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The Existing Indian Family Exception to the Indian Child Welfare Act

Toni Hahn Davis

THE EXISTING INDIAN FAMILY EXCEPTION TO THE INDIAN CHILD WELFARE ACT

TONI HAHN DAVIS*

I. INTRODUCTION: A SPECIAL ALLIANCE

Throughout American history, Native Americans have had a special relationship with the federal government. Indians were originally viewed by many European missionaries and commentators as primitive, yet pristine and innocent—free from "distinctions of rank and wealth."[1] Before America's conquest, Indians had no contact with Christianity and were therefore deemed innocent of "infidelity" and of spurning the word of God.[2] In the decades preceding the American Revolution, the English government had an unusual association with the Indians: the English dealt directly with the Indian nations, even over the heads of their own colonists. For example, the English negotiated and made treaties with the Indian nations regarding lands, and even tried to protect Native Americans from encroaching white settlement.

The special alliance between the British and the Indian nations served as a precedent for the federal government created by the U.S. Constitution. Besides the Indian nations, no other peoples were singled out as a "foreign nation" within the boundaries of the United States. One legal scholar calls the Indian tribes a "jurisdictional anomaly."[3] There has been no other group about whom the American government has displayed such long term ambivalence and guilt.

Throughout American history, there has been a remarkable double standard regarding Indians and blacks. Despite the fact that North American colonists held some Indian slaves, they never doubted that the majority of Indians were and should remain free and could even be assimilated as equal citizens after a long period of being "civilized."[4] Blacks, on the other hand, were deemed

* Presently Tutor in Law of the Yale Law School Graduate Programs, 1992-93 and 1993-94, and Doctoral Candidate at the Yale Law School; L.L.M., 1992, Yale Law School, New Haven, Connecticut; J.D., 1985, University of Connecticut School of Law, Hartford, Connecticut; M.S.W., 1970, University of Southern California, Los Angeles, California; B.A., 1968, Cornell University, Ithaca, New York.

1. DAVID B. DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE, 167 (1986).

2. *Id.* at 168.

3. *See* Barbara A. Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1051 (1989) ("Indian tribes in the United States are a jurisdictional anomaly.").

4. DAVIS, *supra* note 1, at 177.

inherently inferior and incapable of the responsibilities of citizenship. By the time of American independence, the vast majority of blacks were slaves, whereas virtually all Indians were free.[5] Both Europeans and early white Americans were especially sensitive to the plight of the Native American and expressed a continuing sense of guilt over the coercive dispossession and anticipated "extinction" of numerous tribes. Chief Justice Taney, in *Dred Scott v. Sandford*,[6] summed up this double standard when he compared the population of imported Africans and their descendants—"considered . . . [an] inferior class of beings"[7]—to the Indian race—"uncivilized . . . yet a free and independent people, associated together in nations or tribes, and governed by their own laws."[8] Accordingly,

> [t]hese Indian Governments were regarded and treated as foreign Governments . . . . Treaties have been negotiated with them, and their alliance sought for in war . . . . [I]t has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them . . . .[9]

Despite this underlying sense of alliance, the policies of the American government toward the Indian tribes have changed considerably at various times in American history. One legal scholar notes that while current federal policy aims at "enhancing tribal identity and autonomy," much of prior federal policy was aimed at assimilation and "termination of tribes and tribalism."[10]

II. APPLICABLE LEGISLATION

Over the centuries much legislation was enacted, including the United States Constitution, which elaborated or embodied the special relationship between the United States government and the Indian nations. Article I, Section 8, Clause 3 of the Constitution reserved to Congress the power to regulate commerce with Indian tribes and "through this and other constitutional authority, Congress ha[d] plenary power over Indian affairs[.]"[11] "[T]hrough statutes, treaties, and the general course of dealing with Indian

5. *Id.* at 180.
6. 60 U.S. 393 (1856).
7. Dred Scott v. Sandford, 60 U.S. 393, 404-05 (1856).
8. *Id.* at 403.
9. *Id.* at 404.
10. Atwood, *supra* note 3.
11. Indian Child Welfare Act of 1978, 25 U.S.C. § 1901(1) (1988). All subsequent footnotes citing 25 U.S.C. will refer only to section numbers.

tribes, [Congress] assumed the responsibility for the protection and preservation of Indian tribes and their resources[.]"[12] Congress found that there was "no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children . . . ."[13]

A. THE INDIAN CHILD WELFARE ACT

1. *Purposes of the Indian Child Welfare Act*

As a result of this "special relationship between the United States and Indian tribes and their members and the Federal responsibility to Indian people,"[14] Congress enacted the Indian Child Welfare Act (hereinafter "the ICWA" or "the Act")[15] in 1978 "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ."[16] In order to promote this policy, Congress established in the Act "minimum Federal standards for the removal of Indian children from their families" and sought to ensure "the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . . ."[17]

Congress enacted the ICWA to enhance tribal identity and autonomy after finding that a very high percentage of Indian families were "broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies"[18] and that a high percentage of these children were "then placed in non-Indian foster and adoptive homes and institutions . . . ."[19] In *Mississippi Band of Choctaw Indians v. Holyfield*,[20] the Supreme Court noted that studies "presented in the [1974] Senate hearings showed that 25 to 35% of all Indian children had been separated

12. § 1901(2).
13. § 1901(3).
14. § 1901.
15. §§ 1901-1963.
16. § 1902.
17. *Id.* Examples of the minimum standards are: 1) the preference given to members of the child's extended family, other members of the Indian child's tribe, or other Indian families in any placement in state court under § 1915(a); 2) the efforts that must be made to provide remedial and rehabilitative programs to prevent the breakup of the Indian family prior to foster care placement or termination of parental rights to an Indian child under state law under § 1912(d); and 3) the necessary evidentiary burden of beyond a reasonable doubt in the termination of parental rights that continued custody of the child is likely to result in serious emotional or physical damage to the child under § 1912(a) and (f).
18. § 1901(4).
19. *Id.* *See* H. R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7530-34 (stating the legislative purpose, background, and standards for the ICWA).
20. 490 U.S. 30 (1989).

from their families and placed in adoptive families, foster care, or institutions."[21]

> [I]n the state of Minnesota, for example, one in eight Indian children under the age of 18 was in an adoptive home, and during the year 1971-1972 nearly one in every four infants under one year of age was placed for adoption. The adoption rate of Indian children was eight times that of non-Indian children.[22]

In addition, the Supreme Court noted that testimony indicated that Indian children placed in non-Indian homes often developed "serious adjustment problems" during adolescence.[23]

Congress also found that "administrative and judicial bodies [of the various states] have often failed to recognize . . . the cultural and social standards prevailing in Indian communities and families."[24] The two purposes of the Act—to promote "the 'best interests of Indian children' and the . . . 'stability and security of Indian tribes and families'—are intertwined" with the underlying belief that "it is in the best interest of an American Indian child that the role of the tribal community in the child's life be protected."[25]

2. *Definitions in the ICWA*

Operation of the ICWA is triggered by a child custody proceeding, the subject of which is an Indian child. "Child custody proceeding," as that term is defined and used in the Act, refers to proceedings for foster care placement, termination of parental rights, preadoptive placement, and adoptive placement.[26] The plain language of the Act provides for only two exceptions to the types of proceedings covered by the Act: 1) custody proceedings as part of a divorce decree, and 2) delinquency proceedings.[27] Neither of these proceedings involves the removal of an Indian child from parental control and protection.

An "Indian child" is defined as "any unmarried person who is

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21. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).
22. *Id.* at 33.
23. *Id.*
24. § 1901(5).
25. Donna J. Goldsmith, *Individual vs. Collective Rights: The Indian Child Welfare Act*, 13 HARV. WOMEN'S L. J. 1, 4 (1990). *See also In re* Appeal in Pima County Juvenile Action, 635 P.2d 187, 189 (Ariz. Ct. App. 1981) ("The Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected." (footnote omitted)).
26. § 1903(1).
27. *Id.*

under age eighteen and 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[.]"[28] The "Indian child's tribe," as that term is defined and used in the Act, refers to "(a) the Indian tribe in which an Indian child is a member or eligible for membership or (b), . . . the Indian tribe with which the Indian child has the more significant contacts[.]"[29] "Indian tribe," as defined in the Act, refers to "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians . . . ."[30]

The ICWA definition of an "Indian child" and its requirement that a child's tribal identity be used as a basis for custody decisions may well raise claims that the Equal Protection Clause of the Fourteenth Amendment or the Equal Protection Clause of the Fifth Amendment has been violated. The Equal Protection Clause guarantees that all individuals will be afforded fair treatment in the exercise of fundamental rights and will not be classified on the basis of impermissible criteria.[31] The basis for such an equal protection claim may be found in *Palmore v. Sidoti*.[32] In *Palmore*, the United States Supreme Court ruled that state courts violate the Equal Protection Clause if they change a child's custody solely on the basis of racial considerations.[33] This whole issue of recognizing racial considerations is extremely controversial. Since the status of a child as an Indian under the ICWA is dependent upon tribal membership, which in turn depends on racial heritage, the ICWA gives sanction to racial considerations in just such custody matters. It could be argued, however, that equal protection claims with regard to the ICWA protections on the basis of tribal membership fail in light of the unique status of the Indian tribes as self-gov-

28. § 1903(4).

29. § 1903(5).

30. § 1903(8).

31. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. If the federal government classifies individuals in a way which would violate the equal protection clause, it will be held to contravene the Due Process Clause of the Fifth Amendment. *See generally* Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Classifications on the basis of such criteria as race "are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose." Palmore v. Sidoti, 466 U.S. 429, 432-33 (1984) (citations omitted).

32. 466 U.S. 429 (1984).

33. Palmore v. Sidoti, 466 U.S. 429, 434 (1984). The United States Supreme Court held that the custody change on the basis of race did not pass constitutional muster under the Equal Protection Clause. *Id.*

erning political nations[34] and because the tribal classification is used to remedy proven past discrimination.[35]

"Parent," as that term is defined and used in the Act, "does not include the unwed father where paternity has not been acknowledged or established[.]"[36] Therefore, when a child is born out of wedlock to a non-Indian mother and an Indian father, unless the Indian father acknowledges or establishes his paternity, he is not considered a "parent" of the child. Thus, the ICWA provides a clear definition of an Indian child, a parent, and the child custody proceedings to which it applies.

The Act's limitation on the definition of "paternity" to exclude unwed fathers whose "paternity has not been acknowledged or established"[37] complies with Supreme Court decisions emphasizing protection of parental rights of biological parents only if they have established or acknowledged their paternity. For example, in *Stanley v. Illinois*,[38] the United States Supreme Court described Peter Stanley, an unwed father, as a man who had "sired and raised"[39] his children, and as a result, had a "cognizable and substantial" interest in retaining their custody.[40] The Court thus found that Stanley had a constitutional interest in his relationship

34. Chief Justice Marshall writing for the Court in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831) outlined the conception of Indian tribes as "domestic dependent nations" under the "protection" of the United States. *Id.*

35. Courts have taken race into account in deciding whether a constitutional violation has occurred and in formulating constitutional remedies. *See* North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971); Local 28 Sheet Metal Workers' Int'l Assoc. v. Equal Employment Opportunity Comm'n, 106 S. Ct. 3019 (1986); Metro Broadcasting, Inc. v. Federal Communications Comm'n, 110 S. Ct. 2997 (1990).

36. § 1903(9). *See In re* Appeal in Maricopa County, 667 P.2d 228, 232-33 (Ariz. Ct. App. 1983) ("[I]n the case of a child born out of wedlock to a non-Indian mother, until . . . the putative Indian father acknowledges or establishes paternity, . . . ICWA [is] not applicable"); *In re* Adoption of Baby Boy D, 742 P.2d 1059, 1064 (Okla. 1985) (stating that the ICWA is inapplicable when the unwed father "failed to lay legal claim to the child").

37. § 1903(9). The Act does not define a particular method of acknowledging or establishing paternity. Courts have "looked to state law to determine whether an alleged father of an Indian child has acknowledged or established paternity." *In re* Adoption of A Child of Indian Heritage, 543 A.2d 925, 935 (N.J. 1988) (citations omitted). "Furthermore, the ICWA's definition of parent looks to state or tribal law to determine the status of adoptive parents, and also makes the determination of whether a person has legal custody of a child a question of state or tribal law." *Id.* (citations omitted).

> We conclude, therefore, that Congress intended to defer to state or tribal law standards for establishing paternity, so long as these approaches are permissible variations on the methods of acknowledging and establishing paternity within the general contemplation of Congress when it passed the ICWA, and provide a realistic opportunity for an unwed father to establish an actual or legal relationship with his child.

Id. (citations omitted).

38. 405 U.S. 645 (1972).

39. Stanley v. Illinois, 405 U.S. 645, 651 (1972).

40. *Id.* at 652.

with his children equal to the interest of other parents.[41] Further, in *Caban v. Mohammed*,[42] the Court recognized Caban's past custodial relationship and accordingly afforded constitutional protection to the unwed father.[43]

On the other hand, in *Quilloin v. Walcott*,[44] the Court found that Quilloin had never consistently supported the child and had never sought actual or legal custody of the child.[45] The Court denied constitutional protection to Quilloin, noting that "the State was not foreclosed from recognizing this difference in the extent of commitment to the welfare of the child,"[46] because he had manifested only limited interest in his children. Under these three cases (*Stanley*, *Caban*, and *Quilloin*), establishment of paternity and parental rights by past custodial relationship, legal acknowledgment, and emotional involvement with the child is critical to the unwed father's rights.

A more recent case in which the rights of an unwed father were at issue is *Lehr v. Robertson*.[47] The United States Supreme Court emphasized in *Lehr* that the biological relationship between a parent and a child is of constitutional significance because it offers biological parents a unique opportunity to develop critical emotional bonds with their children.[48] However, the Court then denied parental rights to the unwed father who had failed to establish a substantial relationship with his child.[49] The Supreme Court reasoned that a state may require that an interested putative father develop a relationship with his child in order to establish parental rights.[50] In a similar manner, several state courts have refused to apply the ICWA because the Indian putative father had failed to acknowledge or establish his paternity, as required in the Act's definition of "parent."[51]

Moreover, despite clear language in the ICWA limiting its application *only* to parents who have acknowledged or established paternity, a judicially created exception without express statutory

41. *Id.* at 658.
42. 441 U.S. 380 (1979).
43. Caban v. Mohammed, 441 U.S. 380, 389 (1979).
44. 434 U.S. 246 (1978).
45. Quilloin v. Walcott, 434 U.S. 246, 256 (1978).
46. *Id.*
47. 463 U.S. 248 (1983).
48. Lehr v. Robertson, 463 U.S. 258, 262 (1983).
49. *Id.* at 265.
50. *See id.* at 248.
51. *In re* Adoption of A Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); *In re* Adoption of Baby Boy D, 742 P.2d 1059 (Okla. 1985); *In re* Appeal in Maricopa County, 667 P.2d 228 (Ariz. Ct. App. 1983).

foundation—the existing Indian family exception—has nonetheless been successfully invoked to defeat application of the Act when the father has properly established or acknowledged his paternity.[52] The existing Indian family exception—an exception based on the notion that the ICWA will only be applicable if an Indian child is removed from an "existing Indian family unit"[53] or "Indian home or culture"[54]—is now commonly employed by both courts and parties. How this exception has been employed, its effects on the ICWA, and the broader implications of its use will be discussed later in this article.

3. *The Structure of the ICWA*

The ICWA provides a jurisdictional, procedural, and substantive structure governing child custody proceedings in an attempt to correct the failures of administrative and judicial bodies of the state and nontribal public and private agencies.

a. Jurisdictional Provisions of the ICWA

The jurisdictional structure of the ICWA is a dual scheme, based on the residence or domicile of the Indian child. Pursuant to the Act, disputes concerning Indian children who reside or are domiciled within their tribal reservations are the exclusive responsibility of the tribe.[55] However, in the case of Indian children who do not reside or are not domiciled on their tribe's reservation, state courts may exercise jurisdiction concurrent with tribal courts.[56] State courts must refer the dispute to the appropriate tribal court unless good cause is shown for the retention of state court jurisdiction, or unless either parent objects to the transfer, or unless the tribal court declines the transfer.[57] But if the threshold requirements—that it is a child custody proceeding and that the matter involves an Indian child—are fulfilled and the state court retains the case, the substantive and procedural provisions of the

52. *See In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982) (finding that the ICWA did not apply because the child was never a part of an Indian family); Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987) (stating that the ICWA was inapplicable because the child was not a member of an existing Indian family).

53. *In re* Adoption of Baby Boy L., 643 P.2d at 175-76.

54. *Claymore*, 405 N.W.2d at 653-54.

55. § 1911(a).

56. § 1911(b). *See also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989) ("Section 1911(b) . . . creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation . . . .").

57. § 1911(b).

ICWA still apply and the tribe has the right to notice[58] and to intervene in the state proceedings.[59] It is in the context of a state court proceeding that the existing Indian family exception is raised.[60]

b. Substantive Provisions of the ICWA

The ICWA provides a substantive structure which Congress intended to further promote the goals of the Act. In briefest summary, the Act states that "In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, 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."[61] Similar preference shall be given for foster care or preadoptive placement.[62] Such preferences may not exist under state law. Further, the ICWA mandates that "[a]ny party seeking . . . foster care placement of, or termination of parental rights to, an Indian child under State law shall . . . [make efforts] to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and [shall satisfy the court] that these efforts have proved unsuccessful."[63] State laws without ICWA applicability do not require similar efforts.

c. Procedural Provisions of the ICWA

In ICWA proceedings, parental rights cannot be terminated without evidence "beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in

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58. § 1912(a). Violation of the notice provisions may be cause for invalidation of the proceedings under section 1914.

59. § 1911(c).

60. *See, e.g.*, Claymore v. Serr, 405 N.W.2d 659 (S.D. 1987). *See also supra* notes 52-53 and accompanying text.

61. § 1915(a). The United States Supreme Court, in *Mississippi Band of Choctaw Indians v. Holyfield*, called this provision "the most important substantive requirement imposed on state courts . . . ." 490 U.S. 30, 36 (1989). In the recent case *In re* Oscar C., Jr., neglect proceedings were brought concerning Indian children. 559 N.Y.S.2d 431 (N.Y. Fam. Ct. 1990). The court noted that if there is "clear and convincing evidence that continued custody . . . by [the Indian] father is likely to result in their serious emotional or physical damage [the court may] remove them from his care." *Id.* at 433. The court stated that if the children could not be returned to their father, "the ICWA establishes that a preference be given to a member of the Indian child's extended family [for foster care]." *Id.* at 434. The children were placed with their maternal grandmother, a Native American. *Id.* at 435.

62. § 1915(b).

63. § 1912(d).

serious emotional or physical damage to the child."[64] State laws require "clear and convincing evidence" for terminating parental rights.[65] Most state laws permit the temporary removal of children from their families and placement in foster care on a preponderance of the evidence standard. However, the ICWA provides that a child may not be placed in foster care unless there is "clear and convincing evidence" that "serious emotional or physical damage" to a child is likely to result if the child remains with its parents or Indian custodian.[66]

Legislative history of the ICWA indicates that the facts presented to Congress prior to the enactment of the ICWA included: 1) "The decision to take Indian children from their natural homes is, in most cases, carried out without due process of law[;]" 2) "Many cases do not go through an adjudicatory process at all, since the voluntary waiver of parental rights is a device widely employed by social workers to gain custody of children[;]" and 3) "Because of the availability of the waivers and because a great number of Indian parents depend on welfare payments for survival, they are exposed to the sometimes coercive arguments of welfare departments."[67] As a result, the ICWA contains numerous procedural provisions that are intended to offer additional protections to Indian children, families, and tribes.

Provisions of the Act regarding consent to termination of parental rights—a parent's consent, for example, executed in writing and recorded before a judge—are designed to increase the likelihood that a consent was voluntarily given.[68] For involuntary proceedings in state court, notice must be given to the child's parent or Indian custodian and the child's tribe.[69] Consent to a foster care placement may be withdrawn at any time.[70] In any voluntary proceeding for termination of parental rights or adoptive placement, the consent of the parent may be withdrawn for any reason

64. § 1912(f).

65. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 747-48 (1982). In a South Dakota case, *In re* N.S., the trial court stated that " 'by clear and convincing evidence it is necessary for the child's physical and mental well-being that the parental rights . . . be terminated . . . [and] no lesser restrictive alternative than termination . . . [is] available . . . to protect the minor child . . . .' " 474 N.W.2d 96, 99 (S.D. 1991) (quoting dispositional order). The South Dakota Supreme Court stated that under section 1912(f), there must be "evidence beyond a reasonable doubt that 'the continued custody of the child is likely to result in . . . damage to the child.' " *Id.* (quoting 25 U.S.C. § 1912(f)).

66. § 1912(e).

67. *See* H.R. REP. NO. 1386, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7533.

68. § 1913(a).

69. § 1912(a).

70. § 1913(b).

prior to the entry of a final decree, and may be withdrawn after the final decree in cases involving fraud or duress.[71] Once again, state laws vary considerably but they are generally much less favorable to the natural parents than are the ICWA provisions.

4. *Applicability of the ICWA*

As previously indicated, the goal of the Act is to safeguard not only tribal interests, but the interests of Indian children and their families as well. Since the substantive and procedural provisions of the ICWA are intended specifically to be protective of Indian children, families and tribes, the provisions are often substantially different from state provisions. As a result, it is the applicability of the ICWA that often becomes the dispositive issue in cases involving Indian children in child custody proceedings. If the Act is applicable, the particular procedural, jurisdictional, and substantive structure outlined in the ICWA of 1978 must be followed. If provisions of the Act are not observed, an Indian child, the parent or Indian custodian of an Indian child and/or the child's tribe may petition the court to invalidate a foster care placement, a termination of parental rights, an adoption, or a preadoptive placement by showing a violation of the Act.[72]

III. THE JUDICIAL EXCEPTION TO THE ICWA

A. DIFFERING OPINIONS

Despite the congressional goals to enhance tribal identity by enactment of the ICWA, state courts frequently avoid its application. By denying the ICWA's applicability, the particular procedural, jurisdictional, and substantive provisions are avoided in making foster care placements and adoptions. In the same way, a foster care placement, adoption, or termination of parental rights made pursuant to the Act can be invalidated by challenging the application of the ICWA. This challenge is made by using a judicially created exception: the existing Indian family exception (hereinafter "the exception"). A considerable number of American jurisdictions recognize this judicial exception to the Act. Contrary to the plain language of the Act, the exception allows an Indian child who is the subject of a child custody proceeding to which the ICWA applies to be exempted from the Act.

What is this judicial exception? How has it been employed by

71. § 1913(c), (d).
72. § 1914.

both courts and parties? What are the effects of such an exception on the ICWA and its goals? And what are the broader implications of this judicially created exception?

As mentioned earlier, the existing Indian family exception is based on the notion that the ICWA will only be applicable if an Indian child is removed from an "existing Indian family unit" or "Indian home or culture." When there is no "existing Indian family" from which an Indian child is being removed, proponents of the exception argue, the ICWA is inapplicable. This argument is made despite the fact that the two threshold requirements for applicability of the ICWA—1) that the matter involves an Indian child, and 2) in a child custody proceeding—are fulfilled, and despite the fact that there is no language in the Act which indicates removal from an Indian family as a requirement.

The Act itself states:

> The Congress hereby declares that it is the policy of this Nation to 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, and by providing for assistance to Indian tribes in the operation of child and family service programs.[73]

The proponents' claim is based on this language and similar passages in the ICWA, from which they conclude that the underlying goals of the ICWA focus on an Indian child being removed from an Indian family. Therefore, when a court sustains the claimed existing Indian family exception because there is no existing Indian family, home, or culture, ICWA provisions do not govern, its intended protections and purposes are no longer operative, and, instead, state law governs.

The opponents of the existing Indian family exception argue, for their part, that the existing Indian family exception is directly contrary to the purposes and goals of the ICWA. The opponents of the exception state that the goals and purposes of the Act specifically include protections for the Indian tribe and Indian child as well as the Indian family. They assert that the provisions of the

73. § 1902.

ICWA provide for only two exceptions—1) custody proceedings as part of a divorce decree, and 2) delinquency proceedings—neither of which states that an Indian child must be removed from an Indian family to be protected by the ICWA.

B. EMPLOYMENT OF THE JUDICIAL EXCEPTION

It is against the backdrop of the procedural, jurisdictional, and substantive components of the ICWA that the existing Indian family exception is raised. The scenarios in which a party claims or a court raises the existing Indian family exception to the application of the ICWA are surprisingly diversified. Indeed, the exception is raised by both Indian and non-Indian parties and is used to attempt to defeat placements in either Indian or non-Indian families. Courts, too, have employed the exception in similarly varied circumstances. A careful examination of some of the successful and unsuccessful attempts to invoke the judicial exception is enlightening with respect to its general effect on the ICWA and on the goals of Congress. If, as opponents to the exception argue, the existing Indian family exception thwarts the goals of the ICWA and permits manipulations that do not in any way promote the interests of the Indian families, children, and tribes, a closer look should be given to the Act itself, its language, its provisions and its purposes.[74]

The Supreme Court recently addressed questions concerning the ICWA for the first time. As mentioned earlier, the existing Indian family exception is raised to challenge the application of the Act *only* in the context of a state court proceeding. The existing Indian family exception was not at issue in *Mississippi Band of Choctaw Indians v. Holyfield*.[75] The sole issue in *Holyfield* was whether, under the ICWA, the tribal court had exclusive jurisdiction or concurrent jurisdiction with the state court. Nevertheless, subsequent lower court decisions and party claims both defeating and supporting the existing Indian family exception have relied on its ruling.[76]

Holyfield concerned the status of illegitimate twin babies whose unmarried parents were enrolled members of the Choctaw tribe and residents and domiciliaries of the Choctaw Reservation

74. Although it is beyond the scope of this paper to examine the goals of Congress in enacting the ICWA, it is important to note that tensions between and among the interests of the Indian child, the Indian family, and the Indian tribe are exceedingly difficult to resolve.

75. 490 U.S. 30 (1989).

76. *See, e.g., In re* S.C., 833 P.2d 1249 (Okla. 1992) (recognizing the limitations of *Holyfield* holding).

in Mississippi. The parents deliberately drove to a town in Harrison County some 200 miles away for the birth of the twins. Both parents then executed consent-to-adoption forms on behalf of a non-Indian couple, the Holyfields.[77] However, some time later, the Choctaw tribe filed a motion to vacate the adoption decree entered by the county court. The tribe claimed that exclusive jurisdiction over the matter was vested in the tribal court under the ICWA, not the state court system using the substantive ICWA provisions, since both parents were domiciliaries and members of the Choctaw tribe reservation.[78] Since the ICWA failed to define the word "domicile," the Court had to decide whether the domicile of the twins was in Harrison County or the Choctaw reservation to see if, pursuant to the jurisdictional structure of the ICWA, the adoption should have been the exclusive responsibility of the tribal court.[79]

The Court found that although the twins had never been physically present on the reservation, had been "voluntarily surrendered"[80] by their parents, and had been promptly relinquished to adoptive parents, their domicile was still the tribal reservation.[81] The Court emphasized that "[t]ribal jurisdiction under [the Act] was not meant to be defeated by the actions of individual members of the tribe . . . ."[82] The *Holyfield* Court ruled that the twins were domiciled on the reservation, and the individual Indian parents could not defeat the ICWA's provisions for exclusive jurisdiction to the tribal court if the parents were domiciled within a reservation.[83] Surprisingly, *Holyfield* has been relied upon by courts and parties both to support and reject the existing Indian family exception, which has been invoked in proceedings involving Indian children and families who are living off the reservation and who are, therefore, subject to state court jurisdiction concurrent with that of the tribal court.

1. *Support for the Exception—Scenario 1*

The first scenario in which the existing Indian family exception has been raised involves challenges by unwed Indian fathers to the adoption of their illegitimate children.[84] In fact, the case

77. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37-38 (1989).
78. *Id.* at 38.
79. *Id.* at 42.
80. *Id.* at 49.
81. *Id.* at 53.
82. *Holyfield*, 490 U.S. at 49.
83. *Id.*
84. Claymore v. Serr, 405 N.W.2d 650, 653-54 (S.D. 1987) (finding the ICWA

most notable for the existing Indian family exception involved an unwed Indian father challenging the adoption of his illegitimate child. In the 1982 Kansas case, *In re Adoption of Baby Boy L.*,[85] an infant was born out of wedlock to a non-Indian mother and an Indian father duly enrolled as a member of the Kiowa tribe. The mother of the infant executed a consent to an adoption "specifically directed and limited to" the non-Indian adoptive parents.[86] The adoptive parents filed a petition that the court declare the father unfit and terminate his parental rights, and also filed a petition for adoption.[87]

The state court entered an order granting temporary care and custody to the adoptive parents. Notice of the adoption proceedings was personally served on the father, who at the time was incarcerated. The father claimed that the ICWA applied, and that in accordance with the Act, the father's tribe had a right to participate in the proceedings. The tribe moved to intervene. However, the trial court denied the father's claim of the applicability of the Act and denied the tribe's motion to intervene "on the grounds that the ICWA did not apply to [the] proceedings."[88]

On appeal, the Kansas Supreme Court reasoned that Congress never intended the Act "to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."[89] The court stated:

> 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

inapplicable since the Indian child resided with the non-Indian mother and was never part of an "Indian family" and concluding that an Indian child must be part of an existing Indian family before the Act can apply); *In re* S.A.M., 703 S.W.2d 603, 605-09 (Mo. App. 1986) (finding that the ICWA did not apply since the unwed Indian father and non-Indian mother never lived as a family); *In re* Adoption of Baby Boy D, 742 P.2d 1059, 1064 (Okla. 1985) (stating that the ICWA is inapplicable when the unwed Indian father never had custody and had not acknowledged or established paternity and when the child never resided in an Indian family and had a non-Indian mother).

85. 643 P.2d 168 (Kan. 1982).
86. *In re* Adoption of Baby Boy L., 643 P.2d 168, 172 (Kan. 1982).
87. *Id.* at 173.
88. *Id.* at 174.
89. *Id.* at 175.

would be to violate the policy and intent of Congress rather than uphold them.[90]

Further, the court pointed out that the non-Indian mother had made it clear that if the child was placed for adoption under the terms of the Act, she would revoke her consent and would again take custody of her child; in that event, the child would not have been in an Indian home either.[91] Since the "underlying thread" of the entire Act was, according to the *Baby Boy L.* court, a concern with the "removal of Indian children from an existing Indian family unit and the resultant breakup of the Indian family,"[92] the court concluded that the ICWA was inapplicable and upheld the trial court's denial of the Indian father's claims.[93]

As previously indicated, a number of jurisdictions have followed the Kansas Supreme Court's promulgation of the existing Indian family exception to the applicability of the ICWA where there has been a voluntary relinquishment of an illegitimate Indian child by its non-Indian mother. In the 1990 case of *S.A. v. E.J.P.* ,[94] the Alabama Civil Appeals Court agreed with the Kansas court and applied the existing Indian family exception because the illegitimate child had lived primarily with her non-Indian mother or her non-Indian great-aunt and great-uncle, the "mother and father had never married and had never lived together," "[t]he father had never supported the mother or the child," "[t]he child [had] minimal contact with her father" and "no involvement in tribal activities," and "[t]he father had never exercised his parental responsibilities . . . ."[95]

In this scenario, "where the child has few ties to its Indian heritage," courts have employed the existing Indian family exception to narrow the application of the ICWA. In these cases, it is the Indian father who is trying to invoke the use of the ICWA to undo the unilateral acts of the non-Indian mother, usually one placing the child for adoption under state law. Underlying the courts' use of the exception is the fact that the mother is non-Indian and the child is illegitimate and has been voluntarily relinquished for adoption by the mother. The unwed father has generally failed to support the child or the mother. The contacts between the child and the father and the child and the father's tribe have usually

90. *Id.*
91. *In re* Baby Boy L., 643 P.2d at 176.
92. *Id.* at 175.
93. *Id.* at 188.
94. 571 So. 2d 1187 (Ala. Civ. App. 1990).
95. S.A. v. E.J.P., 571 So. 2d 1187, 1189 (Ala. Civ. App. 1990).

been minimal. In fact, the courts place emphasis on the father's failure to exercise his parental responsibility, despite the father's acknowledgment of paternity or establishment of paternity.[96]

In these circumstances, courts have understood the framers of the Act to have intended to maintain the Indian family, Indian children, and Indian tribal interests in the narrowest sense: only where there has been a recognizable Indian family.[97] The courts generally emphasize that when no coercive state activities removing an Indian child are involved, the private adoptive placement is voluntary and the removal is not breaking up an existing Indian family. The non-Indian mother's background is viewed, as the *Baby L.* court stated, as the child's "primary cultural heritage."[98] Indeed, courts underscore the small percentage of Indian genes in the Indian child. For example, the *Baby Boy L.* court emphasized that the infant was "only 5/16ths Kiowa."[99] By employing the exception, courts can avoid invalidating the child custody arrangements made under state law.[100]

2. *Criticisms of the Exception*

Other jurisdictions, however, have criticized the use of the existing Indian family exception.[101] The California Court of Appeals, in *In re Crystal K.*,[102] refused to employ the exception and held that the Act applied to an Indian child of a non-Indian

96. *See id.*; Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987) (upholding the termination of the unwed father's rights and adoption by the stepfather and emphasizing that the non-Indian mother provided sole care of the child, and that the father, although he acknowledged his paternity, never exercised parental responsibilities); *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982).

97. *See* Claymore v. Serr, 405 N.W.2d 650, 653 (S.D. 1987) (stating that there was no existing "Indian family" losing an Indian child when the child had a non-Indian mother and never resided in an Indian family); *In re* S.A.M., 703 S.W.2d 603, 608 (Mo. App. 1986) (stating that neither the relationship between the non-Indian mother and the seven-year-old mentally handicapped child nor the relationship between the Indian father and the child could constitute an Indian family).

98. *In re* Baby Boy L., 643 P.2d at 175.

99. *See also* S.A. v. E.J.P., 571 So. 2d 1187, 1188 (Ala. Civ. App. 1990) (noting that the father is 1/8th Cherokee); *In re* Adoption of T.N.F., 781 P.2d 973, 974 (Alaska 1989) (noting that the father was 1/32 Chickasaw and the infant only 1/64 Indian).

100. *See In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982).

101. *See In re* Adoption of A Child of Indian Heritage, 543 A.2d 925, 937 (N.J. 1988) ("We disagree with . . . other courts that have limited the scope of [§ 1914] to cover only parents who at one time or another had actual physical custody of an Indian child."); *In re* Custody of S.B.R., 719 P.2d 154, 156 (Wash. Ct. App. 1986) (stating that the ICWA applies in the adoption proceeding of an Indian child who had never lived in an Indian family because "[i]t is in the Indian child's best interest that its relationship to its tribe be protected.") (citations omitted); *In re* Adoption of Baade, 462 N.W.2d 485, 489 (S.D. 1990) ("[I]t is incorrect, when assessing ICWA's applicability to a particular case, to focus only upon the interests of an existing family" because "[s]uch a practice fails to recognize the legitimate concerns of the tribe that are protected under the Act.") (citations omitted).

102. 276 Cal. Rptr. 619 (Cal. Dist. Ct. App. 3d 1991) (quoting § 1903(1)).

mother and Indian father who had divorced some years before. The mother had remarried and two years later petitioned the court to sever the biological father's parental rights. The issue before the court was whether the standards for termination of parental rights were those of state law or the ICWA, a tougher standard designed to protect the Indian parent. The court refused to sustain the claim of the existing Indian family exception raised by the non-Indian parent since, according to the California Court of Appeals, the plain language of the Act indicated that the matter fell within the ICWA. The provisions of the ICWA, the court pointed out, defined a child custody proceeding as including " 'any action resulting in the termination of the parent-child relationship,' "[103] placing the proceeding squarely within the Act. The court held that the ICWA applied and that no judicially-created exceptions should be permitted: "Limiting the Act's applicability solely to situations where nonfamily entities physically remove Indian children from actual Indian dwellings deprecates the very links—parental, tribal and cultural—the Act is designed to preserve."[104]

Another California court recently criticized the existing Indian family exception with respect to a much older child than the child in the Kansas *Baby Boy L.* case. Unlike *Baby Boy L.*, this was a child who had actually lived in a non-Indian household for many years.[105] In 1991, the California Court of Appeals, in *In re Adoption of Lindsay C.*,[106] reviewed a stepfather's adoption petition for a seven-year-old child born out of wedlock to a non-Indian mother and Indian father. The court argued that "*Holyfield* has raised new questions regarding the continuing viability of *Baby Boy L.* and its progeny. . . . *Baby Boy L.* may have given inappropriate weight to the wishes of the family [as opposed to those of the tribe]."[107]

The *Lindsay C.* court pointed to the change in the South Dakota Supreme Court's decisions regarding the existing Indian

103. *In re* Crystal K., 276 Cal. Rptr. 619, 623 (Cal. Dist. Ct. App. 3d 1991) (quoting § 1903(1)).

104. *Id.* at 625. *See also In re* Junious M., 193 Cal. Rptr. 40, 46 (Cal. Dist. Ct. App. 1983) (stating that "[t]he language of the Act contains no such exception to its applicability" and refuting the trial court's decision on the basis that the child had developed no Indian identification).

105. In light of the *Baby Boy L.* court's emphasis on the fact that the child was not raised in an Indian home, this case presents an even stronger challenge to the Kansas court rationale, since the child had lived in a non-Indian household for seven years by the time the matter reached the final court determination.

106. 280 Cal. Rptr. 194 (1991).

107. *In re* Adoption of Lindsay C., 280 Cal. Rptr. 194, 199 (1991).

family exception in *Claymore v. Serr* and *In re Adoption of Baade* following *Holyfield*. The *Lindsay* court noted that in *Claymore*, the South Dakota Supreme Court had found the Act inapplicable when the custody proceeding involved an illegitimate child who had never lived in an Indian home; however, in *Baade*, the South Dakota court had stated that ICWA applies any time an " 'Indian child' is the subject of a 'child custody proceeding' as those terms are defined by the Act."[108]

The *Lindsay C.* court proceeded to hold that the ICWA applied to an illegitimate Indian son of an Indian father and a non-Indian mother. The *Lindsay C.* court emphasized the *Holyfield* Court's statement that Congress's 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 in placements outside their culture.[109] The court relied on the Supreme Court's holding that the twins in *Holyfield* assumed the domicile of their Indian mother, regardless of whether they were "voluntarily surrendered" by their mother:

> "Tribal jurisdiction under [the Act] was not meant to be defeated by the actions of 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 of the large numbers of Indian children adopted by non-Indians."[110]

The California court held that the Act applied to the adoption of Lindsay C., since: 1) "Lindsay [was] an Indian child within the meaning of the Act;" 2) the matter was a proceeding which fell within the Act; 3) "[the proceeding did] not fall within one of the two specific exclusions under the Act (i.e., divorce or delinquency proceedings . . .[;]" 4) there did not appear to be any other basis for exclusion[;]" 5) the Act's application "advance[d] the stated purposes of the legislation[;]" and 6) applying the ICWA was "in keeping with the tenor of *Holyfield*, which stresse[d] consideration of not only the wishes of the parents, but the well-being and interests

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108. *Id.* at 199 (citing Claymore v. Serr, 405 N.W.2d 650, 653 (S.D. 1987) and *In re* Adoption of Baade, 462 N.W.2d 485 (S.D. 1990)). The *Lindsay C.* court noted that only three years after *Claymore* and after *Holyfield*, the *Baade* court clarified the Act's application when it stated that the ICWA's application to a case was contingent "*only* upon whether an 'Indian child' was the subject of a 'child custody proceeding' as those terms are defined by the Act." *Id.* (emphasis added).

109. *Id.* at 198-99 (citing Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49-51 (1989)).

110. *Id.* at 199 (quoting Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989)).

of the child and the tribe."[111] In accordance with the ICWA, therefore, notice of the proceedings had to be given to the tribe.[112]

Courts refusing to invoke the existing Indian family exception emphasize that the plain language of the Act provides no exceptions other than custody proceedings related to divorce or juvenile court proceedings. In *In re Adoption of A Child of Indian Heritage*,[113] the New Jersey Supreme Court disagreed with the *Baby Boy L.* rationale that "the ICWA does not apply where an unwed mother voluntarily relinquishes her child for adoption shortly after birth."[114] The court interpreted *Baby Boy L.* and other state court decisions as finding that when "no coercive state activities are involved, assuming a private adoption placement is truly voluntary, and the removal is not breaking up an Indian family, . . . the concerns addressed by the Act [are] not implicated . . . ."[115] The *Child of Indian Heritage* court stated that "[w]e disagree with this interpretation of the Act because it posits as a determinative jurisdictional test the voluntariness of the conduct of the mother."[116] The court argued that under the plain language of the Act, the conduct of the mother is not a jurisdictional test of its coverage. Further, "[t]he effect on both the tribe and the Indian child . . . is the same whether or not the placement was voluntary."[117]

> Finally, while 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 interest, 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.[118]

In the same manner, in the case *In re N.S.*,[119] the South Dakota Supreme Court emphasized that there was no statutory requirement that a child be born into an Indian home or commu-

111. *In re* Adoption of Lindsay C., 280 Cal. Rptr. at 201.
112. *Id.* at 201. The court noted, however, that there was nothing in its opinion which was "meant to suggest [whether] the tribe should intervene or, if it [did], that it [would] necessarily prevail on the positions it takes." *Id.*
113. 543 A.2d 925 (N.J. 1988).
114. *In re* Adoption of A Child of Indian Heritage, 543 A.2d 925, 930 (N.J. 1988).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* (citation omitted).
119. 474 N.W.2d 96 (S.D. 1991).

nity before the ICWA applied.[120] According to the court, "No amount of probing into what Congress 'intended' can alter what Congress *said*, in plain English, at 25 U.S.C. § 1903(4)."[121] The ICWA was meant to address the interests of Indian tribes and Indian children, not just the interests of parents. To permit the existing Indian family exception to defeat the applicability of the ICWA would sidestep the Act's protections of these interests.

South Dakota Supreme Court Justice Sabers concurred in *In re N.S.*,[122] emphasizing that *Holyfield* "authoritatively established the principle that the provisions of ICWA are to be strictly construed and applied."[123] Further, Justice Sabers asserted that in *Baade*, "this court acknowledged that pre-*Holyfield* state court cases like [*Claymore* and *Baby Boy L.*] are now doubtful authority, and that [the] ICWA has effect even when the Indian child has never been raised in an Indian home."[124] All three cases (*Baade*, *Claymore*, and *Baby Boy L.*) involved an illegitimate Indian child living with a non-Indian mother, yet it was only in *Baade* that the provisions of the Act were strictly construed, thwarting the application of the existing Indian family exception. As in *Baade*, the *In re N.S.* court strictly construed the Act, stating that the ICWA terms are unambiguous on its face and "when a court ignores the clear provisions . . . in reliance on what the court believes the legislature must have meant to say, the court is improperly engaging in judicial lawmaking."[125] Moreover, in *In re Crystal K.*,[126] a California appellate court noted that it would be contrary to the interests of Indian children, families, and tribes to assume that the cultural links Congress intended to protect were found solely within "actual Indian dwellings."[127]

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120. *In re* N. S., 474 N.W.2d 96, 101 n.6 (S.D. 1991).

121. *Id.* (emphasis in original).

122. 474 N.W.2d 96 (S.D. 1991).

123. *In re* N.S., 474 N.W.2d 96, 100 (Sabers, J., concurring specially).

124. *Id.* (citations omitted).

125. *Id.* at 100 n.6. In *In re* Junious M., the court stated that:

> We note that the trial court predicated its decision not to apply the Act in part on its determination that the minor had developed no identification as an Indian. The language of the Act contains no such exception to its applicability, and we do not deem it appropriate to create one judicially.

193 Cal. Rptr. 40, 46 (Cal. Dist. Ct. App. 1983) (citation omitted). *See also In re* Custody of S.B.R., 719 P.2d 154, 156 (Wash. 1986) ("The [maternal grandparents petitioning for custody] assert that the Act does not apply where the child had never been a part of any Indian family relationship. Again, the language of the Act contains no such exception, and the [grandparents] have presented no compelling reason to create one.") (citations omitted).

126. 276 Cal. Rptr. 619 (Cal. Dist. Ct. App. 1991).

127. *In re* Crystal K., 276 Cal. Rptr. 619, 625 (Cal. Dist. Ct. App. 1991).

3. *Scenario 2*

Another frequent but very different scenario in which the existing Indian family exception is raised involves Indian mothers who had previously arranged to have their illegitimate children adopted by non-Indian parents under state law. These mothers will often later, in some cases years later,[128] attempt to invalidate the earlier adoption granted in accordance with state adoption regulations. The basis on which they seek to invalidate the earlier adoption is that the ICWA provisions should have governed the adoption. In the first scenario, it will be recalled, some courts were seeking to avoid invalidating an adoption by use of the existing Indian family exception. Similarly, in this scenario, some courts also seek to avoid invalidating an adoption by use of the existing Indian family exception, despite the fact that the natural mother is an Indian. Whereas in the first instance, it is the unwed Indian father who invokes the ICWA to invalidate the unilateral act of the non-Indian mother, in the second scenario, it is the unwed Indian mother who invokes the ICWA to invalidate her own unilateral act.

In *In re Adoption of T.R.M.*,[129] for example, an Indian mother arranged to have her illegitimate child adopted by a non-Indian couple. When the Indian mother changed her mind one year later, she and the tribe sought to invalidate the adoption on the grounds that "the . . . adoption proceeding and [the trial court] judgment [were] contrary to the ICWA[.]"[130] The court, however, found that the child had been given up for adoption shortly after birth and was never part of an existing Indian family.[131] Thus, the court suggested that because of the existing Indian family exception, the ICWA did not apply. The court noted that "except for the first five days after birth, [T.R.M's] entire life of seven years to date has been spent with her non-Indian adoptive parents in a non-Indian culture . . . . [W]here the child was abandoned to the adoptive mother essentially at the earliest practical moment after childbirth . . ., we cannot discern how the subsequent adoption proceeding constituted a 'breakup of the Indian family.' "[132]

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128. Although the Indian mother in *In re* Adoption of T.R.M. began to challenge the adoption within a year, at the time of the court decision, the child was seven years old and had lived with the adoptive parents since she was a week old. 525 N.E.2d 298, 302 (Ind. 1988).

129. 525 N.E.2d 298 (Ind. 1988).

130. *In re* Adoption of T.R.M., 525 N.E.2d 298, 302 (Ind. 1988).

131. *Id.* at 303.

132. *Id.*

The *T.R.M.* court seemed to base its holding and use of the existing Indian family exception on the lack of time the child had spent with her Indian mother and the great amount of time she had spent with her non-Indian adoptive mother, apparently paying little heed to the fact that her mother was Indian. The *Baby Boy L.* court, on the other hand, in the first scenario, had viewed the fact that the child's natural mother was non-Indian as critical to its determination that there was no existing Indian family. The child in *Baby Boy L.*, like the child in *T.R.M.*, had spent only a matter of days with the natural mother. Because T.R.M. had spent so little time with her Indian mother, however, the court simply indicated that it was not an existing Indian family, which was a necessity for ICWA application, according to this court.

Another Indiana court, also reviewing a case in which the mother was Indian, agreed that the Act covers the removal of an Indian child from an existing Indian family. Unlike the *T.R.M.* court, however, the court in *In re D.S.*[133] stated that "where the mother is a Native American Indian, the mother and child, at least presumptively for purposes of initiating ICWA inquiries, constitute an 'Indian family.' "[134] Thus, the *In re D.S.* court would have applied the existing Indian family exception—which would prevent application of the ICWA if the Indian child did not come from an existing Indian family—if the mother had not been Indian. However, since the court presumed there was an Indian family, the court stated that the ICWA applied to the Indian mother and her child and held that, on remand: 1) the tribe must be given notice; 2) the standard of parental termination is beyond a reasonable doubt, and 3) "the trial court . . . [must] inquire of the expert witnesses as to their specific qualifications related to the placement of Native American Indian children."[135]

In a recent Washington state case, *In re Adoption of Crews*,[136] the court was also faced with an Indian mother who had consented to adoption of her child. As in the previous two Indiana cases (*T.R.M.* and *D.S.*), the court accepted the principle of the judicial exception—that unless the Indian child was removed from an existing Indian family, the ICWA does not apply—and then struggled to determine whether an Indian family "existed" for purposes of the existing Indian family exception.[137] As in *D.S.*, the mother

133. 577 N.E.2d 572 (Ind. 1991).
134. *In re* D.S., 577 N.E.2d 572, 574 (Ind. 1991).
135. *Id.* at 575-76.
136. 825 P.2d 305 (Wash. 1992).
137. *See In re* Adoption of Crews, 825 P.2d 305, 308-10 (Wash. 1992).

was a young, single Indian woman. Ms. Crews, the mother, had no contact with an Indian tribe, and, in fact, only discovered the extent of her Indian background once she decided to challenge the earlier adoption of her child.[138]

The mother and the baby's father, a non-Indian, decided to place the infant for adoption with an agency. In the parents' interviews with the adoption service, there was some mention of the mother's possible Indian heritage, but the adoption service assumed that the child was not an Indian and that, therefore, the ICWA did not apply.[139] As a result, the adoption proceeded under state law. When the mother later changed her mind about the adoption and brought suit, she alleged that the ICWA should have governed and that the adoption had, therefore, not been in compliance with the Act.[140] The Washington Supreme Court found that the ICWA did not apply because the infant had not been removed from an existing Indian environment and noted further that the mother had voluntarily consented to a non-Indian adoption.[141] The *Crews* court cited the United States Supreme Court's ruling in *Holyfield* to support its conclusion that the "ICWA is not applicable when an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation."[142]

Justice Andersen concurred with the court's holding, but argued that the ICWA did not apply because the threshold requirements for the Act had not been met.[143] He read the Act to apply to any Indian child, "regardless of . . . previous exposure to tribal culture and traditions."[144] Justice Andersen noted that the Act applied to "the child's membership in or relationship with a tribe—a political entity whose sovereignty is recognized by our federal government[.]"[145] According to Justice Andersen, under the Act, the Crews infant had not been an "Indian child" (a biological child of a member of a tribe), at the time of the termination of parental rights.[146] Justice Andersen disagreed with the court's use of the existing Indian family exception, prescribing application of

138. *Id.* at 307.
139. *Id.*
140. *Id.*
141. *Id.* at 310.
142. *In re* Adoption of Crews, 825 P.2d at 310.
143. *Id.* at 313.
144. *Id.* at 312.
145. *Id.* at 313.
146. *Id.*

the ICWA only if "the cultural awareness, tribal affiliation or lifestyle of the birth family meets some judicially fashioned level of 'Indian-ness.' "[147]

4. *Effects of the Exception in Scenario 2*

In all these cases involving Indian mothers, courts have fashioned such levels of "Indian-ness" to try to manipulate their use of the existing Indian family exception. In all three cases (*Crews*, *D.S.*, and *T.R.M*), the courts have struggled to determine whether, even though the child's mother was an Indian, there was no existing Indian family from which the child was removed. The result is that in the application of the existing Indian family exception, when the mother is an Indian challenging an adoption under state law, there is no uniformity or predictability in the determination.

Although the ICWA clearly defines an Indian child by its membership or eligibility for membership in a tribe or the membership of its biological parent in a tribe[148] in a manner common to other federal acts,[149] and requires an Indian father to come forward to lay legal claim to the child by acknowledging or establishing his paternity,[150] these courts' employment of the existing Indian family exception becomes a second litmus test for "Indian-ness." That is, although the Act is quite clear about the crucial definition of an Indian child based on tribal membership, these courts attempt to introduce such notions as: 1) ties to the tribe, 2) Indian cultural setting, and 3) length of time living in an Indian home—effectively adding a new requirement or redefining an "Indian child." There are, however, no clear lines or demarcations to these notions, and stereotypes, prejudices, and biases can quickly enter into the determination. As shown, this test is not only fuzzy and indeterminate, but it also has no explicit foundation

147. *In re* Adoption of Crews, 825 P.2d at 312.

148. *See* § 1903(4).

149. Several federal eligibility standards for Indian services and programs are based on tribal membership in a federally recognized tribe. *See, e.g.*, 25 U.S.C. § 1462 and § 1452 of the Indian Financing Act.

150. *See* § 1903(9). *See also In re* Appeal in Maricopa County, 667 P.2d 228 (Ariz. 1983). The *In re* Appeal in Maricopa County court distinguished its holding from *In re* Baby Boy "in which the court found that the Act did not apply even where the Indian father acknowledged paternity." *Id.* at 233 n.5. The Arizona court emphasized that

> [T]he Act does not attempt to preserve a child's right to its Indian heritage under all circumstances. Congress has limited the Act's coverage to members of only those Indian tribes which qualify under the ICWA definition of "Indian tribe." Nor does the Act apply to a child of an Indian if the child is not a member of a tribe or not eligible for membership in a tribe.

Id. (citations omitted).

in the Act. Moreover, the Alaska Supreme Court in *In re Adoption of T.N.F.*[151] suggested that the application of an "Indian family" requirement by the *T.R.M.* court

> effectively deprived both the Indian mother and her Tribe of the protections set out in the Act. It would seem that the adoption in *T.R.M.* was exactly the type of scenario in which Congress sought to impose federal procedural safeguards in order to protect the rights of the Indian parents and their tribe.[152]

Thus, reliance on a requirement that the Indian child be part of an Indian family for the Act to apply also undercuts the interests of Indian tribes and Indian children themselves.

5. *Scenario 3—Intra-Family Disputes*

The existing Indian family exception has also been invoked in situations in which the adoptive family is the extended Indian family. This particular scenario has been labeled "intra-family disputes." In these cases, the adoptive family raises the existing Indian family exception, claiming that the ICWA is not required since the Act's alleged purpose was to remedy the removal of Indian children from their cultural settings.[153]

In *A.B.M.. v. M.H.*,[154] the biological Indian mother urged the Alaska Supreme Court to revoke her consent to adoption of her child by her sister and brother-in-law pursuant to the ICWA. The adoptive parents, however, argued that because the Act was intended to remedy agency bias resulting in the removal of Indian children from their cultural settings or families, the Act was not applicable since they were the child's extended Indian family.[155] According to the adoptive parents, the child's adoption by members of her "extended family" would not deprive her of the exposure to Indian cultural or social values that the Act was designed to safeguard.[156]

While the Alaska court noted that one of the primary purposes of the Act was to preserve the child's ties to Indian culture or

151. 781 P.2d 973 (Alaska 1989).
152. *In re* Adoption of T.N.F., 781 P.2d 973, 977 (Alaska 1989).
153. *See In re* Custody of S.B.R., 719 P.2d 154, 156 (Wash. 1986) (finding that "[t]he language of the Act makes but two exceptions" but does not include an exception for intra-family custody disputes); *In re* Adoption of T.N.F., 781 P.2d at 977 (stating that while one of the primary purposes of the Act is to preserve the child's ties to Indian culture, a judicial exception to the Act on that basis alone could not be justified).
154. 651 P.2d 1170 (Alaska 1982).
155. A.B.M. v. M.H., 651 P.2d 1170, 1172-73 (Alaska 1982).
156. *Id.*

social values, the court stated that it would not "creat[e] a judicial exception to the Act's coverage on [that] basis alone."[157] The Alaska court explicitly declined to follow a Montana court's interpretation that the ICWA was not intended to cover internal family disputes between a child's non-Indian mother and Indian paternal grandparents.[158] According to the *A.B.M.* court, the Montana court's holding was contrary to express provisions in the Act.[159] This is because there was no language in the Act regarding exceptions for custody disputes within the extended family or distinctions based upon whom the adoptive or foster parents would be.[160]

The *A.B.M.* court pointed to explicit language in the Act which excluded only "custody disputes resulting from divorce proceedings between parents of an Indian child and placements of Indian children resulting from juvenile delinquency actions."[161] The court noted that "[i]t is clear, then, that there were certain internal family disputes which Congress intended to except from the provisions of the Act. These exceptions were clearly expressed and we find no compelling basis for implying any others."[162] The court concluded that pursuant to the ICWA, the child was to be returned to the natural mother, and that the adoptive parents could challenge the return of custody to the biological mother.[163] The adoptive parents, according to the Act,

> must prove that such return is not in the child's best interests by showing (1) that remedial and rehabilitative programs designed to prevent the breakup of the Indian family have been implemented without success and (2) that such return of custody is likely to result in serious harm to the child. This final element must be shown beyond a reasonable doubt and must be established by the testimony of qualified expert witnesses.[164]

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157. *Id.* at 1173.

158. *Id.* at 1173 n.6. The basis of the Montana court's holding in *In re* Bertelson was that the ICWA "is not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian culture [sic] values under circumstances in which an Indian child is placed in a foster home or other protective institution." *In re* Bertelson, 617 P.2d 121, 125 (Mont. 1989).

159. *A.B.M.*, 651 P.2d at 1173 n.6.

160. *Id.* at 1173.

161. *Id.*

162. *Id.*

163. *Id.* at 1175.

164. *A.B.M.*, 651 P.2d at 1175 (citation omitted).

6. *Scenario 4—Surrogacy*

The existing Indian family exception has been raised in another intra-familial matter—in the highly unusual case of a surrogacy arrangement. In *In re Adoption of T.N.F.*,[165] the Supreme Court of Alaska was reviewing an action to set aside an Indian child's adoption on the basis that the adoption had violated the ICWA. In this case, a non-Indian woman ("the adoptive mother") was unable to have children with her husband of sixteen years, a 1/32 Chickasaw Indian. The adoptive mother's sister, a married non-Indian woman with four children of her own, agreed to be artificially inseminated by her sister's husband.[166] Soon after T.N.F.'s birth, custody of the infant was relinquished to the adoptive mother and her husband, T.N.F.'s biological father.[167] The surrogate mother and her husband signed written consents, notarized in California where they lived, to the adoption of T.N.F. by the adoptive mother pursuant to Alaska laws, where the adoptive mother and her husband, T.N.F.'s biological father lived. The adoptive mother and her husband, T.N.F.'s biological father, filed a petition to adopt T.N.F., sending notices to the surrogate mother and the Chickasaw tribe.[168] The Alaska Superior Court granted the adoption and held that the "ICWA [was] inapplicable because the parental rights of the only Indian involved in the proceedings [T.N.F.'s biological father] were not modified."[169]

However, two years later the surrogate mother changed her mind about the adoption and filed a motion to vacate the adoption decree on the basis that the ICWA was applicable and that her consent to the termination of her parental rights was invalid because it was not recorded in accordance with section 1913(a) of the ICWA.[170] She argued that as the biological parent of an Indian child, the provisions of the ICWA applied to her. She also noted that there was no requirement that the petitioning parent be an Indian.[171] Further, the surrogate mother argued that the child fell within the Act's definition of an Indian child, since T.N.F. was a member of the Chickasaw tribe and was also the biological child of the adoptive mother's husband.[172] The adoptive mother and her

165. 781 P. 2d 973 (Alaska 1989).
166. *In re* Adoption of T.N.F., 781 P.2d 973, 974 (Alaska 1989).
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *In re* Adoption of T.N.F., 781 P.2d at 975.
172. *Id.* at 975-76.

husband, T.N.F.'s biological father, for their part, argued that the existing Indian family exception should apply—that T.N.F. was born to a non-Indian mother and had never been part of an Indian family—and that the ICWA had been inapplicable.[173] They argued that the termination of the mother's and her husband's rights, as well as the adoption procedure, had been properly executed under state law. Further, the result of applying the Act to this case—returning the infant from the adoptive mother and her husband, T.N.F.'s biological father, to the surrogate mother—would be to disrupt an Indian family, not to protect one, one of Congress' goals in enacting the ICWA.[174]

In *In re Adoption of T.N.F.*, however, the court refused to use the existing Indian family exception as a judicially created exclusion to the Act's coverage.[175] Instead, the court held that the Act applied. Relying on *Holyfield*, the court asserted that Congress had enacted the ICWA seeking not only to protect the interests of individual Indian parents but also to protect the interests of Indian tribes, communities, and Indian children. To sustain an Indian family exception would, the court stated, "undercut the interests of Indian tribes and Indian children" in general, even though it might also work against the desires or interests of an Indian individual in this case.[176] The court based its rejection of the existing Indian family exception on

> serious policy reservations concerning the creation of judicial exceptions to the plain language of ICWA . . . . Moreover, these judicially-created exceptions to the coverage of ICWA are somewhat suspect in light of the Act's purpose of imposing federal procedural safeguards. State courts must be particularly hesitant in creating judicial exceptions to a federal act which was enacted to counter state courts' prejudicial treatment of Indian children and communities.[177]

As a consequence, state courts ought to be particularly hesitant about creating judicial exceptions in these circumstances: "[T]o utilize a judicially created 'Indian family' exception would

173. *Id.* at 976.
174. *Id.*
175. *Id.* at 977-78.
176. *In re* Adoption of T.N.F., 781 P.2d at 977.
177. *Id.* at 977-78. *See also* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989) ("Indeed, the congressional findings that are a part of the statute demonstrate that Congress perceived the States and their courts as partly responsible for the problem it intended to correct.").

be to enter onto a slippery slope which threatens to exclude the very type of cases Congress had in mind when it adopted the Act."[178] The court rejected the existing Indian family exception to the ICWA raised by the Indian father and his wife, but concluded nevertheless that the adoption decree could not be challenged because the statute of limitations had run.[179]

Justice Compton, concurring in the court's decision, joined with the court in rejecting the existing Indian family exception since it "could lead too easily to chicanery which would defeat the very purpose of the Act."[180] However, Justice Compton did not agree with the court "that the non-Indian . . . may avail herself of the protections of the Act to further purposes which have nothing to do with furtherance of Indian welfare, so emphatically determined by Congress to be in need of protection."[181] He reiterated the "special relationship between the United States and Indian tribes[,]" as well as the "[f]ederal responsibility to Indian people."[182] According to Justice Compton, "The principal malefactor is the non-Indian and non-Indian agency, public or private."[183] Justice Compton "recognize[d] that [his] construction of 'parent' to include only a biological Indian parent may be open to the same criticism that has been leveled against the 'Indian family' exception . . . ."[184] Indeed, Justice Compton's construction of the word "parent," to include only a biological Indian, has no grounding in the plain language of the Act. By excluding the rights of non-Indian parents of an Indian child from the provisions of the ICWA, he is undercutting the interests of both the tribe and the child, since those interests and resulting ICWA protections rest on the fact that the *child* is an Indian child, not on the "Indian-ness" of the parent.

IV. CONCLUSION

Having examined judicial responses to the existing Indian family exception, what general conclusions can be drawn? The Indian Child Welfare Act was enacted by Congress to enhance the identity and autonomy of the Indian nations with whom the federal government has long had a special alliance. The virtues or

178. *In re* Adoption of T.N.F., 781 P.2d at 978.
179. *Id.* at 981.
180. *Id.* at 982 (Compton, J., concurring).
181. *Id.*
182. *Id.*
183. *In re* Adoption of T.N.F., P.2d at 982.
184. *Id.* at 984.

faults of the Act as a whole are beyond the scope of this paper. Still, a review of the successful and unsuccessful attempts by courts and parties to invoke the judicially created existing Indian family exception in order to avoid ICWA applicability suggests that use of the exception should cease.

From the text of the ICWA, the legislative history and hearings that led to its enactment, and the Supreme Court's review of the ICWA in *Holyfield*, it is clear that Congress was concerned about the rights of Indian children, Indian families, and Indian communities vis-a-vis states and their courts: "More specifically, its purpose was, in part, to make clear that in certain situations the state courts did *not* have jurisdiction over child custody proceedings."[185] Contrary to this purpose, the existing Indian family exception has been used to evade applicability of the Act and to confine a variety of cases concerning Indian children, their families, and tribes in the state courts under state law.

In the scenario involving the non-Indian mother and the Indian father, the use of the existing Indian family exception narrows the ICWA's applicability by requiring that arbitrary criteria be met that deprive Indian children, Indian fathers, and Indian tribes of the protections offered by the Act. The unwed father's claim to the child is already defined by the statutory limitation which requires his establishment or acknowledgment of paternity. Yet he is unprotected by the Act against the non-Indian mother's unilateral actions when courts employ the exception to negate the application of the ICWA.

In the scenario involving the Indian mother and the non-Indian father, the use of the existing Indian family exception has also resulted in a manipulation that does not promote the interests of Indian children, families, or tribes. The Act applies to the Indian child on the basis of his tribal membership or the tribal membership of his biological parent. Instead of relying on the Act's clear definition of the Indian child, the courts in this particular scenario have been reduced to a search for "Indian-ness" or "actual Indian dwellings" in an attempt to avoid application of the Act. Fashioning levels of "Indian-ness" thwarts Congress' policy to enhance the Indian community.

Underlying the enactment of the ICWA was the Congressional concern about coercive state action by state officials, social work-

185. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45 (1989) (emphasis in original).

ers, courts, and adoption agencies. Yet the judicially created exception is itself a coercive state activity that undermines the federal legislation. The judicial exception to the Act may well be another version of the state action described in the ICWA: "judicial bodies have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families."[186] One state, at least, seems to have moved in the right direction. South Dakota court rulings in the last half-decade have changed decisively from use of the existing Indian family exception in *Claymore* to rejection of it in *Baade* and *In re N.S.*

Congress' belief that it is in the child's best interest to maintain its relationship to the tribe is also defeated by the avoidance of the ICWA protections. This is because the thwarted ICWA protections include provisions that support the Indian child's relationship to the tribe. Further, it has been discovered that psychological difficulties often surface late in the development of Indian children placed in non-Indian homes. This problem of confused identity, which was one of the factors that led Congress to enact the ICWA, would obviously not be remedied by avoidance of the ICWA protections. In fact, the claim that there is no existing Indian family can be misleading or even deceptive. After all, if the Act were applicable and the exception denied, an Indian family might be strengthened or even created as a result of the provisions of the ICWA. The child might, instead of being placed with a non-Indian couple, be placed with his own Indian uncle or grandparent as envisioned by Congress. It may well be that if use of the judicially created existing Indian family exception were to cease, adoption agencies, state officials, social workers, and even the courts might faithfully apply the Act, thereby decreasing the needless and destructive litigation that often arises from later challenges to the placement of a child.

186. § 1901(5).