Judicial Indifference: How does the "existing Indian family" exception to the Indian Child Welfare Act continue to endure in the Age of Obama?

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Introduction

In November of 2008, the country celebrated the election of the first African-American to the office of President: Barack Hussein Obama.[2] It appeared that the country was ready to consider a candidate regardless of the color of his skin. For a brief shining moment, it seemed as if Reverend Doctor Martin Luther King, Jr's dream was coming true. That a man would not be judged based upon the color of his skin[3]. Sadly, this dream is not coming true for many American Indians [4]and American Indian tribes in this country.

Congress created the Indian Child Welfare Act (ICWA) in order to preserve the relationship between tribes and their members. Courts created and used the "existing

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[2] *See, e.g.* Rex W. Huppke & Stacy St. Clair, *The Grant Park Rally: Chicago Becomes the Epicenter of the World as Tens of Thousands Gather Downtown to Celebrate the Election of Barack Obama as the 44th President of the United States*, CHI. TRIB., Nov. 5, 2008, at 10; Sharon Cohen, *Americans Experience a Flood of Emotions as They Celebrate Obama's Victory*, FORT WORTH STAR-TELEGRAM, Nov. 5, 2008, at AA5; Jacqueline Charles et al., *South Florida: Joy in the Streets after Victory*, MIAMI HERALD, Nov. 5, 2008, at A3; Kristin Bender, *Revelers Hit the Streets in Berkeley, Oakland, to Celebrate Obama Victory*, OAKLAND TRIB., Nov. 5, 2008, *available at* 2008 WLNR 21115507; Marc Fisher, *Rapture in the Streets as Multitudes Cheer Obama and Celebrate America*, WASH. POST, Nov. 6, 2008, at A24; Jennifer Lee & Timothy Williams, *Crowds in Streets Celebrate Obama Victory*, N.Y. TIMES, Nov. 4, 2008, http://cityroom.blogs.nytimes.com/2008/11/04/new-york-crowds-celebrate-obama.

[3] "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." Rev. Dr. Martin Luther King, Jr., Address at the Lincoln Memorial, March on Washington for Jobs and Freedom (Aug. 28, 1963), *available at* http://www.usconstitution.net/dream.html (last visited July 30, 2010).

[4] While the term Native American can be used, the author prefers the term American Indian and will use American Indian and Indian interchangeably throughout this article.

Indian family" exception to avoid applying the ICWA to children or parents the court did not consider Indian enough. Courts continued and pervasive use of this judicially created exception to the Indian Child Welfare Act suggests indifference, ignorance or intolerance. One would hope that since the Indian Child Welfare Act is over 30 years old, ignorance of the law would eventually subside. A cursory research of the law should alleviate judicial ignorance of the Indian Child Welfare Act. Absent judicial laziness, that leaves either indifference or intolerance. Indifference is that the judiciary is aware of the Indian Child Welfare Act, but either believes it to be an archaic law that is no longer needed or that the result they reach under state law is better. Intolerance is a judiciary that perceives the Indian Child Welfare Act as creating "special rules" for American Indians and American Indian tribes that the courts are loathe to enforce. The law is seen as creating two tracks for adoption: the fast track for non-Indian children and the slow, plodding track for American Indian children. The goal of this article is to remedy once and for all the problem of ignorance of the Indian Child Welfare Act and indifference towards it. Unfortunately, this article may not be able to remedy the problem of intolerance.

In 1982, the Kansas Supreme Court created the existing Indian family exception to the Indian Child Welfare Act; however, the Court properly overturned its use in early 2009[5]. The Kansas Supreme Court recognized that the use of the existing Indian family exception to the Indian Child Welfare Act was a departure from the norm and was persuaded that the abandonment of it was the wisest course.[6] The Kansas Supreme Court overcame both ignorance and indifference to the Indian Child Welfare Act. Unfortunately, late in 2009, the Nevada Supreme Court adopted the use of the existing Indian family exception to avoid the application of the Indian Child Welfare Act.[7] The

[5] *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982), *overruled by In re* A.J.S., 204 P.3d 543 (Kan. 2009).

[6] *In re* A.J.S., 204 P.3d 543, 549 (Kan. 2009). From this point in ICWA interpretation and the development of common law, we are persuaded that abandonment of the existing Indian family doctrine is the wisest future course. Although we do not lightly overrule precedent, neither are we inextricably bound by it. See *Crist v. Hunan Palace, Inc.,* 277 Kan. 706, 715, 89 P.3d 573 (2004). *Baby Boy L.* is ready to be retired.

[7] *In re* N.J., 221 P.3d 1255 (Nev. 2009).

Nevada Supreme Court ignored the interests of the American Indian tribes when it adopted the existing Indian family exception for use in Nevada.[8] It ignored the recent Kansas Supreme Court ruling that overturned the existing Indian family exception that it created.[9] American Indian tribes and the American Indian community took two steps forward with the case in Kansas and one step back with the case in Nevada.

The existing Indian family exception is a blemish on states whose courts choose to adopt and use it. The courts either blindly think that they know what is best for American Indian children and their tribes (intolerance) or they simply don't care (indifference). The ICWA requires a different process and rules than a non-Indian adoption and some courts may still be unaware of the requirements or simply resent having to comply with two separate processes. The question then becomes is the inconvenience worth maintaining the integrity of American Indian tribes and their lifeblood, their children, or is the process too cumbersome and therefore the decimation of American Indian tribes is worth it?

The first part of this article is intended to cure the problem of ignorance as to the Indian Child Welfare Act. It will provide information about the Indian Child Welfare Act and the history of the existing Indian family exception. The second part of this article addresses the issue of indifference and gives courts four reasons why the use of the existing Indian family exception is improper.

I. The remedy for judicial ignorance: The Indian Child Welfare Act and its history

A. The need for the Indian Child Welfare Act

The federal government's relationship with American Indian tribes has vacillated from assimilation to self-determination.[10] During the period of assimilation, American

[8] *In re* N.J., 221 P.3d 1255 (Nev. 2009).
[9] *In re* A.J.S., 204 P.3d 543, 549 (Kan. 2009).
[10] The "Assimilation Era" of federal Indian policy is generally considered to have encompassed the years 1871-1928. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.04 (Nell Jessup Newton ed., 2005) (1942); Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological*

Indian children were removed from their families and their American Indian tribes.[11] In the 1800s, in an attempt to assimilate American Indian children into White culture, the children were involuntarily removed from their homes and placed in White-run boarding schools.[12] The policy of assimilation continued during the 1960s and 1970s on the state level, when welfare workers and other state officials strived to locate White homes for American Indian children. [13] The state social workers cited low-income, unemployment, poor health, and low educational attainment as reasons to remove an American Indian child from his or her American Indian family.[14] Based on these factors the social worker found neglect or abandonment where in actuality there was none. [15] Unfortunately, the reality of the poverty and dependence created by the Federal government with the use of reservations were used as evidence that American Indian parents were unfit and resulted in the removal of their children.[16]

Surveys in 1969 and 1974 conducted by the Association of American Indian Affairs (AAIA) found that between twenty-five to thirty-five percent of all American Indian children were separated from their families and placed in non-American Indian foster homes, adoptive homes, or institutions.[17] By 1978, over ninety percent of adopted American Indian children had been removed their American Indian homes and placed in non-American Indian homes.[18] The "wholesale separation of Indian children from their

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Diversity, 31 ARIZ. ST. L.J. 483, 495 (1999). Since 1961, federal Indian policy has shifted to a "Self-Determination" and "Self-Governance" approach. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 (Nell Jessup Newton ed., 2005) (1942); Dean B. Suagee, *The Cultural Heritage of American Indian Tribes and the Preservation of Biological Diversity*, 31 ARIZ. ST. L.J. 483, 495-486 (1999).

[11] Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 601 (2002).

[12] Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 602 (2002).

[13] Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 603 (2002).

[14] H.R. REP. NO. 95-1386, at 12 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7534.

[15] H.R. REP. NO. 95-1386, at 10 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7532.

[16] Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United* States, 16 B.C. THIRD WORLD L.J. 17, 24 (1996).

[17] H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.

[18] Erik W. Aamot-Snapp, Note, *When Judicial Flexibility Becomes Abuse of Discretion: Eliminating the "Good Cause" Exception in Indian Child Welfare Act Adoptive Placements*, 79 MINN. L. REV. 1167, 1167-68 (1995).

families" was widely viewed as the "most tragic and destructive aspect of American Indian life." [19] At the core of this American Indian child welfare crisis was the failure of society to recognize and respect the cultural values and social norms of American Indian tribes.[20]

These issues led Congress to enact the Indian Child Welfare Act in 1978. Congress was concerned with not only American Indian families, but also American Indian tribes.[21] First, the ICWA was established to help tribes keep American Indian children in their American Indian community.[22] Second, Congress also recognized a "Federal responsibility to Indian people." [23] This Federal responsibility arises from Congress' general course of dealing with American Indian tribes, relevant statutes, and

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[19] H.R. REP. NO. 95-1386, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7531.

[20] Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 2 (1998-1999).

[21] Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 419 (1997).

[22] Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 419 (1997).

[23] 25 U.S.C. § 1901. Congressional findings

> Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds--
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> (1) that clause 3, section 8, article I of the United States Constitution [USCS Constitution, Art. I, § 8, cl 3] provides that "The Congress shall have Power . . . To regulate Commerce . . . with Indian tribes [Tribes]" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;
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> (2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;
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> (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 trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
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> (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
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> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

treaties.[24] This Federal responsibility includes "the protection and preservation of Indian tribes and their resources."[25]

The ICWA, enacted during the Self-Determination era,[26] presumably seeks to protect and preserve American Indian tribal sovereignty.[27] Another basic tenet of the Indian Child Welfare Act is to protect the best interests of American Indian children.[28] The ICWA recognizes that American Indian tribes have a solemn stake in the welfare of their children and it empowers these tribes with jurisdiction over American Indian child custody proceedings in order to prevent further obliteration of American Indian tribal and family interests.[29] The ICWA is based on the fundamental assumption that it is in the best interest of the American Indian tribes and American Indian children that the child's relationship with the tribe be protected.[30] Unfortunately, some state courts focus on the best interest of the child and completely ignore the other half of this national policy.

B. The Indian Child Welfare Act

The Indian Child Welfare Act established minimum Federal standards for the removal of American Indian children from their families and the placement of such children in foster or adoptive homes.[31] The placement was to reflect the unique values of

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[24] 25 U.S.C. § 1901(2).
[25] 25 U.S.C. § 1901(2).
[26] Indian Child Welfare, 25 U.S.C. § 1901 (1978); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 1.07 (Nell Jessup Newton ed., 2005) (1942).
[27] Maire Corcoran, *Rhetoric Versus Reality: The Jurisdiction of Rape, The Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L.415, 428 (2009), *citing* ALVIN M. JOSEPHY JR. ET AL, RED POWER: THE AMERICAN INDIANS' FIGHT FOR FREEDOM 122 (Alvin M. Josephy Jr. et al eds., Univ. of Neb., 2d ed. 1999.
[28] Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United* States, 16 B.C. THIRD WORLD L.J. 17, 18 (1996).
[29] Patrice H. Kunesh, *Transcending Frontiers: Indian Child Welfare in the United* States, 16 B.C. THIRD WORLD L.J. 17, 18 (1996).
[30] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 n. 24 (1989), *citing In re* Appeal in Pima County Juvenile Action No. S-903, 635 P.2d 187, 189 (Ariz. Ct. App. 1981); *see also* Suzianne D. Painter-Thorne, Article, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 365 (2008-2009).
[31] 25 U.S.C. § 1902. Congressional declaration of policy.

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the

American Indian culture.[32] The Indian Child Welfare Act also made provisions for assistance to American Indian tribes in the operation of child and family service programs.[33]

The Indian Child Welfare Act is a set of federal rules that dictate to state courts dealing with American Indian children when they must defer to American Indian tribal jurisdiction[34] or permit American Indian tribal participation[35]. The ICWA also establishes a hierarchy of preferences for placement of American Indian children.[36] The

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establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

[32] 25 U.S.C. § 1902.

[33] 25 U.S.C. § 1902.

[34] 25 U.S.C. § 1911(a), (b). Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction. An Indian tribe shall have jurisdiction exclusive as to any State over any 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.

(b) Transfer of proceedings; declination by tribal court. 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, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.

[35] 25 U.S.C. § 1911(c), State court proceedings; intervention. In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding. 25 U.S.C. §1912(a). Pending court proceedings (a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice shall be given to the Secretary in like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

[36] 25 U.S.C. § 1915. Placement of Indian children

(a) Adoptive placements; preferences. 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.

(b) Foster care or preadoptive placements; criteria; preferences. Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a

requirements of the ICWA are not for the tribe or the parent to enforce, but rather place an active duty on the state to follow this federal law.[37] The long-term benefit of the ICWA is the continued existence of American Indian tribes.[38]

In enacting the Indian Child Welfare Act, Congress recognized the special relationship between the United States and American Indian tribes and their members and the federal responsibility to American Indian people.[39] Congress recognized that the Federal government has a responsibility to protect and preserve American Indian tribes and their resources.[40] Congress found that the most vital resource to American Indian tribes is their children.[41] Additionally, Congress acknowledged that state courts failed to recognize the essential tribal relations of American Indian people and the

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family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive 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.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences. In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable. The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability. A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

[37] Kathryn Fort, *The Cherokee Conundrum: California Courts and the Indian Child Welfare Act* 5 (Mich. St. Univ. Legal Studies Research, Paper No. 07-07, 2009) *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392293*.

[38] *Joint Hearing of the House Resources Committee and Senate Committee on Indian Affairs, on H.R. 1082 and S. 569, Bills to Amend the Indian Child Welfare Act of 1978*, Before the H. Comm. on Resources, 105th Cong. 20 (June 18, 1997) (statement of Ada E. Deer, Assistant Secretary for Indian Affairs, Dept. of the Interior), *available at* http://gos.sbc.edu/d/deer.html (last visited Mar. 26, 2010).

[39] 25 U.S.C. § 1901 ("Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds….").

[40] 25 U.S.C. § 1901(2).

[41] 25 U.S.C. § 1901(3).

cultural and social standards prevailing in American Indian communities and families.[42] Congress further went on to declare that the protection of the best interest of American Indian children and the promotion of the stability and security of American Indian tribes and families was to be this Nation's policy.[43]

C. The application of the Indian Child Welfare Act

The Indian Child Welfare Act is specific in its application. The ICWA defines an Indian as a person who is a member of an American Indian tribe.[44] The children that it applies to are any unmarried minor who is either a member of an American Indian tribe or is eligible for membership in an American Indian tribe and is the biological child of a member of an American Indian tribe.[45] Tthe ICWA by its definitions limits the application of its provisions to only those children who have a membership tie to a particular American Indian tribe.

The ICWA applies to child custody proceedings, which are defined by the act as foster care placement, termination of parental rights, preadoptive and adoptive placement.[46] The Act provides American Indian tribes with exclusive jurisdiction over an

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[42] 25 U.S.C. § 1901(5).
[43] 25 U.S.C. § 1902.
[44] 25 U.S.C. § 1903(3). "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 7 of the Alaska Native Claims Settlement Act (85 Stat. 688, 689) [43 USCS § 1606];
[45] 25 U.S.C. § 1903(4). "Indian child" means 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;
[46] 25 U.S.C. § 1903(1). (1) "child custody proceeding" shall mean and include--

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

Indian child who is a resident or domiciliary of the Tribe's reservation.[47] Additionally, the tribe has a right to intervene in a state court proceeding.[48] Furthermore, tribes have a right to have jurisdiction transferred to their court under the ICWA for an Indian child not a resident or domiciliary on a reservation.[49]

To trigger the application of the ICWA only two things are required: first, a "child custody proceeding,"[50] as defined by the ICWA, and second, an "Indian child"[51] as defined by the ICWA must be the subject of the child custody proceeding.[52] Once the ICWA is triggered, then the issue becomes who has jurisdiction over the child.[53]

D. The Indian Child Welfare Act is still necessary

The creation and survival of the existing Indian family exception to the Indian Child Welfare Act is proof that ICWA is still needed. By applying the existing Indian family exception the states are using a back-door approach to do exactly what the ICWA was intended to prevent: imposition of white middle class standards to child

[47] 25 U.S.C. § 1911(a).Exclusive jurisdiction.
An Indian tribe shall have jurisdiction exclusive as to any State over any 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.
[48] 25 U.S.C. § 1911(c). State court proceedings; intervention.
In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.
[49] 25 U.S.C. 1911(b) Transfer of proceedings; declination by tribal court.
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, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.
[50] 25 U.S.C. §1093(1).
[51] 25 U.S.C. §1903(4).
[52] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 739 (2006).
[53] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 739 (2006).

custody cases involving American Indian children.[54] Some commentators believe that the ICWA has significantly failed to achieve its stated goals.[55] State courts' inventive use of judicially created exceptions is a partial cause for the failure. Evidence also indicates that the ICWA's wide discretion allowed to state courts has resulted in ICWA's failure to protect and maintain American Indian children and families.[56] State courts, welfare agencies, and attorneys who fail to follow the letter and spirit of the law either from ignorance or indifference have all contributed to this enduring quandary.[57]

As early as a decade after the ICWA's enactment, state courts continued to ignore the ICWA mandate and continued to place American Indian children in non-Indian homes.[58] Fifteen years after enactment up to one-fifth of American Indian children were still being placed outside of American Indian familial and tribal placement

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[54] Amanda B. Westphal, Student Article, *An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. REV. 107, 124 (2003).

[55] Maire Corcoran, *Rhetoric Versus Reality: The Jurisdiction of Rape, The Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L.415, 417 (2009), *citing* Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 3 (1998-1999).

[56] Maire Corcoran, *Rhetoric Versus Reality: The Jurisdiction of Rape, The Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L.415, 418 (2009); U.S. GOV'T. ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, GAO-05-290, INDIAN CHILD WELFARE ACT: EXISTING INFORMATION ON IMPLEMENTATION ISSUES COULD BE USED TO TARGET GUIDANCE AND ASSISTANCE TO STATES 33-38, 44-46 (2005), *available at* http://www.gao.gov/new.items/d05290.pdf (last visited July 24, 2010) (reporting that, under the ICWA, Indian children spent comparatively more time in foster care than non-Indian children, were less likely to be adopted out of foster care, and more likely to be transferred to other agencies); Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 3 (1998-1999) (stating that "recent studies suggest that one-fifth of all Native American children 'are still being placed outside of their natural tribal and family environments.'").

[57] Maire Corcoran, *Rhetoric Versus Reality: The Jurisdiction of Rape, The Indian Child Welfare Act, and the Struggle for Tribal Self-Determination*, 15 WM. & MARY J. WOMEN & L.415, 432 (2009), *citing* Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 3 (1998-1999).

[58] Solangel Maldonado, *Race, Culture, and Adoption: Lessons From Mississippi Band of Choctaw Indians v.Holyfield*, 17 COLUM. J. GENDER & L. 1, 11 (2008), *citing* Nancy Butterfield, *State Isn't Supporting Indian Child Welfare Laws*, SEATTLE TIMES, Sept. 22, 1990, at A15; Don J. DeBenedictis, *Custody Controversy: Tribe Can't Intervene in Indian Mother's Adoption Decision*, A.B.A. J., May 1990, at 22, 23 (noting that, twelve years after ICWA's enactment, children in Alaska were removed from their homes at five times the rate of non-Indian children and ninety-three percent were placed in non-Indian homes).

preferences.[59] Fortunately, the rate of removal of American Indian children has decreased from pre-ICWA numbers, but American Indian children are still removed from their homes in disproportionately higher numbers than non-Indian children.[60]

E. The "existing Indian family" exception

The existing Indian family exception is viewed by many commentators and American Indian Tribes as the latest attempt to force American Indians into modern society. [61] State courts have resisted the participation of American Indian tribes in child custody proceedings involving American Indian children and the application of the ICWA by using the existing Indian family exception.[62] The existing Indian family exception is an entirely judge-created doctrine that bars application of the ICWA when either the child or the child's parents have not maintained a significant social, cultural, or political relationship with his or her tribe.[63] In these jurisdictions, for the ICWA to apply, the existing Indian family exception requires that the child be removed from an "existing Indian family unit" or "Indian home or culture."[64]

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[59] Introduction to The Indian Child Welfare Act: Unto the Seventh Generation, 1992 Conference Proceedings (Troy R. Johnson ed., 1993).

[60] Barbara Atwood, *The Voice of the Indian Child: Strengthening the Indian Child Welfare Act Through Children's Participation*, 50 ARIZ. L. REV. 127, 128 (2008).

[61] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 741 (2006), *citing* Samuel Prim, Student Article, *The Indian Child Welfare Act and the Existing Indian Family Exception: Rerouting the Trail of Tears?*, 24 LAW & PSYCHOL. REV. 115, 115 (2000).

[62] S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re* Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988) *and In re* D.S., 577 N.E.2d 572 (Ind. 1991); *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982); Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996); Hampton v. J.A.L., 658 So. 2d 331 (La. Ct. App. 1995); *In re* S.A.M., 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re* T.S., 801 P.2d 77 (Mont. 1990); *In re* Adoption of D.M.J., 741 P.2d 1386 (Okla. 1985) *and In re* S.C., 833 P.2d 1249 (Okla. Civ. App. 1992); Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987); *In re* Morgan, No. 02A01-9608-CH-00206, 2007 WL 716880 (Tenn. Ct. App. Nov. 19, 1997); *In re* Crews, 825 P.2d 305 (Wash. 1992) (en banc). *See* Amanda B. Westphal, Student Article, *An Argument in Favor of Abrogating the Use of the Best Interests of the Child Standard to Circumvent the Jurisdictional Provisions of the Indian Child Welfare Act in South Dakota*, 49 S.D. L. REV. 107, 122-23 (2003).

[63] Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 625 (2002).

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

These state courts routinely use the existing Indian family exception to retain jurisdiction, to place American Indian children in contravention of the ICWA placement preferences or to refuse to allow American Indian parents to revoke consent to voluntary foster care or adoption placements. [65] However, what qualifies as an "Indian family" has differed from court to court. In situations where the American Indian child never lived as a part of an American Indian family and had no association with American Indian culture, the ICWA may not be applied even though the biological parent had such associations.[66] The existing Indian family exception can be viewed as employing a "minimum contacts" analysis to conclude whether or not the American Indian child has sufficient ties to his or her tribe for the Act to apply, even though no such test can be found in the ICWA.[67]

1. The history of the “existing Indian family” exception

a. Its birth

The existing Indian family exception was first created by the Kansas Baby Boy L. was born in Wichita, Kansas on January 29, 1981.[68] On the same day, his biological mother, an unmarried non-Indian woman, executed a consent to the adoption specifically directed and limited to the adoptive parents named in the consent. [69] The adoptive parents filed their petition for adoption along with the mother's consent the

[65] Christine Metteer, *Hard Cases Making Bad Law: The Need for Revision of the Indian Child Welfare Act*, 38 SANTA CLARA L. REV. 419, 428 (1998).
[66] Jennifer L. Walters, Comment, *In re Elliott: Michigan’s Interpretation and Rejection of the Existing Indian Family Exception to the Indian Child Welfare Act*, 14 T.M. COOLEY L. REV. 633, 639 (1997).
[67] Ronald M. Walters, Comment, *Goodbye to Good Bird: Considering the Use of Contact Agreements to Settle Contested Adoptions Arising Under the Indian Child Welfare Act*, 6 U. ST. THOMAS L.J. 270, 289 (2008).
[68] *In re* Adoption of Baby Boy L., 643 P.2d 168, 172 (Kan. 1982).
[69] *In re* Adoption of Baby Boy L., 643 P.2d 168, 172 (Kan. 1982).

same day and the court entered an order granting them temporary care and custody of the child. [70]

Baby Boy L's father was an enrolled member of the Kiowa Tribe. [71] Father filed an amended answer in which he alleged that the ICWA applied to the proceedings and asked, among other things, that the child be placed with a member of his extended family, or other members of the Kiowa Tribe, or with other Indian families as defined by the Act.[72] Although the mother objected, the Business Committee of the Kiowa Indian Tribe enrolled Baby Boy L. as a member of the Tribe with a Kiowa blood degree of 5/16ths.[73]

The Kansas Supreme Court found the interpretation of the ICWA difficult, because it thought the ICWA was not only confusing but, if applied, would also be "inconsistent, contradictory, and would accomplish no worthwhile or useful purpose."[74] The court in doing a "careful" study of the ICWA's legislative history found that the overriding concern of Congress was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. [75] The court believed that ICWA could not 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.[76] The court relied on section 1902 of the ICWA and "numerous other provisions" to support its conclusion that Congress never intended for the ICWA to reach a child not already a member of an American Indian family. [77]

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[70] *In re* Adoption of Baby Boy L., 643 P.2d 168, 172 (Kan. 1982).
[71] *In re* Adoption of Baby Boy L., 643 P.2d 168, 172 (Kan. 1982).
[72] *In re* Adoption of Baby Boy L., 643 P.2d 168, 173 (Kan. 1982).
[73] *In re* Adoption of Baby Boy L., 643 P.2d 168, 173 (Kan. 1982).
[74] *In re* Adoption of Baby Boy L., 643 P.2d 168, 174 (Kan. 1982).
[75] *In re* Adoption of Baby Boy L., 643 P.2d 168, 175 (Kan. 1982).
[76] *In re* Adoption of Baby Boy L., 643 P.2d 168, 175 (Kan. 1982).
[77] *In re* Adoption of Baby Boy L., 643 P.2d 168, 175 (Kan. 1982); Symeon C. Symeonides, *Choice of Law in the American Courts in 2009: Twenty-Third Annual Survey*, 58 AM. J. COMP. L. 227, 284 (2010).

However, the Court admitted that Baby Boy L. met the definition of an "Indian child" under the ICWA.[78] Despite this recognition, the court determined that intervention of the Kiowa Tribe under the ICWA was useless.[79] The court feared that an attempt to follow the preferential placement dictated by the ICWA would remove the baby from the adoptive parents and return the baby to the biological mother, who would withdraw her consent and not permit the child to be in an American Indian family. [80]

b. Its death

Twenty seven years after the creation of the existing Indian family exception, the Kansas Supreme Court heard another case about the existing Indian family exception.[81] The biological parents of AJS were unmarried and the father was an enrolled member of Cherokee Indian Nation.[82] The mother wanted AJS to be adopted by her family members and sought to terminate father's parental rights. [83] The father objected and sought to move the matter to Cherokee tribal court and the Cherokee Tribe attempted to intervene. [84] Both parties' requests were denied by the district court, because of the existing Indian family exception to the ICWA. [85]

The Cherokee Nation argued that American Indian tribes have an interest in custodial decisions involving American Indian children that is distinct from but on parity with the interest of the parents.[86] The Kansas Supreme Court took the opportunity to revisit the use of the "existing Indian family" exception to the ICWA. The Court noted that the majority of its sister states who considered the existing Indian family exception

[78] *In re* Adoption of Baby Boy L., 643 P.2d 168, 176 (Kan. 1982).
[79] *In re* Adoption of Baby Boy L., 643 P.2d 168, 177 (Kan. 1982).
[80] *In re* Adoption of Baby Boy L., 643 P.2d 168, 177 (Kan. 1982).
[81] *In re* A.J.S., 204 P.3d 543 (Kan. 2009).
[82] *In re* A.J.S., 204 P.3d 543, 544 (Kan. 2009).
[83] *In re* A.J.S., 204 P.3d 543, 544 (Kan. 2009).
[84] *In re* A.J.S., 204 P.3d 543, 544 (Kan. 2009).
[85] *In re* A.J.S., 204 P.3d 543, 545 (Kan. 2009).
[86] Brief of Appellants, *In re* A.J.S., [on file with the author] (Kan. 2009), *citing* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52-53 (1989) (quoting *In re* Adoption of Halloway, 732 P.2d 962, 969 (Utah 1996)).

rejected it.[87] The court recognized that other states, who once adopted the existing Indian family exception, have since abandoned it.[88]

The Kansas Supreme Court decided to abandon the existing Indian family exception for four reasons. First, the Court acknowledged that the existing Indian family exception was at odds with the clear language of the ICWA, which makes no exception for children such as AJS.[89] Second, the Court realized that the existing Indian family exception failed to acknowledge the entirety of the statement of policy as Congress enunciated in section 1902 of the ICWA.[90] The Kansas Supreme Court accepted the declaration of a New York court in Baby Boy C.[91] that since Congress had clearly delineated the nature of the relationship between an American Indian child and his or her tribe necessary to trigger application of the ICWA, judicial insertion of an additional criterion for applicability is plainly beyond the intent of Congress and must be rejected.[92]

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[87] *In re* A.J.S., 204 P.3d 543, 548-49 (Kan. 2009). *See In re* Adoption of T.N.F., 781 P.2d 973 (Alaska 1989); Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. Ct. App. 2000); *In re* N.B., 199 P. 3d 16 (Colo. Ct. App. 2007); *In re* Baby Boy Doe, 849 P.2d 925 (Idaho 1993); *In re* Adoption of S.S., 622 N.E.2d 832 (Ill. App. Ct. 1993), *rev'd on other grounds*, 657 N.E.2d 935 (Ill. 1995); *In re* Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996); *In re* Adoption of Riffle, 922 P.2d 510 (Mont. 1996); *In re* Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988). S*ee also* Patrice H. Kunesh, *Borders Beyond Borders – Protecting Essential Tribal Relations Off Reservation under the Indian Child Welfare Act*, 42 NEW ENG. L. REV. 15, 59 nn.226, 227 (2007); *In re* Baby Boy C., 27 A.D.3d 34 (N.Y. App. Div. 2005); *In re* A.B., 663 N.W.2d 625 (N.D. 2003); Quinn v. Walters, 845 P.2d 206 (Or. Ct. App. 1993), *rev'd on other grounds*, 881 P.2d 795 (Or. 1994); *In re* D.A.C., 933 P.2d 993 (Utah Ct. App. 1997).

[88] *In re* A.J.S., 204 P.3d 543, 549 (Kan. 2009). *See In re* Baby Boy L., 103 P.3d 1099 (Okla. 2004) (holding the existing Indian family exception to application of Indian Child Welfare Act no longer viable, overruling prior state cases). Such changes of heart can be traced to changes in state law. *See* WASH. REV. CODE § 26.10.034(1) (2004); WASH. REV. CODE § 26.33.040(1) (2004); *In re* Adoption of Crews, 825 P.2d 305 (Wash. 1992) (en banc); *In re* R.E.K.F., 698 N.W.2d 147, 151 (Iowa 2005); OKLA. STAT. tit. 10 § 40.3 (2001).

[89] *In re* A.J.S., 204 P.3d 543, 549 (Kan. 2009), *citing* 25 U.S.C. § 1903(4); Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 745-51 (2006).

[90] *In re* A.J.S., 204 P.3d 543, 549-50 (Kan. 2009).

[91] *In re* A.J.S., 204 P.3d 543, 550 (Kan. 2009), *citing In re* Baby Boy C., 27 A.D.3d 34 (N.Y. App. Div. 2005).

[92] *In re* A.J.S., 204 P.3d 543, 550 (Kan. 2009), *quoting In re* Baby Boy C., 27 A.D.3d 34, 47 (N.Y. App. Div. 2005).

Third, the Court found that the existing Indian family exception undermines the significant tribal interests recognized by the Supreme Court in *Holyfield.*[93] Finally, the Court determined that the existing Indian family exception conflicted with the Congressional policy underlying the ICWA that certain child custody determinations be made in accordance with American Indian cultural or community standards.[94] The existing Indian family exception is clearly at odds with this policy because it requires states to make a subjective factual determination as to the 'Indianness' of a particular American Indian child or parent, a determination that state courts "are ill-equipped to make."[95] The Court stated that since the ICWA was passed, in part, to curtail state authorities from making child custody determinations based upon misconceptions of American Indian family life, the existing Indian family exception, which necessitates such an inquiry, clearly frustrates this purpose.[96] For these four reasons, the Kansas Supreme Court resolved that Baby Boy L. and the existing Indian family exception was ready to be retired.[97]

c. Its resurrection

Later in 2009, the Nevada Supreme Court adopted the existing Indian family exception. N.J. was born in Nevada in September 2005, two weeks premature.[98] N.J.'s biological mother tested positive for drugs, and when N.J. was released from the hospital she was placed in foster care.[99] Subsequent DNA tests identified the biological

[93] *In re* A.J.S., 204 P.3d 543, 550 (Kan. 2009), *quoting* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).
[94] *In re* A.J.S., 204 P.3d 543, 550 (Kan. 2009), *citing* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34-35 (1989) (one of the most serious failings of the present system is that Indian children are removed from natural parents by nontribal governmental authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and child rearing); 25 U.S.C. § 1915(d) (applicable standards "shall be the prevailing social and cultural standards of the Indian communities").
[95] *In re* A.J.S., 204 P.3d 543, 550 (Kan. 2009), *quoting In re* Alicia S., 65 Cal. App. 4th 79, 90 (1998).
[96] *In re* A.J.S., 204 P.3d 543, 551 (Kan. 2009). *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34-35 (1989); Quinn v. Walters, 845 P.2d 206, 209 n.2 (Or. Ct. App. 1993); *In re* D.A.C., 933 P.2d 993, 999 (Utah Ct. App. 1997); *In re* Baby Boy C., 27 A.D.3d 34, 48-49 (N.Y. App. Div. 2005).
[97] *In re* A.J.S., 204 P.3d 543, 549 (Kan. 2009).
[98] *In re* N.J., 221 P.3d 1255, 1258 (Nev. 2009).
[99] *In re* N.J., 221 P.3d 1255, 1258 (Nev. 2009).

father of N.J. [100] Because father was an enrolled member of the Ely Shoshone Tribe, N.J. was eligible to become a member of the tribe.[101] However, mother was neither a member of the Ely Shoshone Tribe nor any other American Indian tribe. [102]

The Nevada Supreme Court acknowledged that N.J. was an Indian child, and that the parental termination proceedings were subject to the ICWA.[103] However, the Court rejected the ICWA's higher evidentiary standard, and found that the termination of parental rights was proper because of the application of the existing Indian family exception doctrine.[104] The Court did a partial reading of section 1902 of the ICWA and found that a national policy to advance the best interests of American Indian children and American Indian families by establishing minimum federal standards for the removal and adoption of American Indian children. [105]

The Court applied the existing Indian family exception, despite acknowledging that the ICWA applied, because it determined that the outcome would be counter to the ICWA's goal of protecting the best interests of American Indian children.[106] The Court held that the existing Indian family exception should be used on a case-by-case basis to avoid results that are counter to the ICWA's policy goal of protecting the best interest of an American Indian child.[107]

Despite recognizing that the existing Indian family exception is judicially created[108], the Nevada Court curiously never cites to any case for its creation. Perhaps because a few months before this case was filed with the Nevada Supreme Court, the existing Indian family exception was abandoned by the very court that created it.[109]

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[100] *In re* N.J., 221 P.3d 1255, 1258 (Nev. 2009).
[101] *In re* N.J., 221 P.3d 1255, 1258 (Nev. 2009).
[102] *In re* N.J., 221 P.3d 1255, 1258 (Nev. 2009).
[103] *In re* N.J., 221 P.3d 1255, 1259-60 (Nev. 2009).
[104] *In re* N.J., 221 P.3d 1255, 1263 (Nev. 2009).
[105] *In re* N.J., 221 P.3d 1255, 1263 (Nev. 2009), *citing 25* U.S.C. § 1902 (1978).
[106] *In re* N.J., 221 P.3d 1255, 1264 (Nev. 2009).
[107] *In re* N.J., 221 P.3d 1255, 1264 (Nev. 2009).
[108] *In re* N.J., 221 P.3d 1255, 1264 (Nev. 2009).
[109] *In re* A.J.S., 204 P.3d 543, 549 (Kan. 2009).

The Court only cites to a California Court of Appeals case that deemed the existing Indian family exception necessary to prevent the ICWA from being unconstitutional.[110] However in California there was a split in the circuit[111] on this issue with several courts[112] declining to follow it and with the state legislature rejecting the existing Indian family exception with the passage of California State Senate bill 678.[113]

II. The Remedy for Judicial Indifference: The "existing Indian family" exception should be rejected

The existing Indian family exception is unsound for four reasons: it ignores the plain language of the ICWA; it creates a stereotype of what is an American Indian child; it ignores the interest that American Indian tribes have in their enrolled members and

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[110] *In re* N.J., 221 P.3d 1255, 1264 (Nev. 2009), *citing In re* Alexandria Y., 45 Cal. App. 4th 1483 (1996).

[111] *Compare In re* Vincent M., 150 Cal. App. 4th 1247, 1265 (2007) ("An unambiguous federal statute and an unambiguous state statute require the application of the ICWA's substantive provisions whenever the proceedings involve an Indian child. The plain language of these statutes precludes the existence of an exception where there is no existing Indian family.") *with In re* B.R., 176 Cal. App. 4th 773, 781 (2009) ("According to Mother, a determination of the minors' membership status in a tribe is not for the state court or a social worker to make as a matter of law under the ICWA. For the reasons discussed below, we agree with Mother's position.").

[112] There have only been 2 cases addressing the existing Indian family doctrine since the passage of S.B. 678 and both have rejected it: *In re* Adoption of Hannah S., 142 Cal. App. 4th 988 (2006), and *In re* Vincent M., 150 Cal. App. 4th 1247 (2007). CALIFORNIA INDIAN LEGAL SERVICES, CALIFORNIA JUDGES BENCHGUIDE: THE INDIAN CHILD WELFARE ACT 14 (2010).

[113] Codified at CAL. WELF. & INST. CODE § 224(a)(1) & (2).

(a) The Legislature finds and declares the following:

(1) There is no resource that is more vital to the continued existence and integrity of Indian tribes than their children, and the State of California has an interest in protecting Indian children who are members of, or are eligible for membership in, an Indian tribe. The state is committed to protecting the essential tribal relations and best interest of an Indian child by promoting practices, in accordance with the Indian Child Welfare Act (25 U.S.C. Sec. 1901 et seq.) and other applicable law, designed to prevent the

child's involuntary out-of-home placement and, whenever that placement is necessary or ordered, by placing the child, whenever possible, in a placement that reflects the unique values of the child' s tribal culture and is best able to assist the child in establishing, developing, and maintaining a political, cultural, and social relationship with the child's tribe and tribal community.

(2) It is in the interest of an Indian child that the child's membership in the child's Indian tribe and connection to the tribal community be encouraged and protected, regardless of whether the child is in the physical custody of an Indian parent or Indian custodian at the commencement of a child custody proceeding, the parental rights of the child's parents have been terminated, or where the child has resided or been domiciled.

A determination by an Indian tribe that an unmarried person, who is under the age of 18 years, is either (1) a member of an Indian tribe or (2) eligible for membership in an Indian tribe and a biological child of a member of an Indian tribe shall constitute a significant political affiliation with the tribe and shall require the application of the federal Indian Child Welfare Act to the proceedings." (Welf. & Inst. Code, § 224, subd. (c).)

their children; and it lacks uniformity. The existing Indian family exception results in the eclipsing of the ICWA.[114] It creates an applicability test that eliminates those who qualify under the ICWA, but not under the existing Indian family exception.[115] The existing Indian family exception focuses on families, and ignores any potential relationship between the American Indian child and his or her tribe.[116] The paradox of the existing Indian family exception is that the ICWA was intended to ensure the continuation of threatened American Indian tribes and culture, but it fails to protect those who need it the most.[117]

A. The "existing Indian family" exception ignores the plain language

Despite a clear definition of "Indian child" in the ICWA, state courts unilaterally define who is a "real" American Indian child.[118] Congress was unambiguous when it defined the key terms of the ICWA: "Indian child" and "child custody proceeding."[119] The use of the existing Indian family exception disregards the plain language of the ICWA, especially the definition of "Indian child."[120]

[114] Charmel L. Cross, Comment, *The Existing Indian Family Exception: Is It Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U. L. REV. 847, 881 n. 206 (1997).
[115] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 745 (2006).
[116] Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 419 (1997).
[117] Ronald M. Walters, Comment, *Goodbye to Good Bird: Considering the Use of Contact Agreements to Settle Contested Adoptions Arising Under the Indian Child Welfare Act*, 6 U. ST. THOMAS L.J. 270, 289 (2008).
[118] B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 397 (1997).
[119] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 749 (2006).
[120] Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 408 (1997).

Congress defined an "Indian child" as a member of a tribe or as the biological child of a member and eligible for membership.[121] The ICWA's definition of "Indian child" is a simple either/or test. If the child is a member of a tribe, then the child is an Indian child.[122] If the child is the biological child of a member and the child is eligible to be a member of the tribe, then the child is an Indian child.[123] It is that simple. Congress identified membership as the only relationship that a parent and child must have with their American Indian tribe for the ICWA to apply.[124]

The existing Indian family exception adds requirements to this simple definition of "Indian child" making it unnecessarily complex.[125] It is unacceptable under the existing Indian family exception to simply be a member of an American Indian tribe.[126] To be acceptable in the eyes of some courts, an American Indian child must be living in an "Indian home," or living in an "Indian family,"[127] or have a relationship with American Indian tribal culture that is substantial in the eyes of the judge.[128] No additional requirements can be grafted on to the definition of "Indian child," because "[n]o amount of probing into what Congress 'intended' can alter what Congress said, in plain English.[129]

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[121] 25 U.S.C. § 1903(4). ("Indian child" means 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.")

[122] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 749 (2006).

[123] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 749 (2006).

[124] Quinn v. Walters, 845 vP.2d 206, 213 (Or. Ct. App. 1993) (Edmonds, J., dissenting), *rev'd*, 881 P.2d 795 (Or. 1994).

[125] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 750 (2006).

[126] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 750 (2006)

[127] Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 413 (1997).

[128] *In re* Bridget R., 41 Cal. App. 4th 1483, 1511 (1996).

[129] *In re* N.S., 474 N.W.2d 96, 100 n* (S.D. 1991) (Sabers, J., concurring).

B. The "existing Indian family" exception perpetuates stereotyping and assimilation of American Indians

1. The Stereotype

Prior to the Indian Child Welfare Act, social workers and state officials found that many American Indian parents were irresponsible parents, because they used extended family members to assist in caring for their children.[130] Yet, it was commonplace for many American Indian families to rely upon family members and other tribal members to serve as responsible caregivers.[131] Congress found these states' officials so wanting in real knowledge and understanding of actual American Indian customs and traditions that it was necessary to enact the ICWA.[132]

The difficulty with the existing Indian family exception is that its use assumes that a state court judge would have any idea what an Indian family is. Unless the state court judge is an American Indian that judge is unlikely to know and understand what a "real" Indian family is. In order to apply the existing Indian family exception, these state court judges must rely on their predetermined notions of what an American Indian is or should be.[133] These judges are ill-equipped to make these determinations. Hollywood has given us the most common stereotypical American Indian: a brown-skinned person with black hair worn in braids and adorned with feathers who lives in a teepee.[134] The existing Indian family exception furthers the stereotype that American Indians live on reservations.

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[130] Denise L. Stiffarm, Note & Comment, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart From the Statutory Placement Preferences*, 70 WASH. L. REV. 1151, 1154 (1995).
[131] Denise L. Stiffarm, Note & Comment, *The Indian Child Welfare Act: Guiding the Determination of Good Cause to Depart From the Statutory Placement Preferences*, 70 WASH. L. REV. 1151, 1154 (1995).
[132] B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 416-17 (1997).
[133] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 751 (2006).
[134] For example, movies such as Dances with Wolves, Pocahontas, and The Lone Ranger.

However, it is the rare American Indian who can meet this stereotype. Given that the United States has more than 560 federally recognized American Indian tribes,[135] no state court judge could possibly be fully aware of what the culture of an American Indian tribe is or has been. The state court judges which apply the existing Indian family exception have the judicial gumption to assume the task of ferreting out "real" American Indians from the "fake" ones.[136] Congress placed the determination of who is a “real” American Indian with the tribes themselves. [137]

With the existing Indian family exception, state courts have created a litmus test for "Indian-ness."[138] This "Indian-ness" litmus test includes such things as ties to a tribe, Indian cultural setting, and length of time living in an Indian home.[139] Another court has been courteous enough to supply us with a list of what it takes to be an American Indian: privately identify themselves as Indians and privately observe tribal customs; participate in tribal community affairs, vote in tribal elections, or otherwise take an interest in tribal politics; contribute to tribal or Indian charities, subscribe to tribal newsletters or other periodicals of special interest to Indians; participate in Indian religious, social, cultural, or political events which are held in their own locality; or maintain social contacts with other members of the tribe.[140] While this court was unclear on how much of the list was required, it would be possible for someone who is not a member of an American Indian tribe to fit this definition simply because he or she

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[135] Bureau of Indian Affairs: What We Do, *available at* http://www.bia.gov/WhatWeDo/index.htm (last visited June 28, 2010).
[136] B.J. Jones, *The Indian Child Welfare Act: In Search of a Federal Forum to Vindicate the Rights of Indian Tribes and Children Against the Vagaries of State Courts*, 73 N.D. L. REV. 395, 415 (1997).
[137] Cheyañna L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 752 (2006).
[138] Cheyañna L. Jaffke, *The “Existing Indian Family” Exception to the Indian Child Welfare Act: The States’ Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 753 (2006).
[139] Toni Hahn Davis, *The Existing Indian Family Exception to the Indian Child Welfare Act*, 69 N.D. L. REV. 465, 489 (1993).
[140] *In re* Bridget R., 41 Cal. App. 4th 1483, 1514-15 (1996).

has an affinity for American Indian culture. State courts have no business crafting indicia of tribal affiliation that lack any tribal input.[141]

State court judges who have created the existing Indian family exception have probed into the sensitive and complicated areas of American Indian cultural values, customs and practices, which Congress saw fit to leave to the tribes themselves.[142] Under the ICWA, to be an American Indian, all that is required is tribal membership, not compliance with some non-American Indian judges' concept of what an American Indian is or should be.[143] These state courts are, once again, demonstrating that they lack the capacity and understanding to have determinative power over American Indians.[144]

A state court judge would never dare to tell an African American that he or she is not African American enough, because he or she does not live in an African American neighborhood, have friends who are African American or participate in political issues of concern to the African American community.[145] Why is it acceptable to do so with American Indians?

2. Assimilation

Given the historical shameful policy of assimilation, courts should reject attempts to return to that discredited policy. The discussion of the assimilation policy is beyond the scope of this article[146], but as used here assimilation is intended to mean the involuntary conversion of American Indians from their unique values, social mores and

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[141] Suzianne D. Painter-Thorne, Article, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 378 (2008-2009).

[142] *Joint Hearing of the House Resources Committee and Senate Committee on Indian Affairs, on H.R. 1082 and S. 569, Bills to Amend the Indian Child Welfare Act of 1978*, Before the H. Comm. on Resources, 105th Cong. 20 (June 18, 1997) (statement of Ada E. Deer, Assistant Secretary for Indian Affairs, Dept. of the Interior), *available at* http://gos.sbc.edu/d/deer.html (last visited Mar. 26, 2010).

[143] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 753 (2006).

[144] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 753 (2006).

[145] Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v.Holyfield*, 17 COLUM. J. GENDER & L. 1, 41 (2008).

[146] *See, e.g.* Judith V. Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1 (1995).

lifestyle to those that most Americans recognize as their own. If American Indian tribes cease to exist, then the assimilationist dreams would come true. No more "special rules" for American Indians and tribes, such as the Indian Child Welfare Act. It would eliminate the trust relationship between the federal government and American Indian tribes.[147] Without American Indian tribes, the federal government would no longer need to pay out tax dollars for the benefit of American Indian tribes or members, such as for Indian Health Services.[148] Goodbye treaty obligations. American Indian tribes should jealously guard their children, because without them they will cease to exist.

The American Indian child is punished by the existing Indian family exception, because through no fault of his or her own, he or she has been denied exposure to his or her cultural heritage.[149] By using the existing Indian family exception to deny the application of the ICWA to urban American Indians who may not have strong cultural ties, the state court perpetuates assimilationist policies that were designed to extinguish American Indians and their tribes.[150] Pre-ICWA child welfare practices resulted in significant numbers of American Indians being removed from their American Indian heritage[151] and have now created a generation of American Indian parents who have been assimilated into non-American Indian culture.[152]

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[147] The federal trust responsibility is the legal commitment made by the U.S. government to Indian tribes when Indian lands were ceded to the United States. This commitment is codified in treaties, federal law, executive orders, judicial opinions, and international doctrine. It can be divided into three general obligations: protection of Indian trust lands; protection of tribal self-governance; and provision of basic social, medical, and educational services for tribal members. *See* Appropriations, National Congress of American Indians, *available at* http://www.ncai.org/Federal-Appropriations.87.0.html (last visited July 30, 2010); "The federal government has substantial trust responsibilities toward Native Americans. This is undeniable. Such duties are grounded in the very nature of the government-Indian relationship." Cobell v. Norton, 240 F.3d 1081, 1086 (D.C. Cir. 2001).

[148] The enacted budget authority for the Indian Health Service for fiscal year 2010 is $4.05 billion. Indian Health Service Fact Sheet, *available at* http://info.ihs.gov/Budget10.asp (last visited July 30, 2010).

[149] Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 432 (1997).

[150] Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 432 (1997).

[151] *In re* Adoption of M. John Doe, 832 P.2d 518, 521 (Wash. Ct. App. 1992).

[152] Christine Metteer Lorillard, *Retelling the Stories of Indian Families: Judicial Narratives That Determine the Placement of Indian Children Under the Indian Child Welfare Act*, 8 WHITTIER J. CHILD & FAM. ADVOC. 191, 220-21 (2009).

State courts seem to have the idea that since the American Indian parents appear to them to be fully assimilated, then their American Indian children should also be assimilated. The existing Indian family exception achieves this goal of a fully assimilated American Indian family. Just because the parents are fully assimilated does not mean that the child has to be. Because states removed American Indian children from their homes, these children never had the opportunity to learn the culture, religion, and language of their tribes.[153] American Indian tribes daily must contend with the federal assimilationist requirements of blood quantum or rolls compiled by federal agents intent on limiting the number of American Indians and promoting assimilationist policies.[154] Generally women must have at least two children for the population to remain stable.[155] This means that tribal members must have a minimum of two children in order for the continued existence of the tribe. With no children to pass on the culture, religion, and language, then a tribe will cease to exist.[156]

C. The "existing Indian family" exception ignores tribal interests

Just as a state has an interest in its citizens and residents, American Indian tribes have an interest in their members and future potential members.[157] States believe that the child's best interest is paramount.[158] There is a conflict with the ICWA, which indicates that both the child's interest *and* the tribe's interest are paramount. [159] The ICWA has a twofold purpose: 1) protecting the "best interests of Indian children"[160]

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[153] Sloan Philips, *The Indian Child Welfare Act in the Face of Extinction*, 21 AM. INDIAN L. REV. 351, 353 (1997).
[154] Kathryn Fort, *The Cherokee Conundrum: California Courts and the Indian Child Welfare Act*, Mich. St. Univ. Legal Studies Research Paper No. 07-07 at 9 (April 20, 2009), *available at* *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1392293*.
[155] CIA World FactBook, *available at* https://www.cia.gov/library/publications/the-world-factbook/fields/print_2127.html (last visited June 10, 2010). *See also* Bryan Caplan, *The Breeder's Cup*, WALL ST. J., June 19-20, 2010, at W1.
[156] Sloan Philips, *The Indian Child Welfare Act in the Face of Extinction*, 21 AM. INDIAN L. REV. 351, 353 (1997).
[157] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 746 (2006).
[158] *In re* N.J., 221 P.3d 1255 (Nev. 2009).
[159] 25 U.S.C. § 1902.
[160] 25 U.S.C. § 1902.

and 2) promoting "stability and security of Indian tribes and families".[161] That necessarily means that the best interests of the Indian child include preserving the stability of his or her American Indian tribe.[162] The U.S. Supreme Court in *Holyfield* stressed "that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents."[163] The Court went on to state that American Indian children have a parallel interest in maintaining a relationship with their tribe, even if their American Indian parents do not have that desire.[164] *Holyfield* signifies that American Indian childrens' and parents' interests are sometimes separate and distinct from and in conflict with tribal interests. [165] *Holyfield* might also be read as allowing tribal interests to trump childrens' best interests and parents' interests.[166] Protection of the sovereignty of American Indian tribes, which includes preservation of tribal identity and determination of tribal membership, is fundamental.[167]

Their children are the only real way for tribes to pass on their tribal heritage.[168] Without a perpetual population, a tribe's ability to continue to self-govern is at risk.[169] Consequently when an American Indian child is removed from that environment most likely to connect that child with his or her cultural heritage, that removal inadvertently continues the gradual elimination of American Indians and their tribes.[170]

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[161] 25 U.S.C. § 1902.

[162] Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 363 (2008-2009); Michael J., Jr. v. Michael J., Sr., 7 P.3d 960, 963 (Ariz. Ct. App. 2000).

[163] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 52 (1989) (quoting *In re* Adoption of Halloway, 732 P.2d 962, 969 (Utah 1996).

[164] *See* Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 49-50 (1989).

[165] Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v.Holyfield*, 17 COLUM. J. GENDER & L. 1, 41 (2008).

[166] Solangel Maldonado, *Race, Culture, and Adoption: Lessons from Mississippi Band of Choctaw Indians v.Holyfield*, 17 COLUM. J. GENDER & L. 1, 41 (2008).

[167] *Joint Hearing of the House Resources Committee and Senate Committee on Indian Affairs, on H.R. 1082 and S. 569, Bills to Amend the Indian Child Welfare Act of 1978*, Before the H. Comm. on Resources, 105th Cong. 20 (June 18, 1997) (testimony of Thomas L. Leclaire, Director, Office of Tribal Justice, Dept. of Justice), *available at* http://www.justice.gov/archive/otj/Congressional_Testimony/icwa2.fin.htm (last visited Mar. 27, 2010).

[168] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34 (1989).

[169] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 34 (1989).

[170] Quinn v. Walters, 881 P.2d 795, 801 (Or. 1994) (Fadeley, J., dissenting).

The tribal interest in need of protection is its very survival.[171] At the heart of this survival is the right of the tribe to determine its own membership.[172] Congress was aware that an American Indian tribe could not continue to exist without additional members[173] and that the future of any tribe lies with its children.[174] Through the ICWA, Congress sought to protect American Indian tribes in child custody proceedings.[175] Congress believed that there was no greater intrusion on tribal self-government than hindering tribal control over the custody of their children.[176] Accordingly, Congress established as a federal policy that an American Indian child should remain in the American Indian community whenever possible.[177] Whenever a state court holds a tribe's interests subordinate to the child's best interests, then that court interferes with the tribe's right of self-determination.[178] Therefore state courts must consider tribal determinations as to membership conclusive.[179]

The use of the existing Indian family exception disregards Congress' goal of tribal survival.[180] Courts do so by supplanting the determination of who an "Indian child" is,

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[171]Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 746 (2006).
[172] Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 654 (2002).
[173] Quinn v. Walters, 881 P.2d 795, 802 (Or. 1994) (Fadeley, J., dissenting).
[174] Quinn v. Walters, 881 P.2d 795, 802 (Or. 1994) (Fadeley, J., dissenting).
[175] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 748 (2006), *citing* Charmel L. Cross, Comment, *The Existing Indian Family Exception: Is It Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U. L. REV. 847, 880 n. 198 (1997).
[176] H.R. REP. NO. 95-1386, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7537.
[177] H.R. REP. NO. 95-1386, at 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7530, 7546.
[178] Daniel Albanil Adlong, *The Terminator Terminates Terminators: Governor Schwarzenegger's Signature, SB 678, and How California Attempts to Abolish the Existing Indian Family Exception and Why Other States Should Follow*, 7 APPALACHIAN J.L. 109, 131 (2007).
[179] Daniel Albanil Adlong, *The Terminator Terminates Terminators: Governor Schwarzenegger's Signature, SB 678, and How California Attempts to Abolish the Existing Indian Family Exception and Why Other States Should Follow*, 7 APPALACHIAN J.L. 109, 129-130 (2007); 2006 CAL. STAT. Ch. 838.
[180] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 748 (2006).

from the hands of the tribes, and into their own.[181] Ironically these same state courts' disregarded for tribal customs led to the need for the ICWA.[182] Regardless if a tribe recognizes a child as a tribal member, which makes that child an Indian under the definitions of the ICWA, state courts use the existing Indian family exception to ultimately decide if the member is sufficiently American Indian to placate their subjective opinion of what an American Indian should do or be.[183] The state court is the body least equipped to make such a decision.[184]

The ICWA provides American Indian tribes the opportunity to correct past assimilation measures. However, the existing Indian family exception denies American Indian tribes the right to establish or renew relationships with children born to fully assimilated tribal members.[185] The existing Indian family exception cannot explain why a child who has yet to be exposed to his or her American Indian culture should not now be provided that opportunity.[186] Furthermore the existing Indian family exception prevents the creation of an Indian family, and "a child removed now from the tribe cannot later be a voice for the tribe."[187]

D. The application of the existing Indian family exception does not provide uniform results

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[181] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 748 (2006).
[182] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 44-45 (1989); Suzianne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 380 (2008-2009).
[183] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 748 (2006).
[184] Wendy Therese Parnell, Comment, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 427 (1997).
[185] Christine Metteer, *The Existing Indian Family Exception: An Impediment to the Trust Responsibility to Preserve Tribal Existence and Culture as Manifested in the Indian Child Welfare Act*, 30 LOY. L.A. L. REV. 647, 649 (1997).
[186] Michael J. Dale, Symposium, *State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test*, 27 GONZ. L. REV. 353, 381 (1991-1992).
[187] *In re* A.J.S., 204 P.3d 543, 550 (Kan. 2009).

Since some states have adopted the existing Indian family exception[188], and others have not[189] American Indian tribes can be faced with different results depending upon which state has the child custody proceeding. The misconceived notion of what constitutes an "Indian family" has differed from court to court.[190] This judicially created exception can be no more than a subjective inspection of the American Indian parents' "Indianness."[191] The use of the existing Indian family exception is unreliable and

[188] Eleven states have, at some point, adopted the "existing Indian family" exception: S.A. v. E.J.P., 571 So. 2d 1187 (Ala. Civ. App. 1990); *In re* Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988) *and In re* D.S., 577 N.E.2d 572 (Ind. 1991); *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982); Rye v. Weasel, 934 S.W.2d 257 (Ky. 1996); Hampton v. J.A.L., 658 So. 2d 331 (La. Ct. App. 1995); *In re* S.A.M., 703 S.W.2d 603 (Mo. Ct. App. 1986); *In re* T.S., 801 P.2d 77 (Mont. 1990); *In re* Adoption of D.M.J., 741 P.2d 1386 (Okla. 1985) *and In re* S.C., 833 P.2d 1249 (Okla. Civ. App. 1992); Claymore v. Serr, 405 N.W.2d 650 (S.D. 1987); *In re* Morgan, No. 02A01-9608-CH-00206, 2007 WL 716880 (Tenn. Ct. App. Nov. 19, 1997); *In re* Crews, 825 P.2d 305 (Wash. 1992) (en banc). Four of those states have since rejected the exception: *In re* A.J.S., 204 P.3d 543 (Kan. 2009) (overruling *In re* Adoption of Baby Boy L., 643 P.2d 168 (Kan. 1982)); OKLA. STAT. ANN. tit. 10 §§ 40.1, 40.3, upheld by *In re* Baby Boy L, 103 P.3d 1099 (Okla. 2004) (abrogating *In re* S.C., 833 P.2d 1249 (Okla. 1985)); *In re* Adoption of Baade, 462 N.W.2d 485 (S.D. 1990); WASH. REV. CODE ANN. § 13.34.040(3) (abrogating *In re* Crews, 825 P.2d 305 (Wash. 1992)). *See* Dan Lewerenz and Padraic McCoy, *Indian Law: The End of the "Existing Indian Family" Jurisrudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 687-88 (2010).

[189] Nineteen states have considered and rejected the "existing Indian family" exception, either in court or by statute: *In re* T.N.F., 781 P.2d 973 (Alaska 1989); Michael J., Jr. v. Michael J., Sr., 7 P.3d 960 (Ariz. Ct. App. 2000); CAL. WELF. & INST. CODE § 224(a)(1) & (2); *In re* N.B., 199 P.3d 16 (Colo. Ct. App. 2007); *In re* Baby Boy Doe, 849 P.2d 925 (Idaho 1993); *In re* Adoption of S.S., 622 N.E.2d 832 (Ill. App. Ct. 1993); IOWA CODE ANN. § 232B.5(2), upheld by *In re* R.E.K.F., 698 N.W.2d 147 (Iowa 2005); *In re* A.J.S., 204 P.3d 543 (Kan. 2009) (overruling *In re* Adoption of Baby Boy L, 643 P.2d 168 (Kan. 1982)); *In re* Elliott, 554 N.W.2d 32 (Mich. Ct. App. 1996); MINN. STAT. § 260.771(2); *In re* Adoption of a Child of Indian Heritage, 543 A.2d 925 (N.J. 1988); *In re* Baby Boy C, 27 A.D.3d 34 (N.Y. App. Div. 2005); *In re* A.B., 663 N.W.2d 625 (N.D. 2003); OKLA. STAT. ANN. tit. 10 §§ 40.1, 40.3, upheld by *In re* Baby Boy L, 103 P.3d 1099 (Okla. 2004) (abrogating *In re* S.C., 833 P.2d 1249 (Okla. 1985)); Quinn v. Walters, 845 P.2d 206 (Or. Ct. App. 1993); *In re* Adoption of Baade, 462 N.W.2d 485 (S.D. 1990); *In re* D.A.C., 933 P.2d 993 (Utah Ct. App. 1997); WASH. REV. CODE ANN. § 13.34.040(3) (abrogating *In re* Crews, 825 P.2d 305 (Wash. 1992)); WIS. STAT. § 938.028(3)(a). *See* Dan Lewerenz and Padraic McCoy, *Indian Law: The End of the "Existing Indian Family" Jurisrudence: Holyfield at 20, In the Matter of A.J.S., and the Last Gasps of a Dying Doctrine*, 36 WM. MITCHELL L. REV. 684, 688 (2010).

[190] *In re* Alexandra Y., 45 Cal. App. 4th, 1483, 1490 (1996).

[191] Novaline D. Wilson, *Tribal Consequences of Urban Indian Relocation: Case Examination of the Existing Indian Family Exception & Adoptive Placement under the Indian Child Welfare Act* 3 (Mich. St. Univ. Col. Of Law Indigenous Law & Policy Center, Working Paper No. 2007-04, 2007), *available at* http://www.law.msu.edu/indigenous/papers/2007-04.pdf (last visited March 27, 2010), *citing* Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 35 (1998-1999).

inconsistent.[192] The ICWA should be applied to American Indian tribes as a whole, not to individual parental interests.[193]

The existing Indian family doctrine creates additional litigation, with attendant delays in the adoptive placement of American Indian children.[194] However, the U.S. Supreme Court has accepted that when Congress passed the ICWA, it wanted nationwide uniformity.[195] In *Holyfield*, the Court determined that a uniform definition of domicile was essential to the purpose of the ICWA.[196] Similarly, a uniform definition of an Indian child is also essential to carry out the purpose of the ICWA.[197]

Conclusion

The Kansas Supreme Court should be applauded for recognizing that the existing Indian family exception has gone the way of the dinosaur. The Nevada Supreme Court however should be embarrassed. The courts are intended to interpret the law that exists, not create new law out of thin air. Nevada and other states that are using the existing Indian family exception need to abandon it as Kansas did. If the

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[192] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 757 (2006), *citing* Charmel L. Cross, Comment, *The Existing Indian Family Exception: Is It Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?*, 26 CAP. U. L. REV. 847, 891 (1997).

[193] Novaline D. Wilson, *Tribal Consequences of Urban Indian Relocation: Case Examination of the Existing Indian Family Exception & Adoptive Placement under the Indian Child Welfare Act* 5 (Mich. St. Univ. Col. Of Law Indigenous Law & Policy Center, Working Paper No. 2007-04, 2007), *available at* http://www.law.msu.edu/indigenous/papers/2007-04.pdf (last visited March 27, 2010).

[194] *Joint Hearing of the House Resources Committee and Senate Committee on Indian Affairs, on H.R. 1082 and S. 569, Bills to Amend the Indian Child Welfare Act of 1978*, Before the H. Comm. on Resources, 105th Cong. 20 (June 18, 1997) (testimony of Thomas L. Leclaire, Director, Office of Tribal Justice, Dept. of Justice), *available at* http://www.justice.gov/archive/otj/Congressional_Testimony/icwa2.fin.htm (last visited Mar. 27, 2010).

[195] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45-46 (1989).

[196] Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 45-46 (1989).

[197] Cheyañna L. Jaffke, *The "Existing Indian Family" Exception to the Indian Child Welfare Act: The States' Attempt to Slaughter Tribal Interests in Indian Children*, 66 LA. L. REV. 733, 758 (2006).

courts are unwilling to revise their stance, then the next step is corrective legislation, either at the state level like California[198] or at the national level.

[198] CAL. WELF. & INST. CODE § 224(a)(1) & (2).