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Postmodernism, Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act

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Postmodernism, Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act

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There is only one child and her name is Children —
A Native American Saying

TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 1222
II. FOCUSING THE LENS—THE POSTMODERN PERSPECTIVE ............... 1227
III. IDENTITY POLITICS AND SPIRIT HEALING: THE AMERICAN INDIAN MOVEMENT AND THE REALIZATION OF SELF-GOVERNMENT .............. 1235

IV. PURPOSE AND SCOPE OF THE ICWA ........................................ 1239
A. Legislative History ......................................................... 1240
B. Coverage Under the Act .................................................. 1241
   1. Divorce Proceedings Exception ...................................... 1244
   2. Judicially Created Exceptions ........................................ 1249
      a. Existing Indian Family Exception ................................ 1249
      b. Intra-Familial Disputes ............................................ 1253

V. THE PROBLEM OF CONCURRENT JURISDICTION AND CHOICE OF LAW ....... 1253
A. The Traditional Approach to Jurisdiction and Choice of Law in Domestic Relations Law .................................................. 1253
B. False Conflicts ............................................................. 1258
C. Real Conflicts .............................................................. 1261

VI. THE SOLUTION: AN EXPRESS CHOICE OF LAW PROVISION ............... 1263

VII. CONCLUSION ................................................................. 1267

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I. INTRODUCTION

Nothing in this article is true; it’s just the way things are. The suicide rate among Indian youths is twice the national average. Social scientists directly attribute this aggravated rate to the identity crisis resulting from Indian children being raised outside of their own cultural systems. In advising an attorney in an Indian child placement case, Dr. Samuel Roll made the following statement:

Cross-racial adoptions (often) and cross-racial Indian adoptions (almost always) have a high likelihood of producing severe identity crises in Indian children as those children become adolescents. The children thus raised are at more serious risk for depression, suicide, anti-social behavior, severe identity crisis, etc. In addition to the problems within the Indian child raised in non-Indian homes, there are also problems of social interaction (prejudice) which make the risk of psychological difficulties (isolation and displacement) in the Indian child even higher.

In 1978, the Indian Child Welfare Act (referred to herein as the ICWA or the Act) was passed by Congress to impact a scandalous history of removal of Indian children from their tribes and families by state agencies and courts. As a means of protecting the best interests of Indian children, the sovereignty of tribes, and the integrity of the Indian family and tribe, Congress crafted minimum federal standards for the governance of child custody determinations made by state courts falling within the ambit of the Act. At the time of the writing of this Article, a bill amending the ICWA has been reported out of the Senate and is expected to reach the floor for vote in September of 1998. Section 9 of the bill includes as one of its significant parts an amendment to 25 U.S.C.A. § 1915(c)(3). This proposed section provides that the placement preference of a parent or Indian child may override the placement preferences set forth in the Act. As the remainder of this Article will elucidate, this amending language could seriously undermine the congressional purpose behind the Act by broadening the scope of the state court’s discretion when applying the placement preferences set forth in the Act. This additional textual basis

2. Id.
3. Id.
5. See infra Part IV.A for a discussion of the legislative history of the Act.
7. Telephone Conversation with Steve McHugh, Assistant General Counsel for the Committee on Indian Affairs (Sept. 1998).
9. Id.

1222
for creating custodial preferences when placing Indian children will exacerbate the already difficult problem of state compliance with federal requirements affecting an area traditionally viewed as falling squarely within the domain of state power—domestic relations law.  

In addition, the divorce proceedings exception to coverage under the Act leaves a growing number of Indian children outside the class of children covered by the Act. These children can be especially vulnerable. As this Article reveals, the jurisdictional complexities created when considerations of federalism, tribal sovereignty, and comity interplay do not give rise to easy answers. However, if we view the problem from the lens of an Indian child who, no matter where or by whom raised, needs a strong, healthy, positive sense of self, one possible solution emerges—an express choice of law provision requiring the application of tribal law to the terms of any adoption or custody decree granted by a state court involving an Indian child as defined by the Act.

A significant portion of this Article was originally presented as a speech for a panel on the Indian Child Welfare Act at a Symposium entitled: “Tribal Sovereignty—Back To The Future,” held December 1-2, 1994, at the St. Thomas University School of Law. Although my exposure to, and interest in, Native American life predates this Symposium by some two decades, the Symposium revitalized my own experience of Native American life as a teacher of Native American children in Phoenix, Arizona. That revitalized experience urges me to start this Article by thanking the indigenous peoples living throughout North and South America for expressing a way of life that is connected and illuminating, and, in my view, consistent with, yet beyond, our postmodern theoretical understanding of humankind’s relational being.

This Article suggests that a “phenomenology of connectedness” is available to us through the lives and cultural narratives of the indigenous peoples of the Americas, and that phenomenology can impact the existential crisis experienced by

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10. Federal power to regulate relations between states and Indian Tribes under Art. 1 sec. 8, cl. 3, the Indian Commerce Clause, largely eclipses state power and arguably overcomes federalism challenges under U.S. v. Lopez, 115 S. Ct. 1624 (1995).

11. For a definition of “Indian child” pursuant to the Act, see infra note 13.

12. The phenomenological method seeks to “bring to awareness” that which is unconscious, and, in that sense, unknown, by re-experiencing everyday phenomena with a view toward unveiling its deeper, unconscious, or hidden meaning. It presumes that the intended meaning underlying action is understood at the level of “being,” although it is not necessarily intellectually known. In this sense, thought is an indirect way of knowing, and critical thought seeks to access unreflective, intended meanings by acting as a bridge to the understanding inherent in being. Thus, as described by Peter Gabel, “Phenomenology pursues truth . . . through a process of ‘unveiling description’ rather than through explanation or rational analysis, and it seeks to be evocative rather than logical.” Peter Gabel, The Phenomenology of Rights-Consciousness and the Pact of the Withdrewn Selves, 62 TEX. L. REV. 1563, 1564 n.2 (1984). Therefore, “[a] phenomenological description of connectedness is one that captures in a qualitative language what [connectedness] feels like in its everyday manifestations, while also revealing the inner intentions that bring it into being.” Id. at 1566. For definitive works on the phenomenological method, see id. at 1564 n.2.
Indian children. As a new epistemological source for law, it will inform and require a transformative jurisprudence that applies tribal law to the configuration of custody arrangements involving "Indian" children made in state forums. In addition, the phenomenology of connectedness has profound implications for the transformation of the alienated character of our present social condition. Even if this constellation of the lives of the indigenous peoples of the Americas is romanticized and/or essentialized, it has the performatory effect of suggesting that there are, here and now, peoples among us who know how and desire to live in close kinship with each other and the earth. Both the phenomenology of connectedness and the idea of earth and extended-family/tribal kinship have the power to (1) invigorate the individual and social movements to overcome alienating reciprocities deeply rooted in our early childhood experiences, and (2) require any interpretation of the "best interest" of the children of indigenous peoples of the Americas to consider the value of "authentic connection" as an experiential reality of the "old Indian way" now sought to be reclaimed in the movement toward tribal sovereignty and self-determination.

13. An "Indian child" is defined by the Indian Child Welfare Act as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C.A. § 1903(4) (West 1983).

14. This Article adopts and draws heavily from Peter Gabel's description of alienation as a systemic social problem in his critique of rights. To summarize, Gabel describes alienation as the "denial of desire" for connectedness; he argues that it cannot be accounted for by externals like the struggle over the finite means of production but must be seen as "a quality of our experience that exists inside of us." Gabel, supra note 12, at 1564-66. He suggests that alienation is more like "a free betrayal that is metaphorically suggested in the theory of original sin." Id. at 1567 n.9. Gabel posits that the desire for connectedness has become permanently associated with an internalized memory of loss emanating from the inter-subjective experiences in childhood of the distancing other. Id. at 1568. As a result, the child develops a "false self" which compulsively repeats an existential sequence: "desire for connection—memory of loss—anxiety—self-falsification." Id. In addition, Gabel describes an interdependent relationship between alienated consciousness and the belief in rights and the state, stating that within the context of current legal thought, "concepts like rights must have an alienated meaning." Id. at 1563-68; see generally GARY MINDA, POSTMODERN LEGAL MOVEMENTS 200 (1995).

15. For a definition of essentialism, see generally Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 STAN. L. REV. 381 (1990).


17. For a discussion of Native American culture and the phenomenology of connectedness, see Richard Simonelli, Finding Balance by Looking Beyond the Scientific Method, 9 WINDS OF CHANGE 106, 111 (Autumn 1994) ("[O]ld Native American culture, through its powerful sense of community, its ceremonies, and its deep connection to nature, endowed tribal people with an intrinsic understanding of connectedness.")
The constructive and destructive power of language requires that I make a few preatory remarks about linguistic and stylistic choices. Like Toni Morrison, I want to awaken and engage the "midwifery" properties of language so that in the midst of the relational experience of text and interpreter, new possibilities of understanding are born. In that regard, I use old words in new ways, or at least, in different ways, and request your participation in the nuanced effects of the words in interaction to allow the alternative view to emerge. Convention in thought is precisely that which I wish to lay aside in exchange for the opportunity to invent. This is especially true in Parts II and III where the critical lens through which the Act is viewed is explained and where the vision of reality which drives the rationality of the Article is revealed. This is not to suggest that anything presented here is new, original, or true in any pure sense, but only that it is intended to resonate at a deeper, more submerged level of consciousness than a more conventional approach generally intends.

In this Article, I speak of people in terms of color, and in doing so, I acknowledge color as a perception of value-able differences so deeply rooted in American society that these descriptors have become synonymous with the people themselves. Therefore, where it is important to emphasize this perceptual choice—to focus on the phenomenology of color consciousness—I use colors as proper names to refer to groups of people: i.e., I refer to Red people, Black people, and White people. Consistent with the use of these descriptors as proper names, they are capitalized. The term Spirit, when used to refer to the animating life force, is also capitalized to emphasize the sense of sacredness associated with its use. The term "Indian," which we all realize is a misnomer, is used when discussing the Indian Child Welfare Act and in other instances when it serves the purpose of consistency and effect. I also use the terms Native American, African American, and European American to describe the whole of Red people, Black people, and White people, respectively, when discussing them as economic, political, and

18. The constructive character of language is exhaustively analyzed in discourse theory. See generally JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" (1993); JEAN COCKS, THE OPPOSITIONAL IMAGINATION: FEMINISM, CRITIQUE, AND POLITICAL THEORY 39-62 (1989); DRUCILLA CORNELL, TRANSFORMATIONS: RECOLLECTIVE IMAGINATION AND SEXUAL DIFFERENCE (1993); Nancy Fraser, The Uses and Abuses of French Discourse Theories for Feminist Politics, 9 THEORY, CULTURE & SOC'Y 51 (1992). Toni Morrison lyrically describes the destructive, limiting, and stifling aspect of language as:

[language] which actively thwarts the intellect, stalls conscience, suppresses human potential. Unreceptive to interrogation, it cannot tolerate new ideas, shape other thoughts, tell another story, fill baffling silences. Official language smothered to sanction ignorance and preserve privilege is a suit of armor, polished to shocking glitter, a husk from which the knight departed long ago.


19. MORRISON, supra note 18, at 18.

20. I hyphenate this word to emphasize the different way in which it is being used. It is used to denote the state of being amenable to valuation or judgment based on relative worth, i.e., able to be valued. It implies placement on a continuum with valueless (lacking in worth) at one extreme and value-ful (possessing worth) at the other.
cultural communities. In using these categorizations, I do not intend to suggest that these communities are homogenous or that they are free of divergent—and, oftentimes, conflicting—interests.21 This is especially true when discussing the class of indigenous North Americans which is constituted of numerous and distinct tribes.22 However, where broad categorizations inform or facilitate the analysis, they are used.23 In addition, I employ the rhetorical devices of hyphenation and quotation to evoke, in the mind of the reader, a sense of the unadulterated force of words that have been de-energized through over-use and/or misuse, and thus are susceptible to other-than-intended meanings.

Part II describes the postmodern context in which the author reviews the Indian Child Welfare Act.24 In other words, the suppositions which undergird the rationality are revealed for critical examination. Part III provides an historical overview of the spirit healing efforts of Red people following the American Holocaust,25 including a comparison of these efforts to those of Black people in America, to which substantially all institutional remedial efforts are responses, including the ICWA. Part IV describes the purpose and scope of the ICWA, including a discussion of the express statutory exceptions to coverage and judicially made exceptions. Part V discusses the problem of concurrent state and tribal jurisdiction over Indian child custody matters. Part VI postulates an express choice of law provision limited to the structuring of terms of adoption and custody decrees as a possible solution to the problem of concurrent jurisdiction as it relates to the

21. For an illustrative and controversial case, see Santa Clara Pueblo v. Julia Martinez, 456 U.S. 49, 72 (1978) (holding that a suit in federal court by a Pueblo mother claiming gender discrimination under the Indian Civil Rights Act was barred by the tribe’s sovereign immunity against suit). For a feminist critique of this decision, see Catharine MacKinnon, Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo, in FEMINISM UNMODIFIED 63 (1987); cf. Harris, supra note 15, at 593 (arguing that MacKinnon’s reduction of the issue to a dichotomous choice between gender equality and culture ignores the social-historical circumstances that position the various players, and fundamentally smells of white cultural imperialism); cf. also Robert Laurence, A Quincentennial Essay on Martinez v. Santa Clara Pueblo, 28 IDAHO L. REV. 307 (1991); Robert A. Williams, Jr., Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context, 24 GA. L. REV. 1019, 1023 n.9 (1990) (providing some of the social historical context called for by Harris).


23. See Mari J. Matsuda, Comment, Pragmatism Modified and the False Consciousness Problem, 63 S. CAL. L. REV. 1763, 1773 (1990) [hereinafter Matsuda, Pragmatism Modified] (arguing that categorization is not antithetical to recognizing movement either within a structure or within a category).


25. The term “American Holocaust” is used by Dr. Maria Yellow Horse Brave and refers to the extermination of Indian tribes. See generally RUSSELL THORNTON, AMERICAN INDIAN HOLOCAUST AND SURVIVAL: A POPULATION HISTORY SINCE 1942 (1987).
assurance of an opportunity for connection of the Indian child with his or her tribe and/or extended Indian family. 26 This choice of law provision would not be limited to child custody proceedings as defined by the Act, but would extend to all custody proceedings involving Indian children as defined by the Act where a state court determines that the custody proceeding falls outside the scope of the Act, or where a parent objects to transfer to a tribal court, or where the state court determines that good cause exists not to apply the procedural or substantive provisions of the Act. Application of tribal law to the terms of custodial arrangements would effectively ensure that in those cases where the Indian child is separated from her or his Indian parent, either as a result of divorce or termination of parental rights, the opportunity for cultural connection is preserved. It would have the effect of expanding and making mandatory the recognition of the Indian civil right of cultural expression as set forth in the ICWA. 27 Although this Article acknowledges the gender-related issues present in custody determinations generally, it is not the intent or focus of this Article to analyze those issues as they exist within the communities of American indigenous peoples. However, this Article presumes that if empowered to do so, indigenous communities can and will respond to such self-defined issues in a contextually appropriate manner. 28

II. FOCUSING THE LENS—THE POSTMODERN PERSPECTIVE

Respect for multiple perspectives as the lenses through which to critically view the law and other normative social institutions has been argued so forcefully and so well in the context of outsider jurisprudence 29 and critical legal studies (CLS) 30 that

26. For further discussion of how this provision would be interpreted and applied, see infra Part V.
27. The proposed amendments to Section 1915 of the Act pertain to voluntary termination of parental rights and provide in pertinent part:
   (b) Notwithstanding any other provision of law (including any State law)—
   (1) a court may approve, if in the best interests of an Indian child, as part of an adoption decree of that Indian child, an agreement that states that a birth parent, an extended family member, or the Indian child’s tribe shall have an enforceable right of visitation or continued contact with the Indian child after the entry of a final decree of adoption; and
   (2) the failure to comply with any provision of a court order concerning the continued visitation or contact referred to in paragraph (1) shall not be considered to be grounds for setting aside a final decree of adoption.
   S. REP. NO. 105-156, at 6-7 (1997). This provision recognizes and is modeled after agreements that have been voluntarily entered into by tribal courts and councils. See the discussion infra Part V.
29. This term generally describes that body of legal scholarship and theory that gives voice to traditionally marginalized perspectives. The term “outsider jurisprudence” was coined by Professor Mari Matsuda. The community of scholars participating in the development of this body of knowledge is extensive, and includes Professors Mari Matsuda, Angela Harris, Kimberlé Crenshaw, Richard Delgado, Derrick Bell, Catharine
there is neither a need to reiterate the analysis nor a question of the legitimacy of the approach. There is little, if any, disagreement that postmodern jurisprudence demands a multicultural analysis. The lingering debate among and between adherents of the schools of critical race theory (CRT) and critical legal theory (CLT) centers around the postmodern deconstructive abandonment of the rights discourse generally associated with CLT and CRT’s pragmatic adherence to expansive rights construction as a tool for social change. The tension is understandable; the CLT approach is generally one of privilege, constructed and defined by privileged white males. Despite the fact that the privileged status of “white male” does not insulate the class from the debilitating effects of universal alienation, that alienation is not particularized and intensified through institutionalized subordination. Thus, while the Spiritual costs of alienation are

MacKinnon, Martha Minnow, Martha Fineman, Charles Lawrence III, Anthony Cook, and many others.

30. Critical legal theory is a specific application of general critical theory. Critical theory and its emancipatory imperative is generally associated with the Frankfurt Institute for Social Research. Donald F. Borman, Serious But Not Critical, 60 S. CAL. L. REV. 259, 332 (1987). Members of the Institute who are closely associated with the development of critical theory include Max Horkheimer (director, 1929), Leo Lowenthal (1926), Theodor W. Adorno (1938), Eric Fromm (1930), Herbert Marcuse (1933), and Walter Benjamin. Id. at 331-38. However, (post)modern critical theory had its birth in the unorthodox minds of left-wing members of the communist party including Karl Korsch, George Lukacs, and Ernst Bloch. Its specific application to law was popularized in America by legal scholars like Roberto Unger and Duncan Kennedy. See G. Edward White, From Realism to Critical Legal Studies: A Truncated Intellectual History, 40 SW. L.J. 819, 835-36 (1986).

31. See MINDA, supra note 14, at 196 ("[a] form of multicultural analysis and criticism has emerged").

32. The “promise” of Critical Race Theory is described by Professor Angela Harris as “a theory that would link the methods of [CLS] with the political commitments of ‘traditional civil rights scholarship’ in a way that would both revitalize legal scholarship on race and correct deconstructive excesses of CLS.” Angela P. Harris, Foreword: The Jurisprudence of Reconstruction, 82 CAL. L. REV. 741, 741 (1994) [hereinafter Harris, The Jurisprudence of Reconstruction].

33. Postmodern thought offers a critical assessment of the fundamental precepts of modern thought. It rejects the notion of subject/object bifurcated independence and asserts that everything is always recreated or reinvented as a result of an “indeterminate, intersubjective network of meanings.” In the context of law, the postmodern view suggests that the rule of law is impossible because there is no objective law “out there” to be applied. For an interesting and provocative argument for the salvation of the rule of law in postmodern philosophy, see generally Francis J. Mootz III, Is The Rule of Law Impossible in a Postmodern World?, 68 WASH. L. REV. 249 (1993). See also MINDA, supra note 14, at 22 (asserting that “modern Jurisprudence developed on the assumption that law was a transcendent object or subject unaffected by particular contexts, including the subjective gaze of the observer”).


35. See supra note 14 (setting forth the meaning of alienation).
comparable, from the standpoints of physicality and materiality, the white-male critique of rights is done from a comfortable distance.

Whiteness and maleness provide insulation from the threat of personal or material loss typically associated with subordination's negative consequences; thus, there is a lesser sense of necessity attached to the "protection" provided through rights discourse. For outsiders, on the other hand, subordination and all the negatives that accompany it are "always already" apparent, and the struggle for greater discursive and legal recourse to secure "protection from" and "access to" in the face of everyday social and cultural conflict must be contemporaneous with any jurisprudential approach to solving our existential conflict. Notwithstanding the fact that a Solomonic, phenomenologist approach to the emergence of justice "in the moment" may resolve many of the theoretical criticisms of rights discourse and unveil the judge as "a man in a tunic and 'the law'...as something like his speech-impediment," it is "safety" that allows the transformative deconstructionist to "rest" in the possibility that the reflective knowledge emanating from reconstitutive social connectedness will occur simultaneously with the deconstruction and abandonment of the mythology of the state.

CLT's aversion to reconstructive, as opposed to transformative, efforts bespeaks its fear that such efforts will remake that which it has worked so feverishly to dismantle. In a sense, this understanding distinguishes between that which is made—constructed reality, including alienation—and that which is

36. The goal of freedom from alienation or connectedness, I believe, is shared by both proponents of CLT and CRT, but the need for protection from subordination is not. In this regard, I agree with Gabel's general criticism of the conflation in Marxists' theory of the "spiritual catastrophe" of alienation with the "material circumstance" of scarcity of resources. Gabel, supra note 12, at 1566 n.9.


38. Rights theory has been criticized as ill-equipped to provide the very protection sought because of its refined and indeterminate character. Gabel, supra note 12, at 1563.

39. See Harris, The Jurisprudence of Reconstruction, supra note 32, at 741, 743 (describing racism as "an inseparable feature of western culture...as always already inscribed in the most innocent and neutral-seeming concepts").

40. In effect, the ability to construct a viewpoint within the parameters of sanctioned legal discourse.

41. The rights which give rise to the institutional duty to protect and make accessible form the basis of the ratchet effect discussed infra note 46. See also Geoffrey De Q. Walker, The Rule of Law: Foundation of Constitutional Democracy (1988) (defending the rule of law as the transitional device for ensuring safe passage from modern to postmodern society).

42. Gabel, supra note 12, at 1569-99.

43. In the context of rights analysis, the "state" is conferred the status of "rights holder." The power to confer status and balance competing interests is in the domain of the state, and it is through the exercise of that power (through its agents) that the state achieves meaning. Gabel, supra note 12, at 1569. For a deconstructed analysis of the state from a feminist perspective, see Deborah L. Rhode, Changing Images of the State: Feminism and the State, 107 Harv. L. Rev. 1181 (1994) and authorities cited therein.
created—connectedness.44 To be sure, this distinction is critical to a postmodern, transformative vision, and it is important to note that this reluctance to reconstruct may be the most self-aware exercise of the CLS postmodernist approach.45

The outsider, on the other hand, has worked just as feverishly to construct a ratchet effect46 through identity politics and rights discourse which checks the effects of white and/or male supremacist ideology—those constructed ideas that make interrelational being, for adults as well as children, a living hell.47 Each notch on the ratchet is important; each upward48 movement requires that the constitutional ideal of equality be reconstructed to mediate between the demand for positive recognition by the alienated other on the one hand and the alienated meaning of the constitutional ideal—e.g., equal protection—on the other.49 This living in the midst of the paradox opens us to transformative thought and transformed experience and, ideally, brings us closer to the time when externally imposed rules of social behavior are no longer necessary, when each creature sees every other creature as integral to the whole.50 From the lens of the racialized nations of Red people, who are less than one percent of the American population,51 rights discourse and positive law which support, reinforce, and expand self-directed power and influence are central to the healing and survival of the Spirit of Red people.

The CRT approach endorses the view that we ultimately reach the cause of racism, sexism, classism, and other forms of subordination (alienation) through acknowledging and attacking their effects.52 In that sense, this Article recognizes

44. Gabel describes us as “constituted as social beings by the desire to be recognized by others in an empowering, life-giving way.” Gabel, supra note 12, at 1566. This understanding of connectedness as essential to being human is greatly influenced by the essays of R.D. Laing. See LAING, supra note 16 (elaborating on the essentialism of such human bonding).

45. Despite deconstruction of the rights discourse and the consequent deflation of its protective force, the shift in perspective is important; it requires recognition and consideration of the “other.”


47. This conjunctive description of supremacy as white and male reflects recognition of the intersection of race and gender as analyzed by Kimberlé Crenshaw and others. The intersection of other factors like class and age also adds other layers to the analysis. See Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1246 (1991) [hereinafter Crenshaw, Mapping the Margins].

48. “Upward” is used here to suggest legal action consistent with the expansion of rights and opportunities to previously excluded groups.

49. See Gabel, supra note 12, at 1577 (setting forth what it truly means to experience connectedness).

50. Jürgen Habermas maintained that the “quality of a society depends largely upon the non-authoritarian character of its everyday mores and customs.” S. E. BRONNER, OF CRITICAL THEORY AND ITS THEORISTS 309 (1994).


52. See Matsuda, supra note 46, at 2325 (describing the focus on effects by “outsiders” as inextricably interrelated with the deep, tangled roots of racism, and stating that this focus “can lead to a just world free of existing conditions of domination”).

1230
and is comfortable with the paradoxical approach of reviewing the modernist, expansive-rights approach of the Act within the larger context of postmodern deconstructive liberation. In other words, this Article seeks legal reform of the Act but a type of reform which has transformative potential. To give birth to this potential, I engage the reconstructive approach described by Professor Angela Harris as the “politics of joy.”

The politics of joy acknowledges the role of spirituality in life, and demands theory that is infused with humility and love. It is not confined to the foundational approaches of reason, but informs reason through understanding, an understanding which exists at the level of being and which is available to each of us through critical self examination. The complement of a Spiritual life is joy. Thus, this analysis starts where Professor Harris’s description of the jurisprudence of reconstruction appears to end—with the premise that “wholeness” is the unifying principle; the quest for its realization is spirituality; and achievement of spirituality is signified by joy. This joy is unattainable to the extent that we are rationally and emotionally trapped by the limiting constructions of one cultural point of view. Thus, this author, like Anthony Cook and Cornel West, views the postmodern critique and Spirituality as synergizing forces capable of simultaneously opposing existential anguish; socioeconomic, cultural, and political oppression; and dogmatic modes of thought and action. Dogmatic thought and action reflecting valueless differences in Red people resulted in the American Holocaust and account for the

53. In Professor Angela Harris’ description of reconstructive jurisprudence, she presents several jurisprudential approaches. The theory of the racialized subject is criticized as potentially falling to “aspir to disenchantment”—a rational state which acknowledges the limitations of rationality as theory for the elimination of racism. Thus, “rationalism may come to represent just one of many tools of social change.” The politics of Joy suggests a “greater acknowledgment of the importance of spirituality in human life generally and in racial struggle in particular.” Harris, The Jurisprudence of Reconstruction, supra note 32, at 741.

54. See id. (providing an excellent overview of the approaches to reconstructive/transformational jurisprudence).

55. The concept of wholeness is most aptly defined in the discipline of theoretical physics as “quantum-based universal relational holism.” For discussion of this concept and its implication for law, see R. George Wright, Should the Law Reflect the World? Lessons for Legal Theory From Quantum Mechanics, 18 FLA. ST. U. L. REV. 855 (1991); see also Laurence H. Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics, 103 HARV. L. REV. 1, 17-20 (1989) (discussing quantum theory). Quantum theory involves the dismantling of the superstition of materialism, i.e., the world is made up of matter and contains objects that are separate from each other in space and time. Instead, quantum theory posits that we are simply fluctuations of energy in a field of energy. Thus, the body is proportionately as void as intergalactic space. Materialism is criticized as making sensory perception the crucial test of reality. For a more detailed discussion of this view of quantum theory, see D. BOHM, WHoleness AND THE IMPLICATE ORDER 67-69 (1980).


57. Professor Cook defines Spirituality as “the sincere striving for unalienated and unfractured human connection . . . understanding the limits of our knowledge and allowing humility fostered by such understanding to open us to the possibilities of knowledge once impeded by the arrogance of our self-contained works.” Id. at 1018.


59. See supra note 25 for an explanation of this term.
senseless acts which gave rise to the passage of the ICWA. Empowering Red
nations to structure tribal and extended family relations with their children
consistent with their view of the child’s best interest has the potential of addressing
the psycho-social problems of Indian children raised outside of their cultures and
transforming the courts of the conquered and conqueror. Postmodernism unveils the
falsehood of false consciousness 60 and at the same time elevates humility to the
status of virtue. 61 All consciousness is real. While none of us knows “the” truth,
through experience we know “a” truth about ourselves: the Spiritual life dictates
that we experience each other’s truths joyfully.

In the context of race relations, Professor Cornel West suggests that the answer
to the modern/postmodern paradox is to replace racial reasoning with moral
reasoning; 62 I suggest we take it a step further and postulate that we subject all
reasoning to the acid test of joy 63—e.g., what is my devalued view of self that I am
afraid to see but which is killing my joy?—that unacknowledged self perception is
the projection which becomes the negativity which I see in others. When you look
at others, you can only see yourself; when you experience others, you can only
experience yourself. It is not him but me; it is not she but I. 64 Postmodern
deconstruction plays an important and critical role in this quest for the realization
of wholeness; it requires the fundamental admission that allows us to move beyond
thought to the experience of wholeness. That admission is: I DON’T KNOW. 65 We
do not know what the Red way of life has to offer Indian children or ourselves. CRT
acknowledges that there are those among us who think that they do know, and who
are willing to impose their “thinking” on others. CRT seeks to protect the
vulnerable from the act of imposition.

This Article asks that you suspend what you think you know about Red people
for a moment and engage in some possibilities. This is the kind of “giving up and
giving in” that Toni Morrison effortlessly engages us in through her use of magical
realism 66 in works like Song of Solomon and Beloved. It presupposes the

60. False consciousness theory posits that no single perspective encompasses “the truth,” not even with
respect to the perspective itself. See Matsuda, Pragmatism Modified, supra note 23, at 1776-80.
61. Cook, supra note 56, at 1007; Harris, The Jurisprudence of Reconstruction, supra note 32, at 782.
Professor West alludes to at the end of the chapter when he states that “[f]or the moment, we reflect and regroup
with a vow that the 1990’s will make the 1960’s look like a tea party.” Id.
63. I consciously use “acid” test as opposed to “fitmus” test to emphasize the severity of the critical self-
examination which is an essential component of the politics of joy.
64. For a fully developed presentation of these ideas, see LAING, supra note 16.
65. Professor Cook states: “The arrogance and potential dominance associated with knowing the right
answer and knowing what is best for the oppressed must be tempered with the postmodern contingency, relativity
and potential deconstruction of our own foundations of knowledge.” Harris, The Jurisprudence of Reconstruction,
supra note 32, at 782.
66. This description of Toni Morrison’s vision is gratefully borrowed from a lecture given by Dr. Margaret
intellectual/mental and emotional/feeling capacity to consider, contemplate, or engage the possibility of the equality of value in the cultural expression of Red people and the necessity of that expression in the experience of wholeness or connectedness (joy). If one accepts the realization of wholeness as joy—as a source of meaning for life—the concept of separateness as supported, in large part, by sensory perceptions of difference distances us from our goal. Moreover, when perception of difference is accompanied with judgment based on that difference (value-able difference), alienation of someone (self or other) is either or both a necessary part or and the clear result. This alienating activity of perceiving difference and judging based on that perception currently dominates human consciousness, and gave rise to the historical events which predicated the passage of the Act. Moreover, the phenomenology and mechanics of perception posit that the world “is” for the perceive what she or he perceives it to be. Thus, when we perceive separateness and valuable difference, we make them real and their reality dictates our experience. Nothing more clearly demonstrates the axiomatic nature of this premise then the preoccupation of American life with what are now “obvious” differentiating characteristics like race and sex. Leading legal scholars like Derrick Bell and Catharine MacKinnon have theorized that racism and sexism are permanent fissures in American consciousness. Today, Americans are frustrated because formerly silenced selves have been given voice and now must be resiledenced or harmonized. We protest that everything is racist and everything is sexist, but yet this is as it should be because everything is racist and everything is sexist when we perceive sex and race as authentic, meaningful differences constituting our separate selves. This is the world we have made.

WE ARE ONE WHOLE. To accept this premise does not require that we look the same, act the same, or be the same, although it does not foreclose those possibilities. It suggests an interconnectedness that transcends perceived differences in bodies or ideologies. To perceive physical or ideological difference without the transcendent awareness of perception as self-reflection is simply an error in perception. This error in perception was and is, but does not have to continue to be.70 The manifestations of the alienation resulting from this erroneous perception may vary from time to time or culture to culture, but the cognitive injury is actually the same; each harm reinforces the cognitive reality of value-able difference and

67. See Angela P. Harris & Marjorie Shultz, "A(nother) Critique of Pure Reason": Toward Civic Virtue in Legal Education, 45 STAN. L. REV. 1773, 1785-86 (1993) (suggesting that rationality and emotion should be viewed as complementary rather than separate); Harris, The Jurisprudence of Reconstruction, supra note 32, at 779 (arguing that rationality and emotionality are compatible ways of knowing).
68. Derrick Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); MacKinnon, supra note 21.
rightful judgment. I call this Spirit injury. Conceptually, Spirit injury is the necessary predicate for and the instantaneous result of perceptions of separateness and value-able difference. This premise is symbolically depicted in the biblical story of Eden when Eve and Adam recognized their nakedness, their gendered difference. It took a fall from grace ((w)hol(i)ness) to perceive separateness and difference. Thus, arguably, all thoughts and acts predicated on such difference/separateness have their genesis in alienation.

Now, one might leap to the (i)logical conclusion that positing wholeness precludes the advocacy of race- or sex-based doctrine or legislation. Definitely not! To correct the error is not to deny its existence and its fruits; correction requires acknowledgment, re-cognition, and re-versal of effects. To undo or balance that which has been done requires that subsequent action focus on the subject and the object of the original doing. Thus, remedial thought, doctrine, and legislation resulting in remedial acts are necessary; but critical to a creative, intelligent response to the error/injury is a conscious understanding of the error/injury itself.

Color is a perceived difference, neutral in and of itself, a good descriptor. When used as a basis for valuation (judgment), it becomes erroneous perception. Two quintessential examples of this kind of erroneous perception based on color are the enslavement of Black people and the forced resettlement and containment of Red people. While the apparent consensus suggests universal condemnation of both institutions, real consensus may be more difficult to identify. Nonetheless, even descensus has resulted in legislative initiatives and social action to remedy some of the resulting harm. The foregoing sets forth the suppositions and positions which inform the rational review of the legislative effort of the 95th and current Congress to impact the misperception of valueless difference in Red people’s expression of family and tribal life and to redress the consequential harms of wholesale removal of Red children from their families and tribes. This re-view perceives Red people as an indispensable part of a whole of which I am also a part, as they are reflectors of me to myself and, as people, invaluable equals.

71. This term was thought to be a neologism at the time of this writing. Research, however, has revealed that it has been used in the context of human rights analysis to explain an aspect of the harm both intended against and inflicted upon women who have been “justifiably” raped during war and other forms of conquest, e.g., slavery. See Adrian Katherine Wing & Sylke Merchant, Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America, 25 Colum. Hum. Rts. L. Rev. 1, 20-25 (1993) (attempting to extrapolate from the apparent long-term effects of Spirit Injury to Black Americans possible implications for Bosnian Muslims). Professor Patricia Williams first articulated the concept as Spirit Murder in her article: Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law’s Response to Racism, 42 Miami L. Rev. 127, 139 (1987).

72. Please don’t recoil from the use of this narrative. The author appreciates that the story has been interpreted to justify judgment and domination, but suggests another interpretation that may illuminate this discussion.

73. Steven L. Winter, Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law, 137 U. Pa. L. Rev. 1105, 1136-37 (1989) (pointing out that the relativists view color as a continuum where different languages carve-up the spectrum differently, creating a perception of radically different colors).

74. This is not an oxymoron; all people are equally invaluable.

It was a cool, crisp day in San Luis Potosi, Mexico. We bundled ourselves against the wind that cut down the mountains from the old silver mines. Joaquin was taking me on a Medicine Walk across the arroyos, down a dry river bed, and then up a canyon. As we walked up the path, I looked at the healing herbs and plants that Joaquin used in his cendero (healing) work. We always located the Chief Plant to ask permission and offer tobacco before we gathered anything. The red rocks gave way to patches of Chamisa and other native grasses along the trail. The Wind was not as biting behind the canyon wall and the enormous turquoise sky made a happy canopy as we continued our climb.

Joaquin stopped for a minute and motioned for me to make a wider berth around one of the cacti. ‘That is Mescalito, the deity of the Peyote,’ he said. ‘He is the Chief cactus in this area and we treat his Sacred Space with reverence,’ he continued. ‘Mescalito has served our people well and the other nations to the north have also benefitted. ‘Joaquin,’ I asked, ‘when did the Peyote Ceremony come to our people in the north?’ He replied, ‘We will sit on the ledge over there,’ he motioned, ‘since this story takes a while.’

When we were seated among the saffron and rust-colored Stone People, he continued. ‘Before my Grandfather was grown, the Yaquis had visits from the Apache Warrior Clans and Medicine Clans that wandered northern Mexico. Now their reservation is near Ruidoso, New Mexico. These brothers were fierce fighters who had watched their people harmed by the White Eyes who had fenced the land and killed the Buffalo. The spirit of the people had been broken. These Braves reported to our Elders that they had been stripped of everything but their souls. Their fear was that the White Eyes would steal their spirits too if they found a way to get them.’ Joaquin seemed lost in thought as he reviewed the past in his mind. Then he began again, ‘You see, Midnight Song, it was a new kind of medicine that was needed then. It was in 1882 that my great-grandfather’s brother gave the Apaches the Medicine of Mescalito.’ He smiled, then his bass voice moved to a whisper. ‘No one can trap the souls of our people now, they have no fear of death. Through Mescalito, they have seen beyond the Void and have visited the Other Side Camp. We know that we always continue to live in one form or another. That is the new kind of power that we gave the Apaches, who shared Peyote Medicine with other Tribes and
Nations of the north. These Apaches are honored and from that time, they were called Mescalero Apache.75

The social and historical realities giving rise to what has come to be known as the American Indian Movement (AIM) are well documented, if not well known.76 Events predicated on perceptions of separateness and valueless difference resulting in both a significant reduction in numbers of full-blooded members of extant tribes and complete genocide of others77 were vigorously rationalized as triumphs of western civilization;78 today, those same acts are just as vigorously condemned as another example of humankind’s barbarity.79

In the same way that the Black Power Movement (BPM) of the 1960’s struggled to re-verse the mantra of inferiority and powerlessness plaguing the Black root race in America by affirming the I AM,80 AIM struggled to remember tribal life and re-sign the Red root race with the Great Mystery.81 Both movements struggled on several fronts, simultaneously recognizing the complexities of subordination to and the necessity for liberation from white supremacy. The tangible and intangible effects of hundreds of years of slavery and containment82 made at least one thing clear; the continuation of the struggle and the eventual liberation of the peoples (Red, Black, and White) was intimately and inextricably bound up with and dependent upon the children of the races.

The meanings of Redness and Blackness having been defined and maligned by Whiteness had to be reconstructed and reinforced in the innocent minds of the
lambs.83 The devastating effects of Spirit injury84 caused by de-valuation and invalidation were all around and every young Spirit, born and yet-to-be-born, was its likely victim; something had to be done. While both the BPM and AIM have been and can be criticized from the standpoint of essentialism85 and identity politics,86 that criticism freezes in time dynamic social movements constructed to overcome alienation and its evils. One cannot expect wholeness87 from that which has been deeply alienated.88 Nonetheless, the goal of reintegration/at-onement/wholeness, as reflected in the movements’ emancipatory efforts, is readily identifiable in their demand for civil and human rights and political liberty. That must be the standard by which they are ultimately measured. More importantly, though, is the recognition that these movements have not died; they have matured, and in their maturity, they have recognized the positionality of their constituent members.89


84. See supra note 71 (stating that the origin of this term derives from the conquest and rape of women).

85. Essentialist reasoning has been criticized as being premised on the presence of a reducible essence that all people possessing a common immutable characteristic must share. This term has been used to describe the erosion of cultural difference based on a common immutable characteristic that is the basis of discrimination. It has formed the basis of criticism of the feminist analysis by women of color. Harris, supra note 15, at 585-86. A comparable concept is “racial reasoning” as described by Cornel West. As a part of his deconstruction of Blackness, West states:

[A]ny claim to black authenticity—beyond that of being a potential object of racist abuse and an heir to a grand tradition of black struggle—is contingent on one’s political definition of black interest and one’s ethical understanding of how this interest relates to individuals and communities in and outside black America. In short, blackness is a political and ethical construct. West, supra note 62, at 39. A similar criticism of Redness has been asserted in Williams, Jr., supra note 21.

86. See BELL HOOKS, YEARNING: RACE, GENDER, CULTURAL POLITICS (1990) (suggesting that there is only one Black or Red perspective, to which all Blacks or Reds should adhere); see Crenshaw, Mapping the Margins, supra note 47, at 1242 (criticizing identity politics as ignoring intragroup differences). For an illuminating discussion of the intersection of race and sex, see Kimberlé Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988); Williams, Jr, supra note 21, at 1019.

87. For purposes of this discussion, wholeness is defined as the ability of the group (global, national, racial, etc.) to appreciate and apprehend the heterogeneity of experience that comprises the group, coupled with the ability and power to protect that heterogeneity as integral to the group. For a more detailed discussion of this concept see LAING, supra note 16, at 53.

88. If the experience of an individual (group) has been invalidated or destroyed, the consequence is destructive behavior. LAING, supra note 16. See generally CLARISSA PINKOLA ESTES, WOMEN WHO RUN WITH THE WOLVES (1992) (applying Jungian psychology as a method for understanding response).

89. For instance, the “women’s movement” is no less dynamic in the Red community than in the Black and White communities. It simply has a different set of interests and priorities. See Williams, Jr., supra note 21, at 1043; Rayna Green, Native American Women, SIGNS, 250 (Winter, 1980).
Without intending to in any way diminish the magnitude of the human rights violations committed against Red people, it can be fairly said that the Red people possess a legally recognized (as distinct from actualized) power not shared by Black people: they are sovereigns. While this sovereignty is qualified and circumscribed, it nonetheless confers a limited power to govern and carries a potentiality with far-reaching material and spiritual benefits. Strategies for greater realization of that potential is the subject of a substantial body of scholarly work. The value of potentiality in the face of actual deprivation is clearly debatable. However, the very act of coming together for the Symposium which spawned this Article renewed my faith in the inevitability of change and thus supports the view that while it doesn’t put food on the table, it does feed the soul.

Unlike the several states, Indian tribes never ceded sovereignty to the federal government, though in some instances they were conquered. However, like Black people, they were socially, politically, and legally subjugated. After forced removal and relocation of tribes during the 1820’s and 1830’s, intergovernmental treaties between the United States and the various tribes renewed the promise of cultural and political autonomy, and the 150 years between 1820 and 1970 revealed the truth of the matter. In 1871, the federal government ceased making treaties with Indian tribes, and the apparent intergovernmental relationship between the United States and the various tribes was replaced with a trustee relationship emanating


93. See, e.g., Grant Foreman, Indian Removal: The Emigration of the Five Civilized Tribes of Indians (1953) (discussing approaches that would enable Indian tribes to realize the benefits of sovereignty); George Dewey Hampton, Sixty Years of Indian Affairs 188-91 (1941) (same); Steven Pevar, The Rights of Indians and Tribes 3 (1992) (same); Frederick J. Turner, The Frontier in American History (1920) (same).


95. Under Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831) and Scott v. Sanford, 60 U.S. 393, 394 (1877), Red people and Black people were constitutionally determined not legally representable and therefore, from the standpoint of rights analysis, invisible people.

96. It is interesting to note that many of these treaties were improperly entered into because they were made with men who lived under matriarchal, matrifocal, and matrilineal tribal societies. Green, supra note 89, at 250.
from Congress' asserted plenary power over Indian Affairs.97 Just as the 1963 March on Washington both actualized and symbolized the force and power of the struggle of the poor of America, especially the condition of Black people, so the Trail of Broken Treaties, Wounded Knee, and the Indian occupation of Alcatraz all actualized and symbolized the determination of Red people to be seen.98 These historical events gave visibility and voice to otherwise-subjugated and silenced people. However, in the same way that the assassinations of Martin Luther King, Jr. and Malcolm X diffused the power of the BPM, AIM was smothered by the trial of Russell Means and Dennis Banks.99 The questionable practices of the United States government generally, and the FBI particularly, were justified in the minds of the public by the deaths of Jack Coler and Ronald Williams, two FBI agents, and the subsequent conviction of Leonard Peltier, an Indian, for their murders.100

Like every good governmental quash of social reform movements, public outrage over governmental impingement on fundamental human rights was assuaged with congressional oversight action and the formation of a commission charged with investigating the nature of the problem. Hence, the American Indian Policy Review Commission was born. Among the many atrocities revealed through the Commission's investigation was the destruction of the American Indian family. In 1978, the Commission's report was released, and in that same year the Indian Child Welfare Act was passed.

IV. PURPOSE AND SCOPE OF THE ICWA

There's a saying in the African American community, "if you white, you right; if you black, get back; if you brown, hang aroun' and if you red, you dead." That saying reflects an African American perception of the relative value placed on shades of human beings by the dominant culture. There are endless stories that legitimate the perception, the social and historical realities underlying the ICWA being the source of many. The stories are both written and unwritten, spoken and unspoken; they are nonetheless revealed—the existence and underdevelopment of

98. For an interesting parody of the BPM as a technique to illuminate the historical context of AIM, see DELORIA, GOD IS RED, supra note 76, at 25-35.
99. Id. at 22.
100. It has been suggested, though not proven, that Coler and Williams were intentionally killed by the FBI in an effort to shift public sentiment in favor of the federal government. Id.
the American Indian reservation, the level of disease, including alcoholism and depression among Indian people, the loss of language and therefore opportunities of perception, the loss of traditional knowledge including medicine and the healing arts, the dismissive historical treatment coupled with self-negating imagery in all forms of media, and the ultimate loss of power, both personal and political. These shared and imposed experiences of the colored cultures in America have a common intent—the delegitimation of a state and way of being, the disorientation from self, and the reorientation toward otherness. I AM (right); ERGO YOU CANNOT BE (right). Because we are different, we both cannot be right. With respect to race, this perception of dichotomous being coupled with valuation as lived out in American society is most aptly described as white supremacy.

As a human endeavor, jurisgenesis necessarily takes place through a cultural medium. Native American scholars have vehemently criticized the use of assimilationist legal discourse to forward a political agenda of cultural genocide. It is the destructive effects of white supremacist thinking and action on Indian existence, family, and tribal life which the ICWA seeks to remediate. Despite the sweeping policy objective articulated by Congress, a strict textualist approach taken by some judges has allowed that policy objective to be seriously undermined.

A. Legislative History

The legislative history of the ICWA is replete with empirical data substantiating intentional acts which destabilized the American Indian family and tribe. It documents state and federal governmental commission and omission which institutionalized practices resulting in the wholesale removal of Indian children from their parents and tribes, including fraudulent and coerced “voluntary” terminations of parental rights; summary process without legal representation resulting in judicial termination of parental rights; application of illegal standards making factors like poverty determinative of the child’s best interest; and abusive agency practices resulting in over-enrollment of Indian children in state and federal boarding schools. It suggests that imposed and impoverished housing, health,
employment, and educational conditions on the reservation, coupled with a mass exodus of Indian children, was a sure-fire formula for cultural genocide, children being the inspiration to continue fighting against the odds. More importantly, for purposes of this discussion, the legislative history acknowledges and begins to deconstruct the perception of separateness and valueless difference which justified the intent and the effect of these destabilizing acts.

By defining the best interest of Indian children to include the continual cultural identification of the Indian child with his or her tribe, Congress squarely confronted the antithetical views of constructed meaning—valuelessness versus valuefulness. Lifting language from reports published by the Association on American Indian Affairs, Congress rebuked state action (including judicial action) that devalued or dismissed Indian culture. 107 The ICWA goes so far as to imply judicial irresponsibility in administering law in this area when judges lack knowledge of Indian life. 108 However, what is more remarkable is the express recognition of the Spirit injury that occurs as a result of devaluation. Noting that not all impoverished societies suffer from catastrophic family breakdown, Congress stated that "cultural disorientation, a person's sense of powerlessness, his loss of self-esteem—these may be the most potent forces at work." 109 Congress went on to state that these forces arise in large measure from "national attitudes" as reflected in longstanding "federal policy." 110 In apparent acknowledgment of the limits of legislative power to timely affect perception, Congress restructured the power relationship between Reds and Whites by vesting exclusive jurisdiction in the tribal courts to decide custody issues involving Indian children where termination of parental rights or severance of custodial relationships was involved. Perhaps this degree of congressional candidness about the effects of white supremacy saw its heyday in the decades of the sixties and seventies, but the reconstructive efforts of the nineties are even more dependent on open and honest discourse about (mis)perception and power and their effects on personhood.

B. Coverage Under the Act

The road to self-government, as distinct from self-determination, 111 has been and remains an arduous one for Native American people. As indicated above, federal "Indian" policy has been arbitrary, erratic, inconsistent with express federal

110. Id.
111. See Matsuda, Pragmatism Modified, supra note 23, at 1763 (arguing that self-determination includes the power to be self-definitional); cf. David Williams, Legislation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law, 80 VA. L. REV. 403, 417 (1994) (asserting that, at least for the past twelve years, the official federal policy has been to promote tribal self-determination).
responsibility, and, until refocused through AIM, consistent with a federal perception of valueless difference in Red people.

The ICWA is legislation undeniably intended to redress and prevent the harmful effects of white supremacist thinking as reflected in authoritative state action; given the role of state agencies and courts in effectuating the harm of wholesale removal of Indian children from their families and tribes, Congress, in forging this remedy, circumscribed state judicial power over Indians. Despite constitutional uncertainty about congressional power to legislate in this manner, Congress’ power to legislate commerce with Indians is said to be plenary in nature, and such “commerce” has been interpreted by the U.S. Supreme Court to include interaction with individual Indians. The remedies provided in the ICWA are both procedural and substantive in nature, placing jurisdiction to make removal determinations exclusively in the tribal court when the child who is the subject of the custody dispute is an Indian, domiciled or residing on the tribal reservation, and the proceeding is not otherwise subject to state jurisdiction under federal law. Where termination of parental rights is involved, the ICWA establishes mandatory placement preferences designed to dictate/facilitate the continued cultural

112. See 25 U.S.C.A. § 1901 (West 1998) (commonly referred to as The Indian Child Welfare Act); H.R. REP. NO. 95-1386, at 9-12 (1978) (noting that state officials and agencies have failed to take into account the special problems and circumstances of Indian families); see also DELORIA & LYITLE, AMERICAN INDIANS, supra note 79 (setting forth Indian History and Law from the Indian perspective).

113. See Williams, Alchemical Notes, supra note 34, at 403, 404 (stating that the United States acquired sovereignty over Red people by claiming racial and cultural superiority and postulating that the superiority argument has lost its power within the context of popular discourse).

114. The federal government’s power to regulate Indian affairs—and therefore relations with individual members of Indian tribes—is predicated on its government-to-government relationship with Indian nations and their political status as sovereigns. However, ICWA resembles race-based remedial legislation and should be interpreted liberally to achieve its remedial purpose.


116. Federalism, Equal Protection and Due Process challenges could be asserted. See id. at 12, reprinted in 1978 U.S.C.C.A.N. 7530, 7534. For recent state court decisions asserting the possible unconstitutionality of ICWA, see the discussion infra note 168.

117. The description of Congress’ power as “plenary” has negative implications with respect to Tribal sovereignty.

118. See U. S. v. Holliday, 70 U.S. 907, 918 (1866) (stating that “if commerce . . . is to be carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress”). This use of the power to regulate commerce as a basis for governmental regulation of private relationships rings familiar. Congress used the Commerce Clause as a basis for remedial race-based legislation respecting Blacks (anti-discrimination laws).

119. For definition of “Indian child” under the Act, see supra note 13.

120. The Supreme Court held in Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 53 (1989), that the domicile of an Indian child is the domicile of his or her parents.

121. Section 1911(a) of the Act provides as follows:

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

identification of the child with the tribe. This continuous cultural identification is expressly described as being consistent with, and integral to, the best interests of the child.

In order to trigger application of the procedural requirements and substantive standards under the Act, there must be the potential for severance of the parental rights of an Indian parent or the removal of a child from his or her Indian custodian. Note, however, that the ICWA excludes from coverage the following classes of cases: custody determinations made incident to divorce proceedings, educational placements, and criminal justice placements. The most problematic of these express exceptions, from the standpoint of federal Indian child welfare policy, is the exception for custody determinations made coincident with dissolution. Moreover, courts have held that the ICWA does not apply to the removal of an Indian child from a non-Indian parent.

In addition, Public Law 280 (P.L. 280) partially codified the federal government’s policy of terminating its special trust relationship with Indian tribes. As part of that policy, the legislation immediately transferred civil and criminal jurisdiction over Indian lands from federal to state governments in five states, and

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122. Section 1915(a) of the Act provides:
In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.
Id. § 1915(a) (West 1998).
123. Congress’ express statement of the policy underlying the Act provides:
The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children ... by the establishment of minimal Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture ....
Id. § 1902 (West 1995). A more detailed analysis of the importance of this policy statement is discussed infra in Part V.C.
125. This exclusion has been broadly interpreted by some state courts to mean all intra-familial custody disputes. See infra Part IV.B.2.b and cases cited therein.
126. When this exception applies, the parents of the child have the unilateral right to demand the return of the child.
128. See In re Baby Boy L., 643 P.2d 168, 175-76 (Kan. 1982) (holding that the ICWA did not apply to an adoption proceeding concerning the non-Indian mother’s illegitimate child who had never lived with the father or with the Indian tribe); cf. In re Appeal in Maricopa County, 657 P.2d 228 (Ariz. 1983) (implying that, as regards an illegitimate child, the ICWA would become pertinent only after the Indian parent acknowledges paternity). The Supreme Court’s holding in Holyfield has been interpreted and seriously questioned in In re Baby Boy L.
130. For definition of Indian lands under the law, see Barbara A. Atwood, Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. REV. 1051, 1053-54 (1989) [hereinafter Atwood, Fighting Over Indian Children].
allowed for the future unilateral assumption of jurisdiction by all other states. However, Title IV of the 1968 Indian Civil Rights Act supplanted unilateral assumption of state jurisdiction over Indian lands by requiring tribal consent for the exercise of state jurisdiction. Thus, where jurisdiction has been assumed or where consent has been granted and such jurisdiction has not been reassumed by the tribe, the preemption of exclusive tribal jurisdiction by preexisting federal law is effectuated. Moreover, because P.L. 280 jurisdiction encompasses jurisdiction over Indian lands, where an action arises on the reservation but does not involve Indians—or, arguably, where the action arises on and off the reservation—the valid exercise of state court jurisdiction is not circumscribed by the consent requirement of P.L. 280.

1. Divorce Proceedings Exception

Where an Indian child who is domiciled or residing on the reservation is the subject of any type of custody dispute, the parens patriae interest of the tribal court is unquestionable; thus one is left to ponder the divorce exception to exclusive jurisdiction. One could assume that the outcome of interspousal disputes will not implicate the purpose of the legislation—protecting Indian children from separation from family and tribe; however, such an assumption ignores the demographic realities of American Indian life and the far-reaching effects of white supremacy. This exception ignored or failed to anticipate the realities of increased interracial marriage between Indians and non-Indians and the coincident pressures, both internal and external, that arise from such unions as well as the changing geography and demography of Indian reservations. Where one parent remains on the reservation with the child or maintains close connections and the other leaves

133. 25 U.S.C.A. § 1918 permits tribes that have previously shared jurisdiction with the states where they are located to reassume exclusive jurisdiction over child custody proceedings involving tribal children residing or domiciled on the reservation when a specified procedure is followed. Notice of reassumption of jurisdiction must be published in the Federal Register and the affected state or states must be notified. The Indian tribe concerned shall reassume jurisdiction 60 days after publication in the Register.
134. Some commentators view the assumption of P.L. 280 jurisdiction as leaving open the question of concurrent tribal court jurisdiction. However, the generally accepted view appears to be that P.L. 280 jurisdiction is exclusive. See Atwood, Fighting Over Indian Children, supra note 130, at 1074-75 and cases cited therein.
135. See id. (explaining P.L. 280 jurisdiction over Indian lands).
137. Over 50% of Native Americans live in urban areas, not on reservations. Atwood, Fighting Over Indian Children, supra note 130, at 1052 n.4.
138. The federal government has unilateral power to reconfigure the geographical boundaries of reservations.

1244
the reservation or views himself or herself as having attenuated ties, lack of clear and exclusive jurisdiction in the tribal court to decide child custody matters results in concurrent jurisdiction, forum shopping, and possible conflicting custody decrees.\footnote{\textit{See} Atwood, \textit{Fighting Over Indian Children}, supra note 130, at 1094-97 (discussing concurrent jurisdiction).}

The case of \textit{DeMent v. Oglala Sioux Tribal Court}\footnote{874 F.2d 510 (8th Cir. 1989).} effectively demonstrates the peculiar mix of abuse and aberration stemming from this jurisdictional anomaly and the negative implications for the parents and children involved. In \textit{DeMent}, a non-Indian father and an Indian mother were divorced in a Nebraska state court. The state court awarded joint custody to both parents and physical custody to the mother. Five months after the divorce, the parents reconciled and the mother and children left the reservation to live with the father in California. The couple separated again two years later; the children remained with the father in California for about nine months until they moved with the mother to a reservation in South Dakota. After the father threatened to take the children back to California, the mother obtained a temporary restraining order from the Oglala Sioux Tribal Court, and the tribal court scheduled a hearing to resolve the custody issue. Before the hearing, the father took the children and returned to California. The father filed an action in the San Diego County Superior Court to modify the Nebraska decree granting physical custody to the mother. The mother secured an order from the tribal court confirming the Nebraska decree and making her children wards of the tribal court. The California court awarded custody of the children to the father and the father went to the South Dakota reservation to take the children back to California; the tribal court issued another order restraining the father from removing the children from the reservation.

Four months later, the tribal court ruled that it had authority to adjudicate the custody matter because the children were domiciled on the reservation; the tribal court ruled the California proceeding invalid and refused to give full faith and credit to the California order. After the tribal court’s decision, the father removed the children from the reservation and took them to California, where they lived for the next year. The California court refused to modify its ruling and the father was again awarded custody. The father allowed the children to visit their mother on the reservation for the summer provided that the tribal court issue an order that the California custody decree would be honored. The tribal court issued a stipulation acknowledging the mother’s summer visitation rights and the father allowed the children to visit the mother for the summer. The children were returned to California at the end of the summer. The same arrangements were made for the following summer, but the mother refused to return the children to California. The tribal court issued another restraining order preventing the father from removing the...
children from the reservation, and the San Diego authorities issued a warrant in California for the mother’s arrest.\textsuperscript{141} The Uniform Child Custody Jurisdiction Act (UCCJA)\textsuperscript{142} and/or the Parental Kidnapping Prevention Act of 1980 (PKPA)\textsuperscript{143} were enacted to resolve interstate jurisdictional conflicts over custody matters.\textsuperscript{144} However, neither statute expressly reaches this configuration of state/tribal jurisdictional conflict, and states are divided in their interpretation and application of the Acts to tribal decrees.\textsuperscript{145} The fact that one federal appellate court has held that tribes are “states” under the PKPA is not definitive.\textsuperscript{146} In addition, the continuing jurisdiction granted under the PKPA requires a valid exercise of jurisdiction in the first instance by the original decree-granting “state.”\textsuperscript{147} In other words, the jurisdictional tests set out in the UCCJA must be satisfied; thus, the more interesting question is, even if the UCCJA did apply to the facts of \textit{DelMent}, what would be the outcome?

Under the UCCJA, a home-state determination would dictate that the California State court forum is appropriate; however, a significant connection determination could arguably result in appropriate jurisdiction in either forum. While this may be problematic, one thing is clear: in its current form, and based on its current interpretation, the ICWA does not clearly vest exclusive jurisdiction in the tribal court.\textsuperscript{148} The divorce proceeding exception which has been expansively interpreted to include all intrafamilial custody disputes takes these facts outside the purview of the Act, despite the fact that the children reside on the reservation.\textsuperscript{149} The children are Indian as that term is defined in the ICWA.\textsuperscript{150} Clearly, the continuity of their relationship with the Indian parent and tribe is implicated; thus, because the spirit of the ICWA reaches the dispute, why does not the letter? Indisputably, there is a different configuration to the rights analysis when the custody dispute involves two parents or a parent and a grandparent rather than a parent and the state or a nonconsanguineal third party. Nonetheless, the core problem of cultural

\textsuperscript{141} See id. at 511-12.
\textsuperscript{142} For an example of this Act, see \textit{L.A. Rev. Stat. Ann.} \textsection 13: 1700 (West 1998).
\textsuperscript{144} These acts are discussed in greater detail infra Part V.
\textsuperscript{145} \textit{Compare} Matter of Adoption of T.R.M. v. D.R.L., 525 N.E.2d 298, 303 (Ind. 1988) (holding that the ICWA does not apply to tribal courts), and Desjarlais v. Desjarlais, 379 N.W.2d 139, 143 (Minn. Ct. App. 1985) (holding that the ICWA does not apply to tribal courts), and Malaterre v. Malaterre, 293 N.W.2d 139, 143 (N.D. 1980) (same); with \textit{In re Marriage of Baisley}, 749 P.2d 446, 449 (Colo. Ct. App. 1987) (holding that an ex parte tribal court order did not deprive the state of its valid prior jurisdiction where the tribal court order was not issued in compliance with the UCCIA); see also Harris v. Young, 473 N.W.2d 141, 143 (S.D. 1991) (holding that “[a]n Indian reservation is not a state within the meaning of the UCCIA”).
\textsuperscript{146} \textit{In re Larch}, 872 P.2d 66, 68 (4th Cir. 1999).
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.} at 69.
\textsuperscript{149} See id. (“This statutory exclusion clearly indicates that a state court may lawfully award custody of an Indian child to a non-Indian parent in a divorce proceeding.”).
\textsuperscript{150} See supra note 13 (defining “Indian child”).
disconnection that the ICWA seeks to address and redress, and which is central to a "best interest" determination of an Indian child, clearly surfaces in the context of divorce and intrafamilial custody disputes.151

Even if, out of considerations of fairness,152 we recognize the necessity of alternative forums, such availability should not foreclose the application of superior law and its articulation of the best interests of Indian children. In any court, state or tribal, the best interest standard will be applied to determine a custody dispute; the ICWA articulates a close nexus between the psycho-social health of Indian children and connection with their tribe. The importance of creating and preserving that connection is not lessened because the dispute is between two parents or two family members; it may be even more important in that situation when the interpersonal relationship between the parents has seriously deteriorated and one or both parents are disinclined to interrelate. Many jurisdictions recognize the seriousness of this dilemma and thus have either encouraged joint custodial arrangements or sought to place primary custody with the parent most likely to encourage substantial contact with the noncustodial parent.153

When institutional bias tends to result in an application of the best interest standard which is deleterious to "outsider" cultural values,154 and when two cultures and sovereigns collide, determinate choice of law rules offer the greatest protection. Effectuation of the policies underlying the ICWA would require the court to consider and reinforce the need for creative custodial or visitation arrangements which recognize, as set forth in the ICWA, the cultural needs of the Indian child, the rights of the Indian extended family, and the tribal interests that are sought to be protected under the Act. In 1994, sixteen years after the passage of the ICWA, over half the Indian children placed for adoption were adopted by non-Indians.155 Today, non-compliance with the ICWA is pronounced in certain localities, and practitioners in this area complain of state judicial activism to avoid application of the Act.156 As discussed in Part II, a person's reality and definition of self is socially constructed; culture and ethnicity are important elements in this self-definitional

151. For a detailed analysis of intersystem jurisdictional conflicts in the Indian child custody context, see Atwood, Fighting Over Indian Children, supra note 130, at 1067.

152. The fairness argument would proceed much like that used to justify diversity and removal jurisdiction: i.e., local plaintiffs may be unfairly advantaged by adjudicating against an out-of-state defendant in his or her home state. Likewise, tribal courts may favor their members over non-members. Note, however, that diversity jurisdiction has come under serious attack because its benefits are said to no longer outweigh the procedural complications arising from its continued recognition.

153. See, e.g., FLA. STAT. ANN. § 61.052 (West 1997).

154. infra note 203.


process. Ethnic validation is requisite to mental health. Moreover, the Native American traditional belief system is an acknowledged vehicle for transforming the dysfunctional aspects of modern Indian family life and reorienting the human being toward full realization of self-worth.

The denial of Red people's power to articulate the custodial rights and duties of non-Indians who marry Indians and parent Indian children is affirmed in the express jurisdictional exception under the ICWA for interspousal custody disputes. Coupled with its expansive interpretation to reach intrafamilial disputes outside the divorce context, this exception effectively forecloses the possibility of tribal jurisdiction over custody disputes arising out of an interracial marriage unless both parties agree to such jurisdiction, even where the child is domiciled on the reservation. This effectively places tribal jurisdiction at the mercy of the non-Red parent. Moreover, the nature of the inquiry in a custody hearing, coupled with the indeterminacy of the best interest standard, necessitates value-laden decision-making even when both parents are present and from homogenous cultural backgrounds. Thus, judicial perceptions of European-American cultural supremacy, coupled with the opportunity and tendency to apply forum law, make state court the smart choice for the non-Red parent. This divorce/intr familial dispute exception to coverage and concurrent jurisdiction in the appropriate state court results in conflicting custody decrees and custody arrangements that fail to adequately appreciate and respond to the psycho-social needs of the Indian child.

157. For a discussion of this constructivist approach in the context of clinical social work, see Greene et al., A Constructivist Perspective on Clinical Social Work Practice with Ethnically Diverse Clients, 41 J. NAT. ASS'N SOC. WORKERS 172-80 (1996).


160. See 25 U.S.C.A. § 1903(1)(iv) (West 1983) (stating, in pertinent part: For the purpose of this chapter, except as may be specifically provided otherwise, the term—
  (1) "child custody proceeding" shall mean and include—
  ...
  (iv) "adoptive placement" [to which this Act shall apply] which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.
  Such term or terms shall not include a placement based upon an act which, if committed by an adult would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents. (emphasis added).

161. Professor Atwood concludes that an answer to this problem of concurrent jurisdiction and possible cultural bias is a preference for the tribal forum in interparental custody disputes. She states:

  Because child custody decisions are heavily laden with cultural and social tradition, the choice of forum as between a state and tribal court can fundamentally affect the outcome of a custody dispute.

  In light of the current national policy of self-determination for Indian tribes, a measured preference for...
2. **Judicially Created Exceptions**

   a. **Existing Indian Family Exception**

In addition to the express exceptions to coverage under the Act, courts have interpreted the Act not to apply to custody proceedings otherwise falling within the purview of the Act where the Indian child who is the subject of the proceeding does not belong to an existing Indian family unit, or the parents and/or the Indian child do not have significant social, cultural, or political ties with the tribe. This state court-developed doctrine is called the "existing Indian Family exception," and has been judicially reasoned to follow from the text of the Act which calls for the protection of Indian families.\(^{162}\) This doctrine was first articulated in *In re Baby Boy L.*,\(^{163}\) a case which, not surprisingly, involved a biracial child. Therein, the non-Indian biological mother wanted to place her child with a non-Indian adoptive family and the Indian father and tribe attacked the adoption as failing to comply with the ICWA. The Kansas Supreme Court refused to allow intervention by the tribe or to apply the placement preferences under the Act, arguing that the absence of an existing Indian family placed the proceeding outside the scope of the Act.\(^{164}\) Recent cases applying the doctrine have focused on the relationship of the Indian child or the Indian parents with the tribe and, in the absence of a "significant social, cultural or political relationship,"\(^{165}\) they have held that the Act does not apply to the voluntary adoption of Indian children. This doctrine effectively precludes the Indian extended family or tribe from assuring a cultural connection with Indian children whose parent or parents may be so affected by cultural dis/reorientation—Spirit injury—that for that or other reasons, they have attenuated ties to the tribe.

In 1989, for the first time, the United States Supreme Court interpreted and strictly applied the mandates of the ICWA in *Mississippi Band of Choctaw Indians v. Holyfield.*\(^{166}\) In *Holyfield*, the Court specifically acknowledged the phenomenology of this form of alienation in Indian life by noting the Court's preference for abandonment of Indian children rather than their entrustment to extended family members.\(^{167}\) It was precisely this type of phenomena that the ICWA sought to affect.

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the tribal forum in interparental child custody battles seems essential.

Atwood, *Fighting Over Indian Children*, supra note 130, at 1057 (footnotes omitted).


163. 643 P.2d 168 (Kan. 1982).

164. *See In re Baby Boy L.*, 643 P.2d at 175 (noting that the basis of the ICWA is protecting the integrity of Indian families already in existence at the time of custody proceedings).


167. *Id.* at 51.
At the time of this writing, three California appellate courts have elevated satisfaction of the existing Indian family doctrine to the status of “a necessary prerequisite to a constitutional application of the ICWA.” In the most recent of the three California appellate decisions, Crystal R. v. Superior Court of Santa Cruz County, the California Appellate Court for the Sixth District remanded the case with instructions to apply the existing Indian family doctrine. Using what has become the paradigm for challenging preferential race-based classifications, the California Appellate Court proclaimed Fifth and Fourteenth Amendment Due Process violations, Equal Protection violations, and Tenth Amendment violations if the ICWA were applied in the absence of a significant relationship between the parent or parents and the tribe. The court grounded its constitutional analysis in the recognition of the liberty interest of the child in her relationship with her adoptive parents. Prior to the Supreme Court’s holding in Holyfield, this interpretive position may have been more credible; however, Holyfield’s clear application of the Act to children who had been born off the reservation, placed with non-Indian adoptive parents from birth, and had never been to the reservation severely weakens the legitimacy of this position. To distinguish their facts from the facts of Holyfield, all three California courts relied on the absence of a strong tribal affiliation of the parents in contrast to the facts of Holyfield. However, as recognized in Holyfield, the absence of such an affiliation in many cases is the direct result of the state’s alienating activities which Congress sought to redress in ICWA. These California cases have significant precedential import because

168. See Crystal R. v. Superior Court, 59 Cal. App. 4th 703, 717 (1997) (“In sum, the court [in Bridget R.] concluded that the presence of significant cultural ties between the family and the Indian tribe is a necessary prerequisite to a constitutional application of the ICWA.”); In re Bridget R., 41 Cal. App. 4th at 1512 (“We conclude that principles of substantive due process, equal protection and federalism all carry the same implication[]...[the ICWA] can properly apply only where it is necessary and actually effective to accomplish its stated and plainly compelling purpose of preserving Indian culture through the preservation of Indian families.”); In re Alexandra Y. v. Renea Y., 45 Cal. App. 4th 1483, 1493 (1996) (“We agree with Bridget R. that recognition of the existing Indian family doctrine is necessary to avoid serious constitutional flaws in the ICWA.”).


170. Id. at 724.

171. The tribe and the biological parents in In re Bridget R. argued that the ICWA is not race-based legislation but legislation based on the government-to-government relationship between tribes and the U.S. government, and thus should not be subject to the standard of review applied to remedial race-based legislation. The court characterized this argument as “superficially appealing,” but went on to say that “children who are related by blood to such a tribe may be claimed by the tribe, and thus made subject to the provisions of ICWA, solely on the basis of their biological heritage. Only children who are racially Indians face this possibility.” In re Bridget R., 41 Cal. App. 4th at 1509.


173. Id. at 719-20.

174. Id. at 722.

175. A Sacramento Bee article reports urban Indians talking about their struggle with self-identity. Stephen Magagnini, Long Suffering Urban Indians Find Roots in Ancient Rituals, SACRAMENTO BE, June 30, 1997, at A1. Many attribute their alcoholism and drug addiction to this struggle. In the article, urban Indians characterize
nearly two-thirds of California's Indian population lives in cities. In many cases, these urban Indians have had to reinvent themselves, and oftentimes that reinvention did not include tribal affiliation.

The earliest of these three cases, In re Bridget R., received national attention and provoked widespread outrage as an unjustified application of the Act to Indian twins who were described as having a small quantum of Indian blood. However, the calculation of Indian blood was limited to the lineage of the father because he alone was a member of a federally recognized tribe, a prerequisite for coverage under the Act. What was not widely publicized was the fact that the mother was also Indian; she was a member of the Yaqui tribe of Mexico.

In response to public outrage and in support of her constituents, the adoptive parents, Representative Deborah Pryce led the legislative effort to amend the ICWA to make it inapplicable to voluntary adoptions. The House passed H.R. 3286, the Adoption Promotion and Stability Act of 1996, which codified the judicially created existing Indian family doctrine. The Senate Committee on Indian Affairs struck Title III of H.R. 3286, concluding that the existing Indian family doctrine would seriously undermine tribal self-government and the policies and objectives themselves as "refugees from America's covert war on American Indian culture." Id. Weapons used in that war are identified as forced boarding school educations, adoption by non-Indians, sterilizations with and without consent, and relocation to cities. Id.

176. California's Indian population is comprised of Cherokee, Apache, Choctaw, Navajo, Sioux, Blackfoot, and Chippewa Indians. Magagnini, supra note 175, at A1.

177. Id.

178. Id.

179. 41 Cal. App. 4th 1483 (1996). In this case, an Indian couple (the father was of American Indian descent and the mother had descended from the Yaqui tribe of Mexico) voluntarily placed their twin girls for adoption. At the time the case was finally heard, the twins were two years old and had lived with their non-Indian adoptive parents since birth. When the biological parents placed the twins for adoption, the attorney handling the adoption informed the father that if he revealed his Indian ancestry, such revelation would complicate the process. As a result, the father identified his race as white. Later, the biological father and mother sought to invalidate their consent to the adoption based on non-compliance with the requirements of ICWA respecting voluntary termination of parental rights. Pursuant to § 1914 of the Act, any consent to termination of parental rights not meeting the requirements of the Act may be declared void at any time by a court of competent jurisdiction upon petition by the child, the Indian parent or custodian, or the child's tribe. In February of 1994, the grandmother of the twins was informed of their birth and the subsequent adoption. She immediately contacted the tribe, as well as the attorney who handled the adoption. The attorney informed the adoptive parents of this communication. On March 4, 1994, the tribe requested intervention in any adoption proceeding concerning the twins. In April, the father sought to formally withdraw his consent. On May 4, 1994, the adoptive parents filed a petition to adopt the twins in Franklin County, Ohio, where they lived. In June, the adoption agency refused to allow the father to withdraw his consent, and suit was filed in the trial court. The trial court invalidated the consent, placing responsibility for the tragic circumstances on the attorney. The adoptive parents had paid approximately $14,000.00 to the attorney for the birth mother's expenses, in addition to attorney's fees. In re Bridget R., 41 Cal. App. 4th at 1492-96.

180. Id. at 1492. The twins were described as being 3/32 Pomo, the tribe of the biological father. Because the mother was a member of a Mexican tribe, her lineage was not considered in the calculation of the quantum of Indian blood. Id.

of ICWA.\footnote{182} The Native American community, which had not been provided an opportunity to testify before the House, asserted that the legislation would unacceptably diminish the ability of tribes to protect the best interests of Indian children. In an effort to diffuse the incentive to broadly legislate created by the case, a coalition was formed to examine the issues raised by the case and to propose an amendment that would more aptly address the individual, state, and tribal interests involved. The coalition, for the first time, included representatives of the Native American communities which would be affected by the legislation.\footnote{183} The compromise bill\footnote{184} succeeded in deleting the codification of the existing Indian family exception;\footnote{185} nonetheless, Representative Pryce, a former judge, in her testimony before the Senate Committee, reaffirmed her intention to reintroduce substantive legislation to codify the existing Indian family doctrine.\footnote{186} Moreover, in an effort to gain the requisite congressional support, the proposed amendments included Senator Hatch's\footnote{187} recommended language allowing the preference of the birth parent or parents regarding placement of the child to constitute good cause for purposes of a court's discretionary determination that good cause exists, to depart from the express placement requirements under the Act upon request by a child or birth parent in the case of voluntary adoptions.\footnote{188}


\footnote{183} The Senate Committee heard testimony from a broad constituency, including the National Congress of American Indians; General Counsel for the Tzun Tzun Chiefs Conference, Inc.; Congressperson Ben Nighthorse Campbell; Thomas Atkinson on behalf of the President of the Navajo Nation; Ada Deer, Assistant Secretary for Indian Affairs; the National Indian Child Welfare Association; and the American Association of Adoption Attorneys.

\footnote{184} The substance of the proposed amendments has been referred to as the "Tulsa Compromise," because discussions began at the June 1996 mid-year convention of the National Congress of American Indians (NCAI) in Tulsa, Oklahoma. "Working together, tribal representatives and adoption professionals identified changes that would address problems with the ICWA's implementation in ways that both adoption advocates and Indian tribes would find acceptable." S. REP. NO. 105-155, at 17 (1997).

\footnote{185} The substance of the proposed amendments directly responds to the concerns raised by the facts of In re Bridget R. A new Section 1914 entitled "Fraudulent Representation" has been added to criminalize the behavior of the attorney in In re Bridget R. Section 1913 would be amended to place time limitations on the tribe's right to intervene and the parental right to withdraw consent to adoption provided that adequate notice is furnished to tribes and parents. See supra note 27 (detailing the required content of the notice set forth in the statutory language).

\footnote{186} See Indian Child Welfare Act: Joint Hearing on S. 569 and H.R. 1082 Before the Senate Committee on Indian Affairs and House Resources Committee, 105th Cong. 37-38 (1997) (testimony of Representative Deborah Pryce) (indicating that "I will reintroduce substantive legislation that . . . will remove many of the provisions of this legislation that are objectionable to the Native American community. This new bill . . . will codify into statute the law applied by many state courts known as the 'existing Indian family doctrine.'").

\footnote{187} Senator Hatch is from the State of Utah.

\footnote{188} Section 9 of the proposed amendments to § 1915(a) of the Act provides in pertinent part: "(3) In any case in which a court determines that it is appropriate to consider the preferences of a parent or Indian child, for purposes of subsection (a) [the placement mandate preferring cultural congruence], that preference may be considered to constitute good cause." See S. Rep. No. 105-156, at 7 (1996).
b. Intra-Familial Disputes

Several courts have expansively interpreted the express divorce exception\(^{189}\) to include all intra-familial disputes over custody, even where the natural parent’s rights are terminated as the result of a voluntary adoption.\(^{190}\) Thus, interracial, unwed parents and their children and tribes are vulnerable to exclusion under both the existing Indian family exception and the intra-familial dispute exception.

V. THE PROBLEM OF CONCURRENT JURISDICTION AND CHOICE OF LAW

A. The Traditional Approach to Jurisdiction and Choice of Law in Domestic Relations Law

Jurisdiction in the context of family law—divorce, child custody, and spousal and child support, in particular—is a peculiar animal. In these areas, subject matter jurisdiction either merges with or substitutes for personal jurisdiction, or the two concepts are otherwise blurred.\(^{191}\) Typically, a forum must have an identifiable and measurable relationship with the defendant when adjudicating individual and/or property rights affecting the defendant to avoid offending traditional notions of fairness and justice.\(^{192}\) However, the policy considerations undergirding and shaping family law reflect the tension between individual rights and social welfare. For

\(^{189}\) See supra Part IV.B.1 (discussing the divorce proceedings exception to the ICWA).

\(^{190}\) See A.B.M. v. M.H., 651 P.2d 1170, 1173 (Alaska 1982) (requiring children to be returned to their natural mother unless such arrangements were proven to be contrary to the child’s best interests); In re Bertelson, 617 P.2d 121, 125 (Mont. 1980) (“The Act is not directed at disputes between Indian families regarding custody of Indian children; rather, its intent is to preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution.”); In re Baby Boy L., 643 P.2d 168, 176 (Kan. 1982) (refusing to apply the Act to an adoption proceeding involving non-Indian mother’s illegitimate child, who had never been in the care or custody of the putative father, a 5/8 Kxowa Indian, in that the issue of preservation of the Indian family was not involved as child had never been a part of any Indian family relationship).

\(^{191}\) Commentators have argued that the jurisdiction exercised in family law cases in which the state has little or no contact with the defendant does not easily fit into either category. Some have argued that the “subject matter” categorization is misapplied. See, e.g., Barbara Ann Atwood, Child Custody Jurisdiction and Territoriality, 52 Ohio St. L.J. 369, 369 n.6 (1991) [hereinafter Atwood, Child Custody] (noting that common jurisdictional guidelines allow courts to exercise jurisdiction over a child if the requisite ties with the child exist). In some sense, this view comports with the characterization of marital and custodial status as a res.

\(^{192}\) See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) and its progeny (setting forth the need for minimum contacts between the defendant and the forum as a prerequisite to the exercise of personal jurisdiction). Note, however, that the Supreme Court’s 5-4 decision in Burnham v. Superior Court, 495 U.S. 604 (1990), states that physical presence alone is sufficient to justify a forum’s exercise of judicial power over a non-resident defendant when that defendant is served within the jurisdiction. This neo-Pennoyerist stance was articulated by the Court on review of an exercise of jurisdiction over an out-of-state defendant in a family law case. Id.
example, while the right to marry is fundamental,\textsuperscript{193} once done, marriage constitutes a status which attaches to the person or persons on whom the status has been conferred, and the presence of one person alone who has the status is sufficient to constitutionally adjudicate the status of both persons despite the absence (or even lack of actual notice) to one of the conferees.\textsuperscript{194} Thus, no personal jurisdiction over the absent spouse is necessary to the dissolution. Likewise, the exigencies which adhere to decisions affecting the custodial status of children, including the state’s economic interest in the welfare and care of children, militate in favor of exercising jurisdiction whether or not both parents who will be affected by the decision are present or constitutionally connected with the forum.\textsuperscript{195} Accordingly, courts readily decide custodial rights (if there are any) of absent parents where a local plaintiff presents himself or herself to the forum. Note, however, that a federal court considering the validity of a custody decree issued by a tribal court has held the decree invalid where the tribe lacked personal jurisdiction over the opposing parent.\textsuperscript{196} Moreover, some state long-arm statutes provide for the adjudication of support orders, both child and spousal, where the child “may have been conceived”\textsuperscript{197} in the jurisdiction and where the jurisdiction was at some time “the marital domicile”\textsuperscript{198} of the parties, despite the fact that the absent defendant has no current relationship with the forum state.\textsuperscript{199} In addition, because of their modifiability, custody and support orders are not protected by the Full Faith and Credit provision of the Constitution.\textsuperscript{200} Thus, in contested custody cases, child-snatching and forum-shopping became the resolution of choice.\textsuperscript{201} A plethora of conflicting custody decrees resulted from this jurisdictional free-for-all.\textsuperscript{202} State sovereignty was implicated, and state courts presented with local plaintiffs seeking

\textsuperscript{193} See Loving v. Virginia, 388 U.S. 1, 11 (1967) (invalidating Virginia’s miscegenation law); Zablocki v. Redhail, 434 U.S. 374, 382 (1978) (holding unconstitutional a Wisconsin statute requiring those parents subject to support orders to obtain a court order granting permission to marry).

\textsuperscript{194} See Williams v. North Carolina, 317 U.S. 287, 298 (1942) (holding that a state in which one of the partners is domiciled has a sufficient interest in terminating marital status even though the other spouse is not present).

\textsuperscript{195} See Arwood, Child Custody, supra note 191, at 369.

\textsuperscript{196} DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510, 514 (8th Cir. 1989).

\textsuperscript{197} Fla. STAT. ANN. § 48.193(b)(1) (West 1984).


\textsuperscript{199} E.g., Fla. STAT. ANN. § 48.193 (West 1984).

\textsuperscript{200} U.S. CONST. art. IV, § 1. Conflicting state court custody decisions with respect to the same child had been a continuing problem because one state was not required by the Full Faith and Credit Clause to give any more binding effect to a custody decree by a sister state than that state itself would give to the decree. See H. CLARK, DOMESTIC RELATIONS § 12.5 (2d. ed. 1988).

\textsuperscript{201} In the case of Palmore v. Sidoti, 466 U.S. 429 (1984), by the time the Supreme Court decided the case, the father had moved to Texas with his new wife and daughter and obtained a favorable custody order from a Texas court.

\textsuperscript{202} See Arwood, Child Custody, supra note 191, at 389 (noting that prior to the UCCJA, “[c]ontested custody cases frequently acted in competition with one another and issued conflicting decrees”).

1254
determination of peculiarly state claims viewed themselves as simply meeting their judicial responsibility.

In an effort to remedy the problem of conflicting decrees and to foster cooperation among the states in the child custody area, Congress passed the PKPA to resolve the conflicts which continued to arise out of legitimate exercises of jurisdiction under the UCCJIA. The UCCJIA allows jurisdiction, inter alia, if the forum either is the home state of the child who is the subject of the action, or has other significant connections with the child. The PKPA places continuing jurisdiction in the original decree-granting state where that state exercised jurisdiction consistent with the dictates of its own law, typically the UCCJIA. All of these arguable exceptions to the typical International Shoe analysis are purportedly justified because of the peculiar nature of family relations, the importance of family to society, and the police power of both state and federal governments. What it boils down to is the peculiar power of a state to determine domestic relations issues and thus the rights and duties of children, women, and men (in whatever configuration they may take in the relational context), by virtue of the presence of the plaintiff in the forum. In addition, consistent with the exercise of its parens patriae power, the forum state will invariably apply its own law to the facts before it. The exclusivity of state power in this area is recognized and affirmed in the federal "domestic relations exception" to diversity subject matter jurisdiction in federal court. This deference to state power and denial of access to federal forums in domestic relations cases has been criticized as subordinating

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203. The UCCJIA was promulgated in 1968 to bring a measure of interstate stability to custody awards. It mandated the recognition and enforcement of out-of-state custody decrees, limited a second court’s authority to modify existing decrees, and encouraged the discretionary denial of jurisdiction where a contestant had engaged in child-snatching or other wrongful practices. The intent underlying the jurisdictional framework was to vest jurisdiction with the state most interested in, and most capable of, determining the child’s welfare. Since its promulgation in 1968, the UCCJIA (or its substantial equivalent) has been adopted by every state. Atwood, Child Custody, supra note 191, at 399-91; see also Ankenbrandt v. Richards, 504 U.S. 689, 207 (1992) (explaining that some courts, in this case state courts, are more qualified to deal with child custody matters than other courts).


206. See 28 U.S.C.A. § 1738(A) (West 1984) (making the requirement of Full Faith and Credit applicable to child custody determinations, despite the possibility of modification in the rendering state).

207. See supra note 192 and accompanying text (discussing this analysis). Under a Brennan-type balancing approach, arguably, such exercises of jurisdictional power are consistent with a minimum contacts analysis. See World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299-313 (1980) (Brennan, J., dissenting) (proposing that stream-of-commerce and the reasonableness of being haled into the particular forum should be enough to satisfy personal jurisdiction requirements); see also Helicopteros Nacionales De Colombia, S.A. v. Hall, 466 U.S. 408, 418-19 (1984) (refusing to find general jurisdiction over defendants who had purchased aircraft in Texas, but were involved in an accident in South America).

208. The most common exception to this choice of law regime is the application of the law of the place of celebration to the issue of the legality of a marriage. Even here, however, the state can refuse to apply the foreign law if such law is repugnant to the public policy of the forum state.
gender-related concerns. In the context of the ICWA, the subordinated other becomes the entire class of Indian peoples. Given this hands-off federal policy with respect to domestic relations cases, application of well-developed state law is firmly entrenched as the traditional practice and policy of state jurists. This longstanding recognition of state power to decide domestic relations cases consistent with its own law, coupled with the perception of white cultural supremacy, allows the exercise of state jurisdiction to effectively undermine the purpose and effect of the ICWA. And there’s more—the federal forum’s failure to review.

In 1996, the Tenth Circuit decided Morrow v. Honorable David Winslow. In Morrow, out of deference to the traditional state interest in domestic relations cases, the Appellate Court vacated the District Court’s disposition of an action for declaratory relief challenging a state court’s compliance with federal requirements under the Act, remanded the case, and directed abstention. The court did not dispute the presence of federal question subject-matter jurisdiction over claims arising under sections 1911, 1912, or 1913 of the Act. However, it concluded that jurisdictional power did not reach the question of abstention because the language of section 1914, allowing a court of competent jurisdiction to invalidate a voluntary adoption for non-compliance with the Act, did not clearly indicate that Congress “intended to allow federal courts to enjoin ongoing state adoption proceedings.” For guidance, the Circuit Court turned to the legislative history of the Act. Citing the House Report, the court concluded that the establishment of minimum federal standards and procedural safeguards to ensure decision-making consistent with the best interests of the Indian child, as federally defined, did not reach federal interdiction of ongoing state custody disputes involving Indian children. Quoting the House Report, the court concluded that the statute does not indicate “that it is necessary or desirable to oust the state of [its] traditional jurisdiction over Indian

210. For a recent Supreme Court affirmation of the domestic relations exception to diversity jurisdiction, see Aikenbrandt v. Richards, 504 U.S. 689 (1992).
211. 94 F.3d 1386 (10th Cir. 1996). In Morrow, an Indian biological father litigated the termination of his parental rights and the non-consensual adoption of his son. The non-Indian biological mother had consented to the adoption, and a petition for adoption was filed in the Oklahoma State District Court. Morrow filed a counterclaim in the state court proceeding seeking custody and a motion to dismiss the adoption proceeding for non-compliance with ICWA. Morrow then filed suit in the United States District Court for the Northern District of Oklahoma, naming the state court judge and the prospective adoptive parents as defendants and seeking to enjoin the defendants from continuing their policy and practice, custom or usage of non-compliance with the ICWA. Id. at 1389. The District Court denied all relief to Morrow and entered judgment in favor of the judge and the adoptive parents. Id. Morrow appealed and the Appellate Court, sua sponte, directed abstention. Id. at 1398.
212. Id. at 1398.
213. This was the situation in In re Bridget R., 41 Cal. App. 4th 1483 (1996). See supra Part IV.B.2.a (discussing the case in the context of the existing Indian Family exception).
214. Morrow, 94 F.3d at 1395.
Therefore, the court concluded, "[W]e need not disregard the policy of abstinence which can also be accommodated so as to avoid duplicitous and protracted litigation."217

In its supplemental memorandum opposing abstinence, petitioner argued that abstinence was inappropriate because of the private nature of the litigators, with neither the state nor any of its agencies being a party. The court rejected this characterization of the private nature of the dispute, finding that the importance of the state interest involved—state concern for family matters—and the inclusion of the state judge as a party made obvious "the [state] interest in the orderly conduct of the proceedings of its courts in a manner which protects the interest of the child and the family relationship."218 Chief Judge Seymour, the lone dissenter, aptly recognized that the paramount federal interest in passing the ICWA was to provide access to a federal forum where state action in this area might result in illegal termination of parental rights.219 Chief Judge Seymour did not see a justifiable application of the abstinence doctrine to a situation where "Congress has found that states failed to recognize federal concerns when conducting the civil proceedings at issue."220 In his view, the earliest determination of whether or not federal standards have been followed is critical to a determination consistent with the best interests of the child and tribe.221

The ICWA superimposes on this already aberrational-jurisdictional schemata an additional layer. It confers upon tribal courts, in limited circumstances, exclusive jurisdiction over proceedings involving the separation of Indian children from their biological parents or Indian custodians.222 In addition, where actions are brought in state court, it mandates transfer to the tribal court absent objection by a parent or good cause not to transfer.223 Further, it grants a right of intervention to the tribe,224 procedural protections to the Indian parent, and where termination or interruption of the parental custodial right is granted, it sets out placement preferences congressionally determined to be consistent with a protection of the child's best interest described to be at least inclusive of preserving or inculcating her or his cultural identity.225

The proposed amendments do little to clarify issues of jurisdictional power. There is no pronouncement concerning the uniform treatment of tribes under the

216. Morrow, 94 F.3d at 1396 n.5.
217. Id.
218. Id. at 1397.
219. Id. at 1398 (Seymour, C. J., dissenting).
220. Id. at 1399 (Seymour, C. J., dissenting).
221. Id. (Seymour, C. J., dissenting).
223. 25 U.S.C.A. § 1911(b) (West 1978). This provision was intended to be a modified forum non conveniens test.
UCCJA or the PKPA. In Representative Pryce’s criticism of ICWA before the Senate and House committees, Representative Pryce made the following statement: “The complexity of these [procedural] requirements almost guarantees an inability to comply. I challenge the members of the committees to read this legislation and understand what it requires. As a former judge, I can tell you that courts are going to have a very difficult time applying the provisions.” While I would suggest to Representative Pryce that the interpretation and application of complex statutes is one of the tasks that judges are trained to perform, I recognize that these complex procedural provisions fail to adequately achieve the legislative purpose of the Act and would recommend that they be supplemented with a plain and simple choice of law provision applicable to all custody determinations affecting Indian children as defined in the Act.

B. False Conflicts

Where factual situations arise involving termination of parental or custodial rights of Indian parents or custodians over Indian children, and such facts do not vest exclusive jurisdiction in the tribal court under the Act, state courts exercise concurrent jurisdiction. However, when petitioned by the tribe, a parent, or an Indian custodian, section 1911(b) of the Act requires state courts to transfer the proceeding to the appropriate tribal court absent objection by either parent or

226. Section 2 of the proposed amendment amends section 1911(a) by adding the following language: (2) An Indian tribe shall retain exclusive jurisdiction over any child custody proceeding that involves an Indian child, notwithstanding any subsequent change in the residence or domicile of the Indian child, in any case in which the Indian child—
(A) resides or is domiciled within the reservation of the Indian tribe and is made a ward of a tribal court of that Indian tribe; or
(B) after transfer of jurisdiction is carried out under subsection (b), becomes a ward of a tribal court of that Indian tribe.
This language is intended to make clear that an Indian tribe retains the exclusive, lawfully acquired jurisdiction over any child made a ward of the tribal court when the child subsequently changes residence or domicile. Recall the DeMent case discussed supra notes 140-47 and accompanying text. The issue became "what is a lawful exercise of jurisdiction under the facts?" Therefore, this amendment does not resolve the question.

227. Supra note 186.

228. Note that it has been determined that not only does a parent have the right to object to transfer to the tribal court, he or she must also have the opportunity to object. Thus, a jurisdictional hearing must be held before a court can enter an order granting or denying transfer. See BUREAU OF INDIAN AFFAIRS GUIDELINES, § C 3(d).
good cause to the contrary.\textsuperscript{229} Good cause not to transfer has been interpreted to mean at least two things: undue hardship,\textsuperscript{230} and better law.\textsuperscript{231}

Decisions not to transfer involving (1) express objection by a parent or (2) undue hardship can be evaluated based on fairly mechanical criteria. Notwithstanding the fact that courts have tended to be abusive by determining that relatively short travel distances to tribal courts constitute undue hardship,\textsuperscript{232} and parental objection is sometimes based on a disorientation from the tribe and self as a result of Spirit injury,\textsuperscript{233} we can determine whether or not a parent has objected, and we can measure the distance to be traveled by witnesses or parties to the tribal court as well as the timeliness of the request for transfer. The "better law" interpretation of the "good cause" exception, however, opens the door to the unfettered exercise of judicial discretion in an area where federal policy favoring transfer is clear.\textsuperscript{234} Notwithstanding the fact that indeterminacy and discretion may be the better rule when considering the merits of child custody determinations generally, a best interest analysis is inappropriate and indefensible at the jurisdictional stage. In addition, it defies logic to conclude that where Congress sought to remedy the harm of unconscionable separation of Indian children from parents and tribes through a grant of jurisdictional power, it simultaneously intended to grant state courts broad discretion in exercising concurrent jurisdiction. What has, in fact, occurred since enactment of the Act is that courts, having made substantive placement determinations, have calculated the likelihood of an

\textsuperscript{229} Section 1911(b) states:

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child’s tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child’s tribe: Provided, that such transfer shall be subject to declination by the tribal court of such tribe.

\textsuperscript{230} U.S.C.A. § 1911(b) (West 1978).

\textsuperscript{231} The undue hardship analysis is primarily a modified forum non conveniens analysis. The court considers factors like (1) distance of tribal court from parties and witnesses, and (2) location of evidence. See In re Interest of C.W., 479 N.W.2d 105, 115 (Neb. 1991) (holding that the petition to transfer was untimely and that transfer would constitute an undue hardship). At least one case suggests that the court should consider the ability of tribal representatives to travel to state court. E.g., In re Appeal of Fima County Juvenile Action, 635 P.2d 187 (Ariz. Ct. App. 1981).

\textsuperscript{232} See discussion of In re M.E.M., 635 P.2d 1313 (Mont. 1981), infra note 235.

\textsuperscript{233} A travel distance of 275 miles has been held to constitute undue hardship. C.E.H. v. L.M.W., 837 S.W.2d 947, 955 (Mo. App. 1992).

\textsuperscript{234} See supra note 71 and accompanying text (discussing the concept of Spirit injury).

\textsuperscript{235} See In re Bertelson, 617 P.2d 121, 129-30 (Mont. 1980) (holding that "good cause" not to transfer exists if, on balance, the state’s interests in the child and parties are more substantial than the tribe’s). According to the court, factors to be weighed in the balance include the best interest of the child and the ethnic and cultural backgrounds of the parents. Id. at 130.

In this case, a non-Indian mother was seeking to regain custody of her child from the Indian grandparents. This decision is simply wrong for at least two reasons: (1) this is a conflict of laws approach which is not appropriate for a transfer analysis; and (2) even if it were appropriate, including the substantive determination of the best interest of the child as a factor supportive of the state’s interests is improper. See id. at 126-27, 129-30.
inconsistent disposition by tribal courts and used this calculation as a basis for their "good cause" determination not to transfer.\textsuperscript{226} While a traditional transfer analysis considers both the convenience of parties and witnesses and the interest of justice,\textsuperscript{226} unless the court is prepared to suggest and substantiate the inability (moral, intellectual, judicial, or otherwise) of the tribal court to adjudicate in the best interest of the child, it is elementary that such a substantive determination is not an appropriate basis for determining the transfer issue. Moreover, a state court’s consideration of the likely outcome of tribal court adjudication is contrary to the express provision of one Bureau of Indian Affairs guideline.\textsuperscript{237} In fact, what the court is doing is applying a "better law" test as that test is defined within the context of a typical conflict of laws analysis.\textsuperscript{226} However, there is no conflict unless the federal law is no longer superior law. Where state courts are simply refusing to apply superior federal law, no real conflict exists.

Notwithstanding congressional recognition and endorsement that tribal courts are necessarily better situated to decide Indian child custody cases consistent with the best interests of Indian children,\textsuperscript{228} state courts, entrenched in exercising their parens patriae power through application of their own indeterminate standards, are often recalcitrant in adjudicating Indian child custody cases consistent with the plain meaning of the statute or federal policy, despite the supremacy of the federal law. As a result, many cases that should be transferred to the tribal court are not. To add insult to injury, a similar "good cause" exception exists with regard to the application of the substantive standards of the Act where the state court exercises its concurrent jurisdiction.\textsuperscript{240} Thus, if the court finds good cause not to transfer, and

\textsuperscript{225} See In re M.E.M.\textsuperscript{, 635 P.2d at 1314. In this case both the mother and the tribe requested transfer to the Standing Rock Sioux Tribal Court. The state social worker had advised the tribe that the State would resist transfer unless the tribal court’s "plans for the disposition of the case" were set forth. When the tribal court failed to respond, the lower court ruled against the transfer. Note, however, that the lower court’s decision was subsequently reversed on other grounds by the Montana Supreme Court. Id. at 1315, 1317.}

\textsuperscript{226} For a discussion of the doctrine of forum non conveniens within the context of federal procedure, see Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

\textsuperscript{227} Bureau of Indian Affairs Guideline § C 3(d) states in pertinent part: "Socioeconomic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause [not to transfer] exists."

\textsuperscript{228} Better law analysis as a basis for deciding conflicts issues has been severely attacked, especially within the context of domestic choice of law analysis. The Article IV obligation, imposed by the Constitution, to give full faith and credit, and the Privileges and Immunities guarantees of Article IV and the Fourteenth Amendment, make such an analysis constitutionally suspect. See Douglas Laycock, Equal Citizens of Equal And Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 250, 249-70 (1992) (discussing better law and the Privilege and Immunities Clauses); id. at 310-12 (discussing better law and the Full Faith and Credit Clause).


\textsuperscript{230} 25 U.S.C.A. §§ 1911(a), 1915(c) (West 1978).
in addition it finds good cause not to apply the placement preferences set out in the Act, the case is decided in state court under state substantive law.\textsuperscript{241} No one has proclaimed the best interest standard, as typically applied, to be a universal, cross-cultural standard; however, its indeterminacy imbues it with the potential to be just that. It is precisely that elasticity which makes it useful in a pluralistic society. However, the standard has been attacked because its rigid interpretation and application effectively institutionalizes a cultural point of view—what is good (mainstream white American values) is surely better than what is not good (marginal non-white values), and what is better is best for purposes of providing content to the best interest standard. The ICWA acknowledges the syllogistic flaw; this is true only from the viewpoint of the advocate of white supremacy; from any other viewpoint, it is simply not true. Where applied to custodial determinations affecting Indian children and parents, it is content without context, and it is context that the ICWA seeks to provide. To be sure, the Act does not intend to call into question the values undergirding the mainstream point of view as much as it intends to recognize the legitimacy of other points of view. It is not a dichotomous dilemma; it is an emancipatory effort—liberation from the conceptual confines of one right way. The Supreme Court has faced this dilemma squarely when balancing the individual rights of parents (e.g., religious freedom, privacy rights) against the best interests of the child where those rights potentially conflict with a mainstream view of the child's best interest.\textsuperscript{242} Because state jurists are in some cases either unwilling or incapable of thinking outside the mainstream paradigm, the ICWA is there to assist. To further assist this process, where state courts have been reluctant to apply federal law, Indian law practitioners and tribal sovereignty advocates have reacted to this recalcitrance by lobbying state legislatures to adopt state Indian child welfare acts substantially similar to the federal law but which effectively domesticize the law and increase the likelihood that it will be applied, and when it is applied, that it is applied fairly.\textsuperscript{243}

C. Real Conflicts

Whereas states ceded their sovereignty to the federal government in adopting the Constitution, Indian tribes never volunteered for such cession.\textsuperscript{244} However, like the states’ ratification of the Constitution, Indians’ treaties with the United States.

\textsuperscript{241} The 1997 amendment recognizing parental preference as good cause empowers the non-Red parent to undermine the purpose of the legislation. \textit{See supra} Part IV.B.1 (discussing the divorce proceedings exception to the ICWA).

\textsuperscript{242} \textit{See} Palmore v. Sidoti, 466 U.S. 429, 431 (1984) (reversing the Florida state court’s grant of custody to the white father where the white mother married a black man).

\textsuperscript{243} States that have adopted Indian Child Welfare acts include: Oklahoma, (OKLA. STAT. tit. 10 (1998)); California, (CAL. RULE CT. 1439 (West 1998)); and Nebraska (NEB. REV. STAT. § 43-1501 (1998)).

\textsuperscript{244} \textit{Supra} note 94 and accompanying text; \textit{see} BASH & HENDERSON, \textit{THE ROAD}, \textit{supra} note 76.
granted limited powers to the federal government, leaving residual power in the tribes. The use of congressional plenary power under the Indian Commerce Clause to govern the internal affairs of Indian tribes as opposed to their external relations with federal or state governments (whether or not such a grant of power is an express treaty provision) suggests an opposite construction—that treaties are the source of tribal power rather than a grant of power. However, the tension inherent in these opposite constructions is somewhat lessened as it pertains to this discussion because neither construction denies the evolutionary capacity of federal Indian policy from wardship to self-determination. As an intermediate step, tribal self-government means the power to make and apply law governing internal affairs. Moreover, since as early as 1832, the Supreme Court has acknowledged tribal rights “to govern themselves by their own law.” In addition, the internationalization of the issue of the rights of indigenous peoples has refocused attention toward valueful difference, and reconstructed the meaning of cultural rights. Thus, the move toward broadened recognition of tribal sovereign powers is invigorated, and the tribal power to make law governing internal affairs seems unquestioned. The legislative history of the Act states that “there can be no greater threat to essential tribal relations and no greater infringement on the right of the . . . tribe[s] to govern themselves than to interfere with tribal control over the custody of their children . . .”

Modern approaches to conflict of laws analysis include: (1) the Restatement’s most significant relationship approach; (2) the comparative impairment approach; (3) interest analysis; and (4) the better law approach. While anything is debatable, it seems hardly supportable that Indian tribes have no real interest in the decisions determining the custody of children of the tribe. Even where the ties between the tribe and the child are tenuous, a finding of no tribal interest and/or no tribal relationship is incongruous with both the legislative history of the Act and empirical 

245. BARSH & HENDERSON, THE ROAD, supra note 76, at 278-79; see also Resnik, supra note 92, at 679-80 (discussing federal jurisprudence as it relates to Indian tribes), and Wissner, supra note 97, at 587.

246. See Joseph W. Singer, Sovereignty and Property, 86 NW. U. L. Rev. 1, 14-17 (1991) (describing the illegal procurement of Indian treaties by the United States government). It is important to note that the constitutional construct of Indian plenary power was developed to circumcribe the exercise of power by the several states over tribes located within their geographical boundaries. The existence of tribal lands “within” the geographical boundaries of states is itself a construction subject to challenge. BARSH & HENDERSON, THE ROAD, supra note 76, at 134.

247. See Worcester v. Georgia, 31 U.S. 515, 542-43 (1832) (insisting that states have no direct powers over Indian nations located within state boundaries).


data substantiating the "threatened status" of Red nations generally.\textsuperscript{252} Moreover, considerations of what law could or should apply is inextricably bound up with considerations of what constitutes justice. Congress has explicitly provided that a just determination of the best interest of Indian children requires recognition of the critical role of tribal identification and affiliation.

Despite the lack of clarity regarding the political status of Red nations,\textsuperscript{253} it can be fairly said that those nations are distinct political and normative communities.\textsuperscript{254} Moreover, current federal policy toward Indian tribes has been described as one of self-determination, suggesting a more expansive vision of the sovereign power of tribes and distinct tribal interests than the federal policy of self-government prevalent when the ICWA was passed.\textsuperscript{255} Where state courts exercise either concurrent jurisdiction or exclusive jurisdiction (assuming no jurisdiction in the tribal court under the Act or under tribal law) over child custody matters, the interest of the state court is predicated on home-state affiliation or other substantial contacts between the child or the parents and the forum.\textsuperscript{256} Thus, the presence of overlapping interests, conflicting norms and policies, and distinct political bodies presents the classic conflict of laws paradigm.\textsuperscript{257}

VI. THE SOLUTION: AN EXPRESS CHOICE OF LAW PROVISION

Leaving for a moment the question of appropriate concurrent or exclusive jurisdiction (either state or tribal), and assuming that choice of forum has inherent value from the standpoints of fairness, participation, and equality,\textsuperscript{258} should the


\textsuperscript{253} For a temporal analysis of the evolution of the concept of Indian tribes as sovereigns, see BASH & HENDERSON, \textit{THE ROAD}, supra note 76 (arguing that post-American Revolution recognition of Indian tribes as true sovereigns was initially rejected as threatening to the newly formed federal government because clear subjugation of a co-sovereign would raise suspicion in the several states over centralized authority). However, once removal was accomplished, geographical distance and collateral isolation insulated the central government from direct view, and subjugating policies and activities resumed. See Resnik, supra note 92, at 679, 696-97 (describing the governmental treatment of Indians as "illuminating" of the "relationship between state and federal government," and suggesting that this illumination had to be contained before the rhetoric of sovereignty would be openly applied to Indian tribes, for fear of flaring the federalism-versus-nationalism debate).

\textsuperscript{254} As explained by Russel Lawrence Bash and James Younghblood Henderson, "[T]ribalism is not an association of interest but a form of consciousness which faithfully reflects the experience of Indians. It is a normative system." BASH & HENDERSON, \textit{THE ROAD}, supra note 76, at viii.

\textsuperscript{255} See Atwood, Fighting Over Indian Children, supra note 130, at 1057 ("In light of the current national policy of self-determination for Indian tribes, a measured preference for the tribal forum in interparental child custody battles seems essential.").

\textsuperscript{256} See supra notes 132-36 and accompanying text (discussing jurisdiction under the UCCIA).

\textsuperscript{257} See Singer, supra note 251, at 731, 737-40 (arguing that the conflicts analysis has been generally oversimplified, masking for the most part the difficult balancing and weighing of conflicting values and policies that must take place when deciding to apply the law of one sovereign over that of another).

\textsuperscript{258} Resnik, supra note 92, at 681 n.44, 689-90.
ICWA be expanded to cover custody decisions made coincident to divorce and other intrafamilial disputes by providing an express choice of laws provision for applying the best interest principle in custody cases involving Indian children brought in state court? Despite the fact that, typically, jurisdiction equals choice of law in the context of domestic relations law (this approach is reinforced in the structure of the UCCJA and the PKPA), recognition of the state's interest in administering law in domestic relations cases and thus its right/duty to exercise jurisdiction does not necessitate application of that state's law to the facts of every custody case it hears. Moreover, the groundwork for federal preemption has been well laid. Not only does the ICWA provide a strong federal policy to be furthered by the choice of law provision, mandatory choice of law is consistent with federal preemption vis-a-vis states. Additionally, conflicts scholars have argued for the general federalization or uniformization of conflicts law. Where termination of the parental or custodial right of an Indian is at issue, the ICWA is implicated, and with respect to the best interest determination, the vertical relationship between state and federal law makes it clear at the outset that this is a false conflict. The real conflict is between dependent sovereigns (tribes) and the U.S. government as manifested through state action, given the domestic relations exception to federal court subject-matter jurisdiction.

The difficulties and complexities of applying the best interest principle fairly and responsibly to cases involving cultural difference are well established. The problem of "fairness" is exacerbated in light of the current view that personal jurisdiction over the absent parent is not essential to the court's power to determine custody. The cultural difference can be vertical (judge/litigant) or horizontal (interlitigant) or both. Indeed, the empirical data supporting the passage of the

259. See supra Part V.A (discussing the traditional jurisdictional approach in domestic relations cases).
260. See generally Larry Kramer, On the Need for a Uniform Choice of Law Code, 89 Mich. L. Rev. 2134 (1991) (arguing that a uniform choice of law rule is needed and would ultimately be as important as the Uniform Commercial Code); Gene R. Shreve, Conflicts Law—State or Federal, 68 N.D. L.J. 907 (1993) (discussing the possibility of federal conflict of law superseding state conflict of law, including benefits and problems, and describing the "conflict" as only theoretical).
261. See Singer, supra note 251, at 731 (analyzing "false" conflict of laws issues); see also Shreve, supra note 260, at 907-08 (discussing "vertical" conflicts of law, and noting that these are not really conflicts at all).
262. See Atwood, Fighting Over Indian Children, supra note 130, at 1050-59, 1082 (noting that both the state and Indian tribes have interests in protecting children); Margaret Howard, Transracial Adoption: Analysis of the Best Interest Standard, 59 Notre Dame L. Rev. 503, 503 (1984) ("The effect of the best interest concept is to include in child placement decisions considerations that serve other political and social ends but are unrelated to the best interest of the affected child.").
263. See Kulko v. Superior Court, 436 U.S. 84, 94-95 (1978) (holding that the children moving to California with their mother when custody was given to the father and him sending support payments to the State did not constitute sufficient minimum contacts to satisfy due process); see also Atwood, Child Custody, supra note 191, at 379 n.63 (listing cases that analogize child custody proceedings to proceedings "in rem"); cf. Comanche Indian Tribe of Oklahoma v. Hovis, 53 F.3d 298 (10th Cir. 1995) (holding that the validity of a custody order entered by the tribal court depends upon personal jurisdiction over the opposing party). This statement is not a criticism of the procedure but simply recognizes that it adds to the complexity of the due process analysis.
ICWA document numerous cases of well-intended judicial paternalism which resulted in the unjustified separation of Indian children from their parents and tribes. The threat of that occurrence is not lessened because the cultural difference is interparental (although the configuration of the concerns are somewhat different where intertribal differences are at issue), especially where the child is either self- (internally) or socially (externally) identified with her tribe.

Because of the racialized character of American society, interracial marriage, like transracial adoption, is an affirmative social act. Racial and cultural identification is an externality; it is not simply a matter of personal choice. This does not make it positive or negative; it simply is. Its socially constructed meaning (along the spectrum from valueless to value-ful), however, is another matter, and it is just that meaning that makes its consideration most compelling. Consistent with social and political ideological goals of equality and pluralism, social construction of value-ful difference in Indian cultural expression is required, although there remains debate about how that meaning is to be given content. 264 In the context of transracial adoption, the consensus seems to be that in-race placement is preferable, 265 and that is the clear policy of the ICWA. In those cases where custodial arrangements for Indian children are determined to fall outside the purview of the Act, 266 or are made pursuant to a grant of discretionary power under the Act, 267 a clear choice of law provision requiring application of tribal law would simplify the process, discourage forum-shopping and the resulting conflicting decrees, encourage the development and enforcement of tribal law, and significantly further the overall purpose of the legislation.

The United States Supreme Court decision in Holyfield, and the subsequent disposition of the underlying substantive issues in the adoption case by the Choctaw tribal court, demonstrate that the tribal courts can be relied upon to fashion a remedy that fairly addresses the interests of all parties involved. Following the determination by the Supreme Court that the procedural mandates of the Act had not been followed and that the State court’s order of adoption of the Indian children by non-Indians must be reversed, the Choctaw tribal court determined that the best interest of the children required that they remain with their non-Indian adoptive parents because of the psychological bonding that had occurred over a three-year period. However, to ensure the continuous link between the tribe and the children,

266. One example would be where the divorce proceeding exception or the existing Indian family exception to coverage is applied.
267. This could occur where good cause not to transfer or apply the placement preferences under the Act is found.
the tribal court mandated continued contact with extended family members and the tribe.

In the case of In re Bridget R., which sparked the heated legislative debate and subsequent action to amend the ICWA, ultimately the tribe and the non-Indian adoptive parents reached an agreement which provided for the open adoption of the Indian twins by the non-Indian adoptive parents and their right to visitation on the reservation. In a similar case, Texan Michelle Jenkins and the Yavapai-Apache Indian tribe of Arizona reached an agreement allowing Jenkins to adopt three Indian boys. The three boys were the sons of an Apache mother, and two of the three boys were the sons of Ms. Jenkins’ nephew. Tribal leaders offered to come to Houston to conduct the custody hearings; however, prior to the hearings, Jenkins met with the tribal leaders and reached an agreement where she would adopt the boys and the boys would become members of the tribe. In describing her experience with tribal leaders, Jenkins said, “Everybody wanted the same thing—what was best for the children. . . . It really worked out well for the children. The boys have enrolled as members of the tribe—so they will retain their cultural heritage. And they are legally adopted now, so they will have a good home.”

As indicated by the Department of Justice in its testimony before the Senate Committee, the enactment of the ICWA has stimulated and supported, both legally and fiscally, the “development of tribal juvenile codes, tribal court processes for addressing child welfare issues, and tribal child welfare services.” Tribal and state intergovernmental agreements are being developed in order to provide for greater cooperation between state and tribal courts in child support enforcement. The agreements allow state courts to enforce tribal court orders against “deadbeat” parents who no longer live on the reservation and allow tribal courts to enforce orders issued by state courts. The Navajo tribe has formed such agreements with Arizona, Utah, and New Mexico. The development of tribal law and enforcement procedures will be enhanced by the delegation of power to articulate the interpretive content of the best interest determination as it is applied to children of its tribe. State and federal governments must commit to adequate fiscal support to exercise that power consistent with the national policy of tribal self-determination. A choice of law provision requiring application of tribal law to the terms of custodial arrangements made for Indian children would make the welfare of the child paramount, would be consistent with national policy, would foster state


270. Indian Child Welfare Act, Joint Hearing on S. 559 and H.R. 1022 Before the Senate Committee on Indian Affairs and House Resources Committee, 105th Cong. 50-56 (1997) (testimony of Thomas L. LeClaire, Director, Office of Tribal Justice, Department of Justice).


1266
and tribal cooperation, and would promote the development of Indian law and courts.

VII. CONCLUSION

The ICWA vests exclusive jurisdiction in, and mandates transfer to, tribal courts where termination of Native American parental or custodial rights are at issue and where the child who is the subject of the proceeding is domiciled or resides on the reservation. It provides procedural protections including heightened burdens of proof for those seeking termination of parental or custodial rights. In addition, the Act provides substantive placement provisions where state courts exercise jurisdiction and find that termination is warranted. In 1978, this was undoubtedly a plausible approach to redressing the harm of unprincipled and/or unwarranted parent/child or tribe/child separation, inculcating respect for tribal judicial authority and contextualizing the application of the best interest standard. However, the narrow scope of the Act in combination with judicially made exceptions and the good cause exception to the Act's application have made the law more precatory than mandatory. As the above discussion has shown, the jurisdictional approach as currently implemented falls far short of reaching a significant number of Indian child custody proceedings. Moreover, while the facts and circumstances surrounding any particular custody proceeding will necessarily vary, in each case the fundamental concerns of assuring the psycho-social health of the Indian child and the continuation of a legitimate and value-ful cultural viewpoint are invariably present.

To construct the issue of expanding the scope of the ICWA as one of individual rights versus group rights is, once again, to miss the point. This is not to suggest that tensions do not exist along this line; however, deciding the issue of the scope of the ICWA from the standpoint of individual rights is to presume that there are inadequate avenues for redress or change within the social structure of the group. Moreover, it reinforces the already imposed and alienated character of American thought and jurisprudence upon a potentially connected phenomenon. One can know oneself only in relation to others; the existence of the group is fundamental to the experience of self. The Spirit healing efforts of Red people have given voice to a call for political liberty—the freedom to be who they are, which, necessarily, includes the ability to choose to be who they once were. Red “being” is essential to the “being” of the whole. The functional coexistence of triple sovereigns (tribal, state, and federal governments) will necessarily pose challenging interrelational questions. The answers are not “there” in reified doctrine, but are dormant in a relational attitude that allows the “other” to be.

Red people, like all people, have a sacred path to follow, both collectively and individually. Expanding the scope of the ICWA to require application of tribal law to all custody determinations involving Indian children made in state courts will
help to protect the overall health of Indian children and ensure the continuation of the sacred Red path. Moreover, it will take us all one step closer to realizing the complementation of difference and connectedness and actualizing joy in our lives.