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The Story of the Holyfield Twins: *Mississippi Band of Choctaw Indians v. Holyfield*

Solangel Maldonado*

In late 1985, Jennie Bell, a member of the Mississippi Band of Choctaw Indians, was facing some difficult decisions. She was twenty-four years old, a single mother of two, and pregnant with twins by a man who was married to another woman and had two children of his own.[1] Jennie, like many Choctaws at the time, was unemployed and could not afford to raise the twins herself, so she turned to her family and other Choctaws on the reservation where she lived. Her aunt offered to adopt one of the twins (the girl), but no one was able or willing to take both. Reluctant to separate the twins, Jennie, almost seven months pregnant, continued her search for an adoptive family.

Orrey Curtiss Holyfield, a Methodist minister, and his wife Vivian Joan ("Joan"), a first-grade teacher, had been trying to adopt for some time, but had been repeatedly rejected by licensed adoption agencies. The reasons were straightforward. Orrey was sixty years old and suffered from a myriad of health conditions, including diabetes and heart disease, and Joan was forty-four years old, significantly older than the preferred age for adoptive mothers at the time. Their attorney suggested that the Holyfields, a Caucasian couple, pursue an independent adoption—one in which the birth parents place the child directly with the adoptive family with the help of an attorney, doctor, or clergy official, rather than through a licensed agency.[2] They put the word out and on

* Professor of Law, Seton Hall University School of Law. I am deeply grateful to Joan Holyfield for sharing her family's story with me and allowing me to share it with others. A longer version of this article appears in Volume 17 of the Columbia Journal of Gender & Law (forthcoming 2008).

[1] Telephone interviews with Vivian Joan Holyfield, in Long Beach, MS (Aug. 11, 2006 & Feb. 6, 2007) [hereinafter Holyfield Interviews]. Unless otherwise cited, all personal information about the family is taken from my interviews with Joan Holyfield.

[2] *See* Elizabeth J. Samuels, *Time To Decide? The Laws Governing Mothers' Consents to the Adoptions of Their Newborn Infants*, 72 Tenn. L. Rev. 509, 566 (2005).

December 3, 1985, Joan's forty-fifth birthday, they received the call they had been praying for. Debbie Crick, a member of the Holyfields' church and a teacher on the Choctaw reservation, had learned from Jennie's aunt, an assistant teacher, that Jennie was looking for a family to adopt her twins. Debbie called the Holyfields and asked if they wanted to adopt Choctaw twins. Although they had never considered twins or Choctaw children, they immediately said yes.

Jennie then left her school-age daughter, Leah, with a family member, and she and her three-year-old son, Scotty, moved into the Holyfields' home in Long Beach, Mississippi, some 200 miles from the reservation. To some extent, Jennie's decision to move in with the Holyfields was motivated by a desire to get to know the couple who would be raising her children. Her decision was also the result of legal advice. Edward Miller, the Holyfields' attorney, had advised them that under the federal Indian Child Welfare Act ("ICWA"),[3] state courts lacked jurisdiction over adoption petitions involving Native American children who resided or were domiciled on a reservation.[4] They could, however, hear cases involving Native American children *not* residing or domiciled on a reservation. Thus, if Jennie and the Holyfields wanted a Mississippi state court to grant the adoption, Jennie would have to leave the reservation, which she did.

On December 29, 1985, less than four weeks after Debbie Crick contacted the Holyfields, Jennie gave birth two months prematurely in a hospital in Gulfport, Mississippi, two miles from the Holyfields' home. The Holyfields named the twins Megan Beth ("Beth") and Samuel Seth ("Seth"). Twelve days later, Jennie executed a consent form before the Chancery Court of Harrison County, Mississippi, relinquishing her parental rights. The next day, attorney Miller went to the prison where Windell Jefferson, the twins' putative father, was incarcerated, and obtained Windell's consent for relinquishing his parental rights.[5] On January 16, 1986, the Holyfields filed a petition to adopt the twins and twelve days later, only a month after their births, the chancellor issued the final decree of adoption.[6]

Jennie, who had been staying with the Holyfields while she recuperated from childbirth, then returned to the reservation with her other children, Scotty and Leah. Soon after, Jennie's mother, in a fit of

[3] 25 U.S.C. § 1901 *et seq.* (2006).

[4] Telephone Interview with Edward O. Miller, in Gulfport, MS (Sept. 6, 2006) [hereinafter Miller Interview].

[5] Miller Interview, *supra* note 4. In 1989, three years after relinquishing his parental rights, Windell filed a petition disputing paternity. The results of that petition are sealed.

[6] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37–38 & n.8 (1989).

intemperance, told some tribal members that Jennie had been paid an exorbitant amount to give up her children. International and state laws prohibit babyselling, and thus birth parents cannot accept money or gifts in exchange for their children. However, there was no evidence that the Holyfields paid for anything other than Jennie's birthing expenses ($3,500) and the twins' intensive care bill ($12,000).[7] These expenses are often paid by adoptive parents and do not constitute babyselling. However, the Holyfield adoption was assailable on a different ground. On March 31, 1986, two months after the Chancery Court issued the final adoption decree, the Mississippi Band of Choctaw Indians ("the Tribe") filed a motion to vacate the adoption, alleging that it violated ICWA.[8]

Under ICWA, an Indian child's tribe has standing to petition to vacate an adoption if it violates certain sections of ICWA.[9] Preferably, a tribe should challenge an adoption *before* it is final, but in this case, the Tribe may not have been aware of the Holyfields' adoption petition until it received a courtesy copy of the final adoption decree.[10] Sending the decree was a courtesy because ICWA does not expressly entitle a tribe to notice in "voluntary cases"—where the parents voluntarily relinquish their child for adoption, as Jennie and Windell had done.[11]

In its petition before the Chancery court, the Tribe argued that the Holyfields' adoption of the twins violated ICWA's provision granting tribal courts exclusive jurisdiction over adoption proceedings involving an "Indian child" domiciled or residing on the reservation. ICWA defines an "Indian child" as a person under the age of eighteen who is either "(a) a member of an Indian tribe or (b) *is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.*"[12] Both Jennie and Windell were full-blood Choctaws, and both were enrolled members of the Tribe.[13] As their biological children, the twins were eligible for membership in the Tribe and thus were Indian children under ICWA.

[7] *See High Court to Weigh Custody of Twins*, N.Y. Times, June 2, 1988, at C13.

[8] 490 U.S. at 38.

[9] 25 U.S.C. § 1914 (2006).

[10] Telephone Interview with Edwin R. Smith, Attorney for the Tribe, Jackson, MS (Jan. 24, 2007) [hereinafter Smith Interview].

[11] 490 U.S. at 57–58 & n.4 (Stevens, J., dissenting). In contrast, ICWA expressly provides that the child's tribe is entitled to notice in "involuntary cases"—i.e., where the state removes the child from the home based on allegations of abuse or neglect. *See* 25 U.S.C. § 1912.

[12] 25 U.S.C. § 1903 (emphasis added).

[13] 490 U.S. at 37; Brief for the Appellant at 3, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (No. 87-980) (Oct. Term 1987) [hereinafter Appellant Brief].

The disputed issue was, therefore, whether the twins were domiciled on the reservation. If they were, the tribal court had exclusive jurisdiction; if they were not, the state courts and tribal courts shared jurisdiction.[14] The Holyfields, Jennie, and Windell maintained that because the twins were born and had remained 200 miles from the reservation since birth, they had never been domiciled nor had resided on the reservation.[15] The Chancery court agreed, holding that the Mississippi state courts had jurisdiction under ICWA.

The Tribe appealed to the Mississippi Supreme Court, arguing that the twins were at all times domiciled on the reservation. The Tribe also argued, alternatively, that the Chancery Court had not complied with Section 1915(a) of ICWA.[16] This section mandates that "absent good cause to the contrary," state courts must give preference (in the following order) to placement with: "(1) a member of the child's extended family; (2) other members of the tribe; or (3) other Indian families."[17] The Mississippi Supreme Court rejected the Tribe's arguments. Although a minor child's domicile generally follows that of his parents, the court held that, because Jennie and Windell had voluntarily surrendered the twins to the Holyfields, the twins had never been domiciled on the reservation. As to the Tribe's argument that the Chancery Court disregarded ICWA's placement preferences, the court merely stated that the Chancery Court had complied with the "minimum federal standards" governing the adoption of Indian children.[18]

The Tribe then petitioned for certiorari review to the United States Supreme Court. One might wonder why. This was certainly not the first time that a state court had placed an Indian child with a non-Indian family.[19] Further, because the twins had been living with the Holyfields since birth, it seemed unlikely that the Supreme Court would hear this case. Indeed, when Edwin Smith, the Tribe's attorney, approached the Native American Rights Fund about appealing to the Supreme Court, he was told that the Court was unlikely to grant certiorari. In addition, unlike cases where the Indian birth parents regretted relinquishing their

[14] 25 U.S.C. § 1911(b).

[15] Jennie and Windell joined the Holyfields as appellees against the Tribe. Brief for the Appellees at 3, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (No. 87-980) (Dec. 1, 1988) [hereinafter Appellee Brief].

[16] 490 U.S. at 40 n.13.

[17] 25 U.S.C. § 1915(a).

[18] 490 U.S. at 40 n.13.

[19] *See* Christine D. Bakeis, *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*, 10 Notre Dame J.L. Ethics & Pub. Pol'y 543, 554–56 (1996) (discussing cases).

parental rights and sought tribal assistance in getting their children back,[20] here, the birth parents sided with the Holyfields. Soon after the Tribe challenged the adoption, Jennie and Windell executed affidavits reaffirming their consent to the adoption and their desire that the children remain with the Holyfields.[21] As Jennie explained in the Appellees' Brief, she feared that if the Tribe was awarded custody, the children would end up in foster care on the Choctaw or another reservation or would be placed in separate foster homes.[22]

So why would a Tribe with limited resources,[23] uncooperative birth parents, and children who had bonded with their adoptive parents pursue this case? In order to understand the Tribe's reasons, it is important to examine the unique legal status of Indian tribes in the United States.

Indian tribes lived as independent, sovereign nations in the territories now known as the United States long before European settlers arrived in North America. Although divested by conquest of the external attributes of sovereignty, such as the right to enter into treaties with other nations, Indian tribes retained their right of internal sovereignty—the right to make their own substantive law in matters of local self-government.[24] This authority does not derive from the Constitution (indeed, it predates it), but rather from each tribe's original status as a sovereign entity. The U.S. Constitution, however, limits this authority by granting Congress plenary power to legislate on behalf of Indian tribes.[25]

The Supreme Court had long held that as "distinct, independent, political communities,"[26] Indian tribes have sovereign authority to regulate the conduct of their members—including adoptions of tribal chil-

[20] *See, e.g.*, In re Adoption of Crews, 825 P.2d 305 (Wash. 1992).

[21] In re B.B. and G.B, 511 So.2d 918, 919 (Miss. 1987), *rev'd*, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[22] Appellee Brief, *supra* note 15, at 17; Holyfield Interviews, *supra* note 1.

[23] Although the Tribe has become quite prosperous in recent years, especially since opening several casinos in the 1990s, at the time it brought this case in 1986, the average annual Choctaw family income was $11,000. *See* Choctaw Chronology, available at http://www.choctaw.org/history/chronology.htm. While other tribes filed *amici* briefs, the Choctaw Tribe did not receive financial support from other tribes or Native American organizations to litigate this case. Smith Interview, *supra* note 10.

[24] Worcester v. Georgia, 31 U.S. 515 (1832); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55–56 (1978).

[25] Courts have located this power in Article I, § 8 which grants Congress the power to "regulate Commerce ... with the Indian Tribes," and Article II, § 2 which grants the President the power, "by and with the advice and consent of the Senate, to make treaties." *See* Morton v. Mancari, 417 U.S. 535, 551–52 (1974) (citing U.S. Const. arts. I & II).

[26] *Worcester*, 31 U.S. at 559.

dren—without state interference.[27] ICWA, enacted in 1978, codified this precedent, recognizing that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[28] Accordingly, it created federal standards governing removal of Indian children from their families and their placement in adoptive homes that "reflect the unique values of Indian culture."[29] However, a decade after ICWA's enactment, state courts continued to disregard its provisions, removing Indian children from their families at disproportionately high rates and placing them in non-Indian homes.[30]

There are several explanations for this noncompliance. As testimony before the Select Subcommittee on Indian Affairs in 1987 revealed, private attorneys were "frequently ignorant of ICWA law or chose not to follow it by instructing clients not to let the State social workers know the Indian heritage of the child up for adoption."[31] Often, tribes were not notified of hearings in involuntary removal cases, and state courts had crafted common-law exceptions limiting tribal rights. When state courts did properly exercise jurisdiction, they often disregarded ICWA's placement preferences. Many tribes, including those that submitted *amici* briefs in support of the Choctaw Tribe, were already parties in state court proceedings involving Indian children and had experienced widely different outcomes. Thus, *Holyfield* was not just about the rights of the Mississippi Band of Choctaw Indians to determine who could adopt *these* two children. Rather, as the *amici* briefs suggested,[32] what was at stake were the rights of hundreds of U.S. tribes to self-preservation and

[27] Fisher v. District Court, 424 U.S. 382 (1976).

[28] 25 U.S.C. § 1901(3).

[29] 25 U.S.C. § 1902.

[30] Nancy Butterfield, *State Isn't Supporting Indian Child Welfare Laws*, Seattle Times, Sept. 22, 1990, at A15; Don J. DeBenedictis, *Custody Controversy: Tribe Can't Intervene in Indian Mother's Adoption Decision*, 76 A.B.A. J. 22 (1990) (noting that twelve years after ICWA's enactment, children in Alaska were placed at five times the rate for non-Indian children, and 93% were placed in non-Indian homes).

[31] Indian Child Welfare Act: Hearing before the Select Subcommittee on Indian Affairs, 100th Cong. (Nov. 10, 1987) (statement of John Castillo, Chairman, ICWA Task Force), available at http://liftingtheveil.org/castillo.htm.

[32] The following tribes filed *amici* briefs: Association on American Indian Affairs, Inc.; the Navajo Nation; the Menominee Indian Tribe of Wisconsin; the Swinomish Tribal Community; the Shoshone–Bannock Tribes; the Turtle Mountain Band of Chippewa Indians; the Kalispel Tribe of Indians of the Kalispel Reservation, Washington; the Mescalero Apache Tribe of the Mescalero Apache Reservation, New Mexico; Pueblo of San Ildefonso of New Mexico; Pueblo of Santa Ana of New Mexico; Pueblo of Santo Domingo of New Mexico; Pueblo of Tesuque of New Mexico; Sac and Fox Tribe of the Mississippi in Iowa of the Mesquakie Settlement, Iowa; and Sisseton–Wahpeton Sioux Tribe of the Lake Traverse Indian Reservation. 490 U.S. at 65.

sovereignty, rights which were threatened if tribal children, "the only means for the transmission of the tribal heritage," were shipped off to non-Indian homes.[33]

This still does not explain why *this* tribe chose to litigate *this* case in particular. One reason is that ten years earlier, the U.S. Supreme Court unanimously held that Mississippi state courts lacked jurisdiction to prosecute a Choctaw for a crime committed on the Choctaw reservation.[34] That case supported the Tribe's argument that Mississippi state courts lack jurisdiction over all matters involving Choctaws domiciled on the reservation. Despite this precedent, the Mississippi Supreme Court seemed, by its *Holyfield* ruling, to be ignoring the Tribe's sovereignty.[35] The Tribe feared that if the *Holyfield* decision were allowed to stand, Mississippi would become a mecca for black marketeers in Indian children.[36]

Second, the Tribe was concerned that allowing a non-Choctaw family to adopt the twins might compromise its ability to sustain itself. The Tribe's requirements for tribal membership are stricter than most tribes'. Tribal members must have at least 50% Mississippi Choctaw blood; indeed, most enrolled members are, like Beth and Seth, full-blood Choctaws. As a result of its stringent membership requirements, the Tribe has fewer than 5,000 members. Not surprisingly, the Tribe believed it had more at stake than tribes with much larger memberships.[37] Specifically, the loss of two full-blooded Choctaws to a non-Indian family would have had a greater impact on the Choctaw Tribe than the loss, for example, to the Narrangansett Indian Tribe or the Cherokee Nation of Oklahoma, nations without any minimum blood quantum.[38] The Tribe was also concerned about the suitability of the adoptive home. Because Jennie drank heavily during her pregnancy, the Tribe suspected that the twins were at risk of fetal alcohol syndrome or effect,[39] lifelong conditions that cause significant physical and/or mental disabilities. The Tribe also feared that Joan and Reverend Holyfield, who had been rejected by

[33] 490 U.S. at 34 (quoting Choctaw Tribal Chief).

[34] United States v. John, 437 U.S. 634 (1978).

[35] Smith Interview, *supra* note 10.

[36] *Id.*

[37] *Id.* Some tribes, such as the Navajo–Dine and the Cherokees of Oklahoma, have over 200,000 members. Annette Jaimes, *Some Kind of Indian: On Race, Eugenics and Mixed–Bloods*, in American Mixed Race 133, 137 (Naomi Zack ed., 1995).

[38] U.S. Gov't Accountability Office, Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States, U.S. GAO–05–290, at 15 (Apr. 2005), available at http://www.gao.gov/new.items/d05290.pdf.

[39] Smith Interview, *supra* note 10.

adoption agencies because of health conditions and age, might not be able to handle two children with special needs.

Finally, unlike other cases in which the birth mother asserted that she left the reservation for reasons (at least in part) other than placing her children for adoption,[40] here, Jennie left the reservation for precisely that purpose. She never claimed that she intended to establish a home outside the reservation, nor did she dispute that, at all times, she was domiciled on the Choctaw reservation. All these facts strongly favored the Tribe and made this the perfect case to affirm tribes' exclusive jurisdiction over tribal children under ICWA.

The Supreme Court Decides

On April 3, 1989, the Supreme Court, in a 6–3 opinion by Justice Brennan, held that although the twins had never been on the reservation, because their mother was domiciled on the reservation, the twins were also domiciled there.[41] In its most basic form, the Supreme Court merely affirmed an established and, until *Holyfield*, relatively uncontroversial legal principle—that a nonmarital child's domicile follows that of his or her mother. The Court, however, did not address the question of domicile until page ten of its opinion. Rather, it began with a discussion of ICWA's legislative history.

In the 1970s, Senate hearings revealed that child welfare workers, most of whom were not Indian and had little or no knowledge of Indian cultural values, had unjustifiably removed thousands of Indian children from their families and tribes and placed them in non-Indian homes and institutions.[42] As a result, 25% to 35% of *all* Indian children had been permanently separated from their families. For example, in Minnesota, nearly 25% of all Indian children under the age of one were placed for adoption, and 90% of these children were placed with non-Indian families. Several experts testified that these placements harmed not only Indian parents who lost their children, but also the children themselves. For example, some Indian children raised in white homes developed a white identity with no understanding of Indian culture or identity. However, when they reached adolescence, they learned that the community they considered their own did not accept them as white. They started hearing the derogatory terms used to describe Indians and learned that some white parents did not want them to date their white

[40] Such reasons might include furthering her education, becoming more independent, or renting her own apartment. *See* Navajo Nation v. Confederated Tribes and Bands of the Yamaka Indian, 331 F.3d 1041, 1044 (9th Cir. 2003).

[41] 490 U.S. at 48–49.

[42] *Id.* at 32, 35 & n.4.

children.[43] This rejection led to social and psychological adjustment problems during adolescence.

After discussing the reasons for ICWA's enactment, the Court turned to the jurisdictional issue. Although ICWA does not define domicile, the Court noted that its meaning is generally uncontroverted: "domicile is established by physical presence in a place" coupled with the "intent to remain there."[44] Since minors lack the legal capacity to form this intent, their domicile is that of their parents and, in the case of a nonmarital child, that of his or her mother. Citing the Restatement (Second) of Conflicts of Laws, the Court noted that a child's domicile might well be a place where he or she has never been.

It was undisputed that, at all times, Jennie was domiciled on the reservation. Although she lived with the Holyfields in Long Beach for a short while before and after giving birth, she always intended to return to the reservation. As such, the Court held that her domicile, and therefore that of the twins, was at all times on the reservation, even though they had never been there. The Court warned that an individual tribal member could not, by her actions, defeat the Tribe's exclusive jurisdiction under ICWA.

The Court was not oblivious to the emotional trauma that could befall these three-and-a-half-year-old children if removed from Joan Holyfield's care. Joan and Reverend Holyfield had raised the twins since birth. After the Reverend suffered a fatal heart attack—a few months before the twins' third birthday and while the case was pending in the U.S. Supreme Court—Joan had continued raising them as a single parent.[45] However, despite its concern for the children's emotional well-being, the Court vacated the adoption, deferring "to the experience, wisdom, and compassion of the Choctaw tribal courts to fashion an appropriate remedy."[46] It was all now up to the Choctaw tribal court.

The Tribal Court Decides

On February 9, 1990, four years after the Holyfields first brought the twins home from the hospital, Choctaw Tribal Court Judge Roy Jim granted Joan Holyfield's petition to adopt them.[47] Given the Tribe's interest in raising Choctaw children, one might have expected the Tribal

[43] *Id.* at 33 n.1.

[44] *Id.* at 48.

[45] Orrey died on Sept. 15, 1988. Joan believes that the financial and emotional stress of litigating for three years killed her husband.

[46] 490 U.S. at 53–54.

[47] Marcia Coyle, *After the Gavel Comes Down: It's Never Quite Over When It's Over, Parties Before the Supreme Court Find Out*, Nat'l L.J 1, Feb. 25, 1991.

Court to return the twins to the Tribe. However, based on the home study conducted by Choctaw Social Services and the recommendation of Fenton Deweese, the children's *guardian ad litem*, Judge Jim determined that it was in their best interests to remain with Joan Holyfield.[48] First, the twins had lived with her their entire four-year lives and "it would have been cruel to take them from the only mother they knew."[49] Second, by all accounts, she was a loving parent who provided a stable home environment. Deweese was impressed with her remarkable patience and how well she handled Beth and Seth even though they were more "energetic" than most children.[50] Third, the twins had not been raised in a Choctaw home and did not speak or understand the Choctaw language, which, according to a 1974 survey, was the predominant language spoken in 80% of Choctaw homes.[51] Placing them in a Choctaw home would have been tantamount to placing them in a foreign environment.[52] Finally, because Choctaw Social Services had not attempted to secure an adoptive home while the case was pending, the twins would have had to be placed in foster care until a permanent home could be found.[53] All of these factors weighed in favor of granting the adoption. Still, Judge Jim was not willing to completely sever the children's ties to the Tribe, and ordered that they maintain contact with their extended family and other tribal members.[54]

In 1986, when Choctaw Social Services first learned that Jennie had placed the twins with the Holyfields, it threatened to take away her other children, Scotty and Leah, alleging neglect.[55] Jennie believed that the threat was retaliatory, and before Choctaw Social Services could take further action, she took Scotty and Leah and moved to the Seminole reservation in Florida. Although she telephoned Joan periodically to ask

[48] Telephone Interview with Fenton Deweese, in Philadelphia, MS (Oct. 17, 2006) [hereinafter Deweese Interview]. The adoption records are sealed so the information from the Tribal Court's decision was obtained from interviews with Fenton Deweese, Joan Holyfield, her attorney Edward Miller, and the Tribe's attorney, Edwin Smith.

[49] Deweese Interview, *supra* note 48.

[50] *Id.*

[51] Brief for the Mississippi Band of Choctaw Indians as Amicus Curiae at 8–9, U.S. v. John, 437 U.S. 634 (1978) (Nos. 77–575 & 77–836).

[52] Deweese Interview, *supra* note 48.

[53] *Id.*

[54] *See* Testimony of Thomas L. LeClaire, Director of the Office of Tribal Justice, Dep't of Justice, Before the Senate Indian Affairs Committee, Director Office of Tribal Justice (June 18, 1997), available at http://www.usdoj.gov/archive/otj/Congressional_Testimony/icwa2.fin.htm.

[55] Holyfield Interviews, *supra* note 1.

about the twins, she never asked to speak to them nor did she ever see them again after leaving the Holyfields' home. She eventually returned to the Choctaw reservation where she died in 1995 at the age of thirty four. Windell died in 2004; he was forty-three years old.[56] According to Joan, both of their deaths were alcohol related, but the exact causes are unknown.

Lessons From *Holyfield*: Who Is a "Real" Indian?

On one level, *Holyfield* illustrates how tribal sovereignty trumps other significant interests such as parental rights, children's best interests, and our anti-discrimination norm. But I focus here on a different lesson—what *Holyfield* teaches us about racial and cultural identity in the context of adoption.

Race: Biology or Socio-legal Construct?

Until recently, it was commonly understood by many that race was biologically determined—that "one's ancestors and epidermis ineluctably determine membership in a genetically defined group."[57] This common understanding was evident in the "one drop rule," which defined an individual with one drop of Black blood as Black, "regardless of the amount of white blood."[58] For example, a Virginia statute, repealed only in 1960, provided that: "Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person."[59] Indian blood, however, did not have the same effect. Virginia law expressly provided that:

> [T]he term "white person" shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasian blood shall be deemed to be white persons.[60]

Thus, although one drop of Negro blood made a person "colored," one drop of Indian blood did not taint white bloodlines. This exception for

[56] *Id.*

[57] *See* Ian Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 6 (1994).

[58] Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans and the U.S. Census*, 95 Mich. L. Rev. 1161, 1187 (1997).

[59] Va. Code Ann. § 1–14 (1960 Repl. Vol.); *see also* State v. Treadaway, 52 So. 500 (La. 1910) ("[A] person who is as much as one thirty-second part negro shall be, for the purpose of this act, a person of the negro race."); *see also* Mullins v. Belcher, 134 S.W. 1151 (Ky. 1911) (holding that persons with 1/16th negro blood are colored even though they are as fair as persons of the white race); State v. Chavers, 50 N.C. (5 Jones) 11 (1857) (same).

[60] Loving v. Virginia, 388 U.S. 1, 5 n.4 (1967) (quoting Va. Code. § 20–54).

persons with less than one-sixteenth Indian blood was the result of the state's interest in recognizing "as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas."[61]

These biological notions of race—deeply imbedded in law—are now changing. In recent years, many scholars have argued that race is not biologically determined. Scientists have found that "there is no set of genes that can tell us whether an individual is or is not a member of a particular race."[62] Indeed, there are greater genetic variations between members of the same racial group than between members of different racial groups.[63] Thus, "[f]rom the perspective of biology, there is no such things as a 'race.' "[64]

Of course, just because race is not biologically determined does not mean that there is no such thing as race. Reporters and criminal investigators often refer to the race of an unidentified suspect, and we often discuss the role of race in education, the workplace, and medicine.[65] Even corporations have distinct and legally recognized racial identities.[66] Thus, race and races do exist. They are, however, not biological, but rather are constructed "through the give-and-take of politics or social interaction."[67] The law's classification of Mexican–Americans both as "white" and as "non-white" at different points in U.S. history illustrates the role of law in creating racial categories.[68] America's relatively recent

[61] *Id.* (internal quotations omitted).

[62] Erik Lillquist & Charlie Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 Harv. C.R.-C.L. L. Rev. 391, 409 (2004).

[63] Lopez, *supra* note 57, at 11–12. This does not mean that groups are genetically indistinguishable. Certain small population groups share similar gene frequencies, and sometimes there are differences in the gene frequencies of persons classified as being of different races. However, these differences are the result of geographic separations—an evolutionary force known as "genetic drift" that "causes populations groups that are separated from one another to diverge in the frequency of genes." *Id.* Interestingly, people who resemble each other physically (i.e., similar skin color, hair texture, and facial features) "do not necessarily share a common genetic heritage" and vice versa. *Id.* at 16. For example, although the Malay Negritos from Oceania and the African Pygmies resemble one other physically, genetically, they are quite different. In contrast, Europeans and persons from northern India are genetically close even though they do not resemble one another physically. *Id.*

[64] Lillquist & Sullivan, *supra* note 62, at 418.

[65] *Id.* at 426–41.

[66] *See* Richard Brooks, *Incorporating Race,* 106 Colum. L. Rev. 2023 (2006).

[67] George Martinez, *The Legal Construction of Race: Mexican–Americans and Whiteness*, *in* A Reader on Race, Civil Rights, and American Law: A Multi–Racial Approach 54, 55 (Timothy Davis et al. eds., 2001).

[68] *Compare* In re Rodriguez, 81 F. 337 (W.D. Tex. 1897) (holding that, from an anthropological perspective, Mexicans are not white) *with* Independent School Dist. v. Salvatierra, 33 S.W.2d 790, 795 (Tex. Civ. App. 1930) (holding that the city could not segregate Mexican–American children from children of "*other white races*"). *Compare* the 1930 U.S. Census (classifying Mexican–Americans as non-white) *with* the 1950 U.S. Census (classifying Mexican–Americans as white). The change was a direct result of the Mexican government's and the U.S. Department of State's objection to the classification of Mexican–Americans as non-white in the 1930 Census. Thus, politics, not nature, rendered Mexican–Americans white under the law. *See* Martinez, *supra* note 67, at 58.

conferral of white status on groups that for many years were considered non-white—e.g., the Irish, Jews, and Italians—is further evidence that race is a socio-legal construct.[69]

Some scholars have argued that many courts in the nineteenth and early twentieth centuries *implicitly* recognized that race was socially constructed.[70] However, only in recent years have courts begun to acknowledge this *explicitly*. For example, in *Saint Francis College v. Al–Khazraji*, a university professor alleged that he was denied tenure because he was of Arab ancestry.[71] The university argued that because persons of Arab descent are Caucasian, the plaintiff had failed to state a federal claim for racial discrimination. The Supreme Court rejected the argument, holding that although persons of Arab descent are *now* considered Caucasian, this was not always the case. The Court noted that in the nineteenth century, race was defined "in terms of ethnic groups;" Finns, Gypsies, Hebrews, Norwegians, Germans, Italians, Hungarians, and Arabs were referred to "as separate races." Now, however, these groups are considered to be members of a single race—Caucasian. Thus, the Court recognized that racial categories are not immutable and definitions of who is white/Caucasian can change. Other federal courts have expressly held that "[no]w it is scientifically accepted that races 'are not, and never were, groups clearly defined biologically.' "[72]

Despite the evidence that race is now understood as a socio-political construct, *Holyfield* and ICWA may serve to reinforce old biological notions of race. Although the Supreme Court has repeatedly condemned "distinctions between citizens solely because of their ancestry" as "odi-

[69] *See* Karen Brodin Sacks, *How Did Jews Become White Folks?*, *in* Race 78 (Steven Gregory & Roger Sanjek eds., 1994); James R. Barrett & David Roediger, *How White People Became White*, *in* Critical White Studies: Looking Behind the Mirror 402 (Richard Delgado & Jean Stefancic eds., 1997); *see also* Brooks, *supra* note 66, at 2072 (arguing that the fact that a corporate entity has a racial identity such as Black or American Indian is evidence that race is socially constructed).

[70] *See* Donald Braman, *Of Race and Immutability*, 46 UCLA L. Rev. 1375, 1381, 1393–1400 (1999); Brooks, *supra* note 66, at 2063.

[71] 481 U.S. 604, 606 (1987).

[72] Ho v. San Francisco Unified Sch. Dist., 147 F.3d 854, 863 (9th Cir. 1998); *see also* U.S. v. Parada, 289 F.Supp.2d 1291, 1305 (D. Kan. 2003) ("[R]ace is merely a social construct. . . .").

ous to a free people,"[73] ICWA treats Indian children differently from other children based on biological definitions of race. ICWA applies to children who are either "members of an Indian tribe" or "are eligible for membership in an Indian tribe and are the *biological children* of a member of an Indian tribe."[74] Thus, ICWA, in effect, relies on ancestry—in other words, a biological conception of race[75]—to determine who is an Indian child.

Here, the *Holyfield* story gets curiouser and curiouser. Recall that the Choctaw Tribe claimed that the Mississippi Chancery Court had not only erred on domicile, but had also disregarded ICWA's placement preferences—the child's extended family, other tribal members, or other Indian families—before placing the twins with a non-Indian family.[76] There had been no search for Choctaw or other tribal members before the twins were placed with the Holyfields.

Yet, the Chancery Court may have unwittingly placed the twins with a Choctaw family. It turns out that Reverend Holyfield's paternal grandmother was a full-blooded Mississippi Choctaw, making Reverend Holyfield, the twins' adoptive father, one-fourth Choctaw.[77] But despite his ancestry, Reverend Holyfield was not an Indian under the Mississippi Choctaw's membership standards.

Federal law does not define who is a member of an Indian tribe. Instead, each of the 562 federally recognized tribes has exclusive authority to set its own standards for tribal membership.[78] Requirements vary widely. For example, both the Seminole and the Choctaw nations of Oklahoma allow any person who can prove a blood or ancestral relationship with one of the original enrollees of the Tribe, to enroll as a tribal member.[79] In contrast, the Louisiana Band of Choctaw Indians requires applicants to be at least one-fourth Louisiana Choctaw.[80] The Mississippi

[73] Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[74] 25 U.S.C. § 1903(3) (2006) (emphasis added).

[75] *See* Rice v. Cayetano, 528 U.S. 495, 499, 514 (2000) (holding that ancestry was a proxy for race).

[76] 490 U.S. at 40 n.13.

[77] Appellee Brief, *supra* note 15, at 17.

[78] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32. However, until recently, states have attempted to define who is a tribal Indian. *See supra* notes 60–61 and accompanying text (discussing Virginia statute).

[79] In re Alexandria Y., 53 Cal. Rptr. 2d 679, 681 n.3 (Ct. App. 1996) (emphasis added); Constitution of the Choctaw Nation of Oklahoma, art. II, § 1; *see also* Application for Certificate of Degree of Indian Blood, Choctaw Nation of Oklahoma.

[80] Jena Band of Choctaw Indians of Louisiana Confirmation Act, 103 Congress, H.R. 2366 (June 10, 1993), § 9.

Band of Choctaw Indians requires even more. A person seeking to enroll in the Tribe must show that he has one-half or more Choctaw blood.[81] Thus, according to the Tribe, Reverend Holyfield, who was one-fourth Choctaw, was not Choctaw enough. Had he been a descendant of either the Seminole or Choctaw nations of Oklahoma, or the Louisiana Band of Choctaw Indians, he would have been eligible for tribal membership and the Holyfield's adoption of the twins would have been a placement with "other Indian families" under ICWA's mandatory preferences.

Although these definitional distinctions did not ultimately affect the outcome in *Holyfield*, they could impact many other cases. Assume that, like 75% of all Indians, Jennie and Windell resided outside the reservation.[82] In that case, the Mississippi Chancery Court would have had jurisdiction over the Holyfield's adoption petition. However, it would not have been able to grant the adoption unless there were no members of the twins' extended family, other Choctaw tribal members, or other Indian families, willing to adopt them.[83] Because Jennie had already asked extended family members and other Choctaw tribal members to adopt the twins without success, the court might have found that ICWA's first two orders of preference had been satisfied. However, the Chancery Court would still have needed evidence that there were no "other Indian families" interested in adopting the twins before it could allow the Holyfields (a non-Indian family under the Mississippi Choctaw definition) to adopt them.

Given the large number of Indian tribes (562), this could be a burdensome, if not, impossible task, even assuming that the court need only document reasonable efforts to find an Indian family. Conceivably, the Chancery Court would have had to reach out to Seminole, Cherokee, and Navajo tribal members, for example, and determine that no member of those tribes was willing to adopt the twins before it could place them with the Holyfields. If, for example, a Seminole family in Florida had been willing to adopt the twins, the Chancery Court would have been required to send them to Florida rather than place them with the Holyfields. Under ICWA, all Indian families, other than members of the child's tribe, are treated the same regardless of cultural, political, economic, or religious differences between the tribes, or the fact that there are over 250 different tribal languages.[84]

[81] Tribal Constitution of the Mississippi Band of Choctaw Indians, art. III, §§ 1 & 2.

[82] U.S. Census Bureau, Characteristics of American Indians and Alaska Natives by Tribe and Language: 2000 (Dec. 2003).

[83] 25 U.S.C. §§ 1915(a), 1915(e) (2006).

[84] U.S. Dep't of Justice, Office of Tribal Affairs, *FAQs About Native-Americans*, available at http://www.usdoj.gov/otj/nafaqs.htm#otj20.

To be sure, the drafters of ICWA sensibly foresaw that a state court might need some flexibility in making placement decisions for Indian children not domiciled or residing on a reservation. ICWA therefore allows state courts to deviate from the mandatory preferences for "good cause" or where provided for by tribal resolution.[85] Although ICWA does not define "good cause," the Bureau of Indian Affairs Guidelines provides a non-exhaustive list of factors.[86] These include:

> (i) The request of the biological parents or the child when the child is of sufficient age. (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness. (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.[87]

A state court considering the Holyfields' petition might have found good cause to deviate from the placement preferences, in light of Jennie's desire that they adopt her children. But there are still a number of obstacles to claims by non-Indian prospective adoptive parents. First, the Guidelines are not binding; therefore, courts are free to interpret them narrowly or disregard them. Indeed, despite the Guidelines' recognition of birth parents' wishes, some courts have been reluctant to defer to the birth parents, especially in light of the Supreme Court's statement in *Holyfield* that a tribe's interests "are as entitled to respect as the interests of the parent."[88] For example, shortly after *Holyfield* was decided, a California court held that a seventeen-year-old Aleut woman who had not had any contact with her tribe since she was two years old and who had since resigned her tribal membership, could not place her child for adoption with a non-Indian family over the tribe's objection. Although the judge was aware of the mother's preference—she had testified that she would raise the child herself rather than place him in the Aleut fishing village—he found that ICWA prohibited him from placing the child with a non-Indian family over the Aleut Tribe's objection.[89] Other courts have similarly refused to find good cause to deviate even where placement with non-Indian parents was found to be

[85] 25 U.S.C. § 1915(a), (c) (2006).

[86] Matter of B.G.J., 133 P.3d 1, 5 (Kan. 2006).

[87] 44 Fed. Reg. 67,584, 67,594 (Nov. 26, 1979).

[88] 490 U.S. at 53.

[89] The mother was adopted by a non-Indian family (before ICWA's enactment) as a toddler. *See* Catherine Gewertz, *Aleut Tribe Given Adoption Control of Baby*, L.A. Times, Jan. 20, 1990, at 1 (Metro); Sonni Efron, *Aleuts Ask Panel for Say in Adoption*, L.A. Times, Mar. 14, 1991, at 6 (Metro). Although the mother resigned her tribal membership soon after her daughter was born, the Aleuts voted the infant in as a member of the tribe over the mother's objections.

in the child's best interests.[90] Second, the procedural hurdles are significant. The party arguing for deviation from the mandatory preferences bears the burden of demonstrating good cause, in some courts by the higher clear and convincing evidence standard.[91]

Acting Indian: The Existing Indian Family Exception

Although compliance with ICWA has improved somewhat since *Holyfield* was decided, recent studies show that Indian children continue to be removed from their homes and placed in non-Indian homes at disproportionately high rates. To illustrate, 61% of the children in foster care in South Dakota in 2003 were Native American even though only 13% of the state's population is Native American. Further, according to one estimate, in 1997 more than 50,000 Indian children were living in non-Indian adoptive homes.[92] There are several explanations. State courts sometimes delay or fail to notify the tribe of hearings involving Indian children. Other courts simply refuse to recognize exclusive tribal jurisdiction despite *Holyfield*'s holding.[93]

But *Holyfield*'s limited effect is best illustrated by the "existing Indian family exception," a judicially created "amendment" to ICWA. Courts in at least seven states have held that ICWA does not apply to *all* "Indian child[ren]" as defined by the statute—those who are tribal members or are eligible for membership and are the biological children of a tribal member[94]—but only to children who are also part of an

[90] Matter of Custody of S.E.G., 521 N.W.2d 357, 362 (Minn. 1994); In re Adoption of Riffle, 922 P.2d 510 (Mont. 1996).

[91] 44 Fed. Reg. 67,584 (Nov. 1979); *Matter of B.G.J.*, 133 P.3d at 4.

[92] *Rights to the Child*, Written Statement submitted by the International Indian Treaty Council, to the United Nations Economic and Social Council, Commission on Human Rights, 57th Session, at 2 (Jan. 23, 2001).

[93] *See* An Analysis of Compliance with the Indian Child Welfare Act in South Dakota, Final Report National Center for State Courts North American Indian Legal Services, Inc. at 8, 16, 84–85 (Dec. 2004); Indianz.com, *Rapid City Journal Runs Series on Indian Child Welfare*, Jan. 5, 2006, available at http://www.indianz.com/News/2006/011893.asp; Indianz.com, *High Rate of Indian Adoptions in Iowa Protested*, Jan. 13, 2004, available at http://www.indianz.com/News/2004/000086.asp (alleging that Iowa is not complying with ICWA). For example, in a recent case with facts similar to *Holyfield*, the birth parents resided on the Yakama reservation until the birth mother was eight months pregnant. The couple then moved off the reservation, gave birth, and placed the child for adoption with a non-Indian family. Four months later, they returned to the reservation. Finding that the birth parents left the reservation "in part to conceal the pregnancy and in part to attend community college," the court held that they had "voluntarily repudiated ICWA and tribal court jurisdiction." Thus, the court allowed the birth parents to defeat tribal jurisdiction despite *Holyfield*'s holding that a birth parent could not, by her actions, defeat a tribe's exclusive jurisdiction. Navajo Nation v. Confederated Tribes and Bands of the Yakama Indian Nation, 331 F.3d 1041 (9th Cir. 2003).

[94] 25 U.S.C. § 1903(3) (2006).

"existing Indian family."[95] According to these courts, a child is not part of an existing Indian family unless the Indian parent (or parents), in addition to being a tribal member, maintained "a significant social, cultural, or political relationship with an Indian community."[96] In other words, an Indian parent is not a "real" Indian unless he or she *behaves* like an Indian. For example, in *In re Santos Y.*, the birth mother was an enrolled member of the Minnesota Chippewa Tribe, but had spent her entire adult life in Oregon and California.[97] Her child, who was "one-quarter Chippewa Indian blood" and was therefore eligible for membership under the Minnesota Chippewa Constitution, was born in California and immediately placed in foster care there due to a positive toxicology for cocaine. After terminating the mother's parental rights, the court, applying ICWA's placement preferences, ordered the child placed with a Chippewa family on the Chippewa reservation in Minnesota. The California Court of Appeals reversed, holding that, because the birth mother had no involvement with the tribe, "there was no Indian family here to preserve."[98]

The rationale underlying this judicially created "existing Indian family" exception is that ICWA's purpose of promoting "the stability and security of Indian tribes and families"[99] is not furthered when an Indian child, raised by his biological parents, would not be raised in an Indian home. As one court explained:

> Losing a child born to parents involved in tribal life is, in effect, losing part of a family that the tribe needs to retain, if it is to extend its current level of cultural growth into the next generation. Conversely, relinquishing control over a child born to parents uninvolved in Indian life, costs the tribe nothing in terms of maintaining a stable level of cultural growth.[100]

Courts have reasoned that applying ICWA to children of tribal members who maintain no significant social, political, or cultural ties to a tribe would mean that the sole basis for applying ICWA "is the child's genetic heritage—in other words, race," and this in turn triggers strict

[95] In re Santos Y., 112 Cal. Rptr. 2d 692 (Ct. App. 2002); *see also* Hampton v. J.A.L., 658 So.2d 331, 336 (La. Ct. App. 1995), *writ denied*, 662 So.2d 478 (La. 1995), *cert. denied*, 517 U.S. 1158 (1996); In re Adoption of Crews, 825 P.2d 305 (Wash. 1992); Matter of Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988).

[96] *In re Santos Y.*, 112 Cal. Rptr. 2d at 719 (internal citations omitted).

[97] *Id.* at 697–98.

[98] *Id.* at 726.

[99] 25 U.S.C. § 1902.

[100] In re Baby Boy C., 27 A.D.3d 34, 46 (N.Y. App. Div. 2005) (quoting and reversing lower court).

scrutiny under the Equal Protection Clause.[101] These courts reject a definition of Indian identity based purely on ancestry (having Indian blood and a biological parent who is a tribal member) and define Indian identity as more than just genetic heritage. In that sense, these courts support the notion that racial identity is not biological, but rather, a social and political construct. When determining whether a child was part of an existing Indian family, courts have considered whether the birth parent described herself as Indian; observed tribal customs; participated in tribal community affairs; voted in tribal elections; contributed to Indian charities; subscribed to periodicals of particular interest to Indians; participated in Indian religious, social, and cultural events; or maintained social contacts with other tribal members.[102] Thus, it seems that when making determinations about who is a "real" Indian, courts inevitably—and predictably—resort to, consciously or unconsciously, stereotypes about Indians.

Adopting a Secure Racial and Cultural Identity

The Supreme Court in *Holyfield* noted Congress's deep concern over the "damaging social and psychological impact" on Indian children of placement in non-Indian homes.[103] Undeniably, some Indian children adopted by non-Indian families do experience significant growing pains. Seth Holyfield certainly experienced his share. According to Joan Holyfield, he was a quick-tempered little boy who got into fights as early as kindergarten and got into trouble at school almost daily. By the time he was in middle school, he had experimented with drugs and had been involved in so many fights that a judge committed him to a state mental hospital for three months.

A recent study of twenty Indian adults adopted by non-Indian families as children found that an Indian child placed in a non-Indian adoptive or foster home is "at great risk of long-term psychological damage as an adult."[104] Nineteen of the twenty study participants

[101] *In re Santos Y.*, 112 Cal. Rptr. 2d at 719 (internal citations omitted).

[102] In re Bridget R., 49 Cal. Rptr. 2d 507, 531 (Ct. App. 1996), *cert. denied*, Cindy R. v. James R., 519 U.S. 1060 (1997). California courts are split on the validity of the existing Indian family exception. While the Courts of Appeal in the Second and Fourth Districts have adopted the exception, other districts have rejected it as incompatible with ICWA. In 1999, the California legislature passed a statute prohibiting courts from applying the existing Indian family exception. However, the Second District, reasoning that only Congress could enact legislation prohibiting the use of the exception, disregarded the California statute and reaffirmed its acceptance of the exception. *See* In re Vincent M., 59 Cal. Rptr. 3d 321, 330–34 (Ct. App. 2007) (summarizing cases); *see also id.* at 337 (Bammattre-Manoukian, J., concurring) (discussing split of authority and inviting the California Supreme Court to resolve the issue).

[103] 490 U.S. at 50 & n.24.

[104] Carol Locust, *Split Feathers . . . Adult American Indians Who Were Placed in Non-Indian Families As Children*, 44 Oacas J. 11 (Oct. 2000).

experienced psychological problems including the loss of Indian identity, "family, culture, heritage, language, spiritual beliefs, tribal affiliation, and tribal ceremonial experiences." They also grew up "feeling different" and each had experienced discrimination either at school, church, or at home. This study found that Indian children raised in non-Indian families became painfully aware that dominant society did not fully accept them. Not one participant was glad about his or her adoptive placement.

Not all research supports this finding. Other studies suggest that the emotional development of Indian children adopted by non-Indian families is similar to that of those adopted by Indian families.[105] They further suggest that Indian children who have relationships with other Indian children develop secure Indian cultural identities even when raised in non-Indian homes. There are few Indians (less than half a percent) in Long Beach, Mississippi where Beth and Seth were raised. Indeed, all of Beth's friends are white. However, according to Joan, Beth's emotional development and adolescence were rather normal. Like Seth, she is "a slow learner" and struggled in special education classes, but she was a hardworking student and never exhibited any behavioral problems. Although she dropped out of high school and moved in with a roommate when she turned 18, she returned to school a few weeks later and graduated in 2005. As of March 2007, she was working in a local supermarket and was considering enrolling at the local college.

Some people might argue that just because Beth appears well-adjusted does not mean that she has a secure Indian identity. However, we have no way of determining just what constitutes a secure Indian identity. Some transracial adoptees identify with the race of their adoptive parents, while others identify with the race of their birth parents. Although Choctaw tribal members are eligible for various federal benefits and tribal services, including health care, housing assistance, scholarships, and a stipend, Joan waited until Beth and Seth were nine years old before enrolling them in the Tribe. She wanted to make sure that they were old enough to understand their heritage and the significance of tribal enrollment. However, despite Joan's wishes that they show more interest in their heritage, Beth and Seth never expressed any desire to spend more time on the Choctaw reservation, which they visited occasionally while growing up. They did, however, maintain contact with their older half-siblings, Scotty and Leah, and with their little brother Nathan, Jennie's youngest son who was raised by a foster family on the reservation. In addition, Beth owns a Choctaw dress which she wears at tribal events. She also recognizes other Choctaws and points them out to Joan at the mall and other public places. Is this

[105] Bakeis, *supra* note 19, at 548.

evidence of a healthy Indian identity? Maybe. Maybe not. But if race is socially constructed, who better than Beth to construct her own racial and cultural identity?

Even if we assume that some Indian children might suffer psychological harm when placed with non-Indian families, aren't other children adopted transracially and/or transculturally subject to a similar risk? Thousands of African–American and Asian children adopted transracially have experienced the complicated challenges of growing up in white homes and attending predominantly white schools.[106] For example, some Korean transracial adoptees have said that growing up they felt like "white [persons] trapped in Asian bodies" and that they did not fit in with whites or Koreans.[107] As children or adolescents, 36% considered themselves Caucasian, but as adults, only 11% identified as such—somewhere along the way, their racial identities changed. African–American children adopted by whites have similarly expressed experiencing "a kind of racial neutering in which they feel no sense of belonging to any racial group."[108]

The *Holyfield* court noted that placements with non-Indian families deprived Indian children of their "tribal and cultural heritage."[109] Other children adopted transracially may be subject to similar risks. For example, some Korean and African–American adoptees have lamented the loss of their culture, and critics of international adoption have long argued that such adoptions separate children from their racial and cultural communities.[110] There are other reasons—aside from children's best interests—such as tribal sovereignty, underlying Congress's decision to keep Indian children with Indian families. Yet, if Congress and the *Holyfield* Court were persuaded by testimony and studies suggesting that Indian children suffer social and psychological harm when placed in non-Indian homes, one has to wonder whether the same is true of other children adopted transracially or transculturally.

We will never know whether Seth's adoption by a white family in Long Beach, Mississippi, where there were no Indian children (other

[106] *See* Madelyn Freundlich & Joy Kim Lieberthal, *The Gathering of the First Generation of Adult Korean Adoptees*, Evan B. Donaldson Adoption Institute, available at http://www.adoptioninstitute.org/proed/korfindings.html.

[107] *Id.* This might be changing as adoption agencies and child development experts are now encouraging adoptive parents to acknowledge racial differences and expose their children to their birth parents' culture.

[108] Lena Williams, *Parent and Child: Beyond Losing Isaiah: Truth in Shades of Gray*, N.Y. Times, Mar. 23, 1995, at C1.

[109] 490 U.S. at 50 n.24.

[110] *See* Leslie Doty Hollingsworth, *International Adoption Among Families in the U.S.: Considerations of Social Justice*, 48 Soc. Work 209, 209 (2003).

than his sister), contributed to his particular emotional and behavioral problems. After all, he was not raised in an all-white neighborhood, but attended school with African–American and Mexican–American children.[111] Indeed, all of Seth's close friends are African–American.[112] Further, although Philadelphia, the city next to the Choctaw reservation, has a long history of racial intolerance,[113] and its white residents "were standoffish towards Indians,"[114] according to Joan and the Tribe's attorney, Long Beach was different. In their opinion, the residents of Long Beach were very welcoming of people of different races. Seth Holyfield himself could not recall ever experiencing discrimination or feeling that he was treated differently because he is Indian.[115]

Factors other than his adoption by a non-Indian family might have contributed to Seth's difficult childhood. His adoptive father died when he was only three years old. He was then raised by his mother alone. Joan was unquestionably a devoted parent. An elementary schoolteacher with a Masters degree in education, she retired when Beth and Seth

111 According to the 2000 U.S. Census, 10% of Long Beach's 17,000 residents were African–American or Latino.

112 Native Americans and African–Americans share a complex history. Although both have been victims of racial prejudice, according to Edwin Smith, the Tribe's attorney in *Holyfield*, white employers in cities near the Choctaw reservation often preferred to hire Choctaws over African–Americans. In addition, a number of Native American tribes have grappled with their own rejection of African–Americans. For example, in early 2007, the Cherokee Nation of Oklahoma revoked the tribal citizenship of descendants of Black slaves once owned by Cherokees, including some persons of mixed Cherokee and African–American ancestry. *See Slave Descendants Lose Tribal Status*, N.Y. Times, Mar. 4, 2007. The Seminoles did the same in 2003. *See* Evelyn Nieves, *Putting to a Vote the Question "Who Is Cherokee?"*, N.Y. Times, Mar. 3. 2007.

113 Philadelphia was the site of the infamous murder by the Ku Klux Klan of three civil rights workers in 1964. The victims, Michael Schwerner, James Chaney, and Andrew Goodman, were in Mississippi to investigate the burning of a Black church and to help Blacks register to vote. The FBI arrested eighteen men, but the state prosecutors refused to charge anyone with murder. Although seven men, including two law enforcement officers, were later convicted on federal conspiracy charges, it was forty years before Mississippi finally charged anyone with murder. Edgar Ray Killen, a part-time preacher, was convicted of manslaughter on June 21, 2005, the forty-first anniversary of the killings. Ariel Hart, *41 Years Later, Ex-Klansman Gets 60 Years in Civil Rights Deaths*, N.Y. Times, June 24, 2005, at A14. These killings inspired the highly acclaimed 1988 film, *Mississippi Burning*. Racial tensions in Philadelphia continued for many years. In 1978, the Tribe argued in *U.S v. John*, (discussed above at note 34 and accompanying text) that white racial intolerance near the Choctaw reservation was still a significant problem both in the criminal justice system and socially. *See* Brief for the Mississippi Band of Choctaw Indians as Amicus Curiae, at 10, U.S. v. John, 437 U.S. 634 (1978) (Nos. 77–575 & 77–836).

114 Holyfield Interviews, *supra* note 1.

115 Telephone Interview with Seth Holyfield, in Long Beach, MS (Feb. 6, 2007) [hereinafter Seth Holyfield Interview].

began first grade, in part, because she knew they would need her help in order to succeed academically. Joan also had an extensive support system in her church. Her deep faith in God and conviction that she was meant to raise Beth and Seth were a source of strength and patience. Nonetheless, numerous studies (of children of all races) suggest that children raised in single-parent homes are more likely to experience emotional and behavioral problems, to experiment with drugs, and to engage in delinquent activity.[116]

In addition, in kindergarten, Seth was diagnosed with fetal alcohol syndrome ("FAS"). Children with FAS can experience "problems with learning, memory, attention span, communication, vision, hearing, or a combination of these."[117] They can also exhibit learning and developmental disabilities such as speech and language delays, hyperactive behavior, and poor reasoning and judgment skills. They are also at risk for psychiatric problems, criminal behavior, and incomplete education. Seth has many of the symptoms of FAS; he has been diagnosed with bipolar disorder, attention deficit disorder, and oppositional defiant disorder, as well as language and speech delays. Despite Joan's tutoring and more than twelve years in special education classes, in 2007, Seth had not yet graduated from high school, and he continued to get in trouble with the law for drug-related offenses.

In contrast to Seth, Beth was always a quiet child. "She never gave [Joan] any trouble" and her teachers never suggested testing her for FAS. As a result, no one knows whether or to what extent Jennie's drinking affected Beth's development. However, she too suffered language and speech delays and was placed in special education classes as a result. Further, according to Joan, although Beth reads "beautifully," she does not understand what she reads. She is also highly susceptible to others' suggestions. These characteristics are often present in children whose mothers drank excessively while pregnant.[118] Even if Beth was affected by her mother's alcohol consumption, she would not necessarily exhibit the same behaviors as her brother since girls are less likely than boys to act out in school, to use drugs, or to engage in criminal activity.

116 *See* Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. Pa. L. Rev. 921, 949–61 (2005).

117 Department of Health and Human Services, Center for Disease Control and Prevention, *Fetal Alcohol Spectrum Disorders*, available at http://www.cdc.gov/ncbddd/fas/fasask.htm.

118 *See id.*; *see also* Michael Dorris, The Broken Cord (1989). Dorris describes his family's experiences raising an adopted son with FAS and how other children or adolescents often took advantage of his son and persuaded him to do things that were not in his best interest, such as parting with his money.

There is no evidence that Beth and Seth would have had better outcomes had they been raised on the reservation. Nathan, Jennie's youngest son who was raised by a Choctaw family, dropped out of school before the age of sixteen. Jennie's oldest son Scotty, who lives on the reservation, has problems with alcohol. As noted, Jennie, like many Indian birth parents, did not want Beth and Seth to be raised on the reservation.[119] One can only speculate about her reasons aside from her stated fear that they would be placed in foster care. However, the economic conditions, limited educational opportunities, and social problems on the Choctaw reservation may have influenced her decision to place her children with the Holyfields. At the time, unemployment and poverty rates on the Choctaw reservation were high, and educational attainment, while improving, lagged behind the nationwide average.[120] Although compared to the general U.S. population, a higher percentage of Native American adults, especially women, abstain from alcohol,[121] the rate of alcohol abuse on the Choctaw reservation was admittedly high.[122] Jennie, like most Mississippi Choctaws at the time, never completed high school,[123] but she wanted Beth and Seth to be raised in a middle class home.[124] She may have been aware that they were at risk for FAS. The Holyfields certainly were, but they believed that Reverend Holyfield's background as an educator and school counselor and Joan's experiences teaching young children made them better equipped than most parents to raise two children they "knew were going to have problems."[125] Jennie might have believed the same.

[119] U.S. Gov't Accountability Office, Indian Child Welfare Act: Existing Information on Implementation Issues Could be Used to Target Guidance and Assistance to States, U.S. GAO–05–290, at 33 (Apr. 2005), available at http://www.gao.gov/new.items/d05290.pdf.

[120] At the time, approximately 28% of Mississippi Choctaws were unemployed and the average Choctaw family income was only $11,000, 33% lower than Mississippi's median family income of $16,513 and less than half the national median family income of $24,897. *See* Choctaw Chronology, available at http://www.choctaw.org/history/chronology.htm; U.S. Census Bureau, Historical Income Tables—Households, Table H–8: Median Household Income by State: 1984–2003.

[121] *See* Philip A. May, *Fetal Alcohol Effects Among North American Indians*, 15 Alcohol Health & Res. World 239 (1991).

[122] *See* Choctaw Chronology, available at http://www.choctaw.org/history/chronology.htm; *see also* Fred Beauvais, *American Indians and Alcohol*, 22 Alcohol Health & Res. World 253, 254–55 (1998) (finding that rate of alcohol related illnesses and deaths among tribal Indians was 5.6 times higher than among the U.S. population in general).

[123] In 1989, when *Holyfield* was decided, the average educational level among Mississippi Choctaws was eleventh grade. *See* Choctaw Chronology, available at http://www.choctaw.org/history/chronology.htm.

[124] Holyfield Interviews, *supra* note 1.

[125] *Id.*

Beth and Seth Holyfield celebrated their twenty-first birthday on December 29, 2006. At the time, Seth still lived with Joan in the same house he had lived in since birth. Beth was living two blocks away with a family she met at work, but she visited Joan daily. As a mother, Joan worries. She worries that Beth and Seth might abuse alcohol. She worries that she did not do enough to help them succeed. These are merely the worries of a loving and devoted parent. Maybe Seth should tell her what he told me: "I am happy I was adopted and I got the mom I got."[126]

[126] Seth Holyfield Interview, *supra* note 115.