Rose, a Navajo woman, was adopted in the early 1960s by a white couple. She grew up in San Francisco, and by her late twenties she was fighting a losing battle with drug addiction. As a child she never quite fit in, and these struggles climaxed when she was put into a drug-addiction program and her children were taken away by Social Services. Because the Indian Child Welfare Act (ICWA) was passed in 1978, the social worker assigned to her case discovered Navajo relatives with whom to place the children. ICWA mandates that social workers determine whether a child is Indian, and if so, follow heightened placement procedures to remove the child. When the social worker went to visit these newfound Navajo relatives, she was surprised to see pictures of Rose as a child still hanging on the walls. In Rose's day, there were no family preservation programs geared towards the special needs of Indian people. Now, more than forty years after Rose's adoption, we finally have legislation in place that recognizes this strong connection Indian people have with their families, so hopefully there will be no more stories like Rose's story.

Before ICWA was enacted, Rose's story was a common occurrence. Indian children were being taken from their homes at alarming rates. A survey of sixteen states in 1969 revealed that approximately 85 percent of Indian children in foster homes and 90 percent of non-relative Indian adoptees were living with non-Indian families. Based on a report by the Association on American Indian Affairs, the director of that institution stated during congressional hearings that "In Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home." He went on to state that in “Montana, the ratio of Indian foster care placement is
at least 13 times greater. In South Dakota, 40 percent of all adoptions made by the State Department of Public Welfare . . . are of Indian children, yet Indians make up only 7 percent of the juvenile population. . . . In Wisconsin, the risk run by Indian children of being separated from their parents is nearly 1,600 percent greater than it is for non-Indian children." Senator Abourezk (S.D.) stated that the placement of "Indian children in non-Indian settings" resulted in "their Indian culture, their Indian traditions, and, in general, their entire way of life . . . being smothered." He went on to say that this treatment "strike[s] at the heart of Indian communities" and has been called "cultural genocide." ICWA was enacted to counteract these devastating practices. While today there is still some evidence of high rates of adoption out of the tribe, because there is legislation that sets out a procedure for state social services to follow, the rates are arguably not as high as they would be without such legislation. This, however, does not mean that we should be satisfied with the results and not strive to improve the situation. The damage done to Indian children who were taken from their homes and placed with well-meaning white families can still be seen today, as Rose's story suggests.

The purpose of ICWA and tribal courts is ultimately to maintain the survival of the tribe though retention of its members, especially by protecting Indian children. According to ICWA, it is per se in an Indian child's best interest to remain with his or her family and/or tribe. It has been nearly thirty years since the passage of ICWA, and we are still unclear about exactly how successful this legislation has been. For many, the wanting data can be explained by the lack of accountability in the implementation of the Act. No agency is charged with oversight of ICWA implementation, and no provision was incorporated to provide penalties for noncompliance. Without knowing how ICWA is being implemented by states, it is difficult to draw conclusions about its usefulness and thus justify its continued existence.

A comparison of early ICWA jurisprudence with current interpretations can facilitate the discussion of whether one goal of ICWA, Indian family preservation, is being met, and if not, where we should go from here. This paper will focus mostly on state court cases, for several reasons. First, a great number of ICWA cases start in state court, and as the urban Indian population increases, this number will only
continue to grow. Second, many tribes have a policy of allowing state courts to handle ICWA cases and only ask for transfer of an ICWA case if they are not satisfied with how the state court is handling the issue. Third, many tribal courts are not courts of record, and thus do not publish decisions for the vast majority of their cases. Thus, tribal court cases are often difficult to obtain. However, I have been able to obtain some tribal court cases and have interviewed several tribal attorneys that handle ICWA cases, in order to flesh out the tribal perspective on this topic.

In the years following the enactment of ICWA, Arizona state courts were dealing with issues relating to domicile and timing of notice to the tribe as required under the Act. The more recent Arizona cases grapple with issues revolving around concurrent jurisdiction, which ICWA provides for when the child is domiciled off the reservation, such as when transfer of jurisdiction to tribal court is proper. This indicates that Arizona courts have dealt with issues surrounding exclusive tribal jurisdiction in ICWA and are now moving on to the more complicated issues surrounding concurrent jurisdiction, such as transfer of jurisdiction to tribal court, which is often assumed to be outcome-determinative.

Unlike Arizona, South Dakota courts dealt with a great variety of ICWA issues fairly soon after the Act’s enactment and now seem to be revisiting the issues. Similarly, South Dakota courts have struggled with what constitutes good cause not to transfer to tribal courts. In addition, South Dakota continues to be plagued with notice issues while simultaneously pushing the envelope and ruling on the interplay between ICWA and the ASFA.

To alleviate both Arizona’s and South Dakota’s problem areas, states and tribes need to work together to better understand each other’s positions. For example, although state social services often complain that tribes do not verify enrollment eligibility quickly enough for them to prepare their cases, this is often due to a lack of tribal funding. To alleviate these tensions, the federal government should provide Title IV-E funding, the primary basis for subsidizing foster care payment for Indian children, directly to the tribes and also allow for separate appropriations to fund culturally appropriate family preservation services. In addition, tribal courts should be strengthened so that they can handle receiving all these ICWA cases. Due to the tribe’s lack of resources, tribes often do not ask for transfer to tribal court unless the state is handling the case extremely poorly. Lastly, the state and tribes need to focus on culturally appropriate family preservation methods for optimal reunification rates.

This paper suggests that successful tribal family preservation involves culturally appropriate placement, the use of culturally appropriate family preservation services, and the willingness of the state to work with tribes to incorporate culturally appropriate methods of family preservation in their programs. Culturally appropriate placement includes the state transferring cases to a tribal court when appropriate, and having a policy of placement with family or tribal members, including a good
relationship with the tribe in order to be able to locate appropriate placements. Culturally appropriate services must be based on a philosophy of family reunification and not a deficit-based model, as is utilized by most state social services.21 States, in turn, must back up decisions on maintaining jurisdiction or transferring jurisdiction to tribal court by including tribes in the entirety of the process. In addition, tribes must help in this process by having culturally appropriate services available for Indian children and families, or by being willing to consult with state social services to develop such programs. Thus, the tribe is the key factor in both state and tribal practices for successful ICWA implementation.

In this article, I will first discuss the purpose and controversy surrounding ICWA. Then I will compare important Arizona state court decisions regarding ICWA in the years following its passage with current cases. Following the decision of the Arizona cases will be a note on the evolution of South Dakota’s ICWA case law. The next section will incorporate a discussion of tribal court ICWA cases, including the importance of tribal courts, how tribal culture influences the courts, and the implementation of would-be ICWA cases by these courts. Lastly, I will discuss some policies and programs that states, tribes, and social service programs should consider when dealing with Indian children, in order to provide these children and their families with the most appropriate services.

**Purpose of ICWA**

The purpose of ICWA is twofold: to prevent the wholesale removal of Indian children from their homes, and to promote the stability of tribes.22 ICWA recognizes, in the Congressional Findings, that there is “no resource more valuable to a culture than its children.”23 As such, Indian children should be given every opportunity to grow up in the cultures into which they were born. ICWA also sets out the basic premise that the best interest of an Indian child runs parallel to the best interests of the tribe.24 Every child has a right to know its culture, and the best way to ensure this is to set out placement preferences that favor placing Indian children in Indian homes. Likewise, tribes have a great interest in keeping their children in their jurisdiction so that they can become knowledgeable tribal members. ICWA strives to accomplish this by transferring child welfare proceedings to tribal court and mandating a preferred placement schedule.

ICWA provides an Indian tribe with exclusive jurisdiction over any child custody proceeding involving an Indian child who resides or is domiciled on the reservation.25 The Act further requires that a state court transfer a child custody proceeding to tribal court if the Indian child is not domiciled on the reservation, unless the court finds that there is good cause to refuse to transfer such a case.26 In a case where the Indian child is not domiciled on the reservation, the parents have an absolute right
to veto a transfer to tribal court from state court. In addition, a tribe may decline such a transfer. If an ICWA case remains in state court, the tribe has the right to intervene at any point in the proceeding. ICWA also provides that every state and every Indian tribe must give full faith and credit to the judicial proceedings of any Indian tribe with regard to Indian child custody proceedings. One of the benefits of ICWA is the utilization of tribal courts as a resource to empower tribes to take over the implementation of child welfare services formerly provided by the state.

ICWA provides that in any involuntary proceeding in state court involving an Indian child, notice must be provided to the parents and the child's tribe. Before an Indian child may be placed in foster care, or parental rights terminated, active efforts to provide remedial services and rehabilitative programs must be proved unsuccessful. No foster care placement may be ordered absent a determination, supported by clear and convincing evidence, that continued custody of the child by the Indian parent will "likely result in serious emotional or physical damage to the child." Similarly, no termination of parental rights may be ordered absent a determination, supported by evidence beyond a reasonable doubt, that continued custody of the child by the Indian parent will likely result in serious emotional or physical damage.

ICWA sets out guidelines for a voluntary termination of parental rights by an Indian parent as well. In any case where an Indian parent voluntarily consents to foster care or termination of parental rights, consent shall be valid only if it is executed in writing, and recorded before a judge in a court of competent jurisdiction where the consequences were fully explained and fully understood by the Indian parent. In any voluntary proceeding, the consent of the parent may be withdrawn for any reason at any time in the foster care placement, or at any time prior to the entry of a final decree of termination or adoption. In a similar vein, whenever an adoption falls through, an Indian parent may petition for return of custody, and the court shall grant the petition unless there is a showing that return of custody is not in the child's best interest. Furthermore, under ICWA, if there is a showing that a child was removed or placed in violation of ICWA, the placement or termination of parental rights may be invalidated.

ICWA therefore sets out placement preferences that the state must follow when placing a child in foster care or adoptive homes. In adoption cases, absent good cause to the contrary, a preference shall be given to placement with 1) a member of the child's extended family; 2) other members of the child's tribe; or 3) other Indian families. In foster care placements, absent good cause to the contrary, an Indian child should be placed with 1) a member of the Indian child's extended family; 2) a foster home licensed by the Indian child's tribe; 3) an Indian foster home licensed by a non-Indian licensing authority; or 4) an institution for children approved by an Indian tribe. The Act also provides that a tribe may set out a different order of
preference that the state must also follow. Lastly, ICWA sets up several programs whereby tribes can obtain grants to improve their tribal courts, create a system for licensing foster homes, and educate members as both tribal court personnel and social service workers. However, to date, no appropriations have ever been authorized by Congress.

The Controversy

Much of the academic discussion about ICWA revolves around the perceived racism of requiring an Indian child to be adopted first by Indian parents. Some scholars hold that the requirement that Indian children be placed in Indian homes is a race-based requirement that should fail under the Equal Protection Clause of the U.S. Constitution. The most notable scholar championing this position is Professor Randall Kennedy of Harvard Law School. Kennedy’s book *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* largely explores his belief that the policy of racial matching in adoption in general is ill-advised; however he does devote an entire chapter to ICWA.

According to Kennedy’s viewpoint, “race would not be allowed to play any part in the selection of adoptive families, unless there was some compelling justification” determined on a case-by-case basis. Before we can delve into an analysis of state and tribal implementation of ICWA in any meaningful way, we must debunk the idea that ICWA is a race-based statute that works to the detriment of Indian children. As Kennedy provides the strongest argument against ICWA’s tribal preference, a comprehensive appraisal of Kennedy’s chapter on ICWA will be beneficial.

Kennedy asserts three arguments as to why there needs to be an ICWA amendment. First, he questions Congress’s finding that there was a child-care crisis in Indian Country. Second, he asserts that Dr. Joseph Westermeyer, one of the experts who testified at a congressional hearing, was practicing “junk science,” and therefore the Act was based on faulty data. Third, he argues that ICWA invites bad decisions by judges because the racial-matching policy is so disturbing to some judges that they have liberally interpreted clauses such as “good cause” when deciding whether to transfer an ICWA case to tribal court.

Professor Kennedy finds fault with the process of ICWA enactment. Specifically, he disputes the conclusiveness of there being an Indian child-care crisis as determined by congressional hearings. He points to one of the witnesses recalling her experience of being taken as a child because she was playing in the mud and her feet were dirty. Kennedy rightly notes that this witness could have been basing her story upon lore that her family told her in order to hide the “ugly realities” of their circumstances. He ultimately faults Congress for not allowing the witnesses the opportunity to develop their testimony properly so as to be factually persuasive.
Kennedy also faults Congress with enacting what he feels basically amounts to a Band-Aid policy. He notes that Congress largely blames state agencies for being racist in unnecessarily taking Indian children from their families.\textsuperscript{52} By framing the issues in such a way, Congress made the required “fix” easy—simply limit the state’s ability to be racist by limiting their power to make decisions for Indian children.\textsuperscript{53} However, as Kennedy wisely points out, much of the problems with Indian children being removed at disproportionate rates may also be due to extreme poverty, drugs, and violence that occur all too often on many reservations.\textsuperscript{54} The task of “fixing” these problems, being much more daunting, may not have appealed to many politicians.\textsuperscript{55} Kennedy, therefore, agrees with Chief Judge B. J. Jones in his assertion that in the end, ICWA was a “procedural statute for a substantive problem.”\textsuperscript{56}

Kennedy takes issue with the assumption that an Indian home is better equipped to handle the needs of Indian children.\textsuperscript{57} Dr. Westermeyer, one of the expert witnesses at an ICWA hearing, claimed that Indian children growing up in white homes were “ill prepared to occupy their rightful place in American society, and that lack of preparedness in turn rendered them vulnerable to psychiatric and social difficulties.”\textsuperscript{58} He called this the “apple syndrome.”\textsuperscript{59} Kennedy correctly notes that Dr. Westermeyer’s study not only had no control group, but the small, geographically limited, and nonrandom sample is not up to muster using the scientific method.\textsuperscript{60}

While persuasive on some fronts, Kennedy’s argument ultimately fails to convince that an ICWA amendment is necessary. First, the political process does not envision that the experts invited to testify at hearings are the basis of proposed legislation. Bills are drafted and often introduced long in advance of picking appropriate witnesses to testify at hearings. Thus, while Kennedy may be right to question the findings of Congress that fault the state agencies for their racism without consideration of the socioeconomic conditions of many tribal members, it is not accurate to state that Dr. Westermeyer’s testimony or studies were the basis of ICWA. In fact, the issue of Indian child welfare was subject to congressional hearings as early as 1974.\textsuperscript{61} In addition, a version of ICWA was drafted and introduced in 1977, which is one congressional year prior to its enactment.\textsuperscript{62} Although that bill did not pass out of committee, the following year it was reintroduced, largely unchanged, as S. 1214 and passed out of the Senate Select Committee on Indian Affairs on November 3, 1977.\textsuperscript{63} The House marked up S. 1214 and adopted an amendment in the nature of a substitute, which was subsequently introduced by Representative Udall as H.R. 12533 on June 21, 1978, as a clean bill.\textsuperscript{64} However, ultimately the original S. 1214, with several floor amendments, passed the full House and was signed by the President.\textsuperscript{65} All three of these bills were remarkably similar, and thus the gravamen of all three bills was drafted prior to the 1977–78 hearings that Kennedy takes issue with.

Second, international law requires that we consider culture when finding homes for children. The Hague Convention on Inter-country Adoption states that in “foster
placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children . . . due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background." In 1993, the United States adopted the Hague Convention, including this article. Plainly, this means that in addition to a moral obligation, the United States now has an international obligation to ensure that a child in need of a home be placed in one that is sensitive to the child's ethnic, religious, cultural, and linguistic background before they are placed in a home that is devoid of these similarities.

Kennedy's second argument is that there may be other co-occurring reasons why Indian children are taken from their homes at disproportionate levels. He cites the high rates of poverty and alcoholism on the reservation as possible reasons why Indian children have been taken away by state social services at such high rates. Unfortunately, he does not extend this argument to allow for other confounding reasons why an Indian parent would choose not to disclose their Indian heritage. In In re Bridget R., a California court held that unless the Existing Indian Family exception was applied, ICWA would be unconstitutional. This case involved a family who, acting under the advice of an attorney, concealed their Indian heritage in order to facilitate the adoption of their twins, because they felt they could not adequately provide for them. Kennedy calls In re Bridget R. an example of a parent taking on a fictive (Indian) identity for litigation purposes only. He conveniently forgets the fact that it was an unethical attorney who suggested that the father not disclose his Indian heritage. The father decided to disclose his Indian heritage and challenge the adoption when he was going through a divorce and was largely without access to his children.

Kennedy also mirrors the court's assertion that the father had no ties to his heritage; however, there is reason to question this blind repetition. First, parents commonly assume the responsibility of enrolling their children in the tribe, so the fact the father did not self-enroll, but rather his mother enrolled him, is not proof the father was denying his Indian identity. Second, although he did not inform his Indian family that he and his wife were planning to put the twins up for adoption, he did maintain ties with them, and as soon as his marriage began to fall apart he went to them for support and guidance. Third, his wife also claimed Indian heritage, and intertribal marriages are common. Fourth, the couple lived in a suburb of Los Angeles, Whittier, that is locally known to have a high proportion of Indian inhabitants.

Kennedy frequently states that he feels it is unfair to burden or impose a culture upon children, who have no choice in the matter. Instead he proposes to never look at race or culture when placing children in foster or adoptive homes. He goes on to state that ICWA's placement hierarchy promotes the "freezing" of the tribal
culture instead of allowing for cultural evolution. While I may agree that a child has little choice in whether he/she grows up partaking in an Indian culture or a white American culture, under Kennedy's solution the child would still have no choice. Thus, whether they are placed in an Indian home or the home of a randomly chosen couple, the child is still in the same choiceless position. To apply Kennedy's solution would likely result in an overreliance on economic factors in determining child placement because absent cultural connection, many Indian homes would pale in comparison to middle-class white American homes.

Kennedy asserts that Indians marrying non-Indians carries a greater assimilative "threat" than non-Indians adopting Indian children. This is not true, for several reasons. First, an interracial couple still has one parent who is Indian and can pass down a culture's traditions. Second, Indian people are highly aware of the issues involved in marrying someone of a different tribe or a non-Indian. Many Indians think not only about the cultural complexities of raising a so-called mixed-blood child, but also about whether or not their children will be eligible for enrollment in their tribe. However, ultimately people will marry whom they love, a stance that Kennedy himself touts. Who one marries is something that Indian people have some degree of control over. If, in fact, the reason that Indian children are taken from their homes at disproportionate rates is because of cultural bias on the part of state social workers, Indian people have little or no control over their children being taken away. So, clearly the threat of assimilation through intermarriage is not as dangerous as adoption out. Thus, this is exactly the type of situation that Congress should step into and protect Indian tribes and culture.

Kennedy does make an excellent point when he notes that ICWA has invited many judges to find ways around the law. Judges have taken liberties in determining "good cause" to deviate from the placement preferences mandated by ICWA. He notes that although the BIA has developed guidelines for determining what is "good cause," these are merely guidelines and have been given varying degrees of deference by courts because they have not gone through the stringent publication and comment periods as compared to most regulations. Here Kennedy points to some state judges' creation of the Existing Indian Family doctrine, which effectively refuses to apply ICWA to an Indian child who does not come from an "existing Indian family," as an example of this judicial advocacy. The most obvious problem with this doctrine is that the judge is probably a white middle-class man who may not be in the best position to determine what is an Indian family. In the same sense, Kennedy may not be in the best position to determine whether the father in \textit{In re Bridget R.} was really using a fictive identity solely for the purpose of litigation.

Underlying Kennedy's argument is the assumption that permanence in the form of legal adoption is a better option than long-term foster care or kinship/guardian care. The fact that he does not consider kinship/guardian care as an
option is unfortunate. As Margaret F. Brinig points out in her article “The Child's Best Interests,” in many cases kinship/guardian care offers an alternative that is the least likely to upset the child's placement, since they already know their new caretaker. In fact, many tribes have a tradition of other kin caring for children of what Western society would consider a nuclear family. Thus, this may be a more culturally appropriate option for Indians. For example, in Navajo society it is culturally appropriate, expected, and common for a maternal grandmother to raise the oldest grandchild to ensure that they will not be lonely.

Lastly, Kennedy states that ICWA reaches beyond Morton v. Mancari's proposition that favoring tribal members is constitutional because it is a political favoring and not a racial favoring. Kennedy states that in the placement hierarchies established in ICWA, namely, that an Indian child should first be placed with family members (kinship bias), then with other members of the child's tribe (political bias), and then with other Indian families, is a racial configuration because the last preference is completely based upon race. However, the Act defines “Indian” as a member of a federally recognized tribe or Alaska corporation, making it a political bias and not a racial one. Thus, in the same way that Mancari's preference would not apply to an unenrolled Indian, ICWA's placement preference does not extend beyond the tribal enrollment rolls either. Kennedy and the California courts seem to be especially concerned with Indian families that have no tribal or political connection; however, if you truly believe that tribes are sovereign political entities, like the United States, it does not matter that the family is not “involved” politically. Simply by being a member of the nation or eligible for membership, they will come under the purview of the Act. This model of nationhood, which more similarly matches Western nationhood, is precisely what makes ICWA a strong piece of legislation. Thus, we can see that although Kennedy makes a strong argument that ICWA is based upon race, the reality is that it is a political statute that aims to prevent the breakup of Indian families and maintain strong tribal nations.

Arizona State Court Cases

Since the passage of ICWA in 1978, the Arizona state appellate courts have thirteen reported cases dealing with the Act. Early cases focused on the technical requirements outlined in ICWA, such as definitions, when notice to the tribe was required, and when the state courts have jurisdiction to hear a case, which is dependent upon the domicile of the child. More recent cases have focused on the determination of who has jurisdiction to hear a case where jurisdiction is concurrent, which often occurs in reference to a tribe's request for transfer of jurisdiction. While jurisdiction has been a common element in both early ICWA cases and current ICWA cases, the types of issues have changed. In early cases, the jurisdictional question revolved around
whether a state court could hear a case involving a child domiciled on the reservation, for which ICWA provides exclusive tribal jurisdiction. Current jurisdictional cases are dealing more with children domiciled off the reservation, where the state has concurrent jurisdiction, but must transfer the case to tribal court if requested, unless good cause to deviate exists.

EARLY ARIZONA STATE COURT CASES

Early Arizona state court cases focused largely on definitional and procedural issues. For example, the first Arizona case dealing with ICWA was In Re Appeal in Pima County Juvenile Action No. S-903. In that case, a fifteen-year old Indian mother gave birth to her child in Nevada and executed a voluntary relinquishment of her parental rights to the Nevada Catholic Welfare Bureau, Inc., who made arrangements with the Catholic Social Service of Tucson to place the child with an adoptive family. Six months after the original voluntary relinquishment, the mother asked for the child back; however, the new adoptive family was unwilling to relinquish the child, causing the ensuing case. The mother's tribe intervened and requested transfer of jurisdiction.

The Arizona trial court held that the child was domiciled in Arizona because the mother had relinquished her parental rights and the child had resided in Arizona continuously for six months while the mother had no contact with the child. The court held that although the child was eligible for enrollment in the Assiniboine tribe in Montana, the best interests of the child were to remain with his adoptive parents. Thus, the trial court found, first, that it had concurrent jurisdiction, and second, that good cause existed not to transfer the matter to tribal court. In addition, the trial court found that the mother had abandoned the child. For that reason, the court ordered a termination of her parental rights.

The mother appealed, and the appellate court rested its decision on the definition of domicile. The court found that the mother was an unemancipated minor. Because she was unemancipated, they found that she was domiciled on the Fort Belknap reservation in Montana since that was the domicile of her father. Since a child takes the domicile of its mother until a new one is lawfully acquired, the child was deemed to be domiciled on the reservation and must be returned to the biological mother.

Two years later, the court heard In Re Appeal in Maricopa County Juvenile Action No. A-25525, where a non-Indian mother gave birth to a child and suspected that the father was a Pima Indian, but he was not listed on the birth certificate. The Catholic Social Service of Phoenix listed the father as "allegedly" Indian, but noted that because the father had not acknowledged paternity the child was not eligible for membership in an Indian tribe. The Pima Indian Community appealed the adoption on the grounds that the Catholic Social Service of Phoenix did not follow the correct
procedure in the primary adoptive placement and no "good cause" was found to deviate from the placement preferences set out in ICWA. The appellate court held that until such time as a putative Indian father acknowledges or establishes paternity, the provisions of ICWA are not applicable.  

In fact, a later Arizona case, Arizona Department of Economic Security v. Bernini, held that suspicion of being an Indian child triggers the notice requirement only and not the substance of the Act. In that case, the trial court applied ICWA based on the father alleging that he had Indian blood and ordered the child returned within one week. The appellate court held that even though the father alleged that the child was an Indian child, this merely invoked the Act's notice provision, which required the inquiry as to whether the child was a member or eligible for membership in an Indian tribe. The Act was, however, inapplicable pending a determination that the child was, in fact, Indian. Thus, if there is some evidence of a child being Indian, the Department of Economic Security must notify the tribe; however the remainder of ICWA will not be applied to that child until such time as it is verified that the child is in fact enrolled or eligible for enrollment in a federally recognized tribe. This ruling means that a child may be subject to two separate placements if they are in fact found to be Indian, potentially causing undue emotional upset.

Another issue surrounding placement was decided in 1987: the Arizona appellate court clarified the "good cause" exemption from the placement preferences set out in ICWA in In Re Appeal in Coconino County Juvenile Action No. J-10175. In this case, a Navajo and a non-Indian woman had a child who was enrolled in the Navajo Nation. After the child's parents split up, the child lived with the mother and stepfather in an "Anglo-type home." State authorities stepped in because of the stepfather's abusive behavior towards the child and the mother's unwillingness to prevent the abuse by the stepfather. The Arizona Department of Economic Security had prepared a case plan that called for the child to live with the father, but the natural mother's younger sisters accused him of molesting them and the plan was modified.

The trial court found that ICWA did not apply because the Act was clearly designed to prevent culture shock. Because the child was raised in an Anglo home, this was "simply the other side of the culture shock coin." The court also found that it was in the best interests of the child to keep her in a situation that was most like what she was used to, namely an Anglo home. The court noted that the mother's home was not adequate because of the presence of the stepfather. Lastly, the court held that the father's home was not a fit placement because it was remote and totally foreign to the child. In addition, the court found that doubts existed about the father's character.

The appellate court reversed. The court found that once it was determined that a child was an Indian child, "the judge must, in the absence of good cause to the contrary, follow the provisions of the Act." The child may not be placed in foster
care unless the judge finds by clear and convincing evidence that parental custody is likely to result in serious physical or emotional harm.111 The court went on to state that the trial court's attempts to establish good cause by noting the culture shock that might follow were insufficient. "When the Act is read as a whole, it is clear that Congress has made a very strong policy choice that Indian children, including those who have a non-Indian parent, belong in an Indian home."112 The court reiterated that a judge may not order foster care unless the judge first determines by clear and convincing evidence that parental placement is likely to result in serious emotional or physical harm to the child, and if the judge so finds, the judge must follow the placement hierarchy dictated in ICWA.113

The early Arizona state court cases dealt largely with definitional and procedural issues. Such early cases clearly established that an Indian baby takes the domicile of the mother, which then may lead to a determination that the tribe has exclusive jurisdiction to hear the case. Another case established the definition of an "Indian child," which is the key factor in determining whether ICWA applies or not. Yet another dealt with the definition of "good cause" to modify placement preferences. Basically, these cases have defined the scope of the state court's discretion on matters dealing with Indian child welfare cases. Arizona state courts have struggled with ICWA and its modification of the standard child welfare protocol. However, by and large, Arizona has interpreted ICWA using the plain language of the Act, and has avoided judicial overreaching.

CURRENT ARIZONA STATE COURT CASES

A comparison of the early Arizona state court cases with the cases that are currently coming through the courts highlights a shift. Increasingly, the Arizona courts are ruling on issues concerning concurrent jurisdiction. To obtain decisions that are more in line with both ICWA and tribal interests, tribes should step up their education efforts so that state judges and attorneys know that tribal courts are fair and just mediums for ICWA decisions. However, there have been some consistencies, such as the reaffirmation that Arizona will not follow the Existing Indian Family exception.

In 2000, an Arizona state court reaffirmed the rejection of the Existing Indian Family exception,114 a doctrine that began in Kansas holding that if an Indian child is not part of an "existing Indian family," ICWA does not apply.115 This type of judicial activism has done much to damage the potential success of ICWA. Fortunately, many states join Arizona in not following this doctrine.116

Arizona first rejected the Existing Indian Family exception in In re Appeal in Coconino County, Juvenile Action J-10175.117 As discussed earlier, in that case, a child was taken from her non-Indian mother and stepfather's home after the stepfather abused her. The lower court held that the Indian child did not have to be placed
with the Navajo biological father because, although he was found to be an adequate
parent, he was "neither a completely traditional Navajo nor a completely Anglicized
individual," and therefore the child would suffer from culture shock, defeating the
purpose of ICWA. The appellate court reversed, finding that this was a "child
proceeding" as defined by the Act, and that the child was enrolled in the
Navajo Nation and was an "Indian child." Thus, absent good cause to the contrary,
ICWA must be followed. The appellate court found that unless the trial judge could
find by clear and convincing evidence that the parental placement would be likely
to result in serious emotional or physical harm to the child, the child may not be
placed in foster care when the Indian parent is willing to take the child.

The Arizona courts reaffirmed this rejection more recently in Michael J., Jr. v.
Michael J., Sr., stating that the judicial exception frustrates the policy of protecting
the tribe's interest in their children. In that case, an Indian child was born to a
non-Indian mother who tested positive for cocaine use at birth. At the time of the
child's birth, the father, an enrolled member of the Tohono O'odham Nation, was
incarcerated. The Department of Economic Security requested that a guardian ad
litem ("GAL") be appointed for the child, and the Tohono O'odham Nation intervened,
acknowledging the Nation's jurisdiction over the child's siblings. The father then
moved to transfer jurisdiction to the tribal court, and the GAL filed an appeal.

The court noted that ICWA grants the tribe exclusive jurisdiction over Indian
children who are domiciled on the reservation, and concurrent but presumptively
tribal jurisdiction for actions involving Indian children not domiciled on the
reservation. The GAL is not a party permitted by statute to object to a transfer of
jurisdiction to tribal court, but may present evidence of good cause not to transfer.
However, in this case, she failed to present any evidence that Tohono O'odham could
not support the child's allegedly special medical needs. Therefore, there was no
good cause not to transfer jurisdiction to tribal court.

The GAL also contended that ICWA should not apply, because the Department
of Economic Security did not remove the child from an "existing Indian family." The
appellate court then reaffirmed Arizona's rejection of the Existing Indian Family
exception, giving five reasons. First, adopting an Existing Indian Family exception
frustrates the policy of protecting the tribe's interest in its children. Second, the
language of the Act does not list an Existing Indian Family exception, and if the
language of the statute is plain and unambiguous, the court must follow the plain
meaning. Third, Congress rejected an earlier version of ICWA that included the
Existing Indian Family exception. Fourth, the Supreme Court has undermined
the imposition of an Existing Indian Family exception, stressing that ICWA reflects
Congress's concern with the tribe's interest in Indian children, and that Indian
children have a corresponding interest in maintaining a relationship with the tribe,
even if the parents do not share that interest. Fifth, the Arizona appellate court
had implicitly rejected the Existing Indian Family exception before in *In Re Appeal in Coconino County, Juvenile Action J-10175.* The rejection of the Existing Indian Family exception has probably spared the Arizona appellate courts from having to hear many ICWA cases, because the issue of whether a child comes from an existing Indian family is highly fact-intensive, very controversial, and subject to individual interpretations, which makes it an issue ripe for appeals.

The issue of the Existing Indian Family exception is so pervasive that the International Indian Treaty Council (IITC), a nongovernmental organization (NGO) with special consultative status with the United Nations, filed with the UN Commission on Human Rights a written statement outlining how the use of the Existing Indian Family exception was undermining ICWA. The IITC cites the Existing Indian Family exception as “an example of continuing interference with parents, families and tribal members.” By allowing judges to determine whether the parents of a child appear to be “real” Indians and therefore fall under ICWA as an “Indian family” in need of protection amounts to the United States having allowed a judicially created exception to circumvent the application and intent of the Act.

Several years earlier, in 1994, the United States submitted its Initial Report of States to the UN Human Rights Committee. In this report, the United States stated that ICWA was passed in 1978 to “promote the placement of Indian children in foster and adoptive homes reflective of their unique cultural environment and heritage.” Not only does the report state that the Act vests initial authority for Indian child placement with tribal courts and provides for full faith and credit to tribal court decisions, but it claims that because of the passage of the Act, there has been an increase in child welfare personnel who are familiar with tribal customs and values. Lastly, the report notes that ICWA authorized the federal government to provide grants to tribes and tribal organizations to establish family preservation programs; however, the report conveniently fails to mention that in over twenty-five years, no such grants have been authorized.

The United States also failed to include in its report to the UN Human Rights Committee any information regarding the judicially created Existing Indian Family exception, and it would be nonsensical to assume that the U.S. State Department did not know of its existence. Thus, it appears that the official position of the United States has been to ignore the problem in the hopes that it will go away or resolve itself—a response all too familiar to Indian people. However, the danger is that this problem will only get worse, and with some state courts unwilling to relinquish control over Indian children to tribal courts, and federal courts’ lack of jurisdiction over family matters, it appears that if a solution is to come, it must come from Congress.

Another issue of great concern in Arizona has been that of transfer to tribal court for cases involving concurrent jurisdiction. In *In Re Appeal in Maricopa County...*
Juvenile Action No. JS-8287, the court held that ICWA's good-cause exception to transfer to tribal court allowed the state court to apply a modified version of forum non conveniens.¹⁴¹ In this case, a child was born to a Santo Domingo Pueblo woman living in Phoenix. The mother had a serious drinking problem and left her child with a friend, who evidently tried unsuccessfully to sell the child for $25 while the mother was incarcerated. The Santo Domingo Pueblo in New Mexico was notified concerning the termination proceeding against the mother and intervened shortly thereafter, but did not petition for transfer of the matter to their tribal court at that time. The Arizona Department of Economic Security's plan originally provided for rehabilitation and then for severance of parental rights, and sought adoption.¹⁴²

Two years later, after it became clear that rehabilitation was unsuccessful, the Santo Domingo Pueblo filed a petition to transfer the proceedings to tribal court.¹⁴³ The Arizona appellate court noted that although there was concurrent jurisdiction with a preference for tribal jurisdiction, that preference could be overcome by a showing of good cause.¹⁴⁴ The court went on to state that because the Act does not define “good cause,” a state court has discretion as to whether to transfer a matter to tribal court or retain jurisdiction.¹⁴⁵ Thus, the appellate court found that a modified version of forum non conveniens could apply to the decision of whether or not to retain jurisdiction over ICWA proceeding.¹⁴⁶ The court found that witnesses located in Phoenix would be unduly troubled with the time and expense required to travel to the Pueblo.

Furthermore, the Arizona court was unsatisfied with the Pueblo's delay in requesting transfer. The Pueblo maintained that it did not petition for transfer earlier because the original plan provided for rehabilitation and eventual reunion with the child. As noted before, this is a common strategy for tribes that do not have an abundance of resources; such tribes do not seek transfer unless they disagree with how the state court is handling the situation. This dispute could arguably have been avoided if the state and the tribal representatives better understood each other's situation. However, the court still found that the tribe had unreasonably delayed its petition for transfer after an adoptive family had been found.¹⁴⁷

Finally, in Rachelle S. v. Arizona Department of Economic Security, the court dealt with the issue of whether an expert witness was required to have experience with Indian communities in order to qualify under ICWA.¹⁴⁸ Here, the parents appealed, arguing for an interpretation of ICWA that required that an expert in Indian children testify in order for a child to be placed in foster care. The court, however, did not agree, stating that the determination of the likelihood of future harm frequently involves predicting future behavior, which is influenced to a large degree by culture, but the Act does not limit a qualified expert to someone with expertise with Indian children or culture.¹⁴⁹ “Special knowledge of Indian life is not necessary where a professional person has substantial education and experience and testifies on
matters not implicating cultural bias.” Thus, an expert with knowledge of Indian cultures is only necessary where cultural values, beliefs, and mores are involved. If an expert in child abuse were to testify on purely physical signs of abuse, no cultural expertise would be necessary in that situation. The court, therefore, held that the baby was correctly determined to be dependent because family members showed a lack of motivation to protect the baby and make changes that would prevent future abuse. While this holding does not appear to invoke any type of cultural bias, one worries that if only one expert is needed and that expert testifies as to physical injuries, then no expert will be available to testify that it is culturally appropriate for multiple family members to help raise one child.

By comparing these current cases to the earlier cases, we can clearly see a shift in the focus of the litigation. There have been some consistencies, such as the rejection of the Existing Indian Family exception. However, there is also an increasing focus on issues surrounding the transfer of jurisdiction from state court to tribal courts. One case held that a modified version of *forum non conveniens* was applicable to good cause not to transfer the case. Given the history of Indian mobility, this may create a problem for many tribes that are not located in the same state as the child placement proceedings.

The doctrine of *forum non conveniens* is also problematic in light of the government-endorsed influx of Indians into urban areas in the twentieth century. During the 1950s, the United States government instituted a plan called the Relocation Act, intended to help Indian families by providing funding to establish “job training centers” in various urban centers. The government provided incentives for Indian people to move from the reservation to these urban centers, where they would be aided in obtaining a job and housing. In return, they had to sign an agreement stating that they would not return to the reservation to live. Because of this program and high rates of unemployment on the reservation, many Indians decided to move, and the urban Indian population grew substantially. By 1975, the Indian population in urban areas was larger than the Indian population living on the reservations. Similar problems like the lack of employment on or near many reservations have driven even more Indian people to relocate to urban environments since the repeal of the Relocation Act. According to the 2000 Census, there are currently approximately 2,680,355 urban Indians across the United States. As a consequence, there are many Indian people from many tribes scattered across the United States, and it will be difficult to honor the rights that tribes have in these proceedings if this modified doctrine of *forum non conveniens* gains strength.

Then we saw a case regarding what types of cultural qualifications an expert witness needed when testifying on whether a child will likely be physically or emotionally harmed if they stay with their parents. That case determined that if the expert’s testimony concerns cultural mores, then the expert must be an expert
in Indian culture, but if the expert's testimony is not influenced by cultural mores, the person need not be an expert in Indian culture as well.\textsuperscript{160}

This shift indicates several things. First, the Arizona courts have dealt with the definitional issues that plagued them during the first ten years after the Act was passed. Second, tribes and tribal members have become more sophisticated in their arguments, leading to more intricate and novel questions in state court proceedings, such as the issue on qualifications of the expert witness. Third, tribal attorneys are willing to petition for transfer to tribal courts, if necessary. This analysis leads to the ultimate recommendation that tribes should continue their efforts at strengthening their institutions, especially their tribal courts, to allow for the transfer of more cases. The stronger (more independent and knowledgeable) the tribal courts become and the more financial support that is funneled in their direction, the more capable they will be to secure the safety and welfare of their people.

**South Dakota State Court Cases**

South Dakota has had a somewhat different evolution of ICWA jurisprudence. Perhaps most strikingly, South Dakota has nearly four times as many ICWA cases reaching the appellate court than Arizona. Thus the speed at which the courts deal with ICWA questions has necessarily been much quicker. The South Dakota courts dealt with many issues soon after the passage of ICWA. Then, between 1991 and 2001 there was a lull in the case law. However, in more recent years, the courts have begun to revisit the same issues that were decided in the first phase. Sometimes these revisitations result in a change in the law, other times they result in clarifications, and quite often they result in upholding the original interpretation. One large exception surrounds the question of notice. Although the state court judges have revisited this issue throughout the years since the passage of ICWA, they have been unwilling to overturn the concept of "substantial compliance," and consequentially repeatedly return to this issue. Overall, however, it is encouraging that the state court judges are refamiliarizing themselves with ICWA and that they are usually willing, when they feel it is necessary, to make changes.

**SOUTH DAKOTA STATE CASES**

Besides settling the definition of domicile, one of the first important cases coming out of the South Dakota Supreme Court tackled the issue of what constitutes an expert witness.\textsuperscript{161} In *In re J.L.H and P.L.L.H.*, the court held that the practical experience of a witness can be used in conjunction with educational experience to qualify the witness as an expert.\textsuperscript{162} Recall that ICWA requires the testimony of an expert that continued custody of the child by the parent will likely result in serious emotional
or physical damage before any termination of parental rights can be ordered. Thus, unless the witness qualifies as an “expert,” the termination ordered in this case would be invalid.\textsuperscript{163}

In order to determine whether the witness qualified as an expert, the appellate court looked to South Dakota laws that “permit qualification as an expert to be based on knowledge, skill, experience, training or education.”\textsuperscript{164} The court then cited a South Dakota decision holding that “the admissibility of a claimed expert’s opinion is within the discretion of the trial court. . . . The trial court’s ruling will be disturbed only in case of a clear abuse of discretion.”\textsuperscript{165} This standard gives great deference to the trial judge to determine what constitutes an expert, making it difficult to challenge the qualifications of a witness as determined by the trial judge. Here, not only did the trial court use state standards in determining what an expert is, but they also used state law standards to overturn that determination. Although ICWA does not define “qualified expert witness,” the BIA did promulgate guidelines in 1979 to help state courts determine the minimum standards of a “qualified expert witness.”\textsuperscript{166} This case makes no mention of these guidelines and instead institutes a standards based state law. Arguably, using such state law-based standards is contrary to one goal of ICWA, which was to provide a nationwide minimum standard for the removal of Indian children from their homes.

This issue of expert witness qualification was revisited by the Supreme Court of South Dakota in 2005 in \textit{In re M.H., L.U.H., WH, Jr., L.S.H., and T.H.}.\textsuperscript{167} The court held that to fulfill the requirement that a termination of parental rights be accompanied by “evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that continued custody of the child by the parent is likely to result in serious emotional or physical damage,” only one witness was required, despite the fact that the statute uses the plural, “expert witnesses.”\textsuperscript{168} However, unlike the prior decision, which relied solely on state-law standards of what constituted an “expert” witness, this case incorporated the BIA Guidelines to “help inform the court as to when the witness offered as an ICWA expert has the requisite special knowledge, skill, experience or training to assist the trial court.”\textsuperscript{169}

The court found that the purpose of requiring an expert witness was to diminish the risk of cultural bias.\textsuperscript{170} Therefore, the absence of a properly qualified expert witness necessitates an invalidation of the termination of parental rights. Using case law from other jurisdictions, the court stated that “experts should possess more than simply substantial education and experience in the area of their specialty. Rather, they should have expertise in, and substantial knowledge of, Native American families and their child-rearing practices.”\textsuperscript{171} The court, thus, held that an expert witness must have knowledge of the specific tribe’s child-rearing practices. It was no longer acceptable to have general experience and knowledge in Native American cultures and child-rearing practices. This holding was reaffirmed in \textit{In re O.S.}, later
that same year. Contrast this decision with the Arizona decision of 1998, which does not require an expert witness to have any experience with Indian culture if the issue can be determined without reference to culture.

Perhaps the most disappointing case to come out of the South Dakota Supreme Court is that of In re S.Z. and C.Z. In this case, parents' parental rights were terminated in September 1980 and in January of the following year; the parents petitioned the court to set aside the termination, alleging that ICWA had been violated because the notice that the Rosebud Sioux Tribe received did not comply with the requirements found in ICWA. Section 1912(a) requires that in an involuntary proceeding, notice must be sent to the Indian child's tribe by registered mail with return receipt requested, indicating the nature of the pending proceeding and notifying the tribe of their right to intervene. The section goes on to state that no foster care placement or termination of parental rights proceedings shall be held until at least ten days after receipt of notice by the parent(s) and the tribe.

Notice to the tribe was sent on June 27, 1979, while the parents' first court appearance was on May 25, 1979. Thus, the tribe did not receive notice in a timely manner. The court, however, held that the notice "requirement was substantially complied with in the case at hand." The court found that the delay did not prejudice the tribe, and the fact that the tribe did not intervene was indicative of the tribe not availing itself of the opportunity to intervene. The court also noted that although the notice did not explicitly state that the tribe had the right to intervene, the "general tenor of the documents" and the novelty of the Act excused the omission. In essence, the court gave leniency to the state for failing to provide proper notice because the Act was newly enacted, but opted not to extend leniency to the tribe for not intervening for that same reason. Essentially the court held that the state had substantially complied with the notice provision housed in ICWA. However, actual notice is not a synonym for registered mail, return receipt requested, and to hold so is to gut the notice provision of the Act. Furthermore, nowhere in ICWA does it provide for substantial compliance with the notice procedure, nor does it say that actual notice can substitute for notice via registered mail with return receipt requested. Congress set out a specific-notice method in ICWA that state courts should be required to follow.

Justice Wollman provided a strong dissent in this case, where he stated that "although a rule of substantial compliance may suffice to carry out the notice provisions of statutes governing mundane matters of property law . . . more is required when the interests at stake are as important as those protected by ICWA." He notes that ICWA was enacted by Congress to establish "minimum Federal standards for the removal of Indian children from their families." He goes on to state that the right to intervene is "virtually meaningless unless notice of the proceedings is prompt." Lastly, Justice Wollman remarks that this case does not fall into line
with prior ICWA cases where the Supreme Court of South Dakota has required compliance with the Act. In early 1988, a brief glimmer of hope emerged in the case of In re N.A.H. and K.A.H. The Supreme Court of South Dakota reviewed an appeal by an Indian mother of the termination of her parental rights. The mother argued that the state failed to prove its case beyond a reasonable doubt, as required by ICWA. The court, however, held that because the notice provided to the tribe did not inform the tribe of its right to intervene and was not sent by registered mail with return receipt requested, as required by ICWA, the state court did not have proper jurisdiction to order the termination of parental rights. The court noted that ICWA was primarily a jurisdictional statute, and the court must examine jurisdictional questions whether presented by the parties or not. Thus, "at a minimum, notice must conform to the standards found in 25 U.S.C. § 1912(a). Better practice would be to follow the Bureau of Indian Affairs guidelines."

Many years after its first appearance, in In re D.M, R.M III, and T.B.C., the Supreme Court of South Dakota reaffirmed the substantial compliance doctrine. The court notes, for the first time, that section 1912(a) is ambiguous as to whether notice via registered mail, return receipt requested, is necessary only at commencement of the proceedings or prior to every proceeding. The court decides, without providing reasoning, that such notice was not necessary prior to every hearing. Therefore, the state's sending of notice of a later hearing by facsimile substantially complied with ICWA.

However, the court does not halt its analysis here, but goes on to state that the "State's failure to ensure that the Tribe received timely, official notice of the dispositional hearing in this case was negligent at best." To most, this would seem to indicate that the state did not substantially comply with the notice requirements of ICWA. The court, nonetheless, determines that the tribe received actual notice, based upon the testimony of the social worker that she informed the tribe's ICWA specialist of the hearing, and the parents' statement that the children's attorney sent a letter notifying the tribe of the proceedings. It should be noted that both evidences of notice are suspect. The department of social services (DSS) worker's job could depend upon her giving notice, and the children's attorney is not the party required to provide notice.

The court ends by chiding the tribe for having waited eleven months before moving to transfer the case to tribal court, and held that good cause existed to deny transfer due to the advanced stage of the proceedings. Justice Konenkamp concurred and added that the reason the tribe waited to request transfer was largely due to the limited resources of tribes and tribal courts to handle all such ICWA cases. Because numerous cases on this exact issue have already come before the Supreme Court,
Konenkamp urges the use of creative solutions to this problem, such as creating a statewide coordinator for ICWA.188

Lastly, and somewhat prophetically, Konenkamp notes that the use of abuse of discretion in good cause not to transfer cases makes little sense, given that the burden is imposed upon those who oppose an ICWA transfer. “If the presumption is in favor of tribal jurisdiction, then mere discretion to override an ICWA transfer is unacceptable.” Instead, the “clear and convincing evidence” standard must be used to determine if good cause not to transfer exists. For support, Konenkamp uses numerous other state court decisions, dealing with ICWA instead of the Supreme Court’s normal procedure of finding quasi-analogous state law.189

In 2005, Justice Konenkamp’s dissent was transformed into the majority opinion in In re T.I. and T.I.190 In this case, one Indian son was enrolled in the Yankton Sioux Tribe and the other was eligible for enrollment in the Yankton Sioux Tribe. Both sons were also eligible for enrollment in the Sisseton-Wahpeton Sioux Tribe.191 Both tribes were provided notice and requested transfer. The Yankton Sioux Tribe withdrew its request for transfer in order to permit the case to be transferred to Sisseton-Wahpeton. The court noted that section 1903(5) of ICWA and the Guidelines for State Courts: Indian Child Custody Proceedings indicate that although an Indian child may be eligible for enrollment in more than one tribe, only one tribe can adjudicate the case.192 The court refused to address Yankton Sioux’s request for transfer because they voluntarily withdrew the request in order for the case to be transferred to Sisseton-Wahpeton.193

The court then addressed the issue of whether good cause existed to deny transfer to the Sisseton-Wahpeton Tribal Court. The court overruled its previous use of the standard of abuse of discretion. Instead, the court opted to use “the standard most consistent with the Act . . . clear and convincing evidence of good cause for a state court to refuse to transfer to tribal court.” Using this standard, the court determined that good cause existed because the only court that has jurisdiction over both children is the state court, since the older son was already enrolled at Yankton and could not be enrolled at Sisseton-Wahpeton Oyate. Given ICWA expert’s testimony that the children should be kept together, the trial court was deemed correct in declining to transfer the case to Sisseton-Wahpeton. Thus, although the Supreme Court did uphold the trial court’s ruling, they also implemented a higher standard for denying transfer to tribal courts, which will likely result in more cases being adjudicated in the proper setting . . . tribal court.194

Justice Wollman, who dissented in In re S.Z. and C.Z.,195 identified a key problem with some of South Dakota’s interpretations of ICWA: the court’s tendency to move away from the minimum standards set out in ICWA.196 In In re P.B., the court continually points to state-law cases with little similarity to ICWA cases. The court
states that parents have a fundamental-liberty interest in the care of their child, but this interest is not absolute. This statement is supported by three South Dakota child welfare cases that do not involve Indian children or ICWA. The court goes on to state that the “best interest of the child is the paramount consideration in determining whether to terminate parental rights.” The judge cites a South Dakota code as well as two South Dakota cases, and again both cases do not involve Indian children or ICWA. Finally, the decision adopts the least restrictive alternative test, which requires that the trial court must apply the least restrictive alternative, but not attempt every conceivable form of assistance. Again, the use of this test is supported by a slurry of South Dakota cases.

There are two overarching problems with using state-law child welfare principles independent of ICWA. The first is that this defeats one purpose of ICWA, which was to create a national standard. ICWA was enacted so that there would be uniformity in how Indian children were treated by courts across the nation. By using state standards, which vary greatly, this purpose is defeated. The second problem is that ICWA does not provide for many of these standards. Nowhere in ICWA does it state that the trial court must apply the least restrictive alternative. In fact, a close reading of ICWA should point to a stricter requirement for Indian children, such as one that requires that more alternatives be attempted to reunite Indian children with their parents since the burden of proof required to terminate parental rights is heavier. Likewise, ICWA does not state that only the best interest of the child is considered. ICWA provides a legislative rule that the best interest of the child is served by remaining with the tribe. Thus, both the tribe's and the child's interests must be used for a determination of whether parental rights should be terminated.

As time goes on, the South Dakota state courts have seemed to rely less and less on purely state court decisions. This may be because there is now a deeper understanding of ICWA issues and the uniqueness of the dual purpose of protecting Indian children while simultaneously protecting Indian tribes. It may also be due to the development of a body of case law from South Dakota regarding ICWA. South Dakota, like many states, may have an aversion to adopting case law from other jurisdictions; however, the fact remains that another similarly situated jurisdiction's case law on ICWA is more likely to be on point than a South Dakota case that deals with a different statute.

One large issue present nationwide but adjudicated by South Dakota courts is that of active efforts versus reasonable efforts. Section 1912(d) of ICWA states that any party seeking foster care placement or termination of parental rights to an Indian child must show that “active efforts” have been made to provide remedial services designed to prevent the breakup of the Indian family, and that these efforts have proved unsuccessful. The Adoption and Safe Families Act (ASFA) requires that
the state make “reasonable efforts” to rehabilitate the family before terminating parental rights. These two standards have created much confusion in state courts. Many state courts use the terms interchangeably, but then this begs the question, “Why didn’t Congress simply use the same phrase?”

_in re E.M, A.M., and J.M.,_ the DSS provided few services to the mother because they interpreted her behavior as uncooperative. Later it was determined that the mother suffered from a learning disability; however, the DSS and the court went forward with the termination. The court stated that the DSS is not required to exhaust all possible services, and that the least restrictive alternative when viewed from the child’s point of view necessitated the termination of parental rights, since the mother was unlikely to be able to acquire the parenting skills necessary to care for the children. Thus, even though the DSS terminated its efforts after only six weeks, these weeks of services miraculously rose to the level of active efforts.

The dissent in this case remarks that the DSS “acknowledged that it did not take active efforts to help this young Indian mother (given her limitations).” Justice Henderson continues that when the DSS learned of the mother's learning disability, they should have stopped the dispositional hearing, based upon the newly discovered facts, and helped the mother by providing her with a parenting plan that was geared towards her abilities. This case left a deeper discussion of the ASFA's effect on ICWA for a later date.

Over ten years later, the Supreme Court of South Dakota ruled that the ASFA did not relieve the DSS of any duty that it held under ICWA to provide active efforts to reunite an Indian family. The ASFA is an amendment to Title IV-B and Title IV-E of the Social Security Act. Title IV-E is the primary basis for payment of foster care subsidies for Indian children; however, in order to be eligible, these children must be placed by a state court or a tribal court that has a cooperative agreement with the state. Tribes operating Title IV-E programs are subject to state-law definitions on “aggravating circumstances” that will negate the need to provide “reasonable efforts” of reunification. Allowing tribes to receive these funds directly, instead of having to receive them from the state and under the state's conditions, would facilitate the receipt of more money (due to decreased administrative costs) and would also enable them to determine for themselves how to best use the funding within their existing cultural framework. An amendment to the ASFA that would allow direct tribal funding, but ensure that tribes are not required to modify their modus operandi, would greatly increase efficiency by alleviating some of the tension between state and tribal standards.

_in re J.S.B., Jr.,_ the court reasoned that ICWA was the more specific statute, and thus controlled. In addition, ICWA provides no exception to the requirement of active efforts to prevent the breakup of an Indian family. On the other hand, the ASFA recognizes that under certain circumstances, reasonable efforts may be
unnecessary. Lastly, the court noted that statutes pertaining to Indians “must be construed in favor of the Indians, with ambiguous provisions interpreted to their benefit.” Thus, “While the presence of ‘aggravated circumstances’ may eliminate the need to provide ‘reasonable efforts’ under SDCL 26-8A-21, it does not remove DSS’s requirement to provide ‘active efforts’ for reunification under ICWA.”

South Dakota has also extended ICWA to a relationship that, at first glance, ICWA seems not to consider. In In re N.S., the Supreme Court of South Dakota held that ICWA applied to the termination of a Caucasian mother’s parental rights to an Indian child. The court acknowledged that despite the fact that the purpose of the Act was to maintain an Indian family, it is incorrect to “assess... ICWA’s applicability to a particular case,... focus[ing] only upon the interests of the existing Indian family” (emphasis original). Thus, the Existing Indian Family theory, which has been used to justify the nonapplication of ICWA to some Indian children, should not be used to limit the applicability of the Act to Indian mothers.

The court in this case focuses on the Indian status of the child and not the Indian status of the parent. Congress stated two purposes for enacting ICWA. The first was to protect Indian children, and the second was to protect Indian families. The Act creates a presumption that it is in the best interests of an Indian child to remain with its Indian family. It is doubtful that by setting a higher standard for the termination of a non-Indian parent’s rights to an Indian child either purpose will be achieved. This expands the scope of ICWA to cover non-Indian parents and Indian parents, and may be an overextension of the congressional intent; however, a strict reading of the Act allows for this outcome.

In a final example, the Supreme Court of South Dakota decided a case dealing with the transfer of jurisdiction to tribal court. In In re J.L, the court upheld the trial-court decision to transfer jurisdiction to tribal court. The court noted that ICWA provides for concurrent, but presumptively tribal court jurisdiction for Indian children domiciled off the reservation. In this case, the mother, who was residing off the reservation, contacted Catholic Family Services to place J.L. for adoption in March 2001. He was placed with an appropriate family. Two months later, she decided against the adoption and requested the return of her son. The very day that she was due to pick up her child, the department of social services received information that J.L.’s sister had been placed in the care of an aunt, where she was abused. Thus, the mother’s care was questioned, and DSS took emergency custody of J.L. The mother then returned to Standing Rock Reservation.

Following a period of sporadic contact, likely due to the physical distance between the mother and the child, both the Standing Rock Sioux Tribe and the foster parents were granted intervention in the case. The tribe moved for transfer to tribal court, and the foster parents objected, arguing forum non conveniens. They insist that the federal guidelines for interpreting ICWA provide that good cause to deny
transfer exists when "evidence necessary to decide the case cannot be adequately presented to the tribal court without undue hardship to witnesses and parties."  

The South Dakota Supreme Court agreed, but noted that while all evidence of the neglect allegations were off the reservation, the evidence of J.L.'s current living situation was on the Standing Rock Reservation, since the mother had later been granted custody. The court stated that situs of evidence was inconclusive, because one side or the other would be inconvenienced and face hardship in the proceedings. Thus, the court found, contrary to the circuit court's conclusion, that *forum non conveniens* is, at best, a neutral factor in evaluating whether good cause exists to deny transfer. The court went on to state that because ICWA provides for presumptively tribal jurisdiction, a neutral factor does not rise to the level needed to provide a basis for denying a tribe's petition for transfer to tribal court.  

The court further analyzed the tribe's petition to transfer jurisdiction to tribal court. They noted that although the best interest of the child is a valid consideration in determining the issue of good cause not to transfer, the fact that a substitute parent might provide the child with as good or better care than the mother is not appropriate for this evaluation. Next, the court noted that the child has been in the care of his mother for over nine months without any further allegations of neglect, and that the allegations of abuse of J.L.'s sister by her aunt, which started the entire neglect process on J.L., simply were not true. Finally, the court added a bit of practical advice by pointing out that even if they were to maintain jurisdiction and move towards termination of parental rights, the DSS would still be required to provide active efforts to prevent the breakup of the family, which would further add to the instability of J.L.  

This case provides an unfortunate example of the heartbreak that can occur for all parties involved when a child is removed from her Indian parents too quickly. It further provides an example of a state court making what likely felt like a tough decision to relinquish jurisdiction to tribal court for adjudication. Removing a case to tribal court does not necessarily mean that the Indian child will be returned to the parents. Tribal courts, like state courts, have the best interests of the children in mind when rendering their decisions. This state court's decision merely provided the tribal court with an opportunity to hear the case and make a proper decision in accordance with their laws and customs. In addition, tribal courts arguably have more latitude to implement creative custody solutions so that ties are not broken between those people that have been influential in the child's life. For example, a tribal court could allow the foster parents to have visitation rights if the court felt that it was in the child's best interest. The fact that a state court recognizes and respects tribal court's jurisdiction enough to release jurisdiction shows a certain level of maturity in the relationship between the tribal and state entities that can only be seen as a step in the right direction for Indian children's welfare.
South Dakota courts have been slowly reevaluating prior ICWA decisions in recent years. In many cases, such as those dealing with qualifying an expert witness, the South Dakota Supreme Court has modified its prior rulings to align better with ICWA. However, the court has not altered its "substantial compliance" doctrine for notice to the tribe. This has become such a problem that in 2004, the governor of South Dakota established the Governor's Commission on the Indian Child Welfare Act. The commission made several recommendations dealing with the notice problem in South Dakota. The following year, the South Dakota legislature passed a statute detailing the information required when providing notice to tribes of proceedings involving an Indian child. This provides a perfect example of how educating state actors can help achieve tribal goals in implementing the Indian Child Welfare Act.

**Tribal Court Cases**

As mentioned earlier, ICWA provides for exclusive tribal jurisdiction over Indian children domiciled on the reservation, and concurrent but presumptive tribal court jurisdiction over Indian children domiciled off-reservation. Thus, any discussion of the implementation of ICWA is incomplete without looking at tribal courts. Tribal courts often do not follow ICWA, but utilize their own tribal juvenile codes for the disposition of the child welfare case. However, without a comparison of state court dispositions to tribal court dispositions, we cannot see the full spectrum of Indian child-welfare action outcomes.

Modern tribal courts were created following the Indian Reorganization Act of 1934. This act allowed tribes to draft a constitution, establish a governmental system, and create a judicial system. After many years of assimilation and hardship, tribes were in a poor position to return to their traditional judicial systems, and thus the new tribal court system was designed similar to the BIA model. These newly created courts were designed to operate under and enforce the new tribal codes. The majority of cases heard in tribal courts are misdemeanors, family disputes, and minor civil matters. In addition, many tribal courts operate under a system of restitution instead of retribution, meaning that defendants often plead guilty and accept responsibility for their actions, with the result that disputes are resolved in a more mutually beneficial manner. Unlike state courts, which are all-or-nothing models, many tribal courts attempt to heal the parties in the action. These differences make nonmembers uneasy about appearing in front of tribal court because they do not know what to expect.

Many tribes have realized the importance of tribal courts in promoting tribal economic development. According to the Harvard Project on American Indian Economic Development, having a strong and independent tribal court is one of the keys to being economically successful. An independent tribal court will support
the separation of powers and will encourage outside businesses and entrepreneurs to develop on the reservation, because they can be assured that their investment will be safe and treated fairly by the tribal court.\textsuperscript{230} Another key factor, according to the Harvard Project, is that tribes must use culturally appropriate methods, or what they term a "cultural fit," which leads to a view of legitimacy among tribal members.\textsuperscript{231} Thus, a strong and independent tribal court should utilize traditional philosophies that the people will understand, but will also treat outsiders fairly. Lastly, a strong tribal court is one of the ultimate expressions of tribal sovereignty. Tribes have taken the responsibility of expressing their sovereignty through protecting their members by taking over institutions instead of relying on federal and state actors.

The next section of this paper focuses on tribes—specifically the Navajo, Cheyenne River Sioux, and Rosebud Sioux case law, and the Pascua Yaqui and White Mountain Apache statutory law. The Navajo Nation's courts are unique and considered by many to be one of the most effective among Native nations. The Peacemaker Courts of the Navajo Nation are an excellent example of a judiciary built on the traditions of conflict resolution. These courts utilize the traditional dispute-resolution methods used by the Navajo people for hundreds of years and recently revitalized through the adoption of Peacemaker Courts in 1982.\textsuperscript{232} In these courts, an elder who is knowledgeable about traditional culture will hear the dispute and will counsel the people as to what the appropriate resolution is that will bring harmony and closure.\textsuperscript{233}

The importance of family to Indian people runs deep. Tribal members depend upon their families for survival. Traditionally, the family and kinship ties that bind people also set out obligations and responsibilities that provided a safety net for any family members that were experiencing difficult times.\textsuperscript{234} While the types of obligations may have changed, these kinship and familial relations have survived. For example, when a Navajo clan member knocks at your house door looking for a place to stay, you are obligated to provide that for him regardless of how well you know the individual or how long it has been since you have talked.\textsuperscript{235} Today, these obligations still provide a method for clan members to travel from place to place in a cost-efficient manner. Knowledge of who one is and their place in the society is based on that person's family and relatives.

The importance of and view of family relations also influences how tribal courts implement ICWA. Many tribal courts have held in varying degrees that ICWA does not directly apply to them.\textsuperscript{236} For example, the Pascua Yaqui Tribal Council has enacted its own placement guidelines, which not only the tribal court but also the state court must use.\textsuperscript{237} Thus, while the Pascua Yaqui Tribe supports ICWA with its alternative placement regime,\textsuperscript{238} once a case is transferred to tribal court, they will apply their own laws to the case. In addition, the Chitimacha Indian Tribal Court of Appeals held that "The I.C.W.A. does not apply to proceedings in tribal court,
notwithstanding the failure of the act to specifically say so." Yet another tribal court stated that although "no party forwarded the proposition that the Indian Child Welfare Act does not govern Tribal Court... ICWA is, at least, instructive." Thus, this court was reluctant to simply follow ICWA, and instead opted to use ICWA as persuasive evidence and thereby not be bound by the Act. These types of tribal courts often utilize traditional beliefs concerning family and adoption in addition to modern laws. This difference in the interpretation of whether to apply ICWA, as well as the acknowledged difference in the view of family, gives rise to different reasonings in ICWA cases that come out of tribal courts as compared to state courts.

Before proceeding to the tribal court cases, it should be noted that many non-Indian litigants are apprehensive about bringing or transferring a case to a tribal court because they fear being treated discriminatorily; however, in practice these fears are largely unfounded. For example, in *In re Halloway*, the Window Rock District Court held that it was in a Navajo child's best interest to remain with the non-Indian foster family because of the bonding that had already occurred, but required that the child return to the Navajo reservation during the summer months to maintain the connection with her family and clan. As Judge McKay, an Arizona judge, explained about one high-profile case, "The result reached by the Navajo Court... is more flexible and resolves more problems than I was accustomed to seeing in my many years of practice in adoption work, in the courts of Arizona, and in child custody matters." Here again we see the importance of a strong, independent tribal judiciary not only to quash the fears of outside litigants, but also to develop the many avenues open to tribal courts that may not be open to state courts.

The Navajo Nation Supreme Court considers the Navajo Nation's tribal codes to be the foremost law of the land. The Navajo Nation courts are charged with interpreting these codes. When the codes are unclear, the courts follow a choice of law, starting with the utilization of Navajo common law or traditional law, to interpret these codes. Thus, the Navajo Nation has developed a system that incorporates their traditional culture into modern laws. This system folds the Old Ways into a modern legal environment, creating a system that the majority of the Navajo Nation membership will be able to understand and make their own. Inevitably, this means that the legal system has legitimacy in the eyes of the membership.

Because of the unique blend of Navajo common law with the Navajo Nation's codes, the Navajo Nation does not utilize ICWA provisions in placement of Navajo children residing on the reservation in foster care or adoptive homes. The Navajo Nation Supreme Court has handed down only one decision that specifically addresses ICWA. They have, however, handed down five other decisions that dealt with child welfare in general. In these later cases, ICWA would not have been applied had the issue arisen in state court.
The one ICWA case that the Navajo Nation Supreme Court did hear set out the traditional law under which ICWA cases should be handled. In *In Re J.J.S.*, a mother seriously neglected her child, and her parental rights were terminated. Upon termination, the mother expressed her desire that her child be adopted by Mr. and Mrs. Chee, her cousin. However, a petition for adoption by another, non-Nativo couple was pending before the court. The court found that the Navajo Nation had original jurisdiction over all cases involving the domestic relation of Indians, such as divorce or adoption matters, and thus had jurisdiction to hear the case. According to Navajo law, if there is an applicable custom of the tribe not prohibited by federal laws, then the court may apply those customs as well as any ordinances of the Navajo Tribe. The court, thus, decided that it would only apply federal laws, such as ICWA, in the absence of a Navajo custom. Fortunately, a Navajo custom concerning adoption existed.

The Navajo conception of adoption is quite different from the American concept, which envisions adoption in terms of duties. In the American concept of child rearing, the natural parents have duties towards their children, and when those duties are breached, social services may take children away and give them to more worthy parents. Navajos, on the other hand, believe that familial relationships are ruled by mutual expectations, rather than obligations. "Desirable actions on the part of others are hoped for and even expected, but they are not required or demanded." Therefore, the court stated that the Navajo view of the relationship of children to parents is not a simple parent-child relationship, but a pattern of expectation and desirable action surrounding children. Furthermore, according to Navajo common law, children are supposed to be taken care of, not just by their parents, but also by their clan members. The court stressed that Navajo adoption is also not necessarily permanent. "Adoption is merely a case of taking the children into the home for a limited time, or permanently, by extending family or parental agreement." Navajo law is therefore concerned with the relationship of the child to a group, which shares the expectation that its members will take care of each other's children. Navajo common law deemphasizes the termination of parental rights. Navajo adoption is thus informal and based upon community expectations.

The court noted that the Navajo tribal council is presumed to have these Navajo common law beliefs in mind when they enact statutes. The tribal council has enacted laws that state that family ties should be preserved and strengthened whenever possible. The Navajo adoption policy states that the Navajo Nation favors formal adoption when the parents are dead, or when the children have been regularly and continuously neglected or abandoned. The statute goes on to state that the Nation neither favors nor disfavors adoption of Navajo children by parents who are not members, and will consider each case individually. Ultimately, the court
held that in this case, an extended clan member (Ms. Chee, a maternal cousin) had stepped forth to assume her responsibility to care for the child, and she should be awarded custody instead of the nonmember.261

A couple of other Navajo Nation Supreme Court cases warrant a short discussion, even though they are not ICWA cases, because they concerned custody disputes between divorced couples, which is explicitly exempted in ICWA.262 In *In re T.M.*, custody of the appellant (T.M.) was awarded to the father because the mother failed to comply with prior court orders. The appellant intervened and requested to be returned to the mother's custody, cease forced visitation with the father, and that therapy be ordered for the father and mother. The court stated that there was a legal fiction that children were not able to speak for themselves. The appellant cited the UN Convention on the Rights of the Child to support his position that because the child is capable of forming his own views, that he has "the right to express those views freely in all matters affecting [him, and that] the views of the child be... given due weight in accordance with the age and maturity of the child."263

The Navajo Nation Supreme Court noted that although the Navajo Nation is not a state party to the Convention, and neither is the United States, the views in article 12 are consistent with Navajo common law. Thus, the court held that under the proper situation, a child may intervene in an action between his or her parents if, after an examination of the child's best interests and whether those interests are adequately represented by existing parties, the trial court determines that intervention is necessary. In this particular case, however, the court determined that intervention was not necessary, but that a spokesperson should be appointed. A spokesperson differs from a guardian *ad litem* in that they are not required to do an independent review of the facts and make recommendations, but to merely make the child's wishes known. This remedy not only allows the child to be heard but also follows the Navajo belief that "it's up to him," meaning that the individual must be consulted before action affecting his interest can be taken."264

In *In re A.O.*,265 the Navajo mother and Anglo father were involved in a protracted custody dispute in state court when the mother took the child and returned to the reservation, where she filed a Petition for Adjudication of a Dependent Child, claiming that the father had sexually abused the child.266 The father filed a Motion to Dismiss because of lack of jurisdiction, and the trial court granted the motion.267 The Navajo Nation Supreme Court ultimately held that regardless of the proceedings in other jurisdictions, the Navajo Nation Children's Court had a duty to decide its jurisdiction and list findings of fact, which it did not do.268 Thus, the court remanded the case back to the trial level for findings of fact.269 The interesting part of this case is the reasoning that the court used for its holding. The ruling was justified in light of the Navajo Nation's recognized interest in its children, as stated in ICWA that "there is no resource that is more vital to the continued existence and integrity of Indian
Tribes than their children." Thus, the court used ICWA's purpose as a justification for the creation of its own ruling based upon Navajo laws.

The low number of would-be ICWA cases that have reached the Navajo Nation Supreme Court is surprising. Several possibilities exist, including that these cases are generally not appealed. However, it is difficult to imagine a more emotion-filled topic than those involving children and adoption. Another possibility is that because state courts seem to be withholding the transfer of ICWA cases, the difficult cases may never reach the Navajo Nation Supreme Court. While that may be true, I believe that a stronger theory is that the Navajo Nation places more of an emphasis on family preservation. Thus, families that are experiencing difficulties while living on the reservation are met with a culturally appropriate system designed to utilize the strengths that already exist in the family, and build up from there to cover the weaknesses. If I am correct in believing that these troubled families receive care that is better geared towards Navajo culture and therefore a positive outcome, then these ICWA-type cases would not see as much court action—partly because the families are more frequently preserved, and partly because if there is an out-of-home placement, it is with extended family and the natural parents do not disagree.

Although tribal custom is not used to the same degree that we see in the Navajo cases, custom does factor into tribal court decisions in South Dakota as well. In Miner v. Banley, the Cheyenne River Sioux Tribal Court of Appeals held that in evaluating the best interest of the child, the children's court must evaluate the needs of the minor for stability and the "physical, emotional, and cultural appropriateness of the placement." Cultural factors include the ability of the placement family to familiarize the child with Lakota customs, traditions, and practices, and the Lakota tradition of returning the child to biological parents upon request. The case was ultimately decided on the grounds that an ex parte communication between the social worker and judge prevented one party from receiving a fair hearing, because they could not respond to the accusations. The court ruled that in evaluating the best interests of the child, the court cannot unduly hinder the rights of the parties to be heard.

An unusual issue of whose version of tribal custom to accept was litigated in Barrera v. Poorman. This case came out of the Rosebud Sioux Tribal Court of Appeals in 1987. Here, the natural mother and Poorman were cousins and, according to Lakota custom, members of the same extended family. The mother gave Poorman custody of the child; however, the father, Barrera, petitioned for a change of custody to legitimate his claim to his child. The court held that it was the "universal right of a natural parent ... to have custody of their own children absent a clear showing of gross misconduct or unfitness or some sound and compelling reason for denying it and that right is superior we find even in Lakota custom and belief." Although the court does not engage in a more detailed analysis of their interpretation that
natural parents have superior rights over other Lakota extended-family members, they nevertheless were faced with two customs and unanimously agreed on the proper Lakota custom.

Unlike the previously discussed tribal courts, the Pascua Yaqui Tribal Court does not publish its decisions, making them nearly impossible to obtain. The Pascua Yaqui Tribal Council enacted the *Resolutions Adopting the Pascua Yaqui Tribe Child Welfare Policy Act* in 2002. The recent date of the resolution suggests that while the tribal council was concerned about the issue of child welfare, they were only recently in the economic position to create and enforce tribal law on this topic. The resolution starts by stating that the preservation of Yaqui families is critical to the survival of the Pascua Yaqui Tribe, and ICWA recognizes the tribe's authority to enforce tribal law in state child welfare cases.

In the Findings section of the act, it states that a survey of Yaqui families concluded that Yaqui members believe that children should be placed with extended family or other Yaqui families if their parents cannot properly care for them, and that Yaqui families do not believe that Yaqui children should be placed in state foster care. The Findings go on to give a brief history of the necessity of this act. It states that at the time of the act, there were approximately sixty child dependency cases involving Yaqui children—approximately thirty in state court and thirty in tribal court. The tribe acknowledged that they have not consistently exercised their sovereignty to transfer jurisdiction to tribal court, and in fact, only two cases had been transferred prior to 2002.

Interestingly, the Pascua Yaqui Tribe Child Welfare Policy Act alters the placement preferences of ICWA. The following placement preferences are for both temporary and permanent placements, including foster care, permanent guardianship, and adoption. A Yaqui child shall be placed, in order of preference, with a local Yaqui extended family member, a local non-Yaqui extended family member, a local non-related Yaqui family, a local Indian family, a non-local Yaqui extended family member, a non-local Yaqui family, a non-local Indian family, and finally a non-local non-Indian family. It is clear from these placement preferences that a placement close to the tribal community is of utmost importance to the tribe, as this would facilitate the continued incorporation of the child for tribal ceremonies.

The act goes on to set additional requirements if a Yaqui child is placed with a non-Yaqui family. These include that the child should have reasonable access to Yaqui family members; that if they wish to attend the tribe's cultural and religious ceremonies, the tribe's social services department must be notified so that appropriate arrangements can be made; that the child's name cannot be changed; that all correspondence from the tribe must be accepted; that the tribe must be kept informed of all address changes; that the tribe's social services department must be allowed to conduct reviews at least two times per year upon adequate advance notice from
the tribe; that if the non-Yaqui family placement or parental rights are at risk, the tribe must be notified immediately.279

Similar to the Navajo common law disfavoring of termination of parental rights, the Pascua Yaqui Act prefers family reunification.280 If reunification is not possible, the preference is placement in foster care or permanent guardianship with an extended family member, and only when absolutely necessary, termination of parental rights and adoption.281 Lastly, the act establishes a Family Preservation Office in the Department of Social Services.282 This office will target at-risk families and develop a Child and Family Services Plan that reflects the tribe's preference for placing children with Yaqui families.283 Having a centralized system in place to handle child welfare issues will increase efficiency and allow the tribe to focus on preservation.

Again, the fact that before the passage of the Resolutions the Pascua Yaqui Tribe had a department of social services but no separate family preservation office seems to support the theory that the tribe's slower evolution and ability to adequately take over these programs stems from a lack of resources. In support of this position, the act mentions that the family preservation office will aggressively obtain resources to support the office and its programs.284 It also states that the tribe will negotiate a Title IV-E funds-sharing agreement with the State of Arizona.285 Both provisions indicate that when creating this policy act, funding was a dominant issue in the minds of the tribal council.

Unlike both the Navajo Nation and the Pascua Yaqui Tribe, the White Mountain Apache have adopted ICWA in its entirety. In their juvenile code, the tribe reiterated that ICWA's purpose is to protect the best interests of the White Mountain Apache children and to promote the stability and security of the tribe.286 The code recognizes that White Mountain Apache children would be "best served through the Tribal Judicial system which can implement as it always has, the Indian Child Welfare Act of 1978 and the rules and regulations promulgated by the Secretary of the Interior in Title 25 CFR parts 13 and 23 as well as the recommended guidelines for state court—Indian child custody proceedings."287 It is unusual to see a tribe adopt fully ICWA, as a large number of tribes that have specifically addressed the issue feel that ICWA does not directly apply to them, although they do support it with respect to requirements placed upon the states.

The White Mountain Apache also have a "Termination and Restoration of Parental Rights" chapter in their juvenile code. This section does not set out a standard of proof required for termination of parental rights. Recall that ICWA requires that there be clear and convincing evidence that continued custody of the child by the parent is likely to result in serious emotional or physical damage to the child, and that termination of parental rights requires evidence beyond a reasonable doubt.288 The White Mountain code allows the juvenile court to terminate parental rights if the "Court finds that the parents are: (1) unfit and incompetent to care and provide
for such child and no alternatives are feasible...; (2) habitually engages in conduct detrimental to the health, safety or welfare of the child; (3) wilfully [sic] refuse to care or provide for the child when able to do so; (4) are unable to care and provide for the child by reason of physical or mental incapacity; or (5) have abandoned the child."

The White Mountain Apache code is also unusual in that termination of parental rights does not seem to be disfavored. There is no explicit statement that termination is disfavored, as in the Navajo Nation and Pascua Yaqui legislation, and there is little pomp and circumstance to the termination of parental rights. However, the code does state that whether "a child is delinquent or in need of supervision shall not be grounds for termination of parental rights." Interestingly, the code provides that all terminations of parental rights are interlocutory in nature, and are thus subject to review within one year. Furthermore, they may be immediately appealed by the parents.

In addition, within six months, the parents may petition the court for "revocation of its termination order and restoration of parental rights on the grounds that a substantial change of circumstances has occurred which requires such revocation and restoration in the best interest of the child." Thus, even though the code appears to take a rather hard stance on termination of parental rights, the fact that it is interlocutory and that parental rights can be restored seems to support the underlying message that the tribe does not wish to terminate parental rights unless absolutely necessary.

Reminiscent of White Mountain's full adoption of ICWA, the Northern Plains Intertribal Court of Appeals adopted the view that tribal courts were required to utilize the standards set out in ICWA for termination of parental rights. In In re DeCoteau, Jr., a father's parental rights were terminated by the tribal court after he was imprisoned for severely beating his wife as the child watched. The child was an infant at the time, and by the time the case reached the appellate court, the child was two-and-a half-years old and had little bonding with the father. Not only did the appellate court require that the tribal court use the "beyond a reasonable doubt" standard, but it also endorsed the use of an expert witness to provide proof that continued custody would likely result in harm to the child.

A short, but strongly worded dissent by Judge Godtland stated that the “majority misplaces its reliance on the Indian Child Welfare Act... The Act reflects congressional intent and federal policy to defer to tribal authority on matters concerning the custody of tribal children. Except for peripheral sections, ICWA does not apply to Indian children in tribal court.” This ruling is clearly an outlier in tribal jurisprudence. Not only does it cramp the use of custom in decision making, but it also would be difficult to implement by many tribes due to budget constraints. As more ICWA decisions are made and reaffirmed on the reservation in tribal courts, more Indian children will obtain their family preservation services on-reservation. Many tribes
are beginning to realize that the same cultural differences that sometimes prevent state courts from making the best decisions regarding their children also exist in the state social services system. Therefore, several tribes have begun to implement their own family preservation models, which draw upon their unique culture to help heal families.

**Family Preservation Services**

The use of tribal custom in tribal court decisions, along with creative family preservation services, goes a long way to further the goals encapsulated in ICWA. States, however, are still struggling with high numbers of Indian children in out-of-home placements. For example, in Minnesota, Indian children still make up 11 percent of out-of-home placements, although they only constitute just under 2 percent of the population. The type of family preservation services and theories that are used by state social services and tribal social services plays a central role in the outcomes among Indian families in their service areas. The models used in family preservation programs can imprecisely, but helpfully, be categorized into two divergent theories.

The first model is geared toward “the provision of intensive brief services” to children in imminent danger of out-of-home placement, and the other is a family-support model emphasizing programs that provide a “range of continuously available primary prevention (FPS [family preservation services]) to all families” in perceived need of support. Western family preservation services emphasize intense, short-term, multi-agency crisis intervention to stabilize the family. These types of models can be characterized as dysfunction-based family preservation, which slowly began in the mid-twentieth century when social work turned towards individualist explanations of family and social dynamics. Under this model, families were labeled as “inadequate” and lacking in certain characteristics and skills. Some scholars have condemned this, saying that “such labeling puts into motion an adversarial relationship whereby the child welfare system views the best interest of Indian children as separate from parent and extended family relationships.” Once a child is removed from his/her home, “a determination of the child’s best interest is based upon predicting which parents, biological or psychological [adopted/foster], will best serve the child.”

In contrast, the second family support model, which encompasses long-term continuous primary prevention, is a better fit for tribal cultures. This model can be termed “strength-based family preservation,” and includes wraparound and multisystems approaches. The goal of strength-based social work is to facilitate a process of capacity-building within families. These models emphasize empowerment from sources such as internal family supports, informal community assets, or formal services. Family members are not passive subjects or clients, but participants
in the decision-making process regarding their treatment plans. The multisystems approach emphasizes family strengths by “recasting the cause of family issues from individual and family pathology to existence of constraints.” This is in contrast to traditional deficit-based family preservation, which seeks to identify constraints, remove them, and allow the family to learn proper parenting. "Wraparound" is one multisystems, strength-based approach that focuses on individual needs and makes active linkages to the community. This model has received much acclaim from tribal scholars because it mirrors traditional tribal practice.

There are several differences between the two models that make the later, strength-based wraparound model better suited for tribal cultures. First, as mentioned above, the wraparound model allows family members to be involved in the process of creating a family preservation plan. Second, this model highlights what a family is doing right, and provides services to help the family change actions that are not positive for the family. This change in perspective can be empowering, as families will feel that their situation is not hopeless and are able to progress towards a better family environment. Third, the wraparound model often involves smaller caseloads and emphasizes the social worker going to the family instead of requiring the family to find transportation, which is a huge problem on many reservations. Fourth, this model allows the child to participate in decision making, which empowers the child and demonstrates that the child is invested in making the process work. Fifth, this model extends the mainstream “nuclear" family to include extended family, kin and clan relations, community, and tribe. Sixth, this model emphasizes using community members in the provision of family preservation services to instill trust in the families. The belief that there are no failures is a principal feature in Fort Berthold family preservation policy, which is an excellent case study. The close connection of tribal communities allows one worker to state, “These are our relatives; we don’t give up on our relatives.”

Forth Berthold Reservation’s tribally run family preservation program exemplifies the strength-based traits. The program serves the Arikara, Hidatsa, and Mandan tribes of North Dakota. Fundamental changes occurred in family services on the Fort Berthold Reservation in the early 1990s, when they developed and implemented their own programs using their own staff. The centerpiece of the Fort Berthold family preservation program is called “Sacred Child Project." This project uses wraparound theory, but reshapes it to fit tribal customs and reinforce extended-family systems already in place. The child picks a team of four to ten people, with the requirement that the majority must be some type of relative. The family discusses with the social worker what the plan should encompass, but it is ultimately the child’s decision what to focus on. The child is allowed to pick three “life domains," which include spiritual, family, living situation, financial, educational and vocational, social and recreational, behavioral and emotional, psychological, health, legal, cultural, and
By giving the child the self-determination to make their own choices, the children feel invested in the family preservation service, and they are an integral part in ensuring that the family does not break up.

Although several tribes across the country, like Fort Berthold, have implemented these powerful programs, many tribes have only implemented parts of these theories. Many tribal family preservation programs are still modeled after the mainstream deficit-based models. This is not to say that mainstream programs have not made some strides. These programs attempt to train their social workers to be more sensitive to cultural differences. However, as Deborah Painte, director of the Sacred Child Project, said, “It’s not how you integrate culture into services but how you integrate services into culture.” Norma Martinez from Pasqua Yaqui also stated, “The tribes that have really been successful are those that have a broad vision—it’s hard but it’s worth it. When you try new things, it raises eyebrows. Social services had to take risks.”

Arizona tribes have implemented some of these theories to varying degrees. Some tribes have incorporated wraparound theories but still maintain vestiges of the mainstream deficit-based system, while others have incrementally overhauled their family preservation programs. For example, the Pascua Yaqui Tribe operates their own social services program, which has found that tribal members are resistant to intensive in-home services. Thus, the tribe utilizes an extended and less invasive service plan in order to ensure that families stay with the program. In addition, Pascua Yaqui Social Services relies heavily upon informal support such as extended family members, elders, and especially religious leaders. However, the tribe still utilizes the same procedures as the state for determining which families are at risk, and mirrors services provided by the state, such as psycho-education, family therapy, and one-on-one therapy. Again, this is not to say that these services are not helpful, but merely to point out that these services are copied from the state service plan and may not be as culturally relevant as some more traditional methods. Tribes would be well served to implement some of the theories of strength-based multisystems wraparound services.

One tribe that has reevaluated and renovated their family preservation program is the Navajo Nation. Just over four years ago, Ronald Phillips designed the “K’e Project” for the Office of Promoting Safe and Stable Families, which provides more culturally appropriate family preservation techniques. This program uses Navajo philosophies such as k’e and hozho to teach proper Dine parenting techniques. K’e is based upon respect and one’s universal relationship with everyone and everything around them. “K’e incorporates many values that bind [an] individual to family, clan, Navajos in general, and all people.” Hozho is also associated with kinship and relations, meaning that “there is a place for everything in this universe and there is harmony when everything is in its place, working well with everything else.”
Phillips reiterated the Pascua Yaqui observation, saying that Dine families usually take more time to open up to social workers, so the intensive Band-Aid style of family preservation that the state utilizes simply does not work with traditional Navajos. He stated that it usually takes at least one to two months to gain a rapport with his clients. His program focuses on high-risk families, such as ones that already have one child removed. Phillips also mentioned the importance of having community members as social workers, especially for the more traditional Navajos, who speak the Dine language instead of using jargon.

The K'e Project teaches that there are two types of parenting techniques: 1) the Monster Way and 2) the Blessing Way. The Monster Way teaches children not to be lazy, by using an assertive voice when communicating with the child. Traditionally, children would run towards the east each morning to signify respect for the Monster Way. The Monster Way also teaches that the best time to talk to children and tell them moral teachings is in the morning when they are not quite awake yet, because this is when their brains are the most receptive to learning and guidance. In contrast, the Blessing Way is kind and caring. It is a passive method of parenting and allows the children to come into their own knowledge by experience. Phillips states that the counseling and teachings that he provides should allow a parent to know when the appropriate time is to do each one.

Phillips teaches families to strive to live in hozho or “the perfect state.” He teaches them that there are four sacred mountains, four sacred colors, and four sacred cardinal directions. Each of these have specific meanings and should be prayed to and lived by. As a brief example, the East represents the standards of life; the South represents how you make your living (thus, your work tools should be kept in the south of your house); the West represents your social competence, kinship, social skills, and storytelling; the North represents respect for nature, food, and animals.

Lastly, the Navajo program teaches about the use of spiritual methods to help stabilize the family. Many clients believe that ceremonies cost a prohibitive amount of money, but the reality is that there are numerous ceremonies that the family can do on their own, or that do not require as much capital as the larger, more elaborate ceremonies. For example, instead of hosting a Blessing Way ceremony, which is a grand event, the family could simply have a medicine man do a private blessing. An even more frugal approach would be to do a family blessing with hot ashes, a cedar ceremony, a smoke ceremony, or even a talking circle. These are all alternatives that families can take advantage of in order to achieve hozho.

**Conclusion**

States differ in their evolution of ICWA jurisprudence, but some generalizations can be made regarding important issues in ICWA implementation. Arizona has struggled
through the aspects of ICWA that deal with exclusive tribal jurisdiction, and is now focusing on the more nebulous concurrent jurisdiction provisions. South Dakota, on the other hand, has been reexamining many earlier decisions. The issues of utilizing a modified version of *forum non conveniens* in order to justify good cause not to transfer is playing an increasingly more important role in ICWA jurisprudence of both Arizona and South Dakota. South Dakota has struggled with what constitutes the minimum requirements of notice to the tribe, which should be a simple provision in ICWA. Arizona, on the other hand, has developed a rather lax definition of what constitutes an expert witness, especially compared to South Dakota. Furthermore, Arizona has not yet dealt with the effect that the ASFA will have on ICWA. Given the importance of this issue, the courts will likely have to grapple with it soon. Happily, many of the problems that arise can be eased through increased communication between state social services and tribes.

As tribes and the state begin to build long-term relationships, the level of mutual understanding should be increased. For example, the state will begin to understand what types of information they must provide in order to obtain quick and accurate enrollment information. Tribes have an important role in ensuring that ICWA is properly implemented in state courts. Not only must the tribe monitor cases involving Indian children currently in state court, but they should take a proactive role in educating state social workers, politicians, lawyers, and judges about their culture and ICWA. Tribes should be willing to work with states to help incorporate cultural elements into state-run family preservation programs. Although states will not be able to duplicate the tribal programs, they can learn to be more culturally sensitive, and therefore help alleviate some of the individual tensions that occur when state social workers interact with tribal members.

In general, tribes should continue to focus their efforts on family preservation programs and on obtaining proper Indian out-of-home placements for Indian children who must be removed from their home. Because of the close-knit communities present on many reservations, once a child is placed out-of-home, usually with either a relative or other tribal member, the parents are often allowed to maintain a relationship with the children while they focus on their family preservation plan. Again, many tribes follow the Navajo belief that although you can legally terminate parental rights, you cannot terminate clan or kinship rights because those ties never break.

It has been nearly thirty years since ICWA was enacted. As noted, although much improvement has been made, especially in certain states, there is still more that can be done. Arizona has been working with tribes and has implemented an ICWA workgroup that meets regularly. This workgroup allows interested parties to discuss problems and solutions to tribal and state relationships in implementing ICWA. Similarly, in 2004 the South Dakota legislature established the Governor's
Commission on ICWA, charging them to study ICWA compliance in South Dakota. Innovative programs such as these allow seemingly divergent interests to see that their interests are more aligned than they may initially believe. ICWA is one of the most interesting aspects of Indian law because nearly all parties involved, whether it be state social workers, tribal social workers, state attorneys and judges, tribal attorneys and judges, Indian parents, Indian extended families, or Indian children, are benevolently motivated. They all have the best interests of the child at heart. They just approach the problem from a different cultural perspective, and often without fully understanding the other side.

NOTES

The author would like to thank Professors Barbara Atwood, Robert Williams, Nancy Parezo, and Jay Stauss for their time, effort, and encouragement in this endeavor.

1. Rose is a pseudonym.
4. According to a House Report, the high rate of out-of-home placements of Indian children was often a product of state child welfare agents' lack of understanding of American Indian culture and child-rearing practices. The report concluded that in only 1 percent of cases were Indian children taken from their homes for physical abuse; thus the rest of the cases stemmed from neglect, which in reality was perceived neglect due to cultural differences in child rearing. H.R. Rep. No. 1386, 95th Cong., 2d Sess. 10 (1978).
7. Id.
9. Id.
12. *Id.* at 2.

13. ICWA contains no provision for agency oversight. HHS does not have specific oversight authority with respect to ICWA, but it is responsible for ensuring that states provide meaningful information about ICWA compliance as part of Title IV-B reporting requirements. *Id.* at 58. HHS also has issued guidance to states on ICWA implementation; however HHS insists that they do not have the authority to hold states accountable for lack of implementation. *Id.* at appendix 3 at 79: Comments from the Department of Health and Human Services, dated March 21, 2005.

14. One of the largest problems with studying ICWA is that very little statistical data is available to form accurate conclusions about the effectiveness of ICWA implementation and formulate strategies for future action.

15. Interview with tribal attorney (Nov. 29, 2005) (interviewee requested not to be named in the footnote due to employment concerns).

16. Many people seem to believe that a tribal court cannot objectively decide what is in the best interests of the child. The reality is, however, that tribes can and do decide what is in the best interest of the child in an objective manner. For example, in *In re Adoption of Halloway*, 732 P.2d 962 (Utah 1986), the case was transferred from Utah court to the Navajo Nation court, where the Navajo Nation tribal court decided that although the child was Navajo, because of the bonding that had occurred over many years of living with the non-Indian family, it was in the Navajo child’s best interest to remain with that family, but return to the Navajo reservation during the summer months. *In re Halloway*, WR-JV-CV-71-84 (Nav. Window Rock Dist. Ct., Nov. 10, 1987) (unpublished opinion on file with author).


18. *Id.* at 16.

19. Interview with tribal attorney (Nov. 29, 2005) (interviewee requested not to be named in the footnote due to employment concerns).


25. 25 U.S.C. § 1911(a) (2000) ("An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.").

26. 25 U.S.C. § 1911(b) (2000) ("In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: Provided, That such transfer shall be subject to declination by the tribal court of such tribe.").

27. Id. Included among the reasons that a tribe may decline transfer are that they do not have a tribal court or do not have enough funding to handle all of ICWA cases that come from urban areas.

28. Id.

29. 25 U.S.C. § 1911(c) (2000) ("In any State court proceeding . . . the Indian child's tribe shall have a right to intervene at any point in the proceeding.").


43. RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION (Pantheon Books 2003) (providing an excellent historical analysis of American race relations from the rape and sexual exploitation of black women by white men to our sad history of racial classifications and laws banning interracial marriages and adoptions).

44. Id. at 416. When a case is brought to court, a judge normally rules based on prior precedent or decisions that the same court has handed down on the issue before. When a case is decided on a case-by-case basis, it means that the judge will look at each case on its own without looking to precedent.

45. Id. at 485.
46. Id. at 486.
47. Id.
49. Id. at 490–92.
50. Id. at 492.
51. Id. at 491–92.
52. Id. at 497.
53. Id.
54. Id. at 497–99.
55. Id. at 497.
56. Id. at 498 (citing B. J. Jones, The Indian Child Welfare Act Handbook 311 (American Bar Association 1995)).
57. Id. at 499.
58. Id. at 500.
59. Id. See also Carol Locust, Split Feathers... Adult American Indians Who Were Placed in Non-Indian Families as Children, 44 Ontario Association of Children’s Aid Societies (3) (2000) (tracking twenty Indian adults who were adopted by non-Indian families, but susceptible to many of the same criticisms as Dr. Westermeyer’s study).
60. Id. at 501–02 (citing Dr. Joseph Westermeyer, The Apple Syndrome in Minnesota: A Complication of Racial–Ethnic Discontinuity, 10 Journal of Operational Psychiatry 134 (1979)).
61. Joint Hearing by the Senate Select Committee on Indian Affairs and the House Committee on Intercing and Insular Affairs, Indian Child Welfare, 93d Cong., 2d Sess. (April 8–9, 1974).
68. 41 Cal. App.4th 1483, 1512, 49 Cal. Rptr.2d 507 (1996). In In re Bridget R., the California appellate court wrote a lengthy analysis justifying the existence of the Existing Indian Family exception on the grounds that without such an exception, the Act would be unconstitutional. The court
held that without the exception, ICWA’s “application runs afoul of the Constitution in three ways: (1) it impermissibly intrudes upon a power ordinarily reserved to the states [which violates the 10th Amendment of the Constitution], (2) it improperly interferes with Indian children’s fundamental due-process rights respecting family relationships; and (3) on the sole basis of race, it deprives them of equal opportunities to be adopted that are available to non-Indian children.” The court applied a strict scrutiny test, which requires that ICWA serve a compelling governmental interest, be narrowly tailored, and be the least restrictive means of serving that compelling governmental interest. While the court conceded that there was a compelling state interest in protecting tribal stability, it held that ICWA’s purpose of preserving Indian culture would not be served by applying it to children who did not have a significant relationship with an Indian community. See infra note 115.

70. Id. at 506.
71. Id. at 507–08.
72. Id. at 508.
73. Id.
75. Id. at 506; See also Carole Goldberg, Descent into Race, 49 UCLA L. REV. 1373, 1387 (2002).
76. Id.
77. Id. at 513.
78. Id. at 513, 518.
79. Id. at 513.
80. Id. at 35.
81. Id. at 488, 504–11; See also Barbara Atwood, Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. REV. 1051 (1989) (discussing the complicated jurisdictional issues that arise from ICWA).
83. Id. at 514.
84. Id. at 504–11.
85. See generally Christine Metteer, Pigs in Heaven: A Parable of Native American Adoption under the Indian Child Welfare Act, 28 ARIZ. ST. L. J. 589, 608 (1996) (discussing the difficulties arising from courts ignoring the Act definition of Indian and creating their own determination of Indianness).
86. Randall Kennedy, supra note 43, at 516.
88. Id. at 2148.
93. Consider how many U.S. citizens would be excluded if political affiliation were required.
98. *Id.* at 204–05, 635 P.2d at 189–90.
99. *Id.* at 206, 635 P.2d at 191 (citing *Garay Uppen v. Super. Ct. of Pima County*, 116 Ariz. 81, 567 P.2d 1210 (app. 1977)).
100. *Id.* at 206, 635 P.2d at 191 (citing *Application of Morse*, 7 Utah 2d 312, 324 P.2d 773 (1958)). It should be noted, however, that this case was issued before *Mississippi Band of Choctaw Indians v. Holyfield*, which more or less resolved the dispute on bonding of an adoptive parent with an adoptive child by stating that "whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question.... Had the mandate of ICWA been followed in 1986, of course, much potential anguish might have been avoided, and in any case the law cannot be applied so as automatically to 'reward those who obtain custody, whether lawfully or otherwise, and maintain it during any ensuing (and protracted) litigation.'" Although in *Holyfield*, the issue was whether the tribe had exclusive jurisdiction to hear the case and not the good cause exception of §1915, *Holyfield*'s language is widely known and is, at the very least, persuasive evidence of the Supreme Court's opinion on the import of foster parent bonding in the statute. 490 U.S. 30 (1989).
101. 130 Ariz. 202, 208, 635 P.2d 187, 193 (1981) (noting that appellant was entitled to the return of her child, and any potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to the mandates of the Act).
The Existing Indian Family doctrine holds that a child must come from an Indian family that lives on the reservation, have a deep connection with his or her tribe, or practice traditional culture to be an Indian child to whom ICWA applies. This doctrine has received heavy criticism as being an overt, judicially created exception that is contrary to the clear intention of ICWA; however, a detailed discussion of the history and its ramifications of the Existing Indian Family exception is beyond the scope of this paper. See Lorie M. Graham, "The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine," 23 AM. INDIAN L. REV. 1 (1998); Barbara Ann Atwood, Flashpoints under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance, 51 EMORY L.J. 587 (2002); Charmel L. Cross, The Existing Indian Family Exception: Is It Appropriate to Use a Judicially Created Exception to Render the Indian Child Welfare Act of 1978 Inapplicable?, 26 CAP. U. L. REV. 847 (1997).

States that have rejected the exception either by case law or by statute include Arizona, Alaska, Idaho, Iowa, Michigan, Montana, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Dakota, Utah, and Washington. States that have applied the exception include Alabama, Indiana, Kansas, Kentucky, Louisiana, Missouri, and Tennessee. It should be noted that several states that have a large number of Indian children, especially in urban environments, have embraced this doctrine, such as California, Washington, and Oklahoma. See In re Baby Boy C v.


118. Id. at 347, 736 P.2d 829, 830.
119. Id. at 349, 736 P.2d 829, 832.
120. Id. (citing 25 U.S.C. § 1915 (2000)).
121. Id. at 350, 736 P.2d 829, 833.
122. 198 Ariz. 154, 7 P.3d 960 (2000).
123. Id. at 155, 7 P.3d at 961.
124. Id.
125. Id.
126. Id. at 156, 7 P.3d 962.
127. Id.
128. Id. at 159, 7 P.3d 965.
129. Id.
130. Id. at 157–58, 7 P.3d 963–64.
131. The earlier version of the bill would have required “significant contacts” with a tribe before tribal court jurisdiction of an Indian child not living on the reservation would be considered. See Indian Child Welfare Act, S. 1214, 95th Cong. § 102(c) (1977) (citing S. Rpt. 95–597 at 4 (1977)).
133. Id.
136. The American legal system is designed so that the legislative body (Congress) creates the law, and the judicial body (courts) interprets those laws. Judges should not add to the law or read into the law anything that is not already there. If there is ambiguity in a particular law, a judge may look to the legislative history that goes along with the law when it was working its way through Congress, or if there is a sufficient amount of ambiguity a judge may find the law void for vagueness.
138. Initial Report of States by the United States to the UN Human Rights Committee, CCPR/C/81/Add. 4 at 849 (August 24, 1994).
139. 171 Ariz. 104, 828 P.2d 1245 (1992). *Forum non conveniens* is a doctrine that allows litigants to
change the venue or the location of a case based on the fact that the first venue is sufficiently not convenient so as to create a hardship on the parties involved.

140. Ultimately the author agrees with Kennedy that judicial activism in ICWA was invited by the law. If the goal is to get rid of the Existing Indian Family exception, then tribes must appeal to Congress, as it is likely that the U.S. Supreme Court will shy away from this issue. However, whether advocating for an amendment is strategically wise at this juncture is not considered by this paper.

141. Id. at 105–06, 828 P.2d at 1246–47.

142. Id. at 106, 828 P.2d at 1247.

143. Id. at 107, 828 P.2d at 1248 (citing In re Robert T., 200 Cal. App. 3d 657, 668, 246 Cal. Rptr. 168, 175 (1988)).


145. Id. at 107–08, 828 P.2d at 1248–49.

146. Id. at 108–09, 828 P.2d at 1249–50.


150. Id. at 521, 958 P.2d at 462.


152. Id.


155. Id.


157. Available at http://www.factfinder.census.gov (Database: Census 2000 Summary File 2 (SF-2) 100-Percent Data with Query: All urban areas/American Indian and Alaska Native alone or in combination with one or more other races).
159. Id.
160. 291 N.W.2d 278 (S.D. 1980).
161. In re Guardianship of D.L.L. and C.L.L., 291 N.W.2d 278 (1980) (holding that reservation domicile was not lost by any alleged abandonment by the parent).
162. Id.
163. Id. (citing South Dakota Codified Laws 19-15-2 (2000)).
164. Id. (citing Buckley v. Fredericks, 291 N.W.2d 770, 771 (S.D. 1980)).
166. 691 N.W.2d 622, 2005 SD 4 (2005).
167. Id. (citing 25 U.S.C. § 1912 (2006)).
169. Id. (citing In re L.N.W., 457 N.W.2d 17, 18 (Iowa App. 1990)).
170. Id. (citing Matter of K.H. and K.L.E., 981 P.2d 1190, 1193, 294 Mont. 466, 469 (1999)).
173. 325 N.W.2d 53 (1982).
174. Id. at 54.
175. Id. at 54–55.
176. Id. at 56 (Wollman, dissenting).
177. Id. at 57 (Wollman, dissenting).
179. Id.
181. Id. at 311.
182. 422 N.W.2d 597 (1988).
183. Id. at 774.
184. Id.
185. Id.
186. Id.
187. Id. at 774–75 (Konenkamp, dissenting).
188. Id. at 775 (Konenkamp, dissenting).
190. Id. at 826–33.
191. Sisseton-Wahpeton Sioux Tribe has since changed its name to Sisseton-Wahpeton Oyate. Many tribes across the nation are changing their names to more accurately reflect their linguistic and sociocultural heritage.
192. *Id.* at 835.
193. *Id.* at 834.
194. 325 N.W.2d 53, 56 (1982) (Wollman, dissenting) (stating that “although a rule of substantial compliance may suffice to carry out notice provisions governing mundane matters of property law . . . more is required when the interests at stake are as important as those protected by ICWA”).
196. *Id.* at 372.
201. *Id.* at 169–75.
202. *Id.* at 176–77 (Henderson, dissenting).
204. 42 U.S.C. 620 et seq. and 42 U.S.C. 670 et seq., respectively. If a tribe operates a Title IV-B program, it is facilitated through a direct grant from the Department of Health and Human Services (DHHS). However, if a tribe operates a Title IV-E program, it is often through a welfare agreement with state and/or counties. 42 U.S.C. 671(a)(15) as amended by section 101 of ASFA.
205. *Id.* at 619.
206. *Id.*
208. *Id.* at 100 (citing *Matter of Adoption of Baade*, 462 N.W.2d 485 (SD 1990)).
209. This ruling will no doubt be beneficial to the child by providing stability in the home life; however, it is less clear that this is the type of relationship that Congress intended to protect.
211. *Id.* at 788–89.
212. *Id.* at 789.
213. *Id.* at 791.
214. *Id.*
215. *Id.* at 792.
218. *Id.* at recommendation 5, 7.
220. See notes 25-30 and accompanying text.
221. See notes 236-294 and accompanying text.
224. Id.
225. Id. at 117-18.
226. Id. at 162.
227. Id. at 118.
230. Id.
236. 25 U.S.C. § 1915 (2000); Pascua Yaqui Tribe Res. No. C04-06-02 (2002) (providing an example of a tribe that altered the placement preferences set out in ICWA). The option for a tribe to provide an alternative-placement standard is provided for in ICWA, but ICWA is silent on whether the tribal court must also adhere to these alternative-placement preferences, or whether only state courts must use these alternative-placement preferences.

237. Pascua Yaqui has chosen to supplant ICWA placement preferences with their own placement preferences, which state courts must follow. However, the Resolution on ICWA also states that TPR and adoption are not preferred, and the states are not formally bound by these preferences of the tribe. Arizona, however, has been willing to follow these preferences in most cases.


242. In re Documenting the Marriage of Slim, 3 Nav. R. 218 (1982) (holding that although there may be a traditional divorce mechanism that could be considered Navajo custom, the Navajo Tribal Council has enacted a statute that states that no person married by tribal custom can claim to be divorced and remarry until the Courts of the Navajo Nation issue a certificate of divorce and the statute overrides the Navajo custom). Res. No. CN-69-02 (November 13, 2002) ("Amending Title 1 of the Navajo Nation Code to Recognize the Fundamental Laws of the Dine").


244. Dawes v. Yazzie, 5 Nav. R. 161, 165 (1987) (holding that judicial notice is appropriate in matters of custom and tradition of facts "every damn fool knows").


249. Id. at 193 (citing 7 N.T.C. § 204 (1985) (Res. No. CD-94-85 (Dec. 4, 1985)).

250. Id. at 193–94.
217

251. *Id.* at 194 (citing *Gary Witherspoon, Navajo Kinship and Marriage* 94–95 (University of Chicago Press 1975)).

252. *Id.* at 194 (citing Nav. Ct. Solicitor Op., 83-10 (1983)).


254. *Id.* at 194.

255. *Id.* at 195 (citing Nav. Ct. Solicitor Op., 83–10 (1983)).

256. *Id.*

257. *Id.* at 195 (citing *In Re Estate of Apachee*, 4 Nav. R. 178 (1983)).

258. *Id.* at 196 (citing 9 N.T.C. § 615(a) (1960)); (Res. No. CN-64-60 (Nov. 18, 1960)).

259. *Id.* at 196 (citing 9 N.T.C. § 615(b) (1960)); (Res. No. CN-64-60 (Nov. 18, 1960)).

260. *Id.* at 196.


262. 5 Nav. R. 121 (1987).


264. *Id.* at 25.

265. *Id.*

266. *Id.* at 122.

267. *Id.*

268. *Id.* at 123.

269. *Id.* at 123–24.

270. State courts have withheld transfer of ICWA cases to tribal courts because the tribe requested the transfer too late in the proceedings. The Navajo Nation also only has one attorney working on ICWA cases, which may reduce the ability of the tribe to effectively bring cases back to the reservation for trial.


273. *Id.*

274. *Id.* at § 1(e).

275. *Id.* at §1(f).

276. *Id.* at § 1(g).

277. *Id.* at § 29(a)(i).

278. *Id.* at § 2(a)(ii).

279. *Id.* at § 2(b)(i).

280. *Id.* at § 2(b)(ii)-(iii).

281. *Id.* at § 3(b).
282. Id.
283. Id.
284. Id. at § 2(g).
295. The author was unable to verify whether this precedent is still good law or if it has since been overruled by the Northern Plains Tribal Appellate Court. As mentioned earlier, tribal courts are not always consistent about publishing case law, and therefore, it is not always clear what the current status of tribal law is, especially to an outside researcher. This paper attempts to breach this barrier, but tribal communities are still the best sources for legal commentary.
297. Id. at 23.
299. Id.
300. Id.
301. Id. at 19.


305. *Id.* at 20.

306. *Id.* at 50.


308. *Id.* at 45.

309. *Id.* at 37. In addition, once the tribe took over family preservation services, there was a marked increase in self-referrals, indicating that the community accepted the programs as legitimate.

310. *Id.*


312. *Id.* at 36-37. Interestingly, nearly all of the children chose spiritual and/or cultural as one of their life domains, seemingly indicating that these are areas that the younger generation feel the community, as a whole, needs to work on.


315. *Id.* at 47.

316. Interview with Norma C. Martinez, MSW, Pascua Yaqui Social Services (Nov. 28, 2005).

317. This means that there is no extra vigilance on the part of social services to find the earliest signs of at-risk families, or to concentrate on preventative measures before any signs develop. They often rely on referrals from the states and from Pascua Yaqui Tribe Behavioral Health Department.

318. *Id.*


320. “Dine” is a term that Navajos use to refer to themselves and their culture.

321. *Id.*

322. *Id.*

323. Interview with Ronald Phillips, Navajo Nation Promoting Safe and Stable Families Project (Dec.
A hogan is a traditional Navajo house. There are two types of hogans: the female hogan, which has six or eight sides and serves as the family home, and the male hogan, which is smaller and shaped like a pyramid. The male hogan is used for private gathering and ceremonies. Scott Tybony, The Hogan: The Traditional Navajo Home (Southwest Parks and Monuments Association, 1998).


The Blessing Way ceremony is used to bless the one sung over to provide them luck and health. It is often done for expectant mothers, but is not limited to such an occasion. Leland C. Wyman and Berard Haile, Blessingway (University of Arizona Press 1970).