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STATE VS. TRIBE:
IMPLEMENTATION OF THE
INDIAN CHILD WELFARE ACT IN ARIZONA

by
Lorinda Maile Natsu Mall

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A Thesis Submitted to the Faculty of the
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STATEMENT BY AUTHOR

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ABSTRACT

The Indian Child Welfare Act (ICWA) was enacted in response to the removal of Indian children from their homes at exorbitant rates by state social services. Many state actors, including state courts, resist the ICWA because they feel the best interests of the child is lost when the Act is followed. This paper analyzes how Arizona's state courts are implementing the ICWA by comparing early appellate cases with current cases. What is lost in most ICWA research is what tribes are doing to implement child welfare on reservations. Thus, this paper also incorporates an analysis on tribal court decisions, tribal child welfare codes, and tribal family preservation programs. When possible interviews of tribal officials were conducted to supplement written material available on tribes. With an understanding of the tribal perspective on the ICWA and child welfare, in general, we will gain a more accurate picture of the ICWA implementation statewide.
INTRODUCTION

Rose, a Navajo woman, was adopted in the early 1960's 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. 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. The family was obviously grieved by the loss of their child and often wondered where Rose was and how she was doing. After graduating from the drug program, Rose returned to the reservation where she was born to be reunited with her family. In Rose's day there were no family preservation programs geared to the special needs of Indian people. Now, more than forty years after Rose's adoption, we finally have legislation in place that recognizes this connect between family and Indian people, so that hopefully, there will be no more stories like Rose's story.

Before the ICWA was enacted Rose's story was a common occurrence. Indian children were being taken from their homes at exorbitant rates. A survey of sixteen

1 Rose is a pseudonym.
3 According to a House Report, the high rate of out-of-home placements of Indian child 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 one 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).
states in 1969 revealed that approximately eighty-five percent of Indian children in foster homes and ninety 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-Indians 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."

The 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.

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6 Id.
7 93rd Cong. 2d Sess. 1, 3 (1974).
8 Id.
The effect of 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. Indeed we often forget that it is not just the child that suffers; the family does not forget the loss of that child either. The effect on the entire family is something that is innately dealt with in tribal family preservation programs. Often tribal family preservation programs include the entire extended family in their service plan and not just the immediate family. These services have proved successful on several reservations and seem to point to a philosophical difference in how Indian people view family. This different worldview must be incorporated into State Social Services in order to increase the success rate of family preservation of Indians.

The purpose of the 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 the ICWA, it is per se in an Indian child's best interest to remain with its family and/or tribe. It has been nearly thirty years since the passage of the ICWA and we are still unclear about exactly how successful this legislation has been. For many, this can be explained because of the lack of accountability in the implementation of the Act. No agency is charged with oversight of ICWA implementation and no provision

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10 Id. at page 61-63.
11 Per se is an often used term in the law meaning by itself, inherently or strictly.
14 Id. at 2.
was included to provide repercussion for noncompliance.\textsuperscript{15} Without knowing whether the ICWA is being implemented successfully by states it is difficult to draw conclusions on its usefulness and thus justify its continued existence.

\textsuperscript{15} The ICWA contains no provision for agency oversight. HHS does not have specific oversight authority with respect to the ICWA, but it is responsible for ensuring that states provide meaningful information about the ICWA compliance as part of Title IV-B reporting requirements. \textit{Id.} at 58. HHS also has issued guidance to states on the ICWA implementation, however HHS insists that they do not have the authority to hold states accountable for lack of implementation. \textit{Id.} at Appendix III at 79: Comments from the Department of Health and Human Services dated March 21, 2005.
STATEMENT OF PROBLEM

The ICWA's dual purpose of protecting Indian children and stabilizing tribal culture is a worthy, but lofty bar. What we know about the implementation of the ICWA is that it is not standardized. State courts vary as to which doctrines they adhere to and state social workers have been somewhat resistant to the congressional idea of the best interests of the an Indian child necessarily resting in tribal hands. What is lost in this framework is what tribes are doing to implement child welfare on the reservation and what they are doing to work with states to ensure that urban Indian children's rights are being met. Without understanding the tribal perspective on ICWA and child welfare, in general, we will not have an accurate picture of ICWA implementation and Indian child welfare nationwide. This paper seeks to first analyze the current state of ICWA implementation in Arizona state courts and social services, and then look at what specific tribes in Arizona are doing in their child welfare codes, their court decisions, and tribal social services. By obtaining a more complete picture of the state of ICWA implementation and Indian child welfare in all of Arizona, we can best determine what changes, if any, are required to best meet the needs of Indian children.

A review the ICWA cases from both Arizona state courts as well as several Arizona tribal courts within ten years of the passage of the ICWA and compare these cases to the ICWA cases currently appearing. A comparison of earlier judicial interpretations of the ICWA with current interpretations can facilitate the discussion of whether one goal of the 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 the 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 the 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.\(^{16}\) Third, many tribal courts are not courts of record, and thus do not write out decisions for the vast majority of their cases for publication. Thus, tribal court cases are often difficult to obtain. I have been able to obtain some tribal court cases and have interviewed several tribal attorneys that handle the ICWA cases in order to flesh out the tribal perspective on this topic.

In the ten years following the enactment of the ICWA, Arizona state courts were dealing with issues relating to timing of notice to the tribe as required under the Act. The more recent Arizona cases grapple with issues revolving around concurrent jurisdiction, which the ICWA provides when the child is domiciled\(^{17}\) off the reservation, such as when transfer of jurisdiction\(^{18}\) to tribal court is proper. This indicates that Arizona courts have dealt with issues surrounding exclusive tribal jurisdiction in the 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\(^{19}\). To smooth this transition states and tribes need to work

\(^{16}\) Interview with Tribal Attorney (11/29/2005)(interviewee requested not to be named in the footnote).

\(^{17}\) Domicile is a legal term meaning the place where an individual have a permanent and fixed home for legal purposes.

\(^{18}\) Jurisdiction generally means the power, right, or authority to interpret or apply a law. It often refers to a court in a specific state where the litigants have domicile or where a substantial portion of the events at issue occurred.

\(^{19}\) 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
together to better understand each other’s positions. For example, although State Social Services often complain that tribes to 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 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.

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 and culturally appropriate services include the state transferring cases to a tribal court when appropriate, 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). See also, Eddie F. Brown, Gordon E. Limb, Toni Chance, and Ric Munoz, The Indian Child Welfare Act: An Examination of State Compliance in Arizona at 14 (December 2002), available at http://www.nicwa.org/resources/catalog/research/2002/01.ICWAArizona02.Rpt.pdf.

Id. at page 16.

22 Interview with Tribal Attorney (11/29/2005)(interviewee requested not to be named in the footnote).

culturally approved methods of reunification when providing services to Indian families in the system. 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.24 States, in turn, must be willingly to 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 family 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 paper I will first discuss the purpose and importance of the ICWA to the maintenance of the tribe. Then I will explore the importance of tribal courts and how tribal culture influences the courts and the implementation of the ICWA in tribal courts. I will then compare Arizona state court decisions regarding the ICWA in the ten years following its passage with current cases. The next section will incorporate a discussion of tribal court ICWA cases. 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 of services.

METHODOLOGY

This paper draws from the both the legal field and social sciences, specifically American Indian Studies. As such much of the language has specific meanings in the law. When necessary, I will define these words so that there will be a common linguistic basis. However, it should be noted that while I do attempt to bring in more culturally relevant aspects in this paper, especially in the family preservation section, nearly every aspect of the paper draws from the law. Case analysis and legislative analysis are paramount and without this no conclusion can be accurate drawn.

This paper compares and contrasts the Arizona state court’s handling of ICWA cases to Arizona tribal court’s handling of these cases. I have reviewed and analyzed all of the Arizona state appellate court cases that deal with the ICWA. I have highlighted several of the important decisions that represent either an interpretation of first impression or a change/clarification of the law. However, my analysis has been greatly limited by my ability to obtain tribal court cases. Tribal courts are frequently not courts of record and judges rarely write opinions. Instead these judges render decisions orally, which, incidentally, is in keeping with tribal oral traditions. As such, this paper focuses on Navajo Nation’s written court decisions and several interviews with tribal officials from the Navajo Nation and Pascua Yaqui.

In addition, to focusing on court cases, this paper explores the differences between state family preservation models and tribal family preservation models. It is through the use of these models, and not through the courts, that many tribal members find themselves intimately acquainted with the ICWA implementation in Arizona. I have
incorporated some analysis on the different approaches to family preservation and the importance of a cultural match in terms of healing Indian families. In addition to print sources, I have obtained information vastly important and exciting information on the family preservation models used by Pascua Yaqui and Navajo Nation through interviews with the directors of each tribe’s family preservation office. These programs are both in such new stages of development that no literature yet exists, and that little scientific analysis has been done as to their success. However, the fact that these tribes are using their sovereignty to take control over their own children is an encouraging sign and time will only tell whether this bold step will pay off.

All interviews were conducted over the telephone lasting approximately half an hour each. Questions were developed in advance based upon the information that the author felt would best bring out the tribal official's knowledge of the ICWA in their capacity. However, an opportunity was provided at the end to allow for any additional information that the subject felt would be useful. Notes were taken contemporaneously, typed and formatted, and are on file with the author. Informed consent was obtain before the interview was conducted when the project was fully explained to the subject. In addition, consent forms were faxed to the subject, signed, and then returned to the author.
LITERATURE REVIEW

The ICWA is a highly controversial piece of legislation. Both the state and tribe have strong interests in protecting Indian children to the best of their ability. States have often argued that it is in the best interest of the child to live in a nice home regardless of the ancestry of the foster/adoptive parents. Tribes, on the other hand, believe that it is in the best interest of the child and the tribe for the child to remain with tribal members. In the wake of this debate, Congress enacted the ICWA and numerous scholars have written on this topic.

Unfortunately no federal agency has oversight over the ICWA. Had an agency had oversight authority the likelihood that there would be more data available about the placement of Indian children at the time of enactment verses the level of out-of-tribe placement today would much higher. One of the largest problems with studying the ICWA is that very little statistical data is available to form accurate conclusions about the effectiveness of the ICWA implementation and formulate strategies for future action.

Much of the literature revolves around the perceived racism of requiring an Indian child to be adopted first by Indian parents. The most notable scholar championing this argument is Professor Randall Kennedy of Harvard Law School. Kennedy’s book Interracial Intimacies: Sex, Marriage, Identity, and Adoption largely explores his belief of the ill-advised policy of racial matching in adoption, however he does devote an entire chapter to the ICWA and the seemingly special status of Indian children with regards to this matching policy.25 Under Kennedy’s view “race would not be allowed to play any

25 Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption (Pantheon Books 2003).
part in the selection of adoptive families, unless there was some compelling justification" determined on a case-by-case basis.26

As Kennedy views it, ICWA proponents espouse three main arguments: 1) unwarranted separation of Indian children from their families by state agencies; 2) the placement of Indian children with non-Indian foster or adoptive families, and; 3) state officials routinely infringing upon tribal sovereignty.27 Kennedy asserts three arguments as to why there needs to be an ICWA amendment. First, he notes that there is reason to question Congress' finding that there was a child-care crisis in Indian Country.28 Second, he believes that one of the experts that testified at a hearing was in actuality practicing "junk science," which meant that the Act was based on faulty data.29 Third, 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.30

Before turning to my own analysis of Kennedy's position, I will briefly discuss other scholar's responses. Although Kennedy does acknowledge that tribes are sovereign, many scholars feel he does not take into full consideration that tribes are not merely racial groups, but sovereign governing entities and that the children are thus politically tied to the tribe. This argument has been put forth by Margaret Brinig.31

26 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 their own without looking to prior precedence.
27 Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 485-86 (Pantheon Books 2003).
28 Id. at 485.
29 Id. at 485.
30 Id.
similar argument about the uniqueness of tribes in comparison to other minorities such as African-Americans is brought forward by Hawkins-Leon and Metteer. They hold that while Kennedy may be correct in stating that strong evidence does not exist that an Indian child who is raised by an Indian family will be better served than if raised by a non-Indian family, tribes nonetheless should be exempted from the argument that race does not matter because race is not the distinguishing factor in the analysis. In other words, similar to the reasoning in Morton v. Mancari, tribes are a political group and not a racial group. This can be supported by the fact that some people who are biologically Indian will nevertheless not qualify under ICWA as a priority placement because they are not enrolled members of a federally recognized tribe.

Professor Kennedy takes issue with the procedure of enacting the ICWA. 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 being taken as a child because she was playing in the mud and her feet were dirty. Kennedy rightly notes that this witnesses could have been basing her story upon

33 Id.
34 417 U.S. 535 (1974) (holding that the BIA may promote Indian employees over non-Indian employees without violating the Civil Rights Act because as members of federally recognized tribes they are not just racially classified, but politically classified and that there are many biologically Indian people who are not members of their tribe and therefore will not fall into the political category of Indian).
35 In order to have “special status” as a Native American you must be enrolled in a federally recognized tribe. Currently there are over 550 federally recognized tribes in the United States. The Bureau of Indian Affairs maintains a current listing of federally recognized tribes that can be obtained from their website at http://www.doi.gov/leaders.pdf
36 Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 488-99 (Pantheon Books 2003).
37 Id. at 490-92.
lore that her family told her 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 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. 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 decision for Indian children. However, as Kennedy wisely points out that much of the problems with Indian children being removed at disproportionate rates may also be due to extreme poverty, drugs, and violence that occurs all too often on many reservations. The task of "fixing" these problems, being much more daunting, may not have appealed to many politicians. Kennedy, therefore, agrees with B.J. Jones in his assertion that in the end the ICWA was a "procedural statute for a substantive problem."

Kennedy takes issue with the assumption that an Indian home is better equipped to handle the needs of Indian children. 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." He called this

38 Id. at 492.
39 Id. at 491-92.
40 Id. at 497.
41 Id.
42 Id.
43 Id. at 497-99.
44 Id. at 497.
45 Id. at 498 (citing B.J. Jones, The Indian Child Welfare Act Handbook 111 (1995)).
46 Id. at 499.
47 Id. at 500.
Kennedy correctly notes that Dr. Westermeyer's study not only had no control group, but the small, geographically limited, and non-random sample is not up to muster using the scientific method. Kennedy's argument, while persuasive on some fronts, 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 finding appropriate witnesses to testify at hearings. Thus, while Kennedy may be accurate to question the findings of Congress in as much as they fault the state agency's for their racism without consideration of the socio-economic conditions of many tribal members, it is not accurate to state that Dr. Westermeyer's testimony or studies were the basis of the ICWA. In fact, the issue of Indian child welfare was subject to Congressional hearings as early as 1974. In addition, a version of the ICWA was drafted and introduced in 1977, which is one Congressional year prior to its enactment. Although that bill did not pass out of Committee, the following year it was re-introduced largely unchanged as S. 1214 and passed out of the Senate Select Committee on Indian Affairs on November 3, 1977. 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, 1977.

48 Id. See also, Carol Locust, Split Feathers... Adult American Indians Who Were Placed in Non-Indian Families As Children, Ontario Association of Children's Aid Societies vol. 44, no. 3 (Oct. 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).

49 Id. at 501-02 (citing Joseph Westermeyer, The Apple Syndrome in Minnesota: A Complication of Racial-Ethnic Discontinuity, 10 Journal of Operational Psychiatry 134 (1979)).

50 Joint Hearing by the Senate Select Committee on Indian Affairs and the House Committee on Interracial and Insular Affairs, Indian Child Welfare, 93d Cong. 2d Sess. (April 8-9, 1974).


52 S. 1214 95th Cong. 1st Sess. (April 1, 1977).
1978 as a clean bill.\textsuperscript{53} However, ultimately the original S. 1214 with several floor amendments passed the full House and was signed by the President.\textsuperscript{54} 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 care should include "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."\textsuperscript{55} The United States has adopted the Hague Convention, including this article. Plainly, this means that the United States has an international obligation to ensure that a child in need of a home be placed in a home 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 disproportion levels. He cites the high rates of poverty and alcoholism on the reservation as possible reasons why Indian children

\textsuperscript{53} H.R. 12533 95\textsuperscript{th} Cong. 2d. Sess. (May 3, 1978).
\textsuperscript{54} President Carter signed the ICWA on November 8, 1978.
were being taking 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 chose not disclose their Indian heritage and then later when their life situation changes disclose that same heritage as occurred in In re Bridget R. In re Bridget R. was a case coming out of California, which held that unless the Existing Indian Family exception was applied, the ICWA would be unconstitutional. The case held that the Act not only violates the 10th Amendment by impermissibly intruding upon a power ordinarily reserved to the states, but it also violates the Indian child's fundamental right to due process and equal opportunity of being adopted by restricting their perspective adopters.

Kennedy calls In re Bridget R. an example of a parent taking on a fictive 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 and that when the father first wanted to give up his twins for adoption he already had a family that he needed to support. When the father decided to disclose his Indian heritage, he was going through a divorce and was largely without access to his children, and it is unclear from Kennedy's account whether the children with his wife were actually his children or those from a prior marriage.

Kennedy also states that in this case the father had no ties to his heritage, which

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56 Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 497-99 (Pantheon Books 2003).
58 Id.
59 Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 511 (Pantheon Books 2003).
60 Id. at 506.
61 Id. at 507-08.
by my interpretation of the facts Kennedy describes shows that the father, in fact, had a connection to his heritage. 62 First, parents commonly assume the responsibility of enrolling their children in the tribe, so the fact that his mother enrolled him does not necessarily mean that he would not have chosen to later on. 63 Second, although he did not inform his family of the planned 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. 64 Third, he married a woman who claims Indian heritage and thus most likely connected partly because of their common culture. 65 Fourth, they lived in a suburb of Los Angeles that is colloquially known to have a high Indian population. 66

Kennedy frequently states that he feels it is unfair to burden or impose a culture upon children, who have no choice in the matter. 67 Instead he proposes to never look at race or culture when placing children in foster or adoptive homes. He goes on to state that the ICWA placement hierarchy is meant to prevent to “extinction” of cultures, but he believes that this promotes the “freezing” of the tribal culture instead of allowing for cultural evolution. 68 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 his solution the child would still have no choice. Thus, whether they are placed in an Indian home or the home of a randomly chosen racial couple, the child is still in the same position. To apply his solution would likely result in an over-reliance of economic factors in

62 Id. at 508.
63 Id.
64 Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 509-11 (Pantheon Books 2003).
65 Id. at 506; See also, Carole Goldberg, Descent into Race, 49 UCLA L. Rev. 1373, 1387 (2002).
66 Id.
67 Id. at 513.
68 Id. at 513, 518.
determining child placement because absent cultural connection many Indian homes would pale in comparison to middle class white American homes.

Kennedy assents that Indians marrying non-Indians carry a greater assimilative “threat” than non-Indians adopting Indian children.69 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. Just because an Indian marries a non-Indian does not mean that that individual leaves his/her tribal culture. Second, Indian people are highly aware of the issues involved in marrying someone of a different tribe or a non-Indian. Many Indians think twice about not only the cultural complexities of raising a so-called mixed-blooded child, but about whether or not their children will be eligible for enrollment in their tribe. However, ultimately people will marry who they love, a stance about which Kennedy is heavily in favor.70 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.

Even though, Kennedy holds that the ICWA needs to be amended because he believes that race-matching is not productive, he makes an excellent point when he says that the ICWA has invited many judges to find ways around the law.71 Judges have taken

69 Id. at 513.
70 Id. at 35.
71 Id. at 488, 504-511; See also Barbara Atwood, Fighting Over Indian Children: The Uses and Abuses of
liberties in determining "good cause" to deviate from the placement preferences mandated by the 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 compared to most regulations. Some state judges have created a doctrine called the Existing Indian Family Doctrine, which effectively refuses to apply the ICWA to an Indian child who does not come from an "existing Indian family." The most obvious issue here is that a probably white middle-classed judge may not be in the best position to determine what is an Indian family. In the same way, Kennedy may not be in the best position to determine whether the father in 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 Brinig points out in many cases kinship/guardian care offers an alternative that is the least likely to upset the child's placement since they already known their new caretaker.

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73 Id. at 514*.
74 Id. at 504-11.
76 Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 516 (Pantheon Books 2003).
78 Id. at 2148.
fact, many tribes have a tradition of other kin caring for children of what we would consider a nuclear family. 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.79

Lastly, Kennedy states that the 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.80 Kennedy states that in the placement hierarchies established in the ICWA, 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.81 He holds that this last preference is a racial bias. However, the Act defines “Indian” as a member of a federally recognized tribe or Alaska corporation making it a political class bias.82 I would analogize this to a preference that an American child be placed with an citizen of any state in the United States before we look to a foreign country for an appropriate family for the child.

For an excellent analysis of the difficulties incorporated in the ICWA, Christine Metteer’s work has been a great inspiration. Her thoughtful analysis of the inconsistencies in state court applications of portions of the ICWA was of great help to developing informative questions for interviewing tribal social service workers, tribal

practitioners, and tribal judges.\textsuperscript{83} Metteer states that "at the core... are the differences between American Indian and Anglo philosophies concerning collective rights and community responsibility for children."\textsuperscript{84}

Metteer also discusses the importance that the ICWA places on tribal courts. The fact that the ICWA grants broad jurisdiction to tribes is a recognition of the important part that the tribe plays in balancing the interests of the parents and child.\textsuperscript{85} The ICWA recognizes that tribal courts should be given full faith and credit by state courts and that state courts should transfer ICWA cases to tribal courts unless there is good cause to refuse transfer. She notes that when difficult cases where an Indian child had bonded with white parents are transferred to tribal court, the tribal court decisions reflect similar concerns that the state court espoused.\textsuperscript{86} Thus implying that state court fears that tribal courts will act imprudently are largely overstated.

Perhaps one of the most informative scholars, especially in generally informing the reader of both state court decisions and tribal decisions has been the work of Barbara Atwood. Her insights in \textit{Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance}, lays out reasons why many state courts have adopted the Existing Indian Family Doctrine.\textsuperscript{87} Atwood does a good job of highlighting the divergent views of many state courts in interpreting the current state of

\textsuperscript{85} Id. at 608.
\textsuperscript{86} Id.
ICWA implementation from the Existing Indian Family Exception to the Best Interest of the Child standard.\textsuperscript{88} To start, Atwood points out that the removal of Indian children has a long history starting when children were taken to attend white, usually religious-run boarding schools back in the 1800s.\textsuperscript{89} Atwood also suggests creative solutions to some of the problems that state courts cite as reasons why they will not return Indian children to the reservation, such as allowing the white family that has bonded with an Indian child to keep the child on the condition that there is tribal visitation or to allow a form of "open adoption" as a way of accommodating both viewpoints.\textsuperscript{90}

One report that was monumentally useful to the development of this paper was published by the National Indian Child Welfare Association, entitled \textit{The Indian Child Welfare Act: An Examination of State Compliance in Arizona}.\textsuperscript{91} The report covered many of the problems that Arizona has faced in properly implementing the Act and provides some potential solutions. The report pointed to problems with adequately trained state social workers on ICWA issues, convergent time-frames required in the Arizona Model Court Act\textsuperscript{92} and the ICWA, lack of communication between the state and the tribe, and lack of resources for tribes to use to accept transfer of ICWA cases and to

\textsuperscript{88} Prior to the enactment of the ICWA, family courts determined child placement according to the "best interest of the child" standard. In its essence, a child would be placed with whichever family it would be in the best interest of the child to stay with or a child would be removed from its parents if it was in the child's best interest. Naturally, this standard does open the door to some biases such as socioeconomic bias. For example, when two adopting families are generally on equal footing save income.

\textsuperscript{89} Id. at 602.

\textsuperscript{90} Id. at 669-70.


\textsuperscript{92} The ICWA requires tribal and parent notification ten days prior to the commencement of proceedings, however, the Arizona Model Court Act mandates a Preliminary Protective Hearing be held five to seven days after a child is taken into custody. \textit{Id.} at 38 (citing personal communication Nancy Logan (June 19, 2002)).
educate state social workers. The report also noted that Arizona was one of the only states that has a tribal/state workgroup to address ICWA issues. The report indicated that better record keeping, more communication between the tribe and the state, and adequate tribal funding were all things that must be focused on in order to properly implement the ICWA in Arizona.

While this paper was a great help in terms of my background research on Arizona state’s implementation of the Act, it did not cover tribal implementation of the ICWA. However, it did provide survey result from tribal social workers, tribal practitioners, and tribal judges that were useful in highlighting some of the problem areas. The omission of tribal implementation of the ICWA, while understandable, created quite a gap in the available information on how tribes are implementing the ICWA, which has necessitated my incorporation of interviews with tribal social workers, tribal practitioners, and tribal judges. It is the hope of the author that this paper will begin to shed some light on how some tribes in Arizona are implementing the ICWA. By bringing forth positive models other tribes may be able to take another look at their states and their own systems of family preservation in order to find the most beneficial model for their unique tribal culture.

93 Id. at 13-21.
94 Id. at 21.
95 Id. at 19-21.
96 Id. at 46-56.
PURPOSE OF THE ICWA

The purpose of the ICWA is two-fold: to prevent the wholesale removal of Indian children from their homes and to promote the stability of tribes.\(^\text{97}\) The ICWA recognizes, in the Congressional Findings, that there is "no resource more valuable to a culture than its children."\(^\text{98}\) As such Indian children should be given every opportunity to grow up in the cultures into which they were born. The ICWA also sets out the basic premise that the best interest of an Indian child runs parallel to the best interests of the tribe.\(^\text{99}\) 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. Tribes have a great interest in keeping their children in their jurisdiction to grow up knowing their culture and their tribe. Indian children, in turn, have a great interest in knowing who they are, where they come from, and how they fit into their tribe's socio-political system. All of this can be accomplished by transferring child welfare proceedings to tribal court and placing Indian children with families within their own tribe.

The 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.\(^\text{100}\) The ICWA 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 case.\(^\text{101}\)


child is not domiciled on the reservation, the parents have an absolute right to veto a
transfer to tribal court from state court.\textsuperscript{102} In addition, a tribe may decline such a
transfer.\textsuperscript{103} If an ICWA case remains in state court, the tribe has the right to intervene at
any point in the proceeding.\textsuperscript{104} The 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.\textsuperscript{105} One of the benefits of the 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. One need only
look at the text of the Act to see the strong protection of tribal sovereignty and tribal
courts in the procedure for both Indian children domiciled on the reservation and off-
reservation.

The ICWA provides that in any involuntary proceeding in state court involving an
Indian child, notice must be provided to the parent and the child's tribe.\textsuperscript{106} The ICWA
requires that before an Indian child may be placed in foster care or parental rights may be
terminated that active efforts to provide remedial services and rehabilitative programs
proved unsuccessful.\textsuperscript{107} 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.\textsuperscript{108}

Similarly, no termination of parental rights may be ordered absent a determination,

\textsuperscript{102} Id.
\textsuperscript{103} 25 U.S.C. § 1911(b) (2000).
\textsuperscript{104} 25 U.S.C. § 1911(c) (2000).
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.\textsuperscript{109}

The ICWA sets out guidelines for a voluntary termination of parental rights by an
Indian parent as well. It requires that in any case where an Indian parent voluntarily
consents to foster care or termination of parental rights, that the 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.\textsuperscript{110} In any voluntary proceeding for foster care placement or termination of
parental rights or adoption placement 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.\textsuperscript{111} 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.\textsuperscript{112} Under the ICWA, if there is a showing that a child was removed or placed in
violation of the ICWA, the placement or termination of parental rights may be
invalidated.\textsuperscript{113}

The ICWA also sets out placement preferences that the State must following
when placing a child in foster care of 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 children'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 states that a tribe may set out a different order of preference that the State must also follow. Lastly, the 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 services. However, no appropriations were every authorized by Congress, and thus tribes have not been able to feel the full effect of this portion of the ICWA.

IMPORTANCE OF TRIBAL COURTS

The role of tribal courts is extremely important to Indian people. A detailed description of tribal jurisdiction is complex and beyond the scope of this paper.118 What can be said is that most crimes occurring on the reservation fall under concurrent tribal and federal jurisdiction.119 The federal government enacted a series of Acts starting in 1817 that reduced exclusive tribal jurisdiction to Indian-on-Indian misdemeanor crimes occurring on the reservation.120 The majority of serious crimes perpetrated by Indians on a reservation fall under concurrent jurisdiction; however unless “major crimes,”121 these crimes are generally not prosecuted by the federal Attorney General.122 In 1990, the Supreme Court held in Duro v. Reina that tribes did not have criminal jurisdiction over members of other tribes while within their reservation boundaries.123 Later that same year Congress responded by enacting the “Duro fix,” which recognized a tribe's inherent power to exercise criminal jurisdiction over all Indians.124 Thus, tribes are placed in a position where, in order to protect their people, they must prosecute crimes themselves. Since tribal courts only have jurisdiction over Indian perpetrators125, however, non-Indian perpetrators committing crimes on the reservation frequently go unpunished.

119 The exception is if the state is what is referred to as a P.L. 280 state, where the state has taken over the federal government’s former role in Indian affairs.
121 The Major Crimes Act was passed in 1885 and enumerated seven major crimes that if committed by an Indian on a reservation, regardless of whether the victim is Indian or non-Indian, would fall under the jurisdiction of the federal government. The number of enumerated crimes has since increased to sixteen. 18 U.S.C. § 1153 (2000).
On the civil side, tribes generally have jurisdiction over incidences occurring on the reservation, even if one of the parties is non-Indian. The U.S. government has, however, imposed certain limitations on the civil authority of tribal courts and simultaneously expanded some of the tribe’s regulatory powers, especially regarding environmental regulations. In 1981, the U.S. Supreme Court began to whittle away at tribal civil jurisdiction over non-Indians in *Montana v. U.S.*, where the Court held that the Tribe did not have regulatory jurisdiction over non-Indians hunting and fishing on a state owned river. In *Strate v. A-I Contractors*, the Court expanded the *Montana* ruling to include civil adjudicatory jurisdiction. In 2001 in *Nevada v. Hicks*, the Court held that a tribe’s adjudicatory jurisdiction over non-members cannot exceed its statutory jurisdiction. In other words, if a tribe can legally regulate a non-Indian by passing a tribal statute, they can also hear a similar case in tribal court. *Hicks* involved a civil suit brought by a tribal member in tribal court against a Nevada state police officer who came onto tribal lands for a crime that was committed on state property. Because of these unique facts the *Hicks* decision may only limit tribal civil jurisdiction over state officers coming onto tribal lands. Regardless of the limitations placed on tribal criminal and civil jurisdiction, tribes have increasingly begun to see the benefits of strengthening their

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128 There are several types of jurisdiction. Territorial jurisdiction or that belonging to a specific state or court. In addition there is subject matter jurisdiction, such as jurisdiction over regulations, crimes, and civil issues.
tribal courts in order to provide better protection for their members as well as to provide for a better future for their people.\textsuperscript{133}

Modern tribal courts came about following the Indian Reorganization Act of 1934.\textsuperscript{134} This Act allowed tribes to draft a constitution, establish a governmental system, and create a judicial system. After years of assimilation, tribes were in a poor position to return to their traditional judicial systems, and thus the new tribal court system was designed similarly to the BIA model.\textsuperscript{135} These newly created courts were designed to operate under and enforce the new tribal codes.\textsuperscript{136} The majority of cases heard in tribal courts are misdemeanors, family disputes, and minor civil matters.\textsuperscript{137} In addition, these courts operate under a system of restitution instead of retribution\textsuperscript{138}, meaning that defendants often plead guilty, and accept the responsibility of their actions, with the result that disputes are resolved in a more mutually beneficial manner.\textsuperscript{139} Unlike state courts, which are all-or-nothing models, many tribal courts attempt to heal the parities in the action.\textsuperscript{140} These differences make non-members 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

\textsuperscript{133} The Navajo Nation is arguably the best example of a strong judiciary. The Navajo Nation courts incorporate Navajo common law into their decisions, which legitimizes the Western-type court in the eyes of the people. In addition any case can be moved to the Navajo Nation Peacemaker courts, which utilize traditional alternative dispute resolution methods. Personal communication with Phil Bluehouse (12/05/05). \textit{See} H.R. Rpt. 83-648, 5-6 (1953).


\textsuperscript{135} Vine Deloria, Jr. and Clifford M. Lytle, American Indians, American Justice, 116 (University of Texas Press 1983).

\textsuperscript{136} Id.

\textsuperscript{137} Id. at 117-18.

\textsuperscript{138} Id. at 162.

\textsuperscript{139} Id. at 118.

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.\textsuperscript{141} 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{142} 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{143} 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 having a strong and independent judiciary.

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


\textsuperscript{142} Id.

family members that were experiencing difficult times. 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. Today, these obligations still provide a method for clan members to travel from place to place in a cost efficient manner. How an Indian person knows who they are and their place in the society is based on their family and relatives.

The importance of and view of family relations also influences how tribal courts implement the ICWA. Many tribal courts have held in differing degrees that the ICWA does not directly apply to them. For example, the Pascua Yaqui Tribal Council has enacted its own placement guidelines that not only the tribal court, but also the state court, must use. Thus, while the Pascua Yaqui Tribe supports the ICWA with its alternative placement regime, once a case is transferred to tribal court, they will apply

147 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 the ICWA). The option for a tribe to provide an alternative placement standard is provided for in the ICWA, but the ICWA is silent on whether the tribal court must also adhere to these alternative placement preference or whether only state courts must use these alternative placement preferences.
148 Pascua Yaqui has chosen to supplant the ICWA placement preferences with their own placement preferences, which state courts must follow. However, the Resolution on the ICWA also states that TPR and adoption are not preferred and the states, are not formally bound by these preferences of the tribe.
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 . . . the ICWA is, at least, instructive.” Thus, this court was reluctant to simply follow the ICWA, and instead opted to use the ICWA as persuasive evidence and thereby not be bound by the Act. These types of tribal court often utilize traditional beliefs concerning family and adoption as well as modern laws that have been incorporated into tribal practices. This difference in the interpretation of whether to apply the ICWA as well as the acknowledged difference in the view of family, gives rise to different reasonings in the ICWA cases that come out of Arizona state courts and Arizona tribal courts.

Since the passage of the ICWA in 1978, the Arizona state appellate courts have
heard thirteen cases dealing with the Act. Early cases focused on the technical
requirements outlined in the 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. The more recent cases have focused on the
determination of who has jurisdiction to hear a case where jurisdiction is concurrent,
often 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, which the
ICWA provides for exclusive tribal jurisdiction. Current jurisdictional cases are
dealing more with children domiciled off the reservation where the state has concurrent
jurisdiction, but may transfer the case to tribal court if requested to do so.

domicile of an Indian child is that of the mother); Goclanney v. Desrochers, 135 Ariz. 240, 660 P.2d 491
(1983) (holding that the domicile of a child is that of the mother); In Re Appeal in Maricopa County Juv.
Action No. A-25525, 136 Ariz. 528, 667 P.2d 228 (1983) (holding that Indianess must be established before
any part of the ICWA is applied including notice to the tribe); In Re Appeal in Maricopa County Juv.
Action No. JS-7359, 159 Ariz. 232, 766 P.2d 105 (1989) (holding that you must perfect enrollment before
the ICWA applies).
(holding that an out-of-state tribal court transfer can be denied because of forum non convines); In Re
Appeal in Maricopa County, Juv. Action No. JD-6982, 186 Ariz. 354, 922 P.2d 319 (1996) (holding that
parental veto over transfer to tribal court is absolute); Rachelle S. v. Arizona Dept. of Econ. Sec., 191 Ariz.
518, 958 P.2d 459 (1998) (holding that an expert witness does not need to be experienced on Indian culture
if the culture is not relevant to their testimony); Michael J., Jr. v. Michael J., Sr., 198 Ariz. 154, 7 P.3d 960
(2000) (affirming the rejection of the Existing Indian Family Exception in Arizona courts).
Early Arizona State Court Cases

The first Arizona case dealing with the ICWA was *In Re Appeal in Pima County Juvenile Action No. S-903*\(^{154}\). 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.\(^ {155}\) 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.\(^ {156}\) The mother's tribe intervened and requested transfer of jurisdiction.\(^ {157}\) The 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.\(^ {158}\) 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.\(^ {159}\) Thus, the trial court found that it had concurrent jurisdiction and good cause existed not to transfer the matter to tribal court.\(^ {160}\) 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.\(^ {161}\)

The appellate court's decision rested on the definition of domicile. The court

\(^{155}\) *Id.* at 204-05, 635 P.2d at 189-90.
\(^{156}\) *Id.*
\(^{157}\) *Id.* at 205, 635 P.2d at 190.
\(^{158}\) *Id.*
\(^{159}\) *Id.* at 205, 635 P.2d at 190.
\(^{160}\) *Id.*
\(^{161}\) *Id.*
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. A child takes the domicile of its mother until a new one is lawfully acquired. Thus, the child, in this case, was deemed to be domiciled on the reservation as well. The court went on to say that even assuming that the Arizona court had jurisdiction to terminate the mother’s parental rights, the trial court did not do so properly because the ICWA imposed a higher burden of proof. Under the ICWA the state must show that “beyond a reasonable doubt, including testimony of a qualified expert witness, continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.” Thus, the appellate court concluded that the child must be returned to the biological mother.

In Goclanney v. Desrochers, the Arizona appellate court reached a similar conclusion. In that case the mother agreed to place the child in temporary care with the

House of Samuel Inc, a Tucson-based Christian placement organization. The child was

An unemancipated minor is one under the age of eighteen that has not been determined by a court to be able to care for themselves and no longer requires parental supervision.

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)).

Id. at 206, 635 P.2d at 191 (citing Application of Morse, 7 Utah 2d 312, 324 P.2d 773 (1958)).

Id.

Id. at 206, 635 P.2d 191. Burden of proof is the responsibility to provide a sufficient amount of evidence to convince a fact finder (judge or jury) of a fact or issue.

This is the burden of proof that is normally required in a criminal case. This is the strictest burden of proof in the law and can, with some hesitation, be explained as 99% certainty.


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).


135 Ariz. 240, 241, 660 P.2d 491, 492 (1983). Note that historically many Christian organizations had a hand in taking Indian children away from their homes. These organizations pressured Indian mothers, especially those with no husband or those who already had several children. They promised a better life for these children and convinced these mothers that they could not properly take care of the child either because they lacked a husband or they already had several children. See generally James
placed in Texas, where after one year the mother moved with her husband to try to obtain
custody of her child again.\textsuperscript{172} While she was there, the Desrochers came to her apartment,
took her to a notary public, and got her to sign an "Affidavit of Relinquishment of
Parental Rights by Mother."\textsuperscript{173} Several months later the Texas courts entered orders that
terminated the mother's parental rights and made the Desrochers adoptive parents.\textsuperscript{174} The
Arizona appellate court noted that the Texas court did not have jurisdiction to hear the
case because of a Texas jurisdictional requirement that "any child residing in this state at
the time of the petition requesting adoption is filed may be adopted."\textsuperscript{175} Again, the court
found that the domicile of an illegitimate child rests with the mother, and therefore, the
Texas court did not have jurisdiction to grant the termination of parental rights or
adoption orders.\textsuperscript{176}

The same year in another Arizona county, the appellate court heard an appeal
from an order of the Superior Court granting an adoption of an Indian child.\textsuperscript{177} In \textit{In Re
Appeal in Maricopa County Juvenile Action No. A-25525}, 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.\textsuperscript{178} 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

\textsuperscript{173} Id.
\textsuperscript{174} Id. at 242, 660 P.2d 493.
\textsuperscript{175} Id. at 242, 660 P.2d 493 (citing Tex. Family Code Ann. §16.01 (2005)).
\textsuperscript{176} Id.
\textsuperscript{177} In Re Appeal in Maricopa County Juv. Action No. A-25525, 136 Ariz. 528, 530, 667 P.2d 228, 230
(1983).
\textsuperscript{178} Id.
not eligible for membership in an Indian tribe.\textsuperscript{179} The Catholic Social Service then attempted to terminate the alleged father’s paternal rights and have the child adopted out.\textsuperscript{180} The trial court found that the mother had voluntarily terminated her parental rights and that the father knew of the baby, but made no attempt to establish a relationship.\textsuperscript{181} In addition, the trial court did not make a finding that the child was an “Indian child” as defined by the ICWA.\textsuperscript{182}

The Pima Indian Community moved to intervene, and nearly a year after the beginning of the dispute the father signed an affidavit acknowledging paternity.\textsuperscript{183} Approximately one month after the Indian father acknowledged paternity the trial court granted the final order of adoption, citing the avoidance of “further insecurity and upset” to the child as the reason why the ICWA adoptive placement preferences should not be followed.\textsuperscript{184} The Pima Indian Community appealed 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 the ICWA.\textsuperscript{185} The Pima Indian Community contended that the remedy for the failure to adhere to the preferences was to vacate the adoption order.\textsuperscript{186} In addition, on appeal the Pima Indian Community contended that the trial court abused its discretion in finding that it was in the child’s best interest to remain with the adoptive parents.\textsuperscript{187}

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\textsuperscript{179} Id.
\textsuperscript{180} Id.
\textsuperscript{181} Id.
\textsuperscript{182} Id.
\textsuperscript{183} Id.
\textsuperscript{184} Id. at 531, 667 P.2d at 231.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Id.
\end{flushleft}
The appellate court held that until such time as a putative Indian father acknowledges or establishes paternity, the provisions of the ICWA are not applicable. The court cited the definition of “parent” in the ICWA, which is “any biological parent . . . of an Indian child . . . It does not include unwed father where paternity has not been acknowledged or established.” The court also held that there was evidence that the child had resided with the adoptive mother for three years and that they had developed a close relationship. Thus, removal of the child would cause psychological damage, and the trial court, therefore, did not abuse its discretion in ordering adoption of the child and declining to follow the preferences established in the ICWA. 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 the 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

188 Putative means thought, assumed, or alleged.
189 Id. at 532-33, 667 P.2d at 232-33.
190 Id. at 533, 667 P.2d at 233.
191 Id. at 534, 667 P.2d at 234.
192 Id.
Supreme Court's opinion on the import of foster parent bonding in the statute.

The holding of *In Re Juvenile Action No. A-25525* is troubling because before any section of the Act applies, it must be established on the record that the child meets one or both of the definitional criteria; only then does a parent or tribe qualify for "protection" under the ICWA. At first glance and in the specific context of the facts of this case, this holding seems to be logical. However, this holding is broad in its terms, and could be used to avoid the applicability of the notice requirement to the tribe when there is a possibility of an Indian child being adopted. It states that before any part of the Act can apply (including notice to the tribe), it must first be established that the child is Indian. This very case notes that the "best source of information on tribal membership is the tribe itself." How can the tribe definitely establish that a child is Indian, if the state does not notify the tribe that there is a potentially Indian child in their custody? In ambiguous cases, tribes have information that may be extremely useful in determining if the ICWA applies or not.

In fact, a later Arizona case, *Arizona Department of Economic Security v. Bernini*, held that suspicion of being an Indian child merely triggers the notice requirement and not the substance of the Act. In that case, the trial court applied the 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

196 *Id.* at n. 4.
198 *Id.*
required the inquiry whether the child was a member or eligible for membership in an Indian tribe.\textsuperscript{199} The Act was inapplicable pending a determination that the child was, in fact, Indian.\textsuperscript{200} Thus, if there is some evidence of a child being Indian the Department of Economic Security must notify the tribe; however the remainder of the 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.

In 1987, the Arizona appellate court decided \textit{In Re Appeal in Coconino County Juvenile Action No. J-10175}\textsuperscript{201} to clarify the "good cause" exemption from the placement preferences set out in the ICWA. In this case, a Navajo man lived with a non-Indian woman, and they had a child who was enrolled in the Navajo Nation.\textsuperscript{202} After the child's parents split up, the child lived with the mother and stepfather in an "Anglo-type home."\textsuperscript{203} 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.\textsuperscript{204} A dependency petition was filed and the natural father intervened, seeking custody of the child.\textsuperscript{205} A psychotherapist found that the father could potentially be an adequate parent, if he more consistently maintained contact with the child.\textsuperscript{206} Another psychologist also found that the father would be an adequate parent, and described him as "neither a completely traditional Navajo nor a completely Anglicized individual."\textsuperscript{207} The Arizona

\begin{footnotesize}
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\item \textsuperscript{199} \textit{Id.} at 564, 48 P.3d 514.
\item \textsuperscript{200} \textit{Id.} at 564-66, 48 P.3d 514-16.
\item \textsuperscript{201} 153 Ariz. 346, 736 P.2d 829 (1987).
\item \textsuperscript{202} \textit{Id.} at 347, 736 P.2d 830.
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} \textit{Id.}
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{Id.}
\item \textsuperscript{207} \textit{Id.}
\end{itemize}
\end{footnotesize}
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.208

The trial court found that the 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.”209 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.210 The court noted that the mother’s home was not adequate because of the presence of the stepfather.211 Lastly, the court held that the father’s home was not a fit placement because it was remote, totally foreign to the child. In addition, the court found that doubts existed about the father’s character.212

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.”213 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.214 The court went on to state that the trial court’s attempts to establish good cause by noting the culture shock that may follow were not sufficient.215 “When the Act is read as a whole, it is clear that Congress has made a very

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208 Id. at 347-48, 736 P.2d at 830-31.
209 Id. at 348, 736 P.2d at 831.
210 Id.
211 Id.
212 Id.
213 Id. at 349, 736 P.2d at 832.
214 Id. (citing 25 U.S.C. § 1912(e) (2000)).
215 Id. at 349, 736 P.2d at 832.
strong policy choice that Indian children, including those who have a non-Indian parent, belong in an Indian home."216 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 the ICWA.217

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,” the key factor determining whether the ICWA applies or not. Yet another case 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 the Indian child welfare cases. Evidenced by cases, such as In Re Appeal in Maricopa County Juvenile Action No. A-25525218, Arizona state courts have struggled with the ICWA and its modification of the standard child welfare protocol. However, by and large, Arizona has interpreted the ICWA using the plain language of the Act, and has avoided judicial overreaching.

216 Id.
217 Id. at 350, 736 P.2d at 833.
218 136 Ariz. 528, 667 P.2d 228.
Current Arizona State Court Cases

In 2000, an Arizona state court reaffirmed the rejection of the Existing Indian Family Exception\(^{219}\), a doctrine that began in Kansas holding that if an Indian child is not part of an “existing Indian family” the ICWA does not apply.\(^{220}\) This type of judicial activism has done much to damage the potential success of the ICWA. Fortunately many states join Arizona in not following this doctrine.\(^{221}\)

Arizona first rejected the existing Indian family exception in *In Re Appeal in Coconino County, Juvenile Action J-10175*.\(^{222}\) As discussed earlier, in that case, a seven year old 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 returned to the Navajo biological father because, although he was found to be an adequate parent, he was “neither a completely traditional Navajo nor a completely

\(^{219}\) The Existing Indian Family Doctrine holds that a child must have 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 which the ICWA applies. This doctrine has received heavy criticism as being an overt judicially created exception that is contrary to the clear intention of the ICWA, but 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).

\(^{220}\) *In Re Adoption of Baby Boy L*, 231 Kan. 199, 643 P.2d 168 (1982). The Kansas Supreme Court stated that “the overriding concern of Congress . . . was the maintenance of the family and tribal relationships existing in Indian homes and to set minimum standards for the removal of Indian children from their existing Indian environment. It was not to dictate that an illegitimate infant who has never been a member of an Indian home or culture, and probably never would be, should be removed from its primary cultural heritage and placed in an Indian environment over the express objections of its non-Indian mother.”

\(^{221}\) States that have rejected the exception either by caselaw 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. Tohono O’odham Nation*, 27 A.D.3d 34, 805 N.Y.S.2d 313, 323 fn. 4 (2005).

Anglicized individual," and therefore found that the ICWA did not apply to this proceeding.\textsuperscript{223} The appellate court reversed, finding that this was a "child custody proceeding" as defined by the Act and that the child was enrolled in the Navajo Nation and was an "Indian child."\textsuperscript{224} Thus, absent good cause to the contrary, the ICWA must be followed.\textsuperscript{225} The appellate court found that unless the trial judge could find by clear and convincing evidence that the parental placement is 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.\textsuperscript{226}

The Arizona courts reaffirmed this rejection more recently in \textit{Michael J., Jr. v. Michael J., Sr.}, stating that the judicial exception frustrates the policy of protecting the tribe's interest in their children.\textsuperscript{227} In that case an Indian child was born to a non-Indian mother who tested positive for cocaine use at birth.\textsuperscript{228} At the time of the child's birth, the father, an enrolled member of the Tohono O'odham Nation, was incarcerated.\textsuperscript{229} The Department of Economic Security requested that a guardian ad litem\textsuperscript{230} ("GAL") be appointed for the child, and the Tohono O'odham Nation intervened, acknowledging the Nation's jurisdiction over the child's siblings.\textsuperscript{231} The father then moved to transfer jurisdiction to the tribal court and the GAL filed an appeal.\textsuperscript{232}

\textsuperscript{223} Id. at 347, 736 P.2d 829, 830.
\textsuperscript{224} Id. at 349, 736 P.2d 829, 832.
\textsuperscript{225} Id. (citing 25 U.S.C. § 1915 (2000)).
\textsuperscript{226} Id. at 350, 736 P.2d 829, 833.
\textsuperscript{227} 198 Ariz. 154, 7 P.3d 960 (2000).
\textsuperscript{228} Id. at 155, 7 P.3d at 961.
\textsuperscript{229} Id.
\textsuperscript{230} A guardian ad litem is one who is appointed by the courts to represent the interests of a particular minor or incompetent person. They are not legal counsel, but instead there to look out for the best interests of the minor or incompetent person.
\textsuperscript{231} Id.
\textsuperscript{232} Id. at 156, 7 P.3d 962.
The court noted that the ICWA grants the tribe exclusive jurisdiction over Indian children who are domiciled on the reservation and concurrent but presumptively tribal jurisdiction\textsuperscript{233}, for actions involving Indian children not domiciled on the reservation.\textsuperscript{234} The GAL is not a party permitted by statute to object to a transfer of jurisdiction to tribal court, and because of this the court did not overturn the transfer of jurisdiction to tribal court.\textsuperscript{235} The court also noted that the GAL failed to carry the burden of showing that good cause existed for denying the transfer because she failed to present any evidence that Tohono O’odham could not support the child’s medical needs.\textsuperscript{236} Therefore, there was no good cause not to transfer jurisdiction to tribal court.

The GAL also contended that the ICWA should not apply because the Department of Economic Security did not remove the child from an “existing Indian family.”\textsuperscript{237} 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.\textsuperscript{238} 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.\textsuperscript{239}

Third, Congress rejected an earlier version of the ICWA\textsuperscript{240} that included the existing

\textsuperscript{233} When an Indian child is domiciled off the reservation, the ICWA allows for either the state court or the tribal court to hear the case. The ICWA states that the state court should transfer such a case to tribal court unless there is good cause not to transfer. In addition, either parent may veto the transfer and the tribal court has the right to refuse a transfer, as well. See 25 U.S.C. § 1911(b) (2000).

\textsuperscript{234} Id.

\textsuperscript{235} Id. at 159, 7 P.3d 965.

\textsuperscript{236} Id.

\textsuperscript{237} Id. at 157, 7 P.3d 963.

\textsuperscript{238} Id.

\textsuperscript{239} Id.

\textsuperscript{240} 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
Indian family exception. Fourth, the Supreme Court has undermined the imposition of an existing Indian family exception stressing that the ICWA reflects Congress' 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 Exiting Indian Family Exception before in In Re Appeal in Coconino County, Juvenile Action J-10175.

The rejection of the Existing Indian Family Exception has 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. As much of the case law espousing this exception comes out of California, a brief foray into California case law will beneficial. In In Re Bridget R., a case embracing the exception, the court held that "token attestation" of cultural identity fall short of establishing the existence of those "significant cultural traditions and affiliations" which ICWA exists to preserve. To prove an existing Indian family the parents must show that they had "significant social, cultural, or political relationship with an Indian community." Problem is that, besides the judge, no one knows what is required in order to meet these standards.

Act, S. 1214, 95th Cong. § 102(c) (1977) (citing S. Rpt. 95-597 at 4 (1977)).
241 Id. at 158, 7 P.3d 964.
242 Id.
243 Id.
245 Id. at 1507, 49 Cal. Rptr. 2d 507.
The existence of the Existing Indian Family Exception has also required that those states that accept the doctrine deal with issues that would not come up in other states. For example, 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 court held that the ICWA “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.”246 The court applied a strict scrutiny test, which requires that the ICWA serve a compelling governmental interest, must be narrowly tailored, and be the least restrictive means of serving that compelling governmental interest.247 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.248

In *In re Alexandria Y.*, that same California court went even further and suggested that the *Bridget R.* holding was too narrow, and that there were some circumstances in which the exception might be used where the parent, or even the child, had maintained some involvement in Indian life.249 The following year, in *Crystal R. v. Superior Court*,

246 *Id.* at 1512, 49 Cal. Rptr.2d 507.
247 *Id.* at 1508, 49 Cal. Rptr.2d 507.
248 *Id.* at 1507, 49 Cal. Rptr.2d 507.
the appellate court remanded the case to trial court to conduct a special hearing where the
father and the tribe bore the burden of proof of proving that the father maintained
significant ties with the tribe.250

Not all California courts have agreed to apply the exception. One case noted that
with the Existing Indian Family Exception, the trial court must decide, with little
guidance or expertise, whether "the parents' Indian activities and beliefs were
'significant' enough to warrant application of the ICWA."251 This evokes images of pre-
ICWA days when Indian children were removed from their natural parents by state social
workers who had no experience in Indian childrearing practices.252 Because Arizona does
not adhere to the existing Indian family exception, the cases that the appellate courts do
hear focus more heavily on whether the Act applies and whether the case should be
transferred to a tribal court.

The issue of the Existing Indian Family Exception is so pervasive that the
International Indian Treaty Council (IITC), a non-governmental organization (NGO) with
special consultative status with the United Nations, filed with the Commission on Human
Rights a written statement outlining how the use of the Existing Indian Family Exception
was undermining the ICWA.253 Pursuant to Article 71 of the United Nation's Charter
NGOs may apply for special consultative status, which means that they hold special
competence in, and are concerned specifically with, only a few of the fields of activity

252 Id. It is interesting to consider that the age at which a child begins to be a cultural being may differ
depending upon the culture. For example, a baby's first laugh is when it is considered a Navajo culturally
253 Statement by International Indian Treaty Council submitted to Commission on Human Rights,
E/CN.4/1999/NGO/77 (March 5, 1999).
} The IITC cites the Existing Indian Family Exception as “an example of continuing interference with parents, families and tribal members.”\footnote{Statement by International Indian Treaty Council submitted to Commission on Human Rights, E/CN.4/1999/NGO/77 at 3 (March 5, 1999).} By allowing judges to determine whether the parents of a child appear to be “real” Indians and therefore fall under the ICWA as an “Indian family” in need of protection amounts to the United States having allowed a judicially created\footnote{The American legal system is designed so that the legislative body (Congress) creates the law and the judicial body (courts) interpret those laws. Judges should not add to the law or read into the law anything that is no 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.} exception to circumvent the application and intent of the Act.\footnote{Statement by International Indian Treaty Council submitted to Commission on Human Rights, E/CN.4/1999/NGO/77 at 5-6 (March 5, 1999).}

In 1994, the United States submitted their Initial Report of States to the UN Human Rights Committee.\footnote{Initial Report of States by the United States to the UN Human Rights Committee, CCPR/C/81/Add. 4 (August 24, 1994).} In this report, the US stated that they passed the ICWA in 1978 to “promote the placement of Indian children in foster and adoptive homes reflective of their unique cultural environment and heritage.”\footnote{Initial Report of States by the United States to the UN Human Rights Committee, CCPR/C/81/Add. 4 at 848 (August 24, 1994).} 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\footnote{Courts normally give each other full-faith and credit, meaning that each court will uphold what another court has already ordered in a particular case.} 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.\footnote{Initial Report of States by the United States to the UN Human Rights Committee, CCPR/C/81/Add. 4 at 848-49 (August 24, 1994).} Lastly, the report notes that the ICWA
authorized the federal government to provide grants to tribes and tribal organization to establish family preservation programs, however, the report conveniently fails to mention that in over twenty-five years no such grants have been authorized.\textsuperscript{262} The U.S. did not include in its report the judicially created Existing Indian Family Exception and it would be grossly insulting to assume that the U.S. did not know of its existence. Thus, it appears that the official position of the US has been to ignore the problem in the hopes that it will go away or resolve itself... a response all to 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 court's lack of jurisdiction over family matters, it appears that if a solution is to come it must come from Congress.

In one Arizona case, \textit{In Re Appeal in Maricopa County Juvenile Action No. JS-8287}, dealing with transfer of jurisdiction to tribal court, the court held that the ICWA's good cause exception to transfer to tribal court allowed the state court to apply a modified version of \textit{forum non conveniens}.\textsuperscript{263} A child was born to a Santa Domingo Pueblo woman living in Phoenix.\textsuperscript{264} The mother had a serious drinking problem and left her child with a friend, who evidentially tried unsuccessfully to sell the child for $25, while the mother was incarcerated.\textsuperscript{265} The Santa Domingo Pueblo in New Mexico was notified concerning the termination proceeding against the mother, and intervened shortly...

\textsuperscript{262} Initial Report of States by the United States to the UN Human Rights Committee, CCPR/C/81/Add. 4 at 849 (August 24, 1994).
\textsuperscript{263} 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.
\textsuperscript{264} Id. at 105, 828 P.2d at 1246.
\textsuperscript{265} Id.
thereafter, but did not petition for transfer of the matter to their tribal court at that time.266 The Arizona Department of Economic Security’s plan originally provided for rehabilitation and then for severance of parental rights, and sought an adoptive family for the child.267

Two years later, the Pueblo Santo Domingo filed a petition to transfer the proceedings to tribal court.268 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.269 The court went on to state that because the Act does not define “good cause,” a state court has discretion whether to transfer a matter to tribal court or retain jurisdiction.270 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 the ICWA proceeding.271 The Pueblo maintained that it did not petition for transfer earlier because the original plan provided for rehabilitation and eventual reunion with the child.272 As noted before, this is a common strategy for tribes that do not have an abundance of resources to intervene; such tribes do not seek transfer unless they disagree with how the state court is handling the situation. The dispute in that case could arguably have been avoided if the state and the tribal representatives better understood each other’s situation. The court still found that the tribe had unreasonably delayed its

266 Id. at 105-06, 828 P.2d at 1246-47.
267 Id. at 105, 828 P.2d at 1246.
268 Id. at 106, 828 P.2d at 1247.
269 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)).
271 Id. at 107-08, 828 P.2d at 1248-49.
272 Id. at 108, 828 P.2d at 1249.
petition for transfer after an adoptive family had been found.\textsuperscript{273}

In \textit{In Re Appeal in Maricopa County, Juvenile Action No. JD-6982}, the court held that a parental objection to transfer the proceeding to tribal court is an absolute veto right.\textsuperscript{274} In that case the mother, a member of the Tohono O'odham Nation, was a drug abuser and mentally unstable.\textsuperscript{275} She had a GAL appointed for her, although she was not deemed incompetent.\textsuperscript{276} The GAL and the other parties involved did not object to transfer to Tohono O'odham Tribal Court, but the mother objected to the transfer.\textsuperscript{277} According to the ICWA, when a party petitions for transfer to tribal court, the state court shall transfer, absent objection by either parent.\textsuperscript{278} The court noted in this case there is only one reported decision that affirmed a trial court’s transfer of jurisdiction over a parental objection, and there it was deemed that the mother had consented to transfer by leaving her children on the reservation and the tribal court had already issued custody orders.\textsuperscript{279} The appellate court held that absent a judicial determination of incompetency, the GAL’s determinations of the parent’s best interest cannot substitute for the expressed wishes of that parent.\textsuperscript{280} Thus, the mother’s objection to the transfer is valid and final.

The ICWA requires that foster care placement occur order only when it can be determined by clear and convincing evidence\textsuperscript{281}, including the testimony of a qualified

\begin{itemize}
\item \textsuperscript{273} \textit{Id.} at 109, 828 P.2d at 1250.
\item \textsuperscript{274} 186 Ariz. 354, 922 P.3d 319 (1996).
\item \textsuperscript{275} \textit{Id.} at 355, 922 P.3d at 320.
\item \textsuperscript{276} \textit{Id.} at 356, 922 P.3d at 321.
\item \textsuperscript{277} \textit{Id.}
\item \textsuperscript{278} 25 U.S.C. § 1911(b) (2000).
\item \textsuperscript{279} \textit{Id.} at 357, 922 P.3d at 322 (citing \textit{In Re the Welfare of R.I.}, 402 N.W.2d 173, 175-76 (Minn. App. 1987)).
\item \textsuperscript{280} \textit{Id.} at 359, 922 P.3d at 324.
\item \textsuperscript{281} Clear and convincing evidence is a standard that is lesser than beyond a reasonable doubt. The standard is often used in civil cases and its meaning is slight less defined and consistent than the beyond a reasonable doubt standard. One may wish to quantify this standard as 75% certainty.
\end{itemize}
expert witness, that continued custody of the child by the parent will likely result in serious emotional or physical harm.282 In Rachelle S v. Arizona Department of Economic Security, the court ruled on what qualifications an expert witness needed.283 In that case, Rachelle and Mark were the biological parents of an Indian child who suffered from shaken baby syndrome.284 The parents and child lived in an extended family home.285 Rachelle took the baby to the hospital several months after he was born because he was running a high fever, and the doctors diagnosed the condition.286 Detectives were unable to determine which family member was the perpetrator(s) since many people cared for the child and none were willing to admit any abuse.287 Due to the severity of the baby's injuries and the inability to determine the source, the Department of Economic Security filed a dependency petition.288

The parents appealed the juvenile court’s order adjudicating the child to be dependent upon state intervention for their safety.289 The parent’s interpretation of the ICWA was that an expert in Indian children had to testify in order for a child to be placed in foster care on the grounds that serious emotional or physical harm would come to the child if the child stayed in the custody of the parents.290 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

284 Id. at 519, 958 P.2d at 460.
285 Id.
286 Id.
287 Id.
288 Id.
289 Id.
290 Id. at 520, 958 P.2d at 461.
does not limit a qualified expert to someone with expertise with Indian children or culture.\footnote{Id.} "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."\footnote{Id. at 520-21, 958 P.2d at 4601-62 (citing Juv. Action No. JS-8287, Ariz. 104, 111, 828 P.2d 1245, 1252 (1991) (citing In Re N.L., 754 P.2d 863, 867 (Okla. 1988))).} 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 to make changes that would prevent future abuse.\footnote{Id. at 521, 958 P.2d at 462.}

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 in the later cases. One case held that a modified version of \textit{forum non conveniens} was applicable to good cause not to transfer the case.\footnote{In Re Appeal in Maricopa County Juv. Action No. JS-8287, 171 Ariz. 104, 828 P.2d 1245 (1992).} 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 proceeding.

The doctrine of \textit{forum non conveniens} is problematic in light of the government endorsed increase of urban Indian populations in the twentieth century. During the
1950's the United States government instituted a plan called The Relocation Act\textsuperscript{295} intended to help Indian families by providing funding to establish “job training centers” in various urban centers.\textsuperscript{296} 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.\textsuperscript{297} Because of this program and high rates of unemployment on the reservation the urban Indian population grew substantially. By 1975, the Indian population in urban areas was larger than the Indian population living on the reservation.\textsuperscript{298} Similar problems like the lack of employment on or near many reservations have driven even more Indian people to relocate to urban environments. According to the 2000 Census, there are currently approximately 2,680,355 urban Indians across the United States.\textsuperscript{299} 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 \textit{forum non conveniens} gains strength.

A second case dealt with transferring the proceeding to tribal court. In that case

\begin{footnotesize}
\begin{itemize}
\item[297] \textit{Id.}
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the court held that a parent’s right to veto transfer from state court to tribal court is absolute.\textsuperscript{300} Lastly, 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.\textsuperscript{301} 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{302}

This shift indicates several things. First, the Arizona courts have dealt with the definitional issues that plagued it 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 courts are becoming stronger and able to handle more cases, and 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. The stronger (more independent and knowledgeable) the tribal courts become and the more financial support that is funneled in their direction, the better capable they will be to secure the safety and welfare of their people.

\textsuperscript{300} \textit{In Re Appeal in Maricopa County, Juvenile Action No. JD-6982, 186 Ariz. 354, 922 P.2d 319} (1996).
\textsuperscript{302} \textit{Id.}
ARIZONA TRIBAL COURT CASES

The second half of this thesis focuses on Arizona tribes—specifically the Navajo Nation’s case law and Pascua Yaqui and White Mountain Apache's 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 traditions and conflict resolution process of the Navajo. The Peacemaker courts use the traditional dispute resolution methods used by the Navajo people for hundreds of years and recently revitalized through the adoption of Peacemaking Courts in 1982. 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.

Before proceeding into 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. As Judge McKay 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 to not only 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's Tribal Codes detail the laws of the Nation. These Codes are considered the foremost law of the land. 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 which 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 the 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 the ICWA. The Navajo Nation Supreme Court has, however, handed down five other cases that dealt with child welfare, but in cases the ICWA would not have been applied

306 *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 Common Law, 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").


308 *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").


had the issue arisen in state court.311

The one 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.*,312 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.313 However, a petition for adoption was pending before the court to another, non-Navajo couple.314 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.315 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 and any ordinances of the Navajo Tribe.316 The Court, thus, decided that it would only apply federal laws, such as the ICWA, in absence of a Navajo Custom. In that case, however, a Navajo Custom concerning adoption existed.

The Navajo Nation Supreme Court provided an excellent recounting of Navajo Common Law regarding adoption. The Navajo conception of adoption is quite different from the American concept, which envisions adoption in terms of duties.317 In the American concept of childrearing, the natural parents have duties towards their children, and when those duties are breached, social services may take children away and give

313 Id.
314 Id.
315 Id. at 193 (citing 7 N.T.C. § 204 (1985) (Res. No. CD-94-85 (Dec. 4, 1985)).
316 Id.
317 Id. at 193.
them to more worthy parents.\textsuperscript{318} Navajos, on the other hand, believe that familial relationships are ruled by mutual expectations, rather than obligations.\textsuperscript{319} "Desirable actions on the part of others are hoped for and even expected, but they are not required or demanded."\textsuperscript{320} 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.\textsuperscript{321} According to the Navajo Common Law,\textsuperscript{322} children are supposed to be taken care of, not just their parents, but also their clan members.\textsuperscript{323}

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."\textsuperscript{324} Navajo law is thus 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 de-emphasizes the termination of parental rights.\textsuperscript{325} Navajo adoption is thus informal and based upon community expectations.

The Court noted that the Navajo Tribal Council is presumed to have these Navajo

\textsuperscript{318} Id.
\textsuperscript{319} Id.
\textsuperscript{320} Id. at 194 (citing Gary Witherspoon, Navajo Kinship and Marriage, 94-95 (University of Chicago Press 1975)).
\textsuperscript{321} Id. at 194 (citing Nav. Ct. Solicitor Op., 83-10 (1983)).
\textsuperscript{322} Navajo Courts pronounced a preference for the term "Navajo Common Law" rather than "custom" because it is not widely understood that customs of the Navajo are actually laws. Thus, the English term more accurately reflects custom as law. In Re Estate of Apachee, 4 Nav. R. 178, 180-81 (1983) available at http://www.tribalresourcecenter.org/opinions/opfolder/1983.NANN.0000070.htm.
\textsuperscript{323} Id. at 194.
\textsuperscript{324} Id. at 195 (citing Nav. Ct. Solicitor Op., 83-10 (1983)).
\textsuperscript{325} Id.
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 where the children were 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. Thus, 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 would be awarded custody instead of the non-member.

Another Navajo Nation Supreme Court case warrants a short discussion, even though it is not an ICWA case because it concerned a custody dispute between a divorced couple, which is explicitly exempted in the ICWA. In *In Re A.O.*, 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. The father filed a Motion to Dismiss because of lack of jurisdiction and the trial court granted the motion. The Navajo Nation Supreme Court ultimately held that regardless of the proceedings in other jurisdictions, the Navajo Nation Children's Court

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326 Id. at 195 (citing *In Re Estate of Apachee*, 4 Nav. R. 178 (1983)).
327 Id. at 196 (citing 9 N.T.C. § 615(a) (1960); (Res. No. CN-64-60 (Nov. 18, 1960)).
328 Id. at 196 (citing 9 N.T.C. § 615(b) (1960); (Res. No. CN-64-60 (Nov. 18, 1960)).
329 Id. at 196.
332 Id.
333 Id. at 122.
had a duty to decide its jurisdiction and list findings of fact, which it did not do.\textsuperscript{334} Thus, the Court remanded the case back to the trial level for findings of fact.\textsuperscript{335} The interesting part of this case is the reasoning that the Court used for its holding. It reasoned that the ruling was justified in light of the Navajo Nation’s recognized interest in its children as stated in the ICWA as “there is no resource that is more vital to the continued existence and integrity of Indian Tribes than their children.”\textsuperscript{336} Thus, the Court used the ICWA’s purpose as a justification for the creation of its own rules based upon Navajo laws.

The low number of cases that have reached the Navajo Nation Supreme Court concerning the ICWA is surprising. One possibility for this is that these cases are generally not appealed. However, it is difficult to imagine a more emotion filled topic than those involving children and adoption. Or it could be that because state courts seem to be withholding the transfer of the ICWA cases\textsuperscript{337}, the difficult cases may never reach the Navajo Nation Supreme Court. However, a better theory is that the Navajo Nation places more of an emphasis on family preservation for those families that are experiencing difficulties while living on the Reservation.\textsuperscript{338} Thus, these cases rarely end up in court - partly because the families are more frequently preserved, but also partly because if there is an out-of-home placement it is with extended family and the natural parents do not disagree.

Unlike the Navajo Nation Supreme Court, the Pascua Yaqui Tribal Court is not a

\textsuperscript{334}Id.
\textsuperscript{335}Id. at 123
\textsuperscript{336}Id. at 123-24.
\textsuperscript{337}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 the ICWA cases, which may reduce the ability of the tribe to effectively bring cases back to the reservation for trial.
\textsuperscript{338}Personal Communication with Ronald Phillips, Navajo Social Service Family Preservation Office (Dec, 1, 2005).
court of record. The Pascua Yaqui Tribal Council enacted the Resolutions Adopting the Pascua Yaqui Tribe Child Welfare Policy Act in 2002.\textsuperscript{339} The recent date of the resolution suggests that while the Tribal Council was concerned about the issue of child welfare, they were not until 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 the ICWA recognizes the tribe’s authority to enforce tribal law in state child welfare cases.\textsuperscript{340}

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.\textsuperscript{341} 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 60 child dependency cases involving Yaqui children – approximately 30 in state court and 30 in tribal court.\textsuperscript{342} 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.\textsuperscript{343}

The Pascua Yaqui Tribe Child Welfare Policy Act alters the placement preferences of the ICWA. The following placement preferences are for both temporary and permanent placements including foster care, permanent guardianship, and adoption.

\textsuperscript{339} Res. No. C04-06-02 (2002).
\textsuperscript{341} Id. at § 1(e).
\textsuperscript{342} Id. at §1 (f).
\textsuperscript{343} Id. at § 1(g).
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.344 It is clear from these placement preferences that a placement close to the tribal community is of utmost importance to the Tribe.

The Act goes on to set 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 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.345

Similar to the Navajo Common Law disfavoring of termination of parental rights, the Pascua Yaqui Act prefers family reunification.346 If reunification is not possible, the preference is placement in foster care or permanent guardianship with extended family member, and only when absolutely necessary termination of parental rights and adoption.347 Lastly, the Act establishes a Family Preservation Office in the Department of

344 Id. at § 29(a)(i).
345 Id. at § 2(a)(ii).
346 Id. at § 2(b)(i).
347 Id. at § 2(b)(ii)-(iii).
Social Services.\textsuperscript{348} 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.\textsuperscript{349}

Again, the fact that before the passage of the \textit{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 Office of Family Preservation will aggressively obtain resources to support the Office and its programs.\textsuperscript{350} It also states that the Tribe will negotiate a Title IV-E funds sharing agreement with the State of Arizona.\textsuperscript{351} Both provisions indicate that when creating this Policy Act, funding was dominant issue in the minds of the Tribal Council. Within the last decade Pascua Yaqui Tribe has concentrated its efforts at successful nation building, and has recently been in a position to not only increase services to its tribal members, but also sponsor community affairs in the surrounding community as well. This evolution unfortunately makes one wonder if it the proper tribal implementation of the ICWA depends more upon the economic success of a tribe with a successful casino or if simply caring for their children is enough to keep them in the community.

Unlike both Navajo Nation and Pascua Yaqui Tribe, the White Mountain Apache have adopted the ICWA in its entirety. In their Juvenile Code the reiterate ICWA's

\textsuperscript{348} \textit{Id.} at § 3(b).
\textsuperscript{349} \textit{Id.}
\textsuperscript{350} \textit{Id.}
\textsuperscript{351} \textit{Id.} at § 2(g).
purpose is to protect the best interest of the White Mountain Apache children and to promote the stability and security of the Tribe.\textsuperscript{352} 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.”\textsuperscript{353} It is unusual to see a tribe adopt fully the ICWA, as a large number of tribes that have specifically addressed the issue feel that the 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 Termination and Restoration of Parental Rights Chapter in their Juvenile Code. This section does not set out a standard of proof required in order to terminate parental rights. Recall that the 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.\textsuperscript{354} 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) willfully [sic] refuse to care or provide for the child

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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 terminate parental rights. However, the code does state, "that a child is delinquent or in need of supervision shall not be grounds for termination of parental rights." What is interesting about the Code is that all termination of parental rights are interlocutory in nature, and are thus subject to review within one year. All termination of parental rights may be immediately appealed by the parents, as well.

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.

FAMILY PRESERVATION SERVICES

The use of Tribal custom in tribal court decisions alone cannot account for the
different rates of success in the implementation of the goals encapsulated in the ICWA.
For example, in Minnesota Indian children still make up eleven percent of out-of-home
placements, although they only constitute just under two percent of the population.360
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 different outcomes among
Indian families in their service areas. The models used in Family Preservation programs
can imprecisely 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) to all families" in perceived need of support.361 Mainstream family
preservation services emphasize intense, short-term, multi-agency, crisis intervention to
stabilize the family.362 These types of models can be characterized as dysfunction-based
Family Preservation, which slowly began in the mid-20th century when social work
turned towards individualist explanations of family and social dynamics.363 Under this
model families were labeled as "inadequate" and lacking in certain characteristics and

360 Minnesota Dept. of Human Servs., Children in out-of-home care: A 1998 Minnesota report by race and
361 John G. Red Horse, Cecilia Martinez, Priscilla Day, Don Day, John Poupart, and Dawn Scharberg,
Family Preservation: Concepts In American Indian Communities at 20 (December 2000) available at
362 Id. at 23.
363 John G. Red Horse, Cecilia Martinez, and Priscilla Day, Family Preservation: A Case Study of Indian
Tribal Practice at 17 (December 2001), available at
As some scholars have condemned, "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. These models can be termed strength-based Family Preservation, and include 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 internal family supports to informal community assets to 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

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364 Id.
365 Id.
366 Id. at 19.
367 Id. at 20. See, Personal Communication with Ronald Phillips, Navajo Social Service Family Preservation Office (Dec, 1, 2005).
368 Id.
369 Id.
370 Id. at 21.
much acclaim by scholars because it mirrors traditional tribal practice.371

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, these models allow family members to be involved in the process of creating a family preservation plan.372 Second, these models highlight what a family is doing right and provide services to help the family with their actions that are not positive to the family.373 This change in perspective can be empowering, as families will feel that they are at least able to progress towards a better family environment. Third, wraparound models often involve smaller caseloads and emphasize the social worker going to the family instead of requiring the family to find transportation, which is a huge problem on certain reservations.374 Fourth, these models allow the child to participate in decision-making, which empowers the child and demonstrates that the child is invested in making the process work.375 Fifth, these models extend the mainstream “nuclear” family to include extended family, kin and clan relations, community, and tribe.376 Sixth, these models emphasize using community members in the provision of family preservation services to instill trust in the families.377 The belief that there are no failures is a principal

371 Id. at 22. John G. Red Horse, Cecilia Martinez, and Priscilla Day, Family Preservation: A Case Study of Indian Tribal Practice at 53; Center for Effective Collaboration and Practice, Institute for Research, Promising practices in wraparound programs for children with serious emotional disturbances and their families, in Systems of care: Promising practices with children’s mental health Vol. IV (B.J. Burns and F.R. Goldman, eds. 1998); Native American Training Institute, Wraparound in Indian country: The ways of the people are who we are (undated).
372 Id. at 36.
373 Id. at 20.
374 Id. at 50.
375 Id. at 45.
376 Id. at 53.
377 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.
feature in Ft. Berthold family preservation policy, which is easily implemented because of the close connection of tribal communities. “These are our relatives; we don’t give up on our relatives.”

A tribally-run family preservation program that exemplifies these traits is the Fort Berthold Reservation in North Dakota, which serves the Arikara, Hidatsa, and Mandan tribes. Fundamental changes occurred in family services on the Ft. Berthold Reservation in the early 1990’s, when they developed and implemented their own programs using their own staff. The center piece of the Fort Berthold family preservation programs is called “Sacred Child Project.” This project uses wraparound, but reshapes it to fit tribal customs and reinforce extended family systems already in place. The child picks a team of 4-10 people, with the requirement that the majority must be family. 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 safety. 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.

378 Id.
380 Id. at 36.
381 Id.
382 Id. at 37
Although several tribes across the country, like Ft. 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." 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 some vestiges of the mainstream deficit-based system, while others have almost completely overhauled their family preservation programs. For example, the Pascua Yaqui Tribe operates their own Social Services, which has found that tribal members were 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,

384 John G. Red Horse, Cecilia Martinez, and Priscilla Day, Family Preservation: A Case Study of Indian Tribal Practice at 51 (citing Native American Training Institute, Wraparound in Indian country: The ways of the people are who we are (undated)).
385 Id. at 47.
386 Interview with Norma C. Martinez, LMSW, Pascua Yaqui Social Services (Nov. 28, 2005).
387 Id.
and especially religious leaders.388 However, the tribe still utilizes the same procedures as
the state for determining which families are at risk389 and mirror the services provided by
the state, such as psycho-education, family therapy, and one-on-one therapy.390 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 cultural relevant as some more
traditional methods. In Arizona, tribes would be well served to implement some of the
theories of strength-based multisystems wraparound services.

One tribe that has re-evaluated and renovated their family preservation model is
the Navajo Nation. Over three years ago, Ronald Phillips, designed the K'e Project for
the Office of Promoting Safe and Stable Families, which provides more traditionally
appropriate family preservation techniques.391 This program uses Navajo philosophies
such as k'e and hozho to teach proper Dine392 parenting techniques. K'e is based upon
respect and one's universal relationship with everyone and everything around them.393
“K'e incorporates many values that bind [an] individual to family, clan, Navajos in
general, and all people.”394 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.”395 Phillips notes that Dine

388 Id.
389 This means that there is no extra vigilance on the part of Social Services to find the earliest signs of at-
风险 families or to concentrate on preventative measures before any signs develop. They often rely on
referrals from the states and from Pascua Yaqui Tribe Behavior Health Department.
390 Id.
391 Interview with Ronald Phillips, Navajo Nation Promoting Safe and Stable Families Project (Dec. 14,
2005).
392 Dine is term that Navajos use to refer to themselves and their culture.
393 Tom Tso, Moral principles, traditions, and fairness in the Navajo Nation Code of Judicial Conduct,
394 Id.
395 Id.
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.\textsuperscript{396} He states that it usually takes at least one to two months to gain a rapport with his clients.\textsuperscript{397} His program focuses on high-risk families, such as ones that already have one child removed.\textsuperscript{398} Phillips also mentioned the importance of having community members as social workers, especially for the more traditional Navajos, to have someone who spoke the Dine language instead of using jargon.\textsuperscript{399}

The K'e Project teaches that there are two types of parenting techniques: 1) the Monster Way and 2) the Blessing Way.\textsuperscript{400} The Monster Way teaches children not to be lazy by using an assertive voice when communicating with the child.\textsuperscript{401} Traditionally, children would run towards the east each morning to signify respect for the Monster Way.\textsuperscript{402} 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 his is when their brains are the most receptive to learning and guidance.\textsuperscript{403} In contrast, the Blessing Way is kind and caring.\textsuperscript{404} It is a passive method of parenting and allows the children to come into their own knowledge by experience.\textsuperscript{405} Both Phillips states that the counseling and teachings that he provides should allow a parent to know when the

\textsuperscript{396} Interview with Ronald Phillips, Navajo Nation Promoting Safe and Stable Families Project (Dec. 14, 2005).
\textsuperscript{397} Id.
\textsuperscript{398} Id.
\textsuperscript{399} Id.
\textsuperscript{400} Id.
\textsuperscript{401} Id.
\textsuperscript{402} Id.
\textsuperscript{403} Id.
\textsuperscript{404} Id.
\textsuperscript{405} Id.
appropriate time is to do each one.406 Phillips explains that in the modern world things are often more complicated than these almost-simplistic teachings make it seem.407 For example, traditionally the mother would rule the inside of the hogan and the father the outside.408 Thus, each parent would be responsible for the upbringing of their children in certain realms.409 However, nowadays there is a push, especially among women, to be considered equal.410 This push has resulted in women wanted more control outside in the world and not just domestically.411 In addition, many families, especially the high-risk families are single parents.412 Thus, the dual role is impossible and the single parent is forced to use the Monster Way and the Blessing Way equally instead of favoring one over the other and having the other parent compensate the other way.413

Phillips also teaches families to strive to live in hozho or “the perfect state.”414 He teaches them that there are four sacred mountains, four sacred colors, and four sacred cardinal directions.415 Each of these have specific meanings and should be prayed to and lived by.416 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

406 Id.
407 Id.
408 Id.
409 Id.
410 Id.
411 Id.
412 Id.
413 Id.
416 Id.
storytelling, the North represents respect for nature, food, and animals.\textsuperscript{417}

Lastly, the Navajo program teaches about the use of spiritual methods to help stabilize the family. Many believe that it costs an inhibitive amount of money to have a ceremony done, 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 some of the larger ceremonies.\textsuperscript{418} For example, instead of hosting a Blessing Way ceremony, which is a grand event, the family could simple have a medicine man do a private blessing.\textsuperscript{419} 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.\textsuperscript{420} These are all alternatives that families can take advantage of in order to achieve hozho.
CONCLUSION

In Arizona state courts have struggled through the aspects of the ICWA that deal with exclusive tribal jurisdiction, and are now focusing on the more nebulous concurrent jurisdiction provisions. State courts are now grappling with when jurisdiction over child welfare cases should be transferred to the tribe. As tribes and the state begin to build long-term relationships the level of understanding on both parties 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 the ICWA is properly implemented in state courts. Not only must the tribe monitor cases involving Indian children currently in state court, but must take a proactive role in educating state social workers, politicians, lawyers, and judges about their culture and the ICWA.

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 must be removed from their home. Because of the close knit communities present on many reservations, once a child is placed out-of-home, either with 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.

Lastly, tribes should focus on strengthening their tribal court system. This is at least a two-step process. First, tribes must obtain a sufficient amount of funding for these
tribal courts. This can be done internally by the tribal council allocating an adequate budget for the tribal courts to obtain competent judges and staff. Tribes should also lobby Congress for funds to improve their tribal court systems. By moving cases from state and federal courts to tribal courts the federal and state governments would ultimately be saving money and thus an argument exists that strengthening tribal courts is a goal that is in harmony with federal appropriation policy. Tribes could also lobby Congress for an amendment to the ASFA, which would allow tribes to be eligible for direct funding from Title IV-E monies. To allow tribes to receive these funds directly, instead of having to receive them from the state and under the state’s conditions, would allow the tribes to possibly receive more money and also determine for themselves how to best use the funding. The second step is to structure the tribal court in a way that will ensure that these courts are legitimate in the eyes of the tribal members and simultaneously independent enough to ensure that all will receive a fair hearing.

It has been nearly thirty years since the 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 the ICWA. Innovative programs such as these allow seemingly divergent interests to see that their interests are more aligned than they believe. The ICWA is one of the most interesting aspects in 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 motivated from benevolent desires. 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.
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