RACE, CULTURE, AND ADOPTION: LESSONS FROM *MISSISSIPPI BAND OF CHOCTAW INDIANS V. HOLYFIELD* *

SOLANGEL MALDONADO**

Jennie Bell, a member of the Mississippi Band of Choctaw Indians, a federally recognized tribe, was facing some difficult decisions. She was twenty-four years old, a single mother of two, and she was pregnant with twins by a man who was married to another woman and had two children of his own.[1] Unemployed and not able to raise the twins herself, she turned to her family and other Choctaws on the reservation where she resided. Although her aunt offered to adopt one of the twins (the girl),[2] no one was able or willing to take both children. Reluctant to separate the twins, Jennie, now seven months pregnant, continued her search for an adoptive family.

Orrey Curtiss Holyfield, a Methodist minister, and his wife, Vivian Joan ("Joan"), had been trying to adopt for some time but had been repeatedly rejected by licensed adoption agencies because of their advanced age and Orrey's poor health.[3] At their attorney's suggestion, they decided to pursue an

---

* A shorter version of this article was published as Solangel Maldonado, *The Story of the Holyfield Twins:* Mississippi Band of Choctaw Indians v. Holyfield, *in* FAMILY LAW STORIES 113 (Carol Sanger ed., 2008).

** 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. I thank Timothy Glynn, Tristin Green, Kevin Noble Maillard, Melissa Murray, Carol Sanger, and Charlie Sullivan for their suggestions on earlier drafts. Thanks to Jeffrey Gruen and Kristan Lockett for exceptional research assistance.

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

[2] This is not surprising since most adoptive parents have a preference for female children. *See* BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 54-69 (2002) (documenting and explaining reasons for this preference).

[3] 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. *See* Adoption.com, Review of Qualification Requirements for Prospective Adoptive Parents, http://adopting.adoption.com/child/review-of-qualification-requirements-for-prospective-adoptive-parents,2.html (last visited November 10,

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.[4] The Holyfields put the word out, and on Joan's forty-fifth birthday, a member of their church and teacher on the Choctaw reservation called to ask if they were interested in adopting Choctaw twins. They immediately said yes.

This Article uses the Supreme Court's seminal opinion in *Mississippi Band of Choctaw Indians v. Holyfield*,[5] best known for its affirmance of tribal sovereignty over adoptive placements of tribal children, to explore questions of racial and cultural identity and the meaning and role of race in adoptions. The Article proceeds in three parts. Part I focuses on the story behind the Supreme Court's decision as recounted by Joan Holyfield and the attorneys who represented the Holyfields, the Mississippi Band of Choctaw Indians (the Tribe), and the children. Specifically, Part I explores how Jennie's decision to place her children with the Holyfields, a non-tribal, Caucasian family, led to a four-year litigation involving the Mississippi state courts, the U.S. Supreme Court, and the Choctaw Tribal Court. It analyzes the Supreme Court's interpretation of the Indian Child Welfare Act and its determination that tribal interests can trump individual tribal parents' interests in selecting an adoptive family for their children. This Part also examines the Choctaw Tribal Court's attempt to balance children's best interests against tribal interests.

Part II attempts to shed light on some of the most difficult questions faced by race and family law scholars. Drawing on *Holyfield* and its progeny, this Part explores how society and the law have defined race and examines how these definitions have changed over time. It then compares the law's treatment of non-Indian children with its treatment of Indian children in the context of transracial adoption.[6] Part III briefly concludes and poses questions for future discourse.

2007) (noting that most agencies prefer that prospective adoptive parents be under the age of forty). *See generally* David Harrison, *Age of Prospective Adoptive Parent as Factor in Adoption Proceedings*, 84 A.L.R. 3d 665 (1978).

[4] *See* Elizabeth J. Samuels, *Time To Decide? The Laws Governing Mothers' Consents to the Adoptions of Their Newborn Infants*, 72 TENN. L. REV. 509, 520 n.73 (2005).

[5] 490 U.S. 30 (1989).

[6] Although I prefer the term "Native American," much of the literature, cases, and statutes use the term "Indian." Therefore, throughout the Article, I will use the terms "Native American" and "Indian" interchangeably.

I. TRIBAL INTERESTS AND PLACEMENTS OF TRIBAL CHILDREN

A. Parental Autonomy Prevails: The Mississippi Courts' Decisions

Once the Holyfields agreed to adopt her twins, Jennie left the Choctaw reservation and moved to the Holyfields' home in Long Beach, Mississippi, some two hundred miles from the reservation. Jennie's reasons for staying with the Holyfields were twofold. First, she wanted to get to know the family that would be raising her children. Second, Edward Miller, the Holyfields' attorney, had advised them that under the Indian Child Welfare Act of 1978 (ICWA),[7] the federal law governing adoptions and foster care placements of Native American children, state courts lacked jurisdiction to hear adoption petitions involving Native American children who resided on or were domiciled on a reservation.[8] State courts could, however, hear cases involving Native American children *not* residing or domiciled on a reservation. Since Jennie and the Holyfields wanted a Mississippi state court to grant the adoption, Jennie needed to leave the reservation.

In order to understand the reasons underlying ICWA's enactment, it is necessary to examine the unique legal status of Indian tribes in the United States. Indian tribes lived as independent, sovereign nations in the territories that are now known as the United States long before European settlers arrived in North America.[9] Although divested by conquest of the external attributes of sovereignty, such as the right to enter into treaties with other nations, Indian tribes retain their right of internal sovereignty—the right to make their own

---

[7] 25 U.S.C. §§ 1901-03, 1911-23, 1931-34, 1951-52, 1961, 1963 (2000) (effective Nov. 8, 1978) [hereinafter ICWA].

[8] Telephone Interview with Edward O. Miller, in Gulfport, Miss. (Sept. 6, 2006) [hereinafter Miller Interview]. Domicile is distinct from residence, as a person can have multiple residences but only one domicile. Further, a person "can reside in one place but be domiciled in another." *Holyfield*, 490 U.S. at 48.

[9] *See* Johnson v. M'Intosh, 21 U.S. 543, 545 (1823) (noting that when Christopher Columbus discovered North America, much of the territory "was held, occupied, and possessed, in full sovereignty, by various independent tribes or nations of Indians, who were the sovereigns of their respective portions of the territory, and the absolute owners and proprietors of the soil; and who neither acknowledged nor owed any allegiance or obedience to any European sovereign or state"); McClahanan v. State Tax Comm'n of Ariz., 411 U.S. 164, 172 (1973) ("It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government.").

substantive law in matters of local self-government.[10] This authority derives from each tribe's original status as a sovereign entity and thus, predates the U.S. Constitution.[11] The U.S. Constitution, however, limits this authority by granting Congress plenary power to legislate on behalf of Indian tribes.[12]

The Supreme Court has long held that, as "distinct, independent political communities,"[13] Indian tribes have sovereign authority to regulate the conduct of their members—including adoptions of tribal children—without state interference.[14] Congress codified this precedent by enacting ICWA in 1978.[15]

In the 1970s, Senate hearings preceding ICWA's enactment 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.[16] As a result, twenty-five to thirty-five percent of all

---

[10] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) ("Although no longer 'possessed of the full attributes of sovereignty, [tribes] remain a separate people, with the power of regulating their internal and social relations.'") (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886)).

[11] *Id.* at 56 (noting that "[a]s separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority").

[12] *Id.* The Supreme Court has 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." Morton v. Mancari, 417 U.S. 535, 551-52 (1974) (quoting U.S. CONST. art. I & II).

[13] Worcester v. Georgia, 31 U.S. 515, 559 (1832).

[14] Fisher v. Dist. Court, Sixteenth Judicial Dist. of Mont., 424 U.S. 382 (1976) (*per curiam*) (holding that the tribal court has exclusive jurisdiction over adoption proceedings where all parties were tribal members residing on the reservation); *see also* Wisconsin Potowatomies of Hannahville Indian Cmty. v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973) (holding that the tribal court has exclusive jurisdiction over Indian children domiciled on the reservation); Wakefield v. Little Light, 276 Md. 333 (1975) (same).

[15] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 42 (1989) (noting that "[t]ribal jurisdiction over Indian child custody proceedings is not a novelty of the ICWA" and "[i]n enacting the ICWA Congress confirmed that, in child custody proceedings involving Indian children domiciled on the reservation, tribal jurisdiction was exclusive as to the States"). *See generally* ICWA §§ 1901-03, 1911-23, 1931-34, 1951-52, 1961, 1963.

[16] *Holyfield*, 490 U.S. at 32, 35 & n.4.

Indian children had been permanently removed from their birth families.[17] In Minnesota, for example, from 1971 to 1972, nearly twenty-five percent of all Indian children under the age of one were placed for adoption and ninety percent of these children were placed with non-Indian families.[18] The Senate hearings, and ultimately ICWA, focused on the harm to the tribes, Indian parents, and Indian children resulting from the massive removal of Indian children from their homes.[19] The Chief of the Mississippi Band of Choctaw Indians testified in the 1978 Senate hearings that "culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People."[20] ICWA's sponsors similarly expressed concern that the removal of Indian children from tribal communities threatened tribal existence, stating that ICWA was "directed at conditions which . . . threaten . . . the future of American Indian tribes."[21]

Several experts' testimony focused on the harm experienced by Indian children themselves.[22] According to these child development experts, some Indian children raised in white homes developed "white" identities with no correlative understanding of Indian culture.[23] When these children reached adolescence, they learned that the community they considered their own did

---

[17] *Id.* at 32.

[18] *Id.* at 33; *see also* Marcia Yablon, *The Indian Child Welfare Act Amendments of 2003*, 38 FAM. L.Q. 689, 691 (2004) (noting that children in Montana, South Dakota, and Washington were thirteen, sixteen, and nineteen times more likely, respectively, than non-Indian children to be living in foster or adoptive homes and that in Wisconsin, the likelihood of being removed from the home was nearly 1,600 times greater for an Indian child than for a non-Indian child).

[19] *Holyfield*, 490 U.S. at 32 (stating that ICWA "was the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes").

[20] *Indian Child Welfare Act of 1978: Hearing on S. 1214 before the Subcomm. on Indian Affairs and Public Lands of the H. Comm. on Interior and Insular Affairs*, 95th Cong. 193 (1978) (statement of Calvin Isaac, Tribal Chief of the Miss. Band of Choctaw Indians and representative of the Nat'l Tribal Chairmen's Ass'n).

[21] 124 CONG. REC. 38,102 (1978) (statement of Rep. Lagomarsino); *see also id.* (statement of Rep. Udall).

[22] *Holyfield*, 490 U.S. at 33 & n.1.

[23] *Id.*

not accept them as white.[24] They became aware of the derogatory terms used to describe Indians and discovered that some white parents objected to Indians dating their white children.[25] In some cases, this rejection led to social and psychological adjustment problems during adolescence.[26]

In enacting ICWA, Congress further recognized that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children."[27] Accordingly, ICWA served as a federal standard governing the removal of Indian children from their families and required placement in adoptive homes that would "reflect the unique values of Indian culture."[28] It demonstrated "a Federal policy that, where possible, an Indian child should remain in the Indian community."[29] However, a decade after ICWA's enactment, state courts continued to disregard its provisions, removing Indian children from their homes at disproportionately high rates and placing them in non-Indian homes.[30]

It is against this background that Jennie gave birth to the twins, who the Holyfields named Megan Beth ("Beth") and Samuel Seth ("Seth"), on December 29, 1985, in a hospital two hundred miles from the Choctaw reservation. Twelve days later, Jennie executed a consent form before the Chancery Court of Harrison County, Mississippi, relinquishing her parental rights.[31] The following day, Windell Jefferson, the twins' putative father,[32] did

---

[24] *Id.*

[25] *Id.*

[26] *Id.*; *see also id.* at 50 & n.24.

[27] 25 U.S.C. § 1901(3) (2000) (effective Nov. 8, 1978).

[28] 25 U.S.C. § 1902.

[29] H.R. REP. NO. 95-1386, at 23 (1978).

[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*, A.B.A. J., May 1990, at 22, 23 (noting that, twelve years after ICWA's enactment, children in Alaska were removed from their homes at five times the rate of non-Indian children and ninety-three percent were placed in non-Indian homes).

[31] *Holyfield*, 490 U.S. at 37-38 & n.7.

[32] In 1989, three years after relinquishing his parental rights, Windell filed a petition disputing paternity. Telephone Interview with Edwin R. Smith, Attorney representing the Tribe in *Holyfield*, in Jackson, Miss. (Jan. 24, 2007) [hereinafter Smith Interview]. The results of that petition are sealed.

the same.[33] The Holyfields filed a petition to adopt and less than a month after the twins' birth, the chancellor issued the final decree of adoption.[34] The decree did not mention the children's Choctaw background or ICWA.[35]

Jennie, who had been staying with the Holyfields while she recuperated from childbirth and waited for the final adoption decree, returned to her home on the reservation with her other children, Scotty and Leah. On March 31, 1986, two months after the Chancery Court issued the final adoption decree, the Tribe filed a motion to vacate the adoption on the grounds that it violated ICWA.[36]

Under ICWA, an Indian child's tribe has standing to intervene in termination of parental rights proceedings and to file a petition to vacate an adoption if the proceedings or adoption violate certain sections of ICWA.[37] Preferably, a tribe should challenge an adoption *before* it is final, but in this case, the Tribe may not have been aware of the Holyfield's petition until after the adoption was final, when it received a courtesy copy of the final adoption decree.[38] ICWA does not expressly entitle a tribe to notice in "voluntary cases"—where the parents voluntarily relinquish the child for adoption.[39]

---

[33] Miller Interview, *supra* note 8; *see also Holyfield*, 490 U.S. at 38 n.8.

[34] *Holyfield*, 490 U.S. at 37-38 & n.8.

[35] *Id.* at 38. Although the decree did not mention ICWA, the chancellor's certificates stated that the birth parents' consent to the adoption "was given in full compliance with [25 USC § 1913(a)]," an ICWA provision. *Id.* at 38 & n.11.

[36] *Id.* at 38; *In re* B.B. and G.B, 511 So. 2d 918, 919 (Miss. 1987), *rev'd sub nom.* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[37] 25 U.S.C. § 1914 (2006) ("[T]he Indian child's tribe may petition any court of competent jurisdiction to invalidate [any action for foster care placement or termination of parental rights under State law] upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of [ICWA]."); 25 U.S.C. § 1911(c) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.").

[38] Smith Interview, *supra* note 32.

[39] *Holyfield*, 490 U.S. at 57-58 & n.4 (Stevens, J., dissenting) (stating that ICWA "provides for a tribal right of notice and intervention in involuntary proceedings [i.e., where the state removes the child from the home based on allegations of abuse or neglect] but not in voluntary ones") (citing 25 U.S.C. §§ 1911(c) & 1912(a) (2000) (effective Nov. 8, 1978)); *see also* Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67586 (Nov. 26, 1979) ("[ICWA] mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones"); 25 U.S.C. § 1912(a) (2000) (effective Nov. 8, 1978) ("In any involuntary proceeding in a State court, where the court knows or has reason to know

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.[40] Under ICWA an "Indian child" is an unmarried 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.*"[41] Both Jennie and Windell were full-blooded Choctaws and both were enrolled members of the Tribe.[42] As their biological children, the twins were eligible for enrollment in the Tribe and thus were Indian children under ICWA.

The disputed issue was 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 concurrent jurisdiction.[43] A child's domicile generally follows that of the parents,[44] and in the case of a

---

that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify . . . the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention."). Although ICWA has no similar provision expressly mandating notice to the tribe in voluntary proceedings, some tribes have argued that ICWA entitles them to notice in all proceedings involving termination of parental rights. *See* Navajo Nation v. Super. Ct., 47 F. Supp. 2d 1233, 1237-38 (E.D. Wash. 1999) (rejecting the tribe's argument), and some commentators have agreed with these tribes' interpretation of ICWA, noting that "[i]n other provisions of the ICWA, when Congress wanted to limit the provisions to just involuntary or voluntary proceedings, Congress expressly stated its intent . . . . [Thus a] good argument exists that the intervention rights found in Section 1911(c) apply to both voluntary and involuntary proceedings, since there is no language limiting its application." Charmel L. Cross, *The Existing Indian Family Exception: Is it Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U. L. REV. 847, 861 n.95 (1997). Since ICWA entitles a tribe to intervene in both voluntary and involuntary proceedings, *see* 25 U.S.C. § 1911(c) (2000), its failure to require notice to the tribe in voluntary relinquishment cases may result in late interventions after the adoption is final, disrupting final adoptive placements, as in *Holyfield*, or in the tribe foregoing its right to intervene. As a result, many states have enacted statutes requiring notice to the tribe in voluntary placements. *See, e.g.*, IOWA CODE § 232B.5(4), (8) (2006); CAL. RULES OF CT., R. 5.664 (2007).

[40] *Holyfield*, 490 U.S. at 38.

[41] 25 U.S.C. § 1903(4) (2000) (effective Nov. 8, 1978) (emphasis added).

[42] *Holyfield*, 490 U.S. at 37; Brief of Appellant, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (No. 87-980), 1987 WL 880195, at *3 [hereinafter Appellant Brief].

[43] 25 U.S.C. § 1911 (2000) (effective Nov. 8, 1978).

[44] Yarborough v. Yarborough, 290 U.S. 202, 211 (1933).

nonmarital child, domicile has traditionally been that of the mother.[45] Since Jennie conceived the twins out of wedlock, under this rule the twins would take her domicile. In order to change domicile, a person must establish physical presence in a location as well as the "intent to remain there."[46] Since Jennie admitted that she left the reservation for the sole purpose of giving birth and always intended to return to the reservation, her domicile never changed; she remained at all times domiciled on the reservation. Consequently, if the twins' domicile followed hers, the tribal courts would have exclusive jurisdiction over any adoption proceedings involving them. The Holyfields, Jennie, and Windell argued, however, that because Jennie voluntarily surrendered the twins at birth they did not take her domicile. They further asserted that since the twins were born outside the reservation and had never been on the reservation, they were never domiciled there.[47] The Chancery Court agreed and held that the Mississippi state courts had jurisdiction under ICWA.[48]

The Tribe appealed to the Mississippi Supreme Court, arguing that, pursuant to the traditional rule of domicile of a nonmarital child, the twins were domiciled on the reservation, and thus the Chancery Court lacked jurisdiction over them.[49] Alternatively, the Tribe argued that the Chancery Court had not complied with section 1915(a) of ICWA.[50] This section provides that, "in the absence of good cause to the contrary," state courts must give preference "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."[51]

---

[45] *E.g.*, Kowalski v. Wojtkowski, 116 A.2d 6, 12 (N.J. 1955); *In re* Estate of Moore, 415 P.2d 653, 656 (Wash. 1966); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 14, 22 (1971).

[46] *Holyfield*, 490 U.S. at 48.

[47] Jennie and Windell joined the Holyfields as appellees against the Tribe. Brief of Appellees, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (No. 87-980), 1988 WL 1026021, at *3 [hereinafter Appellee Brief].

[48] *Holyfield*, 490 U.S. at 39. The Chancery Court noted that Jennie and Windell "went to some efforts to see that [the twins] were born outside the confines of the Choctaw Indian Reservation" and "had promptly arranged for the adoption by the Holyfields." *Id.* It further reasoned that the twins had never "resided on or physically been on the Choctaw Indian Reservation." *Id.*

[49] *Id.*

[50] *Id.* at 40 & n.13.

[51] 25 U.S.C. § 1915(a) (2000).

The Mississippi Supreme Court rejected the Tribe's arguments and held that the twins had never been domiciled on the reservation.[52] In order to distinguish this case from Mississippi cases holding that a minor child's domicile is the same as that of the parents, the court emphasized that, here, Jennie and Windell had voluntarily surrendered the twins to the Holyfields, and Jennie had gone through "some efforts to prevent the children from being placed on the reservation."[53] Furthermore, the twins had never been on the reservation.[54] As to the Tribe's argument that the Chancery Court had disregarded section 1915(a), the court merely stated that the Chancery Court had complied with the "minimum federal standards" governing the adoption of Indian children.[55]

The Tribe 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 and the tribe had not intervened.[56] 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 attorney representing the Tribe, approached the Native American Rights Fund about appealing to the Supreme Court, he was told that the Court was unlikely to grant certiorari.[57] In addition, unlike cases where the Indian birth parents regretted relinquishing their parental rights and sought tribal assistance in getting their children back,[58] 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 twins remain with the Holyfields.[59] Jennie

---

[52] *In re* B.B. and G.B, 511 So. 2d 918, 921 (Miss. 1987), *rev'd sub nom.* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *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 such cases).

[57] Smith Interview, *supra* note 32.

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

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

feared that if the Tribe were awarded custody, the children would end up in foster care on a reservation or would be placed in separate foster homes.[60]

So why would a tribe with limited resources,[61] uncooperative birth parents, and children who had bonded with their adoptive parents pursue this case? Recall that a decade after ICWA's enactment, state courts continued to ignore its mandate and repeatedly placed Indian children in non-Indian homes.[62] There are several explanations for this noncompliance. According to testimony before the Select Subcommittee on Indian Affairs, 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."[63] Tribes were frequently not provided with notice in involuntary cases (as required by ICWA), and state courts either disregarded ICWA or crafted exceptions limiting tribal rights.[64] Many tribes, including those submitting amicus briefs in support of the Choctaw Tribe, were parties in state court proceedings involving Indian children[65] and experienced widely

---

[60] Appellee Brief, *supra* note 47, at *17; Holyfield Interview, *supra* note 1.

[61] The Tribe has become quite prosperous in recent years, especially since opening several casinos in the 1990s, but at the time it brought this case in 1986, the average annual Choctaw family income was $11,000. *See* Choctaw Vision, Choctaw Chronology, www.choctaw.org/history/chronology.htm (last visited Oct. 6, 2007). While other tribes filed amicus briefs, the Choctaw Tribe did not receive financial support from other tribes or Native American organizations to litigate this case. Smith Interview, *supra* note 32. However, the Appellee Brief noted Jennie's fear that her children would be placed in foster care on the reservation "for the purpose of her tribe receiving additional Government subsidies," which suggests a financial motive for tribes to retain jurisdiction over Indian children. Appellee Brief, *supra* note 47, at *17.

[62] *See* Butterfield, *supra* note 30; DeBenedictis, *supra* note 30.

[63] *Indian Child Welfare Act: Oversight Hearings on the Indian Child Welfare Act, Before the Select Comm. on Indian Affairs*, 100th Cong. 61 (1987) (statement of John Castillo, Chairman, ICWA Task Force), *available at* http://www.eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/1e/43/68.pdf.

[64] *See In re B.B. and G.B*, 511 So. 2d at 921 (summarily dismissing tribe's argument that Chancery Court disregarded ICWA's mandatory placement preferences); *infra* notes 164-175 and accompanying text (discussing existing Indian family exception).

[65] *See* Motion for Leave to File Brief of Amici and Brief of Amici Curiae Swinomish Tribal Community, Shoshone-Bannock Tribes, and Turtle Mountain Band of Chippewa Indians in Support of Appellant, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (No. 87-980), 1988 WL 1026010, at *ii (stating that "Amici Indian tribes are all involved in ongoing Indian Child Welfare Act proceedings in state court").

different outcomes.[66] It was time for the Supreme Court to clarify when state courts could hear cases involving Indian children. *Holyfield* was not just about the rights of the Mississippi Band of Choctaw Indians to determine who could adopt *these* two children, but rather, as the amici suggested,[67] it implicated the rights of hundreds of tribes to self-preservation and sovereignty, rights which would be threatened if tribal children, "the only real means for the transmission of the tribal heritage," were legally placed in non-Indian homes.[68]

This still does not explain why this tribe chose to litigate this case. One reason may have been *United States v. John*,[69] a Supreme Court decision rendered a decade prior. In *John*, the Court unanimously held that Mississippi state courts lacked jurisdiction to prosecute a Choctaw for a crime committed on the Choctaw reservation.[70] The Tribe hoped that the rejection of state jurisdiction over criminal matters could be extended to imply a lack of

---

[66] *See, e.g.*, Catholic Soc. Servs. v. C.A.A., 783 P.2d 1159 (Alaska 1989) (reversing the trial court's determination that the tribe was entitled to notice of the mother's voluntary relinquishment of her parental rights); *In re* Adoption of T.R.M., 525 N.E.2d 298, 303 (Ind. 1988) (holding that ICWA did not apply where the mother relinquished the child at birth); *In re* D.M.J., 741 P.2d 1386 (Okla. 1985) (holding that ICWA did not apply in a proceeding to terminate the Cherokee father's parental rights where the child had been in the custody of her non-Indian mother since the parents' divorce), *overruled by In re* Baby Boy L., 103 P.3d 1099 (Okla. 2004); Richard Lacayo, *The Battle Over Baby K.*, TIME, May 2, 1988, at 64 (discussing a Navajo tribe's challenge to an adoption by a non-Indian family).

[67] *See* Motion for Leave to File Brief of Amici and Brief of Amici Curiae Swinomish Tribal Community, Shoshone-Bannock Tribes, and Turtle Mountain Band of Chippewa Indians in Support of Appellant, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (No. 87-980), 1988 WL 1026010, at *ii (stating that the Supreme Court's decision in *Holyfield* "will have a significant impact on the ability of amici tribes to advocate their interests under the Indian Child Welfare Act in ongoing proceedings"). The following amicus briefs were filed in favor of the Tribe in *Holyfield*: Motion for Leave to File Amicus Curiae Brief and Brief of Amicus Curiae Menominee Indian Tribe of Wisconsin, Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (No. 87-980), 1988 WL 1026011; Motion of Association on American Indian Affairs, Inc., et al. for Leave to File Brief Amici Curiae and Brief Amici Curiae in Support of Appellant, *Holyfield*, 490 U.S. 30 (No. 87-980), 1988 WL 1026016; Navajo Nation's Motion for Leave to File Brief as Amicus Curiae and Brief of Navajo Nation, Amicus Curiae, in Support of Appellant, *Holyfield*, 490 U.S. 30 (No. 87-980), 1988 WL 1026004; Motion For Leave to File Brief of Amici and Brief of Amici Curiae Swinomish Tribal Community, Shoshone-Bannock Tribes, and Turtle Mountain Band of Chippewa Indians in Support of Appellant, *Holyfield*, 490 U.S. 30 (No. 87-980), 1988 WL 1026010.

[68] *Holyfield*, 490 U.S. at 34 (quoting the Choctaw Tribal Chief).

[69] 437 U.S. 634 (1978).

[70] *Id.* at 654.

jurisdiction over *all* matters involving Choctaws domiciled on the reservation.[71] Thus, the Tribe believed that the Mississippi Supreme Court was offending tribal sovereignty with its *Holyfield* ruling and potentially undermining the vigor of *John*.[72] It feared that if the *Holyfield* decision were allowed to stand, Mississippi state courts improperly exercising jurisdiction over tribal children would routinely place them in non-Indian homes,[73] thereby providing incentives for non-Indian families from all over the country to come to Mississippi for tribal children. In other words, the Tribe feared that Mississippi would become "a mecca for black marketeers in Indian children,"[74] as independent adoption brokers seeking to maximize finder's fees would persuade Indian mothers to give up their children without regard for the interest of the mothers, the children, or the tribes.[75]

The Tribe was also concerned that allowing the twins to be adopted by a non-Choctaw family could compromise its ability to sustain itself.[76] The Tribe's requirements for tribal membership are stricter than those of most tribes. Tribal members must have at least fifty percent Mississippi Choctaw

---

[71] Smith Interview, *supra* note 32.

[72] *Id.*

[73] The Tribe believed that state courts are significantly more likely than tribal courts to place tribal children in non-Indian homes. *Id.*

[74] *Id.* The *Holyfield* majority, recognizing this concern, commented that individual state determinations of the meaning of "domicile" regarding tribal children could "spur the development of an adoption brokerage business." *Holyfield*, 490 U.S. at 47.

[75] Both U.S. and international law prohibit selling babies, thus birth parents cannot accept money or gifts in exchange for their children. *See, e.g.*, KY. REV. STAT. ANN. § 199.590(2) (LexisNexis 2007); CAL. PENAL CODE § 273(a) (West 1999); *In re* Baby M., 109 N.J. 396, 423 (1988) ("[New Jersey] law prohibits paying or accepting money in connection with any placement of a child for adoption."); G.A. Res. 44/25, ¶ 35, U.N. Convention on the Rights of the Child, 44th Sess., Annex, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), *available at* http://www.un.org/documents/ga/res/44/a44r025.htm (prohibiting child trafficking); Hague Conf. on Private Int'l Law: Final Act of the 17th Sess., Including the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1142 (prohibiting babyselling by banning "improper financial or other gain" from adoptions). However, adoption facilitators often collect a fee for matching birth parents and adoptive parents. While many states prohibit facilitators other than attorneys from receiving compensation for their services, adoptive parents are unlikely to report the facilitator and risk losing the child. As a result, detection and enforcement of illegal adoption practices are difficult. *See* Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1441-42 (2006).

[76] Smith Interview, *supra* note 32.

blood;[77] indeed, most enrolled members are, like Beth and Seth, full-blooded Choctaws. [78] As a result of its stringent enrollment requirements, the Tribe's membership is relatively small (less than 5000 members). [79] Not surprisingly, the Tribe believed it had more at stake than tribes with much larger memberships.[80] Specifically, the loss of two full-blooded Choctaws to a non-Indian family would have had a greater impact on the Choctaw Tribe than a similar loss to nations without a minimum blood quantum, since those nations are open to a significantly larger potential membership.[81]

The Tribe was also concerned with the suitability of the adoptive home. Jennie Bell drank heavily during her pregnancy and the Tribe suspected that the twins were at risk of fetal alcohol syndrome or effect.[82] The Tribe also feared that Joan and Reverend Holyfield, who had been rejected by adoption agencies because of their ages and his health conditions, might not be able to handle two children with special needs.[83]

Finally, unlike other cases in which the birth mother asserted that she left the reservation (at least in part) for reasons other than placing her children for adoption,[84] Jennie left the reservation for precisely that purpose. She never

---

[77] TRIBAL CONST. OF THE MISS. BAND OF CHOCTAW INDIANS, art. III, §§ 1 & 2, *available at* http://www.choctaw.org/government/tribal_constitution.htm#three.

[78] *Id.*

[79] *Id.*

[80] *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).

[81] U.S. GOV'T ACCOUNTABILITY OFFICE, U.S. GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 15 (2005), *available at* http://www.gao.gov/new.items/d05290.pdf [hereinafter U.S. GAO REPORT]; Kevin Noble Maillard, *Pocahontas Exception: The Exemption of American Indian Ancestry from Racial Purity Law,* 12 MICH. J. RACE & L. 351, 354 n.20 (2007) (noting that "[i]n the Cherokee Nation, which has no minimum blood requirement for membership, quantums range from 'full blood' to 1/2048"); Evelyn Nieves, *Putting to a Vote the Question 'Who Is Cherokee?'*, N.Y. TIMES, Mar. 3, 2007, at A9 (noting that more than seventy-five percent of enrolled Cherokee members have less than one-quarter Cherokee blood).

[82] Smith Interview, *supra* note 32.

[83] *Id.*

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

claimed that she intended to establish a home outside the reservation nor did she dispute that, even while living with the Holyfields, she was still legally domiciled on the Choctaw reservation.[85] All of these facts strongly favored the Tribe and made this the perfect case to affirm exclusive tribal jurisdiction over Indian children under ICWA.

B. Affirming Tribal Sovereignty: The Supreme Court Decision

On April 3, 1989, in a 6-3 opinion by Justice Brennan, the Supreme Court reversed. The Court held that, although the twins had never been on the Choctaw Reservation, because their mother was domiciled there, so were they.[86] 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 the mother.[87] After discussing the reasons for ICWA's enactment—"to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society"[88]—the Court turned to the jurisdictional issue.[89] As noted, the Mississippi Supreme Court had distinguished Mississippi cases establishing that a child's domicile is the same as that of the parents.[90] Specifically, the state court had found that, because the twins had been "voluntarily surrendered and legally abandoned by the natural parents to the adoptive parents" and because Jennie had taken efforts to avoid their placement on the reservation by arranging for their birth and adoption outside the reservation, their domicile was Harrison County—where they were born and had spent their lives.[91] In reversing, the Supreme Court established that the meaning of domicile under ICWA, although not defined in the statute, should

---

[85] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989).

[86] *Id.* at 48-49.

[87] *Id.*; *see also* Kowalski v. Wojtkowski, 116 A.2d 6, 12 (N.J. 1955); *In re* Estate of Moore, 415 P.2d 653, 656 (Wash. 1966); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 14, 22 (1971).

[88] *Holyfield*, 490 U.S. at 37 (quoting H.R. REP. NO. 95-1386, at 23 (1978)).

[89] *Id.* at 43.

[90] *In re* B.B. and G.B, 511 So. 2d 918, 921 (Miss. 1987), *rev'd sub nom.* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[91] *Id.*

not depend on state law unless that was Congress's clear intent.[92] Finding that Congress "intended a uniform federal law of domicile for the ICWA,"[93] the Court relied on cases holding that a nonmarital child's domicile follows that of the mother.[94] Citing the Restatement of Conflict of Laws, the Court further stated that a child's domicile might well be a place where he has never been.[95]

As noted, it was undisputed that Jennie was domiciled on the reservation.[96] Consequently, the Court held that the twins were also domiciled on the reservation, even though they had never been there. The Court warned that since "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," an individual tribal member could not, by her actions, defeat the Tribe's exclusive jurisdiction under ICWA.[97] Because a tribe's interests in custodial decisions "are as entitled to respect as the interests of the parents,"[98] Jennie's acts of giving birth and surrendering the twins for adoption outside the reservation did not deprive the Tribe of exclusive jurisdiction over any custody proceedings involving them.[99]

The Court was not oblivious to the emotional trauma that could befall these three-and-a-half-year-old children if removed from the care of Joan Holyfield, the woman who had raised them since birth.[100] However, despite its

---

[92] *Holyfield*, 490 U.S. at 43-46.

[93] *Id.* at 47. The Court noted that "[t]he statement of the Supreme Court of Mississippi that '[a]t no point in time can it be said the twins . . . were domiciled within the territory set aside for the reservation' may be a correct statement of that State's law of domicile, but it is inconsistent with generally accepted doctrine in this country and cannot be what Congress had in mind when it used the term in the ICWA." *Id.* at 49 (citation omitted).

[94] *Id.* at 48-49; *see also* Kowalski v. Wojtkowski, 116 A.2d 6, 12 (N.J. 1955); *In re* Estate of Moore, 415 P.2d 653, 656 (Wash. 1966); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 14, 22 (1971).

[95] *Holyfield*, 490 U.S. at 48 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 14 cmt. b (1971)).

[96] *See supra* note 85 and accompanying text.

[97] *Holyfield*, 490 U.S. at 49.

[98] *Id.* at 53.

[99] *Id.* at 49.

[100] Orrey had 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. *See id.* at 38 n.9.

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."[101]

C. Best Interests of the Children: The Tribal Court Decision

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.[102] Given the Tribe's interest in raising Choctaw children, not to mention the Tribe's significant legal efforts in asserting jurisdiction, one might have expected the Tribal Court to return the twins to the Tribe. However, the Tribal Court balanced the Tribes' interest in keeping tribal children in tribal communities against the children's interests in continuity and stability. Based on the home study conducted by Choctaw Social Services and the recommendation of the children's guardian *ad litem*, Judge Jim determined that it was in the twins' best interest to remain with Joan Holyfield.[103] Even though she was an "older parent,"[104] a number of factors favored Joan. First, the twins had lived with her all their lives and "it would have been cruel to take them from the only mother they knew."[105] Second, by all accounts, she was a loving parent who provided a stable home environment. 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 eighty percent of Choctaw homes.[106] Thus, placing them in a Choctaw home would have been tantamount to placing them in a foreign environment.[107] Finally, because Choctaw Social Services had not

---

[101] *Id.* at 53-54.

[102] Marcia Coyle, *It's Never Quite Over When It's Over, Parties Before the Supreme Court Find Out*, NAT'L L.J., Feb. 25, 1991, at col. 1.

[103] *Id.*; Telephone Interview with Fenton Deweese, in Philadelphia, Miss. (Oct. 17, 2006) [hereinafter Deweese Interview]. The adoption records are sealed. The information from the Tribal Court's decision was obtained from interviews with Mr. Deweese, who served as the children's guardian *ad litem*, Joan Holyfield, her attorney Edward Miller, and Edwin Smith, the attorney who represented the Tribe in *Holyfield*.

[104] Deweese Interview, *supra* note 103.

[105] *Id.*

[106] Brief of the Miss. Band of Choctaw Indians as Amicus Curaie, John v. Miss., 437 U.S. 634 (1978) (Nos. 77-575, 77-836), 1978 WL 223445, at *8-9.

[107] Deweese Interview, *supra* note 103.

attempted to secure an adoptive tribal home while the case was pending, the twins would have been placed in foster care until a permanent home could be found.[108] All of these factors weighed in favor of granting the adoption. Still, Judge Jim was not willing to sever the children's ties to the Tribe completely; he ordered that they maintain contact with their extended family and other tribal members.[109]

II. LESSONS FROM *HOLYFIELD*

On one level, *Holyfield* illustrates how tribal sovereignty can trump parents' fundamental rights to direct their children's upbringing, children's best interests, and the United States' anti-discrimination norm. But I focus here on another lesson—what *Holyfield* teaches us about racial and cultural identity in the context of adoption. Part A argues that, despite modern scholarship establishing that race is a socio-legal construct, *Holyfield* and ICWA may reinforce biological notions of race. Part B examines lower courts' focus on culture as an essential aspect of Indian identity. Finally, Part C introduces the Multi-Ethnic Placement Act and compares the law's treatment of non-Indian children with its treatment of Indian children in the context of transracial adoption.

A. "Concepts of Race: Biological Reality or Social Construct?"[110]

Holyfield illustrates how Congress and the Supreme Court continue to struggle with definitions of race. Historically, it was commonly understood that race was biologically determined—that "one's ancestors and epidermis ineluctably determine membership in a genetically defined racial group."[111]

---

[108] *Id.*

[109] Joan enrolled the twins in the Tribe when they were nine years old and took them to the Choctaw reservation periodically while they were growing up. Although Beth and Seth never met their biological parents, both of whom died at relatively young ages, the twins keep in touch with Jennie's other children—their half-siblings—and other extended family members. For a summary of the expected balancing between tribal sovereignty and the best interests of Indian children under ICWA, *see* Testimony of Thomas L. LeClaire 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.

[110] *See* Michael Omi & Howard Winant, *The Evolution of Modern Racial Awareness*, *in* A READER ON RACE, CIVIL RIGHTS, AND AMERICAN LAW 3, 3 (Timothy Davis et al. eds., 2001).

[111] *See* Ian F. 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). This concept of

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."[112] For example, a Virginia statute, repealed only in 1960, provided that "[e]very person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person."[113]

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-Caucasic blood shall be deemed to be white persons.[114]

Thus, although one drop of Negro blood made a person "colored," one drop of Indian blood did not taint white bloodlines. For example, under Virginia law, persons with one-fourth Indian blood, one-eighth Negro blood, and five-eighths Caucasian blood were deemed Black even though the percentage of Caucasian and Indian blood greatly exceeded the percentage of Negro blood.[115] In short, while the law clearly subscribed to biological notions of race, it also

---

biological races dates back to the eighteenth century when scientists attempted to classify humankind into five different races—Caucasian, Mongolian, Ethiopian, American Indian, and Malay. *See* Donald Braman, *Of Race and Immutability*, 46 UCLA L. REV. 1375, 1386 n.24 (1999). It is well-illustrated by Voltaire's statement that "the negro race is a species of men [sic] as different from ours as the breed of spaniels is from that of greyhounds." Voltaire, *The Negro*, *in* 39 THE WORKS OF VOLTAIRE: A CONTEMPORARY VERSION 240, 240 (Tobias Smollett, ed., William F. Fleming trans., 1901).

[112] 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).

[113] VA. CODE ANN. § 1-14 (Michie 1960) (repealed 1960); *see also* State v. Treadaway, 52 So. 500 (La. 1910) (upholding a Louisiana statute categorizing persons with as much as one-thirty-second African American blood as racially "negro"); Mullins v. Belcher, 134 S.W. 1151 (Ky. 1911) (holding that persons with one-sixteenth negro blood are colored even though they are as fair as persons of the white race); State v. Chavers, 50 N.C. 11 (1857).

[114] Loving v. Virginia, 388 U.S. 1, 5 n.4 (1967) (quoting VA. CODE. ANN. § 20-54 (Michie 1960) (repealed 1960)).

[115] *See* VA. CODE ANN. § 1-14 ("[E]very person not a colored person having one-fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes living on reservations allotted them by the Commonwealth having one-fourth or more of Indian blood and less than one-sixteenth of Negro blood shall be deemed tribal Indians so long as they are living on such reservations.").

treated Native American ancestry differently than other non-white bloodlines.[116] This 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."[117]

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.[118] Scientists have concluded that "there is no set of genes that can tell us whether an individual is or is not a member of a particular race."[119] Indeed, there may be greater genetic variations between members of the same racial group than between members of different racial groups.[120] Thus, "[f]rom the perspective of biology, there is no such thing as 'race.'"[121]

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

---

[116] *Id.*; *see also Loving*, 388 U.S. at 5 n.4 (quoting VA. CODE ANN. § 20-54).

[117] *Loving*, 388 U.S. at 5 n.4 (quoting W.A. Plecker, *The New Family and Race Improvement*, *in* VA. HEALTH BULL. 3, 25-26 (Va. State Bd. of Health, New Family Series No. 5, Extra No. 12, 1925)); *see also* Maillard, *supra* note 81 (noting that by defining as "white" persons with "one-sixteenth or less of the blood of the American Indian and having no other non-Caucasic blood," Virginia sought to ensure that the descendants of Pocahontas, the "Indian Princess," and John Rolfe, the white Englishman, could be legally white).

[118] *See, e.g.*, Lopez, *supra* note 111; Braman, *supra* note 111; Anthony Appiah, *The Uncompleted Argument: Du Bois and the Illusion of Race*, *in* "RACE," WRITING, AND DIFFERENCE 36 (Henry Louis Gates, Jr. ed., 1986).

[119] Erik Lillquist & Charles A. Sullivan, *The Law and Genetics of Racial Profiling in Medicine*, 39 HARV. C.R.-C.L. L. REV. 391, 409 (2004).

[120] Lopez, *supra* note 111, at 11-12. This does not mean that groups are genetically indistinguishable. *Id.* at 12. 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 "cause[] population groups that are separated from one another to diverge in the frequency of genes." Lillquist & Sullivan, *supra* note 119, at 396. Interestingly, people with similar morphological characteristics (i.e., similar skin color, hair texture, and facial features) may be genetically quite dissimilar and vice versa. Lopez, *supra* note 111, at 15-16. For example, although the Malay Negritos from Oceania and the African Pygmies resemble one other physically, they are genetically quite different. In contrast, although Europeans and persons from northern India share a similar genetic makeup, they look nothing alike. *Id.*

[121] Lillquist & Sullivan, *supra* note 119, at 418.

of race in education, the workplace, and medicine.[122] According to some scholars, even corporations have distinct and legally cognizable racial identities.[123] Thus, what we refer to as "race" is constructed "through the give-and-take of politics or social interaction."[124] 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.[125] America's relatively recent 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.[126] This social construction of race is evidenced in Latin America, where class, education, and wealth may be more important determinants of racial classification than ancestry.[127] For example, family members are often attributed different racial categories based, in part, on physical appearance, but more importantly, on social and economic status.[128] An individual's racial designation, as socially perceived, can change

---

[122] *Id.* at 426-41.

[123] *See* Richard Brooks, *Incorporating Race*, 106 COLUM. L. REV. 2023 (2006).

[124] George A. Martínez, *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).

[125] *Compare In re* Rodriguez, 81 F. 337 (W.D. Tex. 1897) (holding that, from an anthropological perspective, Mexicans are not white) *with* Indep. Sch. 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*" (emphasis added)). *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* Martínez, *supra* note 124, at 56-57.

[126] *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 123, 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).

[127] Tanya Kateri Hernández, *Multiracial Matrix: The Role of Race Ideology in the Enforcement of Antidiscrimination Laws, A United States-Latin America Comparison*, 87 CORNELL L. REV. 1093, 1106 (2002) ("In Latin American settings, social status informs formal racial classification, as illustrated by the common belief that persons of prominence should not be 'insulted' by referencing their visible African ancestry.").

[128] *Id.*

in direct correlation to change in his educational and economic status.[129] Indeed, in Latin America, "[p]ersons with some obvious African or Indian traits may even be accepted as white, if they are quite prosperous and well educated."[130]

Some scholars have argued that many courts in the nineteenth and early twentieth centuries implicitly recognized that race was socially constructed.[131] 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.[132] The university argued that because persons of Arab descent are Caucasian, the plaintiff had failed to state a federal claim for racial discrimination.[133] The Supreme Court rejected the argument, holding that, although persons of Arab descent are now considered Caucasian, this was not always the case.[134] 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."[135] Now, however, these groups are considered to be members of a single race—Caucasian.[136] Thus, the Court recognized that racial categories are not immutable. Other federal courts have stated, "Now it is scientifically accepted that races 'are not, and never were, groups clearly defined biologically.'"[137]

---

[129] *Id.* (noting that in Latin America "economic and social status [can] mediate a formal racial designation" and "[a]n individual can become socially lighter by marrying a lighter-skinned partner, or by becoming wealthy or famous").

[130] F. James Davis, *The Hawaiian Alternative to the One Drop Rule*, *in* AMERICAN MIXED RACE 115, 119 (Naomi Zack ed., 1995).

[131] *See* Braman, *supra* note 111, at 1381, 1393-1400; Brooks, *supra* note 123, at 2063.

[132] Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604 (1987).

[133] *Id.* at 606.

[134] *Id.* at 610-11.

[135] *Id.* at 611-12.

[136] *Id.* at 610.

[137] Ho by Ho v. S.F. Unified Sch. Dist., 147 F.3d 854, 863 (9th Cir. 1998) (quoting William W. Howells, *The Meaning of Race*, *in* THE BIOLOGICAL AND SOCIAL MEANING OF RACE 16 (Richard H. Osborne ed., 1971)); *see also* U.S. v. Parada, 289 F. Supp. 2d 1291, 1305 (D. Kan. 2003) (noting that "race is merely a social construct").

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 "[d]istinctions between citizens solely because of their ancestry,"[138] ICWA treats Indian children differently from other children based on biological definitions of race. ICWA applies to any child who is either "a member of an Indian tribe" or "is eligible for membership in an Indian tribe and is the *biological child* of a member of an Indian tribe."[139] As shown below, most tribes condition eligibility for membership on the existence of Indian blood.[140] ICWA thus effectively relies on ancestry—in other words, race[141]—to determine who is an Indian child.

As noted above, the Choctaw Tribe claimed that the Mississippi Chancery Court had not only erred in determining the twins' domicile but had also disregarded ICWA's placement preferences, which require placement with the child's extended family, other tribal members, or other Indian families before placement with a non-Indian family.[142] Although the U.S. Supreme Court focused on the jurisdictional issue, it noted that the Chancery Court had failed to search for Choctaw or other Indian families (of any tribe) before placing the children with the Holyfields.[143] However, as shown below, the Chancery Court may have unwittingly placed the twins with a Choctaw family even if they did not qualify as such under the Tribe's membership requirements.

As the Holyfields noted in their brief, Reverend Holyfield's paternal grandmother was a full-blooded Mississippi Choctaw, making Reverend Holyfield, the twins' adoptive father, one-fourth Choctaw.[144] Given his

---

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

[139] 25 U.S.C. § 1903(4) (2000) (emphasis added).

[140] *In re* Santos Y., 112 Cal. Rptr. 2d 692, 724 (Ct. App. 2002) (noting that adopted children of tribal members are not eligible to enroll because they do not satisfy the blood requirement).

[141] *See* Rice v. Cayetano, 528 U.S. 495, 499, 514 (2000) (holding that, where the state restricted the right to vote for the board of trustees of the Office of Hawaiian Affairs to those of traceable Hawaiian ancestry, the state had "used ancestry as a racial definition and for a racial purpose").

[142] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 40 n.13 (1989).

[143] *Id.*

[144] Appellee Brief, *supra* note 47, at *17.

Choctaw heritage, one might have expected the Holyfields to be an "Indian famil[y]" under ICWA's placement preferences. Yet they were not.

Federal law does not define who is a member of an Indian tribe. Instead, each federally recognized tribe has exclusive authority to set its own standards for tribal membership.[145] Requirements vary widely.[146] As discussed in Part I.A, a person seeking to enroll in the Tribe must show that he has one-half or more Choctaw blood.[147] Thus, according to the Mississippi Choctaw Tribe, Reverend Holyfield, who was one-fourth Choctaw, was not Choctaw enough. Had he been a descendant, for example, of the Seminole or Choctaw Nations of Oklahoma, or the Louisiana Band of Choctaw Indians, tribes with lower or no minimum blood quantum requirements,[148] he would have been eligible for tribal membership and the Holyfield's adoption of the twins would have been deemed 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. For example, imagine that, like seventy-five percent of all Indians,[149] Jennie and Windell had resided outside the reservation. In that case, the Mississippi Chancery Court would have had jurisdiction over the Holyfields' adoption petition. However, as the court would still have been bound by ICWA, per section 1915(a) it would not have been able to grant the adoption unless there were no members

---

[145] Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978). However, until recently, states have attempted to define who is a tribal Indian. *See supra* notes 113-117 and accompanying text (discussing the Virginia statute).

[146] *See* U.S. GAO REPORT, *supra* note 81, at 14 & 15 tbl.4 (listing tribal membership requirements for various tribes and noting that "[t]wo common conditions for enrollment are lineal descendancy from a person named on a tribe's historical membership list . . . or a minimum amount of tribal blood").

[147] *See supra* note 77 and accompanying text.

[148] Both the Seminole and the Choctaw Nations of Oklahoma allow any person who can prove a blood or ancestral relationship, respectively, with one of the original enrollees of the tribe, to enroll as a tribal member. *See In re* Alexandria Y., 53 Cal. Rptr. 2d 679, 681 n.3 (1996) (discussing the Seminoles); CONST. OF THE CHOCTAW NATION OF OKLAHOMA, art. II, *available at* http://www.choctawnation.com/files/Constitution.pdf; CHOCTAW NATION OF OKLAHOMA, APPLICATION FOR CERTIFICATE OF DEGREE OF INDIAN BLOOD, *available at* http://www.choctawnation.com/Files/cdibappl.pdf. By contrast, the Louisiana Band of Choctaw Indians requires applicants to be at least one-fourth Louisiana Choctaw. Jena Band of Choctaw Indians of La. Confirmation Act, H.R. 2366, 103rd Cong. § 9 (1993).

[149] U.S. CENSUS BUREAU, CHARACTERISTICS OF AMERICAN INDIANS AND ALASKA NATIVES BY TRIBE AND LANGUAGE: 2000 (2003).

of the twins' extended family, other Choctaw tribal members, or other Indian families willing to adopt them.[150] 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 officially recognized Indian tribes (561 in the United States)[151] this could be a burdensome, if not impossible, task, even assuming that the court need only document reasonable efforts to find an Indian family.[152] Under ICWA, all Indian families, other than members of the child's tribe, are treated equally regardless of cultural, political, economic, or religious differences between the tribes, or the fact that there are over 250 different tribal languages.[153] Further, ICWA makes no distinction between "local" tribes and those located thousands of miles from the child's tribe.[154]

---

[150] 25 U.S.C. § 1915(a) (2000). The Chancery Court would have also been required to maintain records "evidencing [its] efforts to comply with [ICWA's] order of preference." § 1915(e).

[151] Bureau of Indian Affairs, http://www.doi.gov/bureau-indian-affairs.html (last visited Nov. 10, 2007).

[152] Conceivably, the Chancery Court in the *Holyfield* case would have had to reach out to, for example, Seminole, Chippewa, Cherokee, and Navajo tribal members, among others, to 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, under ICWA, the Chancery Court would have been required to send them to Florida rather than place them locally with the Holyfields.

[153] U.S. Dep't of Justice, Office of Tribal Affairs, Frequently Asked Questions About Native Americans, http://www.usdoj.gov/otj/nafaqs.htm#otj20 (last visited Nov. 10, 2007).

[154] The drafters of ICWA sensibly foresaw that circumstances could arise where 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. *See* 25 U.S.C. § 1915 (a), (c). Although ICWA does not define "good cause," the Bureau of Indian Affairs Guidelines provide a non-exhaustive list of factors. These include: "(i) [t]he request of the biological parents or the child when the child is of sufficient age[;] (ii) [t]he extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness[; and] (iii) [t]he unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria." Guidelines for State Courts, Indian Child Custody Proceedings, 44 Fed. Reg. 67584, F.3 (Nov. 26, 1979); *see also In re* Adoption of B.G.J., 133 P.3d 1, 5 (Kan. 2006). A state court considering the Holyfields' petition to adopt the twins might have found good cause to deviate from the placement preferences in

The Supreme Court has held that federal legislation relating to Indians is not directed towards Indians "as a discrete racial group, but, rather as members of quasi-sovereign tribal entities."[155] However, ICWA's grouping of all tribal families together may serve indirectly to reinforce biological notions of race. Although each tribe has its own requirements for tribal membership, virtually every tribe requires Native American ancestry, even though for some, *any* amount of tribal blood will suffice.[156] Thus, although not all families of Native American ancestry qualify as "Indian families" under ICWA, in order to qualify as an "Indian famil[y]," one of the prospective adoptive parents must have *some* Native American blood, however minimal. This blood requirement trumps religious, cultural, and social similarities. For example, the Cherokee Nation of Oklahoma, which has no minimum blood requirement, has sought to revoke the tribal citizenship of the one percent of its members who are

---

light of Jennie's desire that the Holyfields adopt her children. But there are a number of obstacles to claims by non-Indian would-be adoptive parents. First, the Guidelines are not binding; courts are free to interpret them narrowly, broadly, or disregard them completely. Second, some courts have been reluctant to deviate from the placement preferences based solely on the birth parents' wishes. Shortly after *Holyfield* was decided, a California court held that an eighteen-year-old Aleut woman who had not had any contact with the tribe since she was adopted by a non-Indian family (before ICWA's enactment) at the age of two, and who had since resigned her tribal membership (the Aleuts voted the infant in as a member of the tribe over the mother's objections), could not place her child for adoption with a non-Indian family over the tribe's objection. *See* Catherine Gewertz, *Aleut Tribe Given Adoption Control of Baby*, L.A. TIMES, Jan. 20, 1990, at 1; Sonni Efron, *Aleuts Ask Panel for Say in Adoption*, L.A. TIMES, Mar. 14, 1991, at 6. 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. Gewertz, *supra*; Efron, *supra*.

[155] Morton v. Mancari, 417 U.S. 535, 554 (1974).

[156] Although the Cherokee's requirement of tribal blood is the equivalent of one drop, *see* Maillard, *supra* note 83, at 354 n.20 (noting that, "[i]n the Cherokee Nation, which has no minimum blood requirement for membership, quantums range from 'full blood' to 1/2048"), persons seeking to enroll in the Cherokee Nation must provide documents connecting them "to an enrolled linear ancestor." Dawes Freedmen Roll Application, *available at* http://www.cherokee.org/docs/registration/Freedman_Registration.pdf (last visited Nov. 10, 2007). Further, the enrollment application states that "Tribal Citizenship are [sic] issued through natural parents" and in cases of adoption, "[c]itizenship must be proven through the BIOLOGICAL PARENT to the enrolled ancestor." *Id.* Thus, despite the Cherokees' assertion that "[e]very other Indian tribe is based on blood," it is clear that the Cherokee Nation of Oklahoma, too, is primarily based on blood. Nieves, *supra* note 81; *see also* Associated Press, *Slave Descendants Lose Tribal Status*, N.Y. TIMES, Mar. 4, 2007 (reporting that Cherokee Nation members voted in favor of amending their constitution to "limit citizenship to descendants of 'by blood' tribe members as listed on" the 100-year-old membership roll).

descendants of Black slaves the Cherokees once owned because they cannot prove that they are "Cherokee by blood."[157] Given that, for many tribes, a blood relationship or minimum blood quantum is the only requirement for tribal membership,[158] in some cases, Native American blood may the only thing that a member of one tribe will share with a member of another tribe or even with a member of his own tribe. By preferring an "Indian family" of any tribe over all non-Indian families, cognizant that tribal blood is a prerequisite to becoming an "Indian family," ICWA suggests that biology, rather than social, legal, or political identification, makes a person Native American. Similarly, as noted above, ICWA's definition of an "Indian child" as one who is "a member of an Indian tribe" or "is eligible for membership,"[159] in the context of tribal rules that condition membership on the existence of tribal blood, further shows that biology, above all else, makes a person Indian under ICWA.

B. 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, sixty-one percent of the children in foster care in South Dakota in 2003 were Native American even though less than nine percent of the state's population at the time was Native American.[160] According to one estimate, in 1997 more than 50,000 Indian children were

---

[157] *See* Nieves, *supra* note 81; *Slave Descendants Lose Tribal Status*, N.Y. TIMES, Mar. 4, 2007, at 124.

[158] *But see* U.S. GAO REPORT, *supra* note 81, at 14 (noting that, in addition to lineal descendancy or blood quantum, some tribes require members to reside on the reservation or to maintain contact with the tribe).

[159] 25 U.S.C. § 1903(4) (2000).

[160] *Id.* at 13 tbl.3; U.S. Census Bureau State and County Quickfacts 2005, *available at* http://quickfacts.census.gov/qfd/states/46000.html; *see also* Barbara Ann Atwood, *Flashpoints Under The Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 621 (2002) (noting that although "ICWA has achieved considerable success in stemming unwarranted removals by state officials of Indian children from their families and communities . . . . removals of Indian children from their families of origin—by either tribal or state authorities—continue in high numbers").

living in non-Indian adoptive homes.[161] 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*.[162]

Holyfield's limited effect is best illustrated by the "existing Indian family exception," a judicially-created "amendment" to ICWA, first applied by the Kansas Supreme Court seven years before *Holyfield* was decided.[163] Although some courts have held that the exception is invalid in light of *Holyfield*,[164] 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

---

[161] Int'l Indian Treaty Council, *Rights of the Child*, E/CN.4/2001/NGO/43, Jan. 23, 2001, *available at* http://www.treatycouncil.org/section_211417131.htm (written statement submitted to U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights).

[162] *See* NAT'L CTR. FOR STATE COURTS & NORTH AMERICAN INDIAN LEGAL SERVICES, INC., AN ANALYSIS OF COMPLIANCE WITH THE INDIAN CHILD WELFARE ACT IN SOUTH DAKOTA 8, 16, 84-85 (2004), *available at* http://www.state.sd.us/oia/files/analysis.pdf; Indianz.com, *Rapid City Journal Runs Series on Indian Child Welfare*, Jan. 5, 2006, http://www.indianz.com/News/2006/011893.asp; Indianz.com, *High Rate of Indian Adoptions in Iowa Protested*, Jan. 13, 2004, 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 those in *Holyfield*, the birth parents resided on the Yakama reservation until the birth mother was eight months pregnant. The couple then moved off the reservation and after the birth 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." Navajo Nation v. Confederated Tribes & Bands of the Yakama Indian Nation, 331 F.3d 1041 (9th Cir. 2003). Thus, the court allowed the birth parents to defeat tribal jurisdiction despite the holding in *Holyfield* that a birth parent could not, by her actions, defeat a tribe's exclusive jurisdiction. *Id. See generally* Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 429 (1998) (arguing that state courts continue "to manipulate the application and implementation of [ICWA]").

[163] *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982). *See generally* Atwood, *supra* note 160, at 625-36 (discussing the existing Indian family exception and state courts' resistance to ICWA).

[164] *In re* Baby Boy C., 27 A.D.3d 34, 44 (N.Y. App. Div. 2005) (listing cases rejecting exception after Holyfield and stating that "[i]n the wake of *Holyfield*, many state courts rejected the EIF [existing Indian family] exception on the ground that the doctrine was inconsistent with *Holyfield*'s express recognition of the tribal interests protected by ICWA, as well as ICWA's plain language"); *see also In re* A.B., 663 N.W.2d 625, 636 (N.D. 2003); *In re* Baby Boy Doe, 849 P.2d 925, 931-32 (1993).

tribal member[165]—but only to children who are also part of an "existing Indian family."[166] According to these courts, a child is not part of an existing Indian family unless the Indian parent, in addition to being a tribal member, maintains "a significant social, cultural, or political relationship with an Indian community."[167] 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.[168] Her child, who was "one-quarter Chippewa Indian blood" and 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.[169] 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.[170] The California Court of Appeals reversed, holding that, because the birth mother had no involvement with the tribe, "[t]here [was] no Indian family . . . to preserve."[171]

The rationale underlying this judicially-created exception is that ICWA's purpose of promoting "the stability and security of Indian tribes and families"[172] is not furthered when applied to a child who, if raised by his biological parents, would not be raised in a culturally Indian home.[173] As one court explained:

> [L]osing 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

---

[165] 25 U.S.C. § 1903(4) (2000).

[166] *In re* Bridget R., 49 Cal. Rptr. 2d 507, 516 (Ct. App. 1996); *see also In re* Santos Y., 112 Cal. Rptr. 2d 692 (Ct. App. 2002); Hampton v. J.A.L., 658 So. 2d 331, 336 (La. Ct. App. 1995); *In re* Adoption of Crews, 825 P.2d 305, 309-10 (Wash. 1992); *In re Baby Boy C.*, 27 A.D.3d at 42 (listing cases).

[167] *In re Santos Y.*, 112 Cal. Rptr. 2d at 719.

[168] *Id.* at 697-98.

[169] *Id.* at 698.

[170] *Id.*

[171] *Id.* at 726.

[172] 25 U.S.C. § 1902 (2000).

[173] *In re Santos Y.*, 112 Cal. Rptr. 2d at 724.

> 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.[174]

Members of Congress seeking to codify the existing Indian family exception have similarly argued that ICWA's "original intent . . . to protect Indian children and culture" is not furthered when ICWA is applied to children whose birth "parents do not maintain 'significant social, cultural or political affiliation with the tribe.'"[175]

Courts adopting the existing Indian family exception 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"[176]—which would trigger strict scrutiny under the Equal Protection Clause.[177] Recognizing that the federal government has a compelling interest in promoting the stability and security of Indian tribes, these courts have held that such interest is not furthered by applying ICWA to children whose only

---

[174] *In re* Baby Boy C., 27 A.D.3d 34, 46 (N.Y. App. Div. 2005) (quoting and reversing lower court, 5 Misc. 3d 377, 385 (N.Y. Fam. Ct. 2004)).

[175] Eric Schmitt, *Adoption Bill Facing Battle over Measure on Indians*, N.Y. TIMES, May 8, 1996, at 19 (quoting Rep. Deborah Pryce, who proposed the bill); Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong. (1996) (providing that ICWA does not apply to Indian children who are not residing or domiciled on a reservation except where "one of the child's biological parents maintains significant social, cultural, or political affiliation with the Indian tribe of which either parent is a member"). Although the bill survived the House vote, this provision was struck after hearings before the Senate Committee on Indian Affairs. S. REP. NO. 104-288, at tit. III (1996).

[176] *In re* Bridget R., 49 Cal. Rptr. 2d 507, 527 (Ct. App. 1996).

[177] *Id.* at 527-28. 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, 330-36 (Ct. App. 2007) (summarizing cases); *see also id.* at 337-39 (Bammattre-Manoukian, J., concurring) (discussing split of authority and inviting the California Supreme Court to resolve the issue).

connection to a tribe is a genetic contribution from an enrolled biological parent who has no significant cultural connection to a tribe.[178]

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 contrast to the majority of courts, which defer to a tribe's assertion that a child is eligible for tribal membership based on blood quantum or ancestry and is therefore subject to ICWA, courts applying the existing Indian family exception treat Indian identity as a social and political construct, rather than as a biologically determined issue of fact. One has to question, however, whether state courts are better suited than the tribes to determine an individual's racial or ethnic identity, even if the tribe's determination is based on biological notions of race. When determining whether a child is part of an existing Indian family, state courts have considered whether the birth parent described herself as Indian, as well as whether she "observed tribal customs . . . participated in tribal community affairs, voted in tribal elections . . . contributed to tribal or Indian charities, subscribed to . . . periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events . . . or maintained social contacts with other members of the Tribe."[179] Thus, it seems that when making determinations about who is a "real" Indian, courts have been influenced by stereotypes about Indians.[180] Our history with the "one drop rule" suggests that lawmakers would be wise to avoid attempts to define an individual's racial or ethnic identity.

C. Adopting a Secure Racial and Cultural Identity: ICWA v. MEPA

ICWA reflects Congress's belief that "an Indian child should remain in the Indian community,"[181] not only because the placement of Indian children in non-Indian homes threatens tribal existence, but also because such placements

---

[178] *In re Santos Y.*, 112 Cal. Rptr. 2d at 730; *In re Bridget R.*, 49 Cal. Rptr. 2d at 527 n.13.

[179] *In re Bridget R.*, 49 Cal. Rptr. 2d at 531.

[180] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 751-53 (2006) (describing how stereotypes about Indians influence courts applying the existing Indian family exception).

[181] H.R. REP. NO. 95-1386, at 23 (1978).

threaten Indian children's psychological well-being.[182] Indeed, 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.[183] ICWA is not the only federal law addressing transracial or transcultural adoptive placements. The Multi-Ethnic Placement Act (MEPA), enacted in 1994 and amended in 1996,[184] governs foster care and adoptive placements of children not subject to ICWA, including non-tribal Indians[185] and children of African American, Latino, Asian, and Caucasian ancestry. However, unlike ICWA's mandatory placement preferences, MEPA contains no placement preferences.[186] To the contrary, MEPA, as amended, prohibits agencies receiving federal funds from considering race when making placement decisions.[187] In order to understand Congress's differing approach between transracial or transcultural adoptions of tribal children (those subject to ICWA) and all other children, it is necessary to briefly compare the histories surrounding ICWA's and MEPA's enactments.

As discussed in Part II.A, ICWA reflected Congress's concern with the significant number of Native American children that had been separated from their families and tribal communities and the effect of this removal on the children, their families, and the tribes.[188] Thus, one of ICWA's main goals was to preserve Indian tribes and families.[189] In contrast, when enacting the 1996 amendments to MEPA, Congress was concerned primarily with the significant numbers of African American children languishing in foster care even when there were white families available to adopt them.[190]

---

[182] *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49-50 & n.24 (1989) (discussing congressional hearings regarding ICWA).

[183] *Id.* (quoting S. REP. NO. 95-597, at 52 (1977)).

[184] 42 U.S.C. § 1996b (2000) (originally enacted as 42 U.S.C. § 5115a (1994)).

[185] MEPA expressly provides that it "shall not be construed to affect the application of [ICWA]." 42 U.S.C. § 1996b(3). A child of Native American ancestry who has less than the minimum blood quantum required by the tribe or whose Indian parent is not a tribal member (e.g., did not enroll in the tribe) would not be subject to ICWA.

[186] 42 U.S.C. § 1996b.

[187] 42 U.S.C. § 1996b(1)(B).

[188] *See supra* notes 19-29 and accompanying text.

[189] *Id.*

[190] Maldonado, *supra* note 75 at 1455-57.

The reasons for MEPA's enactment date back to the 1960s. When white families began adopting African American children in significant numbers in the 1960s and early 1970s, the National Association of Black Social Workers (NABSW) expressed strong opposition, calling interracial adoptions "cultural genocide."[191] It argued that African American children must be raised by African American families who could help them develop positive racial identities and the skills to cope with racism in American society.[192] Soon after, some states adopted laws giving preference to families "with the same racial or ethnic heritage as the child."[193] Government-funded agencies in other states adopted similar race-matching policies, albeit informally,[194] and many private agencies, although not required to do so, followed suit.[195] As a result, the number of transracial adoptions involving African American children decreased significantly.[196] Because there were more African American children available for adoption than African American families seeking to adopt, some African American children languished in foster care, waiting for a same-race family to adopt them.[197]

Congress sought to rectify this problem with its enactment of MEPA in 1994. Its main goal was to prevent race-matching policies from delaying adoptive placements. In order to achieve this goal, MEPA established that

---

[191] Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 926-27 (1994) (quoting the NABSW).

[192] *Id.*

[193] MINN. STAT ANN. § 259.55 (West 1993) (renumbered to § 259.29(2) (1994)) (amended 1996); *see also* ARK. CODE ANN. § 9-9-102 (1993) (amended 1997); CAL. FAM. CODE § 8708 (Deering 1993) (repealed 1996).

[194] *See* Maldonado, *supra* note 75, at 1455; David S. Rosettenstein, *Transracial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot"*, 68 ST. JOHN'S L. REV. 137, 140 n.9 (1994) (noting that some state agencies' department practice manuals included race matching policies).

[195] *See* Maldonado, *supra* note 75, at 1455.

[196] Suzanne Brannen Campbell, *Taking Race out of the Equation: Transracial Adoption in 2000*, 53 SMU L. REV. 1599, 1605 (2000) (stating that transracial adoptions dropped thirty-nine percent in the year following the NABSW's statement); Rosettenstein, *supra* note 194, at 141 (noting that the number of formal transracial adoptions nationally peaked in 1971 with 2,574 placements but had fallen to 831 by 1975).

[197] Maldonado, *supra* note 75. Scholars have argued that white adoptive parents' preferences for white children are another reason why whites did not adopt African American children. *See id.*; Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998).

agencies receiving federal funds could not "delay or deny the placement of a child for adoption or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved."[198] Although the 1994 MEPA did not prohibit agencies from considering race, it could not be the sole factor in a placement decision nor could it delay a placement while the agency waited for a same-race family.[199] Even after MEPA's enactment, however, some agencies continued to reject white families' applications to adopt African American children.[200] As a result, in 1996, Congress amended MEPA and repealed the provisions allowing agencies to consider the child's "cultural, ethnic, or racial background" as a factor in the placement decision.[201] Thus, under the amended MEPA, absent extraordinary circumstances, "placements must be colorblind."[202]

This analysis demonstrates that the reasons behind ICWA's and MEPA's enactment were quite distinct. While Congress was concerned when it enacted ICWA that the placement of Indian children in white homes was so high that "Indians as an identifiable group [were] genuinely threatened,"[203] it appears to have been unconcerned, when it enacted MEPA, that transracial adoptions of African American children threatened the "continuance of blacks as a cultural, racial or ethnic group," despite the NABSW's assertions to the contrary.[204]

As shown, Congress enacted MEPA because it found that race-matching policies had resulted in African American children waiting longer to

---

[198] 42 U.S.C. § 5115a(a)(1)(B) (effective Oct. 20, 1994), *repealed by* Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808(d), 110 Stat. 1904 (1996).

[199] *Id.*

[200] Maldonado, *supra* note 75, at 1456.

[201] MEPA, as amended in 1996, prohibits agencies receiving federal funds from "deny[ing] to any person the opportunity to become an adoptive or foster care parent on the basis of race, color, or national origin of the person or of the child involved" or delaying or denying "the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved." 42 U.S.C. § 1996b(1) (2000).

[202] Maldonado, *supra* note 75, at 1456-57 & n.213.

[203] Margaret Howard, *Transracial Adoption: Analysis of the Best Interest Standard*, 59 NOTRE DAME L. REV. 503, 532 (1984).

[204] *Id.*

be adopted than white children.[205] ICWA's racial preferences could have similar consequences. On September 30, 2003, there were 2,190 American Indian or Alaskan Native children waiting to be adopted.[206] At least one court has noted that, as a result of ICWA, the pool of adoptive homes available to Indian children is much smaller than that available to other children.[207] Thus, one would expect that Indian children might wait longer for permanent homes and experience more foster care placements than children of other races. The results of a 2005 United States Government Accountability Office (GAO) study on ICWA's effect on foster care and adoptive placements were inconclusive.[208] However, the report did find that in some states, a greater percentage of children subject to ICWA as compared to non-ICWA children remained in foster care for over three years, and ICWA children were somewhat less likely to be adopted than other children.[209]

Adoptions of Indian children might also be perceived as "riskier" because an adoption agency's or court's failure to strictly comply with ICWA entitles the birth parents or the tribe to reclaim a child who has been placed in an adoptive home. As a result, adoption agencies may be hesitant to accept a birth mother's surrender of a child of Native American descent[210] since, even

---

[205] *See supra* notes 197-199 and accompanying text.

[206] Child Welfare League of America, 2006 Children's Legis. Agenda, Tribal Child Welfare Issues, http://www.cwla.org/advocacy/2006legagenda16.htm (last visited Nov. 12, 2007).

[207] *In re* Santos Y., 112 Cal. Rptr. 2d 692, 727 (Ct. App. 2002).

[208] There is no national data on children subject to ICWA so the federal government relied primarily on data from only four states. In South Dakota and Oklahoma, ICWA and non-ICWA children remained in foster care for similar lengths of time. In Washington, ICWA children remained in foster care longer than other children. Surprisingly, in Oregon, ICWA children exited foster care sooner than other children. However, Oregon's data may not be reliable since Oregon was unable to confirm the race or ICWA status of fifteen percent of the children leaving foster care in 2003. U.S. GAO REPORT, *supra* note 81, at 35. At least one organization, the Committee on Women, Population and the Environment, has found that Indian children remain in foster care longer than non-Indian children. *See* Andy Smith, Comm. on Women, Population, & the Env't, Native Health and Sovereignty Symposium, July 12, 2006, http://www.cwpe.org/resources/healthrepro/nativehealth (citing Loa Porter, Address on Indian Child Welfare at the Native Health and Sovereignty Symposium).

[209] U.S. GAO REPORT, *supra* note 81, at 3.

[210] Bakeis, *supra* note 56, at 552 (citing Debra Ratterman Baker, *Indian Child Welfare Act*, 15 CHILDREN'S LEGAL RTS. J. 28, 28 (1995)); *see also* Carol Sanger, *Infant Safe Haven Law: Legislating in the Culture of Life*, 101 COLUM. L. REV. 753, 771 n.99 (2006) (noting that infant safe haven laws, which guarantee anonymity and immunity to mothers who leave their

after the birth parents have relinquished their parental rights, the child's tribe may challenge the adoption, as the Choctaw Tribe did in *Holyfield*.[211] Further, under ICWA, a birth parent may withdraw her consent to the adoption "for any reason at any time prior to the entry of a final decree of termination or adoption . . . and the child shall be returned to the parent."[212] In other words, a birth parent of an ICWA child can reclaim the child long after the date of relinquishment so long as no final adoption decree has been issued. This rule contrasts with laws enacted in three-fourths of states, where a birth parent's consensual relinquishment of her parental rights in relation to a non-ICWA child becomes irrevocable in fourteen days or less. [213] The risk, or even mere perception, that adoptions of Indian children are more likely to be disrupted might dissuade some non-Indian families from adopting Indian children, even when there are no Indian families available to adopt those children.

Why did Congress respond to the tribes' concerns in enacting ICWA but not acknowledge the concerns of the NABSW when it enacted MEPA? There are a number of possible reasons. First, most African Americans did not share the views of the NABSW, a group which some African Americans considered extreme.[214] Second, when MEPA was enacted in 1994, the percentage of African American children in white adoptive homes was relatively small—less than two percent, according to figures from 1987[215]—while thousands of African American children in foster care waited for adoptive homes.[216] In contrast, shortly before ICWA's enactment, as many as

---

newborns in a designated safe haven, may interfere with tribal jurisdiction under ICWA, since the adoption agency will not know that the abandoned child is of Native American ancestry or which tribe to notify).

[211] *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

[212] 25 U.S.C. § 1913(c) (2000).

[213] *See* Samuels, *supra* note 4, at 513.

[214] Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2352 (1998).

[215] *See* RITA J. SIMON & RHONDA M. ROORDA, IN THEIR OWN VOICES: TRANSRACIAL ADOPTEES TELL THEIR STORIES 6 (2000). The percentage of African American children adopted from foster care by parents of a different race (primarily white) has increased significantly in recent years—from fourteen percent in 1998 to twenty-six percent in 2004. *See* Lynette Clemetson & Ron Nixon, *Breaking Through Adoption's Racial Barriers*, N.Y. TIMES, Aug. 17, 2006, at A1.

[216] At the end of 1990, there were 400,000 children in foster care waiting to be adopted, of which forty percent were African American. KAREN SPAR, FOSTER CARE AND

ninety percent of all Indian adoptees had been placed with non-Indian families.[217] Most importantly, Indian tribes are semi-sovereign nations and as such have the authority to regulate the conduct of their members, including placement of their children for adoption.[218] Their position is analogous to that of foreign nations, which can place restrictions on foreigners seeking to adopt their children and can give preference to their own citizens.[219] In the same way, Native American tribes have exclusive authority to determine who may adopt Indian children domiciled on the reservation. No other racial or ethnic group in the United States has such a right.[220]

These reasons not withstanding, Congress' complete disregard of the NABSW's concerns is puzzling, especially since there is one consideration surrounding transracial and transcultural adoptions that applies to all children, Indian and non-Indian: whether such adoptions are in their best interests. As discussed above, 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,[221] and there is evidence that some Indian children adopted by non-Indian families exhibit such distress.[222]

ADOPTION STATISTICS, CRS REPORT FOR CONGRESS, CONGRESSIONAL RESEARCH SERVICE (Jan. 15, 1997), *available at* http://www.casanet.org/library/foster-care/fost.htm. At the time, African Americans comprised less than fifteen percent of the child population. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, WE THE AMERICAN . . . CHILDREN, fig.2 (Sept. 1990), *available at* http://www.census.gov/apsd/wepeople/we-10.pdf.

[217] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 33 (1989).

[218] *See supra* notes 10-15 and accompanying text.

[219] For example, China requires that foreigners seeking to adopt have a body mass index below 40, a minimum of $80,000 in assets, a high school diploma, and no physical or mental illness, including depression. These restrictions do not apply to Chinese citizens. Pam Belluck & Jim Yardley, *China Tightens Adoption Rules for Foreigners*, N.Y. TIMES, Dec. 20, 2006, at A1.

[220] *See Holyfield*, 490 U.S. at 52 ("This relationship between Indian tribes and Indian children domiciled on the reservation finds no parallel in other ethnic cultures found in the United States.").

[221] *Id.* at 50 & n.24.

[222] A recent study of twenty Indian adults who had been 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." Carol Locust, *Split Feathers . . . Adult American Indians Who Were Placed in Non-Indian Families as Children*, 44 OACAS J. 11, 11 (2000). Nineteen of the twenty study participants regretted the loss of Indian identity, "family, culture, heritage, language, spiritual beliefs, tribal affiliation, and tribal ceremonial experiences." *Id.* They also grew up feeling "different" and each reported experiencing

However, even if we assume for the sake of argument that some Indian children might suffer psychological and emotional harm when placed with non-Indian families, other children adopted transracially and/or transculturally are subject to a similar risk. Thousands of non-Indian children adopted transracially have experienced the challenges of growing up in white homes and attending predominantly white schools and have felt they did not "fit in" with either the dominant culture or that of their birth parents.[223] For example, in one study a Korean transracial adoptee remarked that growing up she felt like "a white [person] in an Asian body"; many other transracial adoptees in the study voiced similar sentiments, stating that they fit in with neither whites nor Koreans.[224] 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."[225] Although many studies have found that the majority of African American children adopted by whites develop a

---

discrimination because she was Indian, either at school, church, or at home. *Id.* at 12-14. Similar to the findings of the pre-ICWA Senate hearings, this study found that Indian children became painfully aware that dominant society did not fully accept them. *Id.* at 14. Not one participant was glad about her adoptive placement. *Id.* at 12.

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. Bakeis, *supra* note 56, at 548 (citing Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1209 (1991)). They further suggest that Indian children raised in white homes who have relationships with other Indian children develop secure Indian cultural identities. *Id.*

[223] *See* Madelyn Freundlich & Joy Kim Lieberthal, Evan B. Donaldson Adoption Inst., The Gathering of the First Generation of Adult Korean Adoptees: Adoptees' Perceptions of International Adoption, http://www.adoptioninstitute.org/proed/korfindings.html (last visited Nov. 15, 2007).

[224] *Id.* As children or adolescents, thirty-six percent of Korean adoptees considered themselves Caucasian, but as adults, only eleven percent identified as such—somewhere along the way, their racial self-identification changed. *Id.* This phenomenon may be in decline, as adoption agencies and child development experts are now encouraging parents adopting transracially and transculturally to be mindful of racial differences and to teach and expose their child to the child's culture. *See* Maldonado, *supra* note 75, at 1462 & n.234.

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

healthy identity,[226] one study has found that these children experience more adjustment difficulties than those adopted intraracially.[227]

The *Holyfield* Court further noted Congress's finding that placements with non-Indian families deprived Indian children of their "tribal and cultural heritage."[228] 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.[229] In short, some of the concerns that led Congress to conclude that placing Indian children in non-Indian homes puts them at risk of psychological and emotional harm might apply to transracial and transcultural adoptions of non-Indian children as well. Of course, there are 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 was persuaded by testimony and studies suggesting that Indian children suffer social and psychological harm when placed in non-Indian homes, one has to wonder why, when enacting or amending MEPA, Congress did not inquire whether the same was true of other children adopted transracially or transculturally or elicit testimony regarding the potential psychological and emotional harm that might result.

It is impossible to read Holyfield and not recall the Supreme Court's refusal in *Palmore v. Sidoti*[230] to consider societal discrimination as a reason to

---

[226] SIMON & ROORDA, *supra* note 215, at 17-18.

[227] *See* William Feigelman & Arnold Silverman, *The Long-Term Effects of Transracial Adoption*, 58 SOC. SERV. REV. 588, 600-01 (1984) (finding that a small percentage of African American transracial adoptees have experienced adjustment difficulties but noting that this phenomenon could be the result of factors other than race). Researchers have found, however, that "the deleterious consequences of delayed placement are far more serious than those of transracial placement itself." Arnold R. Silverman, *Outcomes of Transracial Adoption*, 3 THE FUTURE OF CHILDREN: ADOPTION 104, 115 (1993). They find that "when a choice must be made between transracial placement and continued foster and institutional care, transracial placement is clearly the option more conducive to the welfare of the child." WILLIAM FEIGELMAN & ARNOLD R. SILVERMAN, CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS 100 (1983).

[228] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 & n.24 (1989) (quoting S. REP. NO. 95-597, at 45 (1977)).

[229] Williams, *supra* note 225; Leslie Doty Hollingsworth, *International Adoption Among Families in the U.S.: Considerations of Social Justice*, 48 SOC. WORK 209, 212-13 (2003).

[230] 466 U.S. 429 (1984).

keep children in a homogenous environment. In *Palmore*, a Florida court deprived a white mother of custody of her child—the product of her prior marriage to a white man—when she married an African American man.[231] The court reasoned that, "despite the strides that have been made in bettering relations between the races in this country," if the child were raised by his white mother and African American stepfather, she would "suffer from the social stigmatization that is sure to come" from her classmates once she attains school age.[232] The Supreme Court reversed, holding that, although "a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin," under the Equal Protection Clause, private biases are "impermissible considerations" in custody disputes.[233]

As semi-sovereign nations predating the Constitution, tribes are not subject to the United States Constitution's Equal Protection Clause. Thus, tribes may consider private racial biases and even discriminate against their citizens.[234] However, federal and state courts are constrained by the United States Constitution and thus cannot discriminate against individual Indians or any other United States citizen. Yet, by considering societal prejudices against Native Americans when enacting ICWA's placement preferences, Congress and the *Holyfield* Court, relying on ICWA's legislative history, arguably reinforced the tension between an anti-discrimination policy and preservation of tribal sovereignty.

---

[231] *Id.* at 431.

[232] *Id.* at 431 (quotation marks omitted) (quoting the Appendix of the Petition for Certiorari).

[233] *Id.* at 433.

[234] *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978) (tribes are not constrained by "constitutional provisions framed specifically as limitations on federal or state authority," including the Fifth and Fourteenth Amendments). In contrast, the Indian Civil Rights Act, 25 U.S.C. §§ 1301-03 (1968), which Congress enacted under its plenary authority to limit tribal powers in matters of local self-government, provides that "[n]o Indian tribe in exercising powers of self-government shall . . . deny to any person within its jurisdiction the equal protection of its laws." 25 U.S.C. § 1302(8) (2000). This provision does not create a federal cause of action for enforcement; only tribal courts can enforce violations of this provision. *See Martinez*, 436 U.S. at 72 (refusing to consider whether tribal ordinance denying tribal membership to the children of female members who marry outside the tribe, but not to male members who marry outside the tribe, violates the Indian Civil Rights Act).

III. CONCLUSION

While ICWA's language and the pre-enactment hearings suggest that preservation of tribal sovereignty benefits not only the tribes but also Indian parents and Indian children who may experience psychological harm if placed in non-Indian homes, *Holyfield* demonstrates that children's best interests and parents' interests are sometimes separate from and in tension with tribal interests. It further suggests that tribal interests can trump children's best interests and parents' fundamental right to determine what is best for their children. Although the Tribal Court sacrificed the Tribe's interest in keeping Beth and Seth in the Choctaw community when it granted Joan's adoption petition, it legally could have placed them with a Choctaw family despite the birth parents' opposition and the potential emotional harm to the children. As Justice Stevens argued in his dissent, *Holyfield* might "distort[] the delicate balance between individual rights and the group rights recognized by the ICWA."[235]

As shown, *Holyfield* and ICWA illustrate the tension between biological and socio-legal constructions of race. Given that tribal membership is generally contingent on a fulfillment of tribal blood quantum, ICWA's preference for an Indian family despite geographic, cultural, linguistic, or religious differences between the tribes suggests that lawmakers have adopted a biological definition of race. However, courts applying the existing Indian family exception have apparently rejected a biological approach in favor of a social and cultural construction of race. For these courts, having the requisite tribal blood and a biological parent who is a member of the tribe does not make a child Indian; rather, the child becomes Indian only if the parent has a social, cultural, or political relationship with an Indian community.

While the idea of allowing individuals to choose their racial, ethnic, or cultural identity based on their activities rather than biology has a certain appeal, it is difficult to imagine a court telling a person of African American descent that she is not really African American simply because she does not live in an African American neighborhood, have African American friends, or show interest in political issues that concern the African American community. Although political pundits and private citizens have suggested that Justice Clarence Thomas is "not really Black,"[236] it is quite another thing for

---

[235] Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 55 (1989) (Stevens, J., dissenting).

[236] *See* David L. Hudson, *Justice Clarence Thomas: The Emergence of a Commercial-Speech Protector*, 35 CREIGHTON L. REV. 485 (2002) (discussing criticisms of Justice Thomas).

lawmakers to imply the same. Instead, we allow individuals to self-identify regarding race and ethnicity, regardless of their contact with the relevant community.

The diametrically different approaches to adoptions of tribal children as compared to those of non-tribal children further illustrate lawmakers' struggle concerning the role that race, ethnicity, and culture should play in adoption decisions.[237] MEPA pretends that race, color, and ethnicity do not or should not matter while ICWA strongly suggests that attempts to ignore racial, cultural, and ethnic differences will have detrimental effects on children. MEPA's insistence on colorblind placements, despite ICWA's contrary approach, might imply (illogically) that only tribal children are at risk of psychological harm if racial and cultural differences are ignored, while these are irrelevant considerations where non-tribal children are concerned.

The willingness of Congress in enacting ICWA and the Court in *Holyfield* to consider social prejudices might also signal that antidiscrimination norms are much weaker in cases involving tribal Indians. The Supreme Court has held that, while societal biases might cause children emotional harm, the law cannot consider these biases when determining children's best interests.[238] However, ICWA's drafters and the *Holyfield* court might have unwittingly given effect to such biases when they considered white communities' rejection of Native American children and the potential psychological harm as a reason to keep them in Indian communities.

There are many more lessons to be gleaned from *Holyfield.* For example, *Holyfield* is uniquely significant to birth mothers of Indian children who do not want their families to learn of their pregnancies and who are denied the ability to choose their children's adoptive parents, a right that is afforded to all mothers of non-Indian children.[239] *Holyfield* also raises constitutional questions concerning the reproductive freedoms of women carrying children of Indian descent. Could *Holyfield*'s interpretation of ICWA influence a woman's decision to terminate her pregnancy, place her child for

---

[237] Although the Supreme Court has rejected racial considerations in custody disputes between a natural mother and father, *see Palmore*, 466 U.S. 429, aside from *Holyfield*, which only applies to Indian children under the ICWA, the Supreme Court has not addressed the role of race in adoption.

[238] *Palmore*, 466 U.S. at 433 ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.").

[239] *See generally* Carol Sanger, *Placing the Adoptive Self, in* CHILD, FAMILY AND STATE 58, 75-78 (Stephen Macedo & Iris Marion Young eds., 2003) (discussing reasons for honoring birth mothers' preferences).

adoption, or raise it herself, and if so, is this appropriate?[240] Since *Holyfield*, the Supreme Court has thrice refused to hear a case involving ICWA.[241] Perhaps the time has come.

[240] *See id.* at 75.

[241] *See* Doe v. Mann, 415 F.3d 1038 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006) (holding that ICWA's provision granting tribes exclusive jurisdiction over Indian children domiciled on a reservation does not trump Public Law 280, which authorizes California courts to exercise jurisdiction over child dependency proceedings involving tribal children, and therefore that tribal courts and California courts share concurrent jurisdiction over tribal children); Morrow v. Winslow, 94 F.3d 1386 (10th Cir. 1996), *cert. denied*, 520 U.S. 1143 (1997) (holding that ICWA provision authorizing a parent to petition to "any court of competent jurisdiction" to nullify a placement that violates certain sections of the ICWA does not authorize federal courts to enjoin *ongoing* state adoption proceedings); Comanche Indian Tribe v. Hovis, 53 F.3d 298 (10th Cir. 1995), *cert. denied*, 516 U.S. 916 (1995) (collaterally estopping an Indian tribe that had unsuccessfully argued in state court that the tribal court had exclusive jurisdiction over termination of parental rights proceedings involving a tribal child from relitigating the issue in federal court).