biological father's position in wanting custody of his child.<sup>82</sup> The same emotional child turnover occurred in *Holyfield*: "'The kid was, I think, 5 years old or so' by the time the case reached the Supreme Court, Justice Scalia recalled. 'And we had to turn that child over to a tribal council. I found that very hard. But that's what the law said, without a doubt.'"<sup>83</sup> Although emotions cannot be put aside in difficult cases such as these, *Holyfield* exemplifies that emotions cannot guide these decisions; the law must be followed regardless of emotional investment.

This same series of *NYT* articles shows that although *Baby Girl* was decided in June 2013, the saga did not end there. One article, discussing the Supreme Court's decision, again highlights the emotion behind the lengthy custody battle and the need for clearer legislation: "The [case] has stirred powerful emotional responses from child welfare groups, adoptive parents and Indian tribes, all of whom have sought a clearer legal standard of how the Indian Child Welfare

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<sup>82</sup> Adam Liptak, *Justices Take Case on Adoption of Indian Child*, *NY TIMES* (Jan. 4, 2013), [http://www.nytimes.com/2013/01/05/us/supreme-court-takes-case-on-adoption-of-indian-child.html?\\_r=0](http://www.nytimes.com/2013/01/05/us/supreme-court-takes-case-on-adoption-of-indian-child.html?_r=0).

<sup>83</sup> Adam Liptak, *Case Pits Adoptive Parents Against Tribal Rights*, *NY TIMES* (Dec. 24, 2012), <http://www.nytimes.com/2012/12/25/us/american-indian-adoption-case-comes-to-supreme-court.html>.

Act can be applied when it appears to conflict with state law.”<sup>84</sup> B.F. also released a statement upon the decision’s announcement: “‘I would not want any other parent to be in this position, having to struggle this hard and this long for the right to raise their own child.’”<sup>85</sup>

Justice Scalia’s legal analysis in *Holyfield* and *Baby Girl* is paramount because he was on the bench for both cases: majority for *Holyfield* and dissent for *Baby Girl*. Scalia’s dissent in *Baby Girl* criticizes the new construct of domicile as well as the majority’s negative attitude toward biological parental rights:

I reject the conclusion that the Court draws from the words “continued custody” in 25 U.S.C. § 1912(f) not because “literalness may strangle meaning,” . . . but because there is no reason that “continued” must refer to custody in the past rather than custody in the future. . . . The Court’s opinion, it seems to me, needlessly demeans the rights of parenthood. It has been the constant practice of the common law to respect the entitlement of those who bring a child into the world to raise that child. . . . [P]arents have their rights, no less than children do. This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.<sup>86</sup>

Scalia goes on to take part in a joint dissent with Justices Sotomayor, Ginsburg, and Kagan, so this solitary note of his own is especially poignant. By adding his own thoughts on the majority’s

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<sup>84</sup> Dan Frosch & Timothy Williams, *Justices Say Law Doesn’t Require Child to be Returned to Her Indian Father*, NY TIMES (June 25, 2013), [http://www.nytimes.com/2013/06/26/us/justices-order-return-of-indian-child-to-adoptive-parents.html?\\_r=0](http://www.nytimes.com/2013/06/26/us/justices-order-return-of-indian-child-to-adoptive-parents.html?_r=0). See also Dan Frosch, *Custody Battle Continues Despite Ruling by Justices*, NY TIMES (Aug. 13, 2013), <http://www.nytimes.com/2013/08/14/us/custody-battle-continues-despite-ruling-by-justices.html>; Associated Press, *Cherokee Girl is Handed Over to Adoptive Parents*, NY TIMES (Sept. 23, 2013), <http://www.nytimes.com/2013/09/24/us/ Cherokee-girl-is-handed-over-to-adoptive-parents.html>.

<sup>85</sup> Frosch & Williams, *supra* note 84.

<sup>86</sup> *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2571-72 (2013) (Scalia, J., dissenting).

analysis of the case, Scalia can more singularly highlight the blatant misapplication of the ICWA to B.F.'s attempt to regain custody of Baby Girl and attempt to restore the original intent and application of the ICWA to these types of cases. He further laments the majority's holding in *Baby Girl* in an *NYT* interview: "'This father wants to raise his daughter, and the statute amply protects his right to do so. There is no reason in law or policy to dilute that protection.'"<sup>87</sup>

While not explicit in any of the *NYT* articles or landmark cases, there could potentially be an underlying racial element in developing public perception of Baby Girl's case, an element which harkens back to the Good Cause Exception and the subjective application of the best interests standard. This racial element cannot be proven, however, since it is only Native American adoption cases subject to these special court procedures.

#### IV. ATTEMPTS TO BYPASS THE EXISTING INDIAN FAMILY EXCEPTION

In addition to underscoring some of the problems with the Existing Indian Family Exception, Gallagher's article also highlights some of the legal arguments and court analyses that have favored the ICWA as it was intended. In particular, Gallagher discusses *In re Adoption of Lindsay C.*,<sup>88</sup> an appellate case out of California.<sup>89</sup> Lindsay C. was born on September 3, 1983, and her mother, a non-Indian, and her father, an enrolled member of the Little Lake Tribe, were never

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<sup>87</sup> Frosch & Williams, *supra* note 84.

<sup>88</sup> 229 Cal. App. 3d 404 (1991).

<sup>89</sup> Gallagher, *supra* note 66, at 100.

married.<sup>90</sup> At the time of trial, Lindsay was seven years old and had not had contact with her birth father since she was sixteen months old.<sup>91</sup> According to the record, the birth father never held Lindsay or even "called her his daughter."<sup>92</sup>

This case background is important because it sets similar parameters as in *Baby Girl*, since we have an absent father who allegedly showed little interest in the minor. One of the few factual differences between *Lindsay C.* and *Baby Girl* is the age of the minor at the time of trial, seven years old and twenty-seven months old, respectively. Although these two cases have very similar factual backgrounds, they come to two starkly different endings. Whereas *Baby Girl* holds that the lack of any past custody or domicile on the Indian reservation forfeits application of the ICWA, *Lindsay C.* holds the opposite. Directly addressing *Holyfield* and *Baby Boy L.*, the court in *Lindsay C.* states,

*Holyfield* has raised new questions regarding the continuing viability of *Baby Boy L.* and its progeny. As stated by one legal scholar, "After the decision in *Holyfield*, it appears that the Kansas court in *Baby Boy L.* may have given inappropriate weight to the wishes of the family. The United States Supreme Court seems unlikely to protect the *implied* right of the non-Indian mother to entirely exclude the applicability of the Act which *explicitly* protects the right of a tribe to intervene in any child custody proceeding involving an Indian child."<sup>93</sup>

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<sup>90</sup> *In re Adoption of Lindsay C.*, 229 Cal. App. 3d 404, 406 (1991).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* (quoting Roger A. Tellinghuisen, *The Indian Child Welfare Act of 1978: A Practical Guide with [Limited] Commentary*, 34 S.D. L. REV. 660, 671 (1989)).



Not only does *Lindsay C.* acknowledge that *Holyfield* should be the standard approach to ICWA cases involving extra-tribal adoption, but also that the approach taken in *Baby Boy L.* should not, and at the time likely thought would not, be the way of the future for the U.S. Supreme Court. *Lindsay C.* takes a straightforward approach to analyzing what the ICWA means in conjunction to what Congress intended when it compares the implied right of the non-Indian mother with the explicit right of the tribe to intervene in these proceedings.<sup>94</sup>

More than acknowledging the explicit right of the tribe to intervene, *Lindsay C.* refrains from parsing out the degrees of bloodline to further the legal argument. Whereas degree of blood is a feature in both *Baby Boy L.* and *Baby Girl*, *Lindsay C.* make a simple statement about blood:

In the case at bar, it is uncontroverted that Lindsay C. is an Indian child within the meaning of the Act. It is also undisputed that the tribe of which [the biological father] is a member is a tribe recognized under the Act and that Lindsay is eligible for membership therein.<sup>95</sup>

For the *Lindsay C.* court, simple blood relation is good enough without deconstructing the amount of Indian blood or the current or potential tribal membership. Gallagher attributes this lack of bloodline preoccupation to the court's focus on the balance of interests between the best interests of the child and the interests and rights of the tribe<sup>96</sup>: "Congress was concerned not solely about the interests of

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<sup>94</sup> *Id.* at 408.

<sup>95</sup> *Id.* at 409.

<sup>96</sup> Gallagher, *supra* note 66, at 100-01.

Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians."<sup>97</sup>

On a federal level, Congressional intent for the application of the ICWA appears to be clear, but some states have also taken their own initiatives in case law to make sure that the ICWA is applied properly if parties try to bring the case to state courts. For example, a New Jersey Supreme Court holding found,

[W]hile an unwed mother might have a legitimate and genuine interest in placing her child for adoption outside of an Indian environment, if she believes that such a placement is in the child's best interests, consideration must also be given to the rights of the child's father and Congress' belief that, whenever possible, it is in an Indian child's best interests to maintain a relationship with his or her tribe.<sup>98</sup>

Even further, New Jersey has also declined the acceptance of other courts' interpretations allowing for exceptions to the ICWA.<sup>99</sup>

While some states are taking a stand against subjective application of the ICWA, others are left unsure of how to proceed in cases involving existing families that have already adopted Native American children, particularly with cases in which it is the mother who wants the adoption nullified.<sup>100</sup> Gallagher observes that "[t]he

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<sup>97</sup> *In re Adoption of Lindsay C.*, 229 Cal. App. 3d at 412 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 45 (1989)).

<sup>98</sup> *In the Matter of the Adoption of a Child of Indian Heritage*, 111 N.J. 155, 170 (1988).

<sup>99</sup> Gallagher, *supra* note 66, at 99.

<sup>100</sup> Gallagher, *supra* note 66, at 103 ("Post-Holyfield, . . . even the Supreme Court of Indiana has taken strides to ensure literal application of the ICWA. A factually similar case was recently heard by that court, and a contrary solution realized. . . . In cases involving Indian mothers seeking to nullify

ICWA has served as a convenient, albeit usually unsuccessful, means for biological mothers seeking to rescind consent to adoption of their children.”<sup>101</sup> In cases such as these, the courts seem to value the relationship developing between the minor child and the adoptive family, even when the consenting parent wants to rescind that consent.<sup>102</sup> In two separate cases in different state courts, nearly factually identical cases came out with different holdings when the mother wanted to rescind her consent: in the first, the overwhelming factor was that the minor had already spent all seven years of her life, minus the first five days, with her adoptive family; in the second, the amount of time with the family was of no concern, and the case was remanded for strict application of the ICWA.<sup>103</sup>

There is no simple way to handle these cases. Emotions will always problematize what should be a simple solution; however, allowing emotions to guide the application of a federal statute only works as a disservice to those attempting to benefit from the statute as it was written.

#### V: MOVING FORWARD POST-BABY GIRL

With contrary Supreme Court holdings in *Holyfield* and *Baby Girl*, how is the judiciary to move forward with the ICWA? If lower courts

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their own unilateral actions, the court found a presumption of an existing Indian family prior to the adoption.”).

<sup>101</sup> Gallagher, *supra* note 66, at 103.

<sup>102</sup> Gallagher, *supra* note 66, at 103.

<sup>103</sup> Gallagher, *supra* note 66, at 103.

look to the Supreme Court for guidance, what is to be discerned and followed? The *Baby Girl* holding has seemingly left the status of the ICWA in a precarious state, one filled with subjectivity and a lack of respect for the intent of the statute and a lack of respect for the preservation of tribal autonomy and culture. Among the issues and potential compromises post-*Baby Girl* are the constitutionality of the ICWA and the potential for the Act's being repealed and the prevalent trend of contact agreements between the tribes and the non-Indian adoptive parents.<sup>104</sup>

#### A. ICWA Constitutionality

Upon granting certiorari to the *Baby Girl* case in January 2013, the Supreme Court intended to answer two questions presented:

(1) Whether a non-custodial parent can invoke ICWA to block an adoption voluntarily and lawfully initiated by a non-Indian parent under state law[; and] (2) Whether ICWA defines "parent" in 25 U.S.C. § 1903(9) to include an unwed biological father who has not complied with state law rules to attain legal status as a parent.<sup>105</sup>

These questions appear to be rather straightforward, especially given the clarity and depth with which the ICWA was written. Marcia Zug discusses the politics behind these questions and how they should have already been answerable via *Holyfield*:

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<sup>104</sup> See generally Marcia Zug, *Commentary: Adoptive Couple v. Baby Girl: Two-And-A-Half Ways to Destroy Indian Law*, 111 MICH. L. REV. FIRST IMPRESSIONS 46 (2013) (for a discussion of the Act's constitutionality and its potential for repeal); see generally Walters, *supra* note 44 (for a discussion of contact agreements as a compromise between tribes and non-Indian couples in states adhering to the Existing Indian Family Exception).

<sup>105</sup> Questions Presented at 1, *Adoptive Couple v. Baby Girl*, cert. granted (Jan. 4, 2013) (No. 12-399), available at <http://www.supremecourt.gov/qp/12-00399qp.pdf> (last visited Feb. 17, 2014).

The Supreme Court address the first question in [*Holyfield*], in which the Supreme Court held that ICWA could block an adoption voluntarily initiated by a parent under state law. The clear language of ICWA answers the second question by specifically defining a "parent" as "any biological parent or parents of an Indian child."<sup>106</sup>

If the questions have already been answered, as Zug claims, then why would the Supreme Court revisit these issues rather than defer to *Holyfield*? Zug addresses the possibility of an entire judicial overhaul of Indian law and the constitutionality of the ICWA.<sup>107</sup> *Baby Girl* cannot overrule *Holyfield* because they deal with different provisions of the ICWA; however, *Baby Girl* can work to undermine the Act's constitutionality.<sup>108</sup>

According to Zug, the ICWA's constitutionality relies on two ideas: "First, these special laws for Indians are not race based. And second, Congress has the authority to issue special laws with regard to Indian people and tribes."<sup>109</sup> For purposes of constitutionality, Native American affiliation is seen more as a "political affiliation than a racial category"; therefore, it should be of little concern that Indian and non-Indian children are treated differently.<sup>110</sup>

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<sup>106</sup> Zug, *supra* note 104, at 47.

<sup>107</sup> Zug, *supra* note 104, at 48-49 (noting that the Supreme Court's willingness to hear *Baby Girl* on issues that have already been decided is not the result of a desire to federally recognize the Existing Indian Family Exception, but rather offers the Exception as a possible solution to judicial interpretation of the ICWA without overruling the Act or *Holyfield* just yet).

<sup>108</sup> Zug, *supra* note 104, at 49.

<sup>109</sup> Zug, *supra* note 104, at 49.

<sup>110</sup> Zug, *supra* note 104, at 49 (discussing the implications of *Morton v. Mancari*, 417 U.S. 535, 554 (1974), which held that the preference to Indian children was one granted to "quasi-sovereign tribal entities" rather than racial groups).

Although there is quite likely little actual distinction between these categories as they concern Native Americans, any distinction is still important to maintain the well-deserved tribal sovereignty.

Zug's article was published prior to the summer 2013 *Baby Girl* decision, so many of her concerns about the fate of the ICWA are laid to rest for now. What continues is the tension between *Holyfield* and *Baby Girl* and the potential for another Supreme Court case to deal with issues involved in both cases and lead to an overruling of *Holyfield*.

#### B. Contact Agreements

States that approach extra-tribal adoption with the Existing Indian Family Exception often employ some kind of contact agreement to maintain the cultural elements for the Indian child.<sup>111</sup> A contact agreement is an agreement that upon open adoption, the child will live permanently with the adoptive parents but maintain contact between the tribe and the birth parent(s).<sup>112</sup> These contact agreements have been so prevalent as a potential compromise to extra-tribal adoption that they were "contemplated in a set of proposed amendments to ICWA in 2001."<sup>113</sup> Had these amendments been adopted, they would "authorize[] state

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<sup>111</sup> Walters, *supra* note 44, at 290.

<sup>112</sup> Walters, *supra* note 44, at 290 ("State legislatures have responded to this change by modifying adoption law so that it 'increasingly provides for a continuum of adoption, with closed adoption on one end and ongoing contact between adoptive and birth families, usually in the form of cooperative adoption, on the other.' In order to facilitate the ongoing contact, many states now recognize post-adoption contact agreements as legally binding which gives signatories continuing rights to contact with adoptees.").

<sup>113</sup> Walters, *supra* note 44, at 291.

courts to approve post-adoption visitation agreements as part of an adoption decree if such an agreement was determined to be in the best interests of the child.”<sup>114</sup>

The benefit of these agreements is that they allow the courts to take into consideration the best interests of the child, a consideration to which they are already accustomed, and balance that consideration with the requirements in the ICWA that the tribe be given notice of the adoption and a right to intervene and express its interests.<sup>115</sup> Furthermore, these contact agreements allow the child to stay or become invested in his or her tribal culture and maintain a connection with his or her heritage. In a 1993 study conducted in California, 1,396 adoptions of children between infant and sixteen years old were found to have better behavior scores and more positive feelings toward their birth parents than the children who had no access to their birth parents.<sup>116</sup> It is important to note, however, that these “behavior scores” are not defined in Berry’s study and the scores are determined from the perspective of the adoptive parents.<sup>117</sup> Furthermore, it is also “unknown whether adoptive parents in open adoptions rated their children’s behavior more positively because of . . . positive impressions of the birthparents, whether parents were in open adoptions . . . because of those . . . impressions, or whether

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<sup>114</sup> Walters, *supra* note 44, at 291.

<sup>115</sup> 25 U.S.C. §§ 1911(a), 1915(a).

<sup>116</sup> Marianne Berry, *Risks and Benefits of Open Adoption*, 3 THE FUT. OF CHILD. 125, 133 (1993) available at [https://www.princeton.edu/futureofchildren/publications/docs/03\\_01\\_09.PDF](https://www.princeton.edu/futureofchildren/publications/docs/03_01_09.PDF).

<sup>117</sup> Berry, *supra* note 116, at 133.

open adoption is truly related to more positive behavior in children."<sup>118</sup>

C. Balancing Danger to Tribes with the "Best Interests" Standard

While these contact agreements at least allow the tribes to maintain some cultural influence on the children when the Existing Indian Family Exception overrides strict application of the ICWA, there are issues of assimilation to consider as well as the future of Native American populations and culture.<sup>119</sup> As Walters points out, the United States has recently "refused to sign the United Nations' Declaration on the Rights of Indigenous Peoples--a document declaring in part that 'indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.'"<sup>120</sup> However, Walters suggests that American should not be surprised at this refusal given that "[a]ssimilationist policies were founded on, among other things, the desire to bring Native Americans within the accepted, capitalist economic structure of the white majority. Many Native Americans remain outside that model today."<sup>121</sup>

The majority's decision in *Baby Girl* can be seen as a judicial embodiment of this assimilationist policy: by beginning to move away from a strict application of the ICWA, the Court is essentially reapplying the goals of assimilation that Walters highlights. Patrice

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<sup>118</sup> Berry, *supra* note 116, at 133.

<sup>119</sup> Walters, *supra* note 44, at 292-93.

<sup>120</sup> Walters, *supra* note 44, at 292.

<sup>121</sup> Walters, *supra* note 44, at 292-93.



Kunesh explores two potential dangers to the tribes if tribal sovereignty is harmed: 1) danger from state and federal government interference with tribal authority and affairs; and 2) the internal failure of the tribes to be able to organize in a manner that allows to them to "fairly exercise their powers of self-government in a manner which is responsive to the welfare of their people."<sup>122</sup> Strict application of the ICWA is the only way to prevent both dangers in that there is limited government interference while still allowing for tribal sovereignty and internal structure.

Race as a factor in adoption has a long tenuous history in family law.<sup>123</sup> Likewise, social movements against interracial adoption have

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<sup>122</sup> Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 18 (1996).

<sup>123</sup> See *Compos v. McKeithen*, 341 F. Supp. 261, 268 (E.D.La. 1972) ("The necessity for racial matching of parent, or parents, and child in adoption to promote the best interests of the child, and the reasonableness of that racial classification in light of that purpose cannot be sustained."); see also *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) ("Whatever problems racially mixed households may pose for children in 1984 can no more support a denial of constitutional rights than could the stresses that residential integration was thought to entail in 1917. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody."); *Drummond v. Fulton Cnty. Dep't of Fam. and Child. Services*, 563 F.2d 1200, 1219 (5th Cir. 1977) ("The complaint alleged that the action of the defendants in removing Timmy from custody of the Drummonds was motivated solely on racial grounds, that is it was done pursuant to a policy that black or part black children could not be placed for adoption with a white couple. One of the great defects in the proceeding here is the fact it is utterly impossible to determine whether or not this allegation is true. . . . In any event, . . . there is no indication that any word about other reasons than Timmy's race went into any decision-making or was the basis for the final decision. The fact that this problem could not be resolved by the trial court on the record before it . . . adds much to my feeling of the necessity of having a much more adequate hearing procedure before such issues can be disposed of administratively."); *In re Davis*, 502 Pa. 110, 139 (1983) ("All reasonable people look forward to the day when racial prejudice and tension has disappeared; until that day comes, however, this Court would be remiss in our obligation to determine and further a child's best interest if we ignored the relevance of race in placement proceedings.").

been thriving since the early 1970s: "Organized opposition to transracial adoption, which began in the early part of the 1970s, was formidable enough by 1975 to bring about a reversal in policy by the leading adoption agencies in most states throughout the country."<sup>124</sup> Rita Simon and Howard Alstein outline just how severe the tensions were between the African American and Native American leaders and the adoption agencies: "The opposition was led . . . by the National Association of Black Social Workers . . . and by leaders of black political organizations, who said they saw in the practice an insidious scheme for depriving the black community of its most valuable future resource: its children."<sup>125</sup>

While Black organizations largely led the fight against interracial adoption, Native Americans were actively involved as well, so much so that they likened interracial adoption with genocide: "Native-American groups . . . labeled transracial adoption 'genocide' and . . . also accused white society of perpetuating its most malevolent scheme, that of seeking to deny Native Americans their future by taking away their children."<sup>126</sup> For these Native American activists, even the prospect of white parents adopting Native Americans and still hoping to foster a relationship between the child and the tribe was an insufficient solution because these white parents

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<sup>124</sup> RITA J. SIMON & HOWARD ALSTEIN, *ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS* 37 (2000).

<sup>125</sup> SIMON & ALSTEIN, *supra* note 124, at 37.

<sup>126</sup> SIMON & ALSTEIN, *supra* note 124, at 37.

were simply unable to encourage and understand a racial experience that is/was not their own.<sup>127</sup> Together, African-American and Native American activist groups urged the public to consider the repercussions of transracial adoption by arguing that “nonwhite children who are adopted by white parents are lost to the communities into which they are born. The experience of growing up in a white world makes it impossible for black and Indian children ever to take their rightful place in the communities of their birth.”<sup>128</sup> As we saw in *Holyfield* and *Baby Girl*, the potential for a loss of culture was not lost on the Court, nor was it lost on Congress when they developed the ICWA.<sup>129</sup>

Leading up to this upheaval in the 1970s but prior to the passing of the ICWA, there was great cause for mistrust of the adoption system. In 1958, the Child Welfare League of America and the Bureau of

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<sup>127</sup> SIMON & ALSTEIN, *supra* note 124, at 37 (“Even if some white parents who might want their adopted children to grow up Indian or black, they would lack the skills, insights, and experience necessary to foster this awareness in their children.”).

<sup>128</sup> SIMON & ALSTEIN, *supra* note 124, at 45.

<sup>129</sup> See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49-50 (1989) (“[I]t is clear that Congress’ concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. . . . [T]he 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, ‘[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.’”); *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2583-84 (2013) (Sotomayor, J., dissenting) (“A tribe’s interest in its next generation of citizens is adversely affected by the placement of Indian children in homes with no connection to the tribe, whether or not those children were initially in the custody of an Indian parent.”); 25 U.S.C. § 1901(2-3) (“Congress . . . has assumed the responsibility for the *protection and preservation* of Indian tribes and their resources[. . . . And] there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”) (emphasis added).

Indian Affairs joined forces and created the first interracial adoption program, the Indian Adoption Project ("the Project").<sup>130</sup> By way of the Project, white families adopted 395 Native American children over the next ten years.<sup>131</sup> Native American children were chosen over other races for several reasons:

Prejudice against blacks was disseminated throughout the country; anti-Indian feeling was mostly confined to the reservation states. By moving the children to areas where Indians were a rarity, the project could circumvent this feeling. And it was arguable that since Indian children were even more deprived than blacks, they were in the greatest need of imaginative help.<sup>132</sup>

The number of Native American children adopted out to white families as part of a specific project and goal is extraordinary enough, but also to learn of government-sanctioned reasons for targeting that group is even more appalling, and it is no doubt that reasons such as the Project led to the legislative action in the 1970s and the ICWA.

All of these considerations of racial and cultural preservation must be balanced with the "best interests of the child" standard, particularly if courts are going to move forward following *Baby Girl* and work from a "best interests" standpoint. *Prince v. Massachusetts* highlights the compelling state interest in protecting children and how that state interest can be "trump a parent's right to the care and custody of his or her children."<sup>133</sup> The *Prince* Court held that "where a child's safety and wellbeing are at risk, the State has a duty to

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<sup>130</sup> MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 137 (1976).

<sup>131</sup> BENET, *supra* note 130, at 137.

<sup>132</sup> BENET, *supra* note 130, at 138.

<sup>133</sup> 321 U.S. 158, 165 (1944).

protect that child, and if necessary, intrude on the parents' right to raise the child by both retaining custody and directing the child's religious and moral upbringing."<sup>134</sup> As Stacy Byrd points out, "the standard for termination [of parental rights] is much higher than that for a temporary removal. A best interest standard provides little to no guidance to courts in deciding when to terminate a parent's parental rights, especially given that courts must still address the parent's constitutional considerations."<sup>135</sup> Without even considering the different jurisdictional standards for Native American tribes, this standard is problematic. The state should never be responsible for the religious/cultural and/or moral upbringing of the child because those decisions will inevitably impact the child's sense of self-identification.<sup>136</sup> If the state or federal government determines that a Native self-identification is important as well as the best interests of the child, then the best interests are undoubtedly for the child to remain with tribal family members or as a ward of the tribe itself until such time as an appropriate family may present

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<sup>134</sup> Prince, 321 U.S. at 165.

<sup>135</sup> Stacy Byrd, Note, *Learning From the Past: Why Termination of a Non-Citizen Parent's Rights Should Not Be Based on the Child's Best Interest*, 68 U. MIAMI L. REV. 323, 335 (2013) (citing *In re P.L.*, 778 N.W.2d 33, 36 (Iowa Ct. App. 2010)).

<sup>136</sup> See *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 49-50 (1989) ("[I]t is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. . . . [T]he 1977 Final Report of the congressionally established American Indian Policy Review Commission stated, '[r]emoval of Indian children from their cultural setting seriously impacts a long-term tribal survival and has damaging social and psychological impact on many individual Indian children.'").

itself. It is only in this manner that cultural preservation can be maintained and the ICWA be strictly followed, as Congress intended.

A potential solution for these issues of self-identification and cultural preservation that Kunesh advocates is to "establish[] a group home for the children, located in the Indian community and staffed by community members."<sup>137</sup> This solution could work for situations in which Courts adhere to section 1915(a)(2) of the ICWA and give adoption preference to "other members of the Indian child's tribe" if there is no extended family member or other Native American family willing to adopt the child right away. According to Kunesh, a tribal home would "adhere to the philosophy of preserving and reunifying Indian families by keeping the children within the community, and rendering remedial services that support and strengthen families."<sup>138</sup> Kunesh's suggested program could serve as a good way for courts to apply the ICWA in adoption cases as an alternative to preferring non-Indian families.

Beyond Kunesh's solution, my own is for a reemphasis on tribal sovereignty and a federal affirmation that tribal autonomy and jurisdiction still exist, despite courts' attempts to bypass that autonomy in a family law setting. According to Roger Tellinghuisen, the State's power is supposed to be so limited when it comes to Native American children that it should be able to act only in an emergency capacity:

The effect of the [exclusive jurisdiction] provision is that the State may not . . . interfere with a tribal court's exercise of

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<sup>137</sup> Kunesh, *supra* note 122, at 33.

<sup>138</sup> Kunesh, *supra* note 122, at 33.

jurisdiction in a case already in tribal court. The Act indicates, however, that a state court may issue an order allowing the emergency removal of an Indian child domiciled in or resident of an Indian reservation if the child is "temporarily located off the reservation." Such an order may be issued to prevent *imminent physical damage or harm to the child*.<sup>139</sup>

The Act makes it clear that unless there is imminent danger to the child, the State should refrain from interfering in tribal matters. However, this stipulation appears to apply only in situations in which the matter is "already in tribal court."<sup>140</sup> So what should be done in situations in which the matter is not yet in tribal court? As in *Baby Girl*, the Court clearly determined that the matter was properly in South Carolina family court; however, the Court really only did so because it determined that an Indian family never existed to be disrupted by the Court.<sup>141</sup> The solution to this problem should be simple: exclusive tribal jurisdiction should always be maintained, and all family matters involving Native American children should have automatic deference to tribal courts. The courts could then review the matter and make a determination about the best course of action, which could also include transferring jurisdiction to the State if necessary. However, what is key in this potential solution is that tribal jurisdiction is not bypassed, so there is less possibility for potential abuses of the ICWA and fewer dangers to cultural preservation.

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<sup>139</sup> Tellinghuisen, *supra* note 93 at 664 (quoting 25 U.S.C. § 1922) (emphasis added).

<sup>140</sup> Tellinghuisen, *supra* note 93 at 664.

<sup>141</sup> *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2562-63 (2013).

## VI: CONCLUSIONS

The ICWA is arguably one of the best pieces of legislation drafted to protect not only the family law rights and practices of Native Americans but also to protect their cultures and bloodlines. This piece of legislation, however, is in grave danger of becoming circumvented to the point of becoming obsolete or being repealed altogether. Although circumvention has been taking place in state courts for some time, the decision in *Baby Girl* has solidified a place for the endangerment of this Act by way of the most binding judicial opinion possible.

The elements of what Congress intended to be a safeguard for tribal sovereignty are being warped and misapplied to the point where parents such as B.F. in *Baby Girl* have no right to their children, and these children have, effectively, no right to grow up immersed in their culture and community. Aside from the legal impact resulting from the chipping away at the foundation of the ICWA, courts and Congress need to consider or reconsider the consequences for the future of Native American tribes in this country and reassert the "Federal responsibility to Indian people."<sup>142</sup> This federal responsibility does not, or at least should not, consist only of legal protections, but should also protect the unique characteristics of what make up the tribes: the Native American bloodlines. This assertion is not to say, of course, that no Native American child should ever be adopted by a non-Native American parent or couple, but

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<sup>142</sup> 25 U.S.C. § 1901.



rather than before such an adoption is approved, all the tenets of the ICWA are adhered to as strictly as Congress intended. Failure to sufficiently apply the ICWA has the possibility of leading to a repeat of the abuses and indiscretions that led to its enactment in the 1970s.

Having two concurrent yet starkly different Supreme Court opinions on this matter poses a greater risk to the ICWA and to tribal sovereignty and jurisdiction. The ruling in *Baby Girl* essentially looks at "Indianness" as a hindrance to the judicial process.<sup>143</sup> What this viewpoint does, however minor it is to the majority's decision, is create shaky ground not just for the ICWA but for any Native American-specific legislation or sections of legislation (e.g. criminal statutes for crimes committed by non-Indians on Indian land or the Violence Against Women Act sections pertaining to the safety of Indian women). This type of judicial attitude undermines the importance of these pieces of legislation and undermines cultural progress and equality.

There does not appear to be a clear answer to this issue, especially since there are now competing judicial doctrines, but there are viable solutions to adhere to the existing ICWA and perhaps lessen some of the burden courts may find in attempting to weigh race and heritage against the best interests of the child. Courts simply need to analyze the cultural implications of *Baby Girl* as the holding

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<sup>143</sup> *Adoptive Couple v. Baby Girl*, 133 S.Ct. 2552, 2559 (2013) ("It is undisputed that, had *Baby Girl* not been 3/256 Cherokee, Biological Father would have had no right to object to her adoption under South Carolina law. See Tr. of Oral Arg. 49 ('Under state law, [B.F.'s] consent to the adoption would not have been required').").

operates alongside *Holyfield* and determine the importance of the ICWA and what the holdings mean for other race-based legislation.