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NOTES

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.¹ 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.² 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.”³ 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 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.”⁴ 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.”⁵ Tribes have

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1. Indian Child Welfare Act of 1978, NAT’L INDIAN CHILD WELFARE ASS’N, http://www.nicwa.org/indian_child_welfare_act/ (last visited Apr. 19, 2015).

2. History of the Indian Child Welfare Act, NAT’L INDIAN CHILD WELFARE ASS’N, http://www.nicwa.org/Indian_Child_Welfare_Act/history/ (last visited Apr. 19, 2015).

3. 25 U.S.C. § 1901 (2010).

4. 25 U.S.C. § 1915(a) (2011).

5. 25 U.S.C. § 1918(a) (2011).

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.⁶

In 1989, the Supreme Court strictly followed the tenets of the ICWA in deciding *Mississippi Band of Choctaw Indians v. Holyfield*.⁷ 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.⁸ After both parents signed consent-to-adoption forms, a couple from the same county petitioned to adopt the twins.⁹ After the adoption, the Tribe moved to vacate the decree on the grounds that it had exclusive adoption jurisdiction under the ICWA.¹⁰ 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.¹¹ The details and holding of this case will be discussed later in this note;¹² however, it is important to acknowledge the case here as a contrast to a more recent Supreme Court decision.

In *Adoptive Couple v. Baby Girl*,¹³ the Court again looked to the domicile of the child in question to determine the jurisdiction: state or tribal. *Baby Girl* poses a slightly different scenario from *Holyfield* because there is also the question of parental rights termination; however, the domicile principle set forth in *Holyfield* should still apply. 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 1999.¹⁴ 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 rights.”¹⁵ 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.¹⁶ B.F. challenged this adoption, arguing that “he did not consent to Baby Girl’s adoption” and that he wanted custody of his daughter.¹⁷ *Baby Girl* involved a long trial, beginning with the South Carolina Family Court and ending in the United States Supreme Court, with the Court trying to balance the best interests of the child with the mandates of the ICWA. Unlike

6. 25 U.S.C. § 1919(a) (2011).

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

8. *Id.* at 37.

9. *Id.* at 37-38.

10. *Id.* at 38 (This motion was denied for two main reasons: first, the mother had gone through “some efforts to see that [the twins] were born outside the confines of the Choctaw Indian Reservation[,]” and second, the twins never “resided on or [had] physically been on the Choctaw Indian Reservation.”).

11. *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.”).

12. *Infra* note 40.

13. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013).

14. *Id.* at 2558.

15. *Id.*

16. *Id.*

17. *Id.* at 2559.

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.¹⁸ For all intents and purposes, B.F. is a parent, but a non-custodial parent who is not entitled to ICWA protection.¹⁹

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 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."²⁰ Under the South Carolina Adoption Act, to which *Baby Girl*'s adoption was originally subjected, 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.²¹ Relying heavily on *Baby Girl*'s perceived lack of Indian domicile and the lack of parental efforts of B.F., the *Baby Girl* Court deferred, possibly implicitly,²² to the statutory structure of South Carolina's adoption policies of disregarding the ancestry of the child.²³ Furthermore, a South Carolina father must actively register with the Responsible Father Registry in order to obtain notice of a pending adoption so as to assert his biological claim to the child.²⁴ Thus, the background of the South Carolina Adoption Act works toward both an understanding of the judicial history of the *Baby Girl* case as well as offering insight into the considerations of the Court.

18. *Id.* at 2559-64.

19. *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.").

20. Robert S. Ingram III, *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).

21. See S.C. CODE ANN. § 63-9-310 (2008).

22. See *infra* note 23 for an example of implicit deference to South Carolina law: the Court gives limited weight to ancestry in its determination whether or not to apply the ICWA. Furthermore, the Court explicitly defers to S.C. law to determine that B.F. never had legal or physical custody of *Baby Girl*. *Baby Girl*, 133 S.Ct. at 2562 (2013).

23. *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.").

24. See S.C. CODE ANN. § 63-9-820(c) (2010).

II. ICWA AND THE ISSUE OF DOMICILE

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

... [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. . . .²⁵

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. With this tribal autonomy comes 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*.²⁶

The interpretation of domicile is a key difference between the holdings of *Holyfield* and *Baby Girl*; however, both cases agree on the importance of the ICWA.²⁷ The majority in *Holyfield* spends a great deal of time on the impact and necessity of the ICWA, noting, “[o]ne 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.”²⁸ *Baby Girl* echoes this sentiment by quoting *Holyfield's* description for the reasoning behind the ICWA's enactment;²⁹ however, the reasoning is the only point of agreement between 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.³⁰ Interpretation of the domicile element, in practice, has been left to the courts, a situation which puts cases in a precarious position since the applicability of the ICWA often rests on the domicile of the child in question. Further, the Act has a

25. 25 U.S.C. § 1902 (2011).

26. 25 U.S.C. § 1911(a) (2010) (emphasis added).

27. *Infra* notes 28 and 29.

28. *Holyfield*, 490 U.S. at 34-35 (quoting *Hearing 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)).

29. See *Baby Girl*, 133 S. Ct. at 2557 (“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.”) (quoting *Holyfield*, 490 U.S. at 30).

30. 25 U.S.C. § 1911(a) (2011) (“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 . . .”).

special provision for the improper removal of a child from custody. The ICWA indicates that if a 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.³¹ 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.³²

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.”³³ The *Baby Girl* Court holds that this provision does not apply where the Indian parent never had custody.³⁴ 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.³⁵ For voluntary termination, the ICWA mandates that “such consent shall not be valid unless executed in writing and recorded 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.”³⁶ 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.³⁷ 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 come forward.³⁸ In *Baby Girl*, the Court focuses on the break-up of a family versus the lack of a family unit to begin with, then notes that the removal standard does not apply where a family unit never existed.³⁹

In *Holyfield*, the Court holds that the ICWA does not clearly define “domicile,” but that Congress did intend for a uniform federal law and did not consider the term’s definition to be a matter of state law.⁴⁰ Furthermore, that Court is clear that

31. 25 U.S.C. § 1920 (2011).

32. *Baby Girl*, 133 S. Ct. at 2562-64.

33. 25 U.S.C. § 1912(f) (2011).

34. *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.”).

35. *See id.* at 2562-63.

36. 25 U.S.C. § 1913(a) (2009).

37. *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]’ . . .”).

38. *Id.* at 2564-65.

39. *Id.* at 2562-63. This aspect of the holding will be discussed in greater length *infra* at P.III.

40. *Holyfield*, 490 U.S. at 43-44.

the ICWA's purpose was to completely remove the state courts from having jurisdiction in certain situations regarding child custody.⁴¹ 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.⁴²

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."⁴³

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.⁴⁴ 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."⁴⁵ Moreover, the issue of voluntary termination of parental rights does not affect the domicile issue for the Court. The Court interprets the ICWA to mean that 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"⁴⁶

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, "[m]ost 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."⁴⁷ However, fraud and ignorance are not the only issues with ICWA enforcement. Courts have, although not formally, also instituted use of the "Good Cause Excep-

41. *Id.* at 43. ("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.'") (quoting *Jerome v. United States*, 318 U.S. 101, 104 (1943)).

42. *Id.* at 49.

43. *Id.* at 53.

44. *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.")

45. *Id.*

46. *Id.* at 49.

47. 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).

tion”⁴⁸ and the “Existing Indian Family Exception,”⁴⁹ 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.⁵⁰ As Saffouri articulates, Minnesota enacted a number of statutes in 1985, which incorporated elements of the ICWA to provide “higher tribal protection by requiring earlier tribal notification and additional provisions for tribal intervention.”⁵¹ 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.⁵² What the Task Force found was that in a small sample size of Indian children, there were frustrations and problems in dealing with Social Services and the judicial system and that there was a measurable problem with cultural sensitivity within foster homes.⁵³

After the Task Force conducted this study and made its recommendations, the Minnesota Supreme Court heard *In re Custody of S.E.G.*⁵⁴ 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.”⁵⁵ 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.”⁵⁶ 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 suit-

48. 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).

49. 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).

50. Saffouri, *supra* note 48, at 1192.

51. *Id.* at 1199-1200.

52. *Id.* at 1200-01.

53. *Id.* at 1201-02.

54. *Id.* at 1202.

55. *Id.* at 1205-06.

56. 25 U.S.C. § 1915(a) (2011).

able families for placement after a diligent search has been completed for families meeting the preference criteria.⁵⁷

According to Saffouri, only one of these elements needs to be present for the court to establish good cause.⁵⁸ 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 is in the child's best interests, perhaps emotionally or physically, to stay with a non-Indian family.⁵⁹

B. Existing Indian Family Exception

The latest holding in *Baby Girl* is not the first time the ICWA has had little to no enforcement or a misapplication of its principles. Wendy Parnell's article addresses the "Existing Indian Family Exception,"⁶⁰ a method by which the courts can side-step application of the ICWA. Courts have traditionally applied the Exception in three 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.⁶¹

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."⁶² 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 was able to find that no family ever existed and thus avoid the sections of the ICWA that could restore B.F.'s parental rights to his daughter.⁶³

Daniel Adlong's article also addresses the existing Indian family exception and outlines California's attempt to abolish the family exception.⁶⁴ Adlong argues that the exception "violates the core principles of the ICWA and deprives tribes of certain fundamental rights."⁶⁵ Adlong further asserts that, through this exception, the courts have created "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

57. Saffouri, *supra* note 48, at 1207.

58. *Id.* at 1207.

59. *Id.* at 1208.

60. Parnell, *supra* note 49, at 383-84.

61. *Id.* at 384.

62. *Id.* at 384.

63. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562-63 (2013).

64. Adlong, *supra* note 49, at 135.

65. *Id.* at 135.

parents have with an Indian tribe. However, such an examination completely disregards one group the ICWA is supposed to protect: Indian tribes.”⁶⁶ The majority in *Baby Girl* disregards the ICWA in this way and applies an “Indian-ness” standard; 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.”⁶⁷ 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 toward B.F.’s ICWA protections.⁶⁸ The Court appears to disproportionately favor the state court rather than strictly applying the tenets of the ICWA.

Basing the determination of the future of a child’s welfare upon each court’s interpretation of family 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’ intent in implementing the statute.⁶⁹ 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[.]”⁷⁰ courts continuously exercise the existing Indian family exception to circumvent application of the ICWA.⁷¹

The case of *In re Adoption of Baby Boy L.*⁷² is another example of the court taking into consideration the bloodlines argument and failing to apply the ICWA. Baby Boy L. was born out of wedlock: his mother was a non-Indian, and his father had five-eighths Native American blood belonging to the Kiowa tribe.⁷³ Like *Baby Girl*, Baby Boy L.’s mother unilaterally consented to his adoption to a specifically named couple.⁷⁴ At the time of the mother’s decision, Baby Boy L.’s father was incarcerated at the Kansas State Industrial Reformatory.⁷⁵ The lower court considered two key factors: 1) the father was “an unfit person to have the care or custody of Baby Boy L.”⁷⁶ and his parental rights could, therefore, be terminated, and 2) the Kiowa tribe did not have the right to intervene in either the custody proceedings or the father’s

66. *Id.* at 130.

67. *Baby Girl*, 133 S. Ct. at 2556.

68. *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.”)).

69. 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.’”).

70. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 54 (1989) (quoting *Matter of Adoption of Holloway*, 732 P.2d 962, 972 (Utah 1986)).

71. Gallagher, *supra* note 69, 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.”).

72. 231 Kan. 199 (1982).

73. *In re Adoption of Baby Boy L.*, 231 Kan. 199, 201 (1982).

74. *Id.*

75. *Id.* at 202.

76. *Id.* at 203.

character and fitness assessment.⁷⁷ 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.⁷⁸

As in all the other cases, *Baby Boy L.* addresses and reiterates the purpose behind the ICWA. Despite articulating the guiding principles behind the Act, though, the Kansas Supreme Court still held that the ICWA did not apply in *Baby Boy L.*'s case.⁷⁹ The court's reasoning behind 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.⁸⁰

By looking at the bloodline of *Baby Boy L.*, which is far more substantial 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.⁸¹ 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 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.⁸²

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

77. *Id.*

78. 25 U.S.C. § 1915(a) (2011).

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

80. *Id.* at 206 (emphasis added).

81. *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 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.") (emphasis added).

82. *Id.* at 204-05.

primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.⁸³

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. If an adopted child has grown as part of the adoptive family but is later returned to the biological parents because of an invalid adoption decree, this situation contributes to the self-identification problem.⁸⁴

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 is prioritized in these articles. Statements illustrating 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.⁸⁵ At the same time, these statements castigate the biological father’s request for custody of his child.⁸⁶ 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.’”⁸⁷ 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 Act can be applied when it appears to conflict with state law.⁸⁸

83. Gallagher, *supra* note 69, at 98 (emphasis added).

84. *Id.*

85. 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.

86. *Id.*

87. 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>.

88. 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. 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>.

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."⁸⁹

Justice Scalia's legal analysis in *Holyfield* and *Baby Girl* is paramount because he was on the bench for both cases. He sided with the majority in *Holyfield* and the dissent in *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.⁹⁰

Scalia went 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 analysis of the case, Scalia singularly highlighted 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. Scalia also reiterates his lament for the *Baby Girl* majority's holding in a *NYT* interview.⁹¹

While not explicit in any of the *NYT* articles or landmark cases, there could 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, because only Native American adoption cases are 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 original intent of the ICWA. In particular, Gallagher discusses *In re Adoption of Lindsay C.*,⁹² an appellate case out of California.⁹³ Lindsay C. was born on September 3, 1983; her mother, a non-Indian, and her father, an enrolled member of the Little Lake Tribe, were never married.⁹⁴ At the time of trial, Lindsay was seven years old and had not had contact with her birth father since she

89. Frosch & Williams, *supra* note 88.

90. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2571-72 (2013) (Scalia, J., dissenting).

91. Frosch & Williams, *supra* note 88.

92. 229 Cal. App. 3d 404 (Cal. Ct. App. 1991).

93. Gallagher, *supra* note 69, at 100.

94. *In re Adoption of Lindsay C.*, 229 Cal. App. 3d 404, 406 (Cal. Ct. App. 1991).

was sixteen months old.⁹⁵ According to the record, the birth father never held Lindsay or even “called her his daughter.”⁹⁶

This background is important because it sets similar parameters to those in *Baby Girl* in that there is 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 resulted in two starkly different outcomes. 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.”⁹⁷

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 the court thought 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 with what Congress intended when it compared the implied right of the non-Indian mother with the explicit right of the tribe to intervene in these proceedings.⁹⁸

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.* makes 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.⁹⁹

For the *Lindsay C.* court, simple blood relation is sufficient 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

95. *Id.*

96. *Id.*

97. *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)).

98. *Id.* at 408.

99. *Id.* at 409.

tribe;¹⁰⁰ “Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.”¹⁰¹

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 to make sure that the ICWA is applied properly where parties bring cases in state courts. For example, a New Jersey Supreme Court 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.¹⁰²

New Jersey has gone even further in declining other courts’ interpretations which would allow for exceptions to the ICWA.¹⁰³

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.¹⁰⁴ Gallagher observes that “[t]he ICWA has served as a convenient, albeit usually unsuccessful, means for biological mothers seeking to rescind consent to adoption of their children.”¹⁰⁵ 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.¹⁰⁶ In two separate cases in different state courts, with nearly identical sets of facts, each came out with different holdings when the mother wanted to rescind her consent. In the first case, the determinative factor was that the minor had already spent all seven years of her life, minus the first five days, with her adoptive family.¹⁰⁷ 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.¹⁰⁸

There is no simple way to handle these cases. Emotions will always complicate 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.

100. Gallagher, *supra* note 69, at 100-01.

101. *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)).

102. *In re Adoption of a Child of Indian Heritage*, 111 N.J. 155, 170 (N.J. 1988).

103. Gallagher, *supra* note 69, at 99.

104. *Id.* at 103.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

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 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 the preservation of tribal autonomy and culture. Post-*Baby Girl*, the issues and potential compromises include the constitutionality of the ICWA, the potential for the Act's repeal, and the prevalent trend of contact agreements between the tribes and the non-Indian adoptive parents.¹⁰⁹

A. *The Constitutionality of the ICWA*

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.¹¹⁰

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*:

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."¹¹¹

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.¹¹² *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.¹¹³

109. 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); Walters, *supra* note 47 (for a discussion of contact agreements as a compromise between tribes and non-Indian couples in states adhering to the Existing Indian Family Exception).

110. 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).

111. Zug, *supra* note 109, at 47.

112. *Id.* at 48-49.

113. *Id.* at 49.

According to Zug, the ICWA's constitutionality relies on two ideas; "[f]irst, 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."¹¹⁴ 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.¹¹⁵ Although there is quite likely little actual distinction between these categories as they concern Native Americans, any distinction is still important to maintain their well-deserved tribal sovereignty.

Zug's article was published prior to the *Baby Girl* decision, so many of her concerns about the fate of the ICWA are laid to rest for now. What persists is the tension between *Holyfield* and *Baby Girl* and the potential for another Supreme Court case to deal with these issues involved by overruling *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.¹¹⁶ A contact agreement is an agreement that, upon open adoption, the child will live permanently with the adoptive parents but will maintain contact with the tribe and the birth parent(s).¹¹⁷ 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."¹¹⁸ If these amendments were adopted, they would "authorize[] state 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."¹¹⁹

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 of the ICWA (that the tribe be given notice of the adoption and a right to intervene and express its interests).¹²⁰ 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 infancy and sixteen years of age 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.¹²¹ It is important to note, however, that these "behavior scores" are not defined in Berry's study and the scores are determined from the

114. *Id.*

115. *Id.*

116. Walters, *supra* note 47, at 290.

117. *Id.*

118. *Id.* at 291.

119. *Id.*

120. 25 U.S.C. §§ 1911(a), 1915(a) (2011).

121. Marianne Berry, *Risks and Benefits of Open Adoption*, 3 THE FUTURE OF CHILDREN, 125, 133 (1993) available at https://www.princeton.edu/futureofchildren/publications/docs/03_01_09.PDF.

perspective of the adoptive parents.¹²² 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 open adoption is truly related to more positive behavior in children.”¹²³

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 assimilation issues to consider as well as the future of Native American populations and culture.¹²⁴ 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.’”¹²⁵ However, Walters suggests that Americans 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.”¹²⁶

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 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.”¹²⁷ Strict application of the ICWA is the only way to prevent both dangers as it would entail limited government interference while still allowing for tribal sovereignty and internal structure.

Race as a factor in adoption has a long and tenuous history in family law.¹²⁸ Likewise, social movements against interracial adoption have been thriving since the

122. *Id.* at 133.

123. *Id.*

124. *Id.* at 292-93.

125. *Id.* at 292.

126. *Id.* at 292-93.

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

128. 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.”);

early 1970s; “[o]rganized 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.”¹²⁹ Rita Simon and Howard Alstein outline just how severe the tensions were between the African American and Native American leaders and the adoption agencies; “[t]he 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.”¹³⁰

While Black organizations largely led the fight against interracial adoption, Native Americans were also active against the practice, 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.”¹³¹ For these Native American activists, even the prospect of white parents adopting Native Americans with the hope of fostering a relationship between the child and the tribe was an insufficient solution because, for them, these white parents were simply unable to encourage and understand a racial experience that was not their own.¹³² 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.”¹³³ 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.¹³⁴

Drummond v. Fulton Cnty. Dep’t of Family and Children 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 (Pa. 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.”).

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

130. *Id.*

131. *Id.*

132. *Id.* (“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.”).

133. *Id.* at 45.

134. *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

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 Indian Affairs joined forces and created the first interracial adoption program, the Indian Adoption Project (“the Project”).¹³⁵ Through the Project, white families adopted 395 Native American children over the next ten years.¹³⁶ 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.¹³⁷

The number of Native American children adopted to white families as part of this specific project and goal is extraordinary, but the government-sanctioned reasons for targeting this group are even more appalling. There is no doubt that the Project’s efforts led to legislative action in the 1970s and passage of 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 “trump a parent’s right to the care and custody of his or her children.”¹³⁸ The *Prince* Court held that “where a child’s safety and wellbeing are at risk, the State has a duty to 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.”¹³⁹ 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.”¹⁴⁰ Without even considering the different

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) (2010) (“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).

135. MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 137 (1976).

136. *Id.*

137. *Id.* at 138.

138. *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

139. *Id.*

140. 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)).

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.¹⁴¹ If the state or federal government determines that Native American 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 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."¹⁴² 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."¹⁴³ 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 solution 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 limited to an emergency capacity with respect to Native American children:

The effect of the [exclusive jurisdiction] provision is that the State may not . . . interfere with a tribal court's exercise of 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*.¹⁴⁴

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."¹⁴⁵ So what should be done in situations in which the matter is not yet in tribal court? As in *Baby*

141. 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.'").

142. Kunesh, *supra* note 127, at 33.

143. *Id.*

144. Tellinghuisen, *supra* note 97 at 664 (quoting 25 U.S.C. § 1922) (emphasis added).

145. *Id.*

Girl, the Court clearly determined that the matter was properly in South Carolina family court; however, the Court only did so because it determined that the ICWA did not apply in a situation in which an Indian family never existed in the first place.¹⁴⁶ 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 relevant state if necessary. However, the key in this potential solution is never to bypass tribal jurisdiction. This solution lessens the possibility for potential abuses of the ICWA and dangers to cultural preservation.

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 being circumvented to the point of becoming obsolete, or being repealed altogether. Although circumvention has been taking place in state courts for some time, the *Baby Girl* decision has solidified a place for the endangerment of this Act by way of the most binding judicial opinion possible. The Court has done so by creating a Supreme Court opinion that does not overrule *Holyfield*, but instead operates along side it, thus creating competing and conflicting judicial interpretations of the ICWA. Going forward, lower courts now have the option to refer to either decision: one which upholds a strict application of the ICWA and deference to tribal courts, and another which allows for a more lenient application and deference to state courts.

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 effectively have no right to grow up immersed in their culture and community. Aside from the legal impact of chipping away at the ICWA's foundation, 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."¹⁴⁷ 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 rather that before such an adoption is approved, all the tenets of the ICWA must be adhered to as strictly as Congress intended. Failure to sufficiently apply the ICWA has the

146. *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2562 (2013) ("[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.").

147. 25 U.S.C. § 1901 (2011).

possibility of leading to a repeat of the abuses and indiscretions that led to its enactment in the 1970s.

Having two concurrent yet conflicting Supreme Court opinions on this matter poses a greater risk to the ICWA's potential application, as well as a risk to tribal sovereignty and jurisdiction in adoption matters. The ruling in *Baby Girl* essentially looks at "Indianness" as a hindrance to the judicial process.¹⁴⁸ What this viewpoint does, however inconsequential it is in the majority's decision, is create shaky ground not just for the ICWA but for any Native American-specific legislation (e.g. criminal statutes for crimes committed by non-Indians on Indian land¹⁴⁹ or legislation pertaining to the safety of Indian women¹⁵⁰). 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. There are, however, viable solutions in adhering to the existing ICWA and perhaps lessening 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 operates alongside *Holyfield*, and determine the importance of the ICWA and what these outcomes mean for other race-based legislation.

148. *Baby Girl*, 133 S. Ct. at 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 Transcript of Oral Argument at 49, *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 (2013) (No.12-399) ('Under state law, [B.F.'s] consent to the adoption would not have been required').").

149. See 18 U.S.C.A. § 1152 ("Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."); see also 18 U.S.C.A. § 1162 (2010) for states with jurisdiction for crimes committed by Indians and non-Indians on Indian territory.

150. See 25 U.S.C.A. § 1304 for details regarding tribal jurisdiction over crimes involving domestic violence; see also 25 U.S.C.A. § 3210 for details on the Indian Child Protection and Family Violence Prevention Program established by the Bureau of Indian Affairs.