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PARENTAL RATIFICATION: LEGAL MANIFESTATIONS OF CULTURAL AUTHENTICITY IN CROSS-RACIAL ADOPTION

*Kevin Noble Maillard**

I. Introduction

The question “Who is Indian?” marks a standard subject of academic inquiry, but to ask “who decides and how” is much more interesting. In Indian country, state and tribal standards for determining “Indian” may belie personal and private definitions of identity. While I believe that identity should be self-defined, the unavoidable truth persists that juridical claims cut across subjective beliefs to establish a legal standard for determining identity. As is historically true of legal determinations of race, no single standard of membership exists that provides a clear boundary of belonging that uniformly adjudicates who belongs and who does not. Presently, the closest answer lies within the courts. Judges may exert a great deal of discretion in determining the racial affiliation of the parties, especially in situations where that affiliation stands as the determinative factor in litigation. The substantive reasoning of each case differs in its rationale and logicity, yet this remains an acceptable obligation of the judge, as a supposedly neutral third-party observer, to decide.

The specter of authenticity exists as a perennial foe in the daily battles of life experienced by American racial minorities. In the face of a general consciousness, which usually means White, minorities run against a dominant image of what their group is perceived to embody. This creates a standardizing point against which people of color are measured. These perceptions may be spoken or silent, believable or absurd, but their existence in our collective social consciousness testifies to their powerful influence on perceptions of racial minorities. Whether these are stereotypes, fictions, or truths, the isolated subject relates to an aggregate theme. The proximity of part to whole engenders a hierarchy of authenticity that bolsters or palliates the subject’s connection to the group.

The methods of legitimization for legal consideration as a Native American are neither based solely on considerations of race or culture, but both,

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depending on the jurisdiction. Following the standards established by the federal government in the Indian Child Welfare Act (ICWA),¹ state courts have held that being Native entails the minimal requirements of proof of membership in a federally recognized Indian tribe.² In other states, mere political membership is not enough.³ In order to prove oneself as Indian, a litigant-parent must present evidence of active engagement in seemingly Indian activities, which are designated in the mind of the presiding judge.⁴ The primary problem with the present scheme is that the subjective and personal tribal considerations of membership fail to achieve the level of recognition they deserve outside of Indian country.

This Article aims to critique the practice of judicially created definitions of "Indian" in a hotly contested and controversial area of law: transracial adoption (TRA).⁵ It is my belief that the evaluation of potential parents as appropriate, qualified, and situated persons to adopt and care for children of color stands as a juridical ratification of ethnic authenticity that privileges those who accede to the judicially created norm while punishing those who depart from it. At the heart of the controversy of transracial adoption is the question of what type of ethnic values can the differently situated parent

1. 25 U.S.C. § 1903(3) (2000).

2. Under the Indian Child Welfare Act, the court will assume that tribal enrollment is sufficient to trigger the Act, regardless of the person's racial, social, cultural, and spiritual affiliations. See *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 128 (Cal. Ct. App. 1998) (holding that tribal membership alone is satisfactory to trigger ICWA). But in other cases, the lack of formal tribal enrollment is not a bar to legal relief. See *Michael G. v. Superior Court of San Diego County*, 2002 Ca. App. LEXIS 3473, 7-8 (holding that a parent's failure to report Indian heritage in a child custody proceeding does not forfeit tribal jurisdiction).

3. These states require proof that, in addition to having Indian blood, the person also thinks of herself as an Indian. This is evinced in various practices such as her political affiliations, style of dress, knowledge of tribal language, etc. See generally *In re Adoption of Baby Boy L.*, 643 P.2d 168 (Kan. 1982) (upholding a requirement of substantial tribal affiliation to enact ICWA).

4. One judge wrote a detailed description of appropriate Indian activities that would demonstrate substantial connections to tribal activities. See *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 531 (Cal. Ct. App. 1996) (establishing a rubric for participation in tribal activities that testify to a tribal member's involvement with the tribe). See *id.* at 528.

5. In conducting research for this paper, I noticed differing applications of terminology for adoptions involving parents of one race and a child of another. The term "transracial adoption" is generally applied to cases involving Black children, while "international adoption" generally applies to cases involving Latino/a and Asian children from countries other than the United States. Regarding Indian children, "transracial adoption" is generally downplayed, perhaps because of the greater concern with culture rather than race alone. I will go into further detail about these issues below.

impart upon the child, and whether that parent possesses the cultural consciousness needed by the child to grow up with a healthy racial identity. As Professor Barbara Bennett Woodhouse has argued, the law possesses great influence in ascribing and assigning identity, and the present situation is no exception.⁶ The standard concern in legal discourse would surface as: "Can non-Indians properly raise Indian children?" "Is it possible for Black children to grow up in transracial families and still have a strong racial identity?"

I would like to shift from these direct concerns with the best interest of the child⁷ to what these judicial limitations and restrictions on adoption say about the *parent*, and more generally, ethnic identity. In most of this discourse, which concerns Black children, there is an unstated assumption that racial values can easily be transmitted by members of those respective racial groups.⁸ This is a logical deduction which would include all members of the respective groups as automatically qualified to raise children of color. Thus, Black people have the natural ability to raise Black children as much as Indians have the cultural skills and tribal wherewithal to raise Indian children. Concomitantly, people from other groups would not have this knowledge. Therefore their ability to impart an ethnic awareness unto the child is palliated by the fact that their ethnic origin precludes them from *being an optimal parent*.

Inasmuch as this basic analysis focuses on the automatic qualifications of the inrace prospective parent, it speaks nothing of the cultural specificity of that subject, thus relying on a precept of essentialism which categorically overqualifies all those who fit within the category. Whereas movements against transracial adoption are overinclusive with respects to appropriate parental demographics, they also disregard any improbability of these parents

6. Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 111 (1995) (articulating children's rights to preservation of their identity in adoption).

7. In most states, the "best interest of the child" standard is the majority approach to child placement. See generally VA. CODE ANN. § 63.2-1205 (2002) (defining best interests of the child, standards for determining); *In re Jacob*, 86 N.Y.2d 651, 658 (1995) ("[O]ur primary loyalty must be to the statute's legislative purpose — the child's best interest."); *Macker v. Macker*, 585 A.2d 102, 103 (1991) ("The court must be guided by the best interests of the child.")

8. One commentator has characterized these traits as "existential starting points." HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* 19 (2002). Fogg-Davis continues by quoting Naomi Zack, who argues that race categories fail to predict individual behavior, beliefs, or appearances. "In logical, causal terms, there are no necessary, necessary and sufficient, or sufficient racial characteristics, or genes for such characteristics, which every member of a race has." *Id.* (quoting NAOMI ZACK, *RACE AND MIXED RACE* 14 (1993)).

being culturally equipped to transmit the values espoused as essential by adoption authorities.

The case for Indian children is different, however. In efforts to control the alarming numbers of Indian children that were taken from their families placed in adoptive and foster homes, Congress enacted the Indian Child Welfare Act (ICWA)⁹ in 1978. The act was intended to give power to the tribes in dealing with Indian child custody cases, thus transferring the proceedings to a culturally knowledgeable and sensitive forum.¹⁰ ICWA, by giving tribes exclusive jurisdiction over child custody proceedings,¹¹ took the cases out of the hands of outside officials, who may have had inferior knowledge of the welfare of Indian children. This aimed to correct the abnormally high numbers of Indian children being displaced from their families.¹²

The ultimate purpose of ICWA was to retain a greater number of Indian children within Indian communities, in families that would reflect the values and traditions of Native culture.¹³ Because children embodied the successive generations of Native populations, the development of such a potential population was viewed as crucial for the continued existence of Indians in America.¹⁴

9. 25 U.S.C. § 1901 (2000).

10. *Id.* § 1901(5) (“[T]hat 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.”)

11. *Id.* § 1911(a) (“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.”).

12. AMERICAN INDIAN LAW DESKBOOK 377 (Joseph P. Mazurek et al. eds., 2nd ed. 1998). The actual figures for the number of Indian children being placed out of their homes in the 1970's was alarming. Indian children were much more likely to be placed for adoption than non-Indian children. See also *Indian Child Welfare Program, Hearings before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 93d Cong. 3 (1974) [hereinafter 1974 Hearings] available at <http://liftingtheveil.org/aboutezk.htm> (statement of William Byler) (“The number of South Dakota Indian children living in foster homes is per capita nearly 1,600 percent greater than the rate of non-Indians. In the State of Washington, the Indian adoption rate is 19 times, or 1,900 percent greater and the foster care rate is 1,000 percent greater than it is for non-Indian children.”).

13. For a terse outline of the statutory considerations of ICWA, see Hon. Maurice Potley, *The Indian Child Welfare Act: A Primer*, ARIZ. ATT'Y, Feb. 2000, at 24.

14. Barbara Atwood, *Identity and Assimilation*, 4 MINN. L. REV. 927, 940 (1999) (“Children, like land, are an incommensurable resource for Indian tribes.”)

For both Indian children and Black children, the future of their cultural identity in the hands of people unlike them has drawn a lot of attention. Advocates for both groups hold strong views on what constitutes a proper cultural development in the child, and what type of parent should be transmitting these values. In this Article, I will uncover the social construction of the “good parent” of the minority child. In the middle of criticism of White parents adopting minority children¹⁵ sits a tacit understanding of cultural authenticity. This known, the line between “good” and “bad” parents does not logically fall along racial lines, but begins to carve itself a new line within one of the existing ones. This is my target, and I wish to assail it.

Children represent the growth and potential of the next generation. Naturally, their upbringing is a target of concern in the consideration of a group’s station in the future. As for minority groups, the rearing and education of children has grown into a veritable field of discourse over the past two decades.¹⁶ The young, it is argued, provide fertile ground for the transmission of values, and control over how these precepts are transmitted has become a representative canvas for normative relationships between elders and youth of a specific ethnic group. Increased rates of transracial adoption may signal a number of red flags to those concerned: Indians are not good parents, Indian children fare better outside of Indian communities, White families correct unhealthy habits¹⁷ of Indian life. It has even been suggested

15. This group consists of African-American scholars and activists whose personal experiences as Black people inform their opinions on how Black children should be raised. An in-depth discussion of these viewpoints occurs below. See generally Ruth Arlene Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409 (1997); Ruth Arlene Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL’Y 131 (1995); Jacinda Townsend, *Reclaiming Self-Determination: A Call for Interracial Adoption*, 2 DUKE J. GENDER L. & POL’Y 173 (1995); Zanita Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER L.J. 39 (1993).

16. In 1978, Chief Calvin Isaac of the Mississippi Band of Choctaw Indians testified at a congressional hearing on the separation of Indian children from their original home communities. Chief Isaac argued, “Culturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People.” 143 CONG. REC. E462 (Mar. 13, 1997) (quoted in statement of Rep. Miller).

17. This sentiment has deep roots. Many “liberal” Whites viewed Indian communities as harmful environments for the development of a “civilized” people. Richard H. Pratt, a nineteenth-century government reformer, joined many others in efforts to disintegrate Indians from tribal life. He believed that Indian lands should be broken up, and that the former inhabitants dispersed amongst Whites so that they would progress beyond aboriginal

that high outside adoption rates resulted from the premise that "most Indian children would really be better off growing up non-Indian."¹⁸ These alarming concerns led to official programs adopted by children's advocacy groups to curtail the numbers of minority children being taken out of their home communities.

I will compare the motivations of two movements in opposition to transracial adoption of Black and Indian children. I argue that these policies formalize a racial/cultural rubric to assess who is qualified to import "survival skills" deemed crucial for the rearing of minority children. Part II raises questions about the adoption of Black children by non-Black parents. This establishes the substantial discussion surrounding transracial adoption and expected parental values. Part III does the same for the adoption of Indian children by non-Indian parents. The similarities to adoption of Black children enunciate the in-racial hierarchy of authenticity that unnecessarily reinforces traditional or even stereotypical behavior. Part IV offers a critique of the Existing Indian Family (EIF) exception to the Indian Child Welfare Act. I wish to argue that racial preferencing, as evinced by EIF for adoptive placements rests upon a foundation of essentialism that pigeonholes certain racial minorities as authentically "Black" or "Indian." Part V argues against the cultural expectations imposed on adoptive parents of Indian children. Here, the racial qualifications invoked by EIF stand as prohibitive barriers to demographically "qualified" adoptive parents who fall outside a majoritarian conception of "Blackness" or "Indianness."

II. Who May Raise Black Children?

A. The NABSW's Position

In 1972, the National Association of Black Social Workers (NABSW) issued a powerful statement denouncing the adoption of Black children¹⁹ by

barbarisms. In an 1890 speech titled, "The Advantages of Mingling Indians with Whites" he argued, "If, in the distribution, it is so arranged that two or three White families come between two Indian families, then there would necessarily grow up a community of fellowship along all the lines of our American civilization that would help the Indian at once to his feet." AMERICANIZING THE AMERICAN INDIAN: WRITINGS BY "FRIENDS OF THE INDIAN" 269-70 (Francis Paul Prucha ed., 1973).

18. 1974 Hearings, *supra* note 12, at 1-2.

19. The NABSW's position includes biracial children as well. See Kim Forde-Mazuri, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 927 (1994).

White families.²⁰

The National Association of Black Social Workers has taken a vehement stand against the placement of Black children in white homes for any reason. We affirm the inviolable position of Black children in Black families where they belong physically, psychologically and culturally in order that they receive the total sense of themselves and develop a sound projection of their future.

... Black children in white homes are cut off from the healthy development of themselves as Black people, which development is the normal expectation and only true humanistic goal.²¹

Reacting to transracial adoption as a form of cultural genocide,²² the NABSW openly deplored the practice as destructive to the Black community by taking Black children out of Black environments and placing them in non-Black homes. The stance marks the first official denouncement of transracial adoption,²³ and it began a discursive framework for an analysis of what types of adoptive parents are best suited to raise Black and biracial children. The

20. N.Y. Chapter, Nat'l Ass'n of Black Social Workers, Inc., Position Statement on Transracial Adoptions (Sept. 1972) [hereinafter Position Statement].

21. Forde-Mazuri, *supra* note 19, at 926 (quoting Position Statement, *supra* note 20).

22. Position Statement, *supra* note 20, quoted in Twila Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 46 n.47 (1994).

Our position is based on:

1. the necessity of self-determination from birth to death of all Black people.
2. the need of our young ones to begin at birth to identify with all Black people in a Black community.
3. the philosophy that we need our own to build a strong nation . . .

We . . . have committed ourselves to go back to our communities and work to end this particular form of genocide.

The socialization process for every child begins at birth. Included in the socialization process is the child's cultural heritage which is an important segment of the total process. This must begin at the earliest moment; otherwise our children will not have the background and knowledge which is necessary to survive in a racist society. This is impossible if the child is placed with white parents in a white environment.

Id.

23. Prior to the NABSW's statement, the occurrence of White-Black TRA had steadily increased since the first documented placement in Minnesota in 1948. White-Black TRA reached its peak with 2,574 placements occurring in 1971. HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* 3 (2002).

NABSW firmly argued that Black children could not learn survival skills for living in a racist society if they did not grow up in Black homes.²⁴

The NABSW's position works on two levels: the political and the personal. First, the future of the Black community is dependent on members who identify with that group. The NABSW concludes that transracially adopted Black children grow up with affiliations with White culture,²⁵ which separates them from identifying with the Black community at large.²⁶ Second, it argues that a healthy racial identity in the Black child can only be developed from within a Black family. Black children belong with Black parents, who possess the necessary knowledge to impart to the child about his or her social and psychological identity as a person of African descent.²⁷

B. Responses to the NABSW

These critiques of transracial adoption, while admittedly focused on the best interests of the child, supply ringing statements about the fitness of the parent to impart a racial consciousness on the children. In consideration of the identity of Black children raised in White homes, one critic wrote:

Having never been black, the white adoptive parents might not have been subjected to the kinds of discriminatory treatment that have been the lot of black people. Therefore, they might not have needed to maintain in their cognitive and psychic makeup the expectation of probable oppressive treatment by whites. Nor would they have needed to develop perspicacity in divining when a white person was lying to a black one or to become aware of areas in which oppressive treatment was likely.

. . . When white adoptive parents are unable to transmit to the black adoptive child the tendency toward doubt and the temporary suspension of trust, especially when dealing with white persons, they are failing to satisfy the "psychosurvival" need of the black child.²⁸

24. Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99, 102 (1995).

25. See *infra* note 30.

26. See *infra* note 30.

27. Forde-Mazuri, *supra* note 19, at 927.

28. Margaret Howard, *Transracial Adoption: Analysis Of The Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 540 (quoting Amuzie Chimezie, *Transracial Adoption of Black Children*, 20 SOC. WORK 296, 297 (1975)).

The ability of the White parent to instill racial consciousness upon a Black child is a recurring concern of opponents of transracial adoption, who simply fear that the child will grow up devoid of Blackness, thus harboring a false identity of Whiteness.²⁹ The blame of racial displacement is placed upon the White parents, who despite their good intentions, cannot begin to comprehend the social chasm that differentiates them from their child.³⁰

Despite questions about whether White parents can facilitate the racial development of Black children, some critics strongly support the advantages that the children may experience from having parents with greater connections to the dominant society. White adoptive parents are more likely to be middle class, while Black parents are more likely to be working or lower class.³¹ These proximities to sources of privilege and comfort have been argued as distinct advantages that transracially adopted children have over inrace placements, because “whites are in the best position to teach black children how to maneuver in the white worlds of power and privilege.”³² Along with

29. In a joint statement, the dean of Howard University School of Social Work and the president of the NABSW asserted that “Black children who grow up in white homes end up with white psyches.” RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE, AND IDENTITY* 15 (1992) (quoting Sandy Banisky, *The Question: Is It Bad for Black Children to be Adopted by Whites?*, BALTIMORE SUN, May 28, 1975, at B1).

30. William Merritt, NABSW president in 1985, testified before the Senate Committee on Labor and Human Resources to argue for the plight of Black children adopted by White families. In an infamous statement that characterized transracial adoption as a “blatant form of race and cultural genocide,” Merritt made a number of statements attacking the practice. He blamed White adoptive families for failing to develop appropriate racial identities in their Black children: “Black children who have grown up in white families suffer severe identity problems. On the one hand, the white community has not fully accepted them, and on the other hand they have no significant contact with Black people.” SIMON AND ALTSTEIN, *supra* note 29, at 36 n.49.

31. Perry, *supra* note 22, at 96-97 (offering documentation to support propositions about Blacks’ and Whites’ perceptions of racial issues concerning transracial adoption).

32. Elizabeth Bartholet, *Where Do Black Children Belong: The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1222 (1991).

My thesis is that current racial matching policies represent a coming together of powerful and related ideologies — old-fashioned white racism, modern-day black nationalism, and what I will call “biologism” — the idea that what is “natural” in the context of the biological family is what is normal and desirable in the context of adoption.

Id. at 1172.

this proximity comes greater access to education³³ and increased racial understanding.³⁴

In each of these pro-transracial adoption arguments, a racial generalization occurs that trumps Whites over Blacks in social, economic, and educational achievements. This process of generalization places adoptive parents in either of two categories: A) racially ignorant yet socially advantaged, or B) racially qualified yet alienated from privilege. A general belief exists that membership in a racial group engenders a kit of parenting traits that precludes the possibility of integration. These assumptions about race and parenting can be overinclusive, by saying that all Black adoptive parents are qualified to raise Black children,³⁵ as well as underinclusive, by overlooking the fact that some White families may be as aware of racism or even more so than Black families. Commentators have recognized that some Blacks, particularly middle-class families, may not be able to fulfill these cultural expectations of imparting the essential survival skills upon the Black child.³⁶ Emphasizing this point, Twila Perry asserts that not all Blacks have had the same experience with racism, and each family will teach their children differently how to identify with Blackness.³⁷

C. Authenticity

1. Race and Representation

How do Blacks garner an automatic bid for the potential to parent Black children, yet Whites do not? Suppose a Black heterosexual couple wants to adopt a child. They live in an overwhelmingly White neighborhood, are reasonably educated, and were both transracially adopted themselves. Should this qualify them as Black parents under the clear rubric of the NABSW? Most likely, the answer would be no.³⁸ To add to the facts, suppose neither

33. Perry, *supra* note 22, at 95; Forde-Mazuri, *supra* note 19, at 964.

34. Forde-Mazuri, *supra* note 19, at 965.

35. The NABSW's statement categorically qualifies Blacks as adoptive parents for children of African descent. "Black children should be placed only with Black families whether in foster care or for adoption." SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA 50 (2000).

36. Forde-Mazuri, *supra* note 19, at 965 n.225; Perry, *supra* note 22, at 65.

37. Perry, *supra* note 22, at 65.

38. One interesting note is that the NABSW's position on transracial adoption tends to equate those children in mixed families as White people. Despite physical appearance or ethnic origin, the NABSW basically declares these children as lost to the Black community, beyond the reach of the richness of Black culture and influence. Over a decade ago, the president of the organization stated:

strongly identify with Black culture. Would their mere racial affiliation as Black people provide the environment so ardently supported as crucial for the rearing of Black children? This hypothetical demonstrates the competing considerations of racial membership and racial identity, which may not necessarily be the same. Quite possibly, persons considered to be "Black" may not think of themselves as such.³⁹ This situation complicates and challenges racial qualifications adopting minority children. It also uncovers preconceived expectations of racial identity that are categorically qualified by racial membership.

This hypothetical generates another issue about racial heritage and representation. Black people have an incredible variety of portraying themselves. This places the individual differently in relation to incidents of racism, while affecting her method of coping.⁴⁰ Wide variations in skin tone,⁴¹ hair texture,⁴² speech patterns,⁴³ and even dress⁴⁴ may affect what one sees and

The lateral transfer of our children to white families is not in our best interest. Having white families raise our children to be white is at least a hostile gesture toward us as a people and at best the ultimate gesture of disrespect for our heritage as African people. . . .

. . . .
It is their aim to raise Black children with white minds. . . .

. . . . We are on the right side of the transracial adoption issue. Our children are our future.

Forde-Mazuri, *supra* note 19, at 961, n.205 (quoting Morris F.X. Jeff, Jr., *President's Message*, NAT'L ASS'N BLACK SOC. WORKERS NEWSL., Spring 1988, at 1-2).

39. The socio-legal predicament of Susie Guillory Phipps is a prime example. Phipps petitioned the State of Louisiana to have her official racial status changed from "Black" to "White." See *infra* note 51.

40. Physical features and cultural cues stand for many as significant determinants of race. But remarkable variation in these traits make it difficult to classify any one meaning of blackness. Sandra Patton asks the question, "Are you 'really Black' if your physical features do not identify you as black — your skin is light and your hair is curly and frizzy, but not 'kinky'?" PATTON, *supra* note 35, at 60.

41. A number of Black scholars have written personal narratives on the influence of skin-color in how they are perceived as African-Americans. With the physical appearances of Whites, these scholars recount tales of Whites questioning their identification as Black, and how they are treated differently by both whites and Blacks. See generally JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY (1995); Adrian Piper, *Passing for White, Passing for White, Passing for Black*, TRANSITION 58, 4-32 (1992).

42. See generally John Min Kang, *Deconstructing the Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 312-20 (1997) (chronicling popular and legal accounts of racial differences in assessing Black hair).

43. See Laura B. Randolph, *Why Almost Everybody Loves Colin Powell*, EBONY, Nov. 1995, at 100 (discussing America's fascination with Powell and his views on Black English and

how the world sees him or her. However, the American racial scheme classifies them as Black, regardless of appearance and presentation, if one ancestor is Black.⁴⁵ Depending on one's experience of racism and the way they are treated by others, a child in that person's care will most likely be influenced by that parental outlook. If the NABSW's primary concern is the racial upbringing of Black children, then implicitly, their unwavering stance toward transracial adoption draws a clear understanding of who is Black enough to take care of Black children.

2. Cultural Depictions of Race

The imagery of Black cultural authenticity takes a prominent place in American popular culture. Confronted with the alluring prospects of economic security and social acceptance, Black Americans balance the influences of majority (i.e., White) culture with those of Black culture.⁴⁶ This is to be expected from a minority culture, but most times the dialogue that surrounds cultural diversity opts out of a language of "cultural exchange" to one of preservation. Thus, at base lay an identifiable subject worthy of scrutiny as essential to the social survival of the minority group. The loss of this distinctive trait demonstrates the culturally enervating force of assimilation, which champions a normativity of Whiteness.⁴⁷ In these

standard English).

44. See generally Nancy Murray, *Striking a Balance: Students, Educators, and the Courts: School Safety: Are We on the Right Track?*, Symposium: *Creating a Violence Free School for the Twenty-First Century*, 34 NEW ENG. L. REV. 635 (2000) (exploring the implications of hip-hop clothing on freedom of expression in American high schools).

45. JAMES F. DAVIS, WHO IS BLACK: ONE NATION'S DEFINITION 5 (1997) ("In the South it became known as the 'one drop rule,' meaning that a single drop of 'Black blood' makes a person a Black. It is also known as the 'one Black ancestor rule,' some courts have called it the traceable amount rule,' and anthropologists call it the 'hypodescent rule,' meaning that racially mixed person are assigned the status of the subordinate group.")

46. W.E.B. Dubois' famous statement illustrates this balancing process: "One ever feels his twoness, — an American, a Negro; two souls, two thoughts, two unrecognized strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being town asunder." W.E.B. Dubois, *Our Spiritual Strivings*, in THE SOULS OF BLACK FOLK (1903).

47. Sharon Rush, the adoptive mother of a Black-White biracial child, recalls a confrontation with her daughter's elementary school teacher:

One of my daughter's primary teachers assured me in our initial meeting that she did not even see my daughter as Black. This is a classic expression of the color-blind philosophy and it came in response to my attempt to talk about my daughter's Blackness with the teacher and try to assess how she viewed the importance of race. The teacher immediately tries to reassure me that she is not racist by exclaiming that she didn't even see my daughter's Blackness. The

situations, the suspicious absence of a distinct minority culture is popularly translated as becoming White.

Popular culture provides powerful definitions of Black behavior in relation to Whites. Blacks that fail to assert cultural differences between themselves and Whites are seen as ignorant of their own community and culture.⁴⁸ In politics, the nomination of Clarence Thomas to the Supreme Court raised questions in the mind of many Blacks whether he would adequately offer a Black point of view.⁴⁹ When the Cosby Show first ran, Whites questioned its authenticity as a representation of a professional Black family.⁵⁰ In Louisiana, a court declared a woman to be legally Black, even though she viewed herself as a White woman.⁵¹ And of course, the archetypal Uncle Tom of Harriet Beecher Stowe's novel⁵² serves as the model for the Black figure who

teacher meant well by her comment and probably meant that my daughter's Blackness did not cause her to be prejudiced against my daughter. I also knew, however, that the teacher's unwillingness to positively acknowledge my daughter's race was, itself, a form of racism even though she was not fully aware how negative her comments were.

SHARON RUSH, *LOVING ACROSS THE COLOR LINE* 36-37 (2000).

48. For example, Afrocentric scholar Molefi Kete Asante once asserted, "I am clear that the aping of whites is the road to neither intellectual respect nor ethical decency. Africans who exhibit confusion about their personal identities cannot hope to be clear about cultural identity." Greg Thomas, *The Black Studies War: Multiculturalism vs. Afrocentricity*, VILLAGE VOICE, Jan. 17, 1995, at 23; see also NATHAN HARE, *THE BLACK ANGLO-SAXONS* (1965) (criticizing African-Americans who assimilate into mainstream society).

49. Civil rights leaders categorically opposed Thomas' position on the Supreme Court. Rev. Al Sharpton questioned Thomas's paradoxical stance on affirmative action, "Clarence Thomas lives in the suburbs, a life that was given to him as a result of the civil rights movement." Eric Lipton, *Ministers to Picket Justice's House*, WASH. POST, Sept. 2, 1995, at B2. Questions were also raised about Justice Thomas' potential as a role model for Black children. A Louisiana attorney opposed the nomination because "His values are not consistent with the values I want my daughter to have." Sandra Torry, *Among ABA Lawyers, The Talk is of Thomas*, WASH. POST, Aug. 13, 1991, at A4.

50. See generally Jeannye Thornton, *TV's Disappearing Color Line*, U.S. NEWS & WORLD REP., July 13, 1987 (describing the effects of Black television shows on Whites' impressions of Blacks).

51. In 1983, Suzy Guillory Phipps had applied for a passport in Louisiana and on the application, represented her race as White. When the passport agency checked her application against her birth certificate, which read "Black," her application was rejected. She fought to have her racial designation changed, *Doe v. Louisiana*, 479 So. 2d 369 (La. Ct. App. 1985), which resulted in a string of litigation that was ultimately denied cert by the Louisiana Supreme Court. An excellent description of this case appears in VIRGINIA DOMINGUEZ, *WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA I* (1994).

52. HARRIET BEECHER STOWE, *UNCLE TOM'S CABIN* (Jean Fagan Yellin ed., Oxford Univ.

foolishly oversteps racial boundaries in his efforts to please Whites.⁵³ Which one of these Blacks as prospective parents, would fulfill the NABSW's conception of the appropriate parent who could convey the "survival skills" and prevent the cultural genocide of Afro-America? Each figure can be considered Black, and each has undoubtedly experienced forms of racism in their lives as people of color. Even Michael Jackson may be victim, but surely his physical transformation from Black to brown to gray⁵⁴ may be a point of contention for his racial competency.

3. *Authenticity and Transracial Adoption*

It would be shortsighted to ignore the subtle, yet clear implication of cultural authenticity in the selection of parents in transracial adoption. If Blacks are deemed the best potential parents for Black children, this naturally assumes that White people are unequivocally less suited to become parents of Black children. The racial difference here is the obvious reason for this selection hierarchy, and it is based on the potential understanding of the Black child's racial experience. If Blacks understand it better than Whites, then, with the wide variation of experiences among Blacks, there too must be differentiation.

Presumably, the logic of the NABSW is to instill community and continuity among Black America by including all children of African descent within the fold of its category of urgency. The eligible parents for these children would be anyone who could meet the minimum requirements of race. This asks nothing of what they understand of race, whether it has any importance to them, and whether they want it to be a part of their child's life. By casting such a wide, categorical net, there is sure to be internal prioritization among eligible Black parents who would be more or less able to raise the Black child as a "Black child." A strong argument could be made here in defense of parental privacy, in that racial restrictions on adoption are premised upon the fact that the Black child be raised in a certain way. There is no guarantee that the Black adoptive parent will fulfill the cultural expectations of Black

Press 1998) (1852).

53. The online glossary, "The Rap Dictionary" has defined "Uncle Tom" as "(n) A black man who wants to be white. From the book Uncle Tom's Cabin. (n) A tattle-taler, a person who befriends another only to deceive him, usually in the workplace." The Rap Dictionary (2003), at <http://www.rapdict.org/terms/u> (last visited Sept. 21, 2003).

54. See Joel Garreau, *What Turns Ebony To Ivory: An Unofficial Diagnosis of Pop Star's Skin Disorder*, WASH. POST, Feb. 12, 1993, at C1 (discussing Michael Jackson's change of pigmentation and its affects on his racial identity).

activists who so ardently demand that race be the primary parental benchmark in selection criteria. While Whites are presumed unqualified for their racial ignorance, Blacks are categorically welcomed without consideration of their racial knowledge. The possibility that they may fail in this respect allows for (and I would argue even encourages) discretion amongst the decision makers along the lines of racial authenticity. The consideration of how the child will be brought up racially is quickly answered by categorical considerations of race. But this is an unreliable predictor of the strength of the child's racial upbringing among persons who are supposedly "just like her."

III. Who May Raise Indian Children?

A. A Brief History of the Indian Child Welfare Act

Since 1978, ICWA has given tribes jurisdiction over adoption proceedings involving Indian children and non-Indian parents.⁵⁵ The Act gives tribes greater power in response to a lack of cultural sensitivity of state courts in these matters. At the time of the Act, statistics revealed a disproportionate number of Indian children being involuntarily removed⁵⁶ from Indian homes.⁵⁷ These reasons were traced to the actions of non-Indian social workers and courts who estimated good parenting skills according to White middle-class values.⁵⁸ The Director of the Association of American Affairs testified in

55. Jo Carrillo, *Introduction to READINGS IN AMERICAN INDIAN LAW* 15 (1998).

56. This is to be distinguished from cases where Indian parents had arranged privately to have their child adopted by a non-Indian party.

57. In 1978, the statistics for the displacement of Indian children were alarming.

[A] minimum of 25 percent of all Indian children are either in foster homes, adoptive homes, and/or boarding schools, against the best interest of families, tribes, and Indian communities. Whereas most non-Indian communities can expect to have children out of their natural homes in foster or adoptive homes at a rate of 1 per every 51 children, Indian communities know that their children will be removed at rates varying from 5 to 25 times higher than that.

1974 *Hearings*, *supra* note 12, at 1. Some reports quoted as high as thirty-five percent of Indian children under the age of one had been adopted. Cynthia G. Hawkins-Leon, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 *BRANDEIS J. FAM. L.* 201, 202 n.5 (1997-1998).

58. Sandra Patton, a White adoptee of White parents, addresses the racialized, middle class ideal of American adoptions in her book *BirthMarks: Transracial Adoption in Contemporary America*. In her childhood, her parents presented her with the childrens' book *The Chosen Baby*, to help her understand the adoption process. The last page of the book left an indelible impression on her memory, picturing Mr. and Mrs. Brown and their children, a tightly-knit, adoptive family at home. She recalls the picture as "the ideal nuclear family: the two children lie on the floor in front of the fireplace with their dog and cat, while their parents read and sew

front of Congress about the damaging impact of White values used in assessing Indian families:

I think one of the primary reasons for this extraordinary high rate of placing Indian children with non-Indian families rather than in Indian homes is that the standards are based upon middle-class values; the amount of floor space available in some, plumbing, and income levels. Most of the Indian families cannot meet these standards and the only people that meet them are non-Indians.⁵⁹

Taking away this incursive authority over Indian children aimed to restore decision-making power to tribal institutions that had a better understanding of the needs of Indian children. This works two ways. First, tribal institutions are better situated for a contextual assessment of Indian family structures.⁶⁰ Second, tribes had an increased stake in the future of their young people.⁶¹

Running tandem with the more legal orientation of ICWA was the political issue of transracial adoption. Because the numbers of Indian children adopted claimed such a significant proportion of the youth population, a threat to cultural augmentation existed that was more drastic than among Black children.⁶² The social component of ICWA focused on the transmission of

in their 'family room.'" In her adult life, she characterizes the ideological assumptions that underlie adoptive families.

First of all, Mr. and Mrs. Brown are a nondisabled, White, middle class, heterosexual married couple, and it is no accident that their caseworker's name is Mrs. White. In fact, everyone in the story is White and middle class. The presence of the social worker is significant in adoption stories — she approves the adoptive parents and "finds" the baby. She represents the state's definition of good parents.

PATTON, *supra* note 35, at 29 (citing VALENTINA WASSON, *THE CHOSEN BABY* (1950 rep.) (1939)).

59. Statement of William Byler, 1974 *Hearings*, *supra* note 12, at 5.

60. Advocates of ICWA wanted Indian family structures to be valued in the placement process. Extended kinship structures beyond the traditional nuclear family were offered as cultural differences in childrearing that needed to be accounted for. James Shore & William Nicholls, *Indian Youth and Tribal Group Homes, A Whipper Man*, in 1974 *Hearings*, *supra* note 12, at 106-07.

61. Indian leaders viewed the retention of Indian children as a form of preventive mental health care for Indian communities. By maintaining a sense of cultural identity at an early age, problems of family breakdown and general social damage could be controlled. *Id.* at 107 ("The children leave home; the family breaks down; and it is impossible to reverse the process or repair the damage.")

62. Hawkins-Leon, *supra* note 57.

cultural values from Indian adults to Indian children.⁶³ Transracially adopted Indian children, living in communities isolated from Indian people and culture, were viewed as culturally whitewashed.

During the adolescence of these people, they were raised with a white cultural and social identity. They are raised in a white home. They attended, predominantly white school, and in almost all cases, attended a church that was predominantly white, and really came to understand very little about Indian culture, Indian behavior, and had virtually no viable Indian identity. . . .

. . . [T]hey were finding that society was putting on them an identity which they didn't possess and taking from them an identity that they did possess.⁶⁴

Because these children grew up as "White" instead of "Indian," they were to face significant social anxieties later in life. The doctor listed the psychological symptoms of "chronic insecurity, free floating anxieties, panic reactions, [and] difficulty adapting to family life and adulthood" as common among these culturally displaced children.⁶⁵

But the doctor's most telling statement does not involve psychological health, but cultural essentialism. "[B]ecause of their racial characteristics, the majority of society refuses to let them express that majority cultural identity and they're forced into an identity which they really don't know how to behave in. They really don't know how to act as Indians should."⁶⁶ ICWA responded directly to the inability of White parents to provide the special cultural upbringing that Indian children deserved — to teach children to behave as Indians "should." Here, the focus switches away from the child to the prospective parent. As the potential arbiter of culture and education for the Indian child, this parent has become the canvas on which to portray various interpretations on the type of Indian the child is to become.

ICWA also sets preference placements for the custody of Indian children.⁶⁷ Section 1915 requires that the child be placed first with a member of his/her extended family,⁶⁸ then other tribal members, then other Indian families. At

63. Miller, *supra* note 16.

64. Statement of Dr. Joseph Westermeyer, Department of Psychiatry, University of Minnesota, 1974 Hearings, *supra* note 12, at 46.

65. *Id.* at 45.

66. *Id.* at 49.

67. See generally Mazurek, *supra* note 12.

68. Title 25 U.S.C. § 1903(2) defines "extended family member" as

the very bottom of this hierarchy is the option of placement in a non-Indian home. These preferences work as a kinship hierarchy which places most value upon blood and culture. However, allowances are made for "good cause" when the child should be placed with a non-Indian home.⁶⁹

This paper does not address the jurisdictional issues of ICWA or the social concerns of the best interests of the child. I seek instead to analyze the underlying meaning of the Act, and the implications it shares with standard objections to the transracial adoption of Black children. If courts apply the law to these custody proceedings, normative decisions are made as to the fitness of the parent to raise the child. Inherent in this decision, particularly concerning minority children, is an estimation of the cultural perspicuity of the prospective parent. Usually, this analysis is simplified by contextual clues such as race. It is assumed that in-race placements raise no questions of cultural transmission, and interracial placements categorically do. This wide reliance oversimplifies in-racial alliances in a way that presumes a uniformity of cultural experience amongst all Indians (or all Blacks). The next section discusses the dangers posed by conferring discretion on courts to define Indianness.

IV. Existing Indian Family Exception

To begin, ICWA does not come into effect if there are no Indian parties involved, and some jurisdictions interpret this as a requirement for an *existing Indian family*. Statutory language applies ICWA in any "child custody proceeding" in a state court "involving an Indian child."⁷⁰ If the child is domiciled on the reservation, then the tribe has exclusive jurisdiction over the matter.⁷¹ If the child is domiciled off the reservation, then the matter may be transferred to the tribe, absent any objection by either party.⁷² The language

defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of 18 and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent[.]

Mazurek, *supra* note 12, at 397 n.90.

69. *Id.* § 1915(a), (b) (2003); *see also In re Interest of Bird Head*, 213 Neb. 741, 749-50 (1983) (holding that factual support as to "good cause" for failure to comply with statutory placement preferences are necessary for appellate court review)

70. 25 U.S.C. § 1911(a) (2003).

71. *Id.*

72. *Id.* § 1911(b). For an example of the determination of domicile of an Indian child born off the reservation, *see generally Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

of the application and jurisdiction of ICWA depend on the definition of Indian, which, within the statutory language of ICWA, is not defined. Presumably, the definition of Indian comes from the tribe, which defines membership for themselves as an exercise of tribal sovereignty.⁷³ But a number of courts follow the Existing Indian Family exception (EIF) to determine whether “legitimate” Indian people and culture would be affected by ICWA. This issue is debatable, yet it is clear that ICWA does not provide for state courts to question the tribe’s definition of “Indian,” which is statutorily assumed.

One commentator has argued that the EIF assesses the “Indian-ness of the family⁷⁴”, by allowing the court to decide whether the adoption of an Indian child would prevent him or her from being “part of an existing Indian family unit or any other Indian community.”⁷⁵ First, this requires that the child form a bond with a parent that is Indian. Second, there must be a significant tie to tribal culture or a reservation.⁷⁶ Courts adopting the exception require a demonstration of a connection to an Indian way of life in order to decide whether ICWA should apply at all. This provides a way for courts to avoid the application of ICWA to child custody proceedings.⁷⁷ Additionally, this enables courts to act as tribunals of cultural authenticity that stand to approve or deny a party’s claim under ICWA in opposition to the petitioner’s declaration of tribal affiliation.

A number of courts have rejected the existing family exception, however. These opinions fall into two primary camps. First, there is the statutory concern that applying the exception adds nonexistent language to the Act.⁷⁸

73. Tribes have ultimate discretion over who may qualify as a member. These membership requirements can even contradict the constitutional rights of an American citizen, yet tribal sovereignty gives the Indian nations complete independence in their requirements. For a controversial example of tribal dominion over the determination of membership, see *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978) (holding that tribal exclusion of children of Indian women who married outside of the tribe is a prerogative of the tribe under principles of tribal sovereignty and thus not violative of equal protection).

74. Wendy Parnell, *The Existing Indian Family Exception: Denying Tribal Rights Protected by the Indian Child Welfare Act*, 34 SAN DIEGO L. REV. 381, 398 (1997).

75. *In re Crews*, 118 Wash. 2d 561, 569 (1992).

76. Parnell, *supra* note 74, at 398.

77. Toni Hahn Davis, *The Existing Indian Family Exception To The Indian Child Welfare Act*, 69 N.D. L. REV. 465, 475 (1973).

78. See *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 128 (Cal. Ct. App. 1998) (“There is no threshold requirement in the Act that the child must have been born into or be living with an existing Indian family, or must have some particular type of relationship with the tribe or his or her Indian heritage.”).

Second, non-Indian courts are culturally ill-equipped to adjudicate matters concerning Indian families, and the application of EIF destroys the original protective purpose of ICWA.⁷⁹ Both of these ideas compete with the shared logic of supporters of the exception for the "true" legislative purpose of the Act. Whereas jurisdictions that support the doctrine believe they apply ICWA when the parties are actually "Indian," its opponents support a broad-based application based upon a strict reading of the law. The following cases demonstrate the jurisprudential approaches to the EIF.

A. *In re Baby Boy L*

One of the first exercises of the judicially created exception is *In re Adoption of Baby Boy L*,⁸⁰ which involved the child of an unwed Kiowa father and a non-Indian mother. The mother had arranged for the adoption of the child by a non-Indian couple, who in turn petitioned the state court to declare the absent father unfit in effort to terminate his parental rights.⁸¹ Under a temporary order of custody, the child was given to the care of the non-Indian couple. The father, who was incarcerated at the time of the proceedings, was given notice of the pending adoption, and with the intervention of the Kiowa tribe, sought to block the adoption under an ICWA claim.⁸² The trial court denied the applicability of ICWA, and the tribe appealed.

The Kansas Supreme court agreed with the holding of the lower court, concluding that it was against the intention of the Act to include situations that did not involve the *removal of a child from an Indian home*.⁸³ Because the child was born out of wedlock to a non-Indian mother and was never under the care of the father, the court reasoned that ICWA would not apply.⁸⁴ The court also invoked the issue of blood quantum, raising suspicion as to the strength of the tribe's claim:

79. Quinn v. Walters, 845 P.2d 206, 209 n.2 (1993). ("Engrafting a new requirement into ICWA that allows the dominant society to judge whether the parent's cultural background meets its view of what 'Indian culture' should be puts the state courts right back into the position from which Congress has removed them.").

80. 643 P.2d 168 (Kan. 1982).

81. Hahn Davis, *supra* note 77, at 479.

82. *Baby Boy L*, 643 P.2d at 202.

83. Hahn Davis, *supra* note 77, at 479.

84. *Id.* ("... Congress never intended the Act to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.").

In this case Baby Boy L. is only 5/16ths Kiowa Indian, has never been removed from an Indian family and so long as the mother is alive to object, would probably never become a part of the [father's] or any other Indian family. While it is true that this Act could have been more clearly and precisely drawn, we are of the opinion that to apply the Act to a factual situation such as the one before us would be to violate the policy and intent of Congress rather than uphold them.⁸⁵

In this situation, the court ignores the father's reliance on Indian heritage to result in a judicially created standard for tribal membership, which is insufficient to invoke the Act. Because the child had never lived with the father and was "only 5/16ths Kiowa," the court could not foresee the integration of Indian culture in the life of the child. In the opinion of the court, the child of Indian descent was not an "Indian child." Moreover, the court rejected the father's eleventh-hour assertion of race and culture for the retention of the child. In contrast to the legal language of ICWA which would semantically justify the father's claim, the court fails to recognize his identity as a decisive factor.

B. In re Adoption of Crews

In re Adoption of Crews examines the cultural affiliations of the Indian parent as they would apply to the Act. In this case, an Indian mother sought to revoke her consent to the adoption of her child by a non-Indian family.⁸⁶ The Supreme Court of Washington denied her appeal to regain custody of her child on grounds that she neither had been affiliated with her tribe nor lived on the reservation. The court, relying on Baby Boy L., was "convinced that ICWA was not intended to apply in the situation presented by the specific facts of this case."⁸⁷ The opinion stated:

In this case, however, Crews and the Choctaw Nation ask this court to apply ICWA when B. has *never been a part of an existing Indian family unit* or any other Indian community. Neither Crews nor her family has ever lived on the Choctaw reservation in Oklahoma and there are no plans to relocate the family from Seattle to Oklahoma. Bertiaux, B.'s father, has no ties to any

85. *Baby Boy L.*, 643 P.2d at 175.

86. 825 P.2d 305 (Wash. 1992).

87. *Id.* at 567.

Indian tribe or community and opposes B.'s removal from his adoptive parents. Moreover, there is no allegation by Crews or the Choctaw Nation that, if custody were returned to Crews, B. would grow up in an Indian environment. To the contrary, Crews has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future.⁸⁸

The court found that Crews' late appropriation of her Indian heritage was a weak plot in efforts to keep her child. Her lack of ties to the reservation in Oklahoma supposedly demonstrated her lack of understanding of Indian life, which would preclude her ability to raise her child as an "Indian child."

In this light, the court elevates the concept of Indianness above a racial consideration in favor of a geographic and cultural one. Regardless of Crews' genealogical ties to a Native American background, the court did not see her as a culturally identified Indian woman. Race does not make one Indian here; rather, the concerted involvement in tribal culture does. Her subjective claim to her heritage did not find a sympathetic ear on a bench seeking a more aboriginal conception of Indian. It did not help that she had only recently discovered her heritage as Native American, in addition to the knowledge of what specific tribe she was descended from. The court saw her as an urban White woman with remote connections to an Indian heritage.

C. In re Bridget

The court in *In re Bridget* also showed such contempt for a plaintiff who revealed his Indian heritage after concealing it secret in order to facilitate the adoption of his twin daughters.⁸⁹ The father, a Pomo Indian, enrolled as a tribal member after the custody proceedings had begun, at the behest of his mother. On behalf of the father and his extended family, the tribe intervened in the custody proceedings, relying on ICWA to bring the child under tribal jurisdiction.⁹⁰ Finding this formal standard of tribal affiliation insufficient for ICWA purposes, the California court invoked the existing family doctrine to regulate the application of the Act to apply only to children of Indian descent who would have substantial ties to an Indian community. Although the twins' father had a legitimate claim to tribal membership, the court did not believe him to maintain a "significant social, cultural or political relationship with an

88. *Id.* at 569 (emphasis added).

89. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 507 (Cal. Ct. App. 1996).

90. *Id.* at 518.

Indian community.”⁹¹ For this reason, the court found constitutional problems⁹² with applying ICWA, stating, “At the same time, however, we agree with those courts which have held that this purpose will not be served by applying the provisions of ICWA which are at issue in this case to children whose biological parents do not have a significant social, cultural or political relationship with an Indian community.”⁹³

Bridget demonstrates the power of the court to set standards of cultural authenticity that directly oppose the subjective claim of the appealing party. This effort to invoke a standard of Indianness allows the law, as a disinterested third party, to step outside the local facts and construct a universal scheme of cultural traits that signify one’s designation as Indian. While the role of courts is to assess facts and resolve disputes, this power to assess and rule on cultural identity is potentially problematic. Because the existing family exception is not stated anywhere within the statutory language of ICWA,⁹⁴ each court is left with the discretion to decide its applicability. Such haphazard discretion generates a suspicious jurisdictional question that leaves the parties at the mercy of the personal racial prescriptions of individual courts. This seems dangerous, for in the efforts to construct objectivity, there still exists the lingering subjective opinion of the judge. Thus, the pivotal point of racial ascription centers around an epistemological battle of culture and race. Depending on where one litigates the ICWA claim, there could or could not be a cultural rubric that would pose an initial barrier to one’s claim as Indian.

V. Effects of Cultural Representations of Indians

Before a serious discussion of the adjudication of Indian authenticity may begin, it is of critical importance to recognize that there exists no written definition of a cultural or racial threshold for the application of ICWA or any

91. *Id.* at 520.

92. The court found that the application of ICWA upon strict racial grounds would raise Equal Protection questions. In the case that ICWA were applied to all descendants of tribal members, this would classify all such children as racial Indians. This would qualify ICWA as an application based solely, or predominantly upon race, which makes it subject to strict scrutiny. *Id.* at 528. To avoid this question of the constitutional dangers of ICWA, the California court relies upon a definition of tribal membership that is based upon social, tribal, and cultural affiliations. *Crystal v. Superior Court*, 69 Cal. Rptr. 2d 414, 422 (1997), held that cultural ties were crucial to avoid constitutional problems in ICWA.

93. *Id.* at 526.

94. Parnell, *supra* note 74, at 406.

other federal scheme for Native Americans.⁹⁵ Because the Existing Family Exception of ICWA does not originate in written statutory language,⁹⁶ it stands as judicially created policy without the political authenticity of a legislatively created, legally standardized rubric that identifies the real Indians from the fake ones. Even if there were such a test, the various prongs would be rooted in a normative conception of what a Native American should be.

The idea of the Indian did not come from within, but was an externally imposed vision of what White spectators interpreted as Indian culture.⁹⁷ As the dominant political group, Whites flattened the diverse, polyglot, and variegated nature of Indian culture into a racial classification, which lumped all indigenous peoples into a monolithic group.⁹⁸ The great variety of physical types, languages, and cultures were lost to the generalizing process of race.⁹⁹ Some critics argue that Indians did not become "Indians" until "White" people came to "America."¹⁰⁰ From the beginning of the colonial era, Whites have had definite opinions of Native Americans — an assuredness of thought that persists to the modern era. While most Americans have some knowledge of

95. The statutory language of ICWA relies on tribal definitions of "Indian." 25 U.S.C. § 1911(a) (2000). Thus, according to local standards of membership drawn by the praying tribe, ICWA should adopt that same standard. Felix Cohen recognizes the complexity of the terms "Indian," "tribe," and "band." FELIX COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 2-5 (Univ. of N.M. photo. reprint 1971) (1942). However, Cohen relies on statutory language for a more precise definition of Indian: "[A]ny person of Indian descent who is a member of any recognized tribe now under Federal jurisdiction." *Id.* at 12 (citing 25 C.F.R. 161.2).

96. Some cases have taken strong stands against this absence of statutory language, and follow a strict interpretation of ICWA. *Quinn v. Walters*, 845 P.2d 206, 209 (Or. App. 1993) ("It is not for state courts to add additional requirements."); *In re Alicia S.*, *supra* note 2, at 128 ("When statutory language is clear and unambiguous there is no need for construction and courts should not indulge in it.").

97. ROBERT BERKHOFFER, *THE WHITE MAN'S INDIAN* 4 (1978).

98. *Id.*

99. Michael Omi and Harold Winant have conducted a detailed study of the historical emergence of racial classification in America. MICHAEL OMI & HAROLD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (1994); see also *RACIAL CLASSIFICATION AND HISTORY* (Nathaniel Gates ed., 1997).

100. BERKHOFFER, *supra* note 97, at 3-4. It was because of this perceived physical difference that Whites invented the idea of race to distance themselves from the indigenous inhabitants. In fact, the idea of Whiteness and the privilege that it affords depends on the continued existence of groups considered non-White. Without the otherness of the minority groups, the discriminating concepts of "civilization" and "superiority" could not be sustained. See Cheryl Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707 (1993); see also WINTHROP JORDAN, *WHITE OVER BLACK* 27 (1969) ("Inevitably, the savagery of the Indians assumed a special significance in the minds of those actively engaged in a program of bringing American savagery to the wilderness.").

Indians, these suppositions are more likely to be based on hearsay, imagery, and stereotypes rather than actual encounters with Native American people.¹⁰¹

In this section, I address the stereotypes of Native Americans that affect the application of the Existing Indian Family doctrine. There are three primary areas in which courts have reflected that litigants fall short of being considered as Indian. In each of these areas, courts hold preconceived, majoritarian views of Indian authenticity that are derived largely from cultural lore and popular production. This materializes in three primary forms. First, courts have expressed doubts as to the legitimacy of the petitioner's blood quantum, which asserts racial makeup as an important measure of authenticity. Second, courts hold distinct views on cultural practices that they view as distinct to native communities, which are largely based upon appeals to religious essentialism. Third, courts adhere to strong views on geographic locations that are appropriate for Native American families, thus reserving the application of ICWA for those living in predominantly Indian communities. Litigants that challenge these judge-made views have less chance of being considered under ICWA.

A. Blood Quantums

The aesthetic composition of the Indian has been depicted with such richness of tongue that few Americans would be free from its descriptive power. Narratives of colonial encounters with Indian savages frequently focus on the physical aspects of the indigenous people. Amerigo Vespucci's descriptions of the indigenous in Brazil provided much fodder for the sixteenth-century European imagination:

We found in those parts such a multitude of people as nobody could enumerate . . . a race I say gentle and amenable. All of both sexes go about naked, covering no part of their bodies; and just as they spring from their mother's wombs so they go until death. They have indeed large square-built bodies, well formed and proportioned, and in color verging upon reddish. This I think has come to them, because going about naked, they are colored by the sun. They have, too, hair plentiful and Black . . . They are comely,

101. According to the latest census, the states where Whites are most likely to encounter Native Americans are Alaska, Oklahoma, and New Mexico. More populous states, such as New York, Illinois, and Massachusetts, each have Indian populations of less than one percent. *Census 2000 PHC-T-6* tbl. 3 (Apr. 2, 2001), at <http://www.census.gov/population/cen2000/phc-t6/tab03.pdf> (last visited Sept. 21, 2003).

too, of countenance which they never themselves destroy; for they bore their cheeks, lips, noses and ears.¹⁰²

With these narratives focused on the physical difference between the observer and the Indian, the descriptions rested upon the distinctive characteristics that separated red from non-red: long, Black hair, "tawny skin," and prominent features. Much attention was placed upon the reddish hue of the skin.

The reliance on visuality can be an unreliable symbol of cultural affiliations. If one's physical appearance satisfies a burden of proof for Indian authenticity, then anyone who falls outside of this expectation of appearance has a higher threshold to achieve.¹⁰³ Because the cultural impression of the Native American is so strongly ingrained, deviations from the mythology fail to fulfill an idealized (and perhaps unrealistic) vision of Indianness. This is especially difficult for Indians who have mixed racial ancestry.¹⁰⁴ Mixed blood Indians have more difficult issues with identity and recognition¹⁰⁵ when others refuse to see them as who they are.¹⁰⁶ Additional racial strains may

102. BERKHOFFER, *supra* note 97, at 7-8.

103. Patricia Penn Hilden, a mixblood Indian of Nez Perce and European descent, recalls going to see *Dances With Wolves* with upper-class Brits in Cambridge, England. After requesting her to attend the film in "traditional Native clothing" to the showing, the wife of a colleague displayed ultimate fascination in Hilden's identity as Indian in regards to her White appearance. "Fiona" barraged her with relentless questions:

"One thing, Pat, you don't look at *all* like the Indians. If I hadn't known already, I'd *never* have known . . . I am sure . . . none of my friends would ever know. Do they know in Trinity Hall? Did they know you when you were in King's? Does anyone ever talk about it? I shouldn't think they would because you don't look it at all. You could be all white."

PATRICIA PENN HILDEN, WHEN NICKELS WERE INDIANS 183-84 (1995).

104. William S. Penn estimates mixbloods to comprise over half of the entire Indian population in the United States. WILLIAM S. PENN, AS WE ARE NOW: MIXBLOOD ESSAYS ON RACE AND IDENTITY 2 (1997).

105. A number of scholarly articles have been written that focus on the difficulties of gaining federal recognition for Indian groups that have mixed racial strains. See generally Cindy D. Padgett, *The Lost Indians of the Lost Colony: A Critical Legal Study of the Lumbee Indians of North Carolina*, 21 AM. INDIAN. L. REV. 391, 391 (1997) (describing the problems of the Lumbees of North Carolina gaining recognition because they are generally White in appearance); Gerald Torres & Kathryn Milun, "Translating Yonnonidio" by Precedent and Evidence: The Mashpee Indian Case, in CRITICAL RACE THEORY 177-90 (Kimberle Crenshaw et al. eds., 1995) (depicting the Mashpee of Massachusetts, who failed to meet judicial conceptions of "tribe" because of their mixed racial status and affiliation with Blacks); Martha Minow, *Identities*, 3 YALE J. L. & HUM. 97 (1991) (arguing for the Mashpee as a viable Indian tribe).

106. In 1993, the Ramapough Mountain people applied for federal recognition. With plans

outweigh one's rightful claim to Indian identity.¹⁰⁷ Thus, the addition of outside ancestries disrupts a judicial image of a fullblood Indian as the prototypical Native American, to which all others are measured.

Despite an individual's claim of identity, it is widely believed that increased dilutions of blood demonstrate directly proportional ties to an Indian community. This hypothesis focuses on the ethnicity of the non-Indian party in a marriage, which suggests the cultural affiliations and leanings of the Indian party involved.¹⁰⁸ Thus, a person with a high quantity of non-Indian blood categorically has fewer ties than a person who is predominantly Indian. Courts interpret this dilution of blood as a dilution of culture.¹⁰⁹

B. Cultural Practices

On a strong par with physical images, the nonnative imagination of how the Indian should act and live claims substantial influences on the ICWA exception. Family ties or an Indian environment fall a close second to blood as the test of whether the court actually finds these families to be Indian. It may be possible that ICWA orders the return of a child to a community consisting of people of native descent, but in some jurisdictions, those surroundings may not be Indian enough.¹¹⁰ Blood and genealogy aside, the

to open up a casino that would compete with other gaming establishments in the New York City area, Donald Trump questioned their status as an actual tribe: "They sure don't look like Indians to me." Trump opposed the recognition of the Ramapough because their casino would potentially detract from the success of his own. *Tribal Rights: Refining the Law of Recognition*, N.Y. TIMES, Oct. 17, 1993, at 4-6.

107. Particularly if the additional racial ingredient is Black, the task of racial classification becomes a balancing issue of cultural affiliation. The Black Seminoles of Oklahoma have faced difficulty in gaining recognition from their own tribe. See Aaron R. Brown, *Judgments: Brothers Fighting Over Indian Money: The Right of Seminole Freedmen to a Portion of the Indian Claims Commission Judgment Fund*, 11 AM. INDIAN L. REV. 111 (1983); see also *Who Is a Seminole, and Who Gets to Decide*, N.Y. TIMES, Jan. 30, 2001.

108. This theory is the basis of the tribe's argument in *Santa Clara Pueblo v. Martinez*, *supra* note 73, where women who married outside the tribe were seen as more likely to move outside the bounds of the reservation and lose touch with their culture of origin. Men, however, who intermarried were seen as categorically able to maintain cultural ties while being married to an outsider. The controversial policy of the Santa Clara Pueblos limited membership to the children of male members who intermarried, while denying membership to the children of intermarried women. The Supreme Court upheld the membership restriction.

109. See *supra* note 108.

110. Some courts scoffed at the idea of formerly White litigants who had invoked their Native ancestry in order to bring an ICWA claim. The courts did not view them as Indians who would be able to provide an authentically native environment for the child. See *In re Bridget*, *supra* note 4, at 425 ("Such token attestations of cultural identity fall short of establishing the

ability to be included as Indian under the auspices of ICWA was greatly an issue of behavior.¹¹¹ Here, the court decides whether the child would become exposed to native cultures and traditions, and in doing that, the court holds the power to determine what these cultures and traditions are.¹¹² Even if this court incorporates Indian perspectives into its rulings, it still palliates the individual right of self-definition, potentially deferring to expected images of Indian culture.

It is not only a genealogical standard that courts view as necessary for an ICWA claim, but also a cultural one¹¹³ that represents something significantly different from a mainstream environment.¹¹⁴ In considering what an Indian

existence of those *significant* cultural traditions and affiliations which ICWA exists to preserve . . ."); *In re Crews*, *supra* note 86, at 310 ("Crews has shown no substantive interest in her Indian heritage in the past and has given no indication this will change in the future."); *Crystal v. Superior Court*, 69 Cal. Rptr. 2d 414, 425 (1997) ("His interest in his Indian heritage is a recent phenomenon, sparked, as it would appear, by the commencement of the dependency and the notice provided by the Agency.").

111. At times the logic of physical appearance is completely over-ridden by behavior.

"In [Steve McLemore's] youth, there was a kid in school [whom he] used to call . . . Spec and he was red-headed and freckle-faced. But he was on the rolls as Cherokee Indian . . . He was, to all intents and purposes, white. But spiritually he wasn't. His mother wasn't white, obviously, because he was one of the most stubborn Cherokees and he wouldn't speak anything but Cherokee . . . This boy was accepted by the whole run of the school as Cherokee . . . The mother had raised a red-headed, freckle-faced kid . . . an INDIAN kid. So it's the culture rather than the blood quantum.

Hilden, *supra* note 103, at 146. However, at base in Spec's behavior is the qualification of blood quantum. Despite the inability of his Indian ancestry to materialize physically, his strong identification as Indian reasserts his cultural alliances.

But lack of blood connections may not categorically disqualify one as a member of a cultural group. In MARK TWAIN, *PUDD'NHEAD WILSON* (Norton ed., 1980), two babies are switched at birth. One child is one-thirty-second Black, and the other is purely White. The "Black" child grows up "White," while the "White" child grows up Black. At adulthood, the switch is revealed, yet both characters have been acculturated (perhaps racialized), so thus reversion is impossible. To add to the irony of the novel, townspeople quickly refer to blood as the cause of each boy's bad behavior, wrongly depending on race and ancestry to provide origins for reproachable conduct.

112. See Woodhouse, *supra* note 6.

113. In *PostIndian Conversations*, Gerald Vizenor upsets what he sees as a reliance on blood as a measurement of authority on Indian culture. Eschewing a genealogical requirement for the Indian author, Vizenor questions the validity of blood as a talisman of authenticity. He eloquently writes, "Native blood is not the same as experience or imagination, and the metaphor of native blood is certainly not measured by the liter or even the reservation colonial pint." GERALD VIZENOR, *POSTINDIAN CONVERSATIONS* 150 (1999).

114. ICWA's purpose was to facilitate the "placement of such children in foster or adoptive

environment is, courts rely on images perpetuated in culture but not law. This provides a nebulous set of subjective characteristics that has no uniformity across jurisdictions. Because cultural practices involve so many variables, the standard is less easily interpreted than genealogy or geography. There exist no quantitative or physical indicia of Indianness. In California, the court in *In Re Bridget* enunciated its standard as:

In considering whether the biological parents maintained significant ties to the Tribe, the court should also consider whether the parents privately identified themselves as Indians and privately observed tribal customs and, among other things, whether, despite their distance from the reservation, they participated in tribal community affairs, voted in tribal elections, or otherwise took an interest in tribal politics, contributed to tribal or Indian charities, subscribed to tribal newsletters or other periodicals of special interest to Indians, participated in Indian religious, social, cultural or political events which are held in their own locality, or maintained social contacts with other members of the Tribe.¹¹⁵

While this opinion relies primarily on political activity as the benchmark for its cultural connections, other courts have even more ambiguous standards, which are openly stereotypical views of the ways that real Indians live. In *Alicia S.*, the courts recognized certain practices as typically Indian, despite the fact that they rejected the EIF exception. Describing the litigant's connection to an Indian community, the court noted that, "he has attended yearly Indian pow-wows, enrolled in Indian programs to deal with his alcohol problem, and attended several "sweats."¹¹⁶ This picture fulfills a typical image of the Indian in the White mind: a befeathered figure who dances, drinks, and sweats. While it may be naïve to say that courts unfairly and completely base their decisions on such imagery, it is certainly arguable that they lend relation to questionable cases. In other words, reference to familiar and expected traits may bolster a juridical standard of measuring Indian culture.

To ascertain authenticity of Native American culture entails the close relationship to a majoritarian interpretation. Authenticity will be granted if

homes which will reflect the unique values of Indian culture." 25 U.S.C. § 1902, *quoted in In re Alexandria*, 53 Cal. Rptr. 2d 679, 684 (1996). It is understood that "Indian culture" means reservation culture. A good test for the limits of this clause would be the placement of a child with an urban Indian family — one that unquestionably identified as Indian.

115. *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 531 (Cal. Ct. App. 1996).

116. *In re Alicia S.*, 76 Cal. Rptr. 2d 121, 129 (Cal. Ct. App. 1998)

the subject accedes to the common conception of Indianness. The popular images, grounded in archaism, have achieved a commercialized status that enables outsiders to become vicarious Indians during the moment of consumption. William Penn, a mixblood author, has termed this a "creation of fakery"¹¹⁷: "Kachinas made in Taiwan, Sweat Lodge ceremonies at local health clubs, dreamcatcher key chains, authentic reproductions of Anasazi dwellings at "The Garden of the Gods" in Colorado Springs, or crystal skulls through which Laguna woman teach people to channel."¹¹⁸ The commodification of Indian culture has presented a tableau of Indian representations to the majority culture,¹¹⁹ who in turn essentialize these practices and items as necessary and sufficient traits of Native American life.

The reliance on the conflation of blood and culture, however, may not bring the results desired by the jurisdictions that practice the EIF exception. These classic exertions of the EIF assign greater capital to culture than blood. The courts that follow the existing family doctrine bypass the danger of an equal protection challenge by eschewing race for culture as the trigger for consideration under the Act. This places more emphasis upon cultural behavior or a deliberate demonstration of Indianness rather than invoking racial specificity. If the courts were to apply the Act categorically to all registered Indians who invoked it, "Indian" would figure a racial classification, which would enact strict scrutiny review.¹²⁰ Nevertheless, these represent overinclusive standards that may qualify some litigants as approved Indian families (which may also include unwilling litigants who choose not to identify culturally as Indian). Authenticity is the goal of these courts, which employ judicial discretion in the appropriate application of ICWA. Seeing that courts have been scornful of parties with tenuous connections to Indian tribes,¹²¹ it is evident that the EIF exception is employed to exclude those who

117. PENN, *supra* note 104, at 2.

118. *Id.*

119. Movies about Native Americans with Whites as the main characters are such an example. In his book *Mixedblood Messages*, Louis Owens calls *Dances With Wolves* "the perfect, exquisite reenactment of the whole colonial enterprise in America . . . a revisionist, politically correct western[.]" LOUIS OWENS, *MIXEDBLOOD MESSAGES* 114 (1998).

120. *Bridget R.*, 49 Cal. Rptr. 2d at 531 ("However, any application of ICWA which is triggered by an Indian child's genetic heritage, without substantial social, cultural or political affiliations between the child's family and a tribal community, is an application based solely, or at least predominantly, upon race and is subject to strict scrutiny under the equal protection clause.").

121. *Id.* at 530 ("Such *token attestations* of cultural identity fall short of establishing the existence of those *significant* cultural traditions and affiliations which ICWA exists to preserve, and which are consequently necessary to invoke a constitutionally permissible application of

would otherwise be considered as assimilated Whites. This demonstrates a crucial oversight by courts that rely on culture more than blood in their efforts to ferret out “fake” Indians. If courts are aiming for “authentic” Native Americans that have both blood and cultural ties, what does this make of urban Indians? Furthermore, how do these standards account for Indians raised outside of tribal societies, and have recently become involved in Indian politics and culture?

But what about the forty-five-year-old man who suddenly discovers he has one-quarter Mowhawk blood, for whom the discovery means not only graduate school financial support, but also a new world of “Indian culture”? Who becomes an assiduous attender of sweat lodges and powwows, wearer of Indian jewelry (made by Dine, Zuni, Hopi jewelry makers, not by Mohawks), speaker of strangely accented, but heavily “spiritual” language . . . This man’s blood is quite genuine; he even looks part-Indian. But is he?¹²²

This articulates the problems that courts have in their attempts to crystallize the lifestyles of Native Americans into a terse legal opinion that will satisfy an ICWA application. The reliance on culture is based upon a variety of unstable factors whose availability is contingent upon the cultural expectations of the court.

C. Geographic Standards

The Noble Savage¹²³ dwells in the jurisprudential state of nature, unadulterated by contemporary culture and its assimilating influences. Nature sustains an image unfettered by human art and civilization.

Lo, the poor Indian? whose untutor'd mind
Sees God in clouds, or hears him in the wind
His soul proud Science never taught to stray
For as the solar walk or milky way;
Yet simple nature to his hope has giv'n
Behind the cloud-topped hill, an humbler heav'n¹²⁴

the Act.”).

122. Hilden, *supra* note 103, at 200.

123. Rousseau’s conception of the Noble Savage is the pivotal figure for the realization of civil society. Without the savage to measure against the civilized, civil society ceases to exist. *See generally* JEAN-JACQUES ROUSSEAU, SECOND DISCOURSE ON INEQUALITY (1755).

124. ALEXANDER POPE, ESSAY ON MAN, *quoted in* BERKHOFER, *supra* note 97, at 79.

This picture of Indians, as being close to nature,¹²⁵ propels a visionary standard of the indigenous citizen in the wilderness. Indian storytelling punctuates this image, with tribal creation myths finding root in nature, having animals as primary storytellers.¹²⁶ And the locations of most reservations, in rural areas most heavily concentrated in western states,¹²⁷ contribute to the idea of the Indian in nature. For Indians to exist apart from the natural environment undermines the popular conception of the aborigine as the human embodiment of the natural state.

The romance of the aboriginal environment stands as a measure of cultural authenticity for Indians attempting to assert their identities as modern citizens. "[M]ost Whites still conceive of the 'real' Indian as the aborigine he once was, rather than as he is now. White Europeans and Americans expect even at present to see an Indian out of the forest of Wild West show rather than on a farm or in a city."¹²⁸ These cultural conceptions of Indian habitats and surroundings place a heavy burden of persuasion on Natives who live outside of these environments. With over half of all Indians living in cities or towns,¹²⁹ certainly the image of the natural Indian does not exactly comport with reality.

Natives who live outside of Indian Country face a higher burden of proof in declaring their own identity. In some ways, the decision to remain physically detached from an Indian community signals an acceptance of mainstream culture while simultaneously rejecting the link between homeland and identity.¹³⁰ Big city environments generate new social issues for urban

125. Vizenor, *supra* note 113, at 117.

126. One well known creation story involves the conception of earth as the Great Turtle. Unlike fairytales, which boast of cloud-filled kingdoms, castles, and treasures, Indian stories are more likely to have speaking animals in forests, or humans interacting with nature. See generally JAMES HOWARD & WILLIE LENA, OKLAHOMA SEMINOLES: MEDICINES, MAGIC, AND RELIGION (1984); PAUL RADIN, THE TRICKSTER: A STUDY IN AMERICAN INDIAN MYTHOLOGY (1956); JAMES MOONEY, MYTHS OF THE CHEROKEE (1996).

127. There are 275 Indian reservations in the U.S., amounting to 56.2 million acres of land held in trust for the tribes by the federal government. Internal Revenue Serv., U.S. Dep't of the Treasury, *Indian Tribal Gov't's: FAQ's Regarding Miscellaneous Issues*, at <http://www.irs.gov/govt/tribes/article/0,,id=108394,00.html> (last visited Sept. 21, 2003).

128. PENN, *supra* note 104, at 1 (quoting Berkhofer).

129. *Id.* at 85.

130. Some scholars argue that one of the main concerns of Indian tribes is the preservation of property rights. Land, as a commodity held in common amongst a tribal nation, is many times the most valuable asset that a tribe may hold. From financial purposes of land and mineral profits, to political purposes of sovereignty, the concept of property began and continues as a fundamental issue of Indian Country. See generally Eric Cheyfitz, *Savage Law: The Plot*

Indians (who most often are mixed bloods¹³¹) who live in communities unfamiliar with Indian culture and Indians in general. This equal segment of the Native American population is ignored as a subject of inquiry, perhaps for the failure of mainstream society to acknowledge their identity as an authentic Indian culture.¹³² Instead, studies of Indian populations are much more likely to focus on reservation populations to the exclusion of other areas and forms of Indian life.¹³³

VI. Conclusion

American courts are not unfamiliar to juridical definitions of race. Legal history proves court intervention in administering membership within a cultural group in order to determine one's standing to the law.¹³⁴ This emerged in contexts of antimiscegenation prohibitions, slave codes, immigration restrictions, internment camps and segregation laws. Presently, courts are dealing with the latest public discomfort with challenges to the irreproachable authentication of monoracial families. Such public debates over what type of parent may raise what type of child demonstrate our country's deep-seated uncomfortability with ambiguous racial boundaries.¹³⁵ They also comment on a national dependence upon race as a method of defining social order.

So these are old debates in new forms. We depend upon race as a general social order to construct and impose clarity upon the smallest unit of society: the family. Most discussion of transracial adoption focuses upon the best

Against American Indians in Johnson and Graham's Lessee v. M'Intosh and The Pioneers, in CULTURES OF UNITED STATES IMPERIALISM 109 (Amy Kaplan & Donald E. Pease eds., 1993).

131. PENN, *supra* note 104, at 85.

132. Despite the paucity of popular interest in the urban mixed blood, there have been mainstream examinations, many being the products of Native fiction writers who have characters that struggle with issues of race, culture, and authenticity. These writers include Leslie Marmon Silko, Darcy M'Nickle, Betty Louise Bell, Michael Dorris, and Louise Erdrich.

133. Vine Deloria, Jr. bitterly criticizes academia for setting the epistemological agenda for Indian Country. Focusing on anthropologists (a designation wide in scope), he blames academia for the intellectual colonialism that it brings to Indian communities, most times drawing conclusions and conferring data from past articles rather than accepting the community on its own terms. *See generally* VINE DELORIA, JR., *CUSTER DIED FOR YOUR SINS* (1972).

134. *See generally* Christopher Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231 (1994).

135. I am indebted to Barbara Woodhouse, *Who Owns the Child: Meyer and Pierce and the Child As Property*, 33 WM. & MARY L. REV. 995, 1121 (1992), for providing a theoretical unity for this article.

interests of the child. However, the underexamined side of that coin is the identity of the parent to provide a loving home for the child. It is ironic that in these fierce and polemical debates on developing racial identities in children that their caregivers must struggle at the mercy of the court to have their own race examined, judged, and assessed in efforts to determine what is best for the child. Undeniably, the genesis of the child's cultural health and esteem lies within the parent. Yet, the psychological autonomy of the caregiver to define him/herself in the face of societal expectation upsets an unadulterated, private relationship between parent and child.