In addition, tribes can provide assistance in locating appropriate homes for Indian children needing out of home placements. Many states and private adoption agencies find themselves with a shortage of qualified Indian adoptive homes and can benefit from the pool of homes that tribes may have available. As an example, in the state of Washington, the Yakama tribe has a pool of Indian foster care and adoptive homes, which they have allowed the state Division of Social and Health Services to have access to. This agreement enables the agency facilitating the adoption to find the very best home for that child without unnecessary delays.

4) Is the ICWA a barrier to the timely placement of Indian children in foster care or adoptive homes?

No. In fact, since the passage of the ICWA, hundreds of thousands of Indian children have been successfully placed in both loving foster care and adoptive homes; both Indian and non-Indian. The ICWA has been a bright ray of hope for the vast majority of Indian children by helping them be reunified with their families and finding new homes when there are no natural family placements available. Tribal child welfare programs, which play a pivotal role in this accomplishment, have been increasingly successful in recruiting and maintaining foster care and adoptive homes within and outside of their reservation boundaries, making it possible for tribes to place Indian children even more quickly than states and private agencies in many cases. In many cases, state and private child placing agencies look to tribal child welfare programs to assist them in developing quality foster care and adoptive homes for Indian children.

A 1988 study on the status of the Indian Child Welfare Act revealed that tribal involvement in the placement of Indian children has resulted in, 1) Indian children being reunified more often with their natural families than with state or Bureau of Indian Affairs programs, and 2) shorter stays for Indian children in substitute care (i.e. foster care) than with state or Bureau of Indian Affairs programs. These successes are not surprising given the continued growth and sophistication of tribal child welfare programs in the United States. Many of these programs are now offering a full range of child welfare services independently or in collaboration with private and state child welfare agencies.

5) Are the protections available to Indian children in the ICWA still necessary today?

Yes. While the ICWA has certainly helped to reduce the chances that Indian children will not be unnecessarily removed from their homes, families and communities, there are still too many individuals and agencies involved in the unlawful placement of children; especially Indian children. It is not an exaggeration to say that every year over a thousand Indian children who are eligible for and need the protections of the ICWA are being denied these fundamental rights to have access to their family and culture. This means that one or more of the following violations of the ICWA is usually occurring:

- Tribes and extended family members are not being notified when a member child is being considered for an out of home placement.

- Qualified Indian families, often time's relatives of the Indian child, are not being given consideration as a placement resource for the child.

- Child welfare agencies working with Indian families who are experiencing difficulties are not making active and reasonable efforts to provide rehabilitative services to the family, thereby precluding any chance of the child being able to return home.

- State courts, without good cause, are refusing to transfer jurisdiction of child custody proceedings to tribal courts of which Indian children are members.

- Individuals or agencies are choosing to thwart the law by counseling young Indian families to not disclose their native heritage as a way to avoid the application of the ICWA or simply are refusing to take the necessary steps to confirm or deny whether the ICWA applies in a case.

6) Does the ICWA provide any flexibility for state courts to make individualized decisions in adoption cases?

Yes. A state court has the discretion to place an Indian child outside the placement preferences in the ICWA if it finds good cause to the contrary. While an Indian tribe may seek transfer of jurisdiction to tribal court of an off-reservation case, either birth parent may object to the transfer which has the effect of preventing such a transfer. Moreover, even where a parent does not object, a state court may deny transfer of jurisdiction to a tribal court.

7) Can the ICWA be used to disrupt an adoption proceeding at almost anytime?

No. If the jurisdictional and intervention provisions, and the procedures for consent to adoption in the ICWA are followed, no adoption may be disturbed once it is finalized unless there is fraud or duress in the initial consent. Even when there is fraud or duress, a challenge can be brought only two years after an adoption decree is final. A search of reported court decisions involving Indian adoptions where the ICWA was involved found only 30 cases since 1978 where adoptions were disrupted because of court disputes. Thus, where the ICWA is complied with initially, there is little threat that an adoption will be overturned.

8) Is there any relationship between the application of the ICWA and abortion rates among Indian women?

No. Recently, allegations were made by the National Right to Life Committee based on suggestions by the National Council for Adoption that the application of the ICWA may have the effect of encouraging abortion in Indian women. To date, no credible data has been produced that supports this allegation or shows a relationship between the application of the ICWA and abortions. In fact, not only do most tribes have traditional teachings regarding the special gift of life, but available data shows that Indian women have one of the lowest rates of abortion of any ethnic group. Abortion rates for Indian women have either stayed constant or declined since the inception of the ICWA in areas where data is available. The Alan Guttmacher Institute which does extensive data collection, research and public policy analysis in the area of reproductive health stated the following in a letter to Congressman Don Young dated April 15th.

"We have read the proposed legislation (H.R. 1082) carefully and cannot imagine how the proposed amendments to the Indian Child Welfare Act (ICWA), or the 1978 legislation, could in any way have an impact on the abortion rate of the Indian population."

S. 569 AND H.R. 1082 WILL PROTECT THE BEST INTERESTS OF INDIAN CHILDREN AND PROVIDE CERTAINTY FOR POTENTIAL ADOPTIVE FAMILIES

The amendments in S. 569 and H.R. 1082 were carefully developed in a year long process by tribal leaders and experts in the field of adoption and foster care of Indian children with input from representatives of the American Academy of Adoption Attorneys. In addition, other prominent organizations involved in adoption and foster care issues affecting children have also come forward to express their support for these bills. These organizations include: Child Welfare League of America, North American Council on Adoptable Children, American Humane Association, Catholic Charities, and the American Psychological Association.

This effort by the tribes signifies their willingness to address the specific concerns of those who feel that ICWA has flaws in some areas. But just as important, the amendments meaningfully address the concerns raised about ICWA in a way that can provide more security for potential adoptive parents and still allow for meaningful participation of extended family members and tribes when appropriate. The following is a description of the key provisions in S. 569 and H.R. 1082.

1. Notice to Indian Tribes of Voluntary Proceedings

Provides for notice to tribes in voluntary adoptions, termination of parental rights, and foster care proceedings. Also clarifies what should be included in notices to tribes of these proceedings. Providing timely and adequate notice to tribes will serve to ensure a more appropriate and permanent placement decision for the Indian child. When tribes and extended family members are allowed to be part of a placement decision the risk for disruption is significantly decreased. With proper notice, tribes can make informed decisions on whether the child is a member and whether or not they have an interest to participate in the placement decision. Notice also helps to expand the pool of potential adoptive parents because frequently the tribe knows of extended family members and other quality adoptive homes that are unknown to the individual or agency facilitating the adoption.

2. Timeline for Intervention in Voluntary Cases

Provides for a window of 90 days for tribes to intervene after notice of a voluntary adoptive placement or 30 days after notice of a voluntary adoption proceeding whichever is later. If a tribe does not intervene within these timelines after proper notice, they can not come back and later intervene.

Timely placements of children, whether they be Indian or non-Indian, are a concern of everyone. It is in no one's interest to let children languish in foster care or institutions when there is an appropriate adoptive placement available. Understanding this, tribes came together to adopt language that will place an appropriate timeline on their ability to intervene in voluntary adoptive proceedings involving their children.

Historically, tribes and extended family members interests were almost never given any consideration in these sensitive proceedings. They often only found out about adoptions of their children months and sometimes years after deals had been cut. With proper notice, tribes can

make informed decisions regarding their interest in a child and help facilitate a timely and successful adoptive placement.

3. Criminal Sanctions to Discourage Fraudulent Practices

Provides criminal sanctions for individuals or agencies which knowingly misrepresent whether a child is Indian to avoid application of the Indian Child Welfare Act. The vast majority of disrupted adoptions involving Indian children happen as a result of unethical and illegal behavior on the part of the individual or agency facilitating the adoption. In the now infamous "Rost" adoption case, the natural father was counseled to avoid disclosing he was Indian in order to avoid application of the ICWA, after which the adoption attorney falsified adoption papers that asked for the natural father's ethnicity. This is just one example amongst many where a number of innocent people, as well as the adoption itself, were exposed to unnecessary risks for the purposes of making life a little easier for the person facilitating the adoption.

4. Limits for Withdrawal of Consent to Adopt

Limits the length of time within which birth parents can withdraw their consent to adoption to six months after notice to the tribe. Provides more certainty that adoptions involving Indian children will not be disrupted by placing time limits on the natural parents ability to revoke their consent to adopt. Furthermore, it brings federal law pertaining to the adoption of Indian children more in line with applicable state laws by avoiding unlimited timelines on when consent to adoption can be revoked.

5. State Court Option to Allow Open Adoptions

Allows state courts to provide open adoptions of Indian children where state law prohibits them. Some state courts prohibit biological family members from maintaining contact with the child, even when the adoptive parents agree. This provision provides another tool in a state court adoption proceeding to avoid protracted litigation and ensure children with access to their natural family and culture when deemed appropriate. However, state courts will still have full discretion as to whether this option is utilized.

6. Clarifying Ward of Tribal Court

Clarifies tribal court's authority to declare children wards of the tribal court, much like state courts do. Clarifies that once a tribal court takes control of an on-reservation child or a child transferred to them by a state court that the tribal court retains control. Ensures that tribal courts will not unilaterally reach out and take control over a child whose permanent home is off-reservation.

7. Informing Indian Parents of Their Rights Under the ICWA

Provides that attorneys and public and private agencies must inform Indian parents of their rights and their children's rights under the ICWA. This provision will ensure that Indian parents are informed up front and able to make balanced decisions on the adoption or foster care placement of their children. This will help avoid unnecessary litigation due to natural parents making uninformed decisions that they may wish to change later.

8. Tribal Membership Certification

Any motion to intervene in an adoption proceeding by a tribe shall be accompanied by certification of the child's membership or eligibility for membership in a particular tribe. This provision will help ensure that there is no question as to whether a child is Indian under the ICWA and that tribal membership determinations are not arbitrarily made.

THE SUCCESS OF ICWA IN HUMAN TERMS

I want to tell you in human terms what the Indian Child Welfare Act means to Indian families. Recently a 32 year-old Indian mother in Oakland, California, Prisella Packineau, rediscovered her Indian heritage. She was the child of a Navajo mother and a Mandan-Hidatsa father. When Prisella was only eighteen months old, her mother became mentally ill while living in the Phoenix area. Because her mother was unable to care for her Prisella was placed with a non-Indian foster family and never returned to her mother or extended family. She never even knew she had an Indian family or relatives. Her non-Indian family forbid her to speak of her Indian heritage and passed it off as something that was not important.

Years later, while battling depression and anxiety about her lost identity Prisella developed a substance abuse problem and her own children were placed in substitute care. But this time there was an Indian Child Welfare Act and a social worker who knew how to implement it. Even though Prisella had been enrolled in the Navajo Nation at birth, because of her placement in a non-Indian family at such a young age, no one had bothered to inform or help her enroll her own children. Fortunately, the social worker notified the Navajo tribe who moved to enroll Prisella's children and help find a placement with her extended family.

Upon visiting the home of one of Prisella's aunts, the social worker found pictures of the Prisella at eighteen months of age still on the wall. The aunt told of the families grief and the frustration at not being able to find this child whom they had helped raise as an infant. They told of not being able to find information to know where Prisella might be or if she was even alive. The years of not knowing where their loved one had disappeared to had left a definite mark on this family.

The tribe working with the mother's maternal aunt asked that the children be placed with her while the mother sought treatment for her substance abuse problem. As a result of the Indian Child Welfare Act and the good work of the tribe and Prisella's social worker, the children were placed with Prisella's aunt and are doing beautifully in this home on the Navajo reservation.

Today, Prisella has been reunited with her Navajo family and will very soon be celebrating three years of sobriety. She also knows she has a biological father who is still living, whom she was told by her earlier caseworker had passed away, and hopes someday to meet him as well. She is a much happier, self-confident person today, while her children have found a loving home with their extended family. As Prisella puts it, "I am able to give my children today what I did not get - a strong sense of who they are as Indian people. I am still trying to find what was lost to me long ago and it is very, very hard. I am trying to fill the hole in my heart."

This story is not an uncommon one in Indian Country. As an organization that works with tribal child welfare programs on a daily basis we hear many accounts of children and adults who have been lost to their extended families and culture, in most cases because of poorly thought out federal policies and misguided efforts to "help" Indian children. This illustrates the most important reasons why efforts to change the Indian Child Welfare Act should be carefully developed and why it would be a grave mistake to weaken it in any way.

CONCLUSION

The Indian Child Welfare Act has provided much needed protection and hope to thousands of Indian children since its enactment. What many people do not know is that this law has also given Indian communities hope for a better future. It is not uncommon to find Indian people in communities all across the country that have either found their own identity because of the ICWA or have a family member that was reunited because of the ICWA. These collective experiences which are shared every day provide the healing that is needed for Indian communities ravaged by federal policies that were designed to isolate and assimilate Indian people. In many of these cases, the discovery of their lost identity has enabled them to fill an emptiness inside themselves and find support and understanding they never had. This is the ICWA that we know, and when allowed to work properly, provides security and certainty in Indian children's lives.

We ask you to support passage of S. 569 and H.R. 1082. We believe they will continue the positive contributions to the health and safety of Indian children, while also providing the certainty prospective adoptive parents need. This balanced approach is the kind that makes everyone a winner and achieves what everyone says they want, which is in the best interests of the child. Thank you for serious consideration of this testimony and request.

Spokane Tribe of Indians
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CENTURY OF SURVIVAL
1881 - 1981

STATEMENT OF
THE SPOKANE TRIBE OF INDIANS
Regarding proposed amendments to
The Indian Child Welfare Act: H.R. 1082 and S. 569
Submitted to the Senate Committee on Indian Affairs
and House Resources Committee

The United States Government has long recognized the sovereignty of Indian Tribes, and Congress' unique obligation toward Indians. Congress enacted the Indian Child Welfare Act (hereinafter referred to as "ICWA" or "Act") in 1978 pursuant to that obligation due to the incredibly large number of Indian children being removed from their families, and being placed in non-Indian homes by child welfare agencies. The Act is based on the political relationship between Indian Tribes and the United States, and not on Indians as a race. *See* Section 1901(3) of ICWA, "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." *See also* Morton v. Mancari, 417 U.S. 535 (1974) (upholding BIA Indian preference hiring and promotion policy because Indian status is political as opposed to racial).

The requirements placed on child welfare agencies in handling Indian child custody proceedings under the Act has made a real difference to tribes throughout the United States. Over the last several years alone, the Spokane Tribe has been able to provide culturally appropriate advice, cultural resources, placement resources, and a tribal connection to over 25 of our children involved in state child custody proceedings, and our tribal court has taken

jurisdiction of 11 of those children. These are children who may have been lost to our tribe had it not been for the Indian Child Welfare Act.

For the reasons stated, ICWA has been of great value to our tribe. However, we recognize that some changes to the Act are needed. Included in our statement are comments regarding H.R. 1082 and S. 569, and two stories illustrating the difference ICWA has made to our people.

I. COMMENTS TO H.R. 1082 AND S. 569

H.R. 1082 and S. 569 maintain the original intent of ICWA and provide a reasonable solution to the need of prospective adoptive parents to ensure greater certainty with Indian adoptions. Therefore, the Spokane Tribe supports H.R. 1082, and S.569, the identical bills to amend the Indian Child Welfare Act, with the following changes.

Section 1913(c)(2)(A)(I) should be changed to require that notice be provided not later than 30 days after foster care placement as opposed to the stated 100 days. Allowing notice to follow a placement by over three months will allow attachment and bonding to take place with a foster family, and cause unnecessary trauma to the child if a more appropriate home is found through the tribe. Requiring notice to be provided to tribes as soon as possible, with a maximum limit of 30 days after placement will allow states to utilize tribal knowledge and resources to the benefit of the child as soon as possible.

Sanctions or penalties should be added to Section 1913(h) for failure to comply with court ordered visitation or contact by the birth family, or tribe. As it now stands, a birth

family, or tribe may approve of a particular adoption because of a continued contact agreement, and after the adoption is final, the adoptive family will be able to avoid the agreement without fear of having the adoption decree set aside. The effect will be to discourage birth families and tribes from entering into, or approving voluntary adoptions at the outset.

Alternative and additional penalties should be added to Section 1924. The Committees might consider sanctions against any agency, whether public or private, for violations of the section. The sanctions could include loss of federal funds, for example. States could be required to suspend licenses for agencies that are found to violate the section or to require bonds for violators. States might also be required to include ICWA compliance procedures in examination of licensing proceedings for employees of agencies who are going to work with foster care or adoption cases.

Language should be added specifically rejecting the "existing Indian family exception." Many states have read an exception into ICWA, holding the Act inapplicable where they do not find an "existing Indian family." *Eg.*, Matter of Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982); In re Crews, 825 P.2d 305 (Wash. 1992). The court in In re Crews, held that ICWA did not apply where "an Indian child is not being removed from an Indian cultural setting, the natural parents have no substantive ties to a specific tribe, and neither the parents nor their families have resided or plan to reside within a tribal reservation." Id. at 310.

The ICWA sets forth specific criteria for its application. There must be a child custody proceeding as defined under Section 1903(1), and an Indian child as defined by Section 1903(4) as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an

Indian tribe." The United States Supreme Court in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 42 (1989) concluded that ICWA applies when these conditions are met.

There are approximately 510 recognized tribes within the United States. David H. Getches, et al., Federal Indian Law Cases and Materials 8 (3d ed. 1993). Each of these tribes has a unique cultural setting. In addition, approximately half of the United States Indian population does not live on or adjacent to an Indian reservation. Id. at 15. There are many reasons why Indian people and families may not live as the majority society expects a "typical" Indian family to live. Government policies such as the Relocation Act, and the various Termination Acts, pre-ICWA State child welfare policies of Indian child removal, as well as limited job opportunities on reservations have encouraged or forced Indian people to leave reservations and relocate in urban settings.

In enacting ICWA, Congress found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and ... the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." Section 1901(3). There is no reference to any sort of requirement of an identifiable cultural setting. To the contrary, Section 1901(5) of the ICWA itself states that States "have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families." It is absolutely impossible for a state to determine which families are "Indian families" for purposes of falling under the ICWA requirements. Just because a particular family does not live the way states expect Indian people to live, does not mean that the family ceases to be an Indian family. This is for tribes alone to determine.

By attempting to determine who is an Indian and who is not for purposes of ICWA application through the imposition of an existing Indian family exception, the states are infringing on the exclusive rights of tribes to determine their own membership and perpetuating a problem that the ICWA has sought to rectify. States need specific direction from the Act that this is unacceptable.

II. STORIES ILLUSTRATING THE IMPORTANCE OF ICWA

The Spokane Tribe has two stories that it would like to share with the Committees. The first is about the lives of two Spokane tribal members who were victims of the pre-ICWA state child welfare policies. The second story is about a young girl who was brought into the state system and how ICWA helped to insure her best interests were met.

A. Pre-ICWA

Georgia and Geneva are 38, and 39 years old. They were taken from their grandparents and placed in an orphanage when they were only 3 and 4 years old, before there was an Indian Child Welfare Act. After a year at the orphanage, Georgia went to live with a foster family where she was taught to eat properly, to behave, and to go to church. Georgia moved to a second foster family where she was told she was being kept for the money. She was physically and verbally abused, and molested by her foster brother when she was six years old. This was the age that Georgia stopped talking. Her third grade teacher told her that she would always be "stupid" and "would not learn." She hated the color of her skin.

Georgia later moved to Marie's home, a non-Indian woman who lived on an Indian

reservation for two months, and looked like Georgia's grandmother. Marie was a teacher and tried to interest Georgia in her Indian culture.

It was some time later before Georgia discovered she was a Spokane Indian. Georgia had thought she was a "Chewelah Indian" because she knew that was where she was born. Chewelah is a town located a few miles from the Spokane Reservation. "I didn't want to be Spokane Indian - I hated it! I thought Indians were what I had seen on TV! I was scared about the Indians."

Georgia had been told by foster families that her parents were dead. Marie told her they were still alive, and Georgia located her birth mother and began to write to her. They met in 1977, and Georgia learned that she was also Coeur d'Alene and Salish/Kootenai.

According to Georgia, she was "messed up for a lot of years... Finally, I came back to the [reservation] and stayed. It has taken 34 years to accept myself as being Indian...I know when I have kids, they won't be far from their culture. Today I can honestly say I am happy to be Spokane Indian."

Geneva went from foster home to foster home when she left the orphanage. She had no one try to interest her in her culture. Today, the sisters are in communication, but they do not talk about what happened to them. Geneva to this day does not like being Indian, and she now has a daughter that does not like being Indian either.

B. Post-ICWA

Child A is 6 years old. She was removed from her parents' care, found to be a dependent child, and made a ward of the State Court when she was 4 years old because her mother had left her with a babysitter and had not returned for her. A's father is a member of the Spokane Tribe,

however has not played an active role in his daughter's life. Both parents have substance abuse problems. At the time of placement by the State, A was not enrolled because her parents had not submitted proper documentation to the Tribe. Pursuant to the Indian Child Welfare Act, the state notified the Spokane Tribe. The Spokane Tribe intervened in the matter, and was immediately able to provide the state with a list of family members for potential placement and visitation resources, provided important family history, and made recommendations to assist the court with services for the family, including cultural resources for the child, and gathered paperwork necessary for enrollment, so that A would be eligible for the benefits of being an enrolled tribal member.

She was placed in a foster home on the west coast to be close to her mother while her mother was trying to straighten her life out. While the Tribe had hoped that the parents would engage in services and reunite with the child, they had not done so, and it became apparent that the parents were not in a position in their lives where this would happen. The Spokane Tribe brought the circumstances to the Tribe's Child Welfare Advisory Committee. The Tribe and the State Department of Children and Family Services decided that it was in the best interest of the minor child to be placed with her paternal grandparents who live on the Spokane Reservation. The Spokane Tribe also petitioned to transfer jurisdiction to the Spokane Tribal Court. The Tribe did petition and obtained jurisdiction over her case.

A is now placed with relatives who have loved and cared for her since her birth. She is surrounded by aunts, uncles, cousins and grandparents. She is being raised by family members who teach her the Spokane Indian ways, and to feel good about being Indian. She is frequently seen at Tribal events, dancing, playing with cousins, and other friends. She is part of our

community.

Had it not been for the Indian Child Welfare Act requiring notification to the Spokane Tribe, and allowing intervention in the proceedings, the State may never have inquired as to whether A was Indian in the first place, and since the State did not have contact with A's father, the State would not have known that the Tribe or the Spokane Indian side of her family existed as a resource. Child A may have been lost to the Spokane Tribe and her Spokane Tribal family in much the same way as Georgia and Geneva, and may never have obtained confidence in her Indian identity.

There is a big difference in the outcome of these two situations because of the ICWA. While A is not yet a grown woman, she is already proud to be an Indian, and has a strong sense of identity. Because the Spokane Tribe has many stories like A's, showing the difference that ICWA has made, the Spokane Tribe has a strong hope for a better future for our people.

III. CONCLUSION

ICWA has had a strong positive impact on the lives of Indian people, and on the health of Indian Tribes. We ask you to support the passage of S. 569 and H.R. 1082 with the changes listed above, and we ask specifically that the Committee keep in mind while considering amendments to the Indian Child Welfare Act that each and every one of our people mean the world to us, and that it is the absolute right of every Indian child to be an Indian.

The Spokane Tribe thanks the committee for taking the time to consider the Tribe's input and recommendations.

TESTIMONY OF REPRESENTATIVE TODD TIAHRT

Chairman Campbell, I am grateful for the opportunity to submit testimony to the Senate Committee on Indian Affairs regarding S. 569, the "Indian Child Welfare Act Amendments of 1997". I commend you for your leadership in holding this hearing and your endeavor to improve the lives of Native American children, birth parents and adoptive parents.

The purpose of my testimony is to communicate one strong central point to the Committee - I am opposed to S. 569, the Indian Child Welfare Amendments of 1997, as a means of improving ICWA on behalf of Native Americans. Furthermore, I am deeply concerned about the unintended consequences which would occur in the event of its passage.

The current problem caused by the ICWA is related to the ICWA's overreach and consequential violation of the constitutional rights of Native Americans. The solution to this overreach is not to expand the jurisdiction of ICWA but to restrict it.

Please consider the following conclusions regarding the current jurisdiction of the ICWA as written by Christine D. Bakeis in her law review article *The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe*. (Notre Dame Journal of Law, Ethics & Public Policy Vol 10 Issue No.2, 1996)

> "'To live under the American Constitution is the greatest political privilege that was ever accorded to the human race.' One of the promises of the American Constitution is that states will not enforce any law that abridges a citizen's privileges. The American Constitution also guarantees that states will not 'deprive any Person of life, liberty, or property, without due process of law.' The American constitution applies to 'all persons born or naturalized in the United States,' including American Indians. .....
>
> The ICWA purportedly concerns itself with the well-being of Indian tribes and children. Application of the ICWA, however, is denying parents of Indian children the privilege of living under the Constitution.
>
> .....Despite the American Constitution's promises, the ICWA requires states to treat parents of children with Indian blood differently than they treat other parents. Parents of children with Indian blood are not afforded the privilege of selecting their child's adoptive parents. Likewise they are not necessarily given a right to remain anonymous in an adoption proceeding."

Currently, ICWA is being applied to Americans solely on the basis of their race not on the basis of a willful connection to a tribe. The result - two groups of people are denied full protection of the law: Native American birth-parents and Native American children. A Native American birth parent has less freedom than other Americans to choose the adoptive parents for their child. Second, the Native American child's relationship to an adoptive parent is less secure.

Unfortunately, S.569 does not prevent application of the ICWA to a child or birth-parent based solely on his or her race. S.569 in fact strengthens the reach of the act beyond individuals who have a willful connection to a tribe. Following are the primary concerns I have regarding S.569:

- S. 569 would not restore the freedoms which are unintentionally infringed upon by the ICWA
- S. 569 would extend to Native American tribes complex rights of notice regarding child custody proceedings involving children and birthparents who have no willful connection to a tribe.
- S. 569 would expand the authority of ICWA to encompass **criminal penalties**. If any party other than the birth-parent concealed the fact that a child or birth parent was of any degree of Native American ancestry that individual (e.g. adoptive parent) could be imprisoned for a year.
- Although S. 569 *would* require a tribe to respond within a proscribed time in order to participate in or conduct the child custody proceeding, the bill states that failure on the part of the tribe to fulfill this obligation does not waive the rights of anyone else under ICWA. Therefore, this provision does not provide certainty. Any tribal member or any other tribe from whom the child may be descended could still **threaten the permanency of a birth-parent's decision and a child's adoptive placement.**
- Although S. 569 would establish a two year limit on the ability to overturn a decree of adoption, this two year time limit only applies to a birth-parent's ability to withdraw consent to the adoption. Therefore, if any other violation of the act occurs an adoption decree could still be invalidated beyond the two year period.

For these reasons, I cannot support S.569, and instead support the legislation introduced by Representative Deborah Pryce last year, H.R. 3275 - (104th Congress), in combination with my bill, the Voluntary Adoption Protection Act, H.R. 3156 - (104th Congress), which I am reintroducing today.

These two bills would address the overexpansive jurisdictional problem of the ICWA by restricting application of the Act to birth parents who have a political, social or cultural connection to a tribe (H.R. 3275) and restrict application of the ICWA to instances of involuntary child custody proceedings (H.R. 3156).

Please find enclosed with my written testimony a copy of the law journal article by Christine D. Bakeis referenced earlier, and a copy of my legislation introduced in the 104th Congress, H.R. 3156.

Once again, Mr. Chairman, thank you for giving me the opportunity to the provide the Committee with this written testimony.

104TH CONGRESS
2D SESSION

H. R. 3156

To amend the Indian Child Welfare Act of 1978 to exempt voluntary child custody proceedings from coverage under that Act, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 22, 1996

Mr. TIAHRT introduced the following bill; which was referred to the Committee on Resources

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A BILL

To amend the Indian Child Welfare Act of 1978 to exempt voluntary child custody proceedings from coverage under that Act, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Voluntary Adoption Protection Act".

SEC. 2. FINDINGS AND POLICY.

(a) FINDINGS.—Section 2 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1901) is amended—

(1) in paragraph (3), by inserting before the semicolon at the end the following: "and who would

be subject to involuntary removal from the Indian community";

(2) in paragraph (4)—

(A) by inserting "involuntary" before "removal"; and

(B) by striking "nontribal public and private" and inserting in lieu thereof "public"; and

(3) in paragraph (5), by inserting before the period at the end the following: "in the course of involuntary termination of parental rights".

(b) POLICY.—Section 3 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1902) is amended by inserting "involuntary" before "removal".

SEC. 3. DEFINITIONS.

Section 3 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903) is amended by adding at the end the following:

"(13) 'involuntary', with respect to a child custody proceeding, means the absence of a written consent by a parent or legal guardian (other than a tribal court) of the Indian child.".

SEC. 4. CHILD CUSTODY PROCEEDINGS.

(a) JURISDICTION.—Section 101 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1911) is amended—

(1) in subsection (a), by inserting "involuntary" before "child custody proceeding";

(2) in subsection (b)—

(A) by inserting "involuntary" before "foster care placement"; and

(B) by inserting "involuntary" before "termination of parental rights"; and

(3) in subsection (c)—

(A) by inserting "involuntary" before "foster care placement"; and

(B) by inserting "involuntary" before "termination of parental rights".

(b) COURT PROCEEDINGS.—Section 102 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1912) is amended—

(1) in subsection (a)—

(A) by inserting "involuntary" before "foster care placement" each place it appears; and

(B) by inserting "involuntary" before "termination of parental rights" each place it appears;

(2) in subsection (b)—

(A) by inserting "involuntary" before "removal";

(B) by inserting "involuntary" before "placement"; and

(C) by inserting "involuntary" before "termination of parental rights";

(3) in subsection (c)—

(A) by striking "a foster care placement" and inserting in lieu thereof "an involuntary foster care placement"; and

(B) by inserting "involuntary" before "termination of parental rights";

(4) in subsection (d)—

(A) by striking "a foster care placement" and inserting in lieu thereof "an involuntary foster care placement"; and

(B) by inserting "involuntary" before "termination of parental rights";

(5) in subsection (e), by inserting "involuntary" before "foster care placement"; and

(6) in subsection (f), by inserting "involuntary" before "termination of parental rights".

(c) VOLUNTARY TERMINATION OF PARENTAL RIGHTS.—Section 103 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1913) is amended to read as follows:

"SEC. 103. (a) Upon written consent by a parent or legal guardian (other than a tribal court) of an Indian

child to a voluntary child custody proceeding, this title shall thereafter not apply to any child custody proceeding involving the Indian child, and this Act shall thereafter not be the basis for determining jurisdiction over any child custody proceeding involving the Indian child.

"(b) For the purposes of subsection (a), written consent is irrevocable.".

(d) PETITION TO INVALIDATE ACTION.—Section 104 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1914) is amended—

(1) by inserting "involuntary" before "foster care placement";

(2) by inserting "involuntary" before "termination of parental rights"; and

(3) by striking "101, 102, and 103" and inserting in lieu thereof "101 and 102".

(e) ADOPTIVE PLACEMENT.—Section 105 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1915) is amended—

(1) in subsection (a), by inserting "involuntary" before "adoptive placement";

(2) in subsection (b)—

(A) by inserting "involuntary" before "foster care" each place it appears; and

(B) by inserting "involuntary" before "preadoptive placement" each place it appears; and

(3) in subsection (c)—

(A) by striking "a placement" and inserting "an involuntary placement"; and

(B) by striking "the placement" and inserting "the involuntary placement" each place it appears.

(f) PETITION FOR RETURN OF CUSTODY.—Section 106 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1916) is amended—

(1) in subsection (a)—

(A) by inserting "involuntary" before "adoption"; and

(B) by striking "foster care, preadoptive, or adoptive placement" and inserting in lieu thereof "involuntary foster care, involuntary preadoptive, or involuntary adoptive placement"; and

(2) in subsection (b) by striking "further".

(g) INFORMATION TO ADOPTED CHILD.—Section 107 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1917) is amended by inserting "involuntary" before "adoptive".

(h) IMPROPER REMOVAL OF CHILD.—Section 110 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1920) is amended—

(1) by striking "an Indian child custody proceeding" and inserting "an involuntary Indian child custody proceeding" in lieu thereof; and

(2) by striking "removed the child" and inserting in lieu thereof "removed an Indian child".

(i) PROTECTION OF PARENTAL RIGHTS.—Section 111 of the Indian Child Welfare Act of 1978 (25 U.S.C. 1921) is amended by inserting "involuntary" before "child custody proceeding".

SEC. 5. EFFECTIVE DATE.

The amendments made by this Act shall take effect as of January 1, 1992. Such amendments shall not apply with respect to any permanent placement of an Indian child for adoption occurring before the date of the enactment of this Act.

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THE INDIAN CHILD WELFARE ACT OF 1978: VIOLATING PERSONAL RIGHTS FOR THE SAKE OF THE TRIBE

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I. INTRODUCTION

"To live under the American Constitution is the greatest political privilege that was ever accorded to the human race."[1] One of the promises of the American Constitution is that states will not enforce any law that abridges a citizen's privileges.[2] The American Constitution also guarantees that states will not "deprive any person of life, liberty, or property, without due process of law."[3] The American Constitution applies to "[a]ll persons born or naturalized in the United States,"[4] including American Indians

In the late seventies, the United States' Congress began investigating child custody proceedings involving Indian children. These investigations culminated in Congress enacting the Indian Child Welfare Act of 1978 (ICWA).[5] The ICWA purportedly concerns itself with the well-being of Indian tribes and children. Application of the ICWA, however, is denying parents of Indian children the privilege of living under the Constitution

In the United States, parents enjoy certain rights concerning the upbringing of their children.[6] Despite the American Constitution's promises, the ICWA requires states to treat parents of children with Indian blood differently than they treat other parents. Parents of children with Indian blood are not afforded the privilege of selecting their child's adoptive parents.[7] Likewise

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1. RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 65 (Suzy Platt ed. 1989) (attributed to Calvin Coolidge, the White House, Dec. 12, 1924)
2. U.S. CONST. amend. XIV, § 1.
3. *Id.*
4. *Id.*
5. 25 U.S.C. §§ 1901-1963 (1994).
6. *See infra* notes 121-39 and accompanying text
7. *See infra* notes 140-57 and accompanying text

modest is that it does not challenge any deeply entrenched constitutional doctrines; its implementation requires no sweeping and unlikely emendations in our constitutional thinking. Unlike Fitzgerald's, my proposal involves an unfolding of the implications of traditional liberal theory, as stated by Mill, not the jettisoning of it. It retains faith in a version of the rule of law and supposes an ability to test, in the usual way, substantive state and federal laws regarding children for their constitutionality. Unlike Minow's, my proposal does not suggest that the proper objects of our concern might be something other than the individual, or challenge the notion that the Constitution parcels out only "negative," never "positive," rights. Unlike Woodhouse's, my proposal does not suggest any divergence from the principles of equality that liberalism at its best endorses. At the same time, unlike a thesis of "rugged" individualism my proposal would not have us set aside the moral obligations we have toward children, or have us, in Fitzgerald's words, "abandon [children] bereft of adult guidance, to foolish choices regretted in later life."[185] Since many choices that a child might make will not involve fundamental interests, and since many choices will involve interests that, while fundamental, do not evidently benefit the child, we cannot even anticipate a deluge of children's rights claims in the federal courts. Most importantly, my proposal would protect children's interests in the family, and would provide a basis for challenging state actions that treat children as less than fully human. The deep need parents have for their children is equalled only by the deep and demonstrable need children have for those whom they take to be "parents." The insult to the child, when the state intercedes to breach their strongest affiliations, is just as great as the insult to any adult.

In *Bowers v. Hardwick*, Justice Blackmun referred to the "fundamental interest all individuals have in controlling the nature of their intimate associations with others."[186] What I have tried to do here is to argue that there is no reason in the world not to understand this principle, properly restricted, to apply to children

185. Fitzgerald *Maturity*, *supra* note 8, at 33.
186. Bowers v. Hardwick, 478 U.S. 186, 206 (1986) (Blackmun, J., dissenting)

they are not necessarily given a right to remain anonymous in an adoption proceeding.[8] Thus, when Congress enacted the ICWA it took away personal liberties of men and women who have children with Indian blood.

The ICWA also demonstrates Congress' lack of respect for parents of Indian children. In fact, one of the best examples of such disrespect is the only ICWA case decided by the United States Supreme Court.[9] In *Mississippi Band of Choctaw Indians v. Holyfield*, unwed parents who were expecting twins decided it would be in the children's best interests to give them up for adoption. The parents selected the Holyfields as the family they wanted to adopt and raise their children.[10] Before the twins' birth the mother arranged to have them at the Gulfport Memorial Hospital, some two hundred miles away from the reservation.[11] After the twins birth, the parents consented to the adoption, and an adoption decree was entered in the state court.[12]

Two months later, however, the Indian tribe to which both parents belonged moved the court to vacate the adoption decree on the ground that under the ICWA exclusive jurisdiction was vested in the tribal court.[13] The trial court, respecting the great lengths that the twins' parents had gone to ensure that their children were born off the reservation and adopted by non-Indian parents, denied the tribe's motion.[14] The Supreme Court, on the other hand, disregarded the parents' wishes and found that "[t]ribal jurisdiction under [the ICWA] was not meant to be defeated by the actions of individual members of the tribe, for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves."[15] The court further illustrated its disrespect for the parents' choice by stating that "[p]ermitting individual members of the tribe to avoid tribal exclusive jurisdiction by the simple expedient of giving birth off the reservation would . . . nullify the purpose the ICWA was intended to accomplish."[16] This display

8. *See infra* notes 158-75 and accompanying text.
9. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
10. *Id.* at 37.
11. *Id.*
12. *Id.* at 37-38.
13. *Id.* at 38.
14. *In re* B.B., 511 So. 2d 918, 921 (Miss. 1987), *rev'd sub nom.* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
15. *Holyfield*, 490 U.S. at 49.
16. *Id.* at 52.

of disrespect for parents' wishes is not only disheartening, but unconstitutional.

This Article begins by considering some of the historical events that prompted Congress to enact the ICWA. Next, the Article examines whether the ICWA is accomplishing its purpose as stated by Congress. The Article then criticizes the ICWA as a violation of several persons' equal protection rights. The Article then argues that even if the ICWA is constitutional, because it is being applied inconsistently, congressional or judicial direction is needed. Finally, the Article offers a proposal to amend the existing law so that it will achieve the purpose for which it was enacted, without violating personal rights.

II. HISTORICAL BACKGROUND OF THE ICWA

Native Americans have a lengthy history of experiencing problems in preserving their cultural heritage.[17] Some believe that a policy of destroying Indian culture and tribal integrity, by removing Indian children from their families and tribal settings, was set even before the country became a nation.[18] In the nineteenth century, sending Indian children away to distant boarding schools to "civilize" and educate them was customary in this country. In this century, an even greater problem is the large number of Indian children that are removed from their homes for purposes of foster care and adoption.[19]

In 1978, after extended hearings over a number of years, Congress responded to the recommendations of the American Indian Review Commission and enacted the ICWA.[20] Congress made the following findings which formed the basis for the enactment of the ICWA:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as

17. Culture includes more than artifacts, language, and history. It also includes the members of a tribe. Thus, as the size of the tribe dwindles, its culture is threatened.
18. *See* Manuel P. Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused By Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51 (1979); Edward L. Thompson, *Protecting Abused Children: A Judge's Perspective on Public Law Deprived Child Proceedings and the Impact of the Indian Child Welfare Acts*, 15 AM. INDIAN L. REV. 1, 10 (1990).
19. Studies done in 1969 and 1974 indicated that in states with large Indian populations twenty-five to thirty-five percent of all Indian children were separated from their families and placed in foster homes or institutions. H.R. REP. No. 1386, 95th Cong., 2d Sess., at 9 (1978).
20. 25 U.S.C. §§ 1901-1963 (1994).

> trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, . . . have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[21]

The ICWA is premised on the government's recognition of Indian tribes as sovereign governments. As such, the tribes have a vital interest in deciding whether Indian children should be separated from their families. The ICWA presumes that protecting the Indian child's relationship to the tribe is in the child's best interest.[22]

Under the ICWA, the tribe has, with a few exceptions,[23] exclusive jurisdiction over child custody proceedings where an Indian child is residing or is domiciled on the reservation.[24] Also, even when an Indian child is not residing or domiciled on a reservation, the tribe still has a right to participate in any state court action.[25] In either case, parental rights may not be easily terminated. However, when they are, section 1915 of the ICWA addresses the adoptive placement of Indian children and provides that "a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."[26]

The ICWA provides that an "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian

21. *Id.* § 1901.
22. *See id.* § 1902; Chester County Dep't of Soc. Serv. v. Coleman, 372 S.E.2d 912, 914 (S.C. Ct. App. 1988), *rev'd*, 399 S.E.2d 773 (S.C. 1990), *cert. denied*, 500 U.S. 918 (1991).
23. The ICWA excludes from its coverage custody pursuant to divorce and placements based upon criminal acts committed by juveniles. 25 U.S.C. § 1903(1) (1994).
24. *Id.* § 1911(a).
25. *Id.* § 1911(b).
26. *Id.* § 1915(a).

tribe."[27] Using this definition a child need not be a part of a traditional Indian family to come within the reach of the ICWA. In fact, the child does not even have to be residing with his or her parent who is a member of an Indian tribe. This definition is so broadly framed that children who do not even know of their Indian ancestry can be subject to the rules of the ICWA.

III. IS THE ICWA SERVING ITS PURPOSE?

One author has described the ICWA as standards designed to protect culturally differing child rearing practices.[28] In its official declaration of policy, Congress declares:

> [I]t is the policy of this Nation *to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families* by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes . . .[29]

One of the purposes of the ICWA is arguably to fulfill the policy of this Nation. This Part questions whether the ICWA is promoting the policy of this Nation or working against it.

A. Is the ICWA in the Children's Best Interests?

"[I]t is the policy of this Nation to protect the best interests of Indian children . . ."[30] Although the ICWA has arguably aided in the maintenance of numerous Indian families, the ICWA does not necessarily "protect the best interests" of all Indian children. "The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest . . ."[31] All children, regardless of their race, deserve to be protected from abusive parents. Although it would ignore reality to suggest that ethnic and racial prejudices have been eliminated, such prejudices are impermissible considerations for removal of a child from a parent,[32] and should not be a permissible consideration for placement of a child either.

Although some claim that "placement of an Indian child in a non-Indian home is likely to result in severe psychological

27. *Id.* § 1903(4).
28. David Null, Note, In re Junious M.: *The California Application of the Indian Child Welfare Act*, 8 J. JUV. L. 74, 74 (1984).
29. 25 U.S.C. § 1902 (1994) (emphasis added).
30. *Id.*
31. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).
32. *Id.*

harm,"[33] others disagree. Psychiatrists who testified at the congressional hearings claimed that Indian children were being immersed in white culture without an opportunity to develop a vital Indian identity.[34] Testimony indicated that the lack of Indian identity creates serious problems during adolescence, because this is when Indian children begin experiencing racial discrimination and dating taboos.[35] This viewpoint has been adopted by at least one justice in a reported opinion.[36] Although this may be true, a lack of reliable data on interracial adoptions makes predictions regarding the potential harms to Indian children speculative at best.[37] Furthermore, there are others who argue that placement of an Indian child in a non-Indian home is not harmful to the child.

Professor Elizabeth Bartholet reviewed studies undertaken to assess how well transracial adoptions work from the adoptee's viewpoint.[38] The studies assessed the adoptees' adjustment, self-esteem, racial identity, and integration into the adoptive family as well as the community.[39] She found that the research shows with

> astounding uniformity . . . transracial adoption [is] working well from the viewpoint of the children and the adoptive families involved. The children are doing well in terms of such factors as achievement, adjustment, and self-esteem. They seem fully integrated in their families and communities yet have developed strong senses of racial identity. They are doing well as compared to minority children adopted inracially and minority children raised by their biological parents.[40]

Bartholet's views are also supported by Kim Forde-Mazrui, David Fanshel, and Joseph Westermeyer.[41] Forde-Mazrui questioned the wisdom of racial-matching policies and concluded that "ignoring race when placing a [minority] child . . . would avoid the concrete harms of current policies without subjecting the child to substantiated risks."[42] Fanshel's research suggests that Indian children raised in non-Indian homes develop normally in the cognitive and emotional areas.[43] Finally, Westermeyer's investigation revealed that Indian children raised in non-Indian homes had secure Indian cultural identities when they had relationships with other Indian children.[44] These results suggest that although leaving a child with his or her natural parents is normally preferable, Indian children can develop normally in non-Indian homes. Thus, claims that placement of Indian children in non-Indian homes is damaging to their well-being[45] may need to be re-examined. Regardless of which camp is correct, the ICWA is clearly harming Indian children in other ways. One such example is the heightened standard of proof required by the ICWA.

33. Robert J. McCarthy, *The Indian Child Welfare Act: In the Best Interests of the Child and Tribe*, 27 CLEARINGHOUSE REV. 864, 870 (1993).

34. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs on Problems that American Indian Families Face in Raising Their Children and How these Problems Are Affected by Federal Action or Inaction*, 93d Cong., 2d Sess. 45, 46 (1974) (statement of Dr. Joseph Westermeyer, Dept. of Psychiatry, University of Minnesota).

35. *Id.*

36. *See In re* Baby Boy D., 742 P.2d 1059, 1075 (Okla. 1985) (Kauger, J., concurring in part, dissenting in part) (finding that separation of Indian children from their Indian culture robs them of their cultural heritage and is detrimental to their later development), *cert. denied*, 484 U.S. 1072 (1988).

37. Margaret Howard, *Transracial Adoptions: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 535-36 (1984).

38. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991). Although Bartholet's article deals primarily with black interracial adoptions, its findings are applicable here as well.

39. *Id.*

40. *Id.* at 1209.

41. Michele K. Bennett, Comment, *Native American Children: Caught In the Web of the Indian Child Welfare Act*, 16 HAMLINE L. REV. 953, 971 (1993); Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925 (1994); Joseph Westermeyer, *The Apple Syndrome in Minnesota: A Complication of Racial-Ethnic Discontinuity*, 10 J. OPERATIONAL PSYCHOL. 134 (1979).

42. Forde-Mazrui, *supra* note 41, at 955.

43. Bennett, *supra* note 41, at 971.

44. Westermeyer, *supra* note 41, at 137-39.

45. *See supra* note 33 and accompanying text.

46. *In re* Winship, 397 U.S. 358, 364 (1970) (quoting Speiser v. Randall, 357 U.S. 513, 525-26 (1958)).

47. Santosky v. Kramer, 455 U.S. 745, 754-55 (1982).

1. Standard of Proof

In litigation, parties must take into account the margin of error in fact-finding that is always present.[46] "Standard of proof" functions to instruct the fact-finder as to the degree of confidence society has decided the fact-finder should have in the correctness of its conclusions for the particular adjudication.[47] In proceedings to terminate parental rights, the Supreme Court has held that before a state may sever the parent-child relationship, the due process clause of the Fourteenth Amendment requires

2. Adoptive Placement Preferences

The ICWA states a clear preference for placing children with Indian blood with Indian families. Specifically, section 1915(a) states:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.[69]

Because of these special requirements, "caseworkers and attorneys are sometimes reluctant to accept surrenders of, or terminate parental rights to, an Indian child."[70] Often, this results in Indian children languishing in foster care without permanency, planning, or adoption.[71] Furthermore, when employing placement preferences of the ICWA, courts may be forced to overlook the child's best interests.

In *In re S.E.G.*,[72] the foster parents of three Indian children petitioned to adopt them. The foster parents were not Indians.[73] The trial court found that the children had bonded with the foster parents and needed stability in their lives.[74] The trial court held that because the children needed stability in their lives and an Indian adoptive home was not available, good cause to deviate from the preferences expressed in the ICWA existed.[75]

The Minnesota Supreme Court disagreed. The supreme court found that good cause to place the children in a manner inconsistent with the ICWA had not been established and ordered the children to remain in foster care.[76] Thus, although a family who was willing to adopt all three siblings existed, the children were forced to remain in foster care simply because they were Indian children. Although such a result may be in the best interests of the tribe, it is not in the children's best interests. When two sets of parents who are willing to adopt Indian children exist, and one set is an Indian couple, it may be in the children's best interests to follow the preferences established by the ICWA. However, when, after a diligent search, a willing Indian family cannot be located, the children should not be forced to wait in parentless limbo for the sake of the tribe.

69. 25 U.S.C. § 1915(a) (1994).

70. Debra Ratterman Baker, *Indian Child Welfare Act*, 15 CHILDREN'S LEGAL RTS. J. 28, 28 (1995).

71. *Id.*

72. 521 N.W.2d 357 (Minn. 1994), *cert. denied*, 115 S. Ct. 935 (1995).

73. *Id.* at 359.

74. *Id.* at 360.

75. *Id.* at 361.

76. *Id.* at 366.

Another example of a court enforcing the ICWA without considering the children's best interests is *Mississippi Band of Choctaw Indians v. Holyfield*.[77] As discussed in Part I, the United States Supreme Court, without considering the parents' wishes or the children's best interests, strictly interpreted the ICWA to give the tribe exclusive jurisdiction regarding placement of the twins.[78] The Court did not consider the fact that at the time of its decision, the twins had been in the Holyfields' custody for over two years. Although the tribal court eventually exercised good wisdom and allowed the Holyfields to adopt the twins,[79] the fact remains that the Supreme Court applied the ICWA without any consideration for the bonding that had occurred between the twins and the Holyfields or the children's need for stability.

Furthermore, the argument that the placement preferences of the ICWA do not allow for consideration of the children's best interests is also supported by the large number of courts creating good cause to deviate from the ICWA's dictates.[80] As discussed in Part V.D.3 of this Article, many courts are disregarding the ICWA's clear placement mandates using the good cause exception. Such a phenomenon clearly indicates that the children's needs and interests must be considered.

Although Congress declared that our Nation's policy is "to protect the best interests of Indian children,"[81] the requirements of the ICWA work against, rather than toward the promotion of this policy. The heightened standard of proof that the ICWA forces courts to apply when deciding a termination case may conceivably be forcing Indian children to experience more abuse and neglect. Even if these children are removed from the abusive setting in a timely manner, the standards of the ICWA require them to remain in a state of parentless limbo longer than other children in the same situation. Such outcomes are clearly not promoting Congress' goal of protecting Indian children. Furthermore, the ICWA is likewise ineffective in aiding tribes

77. 490 U.S. 30 (1989). *See supra* notes 9-16 and accompanying text.

78. *Holyfield*, 490 U.S. at 52.

79. Marcia Coyle, *After the Gavel Comes Down*, NAT'L L.J., Feb. 25, 1991, at 1, 24.

80. *See infra* notes 262-305 and accompanying text.

81. 25 U.S.C. § 1902 (1994).

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B. Is the ICWA Being Used by and Aiding Tribes?

According to Robert J. McCarthy, director of the Indian Law Unit of Idaho Legal Aid Services, the ICWA is not having the impact Congress desired.[82] McCarthy reported that according to the Bureau of Indian Affairs:

> [T]he ICWA [has] not reduced the flow of Indian children into foster or adoptive homes. In fact, while the number of children of all races in substitute care decreased in the 1980s, the number of Indian children in care increased by 25 percent . . . . Although 63 percent of all Indian child foster placements are in homes in which at least one parent is Indian, less than half of placements made under state jurisdiction are in Indian homes.[83]

Although this may be true, one must ask if these statistics are in part the result of the tribe's failure to get involved. The ICWA provides that:

> An Indian tribe shall have jurisdiction exclusive as to any State over child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.[84]

It also provides that in "any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child . . . the Indian child's tribe [has] a right to intervene at any point."[85] Furthermore, the ICWA orders State courts to transfer foster care placement and termination of parental rights cases involving Indian children not domiciled or residing on an Indian reservation to tribal court absent one of the following situations: (1) "good cause" to the contrary; (2) objection by either parent; or (3) "declination by the tribal court of such tribe."[86] Thus, tribes are provided ample means of getting involved in cases involving Indian children. Despite this fact, tribes often fail to get involved.

82. *See* McCarthy, *supra* note 33.
83. *Id.* at 864.
84. 25 U.S.C. § 1911(a) (1994).
85. *Id.* § 1911(c).
86. *Id.* § 1911(b).

In a surprisingly high number of reported cases, although the tribe was given notice, the tribe chose not to intervene.[87] If, as Congress stated, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children,"[88] why are such a high number of tribes not getting involved? Although one could understand a tribe's hesitation to get involved in jurisdictions clearly recognizing the existing Indian family exception,[89] a majority of the cases where tribes failed to get involved are from jurisdictions clearly rejecting the existing Indian family exception.

For example, in *In re Bird Head*,[90] the trial court notified the Oglala Sioux Tribe's prosecutor that one of its children was involved in a neglected and dependent proceeding.[91] On the date of the adjudicatory hearing, no one appeared on the tribe's behalf.[92] Despite this fact, the trial court found that the child involved was an Indian child and continued the matter to allow the child's tribe to request a transfer of jurisdiction to tribal court.[93] Although someone from the tribe did file a petition for a change of venue, a tribal representative did not show up to argue the petition at the hearing.[94] Throughout the trial level proceedings and the appeals, the tribe failed to appeal the court's decision to retain jurisdiction.[95]

87. *In re* Stiarwalt, 546 N.E.2d 44 (Ill. App. Ct. 1989), *appeal denied*, 550 N.E.2d 564 (Ill. 1990); *In re* D.S., 577 N.E.2d 572, 573 (Ind. 1991); *In re* B.M., 532 N.W.2d 504, 505 (Iowa Ct. App. 1995); *In re* S.M., 508 N.W.2d 732, 733 n.1 (Iowa Ct. App. 1993); *In re* L.N.W., 457 N.W.2d 17, 18 n.2 (Iowa Ct. App. 1990); *In re* H.D., 729 P.2d 1234, 1235 (Kan. Ct. App. 1986); *In re* Johanson, 402 N.W.2d 13, 16 n.1 (Mich. Ct. App. 1986); *In re* C.E.H., 837 S.W.2d 947, 951 (Mo. Ct. App. 1992); *In re* M.E.M., 725 P.2d 212, 213 (Mont. 1986); *In re* R.W., 509 N.W.2d 237, 239 (Neb. Ct. App. 1993); *In re* Bird Head, 331 N.W.2d 785, 789 (Neb. 1983); B.R.T. v. Exec. Director of the Soc. Serv. Bd., 391 N.W.2d 594, 595 (N.D. 1986); *In re* Child of Indian Heritage, 529 A.2d 1009, 1013 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 543 A.2d 925 (N.J. 1988); *In re* R.N., 757 P.2d 1333, 1335 (N.M. Ct. App. 1988); *In re* S.C., 833 P.2d 1249, 1251 (Okla. 1992); *In re* Baby Boy D., 742 P.2d 1059 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988); *In re* K.L.R.F., 515 A.2d 33 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987); *In re* Baade, 462 N.W.2d 485, 488 (S.D. 1990); *In re* B.R.B., 381 N.W.2d 283, 284 (S.D. 1986).
88. 25 U.S.C. § 1901(3) (1994).
89. *See infra* notes 179-207 and accompanying text.
90. 331 N.W.2d 785 (Neb. 1983).
91. *Id.* at 787.
92. *Id.* at 788.
93. *Id.*
94. *Id.*
95. *Id.*

The same lack of interest is exhibited in *In re Maricopa County Juvenile Action No. JS-8287*.[96] In *Maricopa County*, the trial court notified the Pueblo Indian tribe that one of its children was involved in a dependency case.[97] The tribe did not get involved.[98] The court, however, continued to notify the tribe of all proceedings that took place over the next two years.[99] The tribe remained uninvolved. Once the foster parents petitioned to adopt the child, however, the tribe suddenly had an interest in the child.[100] The tribe disregarded the fact that the child had bonded with the foster-adoptive family during the two years that she had been with them, and petitioned the court to transfer jurisdiction of the proceeding to the tribal court.[101] If this child was such a "valuable resource," why did the tribe wait for over two years before getting involved in her life? At least one commentator blames tardy and sporadic tribal participation in state court ICWA proceedings on tribes' limited financial and technical resources.[102] Others imply that a lack of comprehensive training for both state and tribal social workers is partially to blame.[103]

Also, when tribes do get involved they do not always assert the ICWA's clear placement preferences. For example, after taking the case all the way to the United States Supreme Court, the tribal court involved in the *Holyfield* case allowed the non-Indian mother to adopt the twins.[104] Similarly, the tribe responsible for crossing several state lines to gain custody of the Keetso child[105] eventually awarded permanent custody to the non-Indian parents.[106] Although such decisions show the tribes' ability to recognize the importance of a child's bonding to those who care for it, these cases also reveal the tribes' willingness to release their "valuable resources."

96. 828 P.2d 1245 (Ariz. Ct. App. 1991).
97. *Id.* at 1246.
98. *Id.* ("[T]he Pueblo still was *considering* petitioning for transfer to tribal court . . . ." (emphasis added)).
99. *Id.*
100. *Id.* at 1246-47.
101. *Id.* at 1250.
102. Patrice Kunesh, *Building Strong, Stable Indian Communities Through the Indian Child Welfare Act*, 27 CLEARINGHOUSE REV. 753, 757 (1993).
103. Joseph A. Myers et al., *Adoption of Native American Children and the Indian Child Welfare Act*, 18 ST. CT. J. 17, 25 (1994).
104. Coyle, *supra* note 79, at 24.
105. *See infra* notes 140-47 and accompanying text.
106. Todd J. Gilman, *Baby Given to Couple by Navajo Court*, L.A. TIMES, Sept. 1, 1988, § 1, at 25.

Finally, although tribal utilization of the ICWA is unclear, one thing is clear: the ICWA is not aiding tribes.[107] Alaska is the only state that has reported the number of adoptions and out-of-home placements since the enactment of the ICWA. Out-of-home placements of Alaska Native children, who are considered Indian children under the ICWA, "have significantly increased since the passage of the ICWA."[108] The testimony of the spokesperson for Alaska Federation of Natives is illustrative:

> In 1987, 8 years after the passage of the Indian Child Welfare Act, the problems which the Act tried to rectify have worsened in the State of Alaska. The 1976 survey done by the Association on American Indian Affairs which ultimately led to the enactment of the Indian Child Welfare Act found that there was an estimated 393 Alaska Native children in State and Federal out-of-home placement. In 1986 that figure has risen to 1,010, which represents a 256-percent increase. During the same period of time, the total population of Alaska Native children increased by only 18 percent.
>
> As the figures indicate, the removal of our children from our homes and culture continues at a rate that far exceeds our population. The problems in Alaska continue to worsen for Native children.[109]

Although no other states have reported the number of Indian adoptions since the passage of the ICWA, it is doubtful that it is achieving the desired effect.

IV. EQUAL PROTECTION VIOLATIONS

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[110]

107. Myers et al., *supra* note 103, at 25.
108. *Id.*
109. *Oversight Hearings on the Indian Child Welfare Act: Hearing before the U.S. Senate Select Committee on Indian Affairs*, 100th Cong., 1st Sess. 10 (1987).
110. U.S. CONST. amend. XIV, § 1.

The Fourteenth Amendment was adopted to protect the rights of individuals against classifications based on race.[111] The United States Supreme Court has stated that "[c]lassifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category."[112] This statement appropriately describes the ICWA because the blood ties, or race of the child, dictates whether the ICWA applies. The ICWA does not consider whether a child with the appropriate amount of Indian blood is living with an Indian parent. Likewise, the ICWA does not consider whether the child is living, or has ever lived on an Indian reservation, or in an Indian community. The sole guiding factor is race. Thus, the ICWA can not be reconciled with the Fourteenth Amendment's guiding principle.

As early as 1879 this country recognized that a person born with Indian blood could avoid the reach of the federal Indian power by severing his or her tribal ties and assimilating into society.[113] In *United States v. Crook*, twenty-five Ponca Indians filed a writ of habeas corpus seeking release from their confinement on a reservation.[114] The court found that an Indian had a "God-given right to withdraw from his tribe and forever live away from it, as though it had no further existence."[115] Although this case has never been overruled, persons with Indian blood no longer have the right to act as though they have never belonged to a tribe.

In 1978, Congress, by enacting the ICWA, went against past Supreme Court decisions[116] and did specifically what the Constitution prohibits States from doing. Whereas States are not permitted to treat citizens differently, Congress disregarded the Fourteenth Amendment and enacted the ICWA, authorizing all States to treat parents of children with Indian blood differently. By so doing, Congress is effectively denying these parents their

111. Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." (citation omitted)).

112. *Id.*

113. *See* United States v. Crook, 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14,891).

114. *Id.*

115. *Id.* at 699.

116. *See* Loving v. Virginia, 388 U.S. 1 (1967) (holding that Virginia statute preventing marriages between persons solely on the basis of racial classifications could not stand); Hernandez v. Texas, 347 U.S. 475 (1954) (striking down a Texas law which discriminated against Mexican-Americans in jury selection); Strauder v. West Virginia, 100 U.S. 303 (1879) (striking down a West Virginia law that only permitted white males to serve as jurors).

"liberty" and "property"[117] rights without the process afforded to all other citizens. This continues today despite the Supreme Court's statement in 1981 that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment."[118]

The modern rule controlling equal protection analysis of national legislation on Indian affairs was set out by the Court in *Morton v. Mancari*.[119] In *Morton*, the articulated standard was close to a rational basis test:

> As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.[120]

The ICWA violates the standard set forth by the Court in at least two ways which are discussed below. However, before examining how parental rights are being violated by the ICWA, it is important to understand what rights parents have in regard to their children generally.

A. Parental Rights

1. Background of Parents' Rights Historically

Constitutional law scholar Gerald Gunther has written that the Supreme Court has "occasionally protected aspects of liberty even though they were not explicitly designated in the Constitution."[121] One of these rights is parental rights. Throughout most of history parents have been given a right to raise their child as they see fit. In Europe,

> when one was either a Catholic or a Jew, St. Thomas argue[d] that it would be an injustice to Jews if their children were to be baptized against their will, since they would lose their rights of parental authority over their children as soon as they were Christians.[122]

117. Although the Author does not believe that children should be treated as property, their treatment in this country is similar to property in some respects.

118. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982).

119. 417 U.S. 535 (1974).

120. *Id.* at 555. Since *United States v. Antelope*, 430 U.S. 641 (1977), the Court has not decided any significant Indian equal protection cases.

121. GERALD GUNTHER, CONSTITUTIONAL LAW 492 (12th ed. 1991).

122. Raphael T. Waters, *The Basis for the Traditional Rights and Responsibilities of Parents*, *in* PARENTAL RIGHTS: THE CONTEMPORARY ASSAULT ON

Likewise, the United States has traditionally upheld parents' rights to control the future of their children.[123]

The philosophical basis for parental rights have been described by one commentator as follows:

> Discovery of the order natural to the family and natural to civil society depends on a prior discovery of the nature of man and its essential properties. We are morally free about many things with the social order; for example, we are free about who we will marry, which society we shall live in, and who will govern our societies, as well as a host of other things. But there are other matters about which we are not morally free, and these have to be determined by an adequate study of the nature of each of the social bodies: the domestic and political societies most notably.
>
> Those who wish to impose an order based on the arbitrary decision of some minority, or even some majority, threaten the peace and freedom of every member of civil society. Above all, under such a social order, a few might temporarily find human happiness, but most members would discover what earlier civilizations found to their great regret, namely, that to live counter to that order best established by nature alone involves enormous cost in human terms.
>
> The enemies of the domestic society demand conformity whereby each person becomes an individual citizen existing solely for the sake of the welfare of the political group to which the family belongs. Although these enemies see the domestic unit standing in their way, human offspring need the family. They ought to be reared in love of the goods most fitting to their natures as persons since, as such, they have a value of their own and not as mere individuals disposable for the good of the social whole.
>
> Of what does education of the young consist? It is movement towards the acquisition of the intellectual and

TRADITIONAL LIBERTIES 13-29 (Stephen M. Krason & Robert J. D'Agostino eds., 1988).

123. Thompson, *supra* note 18, at 5 ("Parents have a natural and fundamental interest in the care, custody, and control of their children. Derived from common law, the care, custody, and control of one's child is a fundamental interest protected by . . . the United States and Oklahoma Constitutions."); Stan Watts, Note, *Voluntary Adoptions Under the Indian Child Welfare Act of 1978: Balancing the Interests of Children, Families, and Tribes*, 63 S. CAL. L. REV. 213, 247 (1989) ("Parents have the authority to make many important decisions affecting their children . . . . [H]istorically this parental power has been virtually unconstrained . . . .").

> moral virtues so that the child may become all that he ought to be and capable of all that he ought to do. The parents alone are sufficient guardians of this for their own child. Therefore, they alone have inalienable rights to develop that child to the perfection of full humanity.[124]

Based upon these beliefs, the Constitutional Framers, without explicitly mentioning parental rights, implicitly deemed parents to have rights concerning their children's upbringing when they drafted the Constitution.[125] Scholars all agree that "matters touching on natural parent-child relationships . . . are fundamental liberty and privacy interests protected by the Fourteenth Amendment."[126] This is evidenced by the fact that courts have long recognized "a constitutionally protected parental right to care and custody of children under the Fourteenth Amendment."[127] Courts have gone so far as to state: "The right to direct the upbringing of one's child 'is one of the most basic of all civil liberties.' "[128]

More specifically, this country has consistently upheld parents' rights to direct their children's education and religion, as well as their right to discipline their child.[129] The United States Supreme Court has frequently emphasized that parents' rights to control their children's futures have been deemed " 'essential,' 'basic civil rights of man' and '[r]ights far more precious than property rights.' "[130]

In 1923, the Supreme Court first held that a parent has a right to control his or her child's education.[131] Two years later, the Court reaffirmed this stance by stating that parents have a

124. Waters, *supra* note 122, at 37-38.

125. Thomas J. Marzen, *Parental Rights and the Life Issues*, *in* PARENTAL RIGHTS: THE CONTEMPORARY ASSAULT ON TRADITIONAL LIBERTIES *supra* note 122, at 44, 51.

126. Marian L. Faupel, *The "Baby Jessica Case" and the Claimed Conflict Between Children's and Parents' Rights*, 40 WAYNE L. REV. 285, 289 (1994). *See also* GUNTHER, *supra* note 121, at 492; Marzen, *supra* note 125, at 54; Thompson, *supra* note 18, at 5.

127. Marzen, *supra* note 125, at 54.

128. *In re* K.L.J., 813 P.2d 276, 279 (Alaska 1991) (quoting Flores v. Flores, 598 P.2d 893, 895 (Alaska 1979)).

129. *See* Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding parents' right to educate their children); Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding Amish parents' right to educate their children according to their religious beliefs); RESTATEMENT (SECOND) OF TORTS § 147 (1965) ("A parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education.").

130. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citations omitted).

131. *See Meyer*, 262 U.S. at 400.

liberty right "to direct the upbringing and education of children under their control."[132] In *Pierce* the Court balanced the right of parents to educate and raise their children against the state's interest in a homogeneous population, and found the parents' rights were more vital.[133] The Court stated that a "child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[134] The Court again reaffirmed parents' right to control their child's future in *Wisconsin v. Yoder*.[135] In *Yoder* the Court found that "[t]o be sure, the power of the parent, . . . may be subject to limitation . . . if it appears that parental decision will jeopardize the health or safety of the child,"[136] but permitted Amish families to remove their children from formal education after the eighth grade. Finally, American parents are also given a liberty right to discipline their children as they see fit.[137]

Parents maintain most of these rights even when they give their child up for adoption. In *Dickens v. Ernesto*, the New York Court of Appeals upheld a statute which allowed parents to express their preference that their child be raised in the religion of their choice, even though they were giving the child up for adoption.[138] The court found that a statute which granted birth parents the right to specify the religious affiliation of prospective adoptive parents did not violate the United States or New York Constitutions.[139]

132. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).
133. *Id.*
134. *Id.* at 535.
135. 406 U.S. 205 (1972).
136. *Id.* at 233-34.
137. RESTATEMENT (SECOND) OF TORTS § 147 (1965). Obviously, this discipline must be reasonable and must not harm the child. What is reasonable is determined by each state's law.
138. Dickens v. Ernesto, 281 N.E.2d 153 (N.Y.) (giving considerable weight to the wishes of the natural parents), *cert. dismissed*, 407 U.S. 917 (1972).
139. *Id.* at 156-57. New York is not the only state that considers the birth parents wishes regarding the religious affiliation of the adopting parents. Illinois, Maryland, Massachusetts, and Ohio have also considered the birth parents wishes when making adoption decisions. *See* Cooper v. Hinrichs, 140 N.E.2d 293 (Ill. 1957) (considering natural parents' wishes regarding the religious upbringing of their child); Frantum v. Dep't of Pub. Welfare, 133 A.2d 408 (Md.) (refusing to grant adoption where Catholic birth mother expressed desire for child to be raised a Catholic and child was placed with a Lutheran family), *cert. denied*, 355 U.S. 882 (1957); Purinton v. Jamrock, 80 N.E. 802 (Mass. 1907) (considering natural parents' wishes regarding the religious upbringing of their child); *In re* Doe, 167 N.E.2d 396 (Ohio Juv. Ct. 1956) (same).

When Congress enacted the ICWA it not only gave Indian tribes broader power to control the removal of its children, but also took away personal liberties of men and women who have a child with Indian blood. Thus, Congress effectively created two classes of parents: parents of children with Indian blood and all other parents. Under current law, a parent's rights vary depending upon the class to which they belong.

2. Examples of How Parents of Indian Children Rights Vary from Everyone Else's Rights

a. Selection of Adoptive Parents

In today's media hyped world, all Americans are aware of the fact that birth parents may choose the parents who will adopt and raise their child. Depending on the circumstances, it is not uncommon for the adoptive parents to pay for the birth mother's medical expenses and be present while she is giving birth. Although the right to choose who will adopt and raise a child is not a right enunciated in the Constitution, it is one that all Americans take for granted. It is also, unfortunately, a right which the ICWA took away from parents of children with Indian blood.

In 1987 Ms. Patricia Keetso, a Navajo woman, decided to give up her child for adoption.[140] She answered an advertisement in an Arizona newspaper and met the prospective adoptive couple, Mr. and Mrs. Richard Pitts.[141] After staying with the Pitts for several months, Keetso formed a close bond with the adoptive couple.[142] Mrs. Pitts even coached Keetso during labor and was present when the baby was delivered.[143]

Some time after the child's birth, tribal authorities contacted the child's grandmother who was living on a reservation.[144] According to a newspaper account:

> Keetso [the grandmother] said that tribal authorities had frightened her . . . into helping them spirit 8-month-old Allyssa Kristian Keetso from her natural mother, Patricia Keetso, and from the baby's would-be adoptive parents, Cheryl and Rick Pitts . . . . Keetso and tribal authorities took possession of the baby during a televised airport drama . . . . After they arrived in Arizona for a child custody hearing, the grandmother said that tribal authorities took the child away from her on Friday. Keetso said she

140. Joan Smith, *It Was a Setup*, S.F. CHRON., Apr. 17, 1988, at A1.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

> believes the baby is in the custody of a Navajo social worker, but does not know exactly where.[145]

The Navajo tribe never permitted the Pitts to adopt the Keetso baby, despite the natural mother's desire for them to do so.[146] Unfortunately, this scenario is not an isolated one.[147] The Keetso case is just one example of how Indian parents are not allowed to exercise the same rights as every other citizen of this country. If Patricia Keetso was not an Indian, such action would have never been permitted and the Pitts would have adopted her baby, as she desired.

For example, in *Kasper v. Nordfelt*, the Utah Court of Appeals held that a mother's choice to place her child with an adoption agency should not be disregarded simply because the paternal grandparents want to raise the child.[148] In *Kasper*, the court found that:

> Although the *Wilson* court opined that under some circumstances family relationships might be of such a nature that [grandparents'] application to adopt should be given consideration, . . . we do not find such a circumstance here, where the only living parent of the child deliberately and thoughtfully decided to place the child for adoption with an agency, and not with the paternal grandparents. We think the integrity of such a decision, involving a critically important parental right, must be preserved, not only for the stability and well-being of the child, but also for the protection of the adoption process and its purposes.[149]

Other courts across the nation have made rulings consistent with *Kasper* when faced with a similar situation.[150]

145. *Id.*
146. *Navajo Baby is Home For Good in San Jose*, S.F. CHRON., Apr. 24, 1988, at B3.
147. The attorney for the Navajos claimed the Navajo Nation is involved in seventy-five similar cases throughout the country. Smith, *supra* note 140, at A1.
148. Kasper v. Nordfelt, 815 P.2d 747, 749 (Utah Ct. App. 1991).
149. *Id.* at 747.
150. Hayes v. Watkins, 295 S.E.2d 556, 557 (Ga. Ct. App. 1982) (holding that grandparents do not have a right to intervene in adoption proceeding where at least one natural parent is alive and has consented); *In re* Benavidez, 367 N.E.2d 971, 974 (Ill. App. Ct. 1977) (finding that wishes of mother giving consent to nonrelative adoption should "legitimately be taken into account" because grandparents have no legal right to be preferred over adoptive parents); *In re* B.B.M., 514 N.W.2d 425, 429 (Iowa 1994) (allowing "grandparents to intervene where parents have voluntarily placed their child for an independent adoption . . . would be to elevate the grandparents' interests above the interests of the parents"); Christian Placement Serv. v. Gordon, 697 P.2d 148, 155 (N.M. Ct. App. 1985) (holding that grandmother may not intervene where only living parent had consented to adoption through an agency); *In re* Peter L., 453 N.E.2d 480, 482 (N.Y. 1983) (finding that recognizing right of grandmother to adopt grandchild where mother voluntarily surrendered the child to an agency for adoption would undermine the mother's decision).

In the Keetso case, Kathy Youngbear, a representative of the American Indian Center, argued that the Navajo tribe had the right to the return of the child:

> While Anglo culture holds parental rights sacred, Indians also value the rights of the extended family and the tribe. The Indian Child Welfare Act allows the tribe to intervene in adoption cases even against a mother's wishes. . . . The reporting has been through the eyes of a white couple whose poor baby is being taken away from them. In actuality it should be from an Indian woman's point of view: this baby's rights as a Navajo baby, a Navajo tribal member and a Navajo woman. These Indian kids are our future leaders.[151]

What Youngbear, and many supporters of the ICWA fail to recognize is that by common law, all Americans, regardless of their cultural background, have certain parental rights;[152] rights which the ICWA has effectively taken away from parents of Indian children.[153] Although Youngbear correctly argued that the Keetso case should have been viewed from an Indian woman's point of view, she missed the point. Both Youngbear and the Navajo tribe completely disregarded Keetso's wishes. Keetso was not forced to put her baby up for adoption and she did not make a rash decision to do so. Keetso made a thoughtful and deliberate choice to place her child with a non-Indian family. Under the ICWA, however, her wishes meant nothing. Therefore, the Navajo tribe did not have to consider, let alone honor, her decision to remove the child from the Indian culture.

American law states that a parent has the right to determine what is best for their child, and the community does not have a right to question that decision if the child is not directly harmed by it.[154] The Supreme Court has found that legislation dealing with Indians does not violate equal protection principles so "long as the special treatment can be tied rationally to the fulfillment

151. Smith, *supra* note 140, at A1.
152. *See supra* notes 121-39 and accompanying text.
153. "Tribal jurisdiction under [the ICWA] was not meant to be defeated by the actions of individual members of the tribe . . . ." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).
154. *See generally supra* notes 121-39 and accompanying text.

of Congress' unique obligation toward the Indians "[155] Congress enacted the ICWA "to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families "[156] At least one court has acknowledged that the ICWA "is an intrusion on [a] mother's ability to determine what is in the best interests of her child "[157] Because this intrusion can not be rationally tied to protecting the best interests of the child nor preserving the Indian family, the ICWA is unconstitutional

b. Anonymity

Although adoption is more prevalent and accepted today than it was in the past, giving a child up for adoption remains a rather taboo topic in the American society. This fact is recognized by permitting birth mothers and fathers to remain anonymous until the child turns eighteen. Furthermore, an ever-increasing number of teenage girls are faced with unplanned pregnancies. In such a situation, courts have recognized that not all teens can turn to their families.[158] When Congress enacted the ICWA it chose to disregard this fact. Under the ICWA, parents of children with Indian blood can be forced to tell their families of the birth to ensure compliance with the ICWA's placement preferences. An example of this is *In re Baby Girl Doe*.[159]

In *Baby Girl Doe*, the Montana Supreme Court held that a tribe's right to enforce statutory preferences for adoptive placement of an Indian child prevailed over the mother's statutorily recognized interest in anonymity.[160] In *Baby Girl Doe*, the baby girl's mother expressed her intention to relinquish her parental rights shortly after the birth.[161] After the statutorily required period of time, the mother filed an affidavit waiving all parental rights and consenting to an adoption without further notice.[162] In her affidavit, the mother indicated that she had been advised of the ICWA, "but for privacy reasons wished to remain anonymous and requested that the court not contact her family or

155. Morton v. Mancari, 417 U.S. 535, 555 (1974).
156. 25 U.S.C. § 1902 (1994).
157. *In re* Child of Indian Heritage, 543 A.2d 925, 930 (N.J. 1988).
158. *See, e.g.*, Bellotti v. Baird, 443 U.S. 622 (1979) (holding unconstitutional a Massachusetts statute that required either parental or court consent before a minor may have an abortion).
159. 865 P.2d 1090 (Mont. 1993).
160. *Id.* at 1095.
161. *Id.* at 1090. The mother did not have a specific family picked to adopt her daughter, but clearly expressed her intent to give her daughter to the Department of Family Services for adoptive placement. *Id.*
162. *Id.* at 1091.

Tribe concerning placement."[163] The district court concluded that the mother's relinquishment was knowingly and freely given and that the temporary order for protective services should remain in effect until the child was placed for adoption.[164] The court also notified the Chippewa Cree Tribe that a child eligible for enrollment had been placed for adoption.[165]

The Tribe moved to intervene and requested information regarding the identity of the mother and her family.[166] Because the Tribe's request conflicted with the mother's request for anonymity, the court ordered a hearing.[167] After considering both parties' arguments, the court concluded that the mother's right to anonymity outweighed the Tribe's interest in enforcing the statutory preferences for adoption.[168]

The Tribe appealed this order.[169] The Montana Supreme Court, relying on *Holyfield*, stated that the principle purposes of the ICWA were to "promote the stability and security of Indian tribes by preventing further loss of their children."[170] Therefore, the court found that giving "primary importance to the mother's request for anonymity would defeat the Tribe's right to meaningful intervention and possibly defeat application of the clear preference provided by statute for placement of [the child] with a member of her extended family."[171]

This case is yet another example of how the ICWA permits a tribe to completely disregard the parents' wishes and constitutional rights.[172] Americans would be outraged if all parents were forced to give up their right to privacy in this situation. Unplanned pregnancies remain such a taboo topic in this country that in most states even minors are permitted to have an abortion without their parents knowing.[173] Yet, because of the ICWA, the mother in *Baby Girl Doe* could have been forced to have her family find out not only that she was pregnant but that she had given birth and given the child up for adoption. All other American

163. *Id.* The mother also appeared in court and averred the same. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*
167. *Id.* at 1092.
168. *Id.*
169. *Id.*
170. *Id.* at 1095.
171. *Id.*
172. *See generally* Roe v. Wade, 410 U.S. 113, 153 (1973) (A woman's right to privacy was clearly set forth by Justice Blackmun in *Roe v. Wade* when he stated that the right of privacy is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").
173. *See generally* Bellotti v. Baird, 443 U.S. 622 (1979).

parents' request for anonymity would be honored—Indian parents' request should also be.

The ICWA permits tribes and courts to blatantly disregard a natural parent's deliberate and thoughtful decision to have their child adopted by a specific family of their choice. Even more frightening is the fact that under the ICWA courts and tribes can disregard a parent's conscious decision not to have their child raised in the same social setting to which they belong. Economically poor parents would likely be applauded if they placed their child for adoption with a financially stable, educated family in hopes of giving the child what they could not. The ICWA does not allow parents of children with Indian blood to do the same. Parents of children with Indian blood can not decide that they do not want their child to grow up on a reservation and place their child for adoption off of a reservation without the tribe's consent.[174] Courts have found that parents have certain constitutional rights regarding the upbringing of their children. One of these rights is the right to anonymously place the child for adoption with the family of their choice.[175] Because the ICWA effectively eliminates those rights for a specific class, parents of children with Indian blood, without any rational tie to Congress' obligation to the Indians, the ICWA is unconstitutional. Furthermore, and more importantly, the ICWA is violating the rights of the innocent children involved.

B. Neglected and Abused Indian Children

The race classification created by the ICWA is harming Indian children in two ways. First, as previously discussed in Part III.A.1. of this Article, most states use "clear and convincing evidence" as their standard of proof in termination of parental rights cases. The ICWA, however, uses the "beyond a reasonable doubt" standard of proof in termination of parental rights cases. This elevated standard of proof is potentially causing Indian children to endure more neglect and abuse for the sake of their tribe's future.

Furthermore, once this heightened standard of proof has been satisfied, Indian children may be forced to remain in an abusive setting longer than children of other racial backgrounds because of concern regarding the mixing of children with parents — be they foster or adoptive — of a different race. As previously discussed in Part III.A. of this Article, experts disagree on

174. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989).
175. Kasper v. Nordfelt, 815 P.2d 747, 747 (Utah Ct. App. 1991).

the question of whether placement of Indian children in non-Indian homes is harmful to their mental well-being. Regardless of what experts think, the fact is that the ICWA mandates that:

> In any foster care . . . placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with-
>
> (i) a member of the Indian child's extended family;
>
> (ii) a foster home licensed, approved, or specified by the Indian child's tribe;
>
> (iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
>
> (iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.[176]

Thus, when it becomes clear that a child should no longer remain in an abusive setting, the child will either remain in that setting until a placement which satisfies the mandates of the ICWA is available, or be moved from one foster care setting to another when a placement which satisfies the ICWA is open. Both options are equally unpalatable.

The United States Supreme Court has held that children should not be subjected to adverse legal discrimination because of factors beyond their control.[177] The race of a child's parents and the culture into which a child is born is clearly a factor beyond a child's control. The high standard imposed by the ICWA is denying Indian children equal protection under the law. Thus, the ICWA is arguably violating the rights of parents and children. However, even if the Supreme Court were to somehow justify the classifications and unequal treatment of the ICWA, the Court would have to recognize and deal with the inconsistent application of the Act.

V. Is the ICWA Being Applied Consistently?

C. Steven Hager, a staff attorney with Oklahoma Indian Legal Services, wrote that "[i]f *Holyfield* stands for anything, it is that the states cannot create their own definitions for the ICWA."[178] Six years after *Holyfield*, the only Supreme Court opinion to address the law set forth in the ICWA, state courts have

176. 25 U.S.C. § 1915(b) (1994).
177. Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (holding discrimination against illegitimate children unconstitutional).
178. C. Steven Hager, *Prodigal Son: The "Existing Indian Family" Exception to the Indian Child Welfare Act*, 27 Clearinghouse Rev. 874, 879 (1993) (citing *Holyfield*, 490 U.S. at 42-54).

continued creating their own definitions for several of the terms contained in the ICWA. This is significant for two reasons. First, it indicates that the ICWA is not being applied consistently. Second, it signifies that the language of the ICWA is anything but clear, and the inconsistent application will continue until the United States Supreme Court rules on emerging definitions, or Congress amends the ICWA with more explicit definitions.

A. The Existing Family Exception

In 1982, the Supreme Court of Kansas created what is commonly known as the existing Indian family exception.[179] Baby Boy L. was the illegitimate son of a non-Indian mother, and a five-eighths Kiowa Indian father, Carmon Perciado.[180] On the day of Baby Boy L.'s birth, his mother executed a consent to adoption which was limited to the adoptive parents named therein.[181] On the same day, the adoptive parents filed a petition for adoption.[182] The court granted the adoptive parents temporary custody of Baby Boy L. and served notice of the adoption proceeding on Perciado at the Kansas State Industrial Reformatory.[183] Perciado answered the adoption petition requesting that he be found a fit parent, that his parental rights not be severed, and that he be given permanent custody of his son.[184]

At trial, the court found that because Perciado was an enrolled member of the Kiowa Tribe, the ICWA might apply.[185] Therefore, the court continued the trial to allow notice to be provided to the Kiowa Tribe.[186] The Kiowa Tribe responded by filing petitions to intervene, to change temporary custody, and to transfer jurisdiction.[187] The Kiowa Tribe also enrolled Baby Boy L. as a member of the tribe against the express wishes of his mother.[188] After finding that the ICWA did not apply, and that Perciado was an unfit parent, the trial court granted the adoption of Baby Boy L. to the adoptive parents.[189]

179. *In re* Baby Boy L., 643 P.2d 168 (Kan. 1982), *aff'd sub nom.* Kiowa Tribe v. Lewis, 777 F.2d 587 (10th Cir. 1985), *cert. denied*, 479 U.S. 872 (1986).
180. *Id.* at 172.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 173.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Id.* at 173-74.

The Supreme Court of Kansas affirmed the trial court's conclusion that the ICWA did not apply to this case.[190] In making its decision, the Kansas Supreme Court considered the legislative history and the language of the ICWA.[191] The court found that Congress intended to maintain existing family relationships and concluded that Congress did not intend to "dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother."[192] The court found that the underlying thread which runs throughout the ICWA is the concern with the removal of Indian children from an existing family unit and the resultant breakup of the Indian family.[193] Since the Kansas Supreme Court's holding in *Baby Boy L.*, other states have considered its reasoning with varying degrees of support.

Prior to the Supreme Court's decision in *Holyfield*, nine state appellate courts considered using the reasoning set forth by the Kansas Supreme Court in *Baby Boy L.*[194] Of the nine, four adopted the existing family exception and five rejected it.[195] Although *Holyfield* purportedly implicitly overruled the existing Indian family exception,[196] states continue to apply the excep-

190. *Id.* at 174.
191. *Id.* at 175 (citing 25 U.S.C. §§ 1901(4), 1911(a), 1912(d)-(f), 1914, 1916(b), 1920, 1922 (1978)).
192. *Id.*
193. *Id.*
194. The jurisdictions rejecting the reasoning of *Baby Boy L.*, do so mainly because of their belief that the plain meaning of the statute does not require the exception. *See In re* N.S., 474 N.W.2d 96, 101 n.6 (S.D. 1991) (Sabers, J., concurring) ("There is simply no statutory requirement for [a child] to have been born into an Indian home or an Indian community in order to come within the provisions of [the] ICWA, however much one might believe 25 U.S.C. § 1903(4) *should have been* written that way. No amount of probing into what Congress 'intended' can alter what Congress said, in plain English . . ."). Others have found that a mother and child constitute an "Indian family." *In re* D.S., 577 N.E.2d 572, 574 (Ind. 1991).
195. Indiana, Missouri, Oklahoma, and South Dakota adopted the existing family exception. *See In re* T.R.M., 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re* S.A.M., 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re* Baby Boy D., 742 P.2d 1059, 1064 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988); Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987). Arizona, California, New Jersey, Utah, and Washington rejected the existing family exception. *See In re* Coconino County Juvenile Action No. J-10175, 736 P.2d 829 (Ariz. Ct. App. 1987); *In re* Junious M., 193 Cal. Rptr. 40 (Cal. Ct. App. 1983); *In re* Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); *In re* Halloway, 732 P.2d 962 (Utah 1986); *In re* S.B.R., 719 P.2d 154 (Wash. Ct. App. 1986).
196. Hager, *supra* note 178, at 882.

tion today. In fact, after *Holyfield*, some states changed their prior holdings to recognize the existing family exception which it had previously rejected.[197]

For example, prior to *Holyfield* the Washington Court of Appeals rejected the existing family exception.[198] In 1992, however, the Washington Supreme Court refused to apply the ICWA absent an existing Indian family.[199] In *Crews*, a mother who had Indian bloodlines, but was not a member of a tribe, voluntarily gave her child up for adoption.[200] After the adoption was final, the mother sought to become a member of the Choctaw Nation for the express purpose of invoking the ICWA to secure her child's return.[201] The Washington Supreme Court found that an "Indian family" did not exist at the time the mother surrendered the child for adoption because she was not a member of a recognized tribe at that time.[202] Therefore, the concurrence noted, the child was not an "Indian child" under the Act at the time of adoption.[203] Although the Washington Supreme Court stated that its holding in *Crews* is limited to "the narrow circumstances presented by the facts of this case," the fact remains that the court is willing to use the exception in certain situations.[204] Washington is just one of the states that has refused to apply the ICWA absent an existing Indian family. As it currently stands, Alabama, California, Kansas, Louisiana, Missouri, and Oklahoma also recognize the existing Indian family exception to the ICWA.[205] Thus, the Supreme Court's decision in *Holyfield* did not decrease the number of states applying the existing Indian family exception to the ICWA.

Until the Supreme Court or Congress decides whether the ICWA was meant to apply to children who are not a part of an existing Indian family, states will continue to apply the ICWA discordantly. Unfortunately, it does not appear that either the

197. Both California and Washington rejected the existing family exception before *Holyfield*, but currently accept it. *See infra* notes 198-205 and accompanying text.
198. *In re* S.B.R., 719 P.2d at 154.
199. *In re* Crews, 825 P.2d 305, 307 (Wash. 1992).
200. *Id.*
201. *Id.*
202. *Id.* at 310.
203. *Id.* at 312-13 (Andersen, J., concurring).
204. *Id.* at 311.
205. *See* S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re* Lindsay C., 280 Cal. Rptr. 194 (Cal. Ct. App. 1991); *In re* Baby Boy L., 643 P.2d 168, 175 (Kan. 1982); Barbry v. Dauzat, 576 So. 2d 1013 (La. Ct. App.), *cert. denied*, 578 So. 2d 136 (La. 1991); *In re* S.A.M., 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re* S.C., 833 P.2d 1249, 1254-55 (Okla. 1992).

Supreme Court or Congress will resolve the issue of the existing Indian family exception to the ICWA anytime soon. In June of 1993, a child's would-be adoptive parents appealed to the Supreme Court suggesting that a division existed in the states regarding the existing Indian family exception and asking the Court to rule on the validity of the exception.[206] The Court, however, declined to grant certiorari.[207] Thus, a person's rights, or lack thereof, will continue to vary, depending on which state is interpreting *Holyfield*'s application to the ICWA.

B. Determining when the Right to Revoke Voluntary Consent to Termination of Parental Rights and Adoption Ends

The ICWA provides:

> In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.[208]

This section of the ICWA has been interpreted in two very distinct ways. Some courts find that termination and adoption proceedings are two distinct proceedings; therefore when a final decree of termination is entered, the parent is not entitled to revoke their consent before the adoption decree is entered.[209] Other jurisdictions, however, permit that parents of an Indian child may revoke their consent at any time prior to the final adoption decree, whether or not a final decree of termination exists.[210]

The majority of the jurisdictions addressing this issue have held that a parent's right to withdraw their voluntary consent expires when the final order terminating parental rights is

206. Swenson v. Oglala Sioux Tribe, 62 U.S.L.W. 3119 (U.S. June 14, 1993) (No. 93-18) (petition for cert. filed).
207. Swenson v. Oglala Sioux Tribe, 114 S. Ct. 173 (1993).
208. 25 U.S.C. § 1913(c) (1994).
209. *In re* J.R.S., 690 P.2d 10 (Alaska 1984); *In re* Kiogima, 472 N.W.2d 13 (Mich. Ct. App. 1991), *cert. denied*, 502 U.S. 1064 (1992); B.R.T. v. Exec. Director of Soc. Servs. Bd., 391 N.W.2d 594, 599 (N.D. 1986); *In re* Crews, 825 P.2d 305, 311 (Wash. 1992).
210. *In re* Pima County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re* K.L.R.F., 515 A.2d 33 (Pa. Super. Ct. 1986), *appeal dismissed*, 533 A.2d 708 (Pa. 1987).

entered.[211] In *Kiogima*, the mother of three Indian children contacted DSS and told them that she wanted to release her children for adoption.[212] Four days later, at a hearing held to execute a release of her parental rights, the mother appeared with her attorney and signed the release.[213] A final order terminating the mother's parental rights was entered the same day.[214] Before the order was entered, however, the court informed the mother that "she had a right to request a rehearing within [twenty] days or to appeal within [twenty-one] days after an order was entered terminating her parental rights."[215] Over six months later, the mother petitioned the court to set aside the order of termination, arguing that pursuant to the ICWA she had an unqualified right to revoke her release at any time prior to adoption.[216] The Michigan Court of Appeals adopted the reasoning of the supreme courts of Alaska and Nebraska and held that the mother's right to withdraw her consent expired twenty-one days after the final order terminating her rights was entered.[217] The court quoted with approval, the Alaska Supreme Court's explanation that section 1913(c) applies to two types of consent: "a consent to termination of parental rights or a consent to adoptive placement."[218] The court went on to say that:

> A consent to termination may be withdrawn at any time before a final decree of termination is entered; a consent to adoption at anytime before a final decree of adoption. If Congress had intended consents to termination to be revocable at any time before entry of a final decree of adoption, the words "as the case may be" would not appear in the statute.[219]

A minority of jurisdictions disagree with the Alaska Supreme Court's line of reasoning.[220] For example, in *In re K.L.R.F.*, the

211. Five states have addressed this issue: Alaska, Arizona, Michigan, North Dakota and Pennsylvania. Of the five, three have held that a parent's right to withdraw their voluntary consent expires when the final order terminating parental rights is entered. *In re* J.R.S., 690 P.2d at 10; *In re* Kiogima, 472 N.W.2d at 13; *B.R.T.*, 391 N.W.2d at 599.
212. *In re* Kiogima, 472 N.W.2d at 13.
213. *Id.*
214. *Id.*
215. *Id.* at 14.
216. *Id.* at 13-14.
217. *Id.* at 15-16.
218. *Id.* at 15 (quoting *In re* J.R.S., 690 P.2d 10, 13 (Alaska 1984)).
219. *In re* J.R.S., 690 P.2d at 14.
220. *In re* Pima County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); *In re* K.L.R.F., 515 A.2d 33 (Pa. Super. Ct. 1986), *appeal dismissed* 533 A.2d 708 (Pa. 1987).

court found that because Pennsylvania law "establishes that consent to adoption may be withdrawn at any time before the entry of the final decree of adoption,"[221] the mother could withdraw her consent even though her parental rights had already been terminated. The Pennsylvania court approvingly quoted the Arizona Court of Appeals' statement that "[w]hen an Indian child within the purview of the Act is involved, adoption agencies and prospective adoptive parents must be held to assume the risk that a parent such as appellant might change her mind before the adoption is finalized."[222]

The two interpretations of section 1913(c) are creating unnecessary stress for all parties involved in an adoption proceeding regarding an Indian child. The prospective adoptive parents are forced to wait in nervous anticipation, praying that the natural parent who consented to termination of their parental rights will not revoke their consent before a final adoption decree is ordered. At the same time, in a different state, a natural parent may be heartbroken upon discovering that when they consented to termination of their parental rights they effectively consented to the adoption—despite the ICWA's promise of the right to withdraw their consent "for any reason" prior to the entry of a final decree of adoption. Until the Supreme Court rules on the propriety of the two distinct interpretations of section 1913(c), adoptive parents, natural parents, and the children involved will continue to suffer from the variance. Such a result is unwarranted.

C. Determining who is an Indian

Before the terms of the ICWA will be applied, the child whose placement is at issue must be an "Indian child." The ICWA does not apply merely because the children are "Indian."[223] The ICWA applies only when there is evidence establishing that the child is an "Indian child' as defined in the act.[224] An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe."[225]

221. 515 A.2d at 37.
222. *Id.* at 38 (quoting *In re* Pima County Juvenile Action No. S-903, 635 P.2d at 192).
223. *In re* Stiarwalt, 546 N.E.2d 44, 47 (Ill. App. Ct. 1989), *appeal denied* 550 N.E.2d 44 (Ill. 1990).
224. *Id.* at 48.
225. 25 U.S.C. § 1903(4) (1994).

The ICWA, however, contains no definition of membership in an Indian tribe.

Under the ICWA each Indian tribe has sole authority to determine its membership criteria, and to decide who meets those criteria.[226] Formal membership requirements differ from tribe to tribe, as does each tribe's method of keeping track of its own membership.[227] For example, the Yankton Sioux Tribe requires applicants be one-fourth Indian and of that one-fourth, one must be one-eighth Yankton Sioux.[228] Furthermore, the remaining one-eighth must be Indian blood of a federally recognized tribe.[229] Thus, when a woman whose father was a full-blooded Ponca Indian and whose mother was one-half Yankton Sioux and one-half Caucasian, attempted to enroll her children (whose father was Caucasian), the Yankton Sioux rejected the application because the Ponca tribe had been dissolved and therefore her children did not meet the tribe's blood requirements.[230]

Tribes may also have various methods of keeping track of their members. There is no one method of proving tribal membership. Thus, courts are permitted to make this determination as they see fit. The Guidelines, however, state that

> [e]nrollment is not always required in order to be a member of a tribe. Some tribes do not have written rolls. Others have rolls that list only persons that were members as of a certain date. Enrollment is the common evidentiary means of establishing Indian status, but is not the only means nor is it necessarily determinative.[231]

Despite the Guidelines, some jurisdictions implicitly require enrollment,[232] while others do not.[233] Some courts accept testimony of a representative of the tribal government as probative

226. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n.32 (1978); *In re* B.W., 454 N.W.2d 437, 446 (Minn. Ct. App. 1990) ("[I]t is essential to the purposes of the ICWA to allow appropriate tribal authorities to determine these matters according to tribal law, customs and mores best known to them.")
227. *Martinez*, 436 U.S. at 72 n.32.
228. *In re* J.L.M., 451 N.W.2d 377, 384 (Neb. 1990).
229. *Id.* at 385.
230. *Id.* at 384-85.
231. Guidelines, *supra* note 52, at 67,586.
232. *In re* Baby Boy W., 831 P.2d 643, 647 (Okla. 1992); *In re* Quinn, 881 P.2d 795, 801 (Or. 1994) (finding that the child was not an Indian child because neither father nor child was an enrolled member of an Indian tribe when the mother consented to the child's adoption); *In re* Hunter, 888 P.2d 124, 125-26 (Or. Ct. App. 1995) (same); *In re* B.R.B., 381 N.W.2d 283, 284 (S.D. 1986) (refusing to accept mother's claim that she was a member of the Cheyenne River Sioux Tribe).

evidence of membership.[234] Others reject affidavits stating that a person is a member of the tribe.[235] For example, some courts require an unwed Indian father to acknowledge and establish paternity before declaring the child an Indian child. In *In re Maricopa County Juvenile Action No. A-25525*,[236] the Caucasian mother was uncertain of the paternity of her child, but told the adoption agency that it might be the child of an Indian.[237] Edmund Jackson, an Indian tribe member, was contacted and told that he could be the baby's father.[238] Jackson went to see the baby but did not acknowledge paternity.[239] The adoption agency later filed a petition to terminate Jackson's parental rights alleging Jackson had abandoned the child.[240] The petition was granted.[241]

Over a year later, Jackson's tribe moved to intervene in the adoption proceeding.[242] The tribe alleged that the court had failed to comply with the ICWA placement preferences, claiming that the child was an Indian child.[243] Six days later Jackson acknowledged his paternity of the child.[244] The trial court found that the tribe's, as well as the father's, interest came too late, and concluded that good cause to deviate from the ICWA placement preferences existed because the child had been with the adoptive mother for almost three years.[245]

On appeal, the Arizona Court of Appeals first questioned whether the baby was an Indian child.[246] The court found that the trial court should not have applied the ICWA unless evidence established that the child was indeed an Indian child.[247] The court held that because the ICWA's definition of "parent" does

233. *In re* Baby Boy Doe, 849 P.2d 925, 930 (Idaho) ("There is no requirement that a tribe must make a conclusive determination of a child's eligibility for membership in the tribe as proof that the child is an Indian child."), *cert. denied sub nom.* Swenson v. Oglala Sioux Tribe, 114 S. Ct. 173 (1993).
234. *In re* J.L.M., 451 N.W.2d at 387; *In re* Angus, 655 P.2d 208, 212 (Or. Ct. App. 1982), *cert. denied*, 464 U.S. 830 (1983).
235. *In re* Quinn, 881 P.2d at 801.
236. 667 P.2d 228 (Ariz. Ct. App. 1983).
237. *Id.* at 230.
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.* at 231.
245. *Id.*
246. *Id.* at 232.
247. *Id.* at 232-33.

not include unwed fathers who fail to acknowledge and establish paternity, the trial court should not have applied the ICWA.[248]

This same line of reasoning has been used in other states as well.[249] For example, in *In re Baby Boy D.*, a seventeen-year-old non-Indian female was pregnant with a nineteen-year-old Indian male's child.[250] The male knew that the female was pregnant with his child but did not make any effort to assist the mother in any way.[251] The mother told the father that she intended to give the baby up for adoption, and the father did not object.[252] Two months after the child was born, however, the father filed suit claiming his rights should not have been terminated under the ICWA.[253]

The court found that although the father was a registered Indian, the child was not an Indian child because the father had not acknowledged or attempted to establish paternity.[254] Thus, in Arizona and Oklahoma, having a child with Indian blood is meaningless until and unless the father acknowledges paternity.[255]

On the other hand, some jurisdictions have found that regardless of any acknowledgement of paternity, if a child has Indian blood, it is an Indian child under the ICWA.[256] In *In re N.S.*, the father never acknowledged paternity in any way, but because the mother told the court that the baby's father was one-fourth Indian, the court found that N.S. was an Indian child.[257]

Courts are also inconsistent in decisions regarding when a parent must enroll in an Indian tribe to invoke the ICWA. In *In re H.D.*,[258] the mother did not apply for tribal membership until a court date for termination of her parental rights had been set. Although the tribe did enroll her as a member, this enrollment occurred after the court had terminated her parental rights.[259]

248. *Id.*
249. S.A. v. E.J.P., 571 So. 2d 1187, 1189-90 (Ala. Civ. App. 1990); *In re* Child of Indian Heritage, 529 A.2d 1009, 1014 (N.J. Super. Ct. App. Div. 1987), *aff'd*, 543 A.2d 925 (N.J. 1988); *In re* Baby Boy D., 742 P.2d 1059, 1064 (Okla. 1985), *cert. denied*, 484 U.S. 1072 (1988).
250. *In re* Baby Boy D., 742 P.2d at 1061.
251. *Id.*
252. *Id.*
253. *Id.*
254. *Id.* at 1064.
255. *Id.*; *In re* Maricopa County Juvenile Action No. A-25525, 667 P.2d 228, 232-33 (Ariz. Ct. App. 1983).
256. *See In re* N.S., 474 N.W.2d 96, 98-99 (S.D. 1991).
257. *Id.* at 99.
258. 729 P.2d 1234, 1237 (Kan. Ct. App. 1986).
259. *Id.*

Nonetheless, on appeal, the court found that the children were indeed Indian children to whom the ICWA applied even though their mother was not an enrolled member of the tribe when the case was heard.[260] In contrast, in *In re Johanson*,[261] when the mother enrolled herself and her son in the Cherokee nation after the order terminating her parental rights was entered, the court held that the fact that the child had "Indian heritage" during the proceedings did not qualify him as an Indian child under the ICWA.

Once again, application of the ICWA relies not on objective factors, but on each state's subjective interpretation of it. Deciding who is an Indian, a decision which should be simple, varies depending only on the jurisdiction deciding the case. Such a result is clearly unconstitutional. However, until Congress, or the Supreme Court, produces some guidelines as to what is or is not necessary to establish eligibility for tribal membership, due process rights will continue to be violated.

D. Determining when "Good Cause" to Deviate from the ICWA Exists

The ICWA provides that:

> In any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, *in the absence of good cause to the contrary*, shall transfer such proceeding to the jurisdiction of the tribe.[262]

It also provides that:

> In any [foster care, preadoptive placement, or] adoptive placement of an Indian child under State law, a preference shall be given, *in the absence of good cause to the contrary*, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.[263]

The ICWA does not define the term "good cause." Therefore, courts are permitted to look to other sources for guidance in making the "good cause" determination. What constitutes "good cause" is unique to the individual facts of each case. Not

260. *Id.* at 1241.
261. 402 N.W.2d 13, 16 (Mich. Ct. App. 1986).
262. 25 U.S.C. § 1911(b) (1994) (emphasis added).
263. *Id.* § 1915(a) (emphasis added). Subsection (b) enumerates four placement preferences to be given "in the absence of good cause to the contrary" when foster care or preadoptive care is at issue. *Id.* § 1915(b).

surprisingly, courts across the nation are applying different standards when making a "good cause" determination. State courts are also reaching opposite results in cases that are virtually identical factually. Thus, whether "good cause" to deviate exists may be less than a factual decision depending on the jurisdiction hearing the case.

1. Standard of Proof in Making a "Good Cause" Determination

The ICWA is silent regarding the standard of proof courts should apply when making a "good cause" determination. Thus courts are forced to resolve the issue by attempting to discern legislative intent.[264] Traditionally, legislative silence on standard of proof is viewed as an intention that the preponderance of the evidence standard should be applied.[265] The only case to squarely address this issue, however, chose not to apply the preponderance of the evidence standard.[266] Instead, the Minnesota Court of Appeals found that "good cause" to deviate from adoption placement preferences of the ICWA need only be proven by clear and convincing evidence.[267] However, other jurisdictions have, without discussing their reasons for so doing, applied the preponderance of the evidence standard to a "good cause" finding.[268]

2. "Good Cause" not to Transfer Jurisdiction

The core of the ICWA is its jurisdictional provisions over child custody proceedings.[269] Indian tribes have exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled on the tribe's reservation.[270] In cases where the child does not reside on the reservation, however, the state court exercises concurrent jurisdiction with the tribal court.[271] Nevertheless, the ICWA grants Indian tribes the

264. Steadman v. Sec. & Exch. Comm'n, 450 U.S. 91, 95-96 & n.10 (1981).
265. *Cf.* Grogan v. Garner, 498 U.S. 279, 286 (1991) (preponderance of the evidence standard applied when Congress is silent, unless "'particular important individual interests or rights are at stake'" (quoting Herman & MacClean v. Huddleston, 459 U.S. 375, 389-90 (1983))).
266. *In re* S.E.G., 507 N.W.2d 872, 878 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994), *cert. denied*, 115 S. Ct. 935 (1995).
267. *Id.*
268. *In re* N.P.S., 868 P.2d 934, 936 (Alaska 1994).
269. *In re* J.L.P., 870 P.2d 1252, 1256 (Colo. Ct. App. 1994).
270. 25 U.S.C. § 1911(a) (1994).
271. *Id.* Once a petition to transfer to tribal court is filed, the state court should hold a hearing on the petition. *In re* G.L.O.C., 668 P.2d 235, 236-38 (Mont. 1983). At the hearing, the party opposing the transfer has the burden of establishing that good cause not to transfer exists. *See* 25 U.S.C. § 1911(b) (1994).

privilege of presumptive jurisdiction over nondomiciliary Indian children[272] and provides a procedure for transferring cases from state court to tribal court.[273] Once a petition to transfer jurisdiction to the tribal court has been received, the state court must transfer the case unless (1) the tribal court declines transfer, (2) either parent objects to the transfer, or (3) the court finds there is "good cause" to retain the case.[274] Because the ICWA is silent regarding the meaning of "good cause" as it is used in section 1911(b), courts are free to make their own decisions.

The Guidelines provide that "good cause" exists if the Indian child's tribe does not have a tribal court as defined by the ICWA.[275] "Good cause" also exists, under the Guidelines, when the state court proceeding is at an advanced state.[276] Furthermore, "good cause" exists when an Indian child over the age of twelve objects to the transfer.[277] Finally, the Guidelines provide that "good cause" exists when an Indian child is over the age of five, the child's parents are unavailable, and the child has had little or no contact with his or her tribe.[278]

Courts also turn to the ICWA's legislative history when deciding if "good cause" exists. The ICWA's legislative history indicates that the "good cause" exception was formulated to allow state courts to apply a "modified doctrine of forum non conveniens."[279] Thus, state courts are permitted to decide whether the tribal court is a less convenient forum. Courts across the United States often use the doctrine of *forum non conveniens* to find good cause not to transfer a case to tribal court.[280] When making a good cause determination based on *forum non conveniens* considerations, courts sometimes consider, "the practical

272. 25 U.S.C. § 1911(b) (1994); *In re* T.R.M., 489 N.E.2d 156, 158 (Ind. Ct. App. 1986) ("[P]urpose of Congress in the ICWA is clear that questions concerning the adoption of and termination of parental rights to Indian children must be deferred to tribal determination . . . ."), *rev'd*, 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989).
273. 25 U.S.C. § 1911(b) (1994).
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. *Id.*
279. H.R. REP. No. 1386, 95th Cong., 2d Sess., at 21 (1978).
280. *See, e.g.*, *In re* J.R.H., 358 N.W.2d 311 (Iowa 1984); *In re* J.W., 528 N.W.2d 657, 661 (Iowa Ct. App. 1995); *In re* Baby Boy L., 643 P.2d 168, 178 (Kan. 1982); *In re* Birdhead, 351 N.W.2d 785, 790 (Neb. 1983); *In re* R.N., 757 P.2d 1333, 1336 (N.M. Ct. App. 1988); *In re* N.L., 754 P.2d 863 (Okla. 1988).

factors that make trial of a case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining the attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process."[281]

In *In re N.L.*,[282] a mother was attempting to transfer the proceedings from the state court of Okmulgee County, Oklahoma, to the tribal court which was located in Kay County, Oklahoma.[283] The mother was residing in Oklahoma County, Oklahoma, but all of the necessary witnesses and the child were residing in Okmulgee County.[284] The court found that the presence of the witnesses and the child in Okmulgee County constituted "good cause" to deny the transfer to the tribal court.[285]

State courts have also created their own definitions of what constitutes "good cause." Although the United States Supreme Court has stated that "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interests of the Tribe,"[286] at least two state courts continue to use the "best interests of the child" test in finding good cause not to transfer jurisdiction to a tribal court.[287] On the other hand, two other states have clearly rejected applying the "best interest of the child" standard when making good cause to transfer decisions.[288] Arizona and South Carolina have found that "good cause" exists when a tribe does not have a mechanism for handling child custody matters.[289] South Carolina has also stated that "good cause" exists when there is evidence establishing that removing the children "would be disruptive and detrimental to their best interests."[290] Still

281. *In re* R.N., 757 P.2d at 1336.
282. 754 P.2d at 863.
283. *Id.*
284. *Id.*
285. *Id.*
286. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49 (1989).
287. *In re* Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); *In re* I.S., 801 P.2d 77, 80 (Mont. 1990), *cert. denied*, 500 U.S. 917 (1991).
288. *In re* Armell, 550 N.E.2d 1060, 1065-66 (Ill. App. Ct.), *appeal denied*, 555 N.E.2d 374 (Ill.), *cert. denied*, 498 U.S. 940 (1990); *In re* C.E.H., 837 S.W.2d 947, 954 (Mo. Ct. App. 1992).
289. *In re* Pima County Juvenile Action No. S-903, 635 P.2d 187 (Ariz. Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982); Chester County Dep't of Soc. Servs. v. Coleman, 372 S.E.2d 912, 914 (S.C. Ct. App. 1988), *rev'd*, 399 S.E.2d 773 (S.C. 1990), *cert. denied*, 500 U.S. 918 (1991).
290. *Chester County*, 372 S.E.2d at 915. In *Chester County*, the children lived in South Carolina, but the tribal court seeking jurisdiction was located in South Dakota. *Id.* at 913.

other jurisdictions refuse to find "good cause" even when the child is in the state's jurisdiction at the parents' request.[291] Arizona, New Mexico, and Utah, have held that when a child is born on a reservation, the reservation retains jurisdiction even if the child was voluntarily taken off the reservation for adoption, and has not been on the reservation for over two years.[292] Finally, Arizona and California have found that "good cause" exists when a tribe waits an unreasonable amount of time before intervening.[293]

3. "Good Cause" to Deviate from Foster Care and Adoptive Placement Preferences

The ICWA is also silent regarding the definition of "good cause" as it is used in section 1915(a) and (b). Thus, courts are permitted to make their own decisions. Some find guidance in the Guidelines which provide that in adoptive proceedings, a determination of "good cause" not to follow the order of preference mandated in the ICWA shall be based on any one or more of the following considerations:

> (i) The request of the biological parents or the child when the child is of sufficient age.
> (ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.
> (iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.[294]

However, the Guidelines are not regulations and therefore are neither controlling or binding on a state court's decision.[295] Thus, courts do not always follow them and have even added several other factors to their determination of "good cause."[296] For

291. *In re* Pima County Juvenile Action No. S-903, 635 P.2d at 187; *In re* Baby Child, 700 P.2d 198, 200 (N.M. Ct. App. 1985); *In re* Halloway, 732 P.2d 962 (Utah 1986).
292. *In re* Pima County Juvenile Action No. S-903, 635 P.2d at 187; *In re* Baby Child, 700 P.2d at 200; *In re* Halloway, 732 P.2d at 970-71.
293. *In re* Maricopa County Juvenile Action No. JS-8287, 828 P.2d 1245, 1251 (Ariz. Ct. App. 1991); *In re* Robert T., 246 Cal. Rptr. 168, 174 (Cal. Ct. App. 1988).
294. Guidelines, *supra* note 52, at 67,594.
295. *Id.* at 67,584 (conceding that the Guidelines "are not published as regulations because they are not intended to have binding legislative effect").
296. *See In re* F.H., 851 P.2d 1361, 1363-64 (Alaska 1993); *In re* J.R.H., 358 N.W.2d 311, 321-22 (Iowa 1984); *In re* S.E.G., 507 N.W.2d 872, 879-80 (Minn. Ct. App. 1993), *rev'd on other grounds*, 521 N.W.2d 357 (Minn. 1994), *cert. denied*, 115 S. Ct. 935 (1995); *In re* M., 832 P.2d 518, 522 (Wash. Ct. App. 1992).

example, some courts have also considered factors such as "the best interests of the child, the wishes of the biological parents, . . . the child's ties to the tribe,"[297] the child's need for stability,[298] the child's bonds to the foster parent or preadoptive family,[299] and "the child's ability to make any cultural adjustments necessitated by a particular placement."[300] Other courts reject these factors.[301]

Although the Guidelines clearly state that good cause not to follow the order of preference dictated in section 1915 may be based on parental preference, courts hesitate to find good cause based solely on parental preference. For example, in *In re F.H.*,[302] the mother made it clear that she wanted a non-Indian couple to adopt her child, not a member of her tribe.[303] Despite this fact, the court found it necessary to list three other reasons that good cause had been established as if to say the mother's preference was not enough.[304] The court even went so far as to say that "[g]iven the possibility of a placement with a relative in [the tribe], this case presented a close question."[305]

A "good cause" determination depends more on the court deciding the case than it does on the facts of the case. Until Congress defines 'good cause" or adopts the Guidelines' definition as law, courts will be free to determine "good cause" based on anything they perceive to be relevant. Such a result is an injustice to all involved.

VI. CONCLUSIONS

The ICWA was enacted to prevent the breakup of Indian families and tribes. The ICWA is not serving the purpose for which it was enacted. Worse, it is infringing upon the rights of two groups of people: parents of Indian children and abused

297. *In re* F.H., 851 P.2d at 1363-64.
298. *In re* S.E.G., 521 N.W.2d at 358.
299. *In re* T.R.M., 525 N.E.2d 298 (Ind. 1988), *cert. denied*, 490 U.S. 1069 (1989); *In re* C.W., 479 N.W.2d 105, 117 (Neb. 1992) ("[T]ransfer to the tribe and the inevitable grief over losing their psychological parents would compromise the children's ability to benefit from that culture . . . .").
300. *In re* M., 832 P.2d at 522.
301. *In re* S.E.G., 521 N.W.2d at 362 ("[A] finding of good cause cannot be based simply on a determination that placement outside the preferences would be in the child's best interest.").
302. 851 P.2d 1361, 1365 (Alaska 1993).
303. *Id.*
304. *Id.* The Alaska Supreme Court repeated this act in 1994 when both the child and the mother clearly expressed their preference for a non-Indian to adopt the child. *In re* N.P.S., 868 P.2d 934, 937-39 (Alaska 1994).
305. *In re* F.H., 851 P.2d at 1365.

and neglected Indian children. Although the preference given to tribes in the ICWA may be reasonably and rationally designed to promote tribal self-government, it does not excuse the violations of personal protections. Until the Supreme Court rules on this issue, however, the equal protection violations will continue. Even if the Court were to find that the ICWA is constitutional, more law is needed to ensure that it is being applied consistently in every state.

As it stands, the outcome of a case involving an "Indian child" depends not on the facts of the case, but rather the state in which the case is being heard. Several states refuse to apply the ICWA when there is not an "existing Indian family." States also determine when the right to revoke voluntary consent to an adoption ends, by considering state law instead of federal law. Furthermore, a state's determination of who is an "Indian" does not rely on the ICWA, but on factors adopted in each state. Finally, all states create their own definitions of "good cause." Such inconsistent application of the ICWA is not beneficial to tribes, parents, or children and should be stopped.

Several things can be done to ensure that the goals of the ICWA are achieved and at the same time all persons' rights are respected. First, Congress should enact an amendment which requires the ICWA only be applied to those children who are part of an existing Indian family. Such an amendment would do two things. First, it would ensure that parents of children with Indian blood do not have their constitutional rights violated. Second, it would ensure that the heightened standard of proof is only applied to those children who are living on a reservation or in a traditional Indian home.

Congress could also improve the ICWA by amending section 1915(a), which provides that adoptive placement preferences apply to all adoption proceedings involving an Indian child.[306] Section 1915(a) could be strengthened by amending it so that it would only apply in two situations. First, it should apply to all adoption proceedings where the child has been removed by the state from an existing Indian family. Second, it should apply whenever a parent of an Indian child elects. Such an amendment would ensure that Congress' goals are met and guarantee that parents who wish to choose adoptive parents outside the ICWA's preferences have the right to so do. It would also remove the parental anonymity problems.

Congress could further enhance the ICWA by enacting the part of the Guidelines that deals with methods of determining

306. 25 U.S.C. § 1915(a) (1994).

tribal membership.[307] By making the Guidelines law, Congress could ensure that all courts are respecting a given tribe's method of keeping track of their members. This would in turn secure equal treatment regardless of the state court hearing the case.

Finally, Congress could ameliorate the ICWA by providing a specific list of what does and does not constitute "good cause to the contrary"[308] and what standard of proof should be used when making such a determination. Such a list would, of course, not be exhaustive, but would provide a good basis for ensuring that courts are addressing similar issues in a consistent manner. Thus, parents of children with Indian blood would not need to guess as to how their state court would react to a given set of facts.

As it currently stands, the ICWA is not having the impact Congress desired.[309] This is likely to continue until Congressional amendments or Supreme Court interpretation is given. Thus, action is needed not only to achieve Congressional goals but, more importantly, to ensure its constitutionality.

307 Guidelines, *supra* note 52, at 67,586.

308 "Good cause to the contrary" is used in 25 U.S.C. §§ 1911(b), 1915(a)-(b) (1994), of the ICWA.

309 *See supra* notes 82-83 and accompanying text.

ESSAY

HOMOSEXUAL MARRIAGE AND THE MYTH OF TOLERANCE: IS CARDINAL O'CONNOR A "HOMOPHOBE"?

RICHARD F. DUNCAN*

I. INTRODUCTION

In a 1993 law review article, Professor Larry Yackle peered into a crystal ball and told our collective fortune.[1] He declared that "American society is now absorbed in yet another great civil rights movement, this one on behalf of gay, lesbian, and ambisexual citizens, which will lead ineluctably to the elimination of legal burdens on the basis of sexual orientation."[2] Thus, Yackle confidently predicted the reordering of society along lines advocated by homosexual activists, a world in which the gay legislative agenda has been fully implemented. In this America-to-be, same-sex marriages — the ultimate priority of the homosexual political agenda[3] — will be fully recognized and supported by government.

Yackle's utopia may strike some readers as a tolerant place, a land guided by the principle "live and let live." But that would be a serious misreading of both Yackle and the world of his hopes and visions. In his land of milk and honey, of peace, love and gay

* Sherman S. Welpton, Jr., Professor of Law, University of Nebraska College of Law (rduncan@unlinfo.unl.edu). I wish to thank Lynn Wardle, Steve McFarland, Kelly Duncan, Charlie Rice, and my cyberspace colleagues on the ReligionLaw discussion group. This Essay is dedicated to my children, Casey, Joshua, Rebecca Joy and Hannah Grace—never trade your birthright for a bowl of red pottage.

1. Larry W. Yackle, *Parading Ourselves: Freedom Of Speech At The Feast Of St. Patrick*, 73 B.U. L. REV. 791 (1993).

2. *Id.* at 791.

3. Andrew Sullivan calls access to marriage "the critical measure necessary for full gay equality." Andrew Sullivan, *The Politics of Homosexuality*, NEW REPUBLIC, May 10, 1993, at 24, 37. *See also* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY 185 (1995) [hereinafter SULLIVAN, VIRTUALLY NORMAL] (stating that homosexual marriage is "the only reform that truly matters").

STATEMENT ON BEHALF OF THE

ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC.

SISSETON, SOUTH DAKOTA

SUBMITTED TO THE

SENATE COMMITTEE ON INDIAN AFFAIRS

AND

HOUSE RESOURCES COMMITTEE

HEARING ON LEGISLATION

TO AMEND THE INDIAN CHILD WELFARE ACT

S. 569 AND H.R. 1082

JUNE 18, 1997

SUBMITTED BY:
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I. Introduction

Chairmen Campbell and Young and members of the Senate Committee on Indian Affairs and House Resources Committee. The Association on American Indian Affairs, Inc. (AAIA) is a national non-profit citizens' organization headquartered in South Dakota, with a field office in California. Its mission is the preservation and enhancement of the rights and culture of American Indians and Alaska Natives. The policies of the Association are formulated by a Board of Directors, all of whom are Native Americans.

The Association began its active involvement in Indian child welfare issues in 1967 and for many years was the only national organization active in confronting the crisis in Indian Child Welfare. AAIA studies were prominently mentioned in committee reports pertaining to the enactment of the Indian Child Welfare Act (ICWA) and, at the request of Congress, AAIA was closely involved in the drafting of the Act in 1978. Since that time, the Association has continued to work with tribes in implementing the Act including the negotiation of tribal-state agreements and legal assistance in contested cases.

The ICWA was enacted in response to a tragedy that was taking place within the Indian community. Enormous numbers of Indian children had been removed from their families and tribal communities without just cause. The Indian Child Welfare Act was landmark bipartisan legislation which, although it has been imperfectly implemented in some places, has provided vital protection to Indian children, families and tribes. It has formalized the authority and role of tribes in the Indian child welfare process. It has forced greater efforts and more painstaking analysis by agencies and courts before removing Indian children from their homes. It has provided procedural protection to families and tribes to prevent arbitrary removals of children. It has required recognition by agencies and courts alike that an Indian child has a vital interest in retaining a connection with his or her Indian heritage. Each year thousands of child custody and adoption proceedings take place in which the Indian Child Welfare Act is applied.

II. Background: Why the Indian Child Welfare Act of 1978 became law.

A. The problem

As the United States Supreme Court explained in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) (hereinafter Holyfield), the ICWA "was the product of rising concern in the mid-1970s 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." Id. at 32. The evidence presented before Congress revealed that "25-35% of

Indian children had been separated from their families and placed in foster homes, adoptive homes or institutions." Id.

Studies by the Association on American Indian Affairs, commissioned by Congress, reported that Indian children were placed in foster care far more frequently than non-Indian children. This was true of all 19 states surveyed with Indian placement rates ranging from 2.4 times the non-Indian rate in New Mexico to 22.4 times the non-Indian rate in South Dakota. "The Indian Child Welfare Act of 1977", Hearings on S. 1214 before the Select Committee on Indian Affairs, United States Senate, 95th Cong., 1st Sess. (August 4, 1977), at 539 (hereinafter "Senate 1977 Hearing"). The percentage of Indian children placed in non-Indian foster homes in those states that reported this information ranged from 53% in Wyoming to 97% in New York.

Moreover, "[t]he adoption rate of Indian children was eight times that of non-Indian children [and] [a]pproximately 90% of the Indian placements were in non-Indian homes." Holyfield, supra, 490 U.S. at 33. All but one of the states surveyed also had a greater rate of Indian children placed for adoption than was the case for non-Indians. The Indian adoption rate in the most extreme case -- the State of Washington -- was 18.8 times the non-Indian rate. Senate 1977 Hearing, supra, at 539. The percentage of Indian children placed in non-Indian adoptive homes ranged from 69% in Washington to 97% in Minnesota. Id. at 537-603.

Congress found that this extraordinary and unwarranted rate of placement in out-of-home non-Indian households was not in the best interests of Indian tribes, families and children. See Holyfield, supra, 490 U.S. at 49-50 (The ICWA is concerned about both the "impact on the tribes themselves of the large numbers of children adopted by non-Indians ... [and] the detrimental impact on the children themselves of such placements outside their culture.")

In the case of Indian tribes, the Court specifically found that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children...", 25 U.S.C. 1901(3). This concern was also expressly reflected in the floor statements of "the principal sponsor in the House, Rep. Morris Udall ('Indian tribes and Indian people are being drained of their children and, as a result, their future as a tribe and a people is being placed in jeopardy'), and its minority sponsor, Rep. Robert Lagomarsino ('This bill is directed at conditions which...threaten ...the future of American Indian tribes...')." Holyfield, supra. 490 U.S. at 34, n.3 (citations omitted).

As the Holyfield case likewise recognized, Congress was also very concerned about "the placement of Indian children in non-Indian homes...based in part on evidence of the detrimental impact on the children themselves of such placement outside their culture". 490 U.S. at 49-50. Testimony at Congressional hearings