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Who Is Baby Girl?
A philosophical discussion of the legal obligation to define authenticity

An Honors Thesis submitted in partial fulfillment of the requirements for Honors in
Philosophy and Religious Studies.

By
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Under the mentorship of:
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Abstract

In the later twentieth century, American law attempted to address legacies of unjust treatment of Native Americans through legislation like the Indian Child Welfare Act, which requires considering Native American identity in child custody decisions. This created some complex legal questions about exactly what constituted Native identity. The Supreme Court case, *Adoptive Couple v. Baby Girl*, exposed a number of problems that arose from determining authentic tribal identity. To offer a more precise analysis of the problem of identity in American law, I will engage in philosophical investigations into the nature of authenticity, bringing in the work of the German philosopher, Martin Heidegger. Since the publication of his work *Being and Time*, there have been many critics of Heidegger and authenticity as a whole. These critics argue that the jargon of authenticity no longer holds truth; its understanding has been manipulated and skewed beyond repair, and thus, they argue, that authenticity is a concept that should be thrown away. But authenticity is not an idea that can be ignored due to its prevalence in the laws of The United States. The law is required to make a decision despite authenticity's vagueness and misinterpretations. The confusion in the case of *Baby Girl* demonstrates why a conversation of authenticity is necessary and cannot be disregarded. Furthermore, it proves that the dismissal of authenticity on the grounds that it is a confused notion only perpetuates the misinterpretation and thus causes lawyers and judges to continue to make decisions in ways that may be even more imprecise.

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Introduction

Today, the word *authentic* is everywhere. The economic market is concerned with the “realness” or “genuineness” of everything. “Authentic” things are the preferable things – consumers choose to go to specific restaurants because they provide an “authentic” experience or choose to pay thousands of dollars for a specific bag because it is an “authentic” product of a certain brand. There is an entire market geared towards selling authenticity. Furthermore, authenticity can apply to the individual person. Recently there has been a major push towards the protection and promotion of self-expression and self-love. Today, people *should* be authentic versions of themselves, it is better to live the lives they desire to live than to live the lives others tell them to follow. Popular culture often promotes individual authenticity through movies (i.e. *Mean Girls* or *High School Musical*). The multitude of concepts of authenticity are almost inescapable today.

In any type of communication between people, including in works of literature, there exists an aura of ambiguity between the speaker and audience. This vagueness is caused by the language that is utilized, e.g. words like authenticity have many interpretations. Users of these confused terms blindly place them within sentences with no regard to their intended versus perceived definitions, perpetuating the obscurity. When a writer or speaker fails to remove the uncertainty from the word, she leaves it to the discretion of the audience to define the word. Because words have many interpretations, it is crucial for the author to provide clear and conclusive definitions of her language to avoid misinterpretation.

Though in ordinary language misinterpretation and ambiguity is tolerated, the language that makes up law is much different. Unlike common, everyday language there is not a place for ambiguity in the law; the law requires clarity. But far too often, the language

of the law is obscure. This vagueness leads to misinterpretation and because the U.S. justice system is based on precedents¹, the ambiguity of the language leads to “artificial clarity”. The negative consequences of the obscurity of law is demonstrated in the present laws that attempt to protect Native Americans, specifically in those that offer a “clear” definition of “authentic” Native American identity. Though the law attempts to rectify past mistreatment of natives through establishing clear definitions of authentic identity, the law actually perpetuates misinterpretation and misunderstanding of authentic Native American cultural identity.

The overarching issue with trying to clearly and concisely define a term such as authenticity is that already possesses many faces. For example, it has archetypal definitions, philosophical definitions, and even legal definitions; and all of which give authenticity a different connotation. Definitions of authenticity can include ideas such as “something done by one's own hand and thus a reliable guarantee of quality, having ownership of oneself, or ‘native’.”² Authenticity can also be synonymous with genuineness or realness.

Philosophically, authenticity can be synonymous with individuality as seen in Martin

¹ A precedent is “a case or issue decided by court that can be used to help answer future legal questions. Courts cite to stare decisis when an issue has been previously brought to the court and a ruling already issued. Stare decisis is Latin for “to stand by things decided.” In short, it is the doctrine of precedent. According to the Supreme Court, stare decisis “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” In practice, the Supreme Court will usually defer to its previous decisions even if the soundness of the decision is in doubt. “Precedent,” Legal Information Institute, Cornell Law School, accessed March 11, 2019, <https://www.law.cornell.edu/wex/precedent>; “Stare decisis,” Information Institute, Cornell Law School, accessed March 11, 2019, https://www.law.cornell.edu/wex/stare_decisis.

² Martin Jay, *Essays from the Edge: Parerga and Paralipomena* (Charlottesville: University of Virginia Press, 2011), 10.

Heidegger's *Being and Time*. But, legally, authenticity has no clear definition, and this opens the law to much misinterpretation.

Many critics of authenticity, like Russell T. McCutcheon, say that it actually does not exist; they believe authenticity is an illusion that seeks artificial clarity in the face of the complexity of the world around us. Those critics believe that authenticity is a human construction and that a discussion of authenticity is pointless because it has no real substance or meaning. McCutcheon argues that “the discourse on authenticity – whether found in ethnic, nationalist, or hermeneutic traditions—is an all too common, socio-rhetorical technique used to construct a façade of homogenous group identity in the face of unpredictable, competing, and inevitably changeable historical situations and social interests.”³ All of this may be true; authenticity could just be a concept that is constantly manipulated and possesses no real meaning. There are so many different ways authenticity is used today – to describe heritage, uniqueness, quality, or even origin, so, is there one true definition of authenticity? And if we even have to ask that question, why should uncovering the truth of authenticity matter? After all, it could be a waste of time.

Some philosophers believe that when a solution to a problem seems too difficult to find, ignoring that problem is the correct “solution;” but as Heidegger, in *Being and Time*, proposes, the perceived indefinability or insolvability of a problem does not suggest giving up, but rather it demands further investigation. When defending the importance of a discussion of “Being” he writes, “It has been maintained secondly that the concept of ‘Being’ is indefinable... ‘Being’ cannot be derived from higher concepts by definition, nor can it be

³ McCutcheon, Russell. 2001. “The Jargon of Authenticity and the Study of Religion.” *Religion and Theology* 8, no. 3-4 (2001): 229.

presented through lower ones... the indefinability of Being does not eliminate the question of its meaning; it demands that we look the question in the face.”⁴ Just because a word appears to be indefinable does not mean that it can be ignored, nor does it mean that it is actually unable to be defined. Rather, the “indefinability” of a word calls for its further investigation. A discussion of authenticity is necessary not only because we do not possess a full understanding of it, but that it also plays a pivotal role in society. This is especially true when determining individual and collective forms of identity.

One way to see and begin to understand the impact of the ambiguous “authenticity” is to examine the laws of the United States. Through the investigation into the laws, one will see the obvious and unavoidable fallout from authenticity’s ambiguity, which has the potential to negatively affect identity. Although critics of authenticity argue that its rejection is necessary due to its imprecision, the law is required to make a decision despite authenticity’s discrepancies. The language of the law does far more than just ordinary language. As Sanford Schane writes:

By means of words contracts are created, statutes are enacted, and constitutions come into existence. Yet, in spite of all good intentions, the meanings of the words found in documents are not always clear and unequivocal. They may be capable of being understood in more ways than one, they may be doubtful or uncertain, and they may lend themselves to various interpretations by different individuals. When differences in understanding are irresolvable, the parties having an interest in what is meant may end up in litigation and ask the court to come up with its interpretation. In the eyes of

⁴ Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson, Oxford: Blackwell Publishers, 1962.

the law, when this kind of situation arises, the contract or the legislative act contains “ambiguity”.⁵

But ambiguity is not sufficient for law. Clear and decisive answers are necessary for fairness and accuracy within the law. A conversation of authenticity is crucial because a dismissal of authenticity on the grounds that it is imprecise will cause lawyers and judges to continue to make decisions in ways that might be even more misinterpreted than the one before.

The Indian Child Welfare Act and Its Problems

One piece of legislation that exemplifies the problems of “authentic group identity” is The Indian Child Welfare Act (ICWA). An examination of ICWA reveals the ambiguous nature of authenticity. This act poses questions concerning the requirements of authentic native heritage. Specifically, the act presents questions such as: who determines one’s authenticity and what is required to identify as authentically Indian? Furthermore, it demonstrates the difference between authenticity in the eyes of the law and in the eyes of the tribe.

According to the National Indian Child Welfare Association, ICWA was first established in the late 1970s when the U.S. government was forced to respond to a pressing and destructive issue: the mass removal of American Indian and Alaskan Native children from their biological families and native communities. State welfare authorities and Bureau of Indian Affairs (BIA) officials asserted that there was a profound increase in unmarried Indian mothers with unwanted children and that many Indian individuals and families lacked

⁵ Sanford Schane, “Ambiguity and Understanding in the Law.” *Thomas Jefferson Law Review*, 26, no. 1. (2002): 1.

the resources and skills to properly care for their own children. Using these claims, the BIA promoted the increased fostering and adoption of Indian children in non-Indian families because it was in the “best interest” of the children.⁶ According to The Association on American Indian Affairs “25% to 35% of all Indian children were being placed in out-of-home care (Unger 1977) and of those children being placed in out-of-home care, 85% were being placed in non-Indian homes or institutions (Unger 1977).”⁷

On November 8, 1978 the U.S. congress passed 25 U.S. Code § 1902, which states: The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.⁸

And with this declaration, Congress enacted The Indian Child Welfare Act (ICWA).

At its most basic level, ICWA establishes federal requirements that courts must meet in order to ensure the protection of American Indian children and their families. ICWA tries to ensure the continuation and cultivation of native culture through the active efforts of placing American Indian children in a native home rather than in a non-native home. It also

⁶ “About ICWA,” National Indian Child Welfare Association, accessed November 18, 2018, <https://www.nicwa.org/about-icwa/>.

⁷ Erika Salinas, “The Indian Child Welfare Act of 1978: Communication and Collaboration Between Tribes and the County.” *McNair Scholars Journal: Sacramento State* 15, (2014): 117.

⁸ 25 U.S.C. § 1902 (1978).

allows the tribal courts to have jurisdiction in cases involving American Indian children, giving the tribe a voice in the court decisions. Specifically, the law “requires caseworkers to make several considerations when handling an ICWA case, including: providing active efforts to the family; identifying a placement that fits under the ICWA preference provisions; notifying the child’s tribe and the child’s parents of the child custody proceeding; and working actively to involve the child’s tribe and the child’s parents in the proceedings.”⁹

As the establishment of ICWA was in direct response to the mass removal of American Indian children from their native homes, the law favors the native home over the non-native home to ensure the cultivation of indigenous traditions. ICWA was instituted to directly combat and protect Native American families from the policies that forced family separation and assimilation into Anglo culture. It battles prejudice through setting standards that the court must proceed by before a native child is removed from its home.¹⁰

Unfortunately, because ICWA was established as a response to prejudicial decisions, its jargon creates biases towards Indian families, which at times causes decisions in ICWA cases to go against precedents set by non-ICWA cases. As Alexandra Citrin, the senior associate of the Center for the Study of Social Policy, and Megan Martin, the vice president of public policy at the center, write:

Not only does ICWA promote and ensure protections for AI/AN children and families, it is known within child welfare policies as the “gold standard” as it requires higher levels of parental engagement and efforts to keep families together; parent

⁹ “About ICWA,” National Indian Child Welfare Association, accessed November 18, 2018, <https://www.nicwa.org/about-icwa/>.

¹⁰ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

representation in court proceedings; and placement of children with relatives and in their communities when they can no longer safely remain with their parents.¹¹

Though these two authors praise ICWA for being the “gold standard”, the language of the law which establishes the Native bias makes the law itself vulnerable to misinterpretation and even manipulation.

Unlike most U.S. laws that provide protection to the individual, ICWA was instituted to protect a group from a collective harm. According to some critics of the law, in its efforts to protect the group ICWA unintendedly denies parents basic constitutional rights that protect the individual. For example, “parents of children with Indian blood are not afforded the privilege of selecting their child's adoptive parents. Likewise, they are not necessarily given a right to remain anonymous in an adoption proceeding. Thus, when Congress enacted the ICWA it took away personal liberties of men and women who have children with Indian blood.”¹² Furthermore, the notion of “Indian blood” raises a point of contention in determining authentic native identity. Blood seems to be more of a marker for biology than for cultural identity.

One real-life example of the confusing nature of ICWA is the case *Adoptive Couple v. Baby Girl*. In 2013, the jurisdiction and protections of ICWA were put to the test as the

¹¹ Alexandra Citrin and Megan Martin. “Protecting Children, Families, and Tribes: The Importance of ICWA,” *Center for the Study of Social Policy*, November 1, 2018, <https://cssp.org/2018/11/protecting-children-families-and-tribes-the-importance-of-icwa/>.

¹² Christine Bakeis, “The Indian Child Welfare Act of 1978: Violating Personal Rights for the Sake of the Tribe,” *Notre Dame Journal of Law, Ethics & Public Policy* 10, no.2 (1996): 543-544, <http://scholarship.law.nd.edu/ndjlepp/vol10/iss2/3>.

Supreme Court ruled on a Baby Girl's custody battle between the Cherokee Biological Father and her non-native adoptive parents.¹³

In 2008, a Hispanic woman conceived a child, Baby Girl, with a Cherokee man. Biological Father did not live with Biological Mother, nor did he support her emotionally or financially. When Biological Mother texted Biological Father if he would rather pay child support or relinquish his parental rights, he chose to surrender his rights. At that point, Biological Mother chose to put the baby up for adoption. Because she believed Biological Father was a registered member of the Cherokee Nation, Biological Mother contacted the Cherokee Nation to confirm his legitimacy. Unfortunately, she misspelled the father's name and provided other false information to the Nation, so it was unable to verify the father's membership.¹⁴

Biological Mother then chose a couple to adopt Baby Girl. From that moment on Adoptive Couple was emotionally and financially involved in Baby Girl's and Biological Mother's life. After birth, Biological Mother signed away her parental rights and formally consented to the adoption. Adoptive Couple then returned to their home in South Carolina and continued with adoption proceedings there.¹⁵

As a part of the adoption process, Adoptive Couple served Biological Father with the documents notifying him of the possible adoption. Biological Father completed the documents voiding his parental rights. While in court, Biological Father testified that he was

¹³ Hansi Lo Wang, "Happy Ruling for Adoptive Couple, Uncertainty For Baby Girl," *NPR*, June 26, 2013, <https://www.npr.org/sections/codeswitch/2013/06/26/195787510/Supreme-Court-Sides-With-Adoptive-Family-In-Dispute>.

¹⁴*Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

¹⁵*Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

unaware he was relinquishing his rights to someone other than Biological Mother. Upon this realization, he hired an attorney and requested a stop to the adoption.¹⁶

In January 2010, The Cherokee Nation finally confirmed Biological Father's membership and determined that Baby Girl was now considered an "Indian child" under the Indian Child Welfare Act. The Cherokee Nation then filed a Notice of Intervention, alerting the South Carolina Family Court that this was an ICWA matter. The South Carolina Family Court found that Biological Father did have custodial rights to Baby Girl and the court ruled that the Adoptive Couple failed to prove by clear and convincing evidence that Biological Father's parental rights should be terminated or that granting custody of Baby Girl to Biological Father would likely result in serious emotional or physical damage to Baby Girl.¹⁷ Therefore, Baby Girl, at the age of two, was taken from the custody of her adoptive parents, the only people she was familiar with, and placed Baby Girl with estranged Biological Father.¹⁸

When the case was tested in the South Carolina Supreme Court, the court upheld the previous ruling. First, it ruled that the child did indeed fall under the provisions of ICWA and Biological Father fell under the law's definition of a parent. ICWA makes sure to protect the parental rights of the native biological parents; in order for an Indian parent to lose custody of their child, the court must prove that it first made "active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and "custody of that child would result in serious emotional or physical harm to it beyond a

¹⁶ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

¹⁷ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

¹⁸ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

reasonable doubt.”¹⁹ The court granted custody to Biological Father because active efforts had not been made nor was the Adoptive Couple able to prove that Baby Girl would suffer in the custody of her father.²⁰

Eventually, the ruling in South Carolina was overturned by the U.S. Supreme Court. Justice J. Alito gave the opinion of the court which overruled the State Supreme Court’s ruling.²¹ The Supreme Court held that because the father never had custody of the child, 25 U. S. C. §1912(f) had no authority in this case. Furthermore, it ruled that 25 U. S. C. §1912(d) was not applicable because “the father abandoned the child before birth and never had custody of the child.”²² Five of the nine Supreme Court justices ruled that Biological Father did not have parental rights covered by ICWA because he was so far removed and uninvolved in Baby Girl’s life. At three years old, Baby Girl was finally returned to the adoptive couple.

In the example of *Adoptive Couple v. Baby Girl*, the standards that ICWA sets removed a child from her home and family for years. It disrupted a family and young girl’s life because her father was a Cherokee Indian. Baby Girl was 1.17% native and yet ICWA applied in her case.²³ Adoptive Couple only lost custody of Baby Girl because she had native heritage. South Carolina law states that a father’s consent to adoption is only needed when “the father openly lived with the child or the child’s mother for a period of six months

¹⁹ 25 U.S.C. § 1902 (1978).

²⁰ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

²¹ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

²² Hansi Lo Wang, “Happy Ruling for Adoptive Couple, Uncertainty For Baby Girl,” *NPR*, June 26, 2013,

<https://www.npr.org/sections/codeswitch/2013/06/26/195787510/Supreme-Court-Sides-With-Adoptive-Family-In-Dispute>.

²³ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

immediately preceding the placement of the child for adoption, the father openly held himself out to be the father of the child during the six months period, or the father paid a fair and reasonable sum for the support of the child or for expenses incurred in connection with the mother's pregnancy."²⁴ Biological Father did not financially or emotionally contribute in any way to Biological Mother's pregnancy; he even wrote that he would rather terminate his parental rights than support Baby Girl. According to the law, Biological Father's consent to the adoption was not necessary, but because Baby Girl was an "Indian Child" special provisions had to be made.

The South Carolina Supreme Court ruled that Biological Father has custodial rights to Baby Girl under U.S. Code 25 § 1912(f):

No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.²⁵

But as the U.S. Supreme Court pointed out, this statute only applies to *continued* custody.

"The phrase 'continued custody' refers to custody that a parent already has (or at least had at some point in the past). As a result, U.S. Code 25 § 1912(f) does not apply in cases where the Indian parent *never* had custody of the Indian child."²⁶ Therefore, U.S. Code 25 § 1912 (f) did not apply in *Adoptive Couple v. Baby Girl* because the father never had custody.

²⁴ South Carolina Adoption Act, S.C. Code § 63-9 (2012).

²⁵ 25 U.S.C. § 1912 (f) (1978).

²⁶ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

The South Carolina Supreme Court also ruled that Biological Father has custodial rights to Baby Girl under U.S. Code 25 § 1912 (d):

Any party seeking to affect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.²⁷

Again, the language used in this statute affects its relevancy to *Adoptive Couple v. Baby Girl*. The law requires that active efforts are made to prevent the *breakup* of an Indian family. In the case of Baby Girl, there was no family. According to the U.S. Supreme Court, “when an Indian parent abandons an Indian child prior to birth and that child has never been in the Indian parent's legal or physical custody, there is no "relationship" that would be ‘discontinu[ed]’ — and no ‘effective entity’ that would be ‘end[ed]’ — by the termination of the Indian parent's rights.”²⁸ Therefore, U.S. Code 25 § 1912 (d) was not applicable to *Adoptive Couple v. Baby Girl*.

Justice Alito defended the ruling of the U.S. Supreme Court in the case of *Adoptive Couple v. Baby Girl* through underlining the purpose of ICWA and through demonstrating how a reverse decision could have been detrimental for Baby Girl and for the outcome of future cases. He said:

The Indian Child Welfare Act was enacted to help preserve the cultural identity and heritage of Indian tribes, but under the State Supreme Court's reading, the Act would

²⁷ 25 U.S.C. § 1912 (d) (1978).

²⁸ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

put certain vulnerable children at a great disadvantage solely because an ancestor — even a remote one — was an Indian. As the State Supreme Court read §§ 1912(d) and (f), a biological Indian father could abandon his child in utero and refuse any support for the birth mother — perhaps contributing to the mother's decision to put the child up for adoption — and then could play his ICWA trump card at the eleventh hour to override the mother's decision and the child's best interests.²⁹

The Implications of the Current Qualifications for Native Identity

The case *Adoptive Couple v. Baby Girl* demonstrates the confusing nature of ICWA and poses some interesting questions. First, this case raises but does not answer the question of who is considered an American Indian? The narrow findings of the case only determined the qualifications of a father in terms of the law, it never set out guidelines or qualifications for authentic native identity. Furthermore, according to its language, ICWA applies, and *only* applies, to children who are citizens or members of a federally- recognized tribe; ICWA does not apply to individuals who merely self-identify as American Indian or Alaska Native. This means that in order for a child to be protected under the laws of The Indian Child Welfare Act, she must prove her authenticity. But what does that mean? Who and what determines if she is authentically Indian or not?

Baby Girl was considered eligible under ICWA because she was 1.17% Cherokee. “ICWA defines an ‘Indian child’ as: unmarried, under 18, and a tribal member OR eligible for membership and the biological child of a tribal member. Under federal law, individual tribes have the right to determine eligibility, membership, or both. However, in order for ICWA to apply, the child must be a member of, or eligible for membership in, a federally

²⁹ *Adoptive Couple v. Baby Girl*, 570 U. S. 637 (2013).

recognized tribe.”³⁰ It was her bloodline alone that determined her cultural heritage. Baby Girl had no knowledge of her native heritage, and the only connection to that culture was her father who played no significant role her life. But because her father was a member of a federally-recognized tribe, Baby Girl was considered an Indian Child.

According the law of the United States, “the relationship between federally recognized tribes and the United States is one between sovereigns, i.e., between a government and a government.”³¹ This sovereignty is supposed to give tribal governments the sole authority in determining who is a member of that tribe: “As a general rule, an American Indian or Alaska Native person is someone who has blood degree from and is recognized as such by a federally recognized tribe or village (as an enrolled tribal member) and/or the United States.”³² Blood degree, or blood quantum as some refer to it, is a determination of one’s cultural identity based on a biological blood test. As Kat Chow notes, “The quantum is a fraction of blood that is derived going back to the original enrollees of a tribe who were counted on Census rolls, and then their blood quantum was documented, and usually those original enrollees had a full blood quantum.”³³ Each tribe has its own requirements for blood quantum. For example, *Vežina v. United States* decided that any person 1/4 to 3/8 Chippewa Indian is considered an Indian and *St. Cloud v. United States* determined that 15/32 of

³⁰ “Frequently Asked Questions,” National Indian Child Welfare Association, accessed November 18, 2018. <https://www.nicwa.org/families-service-providers/>.

³¹ “Frequently Asked Questions,” U.S. Department of the Interior Indian Affairs, accessed January 30, 2019. <https://www.bia.gov/frequently-asked-questions>.

³² “Frequently Asked Questions,” U.S. Department of the Interior Indian Affairs, accessed January 30, 2019. <https://www.bia.gov/frequently-asked-questions>.

³³ Kat Chow, “What Exactly Is ‘Blood Quantum’?” *NPR*, February 9, 2018, <https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum>.

Yankton Sioux blood is a sufficient degree of Indian blood for recognition.^{34,35} But regardless of the amount of blood needed, tribal officials are using DNA to decide authenticity.

Is blood quantum sufficient for authentic group identity? One issue in the use of blood quantum for determining authenticity is that it is all based on the blood of the original members. In the beginnings of blood quantum, those documenting the members of the tribes were federal government officials that had no understanding of the native culture, specifically the methods of “establishing and defining their communities. And so, for example these officials would mark someone potentially as ‘full blood’ when potentially that person was not. And that assumption was based on their appearance, not on their level of cultural involvement with their community.”³⁶ Therefore, tribes are continuously using this determiner that could possibly be based on false pretexts. If it is true that these federal officials incorrectly documented the original blood quantum, this criteria for determining authenticity fails.

Furthermore, “the terms identity, ethnicity, and heritage in American Indian society are all entangled with the English conception of race,” but can ethnicity be decided by DNA?³⁷ In the U.S. today, the terms describing a person’s cultural background (i.e. ethnicity) are far too often confused with the color of one’s skin (i.e. race), but ethnicity and race are not interchangeable terms. Race refers to DNA, ethnicity refers to cultural heritage. As anthropologist Ryan Schmidt points out, “Ethnicities are fluid cultural constructions that can

³⁴ *United States v. Vezina*, 165 F. 3d 176 (2nd Cir. 1999).

³⁵ *St. Cloud v. United States*, 702 F. Supp. 1456 (Dist. Court, D. South Dakota 1988).

³⁶ “Frequently Asked Questions,” National Indian Child Welfare Association, accessed November 18, 2018. <https://www.nicwa.org/families-service-providers/>.

³⁷ Ryan Schmidt, “American Indian Identity and Blood Quantum in the 21st Century: A Critical Review,” *Journal of Anthropology* 2011 (2011): <https://doi.org/10.1155/2011/549521>.

change multiple times, not something easily identifiable in our genes... Genetics are no panacea for identifying Indian ancestry. Ancestry, although based in our genes through mating practices, migration and evolutionary forces, is also based upon kinship-cultural affiliation that equates “blood” in the purest metaphorical sense.”³⁸ DNA, in terms of blood quantum, can play a part in cultural heritage, but it is not the sole determinate of one’s ethnicity, but rather a byproduct of her cultural background.

When responding to the recent controversy over Senator Elizabeth Warren decision to prove her Native American heritage through DNA testing in response to taunting President Trump, Cherokee Nation Secretary of State Chuck Hoskin Jr. said the following:

A DNA test is useless to determine tribal citizenship. Current DNA tests do not even distinguish whether a person’s ancestors were indigenous to North or South America," Cherokee Nation Secretary of State Chuck Hoskin Jr. said. "Sovereign tribal nations set their own legal requirements for citizenship, and while DNA tests can be used to determine lineage, such as paternity to an individual, it is not evidence for tribal affiliation. Using a DNA test to lay claim to any connection to the Cherokee Nation or any tribal nation, even vaguely, is inappropriate and wrong. It makes a mockery out of DNA tests and its legitimate uses while also dishonoring legitimate tribal governments and their citizens, whose ancestors are well documented and whose heritage is proven.”³⁹

³⁸ Ryan Schmidt, “American Indian Identity and Blood Quantum in the 21st Century: A Critical Review,” *Journal of Anthropology* 2011 (2011): <https://doi.org/10.1155/2011/549521>.

³⁹ “Cherokee Nation responds to Senator Warren’s DNA test,” Cherokee Nation News Release, Cherokee Nation, October 15, 2018, http://webtest2.cherokee.org/News/Stories/Archive_2018/20181015_Cherokee-Nation-responds-to-Senator-Warrens-DNA-test.

There is still a place in which “blood” is necessary to identify authentic heritage, but “blood” as referring to the family. As Perry Horse, a current member of the Kiowa tribe, explains, “Within the tribe one’s recognition is validated in various ways: parentage, clan relationships, kinship patterns, descendant status, one’s individual tribal name, and other community-based norms. Merely declaring oneself to be American Indian without any of these will be transparent to those with authentic status as American Indian or tribal people.”⁴⁰ Blood in the sense of proven lineage, rather than in DNA, defends the tribe from having to allow every individual membership that claims its identity in the tribe.

Some critics of blood quantum as a means for determining cultural heritage believe that because this test is more racially-centered rather than culturally-centered, it could become vulnerable to attacks that one race receives special attention, which is unconstitutional.⁴¹ So the laws that were implemented to protect the rights on Native Americans could be deemed unconstitutional if the basis for authentic native identity is solely based upon blood quantum. As Krystal Tsosie, a PhD candidate in Genomics and Health Disparities at Vanderbilt University, argues, “Native American identity is not one of biology, but of culture. And, crucially, ‘Native American’ s a political designation that confers rights. If that designation becomes tied to a DNA test, it could threaten those rights.”⁴²

⁴⁰ Perry Horse, “Native American Identity.” *New Directions for Student Services* 2005 (Spring 2005): 63-64, <https://doi.org/10.1002/ss.154>.

⁴¹ Cecily Hilleary, “Native Americans Speak Out on Elizabeth Warren DNA Controversy,” *Voice of America*, October 16, 2018, <https://www.voanews.com/a/native-americans-speak-out-on-elizabeth-warren-dna-controversy/4615743.html?fbclid=IwAR2WaKcx3G52su9AncvZTHRj35RY3vAgl4-7tAt8I0xZyCjeixxe77Ae0A>.

⁴² Krystal Tsosie, “Elizabeth Warren’s DNA Is Not Her Identity,” *The Atlantic*, October 17, 2018, <https://www.theatlantic.com/ideas/archive/2018/10/what-make-elizabeth-warrens-dna-test/573205/>.

Furthermore, an individual's authentic cultural identity cannot solely be based upon DNA. Authentic cultural identification must include other qualifiers beyond blood, otherwise cultures, such as Native American tribes, could lose traditional ways of life (i.e. religion or beliefs) that define that specific group of people.

This brings up another point – the tribe must prove to the U.S. government that it is authentic before it can be “recognized.” And only the federally-recognized tribes enjoy the rights and protections offered to Native Americans by the constitution. So, what qualifies a tribe to be recognized? The U.S. Department of the Interior Indian Affairs defines a federally recognized tribe as “an American Indian or Alaska Native tribal entity that is recognized as having a government-to-government relationship with the United States, with the responsibilities, powers, limitations, and obligations attached to that designation, and is eligible for funding and services from the Bureau of Indian Affairs.”⁴³ Therefore, for a Native American tribe to be recognized and therefore protected under the constitution, it must first have a relationship with the federal government. Then it must agree to follow and abide by a list of “laws” created and established by the federal government. And lastly it must meet all of the requirements of a “authentic native American tribe” established by a branch of the federal government. Only after all of this can a tribe be protected.

In the United States today, tribes receive recognition through various governmental declarations. Specifically, “in 1994, Congress enacted Public Law 103-454, the Federally Recognized Indian Tribe List Act (108 Stat. 4791, 4792), which formally established three ways in which an Indian group may become federally recognized: by Act of Congress, by the

⁴³ “Frequently Asked Questions,” U.S. Department of the Interior Indian Affairs, accessed January 30, 2019. <https://www.bia.gov/frequently-asked-questions>.

administrative procedures under 25 C.F.R. Part 83, or by decision of a United States court. However, a tribe whose relationship with the United States has been expressly terminated by Congress may not use the Federal Acknowledgment Process. Only Congress can restore federal recognition to a ‘terminated’ tribe.”⁴⁴ This act established that the basis for determining the authenticity of a tribe is left up to individuals who possibly could be unfamiliar with the native qualifications of community. As of 2019, the year in which the present body of Congress is considered to be the most racially and ethnically diverse in all of U.S. history, there are only four Native American representatives.⁴⁵ Furthermore, it establishes that some far-off government is the sole determinate of the authenticity of the tribe.

The law as it stands presents itself as offering sovereignty to the tribe, but sovereignty only comes with federal recognition. The need for federal recognition opens the tribe’s authenticity to vulnerability because it forces the tribe into a cookie cutter definition of an authentic to fit the federal guidelines. In turn, this causes the possibility for the tribe to no longer retain and maintain its authentic heritage. According to Horse, “Most tribal groups refuse to deposit their DNA in public databases. They are concerned that genomic information might be used to cast doubt on and threaten the sovereign status that allows members to access resources—such as water, education, or health care—as stipulated by treaties with the federal government. They want to make sure that tribal communities, not

⁴⁴ “Frequently Asked Questions,” U.S. Department of the Interior Indian Affairs, accessed January 30, 2019. <https://www.bia.gov/frequently-asked-questions>.

⁴⁵ Kristen Bialik, Abigail Geiger, and John Gramlich, “The Changing Faces of Congress in 6 Charts,” *Factank: News in Numbers*, Pew Research Center, February 15, 2019, <http://www.pewresearch.org/fact-tank/2019/02/15/the-changing-face-of-congress/>.

scientists and statistics, remain in control of the system.”⁴⁶ It is important to note that though the refusal to submit DNA seems to continue the obscurity of authentic heritage, it may actually be clarifying it. Rendering DNA as a means for determining cultural identity obsolete opens the door to other qualifiers that may lead the law to a more authentic method of determining cultural identity.

Returning to the topic of federal recognition versus tribal sovereignty, an individual tribe may not require blood quantum to determine the eligibility of an individual’s membership, the federal government may still. In most cases, for the individual to be considered federally recognized (i.e. in order to enjoy the protections and privileges provided to American Indians under the law), he or she must provide a Certificate of Indian Blood. This raises a point of contention between tribal sovereignty and the federal government. Who really has the power to determine authenticity?

The issues raised by ICWA and its court cases demonstrate the issues of authenticity. First, the law allows the federal government to determine the identity of tribes and their members. Furthermore, the laws themselves are vulnerable to misinterpretation, which can be seen in 570 U. S. 637 (2013). The ambiguity of what it means to be authentic affects the world of group identity, especially in Native American affairs. The jargon of authenticity in the sense of the laws applicable to Native Americans further proves McCutcheon’s point. The law as it stands presents authenticity as a “socio-rhetorical technique used to construct a façade of homogenous group identity in the face of unpredictable, competing, and inevitably

⁴⁶ Perry Horse, “Native American Identity.” *New Directions for Student Services* 2005 (Spring 2005): 63-64, <https://doi.org/10.1002/ss.154>.

changeable historical situations and social interests.”⁴⁷ So from a philosophical standpoint, how should authenticity be addressed such that the laws no longer perpetuate a misconstrued identity?

Being, Baby Girl, and Being Baby Girl

A philosophical conversation about authenticity would likely start with Heidegger’s investigation into Being. In his work *Being and Time*, Heidegger seeks to explain authenticity through an examination of the individual’s Being. Heidegger defines Being as “the general characterization of a particular view of the world,” and Being is that which provides existence.⁴⁸ He presents three main views of Being: Being-with-others, Being-in-time, and Being-towards-death, which he believes explains the way in which humans exist.⁴⁹

The first view, Being-with-others, can also be understood as Being-in-the-world. Heidegger writes that human beings are just thrown into the world, a world of social expectations and cultural conditioning; and by the time people wake up, realize their existence, and become aware of their surroundings, seeds of social norms have already been planted. Heidegger believes that people can never fully be independent because they are always fundamentally connected to the world around them. For example, when one thinks back to her first memory, she most probably thinks back to a time in which she was around the age of five; at this time, she already possessed an understanding of the world. She had conceptions of morality and socio-typical norms. By the time one is capable of

⁴⁷ McCutcheon, Russell. 2001. “The Jargon of Authenticity and the Study of Religion.” *Religion and Theology* 8, no. 3-4 (2001): 229. ATLA Religion Database with ATLASerials.

⁴⁸ John Tietz, *An Outline and Study Guide to Martin Heidegger’s Being and Time* (Frankfurt am Main: Humanities Online, 2001), 11, Humanities Online.

⁴⁹ Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (Oxford: Blackwell Publishers, 1962), 157-158.

understanding her existence, her view of the world around us was already altered. The second view, Being-in-time, is quite similar to Being-with-others. Heidegger believes that humans are a product of their time; history makes them what they are. The way one sees things and the way one behaves is conditioned by the time and place in which she lives. Heidegger believes one is the time in which she lives, but the time in which she lives is also her.⁵⁰

Each view has an overarching idea in its background – the influence of “the they.” “The they” is understood as society, the man, or the norms of the world around you. According to Heidegger, the They, as that collection of all those social meanings, gives an individual culture, language, and context. Furthermore, the They is necessary and enables the individual to form identity. But the They is also potentially negative. Humans have a tendency to flee from our freedom and responsibility. We often turn to the They to tell us what to do because we do not want to take responsibility for figuring it out for ourselves. that make you lose sight of your individuality. The inauthentic person is the one that gives into the “they” and allows it to make decisions for her. Heidegger says that the inauthentic person takes no responsibility for herself. She blindly leads her life as a puppet of the world around her because she is scared of the freedom and responsibility.⁵¹

The authentic person is the complete opposite. The authentic person is an individual. She takes responsibility for her actions and makes her own decisions. She also accepts the anxiety and discomfort of freedom and responsibility and chooses her life in spite of it. The authentic person is also Being-towards-death; she is aware of her mortality and

⁵⁰ Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (Oxford: Blackwell Publishers, 1962), 157-158.

⁵¹ Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (Oxford: Blackwell Publishers, 1962), 163-168.

acknowledges it despite the anxiety also associated with death. Heidegger believes that anxiety is our possibility to be authentic because it makes us realize that at the end of the day we are going to die and there is nothing we can do about it. Furthermore, we now understand that no one else is going to experience death with us, so why should we listen to other people trying to tell us how to live. Accepting the anxiety and being-towards-death is what makes us authentic.⁵² Michael Wheeler in his discussion of Heidegger writes:

At root, ‘authentic’ means ‘my own’. So, the authentic self is the self that is mine (leading a life that, in a sense to be explained, is owned by me), whereas the inauthentic self is the fallen self, the self-lost to the ‘they’. Of course, one should not conclude from all this talk of submersion in the ‘they’ that a state of authenticity is to be achieved by re-establishing some version of a self-sufficient individual subject. As Heidegger puts it: ‘Authentic Being-one's-Self’ does not rest upon an exceptional condition of the subject, a condition that has been detached from the ‘they’; it is rather an existential modification of the ‘they’” (Being and Time 27: 168). So, authenticity is not about being isolated from others, but rather about finding a different way of relating to others such that one is not lost to the they-self.⁵³

This is an interesting point for the discussion of group identity in terms of authenticity. Heidegger believes that authenticity is found in the individual through the identification of self-identity. The biggest feature of Heidegger’s authenticity is assuming responsibility for one’s life and not allowing others to make decisions on her behalf. So, two

⁵² Martin Heidegger, *Being and Time*, trans. John Macquarrie and Edward Robinson (Oxford: Blackwell Publishers, 1962), 304-311.

⁵³ Michael Wheeler, “Martin Heidegger,” In *The Stanford Encyclopedia of Philosophy* (Stanford: The Metaphysics Research Lab, 2018), <https://plato.stanford.edu/entries/heidegger/>.

questions arise: how would Heidegger feel about group identity as a whole and if he were to accept authentic group identity, how would he feel about the federal government deciding the qualifications for authenticity?

The Limitations of Heidegger's Authenticity

When we are talking about Heidegger, we are talking about authenticity in relation to the individual; this idea that authenticity means not living blindly to the world around us but being aware of our existence and behavior. We are told not to use the They as a means of fleeing responsibility because it leads us towards inauthenticity. Heidegger believes the They has the potential to destroy authenticity when we allow it to take away our personal responsibility. But in terms of the law, we must turn an authority outside of the individual in order to provide objectively true answers.

As seen through the complications of ICWA and *Adoptive Couple v. Baby Girl*, Heidegger might be hitting the nail on the head when it comes to the confusion that turning to an outside authority for decisions causes. Specifically, in *Adoptive Couple v. Baby Girl*, it seems as though individual identity was completely ignored. Baby Girl, though maybe she was too young to understand her cultural heritage, never once self-identified as Native American. Rather, decisions concerning her cultural identity her forced to her father and non-native judges. First, she was a Native American and then she wasn't in the eyes of the law. At some point self-identification is necessary in authentic identity, especially when it comes to cultural identity because at its most basic roots identity is "the distinguishing character or personality of an individual"; so, without the individual, identity would not exist.⁵⁴

⁵⁴ "Identity," Merriam-Webster, Accessed November 18, 2018, <https://www.merriam-webster.com/dictionary/identity>.

The law, as it stands, is perpetuating the misinterpretation of authentic identity; so, even though “the they” is determining authenticity, it is perpetuating an ambiguous, maybe even inauthentic version of authenticity. Some far-off government officials determine the qualifications for authentic tribes, the tribal officials then determine the person’s authentic membership. Individual identity does not play a part, and it is even discouraged through qualifications like blood quantum.

Heidegger’s criticisms of fleeing from responsibility and turning the they (i.e. that it perpetuates inauthenticity) demonstrate that authenticity must be discussed on a macrolevel to encompass groups and their cultures because the present law (created by an outside authority) is not sufficiently addressing authenticity. There must be some sort of authenticity prescribed to collective identity because the law requires it. Collective identity is based upon individual identity. Before a group can exist, an individual must exist. Without the individual, the group (of individuals) would not exist. People who share a collective identity also, individually, share some quality that brings them together as a group. This is culture— “the set of shared attitudes, values, goals, and practices that characterizes an organization,” or in this instance a group of individuals.

For the law, this quality that defines the tribes’ and tribal members’ authenticity is blood. But if the law were to redirect towards something that was less about blood quantum, and focused more on beliefs, traditions, and familial lines maybe Heidegger would support turning to an outside authority, like the law, for a definition of authentic collective identity. Heidegger is focused on the individual choosing her own path to determine authenticity, but if each individual of a group chooses to take the same path on their own accord, they would still fall under the definition of authenticity—assuming responsibility for their lives.

Conclusion

This issue of group identity for Heidegger arises from allowing others to make decisions for the individual. But the law requires that some authority is necessary in order to determine identity. This is the issue that many critics of Heideggerian authenticity have identified. According to these critics, authenticity is a lie, it is and always will be a human construction made up by those in power. They believe that there is no realness to it, and in terms of collective identity, it only divides people into rigid groups.

The laws of the United States not only condone the façade of authenticity, they perpetuate it. The laws determining tribal membership place cultural heritage and race equal. Furthermore, the law requires that the tribe adhere to the regulations set in order to continue to be federally recognized, and any tribe that is not recognized by the federal government is obsolete in the eyes of the law. So, not only does the federal government subject tribes and their members to racial stipulations, they are forced to comply or face non-recognition.

The issue with the jargon of authenticity is that it is multifaceted and thus misinterpreted. When governments use such language in their laws, the acts are vulnerable to abuse. But this does not negate the fact that a discussion of authenticity must occur. The only way to end the misconception is to further discuss it. When a philosopher rejects a concept based on its obscurities, she does an injustice to society because she gives up on further investigation. There would no development in knowledge if every person ceased to discuss a confusing topic.

Colin McGinn makes a profound statement about cognitive closure that is applicable in this problem of authenticity. He writes, “It is deplorably anthropocentric to insist that

reality be constrained by what the human mind can conceive;”⁵⁵ and though he uses this statement to argue as to why philosophers should accept defeat in the face of the unknown, I believe this point still stands. There is knowledge that exists beyond what humans can currently comprehend; and just because there is no current, clear understanding of authenticity does not mean that it is not possible.

This idea that the philosopher, the lover of wisdom, should never stop questioning can be traced all the way back to the Ancients. Plato, in the *Apology*, writes on behalf of Socrates during his trial and Socrates says:

And I am called wise, for my hearers always imagine that I myself possess the wisdom which I find wanting in others: but the truth is, O men of Athens, that God only is wise; and by his answer he intends to show that the wisdom of men is worth little or nothing; he is not speaking of Socrates, he is only using my name by way of illustration, as if he said, He, O men, is the wisest, who, like Socrates, knows that his wisdom is in truth worth nothing.⁵⁶

Socrates is wise because he knows he is unwise; he is aware that there is more knowledge out there. He is also cognizant that if people were to accept the scope of their knowledge, no progress would be made.

We should follow in the steps of Socrates in the pursuit for unambiguous authenticity. We cannot accept that there is no true meaning to authenticity because the law requires that we define it. The law must make a decision despite authenticity’s discrepancies and a

⁵⁵ Colin McGinn, “Can We Solve the Mind-Body Problem?” *Mind* 98, no. 391 (July 1989): 366, <http://www.jstor.org/stable/2254848>.

⁵⁶ Plato, *Apology*. Trans. Benjamin Jowett (Auckland: The Floating Press, 2011), 30-31, eBook High School Collection (EBSCOhost).

conversation of authenticity is crucial because a dismissal of this concept on the grounds that it is imprecise will cause lawyers and judges to continue to make decisions in ways that might be even more misinterpreted. No clear decisions can be made in the legal proceedings involving authenticity until attorneys, law makers, and citizens realize that transparency is possible. Concerned citizens must reject the critics of authenticity, inform themselves on the dangers of this concept's language, and demand clarity.

Because of the confusing nature and multifacetedness of authentic Native American identity in terms of the law, there is no one perfect solution to this problem. Some argue for the essentialist point of view: that there is a set of objective criteria to be met, like blood quantum. Others argue for the complete opposite view: that we are all simply individuals, and that social identities have no reality; they are all social constructions and therefore, fictions. But the answer that I believe best solves this problem lies in the middle. While social identities are social constructions, the criteria for determining an authentic native identity should be grounded on real experiences, histories, and material conditions. Thus, the determination of authentic Native American Identity should be left to experts in such things, which in this case is the tribe.⁵⁷ Though the current laws of the United States read as though the power resides in the sovereign tribes, ultimately the federal government is still pulling the puppet strings.

Furthermore, the sovereignty currently granted by the U.S. to federally recognized Native American tribes, that is based on blood quantum, causes one to question why this specific ethnicity receives such "special privileges." If the federal government really is

⁵⁷ Elizabeth Butterfield, *Sartre and Posthumanist Humanism*, (Austria: Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2012).

basing “authenticity” on blood, which in turn means it is basing it on race, the privileges granted to Native American tribes are unconstitutional.

Though I respect what the current federal law is trying to accomplish (i.e. protect and preserve Native Americans), these laws were only instituted to rectify past injustices. But as the laws stand, there are not fulfilling their purpose, but rather they are perpetuating more injustice. Either the federal government needs to be consistent and honest with tribal sovereignty, and therefore, do away with the racial stipulations of blood quantum as a means for recognition, or these laws should be eradicated. The power needs to reside in the tribe. After all, as Perry Horse writes, “In the American Indian world, it is common to identify first with one’s tribal affiliation and secondarily as American Indian or Native American.”⁵⁸ We must demand that the laws habituate authentic Native American identity, and the only way to ensure that is to allow those cultures, the tribes, to make the decisions.

⁵⁸ Perry Horse, “Native American Identity.” *New Directions for Student Services* 2005 (Spring 2005): 63-64, <https://doi.org/10.1002/ss.154>.

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