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Native American Rights & Adoption by Non-Indian Families: The Manipulation and Distortion of Public Opinion to Overthrow ICWA

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NATIVE AMERICAN RIGHTS & ADOPTION BY
NON-INDIAN FAMILIES:
THE MANIPULATION AND DISTORTION OF PUBLIC
OPINION TO OVERTHROW ICWA

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I. INTRODUCTION

The bedrock of federal child welfare law for all children is to place children with relatives and to honor “important family connections, which are arguably some of the most important relationships we will have in our lifetimes.”¹ This note addresses the Indian Child Welfare Act of 1978 (ICWA)² and the current social opposition and misunderstanding of ICWA as it applies to child custody cases of Indian children and non-Indian adoptive families. Congress passed the Indian Child Welfare Act of 1978 (ICWA)³ in response to the disproportionate rate of removal of Indian children in comparison to other children.⁴ Congress determined that tribal governments had the inherent right to ensure the ongoing stability of their unique Indian Culture.⁵ Congress relied upon Article I, Section 8,⁶ of the United States Constitution as its source of plenary power over Indian affairs to assume responsibility for the “protection and preservation of Indian tribes and their resources.”⁷ Over time, states have struggled to uniformly apply ICWA standards due to a lack of resources within state and tribal agencies, as well as, general misunderstandings around the purpose of ICWA.⁸ ICWA

¹ Suzette Brewer, *ICWA: Supreme Court Denies Hearing in Lexi Case*, INDIAN COUNTRY (January 11, 2017), <https://indiancountrymedianetwork.com/culture/social-issues/icwa-supreme-court-denies-hearing-lexi-case/> [https://perma.cc/WQP8-37E5].

² 25 U.S.C. § 1901–63 (1988).

³ *Id.*

⁴ H.R. Res. 12533, 95th Cong. (1978) (enacted).

⁵ Indian Child Welfare Act of 1978, Pub. L. No. 95–608, 92 Stat. 3069 (1978).

⁶ U.S. CONST. art. I, § 8 cl. 3 (granting Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”).

⁷ 25 U.S.C. § 1901(2) (1988).

⁸ See generally Bob Zellar, *Gazette opinion: Brining Indian foster kids home*, BILLINGS GAZETTE (Aug. 7, 2017),

opponents use written and digital broadcasting to create a negative image of the purpose of ICWA by portraying it as outdated legislation that removes children from their adoptive families.⁹ There is a need to educate society on the purpose of ICWA that highlights the intention of ICWA to place Indian children with their tribal family members when such family members are available and capable of providing for the child.

ICWA was created after years of abuse directed at the disintegration of Indian families from their tribal societies.¹⁰ The purpose is to promote the stability and security of Indian tribes and families by establishing a set of federal standards to protect the interests of Indian children and their tribes, and not to unduly remove Indian children from non-Indian foster families.¹¹ It was necessary to maintain the relationship between Indian children and their tribes because “there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children.”¹² ICWA established a set of procedures that government agencies had to work through to ensure all available means of keeping a child with his family had been exhausted before removing at-risk children from their Indian Families and Indian Nations.¹³ Congress found the best interests of Indian tribes and Indian children were protected by ensuring the placement of Indian children within foster and adoptive homes that reflected the values unique to Indian culture, and providing Indian tribes assistance in managing the operation of family services.¹⁴

ICWA has received unfavorable reviews within the current mainstream media coverage due to the following factors: (1) social ignorance regarding the historical background of ICWA; (2) general lack of understanding of the procedures within ICWA; (3)

http://billingsgazette.com/opinion/editorial/gazette-opinion-bringing-indian-foster-kids-home/article_d0fe1a36-6e03-5855-bb62-341ee2d0ef78.html?utm_content=buffer0c7f0&utm_medium=social&utm_source=facebook.com&utm_campaign=LEEDCC+ [https://perma.cc/Y3E9-YF4C].

⁹ Michael Corcoran, *Media Failure Lead to Flawed Understandings in Cherokee Adoption Case*, TRUTHOUT, (January 13, 2013 7:06 AM), <http://www.truth-out.org/news/item/13749-media-failures-lead-to-flawed-understandings-in-chokeke-adoption-case> [https://perma.cc/P3XG-EUFN].

¹⁰ Suzanne L. Cross, *Indian Family Exception Doctrine: Still Losing Children Despite the Indian Child Welfare Act*, 85 CHILD WELFARE 671, 675 (2006).

¹¹ 25 U.S.C. § 1902 (1988).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

misguided actions by courts who fail to identify Indian children; (4) the creation of the Indian Family Exception Doctrine; and (5) the misperception of Indian child adoption cases within popular media that favors non-tribal adoption.¹⁵ My intention is to outline these issues within this note and at the end offer solutions to address the negativity surrounding ICWA. I hope to show that many of these issues would be dispelled if state entities were better trained to recognize when ICWA applies, and if courts were to uniformly apply ICWA to adoptions of Indian children.

This article is divided into six parts which sets forth both the history of ICWA (its historical application, current trends, the impact of public perceptions) and suggestions to help institute a uniform nationwide application. The first section discusses the historical background surrounding the Indian Child Welfare Act as well as the factors that prompted Congress to enact ICWA given the disproportionate rates of Indian child removal. Then, this article addresses several ICWA topics including guidelines regarding what is an Indian child, tribal jurisdiction in custody proceedings, and finally, other statutory procedures. This is subsequently followed by a discussion on how both courts have found loopholes to avoid the mandates contained as set forth in case law. Part V outlines the United States Supreme Court's holdings on ICWA cases, and the changes applied by the Department of Interior in 2016. Part VI discusses public perception of ICWA based on flawed media coverage. Finally, this article will conclude with suggestions for modifications in the future application of ICWA and its portrayal in the media.

II. CREATION OF ICWA

ICWA was enacted in response to years of federal actions designed to separate Indian children from their families with the determined goal of assimilating Indian children into mainstream

¹⁵ See generally Richard P. Barth, Daniel Webster II & Seon Lee, *Adoption of American Indian Children: Implications for Implementing the Indian Child Welfare and Adoption and Safe Families Acts*, 24 CHILD. & YOUTH SERV. REV. 139, 140-41 (2002); Jill E. Tompkins, *Finding The Indian Child Welfare Act In Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. COLO. L. REV. 1119, 1152 (2010); Kate Fort, *Response to Media Dustup in California ICWA Case*, TURTLE TALK (March 21, 2016), <https://turtletalk.wordpress.com/2016/03/21/response-to-media-dustup-in-california-icwa-case/>.

American society.¹⁶ It was meant to reconstruct the cultural Indian family practices while fostering and strengthening a sense of connection between the Indian child and the Indian tribe.¹⁷ Congress has the responsibility of preserving Indian tribes, and by extension an interest “in protecting Indian children” eligible for membership in their Indian tribe.¹⁸ Congress hoped to prevent the past failures and bolster Indian tribal relations by exercising its jurisdiction over the custody proceedings of Indian children to minimize administrative confusion of the “cultural and social standard prevailing in Indian communities and families.”¹⁹

In order to protect the cultural and social norms of Indian tribes and their resources,²⁰ Congress found it necessary to give tribes exclusive jurisdiction over Indian children who reside or are domiciled within tribal land, and Indian children eligible for tribal membership.²¹ The high percentage of Indian children living outside of their tribal communities severely impacted the well-being and vitality of Indian tribes because many of these children became disconnected and the tribe was unable to pass on its culture and heritage.²² Indian children were five times more likely to be placed into foster care than other children.²³ ICWA was designed to remedy this inequitable treatment of Indian children.

¹⁶ Kelly Halverson, Maria E. Puig, and Steven R. Byers, *Culture Loss: American Indian Family Disruption, Urbanization, and the Indian Child Welfare Act*, 81(2) CHILD WELFARE LEAGUE AM. 319, 324 (2004) (Referencing the policies of the Bureau of Indian Affairs which established various policies to remove Indian children from their families with the aim of interstate placement of Indian children within non-Indian homes.) During the 1950s to the 1970s, 25% to 35% of Indian children were forcibly removed from their families and placed within non-Indian foster homes or adoptive families. In 1969, ~ 85% of Indian children were taken out of foster care and placed within non-Indian families. *Id.*

¹⁷ *Id.* at 325.

¹⁸ 25 U.S.C. § 1901(3) (1988).

¹⁹ 25 U.S.C. § 1901(5) (1988).

²⁰ Marc Mannes, *Factors and Events leading to the Passage of the Indian Child Welfare Act*, 74(1) CHILD WELFARE 264, 265–66 (1995). Indian children raised within Indian homes had a protected and structured family unit. Family extended outside of the usual unit associated within American homes to include the community of family members such as grandparents, aunts, and uncles, who gave structure to the behavioral expectations and discipline within their tribal culture. *Id.*

²¹ H.R. Res. 95–1386, at 9 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530, 7531.

²² Mannes, *supra* note 20, at 275; see also Mathew L.M. Fletcher and Wenona T. Singel, 95 NEB. L. REV. 885, 887–89 (2016).

²³ Large Indian populations were surveyed by the Association of American Indian Affairs (AAIA) at intervals. Survey results showed that over 25% of all Indian children were removed from their families and relocated to foster homes,

Pre-ICWA, the displacement of Indian children occurred although unwarranted due to lack of cultural understanding and prejudicial stigma that portrayed Native Americans as highly susceptible to substance abuse and addiction.²⁴ The majority of this prejudicial stigma can be traced back to the early colonization of America and has resulted in ongoing governmental actions that forces the assimilation of Native Americans.²⁵ Additionally, state welfare standards lacked the cultural sensitivity to assess and utilize available tribal resources for Indian children.²⁶ Instead, state programs gave economic incentives that favored the removal of Indian children from their families and communities.²⁷ Therefore, the combination of a lack of understanding as well as systematic due process violations increased the removal of Indian children from both their families and their communities.²⁸

The best interests of a non-Indian child could not be applied to Indian children because of the familial and societal structure within Indian societies. It is a norm within Indian tribes for children to be raised within larger extended families including non-related fellow tribal members, which differed radically from the non-tribal families that Indian children were being placed in.²⁹ However, the issue of Indian children being raised in mixed race homes with multiple cultural identities further clouded the situation and prevented a clear line one size fits all resolution.³⁰

adoptive homes with non-Indian families, or state-run institutions. H.R. Res. 95–1386, at 9 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530, 7531.

²⁴ 25 U.S.C. § 1901(4) (1988). See also *Indian Child Welfare Program: Hearings Before the S. Subcomm. on Indian Affairs of the Com. on Interior and Insular Affairs*, 93rd Cong. 4–5 (1974) (statement of William Byler, Executive Director, Association on American Indian Affairs; accompanied by Bert Hirsch, Staff Attorney).

²⁵ See generally *Atrocities Against Native Americans*, UNITED TO END GENOCIDE, <http://endgenocide.org/learn/past-genocides/native-americans/> [<https://perma.cc/W7JQ-NY8H>].

²⁶ Marc Mannes, *Factors and Events leading to the Passage of the Indian Child Welfare Act*, 74(1) CHILD WELFARE 264, 266 (1995).

²⁷ *Id.*

²⁸ For example, “In Montana, the ratio of Indian foster-care placement is at least 13 times greater. In South Dakota, 40 percent of all adoption made by the State’s Department of Public Welfare since 1967–68 are of Indian Children, yet Indians only make up 7 percent of the juvenile population . . . [within] Washington, the Indian adoption rate is 19 times greater and the foster care rate is 10 times greater” than the non-Indian rate. H.R. Res. 12533, 95th Cong. (1978) (enacted) (emphasis added).

²⁹ *Id.*

³⁰ Matter of Adoption of T.A.W., 186 Wash.2d 828, 834 (2016).

III. DEFINING THE INDIAN TRIBE AND INDIAN CHILD

To promote the well-being of Indian tribes and tribal interest in keeping Indian children within Indian families, ICWA redefined the standards for protecting the rights of an Indian child.³¹ ICWA provides specific guidelines about which children are considered Indian children and how they are to be placed. Specifically, ICWA considers that many Indian tribes are not federally recognized and has limited its jurisdiction, by definition, to Indian Tribes recognized by the federal government.³² The federal government recognizes specific tribes based on historic treaties between those tribes and the government, and the tribes that were largely impacted by the Indian Relocation Act of 1956. The burden is shifted from the federal government to tribal governments to build legislative, judicial, and economic structures that further the overall development of the tribe and those seeking social assistance.³³

ICWA goes on to clarify how courts and agencies are to determine whether a child is an Indian child. ICWA applies to children who are eligible for official membership within a sovereign tribal government.³⁴ An Indian child is defined as an unmarried person, under the age of eighteen, that already is a member or “is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.”³⁵ ICWA treats tribal membership as “a matter of political affiliation rather than racial origin”;³⁶ tribes maintain the right to determine a child’s Indian status. Once a court is made aware of the possibility of Indian heritage it must give notice to the appropriate tribe(s).³⁷ But, this does not always occur, and if it does occur many smaller tribes may never respond. Some courts and jurisdictions consider the lack of a response as a denial of tribal involvement and will proceed with placement that is in the best

³¹ Mannes *supra* note 26, at 275.

³² 25 U.S.C. § 1903(8) (1988).

³³ Jeff R. Keohane, *The Rise of Tribal Self-Determination and Economic Development*, HUMAN RIGHTS MAGAZINE (2006), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol33_2006/spring2006/hr_spring06_keohane.html [https://perma.cc/588J-CJP3].

³⁴ 25 U.S.C. § 1903(4) (1988).

³⁵ *Id.*

³⁶ *In re D.C.*, 243 Cal. App. 4th 41, 60, 196 Cal. Rptr. 3d 283, 299 (2015).

³⁷ *Dwayne P. v. Superior Court*, 103 Cal. App. 4th 247, 258, 126 Cal. Rptr. 2d 639, 648 (2002); *See also* 25 C.F.R. § 23.111 (2018).

interest of the child.³⁸ This assumption contributes to the misapplication of ICWA; there is no affirmation by the tribe that it has received notice from the state entities who are responsible for informing the Indian tribe. It is understandable that a court would want to move an adoption case along when there are no tribal objections; however, there must be some confirmation that the parties responsible for providing notification have taken the steps required to determine the Indian child's heritage, if possible, and then went through the process of notifying the correct parties in a variety of methods as stated in 25 C.F.R. § 23.111 (2018). Courts should consistently require that the party seeking to remove an Indian child from its home to show that the tribe is either choosing to not partake in the adoption case of the Indian child, or that the tribe has determined the child does not meet the tribe's blood quantum requirement for membership.³⁹

When tribes do respond, the child's eligibility is dependent on whether the child meets the tribe's blood quantum requirement.⁴⁰ Tribes apply blood quantum analysis to determine whether a multi-racial child falls within ICWA and if the child is entitled to benefits given to tribal members.⁴¹ Once it is determined the child is eligible for membership in an Indian tribe, the child's blood quantum does not matter because the Indian child is recognized as a full member

³⁸ Jill E. Tompkins, *Finding The Indian Child Welfare Act In Unexpected Places: Applicability in Private Non-Parent Custody Actions*, 81 U. COLO. L. REV. 1119, 1152 (2010).

³⁹ See Kate Fort, *Unpublished ICWA Case from MN, Judge Jesson Concurrence*, TURTLE TALK (Dec. 12, 2017), <https://turtletalk.wordpress.com/2017/12/12/unpublished-icwa-case-from-mn-judge-jesson-concurrence/> [<https://perma.cc/YU57-FND6>] (providing an example that (1) courts need to give more deference to the standards set out in ICWA and that (2) it is possible for tribes and courts to have similar goals of providing safe and nurturing homes to children without additional delays).

⁴⁰ Paul Spruhan, *A Legal History of Blood Quantum in Federal Indian Law to 1935*, 51 S.D. L. REV. 1, 4-5 (2006). Federal government has a history of applying blood quantum analysis in determining the legal status of mixed-race individuals particularly within individuals with Indian or black ancestors. Blood quantum was used to establish legal status and rights to certain privileges made available to Indians as well as in application to specific federal laws. Federal government has a history of applying blood quantum laws in determining Indian status. Specifically, "Indian" was previously defined as individuals with Indian ancestors who became mixed but maintained their Indian membership within the tribe of their ancestors. *Id.*

⁴¹ *Id.* at 6. Treaties previously gave property rights to mixed-race individuals, and today those same concepts are used in determining an individual's membership within a specific tribe and which rights the individual is entitled to under federal treaties with specific tribes.

of the Indian tribe for ICWA purposes.⁴² States are required to abide by ICWA requirements until the child's status can be determined.⁴³ When a state is unable to identify or locate the Indian parent to determine the child's status and the tribe is undetermined, the state is required to inform the Secretary of the Interior.⁴⁴

Some tribes do not use a minimum blood quantum to determine membership, but require applicants to prove they are a direct descendant of someone who was originally enrolled as a member of a tribe.⁴⁵ Therefore, to establish membership for many of the smaller tribes, an individual must contact the tribe to determine whether the child is a direct descendant of an "Original Enrolled Member."⁴⁶ This is where issues begin to arise; state agencies and tribes may have limited funds, and they may not be able to afford the cost of tracing and establishing membership. Even more concerning is that some tribes may never respond, and the child will then be placed into the child welfare system.

In the past, improper removal of Indian children from their homes by social workers, who were ignorant of Indian culture, resulted in a higher standard of proof under ICWA when removing Indian children.⁴⁷ To terminate parental rights there must be clear and convincing evidence of need to remove the Indian child from his or her family.⁴⁸ Parents choosing to terminate their parental right must make the termination: (1) in writing, (2) before a judge, (3) certifying the parent understood the action performed, (4) must understand English or have a translator available throughout the proceeding, and (5) has been executed at least ten days after the child's birth.⁴⁹ Tribes have exclusive jurisdiction over an Indian

⁴² *Recommendations for Reporting on the Indian Child Welfare Act*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, http://www.nicwa.org/government/documents/2016%20NAJA_ICWA_GUIDE.pdf [<https://perma.cc/4XL6-XDV9>].

⁴³ ANDREA WILKINS, *FOSTERING STATE-TRIBAL COLLABORATION: AN INDIAN LAW PRIMER* 91 (2016).

⁴⁴ The underlying purpose of the State informing the Secretary of the Interior is to ensure that States with limited budgets are still making the effort to properly inform Indian parents and Indian tribes of foster care placement or termination of parental rights involving an Indian child. 25 U.S.C. § 1912(a) (1988).

⁴⁵ Josiah Hair, *Native American Blood Quantum, Facts and Myths*, POWWOWS.COM (Apr. 27, 2016), <http://www.powwows.com/native-american-blood-quantum-facts-and-myths/> [<https://perma.cc/G58N-QNNE>].

⁴⁶ *Id.*

⁴⁷ Barth et al., *supra* note 15.

⁴⁸ 25 U.S.C. § 1913(a) (1988).

⁴⁹ *Id.*

child residing or domiciled within tribal land regardless of the residence or domicile of the Indian child when the child is a ward of the tribal court.⁵⁰

ICWA ensures that tribes retain the right to intervene at any point in the proceeding for foster care placement or termination of parental rights to the Indian child.⁵¹ Many tribes are hesitant to terminate parental rights because they want to leave open the possibility of reunification of the family. Once reunification is not an option, tribes need to evaluate whether it has the resources available to care for the child and how to best proceed with guardianship. If possible, tribes will allow for family members or designated individuals to apply for legal guardianship to maintain a relationship with the child.⁵² Tribes often adopt permanent legal guardianship in place of formal adoptions because the main concern is the well-being of the child. Tribes invest in providing Indian children permanent and stable homes with caregivers who can provide an emotionally stable environment.⁵³ It is a fine line balancing the child's best interest and the tribe's interest in its members.

Within adoptions, ICWA gives preference to the placement of Indian children to either "(1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."⁵⁴ The guidelines exist to protect the best interests of the Indian child while simultaneously promoting the growth and stability of Indian tribes.⁵⁵ Essentially, ICWA is trying to ensure that Indian children remain within the Indian community so that the child may develop a connection to the tribe. Additionally, ICWA functions as a reassurance to tribes that the placement of Indian children would not be determined by "white, middle-class standard[s] which, in many cases, forecloses placement with an

⁵⁰ *See id.* § 1911(a)

⁵¹ *See id.* § 1911(c)

⁵² TULALIP TRIBAL CODES §4.05.660 (2017).

⁵³ *Id.*

⁵⁴ 25 U.S.C. § 1915(a) (1988).

⁵⁵ However, consideration is given to cases where the custody of an Indian child is awarded to a non-Indian family to ensure measures are made available to the child to reconnect with the tribe. The deciding court must inform the Indian child about any "tribal affiliation, if any, of the individual's biological parents and provide such other information as may be necessary to protect any rights flowing from the individual's tribal relationship" once the child turns eighteen. *See* 25 U.S.C. § 1917 (1988).

Indian family.”⁵⁶ ICWA governs proceedings over Indian children where parental rights have been terminated or are in the process of being terminated. ICWA is meant to allow the child’s tribe the opportunity to choose an appropriate placement for the Indian child when the child’s parents no longer have rights to the child, and the child is currently placed within foster care, pre-adoptive, or adoptive placements.⁵⁷

IV. THE RISE OF COURT CREATED EXCEPTIONS TO ICWA

A remaining disconnect between state judicial systems and the ICWA that comes from a lack of understanding of tribal culture and the history behind ICWA. “The rationale for the doctrine may include state judicial systems not completely understanding the tribal cultural and court systems, as well as frustration over the additional time required to comply with the ICWA, which can result in the delay of decisions in cases.”⁵⁸ Specifically, courts have implemented the Indian Family Exception Doctrine and the Existing Indian Family Doctrine into custody cases of Indian children as a method to bypass ICWA.⁵⁹ Some courts have applied the Indian Family Exception Doctrine to narrow the protections ICWA offers “to Indian tribes, families, and children.”⁶⁰

The Indian Family Exception Doctrine originated from a 1982 Kansas State Supreme Court case, *Matter of Adoption of Baby Boy L.*⁶¹ The case involved Baby Boy L., his non-Indian mother, and his Indian father who was enrolled as a member of the Kiowa Tribe.⁶² On the day of Baby Boy L.’s birth, his mother had consented to the baby’s adoption to a specific non-Indian family without the consent of the father, who at the time was incarcerated.⁶³ The Indian

⁵⁶ See Patrice H. Kunesch, *Transcending Frontiers: Indian Child Welfare in the United States*, 16 B.C. THIRD WORLD L.J. 17, 23–24 (1996).

⁵⁷ 25 U.S.C. § 1917 (1988).

⁵⁸ Cross, *supra* note 10, at 673.

⁵⁹ See generally Lorie M. Graham, “The Past Never Vanishes:” *A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1 (1998). The exceptions are “judicially created” exceptions that vary from state to state but have the same result of cutting off Indian children from their tribal culture by redefining the meaning of an “Indian family.” *Id.*

⁶⁰ Cross, *supra* note 10, at 677.

⁶¹ In the Matter of the Adoption of Baby Boy L, 231 Kan. 199, 643 P.2d 168, 175 (1982).

⁶² *Id.*

⁶³ *Id.*

father was later served notice of the adoption proceedings, and the adoptive parents filed a petition outlining the father's unfitness to assume parental responsibilities and asked that his parental rights be severed.⁶⁴ Despite the mother's objections, the Kiowa Tribe and Baby Boy L.'s paternal grandparents moved to enroll Baby Boy L. into the tribe because he had a blood degree of 5/16, which qualified him for tribal membership.⁶⁵ The mother maintained that if Baby Boy L. was not placed with her specified adoption family that she would retain custody of the child and would deny the father, tribe, or grandparents custody.⁶⁶ The Court concluded the purpose of ICWA, and Congress' intention behind implementing the Act, was to maintain Indian families and for children to continue living in their existing Indian home.⁶⁷ It is not the intention of ICWA to take the child away from its mother when a non-Indian mother intends to retain custody of the Indian child. Specifically, the court held that Congress did not intend for the ICWA to mean that an illegitimate child, who is not a member of an Indian home and probably will not be a part of the culture, should be placed with the Indian tribe despite the objections of the unmarried non-Indian mother.⁶⁸ The court concluded it was clear that ICWA was not applicable because there was not an issue of preserving an Indian family given that the child had never lived within an Indian family or established a relationship to an Indian family.⁶⁹ A non-Indian parent has the right to maintain custody over an Indian child without ICWA applying to the Indian child. Kansas has since overturned this precedent,⁷⁰ but other states

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Additionally, the mother refused to transfer the adoption proceedings to the tribal court and a transfer cannot be made when the mother is objecting to the transfer. *Id.* at 205, 209.

⁶⁷ *Id.* at 205–06. The mother made it clear that if the adoptive family was denied custody of Baby Boy L. that upon she would resume custody of the baby, which would still result in Baby Boy L. not living within an Indian home. How could an Indian child living with his own mother not be in an Indian Home. Is blood quantum more important than the maternal instinct.

⁶⁸ *Id.* at 175–76. The court applied the non-Indian mother's background as the child's "primary cultural heritage," therefore, an Indian family was not being broken up because an Indian family never existed in this situation. Does not the child have both heritages. What about mixed race cases? Why do you think there is such a bright line distinction?

⁶⁹ *Id.* at 175; *see also* In Bridget R., 49 Cal. Rptr.2d 507, 529–30 (1996). The child had "at all times" lived within a non-Indian home and was not exposed to Indian culture.

⁷⁰ In the Matter of A.J.S., A Minor Child, 288 Kan. 429, 203 P.3d 543 (2009). Abandoned the court's previous application of the Existing Indian family

have crafted similar reasoning as the court within this case to undermine ICWA.

The next judicially created threat to ICWA is the “Existing Indian Family Doctrine.” State courts apply this doctrine to cases where the child is not being removed from an existing Indian family.⁷¹ Despite ICWA clearly laying out the only statutory requirement, that the Indian child is either a member or eligible for membership within an Indian tribe,⁷² courts try to thwart ICWA with additional tests to undermine the child’s connection to Indian culture. Specifically, courts sustain claims for the Existing Indian Family Exception “because there is no existing Indian family, home, or culture, ICWA provisions do not govern, its intended protections and purposes are no longer operative, and instead state law governs.”⁷³

This view relies primarily on the default American family unit of mother, father, and their children. Proponents of the Existing Family Doctrine fail to consider that Indian families are different than the default American family unit, and that Indian families extend to aunts, uncles, grandparents, and cousins. General societal ignorance of the social structures of tribal families can result in the same harm afflicted on Indian tribes in the pre-ICWA era where tribal interests were not considered.

While some states still apply reasoning similar to the Indian Family Exception Doctrine and the Existing Indian Family Doctrine, other states are making an effort to enact legislation that recognizes the rights of both Indian and non-Indian parents, and gives both parents the same type of provisions outlined by ICWA to rehabilitate parents before termination of their parental rights.⁷⁴ ICWA is not designed to give an Indian parent additional access to

doctrine to cases when “the Indian child’s parent or parents had not maintained a significant social, cultural, or political relationship with an Indian tribe” because of the clear conflict between the doctrine and the language of ICWA.), *overruling In Re Adoption of Baby Boy L*, 643 P.2d 168 (1982).

⁷¹ Proponents claim that the main goal of ICWA is preserving an established Indian family from the unjustified removal of Indian children from their homes. When an Indian family or Indian home does not exist then ICWA is not applicable because the Indian family is not being broken. *Id.*; Graham, *supra* note 59 at 3–4.

⁷² 25 U.S.C. § 1903 (1988). When a child is not a current member of an Indian tribe, all that is required is that one of the biological parents is a member of a federally recognized Indian tribe.

⁷³ Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 476 (1993).

⁷⁴ *Matter of Adoption of T.A.W.*, 186 Wash.2d 828, 834 (2016).

remedial services and rehabilitation to retain parental rights over an Indian child. In application, ICWA gives both Indian and non-Indian parents access to additional remedial services that are designed to prevent the breakup of the Indian family. Specifically, in *Matter of Adoption of T.A.W.*, the court recognized that when parental rights are being terminated to an Indian child, the issue is not whether the parent losing the rights is an Indian or non-Indian parent, but that child is Indian and entitled to the provisions and services outlined by ICWA.⁷⁵

The Indian Family Exception Doctrine and the Existing Indian Family Doctrine ignore the main point of ICWA, which is to identify whether a child within a custody case is Indian—and if so—to protect the rights of the child to maintain its connection to its Indian tribe. It takes two individuals to make a child, if one of the parents is an Indian then it should not matter whether the parents live separately because the child inherently has some Indian heritage. While every single child with an Indian parent may not qualify for membership within an Indian tribe, it is still the duty of the court to determine whether the appropriate tribe was notified before terminating the parental rights of an Indian or non-Indian parent. The courts cannot change the genetics of an Indian child, if the child meets the requirements for tribal membership then that child is an Indian child regardless of whether or not the Indian child lives on a reservation or with the Indian parent.

V. APPLICATION OF EXCEPTIONS TO IMPORTANT ICWA CASES

Congress could not have predicted the level of state-resistance in response to ICWA.⁷⁶ It has been observed that “the Act has been the victim of entrenched state court hostility ever since its enactment more than two decades ago.”⁷⁷ Courts have been

⁷⁵ *Id.* at 847.

⁷⁶ Shannon M. Morris, *Baby Veronica Ruling: Implications for The Indian Child Welfare Act in Indian Child Removals and Adoptions to Non-Indian Custodians*, 72 NAT. LAWYERS GUILD REV.1, 15–16 (2015) (Jim Abourezk, the author of ICWA, considered the Supreme Court’s ruling “an attack on tribal sovereignty through the children” and said that the Court’s refusal to uphold ICWA has set a precedent of hostility for future attacks against ICWA).

⁷⁷ Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 587 (2002).

circumventing the application of ICWA by scrutinizing whether an Indian family exists for ICWA to apply; instead, the court should focus on whether the child, as an individual, qualifies for tribal membership based off the child's lineage.

In *Mississippi Band of Choctaw Indians v. Holyfield*,⁷⁸ twin babies were born to unwed parents who were both domiciled within the Choctaw Reservation. The unwed parents deliberately drove off the reservation for the birth of their children. The issue was determining the domicile of the children, and whether the domicile of the parents extended to the children when the mother had lived on the reservation before and after the birth of the Indian children, but the Indian children had never been on the tribal reservation physically.

Given the parents were domiciled on the Choctaw reservation, the children were not required to be physically present on the tribal land because domicile extended to the children.⁷⁹ The mother voluntarily surrendering custody of the twins does not change the application of ICWA to the adoption process.⁸⁰ The U.S. Supreme Court held that, given the domicile of the twin children on the Choctaw Reservation, the tribe retained the power to determine custody of these children.⁸¹

In contrast, in *Adoptive Couple v. Baby Girl*,⁸² the child was born to an unwed non-Indian who had been in a relationship with the Indian father for some part of the pregnancy. The couple had plans to marry, but the relationship ended before the child's birth.⁸³ The father initially relinquished his rights to the child over a text message, and the mother chose an adoptive family for the child through an adoption agency.⁸⁴ The adoptive parents did not notify the Indian father of the adoption until they had custody of the child and waited to serve the father days before his deployment to Iraq.⁸⁵

The U.S. Supreme Court held that the heightened standard required under § 1912(f) of ICWA does not apply when the parent in question never had physical or legal custody of the child.⁸⁶

⁷⁸ *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 38 (1989).

⁷⁹ *Id.* at 48–49.

⁸⁰ *Id.* at 49.

⁸¹ *Id.* at 53.

⁸² *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 643 (2013).

⁸³ *Id.* at 2558.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

Several sections of ICWA that required a heightened standard did not apply to the father because the child had never lived with the father.⁸⁷ The court found that the preferred placement of the Indian child within an Indian family is required when there is no other party formally seeking to adopt the child. Under §1915(a), the non-Indian couple is not prevented from adopting the child when there are no preferred individuals or entities (the Indian tribe) formally seeking to adopt the child.⁸⁸

The Supreme Court held that a preference cannot be applied if there is not an alternative party seeking to adopt the child because the father was not seeking to adopt the child but was applying ICWA as a method to stop the adoption. If an alternative party had been seeking to adopt the child then this case could have resulted differently, and the father's only argument is that his rights had been wrongfully terminated; he is not permitted to "override the mother's decision and the child's best interest."⁸⁹

The Washington State Supreme Court factually distinguished *Matter of Adoption of T.A.W.*⁹⁰ from *Adoptive Couple v. Baby Girl* by holding that both non-Indian and Indian parents were protected under ICWA when they shared an Indian child.⁹¹ Under ICWA, T.A.W. is an Indian child, his mother is an enrolled member of the Shoalwater Bay tribe, and his father is a non-Indian.⁹² T.A.W.'s parents were married and resided together for some time on the Shoalwater Bay Tribe reservation before the deterioration of their marriage.⁹³ The Washington court held it is immaterial whether a parent whose rights are being terminated is non-Indian when there is a finding that ICWA applies to termination proceedings because ICWA requires that "active efforts be undertaken to remedy and rehabilitate the parents of Indian children before their parental rights may be terminated apply to both state-initiated and privately

⁸⁷ *Id.* The Court held that when the child has not lived with the Indian father, the requirement of making extra efforts and providing resources to preserve the Indian family does not apply. Heightened standard required under § 1912(f) does not apply when the parent in question never had custody of the child, focusing on the phrase "continued custody" in the statute. Supreme Court is essentially agreeing with the judicially created "existing family doctrine" that is applied by some states.

⁸⁸ *Id.* at 2558.

⁸⁹ *Id.* at 2565.

⁹⁰ *Matter of Adoption of T.A.W.*, 186 Wash.2d 828, 834 (2016).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

initiated terminations.”⁹⁴ The court determined that the Existing Indian Family exception was overruled by the state’s adoption of the Washington Indian Child Welfare Act (WICW),⁹⁵ which, like ICWA, states exceptions only apply to delinquency proceedings and custody disputes after the divorce of the Indian child’s parents.⁹⁶ Based on that, the court held the tribal court erred when it did not provide the non-Indian parent the same access to programs and services that would allow him to reinitiate a relationship with the child.⁹⁷ An Indian family is broken up when the rights of either parent, Indian or non-Indian, are terminated and the parent was not offered assistance or services to reestablish a relationship with the Indian child.⁹⁸ Here the court correctly identified the need to provide assistance or services to reestablish a relationship with the Indian child to both the Indian and non-Indian parent. ICWA creates a legal standard for termination of parental rights⁹⁹ that should equally apply to both parents.

There is a need for a uniform standard in the application of ICWA that, from an administrative standpoint, may be best accomplished by the Bureau of Indian Affairs (BIA). However, tribes are unlikely to put trust in any legislation or proposals from the BIA. In response to the variety of state application of ICWA, Congress has recently taken steps to clear the limitations created by the Existing Indian Family exception and other similar doctrines.¹⁰⁰ In June 2016, Department of Interior announced the “implementation and interpretation of the Act has been inconsistent across States and sometimes can vary greatly even within a State,” and that these inconsistencies have led to Indian children and Indian parents receiving “different rights and protections under federal law than an Indian children and Indian parents in another state.”¹⁰¹ Specifically, the BIA makes it clear that once the child has been identified as an Indian child there is no exception to the application

⁹⁴ *Id.*

⁹⁵ WASH. REV. CODE §13.38.180 (2011).

⁹⁶ Matter of Adoption of T.A.W., 186 Wash.2d at 834 (2016).

⁹⁷ *Id.*

⁹⁸ *Id.* at 854–55.

⁹⁹ 25 U.S.C. § 1912(a) (1988).

¹⁰⁰ Indian Child Welfare Act Proceedings, 81 Fed. Reg. 38801–02 (June 14, 2016). Department of Interior specifically rejected the Existing Indian Family Exception Doctrine as a step in clarifying the application of ICWA within Indian child custody matters.

¹⁰¹ Indian Child Welfare Act Proceedings 81 Fed. Reg. 38778–79 (June 14, 2016).

of ICWA, and state courts are not permitted to focus on certain factors to create exceptions (Existing Indian Family or Indian Family Exception doctrines).¹⁰² In the implementation of this final rule on the application of ICWA, there is a hope that ICWA will now be applied appropriately by courts, and once an Indian child is identified that courts will properly inform the child's tribe before the child has become attached to a foster or adoptive family. The best interest of the child may be compromised if the child is separated from a non-Indian family after the child has acclimated to the family and spent a significant amount of time living with the non-Indian family. Non-parental custody cases are difficult, and courts are tasked with making the right decision that respects the rights of the parents while acknowledging the potential damage to the child from the change of placement.

VI. DISTORTION OF PUBLIC PERCEPTION REGARDING ICWA

Even when the child is clearly an Indian child, non-Indian foster or adoptive families have found legal loopholes that allow them to retain custody of the Indian child.¹⁰³ The Bureau of Indian Affairs is taking steps to standardize the application of ICWA in custody cases. However, there is pushback from ICWA opponents that is often mischaracterized by the media and sensationalized to elicit a negative public opinion of ICWA. Adoption agencies and opponents of ICWA often advise non-Indian foster parents seeking to adopt an Indian child to drag out litigation in the hopes that the family can establish claims of “bonding and attachment” between the Indian child and non-Indian child.¹⁰⁴ Often, bonding and attachment is used as support that the best interest of the child is to remain with the foster family, and it often is a “long-term, calculated legal strategy.”¹⁰⁵

¹⁰² *Id.* at 38779.

¹⁰³ A non-Indian family may retain custody of an Indian child that has been improperly removed from the custody of an Indian custodian or parent when the non-Indian adoptive or foster family has shown that the child would be subjected to substantial and immediate danger or threat of such danger. *See* 25 U.S.C. §1920 (1988).

¹⁰⁴ Kate Fort, *Response to Media Dustup in California ICWA Case*, TURTLE TALK (March 21, 2016), <https://turtletalk.wordpress.com/2016/03/21/response-to-media-dustup-in-california-icwa-case/> [<https://perma.cc/W4FJ-NK25>].

¹⁰⁵ *Id.*

Foster families are clearly and regularly informed that Indian children are subject to ICWA, and if reunification with parents is unsuccessful then the Indian child will be placed with extended family.¹⁰⁶ Specifically, in the case regarding Alexandria and the Choctaw Nation of Oklahoma, the foster family was repeatedly informed that the end goal was reuniting Alexandria with her father, and if that failed to place her with family members.¹⁰⁷ The foster family facilitated the child's ongoing relationship with family members in Utah, and authorities repeatedly reminded the family that the Indian girl was not up for adoption. However, the foster family has retained the services of the same attorney as the adoptive couple in *Adoptive Couple v. Baby Girl*, who has a history of attempting to overturn ICWA.¹⁰⁸ Despite the foster family's awareness that Alexandria as an Indian child fell under the protection of ICWA, reunification was the end goal, and she was not available for adoption outside of her family, the foster family chose to engage in years of litigation before ultimately having to give up Alexandria to her extended family in Utah. If the foster family had initially followed the reunification plan set in place by the State, there would not have been an issue of bonding and attachment preventing the Indian child from being returned to her family.

While foster care may work as a long-term placement for children, foster families have a duty to also follow reunification plans established by the courts. It is possible for a child to form a bond with a foster family after a short period of time depending on the quality of care and love shown to the child. Reunification with the Indian family is not always in the best interest of the child, especially when the child has grown attached to the foster family or the Indian family has made no attempts to establish a relationship with the child.¹⁰⁹ However, foster parents must be aware that the

¹⁰⁶ *Id.*; see 25 U.S.C. §1920-22 (1988); see also *Final Rule: Indian Child Welfare Act (ICWA) Proceedings*, BIA 4,

<https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/raca/pdf/idc1-034295.pdf>.

¹⁰⁷ See generally *In re Alexandria P.*, 204 Cal.Rptr.3d 617, 621–22 (2016).

¹⁰⁸ Fort, *supra* note 104; Suzette Brewer, *Breaking: California Returns Child to Family in ICWA Case*, INDIAN COUNTRY TODAY (March 22, 2016), <http://indiancountrytodaymedianetwork.com/2016/03/22/breaking-california-returns-child-family-icwa-case-163881> [<https://perma.cc/4WPV-FA6F>].

¹⁰⁹ See *In re Interest of Mahaney*, 146 Wash.2d. 878, 894 (2002) (Washington State Supreme Court held that “even where there is no showing of present parental unfitness, in determining the best interests of the child the court may take into consideration emotional and psychological damage from prior

initial goal of fostering an Indian child is reunification with the Indian family and that it is in the best interest of the child when the court has set that goal in place with an action plan on how to establish a relationship between the Indian child and the Indian family (presuming that the Indian family is actively trying to establish a relationship with the Indian child).¹¹⁰

In the media, ICWA cases are often one-sided and told from the point of view of the adoptive parents, which, given the sensationalism involved within parents losing a child, increases negative media coverage of ICWA cases.¹¹¹ Media coverage does not cover the historical background of ICWA or the events leading up to the enactment of ICWA. Instead media outlets focus on the emotional drama around the removal of a child from a happy home due to a flawed law that needs to be removed.¹¹²

Moreover, opponents of ICWA capitalize on the sensationalized media coverage and the pain of the adoptive parents to promote inaccurate perceptions on the purpose of ICWA. For example, the Goldwater Institute (Goldwater), an opponent of ICWA, is a “leading free-market public policy research and litigation organization” that believes “[the] U.S. Constitution provides a basic minimum protection for individual rights, while leaving states free to enact laws that protect those rights more broadly.”¹¹³ In relation to ICWA, Goldwater believes that ICWA does not act in the best interest of the child and instead promotes

unfitness of a parent and the child’s current special needs for treatment and care.”).

¹¹⁰ See generally *Matter of Custody of L.M.S.*, 187 Wash.2d 567, 578 (2017) (Absent extreme and unusual circumstances a parent-like relationship is not sufficient to establish an adequate cause to award a non-parent custody when a parent is fit and willing to raise the child.).

¹¹¹ Terry Cross, *National Indian Child Welfare Association Respond’s to Dr. Phil’s Coverage of ICWA Case*, INDIAN COUNTRY TODAY (Oct. 23, 2012), <https://indiancountrymedianetwork.com/news/opinions/national-indian-child-welfare-association-responds-to-dr-phils-coverage-of-icwa-case/> [<https://perma.cc/26Y9-6VFP>].

¹¹² Michael Corcoran, *Media Failure Lead to Flawed Understandings in Cherokee Adoption Case*, TRUTHOUT, (Jan 13, 2013), <http://www.truth-out.org/news/item/13749-media-failures-lead-to-flawed-understandings-in-choerokee-adoption-case> [<https://perma.cc/74XE-UNPL>] (The problem with media outlets sensationalizing the emotional pain of the parties involved “is that it influences the public’s . . . perception of the Indian Child Welfare Act’s true impact on families . . . [because] the media repeatedly use a tiny fraction of ICWA cases” in its portrayal of the law.).

¹¹³ GOLDWATER INSTITUTE, <https://goldwaterinstitute.org/about> [[HTTPS://PERMA.CC/H7QF-ZCSG](https://perma.cc/H7QF-ZCSG)].

“separate, substandard treatment solely because of their race.”¹¹⁴ Goldwater references *In re. B.B.* as the reason for its current position on ICWA.¹¹⁵ Goldwater uses emotionally gripping language to describe the situation the adoptive parents found themselves in:

The case involves a three-year-old boy who was placed in a loving adoptive home by his mother. On the eve of the court finalizing the adoption, a man came forward claiming to be the boy’s father. State law establishes a procedure for acknowledging or establishing paternity in such cases—procedures that typically require the alleged father to demonstrate a commitment to and relationship with the child....These rules are standard across all fifty states and have been upheld by the Supreme Court...the Court has [held that the rules] protect the best interests of children by ensuring that disputes over family relationships don’t cause delay in cases where children need stable, permanent, loving homes.

But this case was different, because the child is biologically eligible for membership in an Indian tribe. As a result, the case falls under the Indian Child Welfare Act, which creates a separate and less protective set of rules for child welfare cases involving Native American kids. In fact, the Utah Supreme Court went even further than the Act requires, and created a new rule that allows the alleged parents of Indian children to get around state law limits on paternity. That meant the alleged father could intervene in the case and block the pending adoption of which the mother had already approved. In other words, because the case involved an Indian child, the purported father—who would otherwise be

¹¹⁴ *Id.* This is not to criticize Goldwater on every position it has taken, but to specifically show how its position on ICWA is contributing to the social misunderstanding of ICWA.

¹¹⁵ *Restoring Native American Children’s Equal Protection Rights: In re. B.B.*, GOLDWATER INSTITUTE., <https://goldwaterinstitute.org/restoring-native-american-childrens-equal-protection-rights-in-re-b-b> [<https://perma.cc/X4KV-WTR4>].

blocked from interfering in the adoption—was entitled to interrupt the adoption and keep the lawsuit going.

That rule exacerbates the already severe problem of separate and unequal treatment that ICWA imposes on Indian children across the country. If the Utah rule is allowed to remain in place, countless Native American kids could find their adoption cases thrown into chaos by after-the-fact interventions by alleged parents.¹¹⁶

However, what this information does not mention is whether the mother knew or had reason to know about the father's Indian status. Additionally, this statement fails to address whether there was any attempt to look into the father's background to determine any information regarding his family, health records, or other personal information that adoptive parents generally seek before adoption. Goldwater also ignores the fact that if any of this information had been known to the relevant court then the court handling this case would have been required to make sure the father's tribe had been given proper notification before permitting the adoption to move as far along as Goldwater claims the adoption went.

Yes, in some cases ICWA does exacerbate adoptions; however, if ICWA had been properly followed throughout the adoption process, the situation would not have reached the point of a father needing to block legislation. Had the tribe been notified when the father's parental rights were first terminated, the tribe would have had the opportunity to either claim the child or allow the adoption to proceed. There is a possibility that an Indian couple from the child's tribe could provide a similar stable, permanent home had the tribe been notified. However, the tribe was not given the opportunity to show such Indian families exist, which then can be portrayed as a lack of such families by ICWA opponents. Ultimately, the situation could have been prevented, instead Goldwater now has an opportunity to sensationalize a case that will further impact a social understanding of ICWA and the steps it takes

¹¹⁶ *Id.*

to ensure the best interest of the child while balancing the interest of the Indian tribe.

There needs to be a balance to both sides so that legislation can be created that best meets the needs of Indian children while respecting the right of Indian tribes to maintain and take care of their members. Non-parent custody cases over children, and especially Indian children, are difficult decisions to make. To best meet the needs of both Indian and non-Indian children within the foster care system there needs to be increased government financial support given to state child services agencies. Future legislation that supports or furthers the purpose of ICWA will be most likely to function if there is financial support given to tribes and child services that allow both entities to quickly assess a child's membership. If tribes and state agencies can quickly determine a child's membership, then they will be able to determine whether a tribe will enforce its right to place the child with an Indian foster family or if the tribe will relinquish its rights to the child and allow the state to choose a foster family. Most of the controversy around this issue is created when there is a delay in determining a child's membership status due to a lack of funds or resources within state and tribal agencies.

The public's general lack of knowledge regarding the history of ICWA and the standards set up by ICWA allows for easy manipulation by adoption agencies and ICWA opponents. A lack of understanding and sensationalized media supports a negative image of Indian tribes that overshadows the protections offered by ICWA, and the improper behavior of adoption agencies and attorneys who encourage adoptive parents to go against the clear standards set out in ICWA.¹¹⁷ This is a difficult situation to address, given the U.S. Supreme Court ruling in *Baby Veronica*, because it fails to acknowledge the historical reasoning for ICWA and maintaining a relationship between an Indian child and its tribe.¹¹⁸ However, the behavior of these adoption agencies and attorneys who are creating delays in the system, and actively working the system to get around

¹¹⁷ Terry L. Cross, *The Indian Child Welfare Act: We Must Still Fight for Our Children*, 23 RECLAIMING CHILD. & YOUTH 24 (2014).

¹¹⁸ Shannon M. Morris, *Baby Veronica Ruling: Implications for The Indian Child Welfare Act in Indian Child Removals and Adoptions to Non-Indian Custodians*, 72 NAT. LAWYERS GUILD REV.1, 15–16 (2015) (“The court’s ruling added another violation of American Indian constitutional rights to the long list of rights consistently abridged by the federal government [and ultimately] exacerbates the Indian child welfare crises.”).

ICWA statutes, should face some sort of monetary fine. Fines would need to be determined on a case by case basis, but could be based on whether there were improper delay tactics, the length of time the litigation took due to improper delay tactics, and whether the adoption agency knew or had reason to know the child was an Indian. Policies surrounding the custody of children as a whole are inconsistent and create conflicting goals and procedural issues when applied.¹¹⁹ To overcome these issues, it is necessary that both legislators and ICWA supporters find a common ground where the agencies responsible for determining a child's membership status are able to do so in a timely manner and hold foster families and Indian families accountable if they fail to follow reunification plans set by these state agencies.

VII. CONCLUSION

A history of racial discrimination and forced assimilation through the removal of Native American children led to the enactment of ICWA.¹²⁰ ICWA was meant to protect Indian children from being removed from their homes for unsubstantiated reasons and to ensure that Indian tribes were not eliminated through indirect means of forced assimilation. Despite the intent of Congress, state courts have continuously interpreted ICWA in a variety of ways that has created loopholes around the mandates.¹²¹ Large cases in front of the Supreme Court of the United States has brought attention to ICWA on a national level.¹²² However, ICWA is often portrayed as a set of rules that ignores the best interest of the Indian child in favor of satisfying the demands of Indian tribes who may not be capable of taking care of the Indian child as well as an already established home with an adoptive family.¹²³ This perception has been further manipulated within the media by ICWA opposition in an effort to dismantle ICWA.

The history and purpose of ICWA has been misinterpreted by courts applying it within custody cases of Indian children. For

¹¹⁹ Ann E. MacEachron and Nora Gustavsson, *Contemporary Policy Challenges for Indian Child Welfare*, 9 J. POVERTY 43, 52 (2005).

¹²⁰ H.R. Res. 12533, 95th Cong. (1978) (enacted).

¹²¹ Cross, *supra* note 10, at 677.

¹²² See generally *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L.Ed.2d 29 (1989); *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 133 S. Ct. 2552, 186 L.Ed.2d 729 (2013).

¹²³ Fort, *supra* note 15; Brewer, *supra* note 108.

ICWA to be successful, it is necessary that states and courts identify the child's tribe and give proper notification to the tribes. ICWA was established to stabilize the growth of tribes that had diminished after decades of assimilation of tribal members into mainstream American society. Despite the set guidelines within ICWA, states apply ICWA differently within each court, which creates disproportionate protection to Indian children, parents, and tribes.¹²⁴ To combat improper application of ICWA it is necessary that clarification of ICWA is provided to state child welfare workers, adoption agencies, judges, and society. Media uses the emotional pull within ICWA adoption cases between Indian tribes and non-Indian adoptive families to undermine the protection given to tribes under ICWA and limit tribal rights. Proper application of ICWA would prevent many of the cases being reported on by news media because many years of litigation would be avoided. And most importantly, the Indian child developing ties to a family the child should not have legally been placed with could be prevented.

¹²⁴ See generally Caroline M. Turner, *Implementing and Defending the Indian Child Welfare Act Through Revised State Requirements*, 49 COLUM. J.L. & SOC. PROBS. 501 (2016).