NOTES

THE WANING OF THE INDIAN CHILD WELFARE ACT: HOW MEDIATION MAY HELP SAVE THE ACT AND PRESERVE ITS ORIGINAL INTENT

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I. INTRODUCTION

In 1978, Congress passed the Indian Child Welfare Act ("ICWA") in response to the staggering rates at which Native American Children were separated from their parents and removed from their communities.[1] At the time, between twenty-five–thirty-five percent of all Native American children were removed from their families and placed in new homes, often with non-Native American parents living off tribal lands.[2] Ignorance of Native American child rearing practices among social workers had impacted the ability of such workers to fairly evaluate Native American parents.[3] Further, standards were often applied unequally between Native American and non-Native American parents, with Native American children being removed from their homes at higher rates for social and family problems present in

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1 H.R. REP. NO. 95-1386, at 9 (1978) ("Surveys of States with large Indian populations conducted by the Association of American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25–35 percent of all Indian Children are separated from their families and placed in Foster homes, adoptive homes, or institutions"); 25 U.S.C.A. § 1902 ("The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.").

2 H.R. REP. NO. 95-1386, at 10.

3 *Id.*

similar rates in local non-Native American families.[4] Non-Native American parents were, in short, often given the benefit of the doubt. The scale of these removals has been described as a kind of genocide,[5] substantially impacting the ability of Native American cultures to retain their identity.[6] This measure created special protections for Native American children at risk of being removed from their homes, granting tribal courts jurisdiction over all court proceedings involving Native American children residing or domiciled within tribal lands.[7] Under this law, the Tribe is empowered to intervene in state court proceedings involving Native children, and child custody proceedings under tribal jurisdiction are entitled to full faith and credit by state and federal courts.[8] Further, the Act provided that in cases where a child is not domiciled within a reservation, a custody proceeding involving the termination of parental rights to a Native American child would be transferred to the tribal court absent good cause to the contrary.[9] This measure sought to empower Native American tribes seeking to maintain a sense of cultural identity in the face of state interference that unnecessarily dissolved Native American families, which it was feared would lead to the eventual death of Native American cultural identity.[10]

This step, in both its intention and effect, allows a tribe to control its own destiny by ensuring that children are raised within the culture.[11] The measure did, however, create some confusion, par-

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4 *Id.* Alcohol abuse, for example, was often cited against Native American parents as grounds for the removal of a child, though drinking rates were similar in the neighboring non-Native American population.

5 Christina Lewis, *Born Native, Raised White: The Divide Between Federal and Tribal Jurisdiction with Extra-Tribal Native American Adoption*, 7 GEO. J.L. & MOD. CRITICAL RACE PERSP. 245, 262 (2015).

6 H.R. REP. NO. 95-1386, *supra* note 2, at 9.

7 25 U.S.C.A. § 1911(a) (1978) ("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.").

8 *Id.* at (d).

9 *Id.* at (b) ("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.").

10 H.R. REP. NO. 95-1386, *supra* note 6, at 9.

11 *Id.*

ticularly in cases where Native American children do not reside on the reservation, which triggers the concurrent jurisdiction (though presumptively tribal) provision of the ICWA.[12] This confusion is concerned in part with how a Native American child is defined.[13] In some cases a child might be considered Native American even though that child has never set foot on tribal lands.[14] However, so long as the Native American parent is enrolled in the tribe, and thus the child might be considered Native American by the particular laws of a tribe, such a child would likely be considered Native American for the purposes of the ICWA.[15] This uncertainty makes the rights of Native and non-Native parents unclear.

This also raises jurisdictional issues in families with both a Native American and non-Native American parent. Typically, Native American tribes do not have criminal jurisdiction over non-Native Americans who commit crimes on their land.[16] Thus, having their rights to their children adjudicated by a Native American court that could not otherwise have jurisdiction over them creates an unusual jurisdictional idiosyncrasy. The jurisdictional situation is unique as it allows a Native American tribe to reach off of their own lands to children and thus to adults who might not otherwise have known that they might come under jurisdiction of Native American tribal courts. While it is settled law that Native American tribes may exert jurisdiction over non-Native Americans in situations where such a non-Native American has entered into some kind of consensual relationship with a Native American tribal member, contractual or otherwise, one might not think to ask the person he or she has decided to procreate with if he has tribal membership, particularly if one is ignorant of the ICWA and its provisions.[17] The same potential for unfairness, however, exists for a state court that seeks to exercise jurisdiction over a Native American parent, suggesting a need for an impartial forum in which such disputes might be adjudicated. This note does not propose to solve

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12 *See*, *supra* note 9.

13 Kathleena Kruck, Note, *The Indian Child Welfare Act's Waning Power After* Adoptive Couple v. Baby Girl, 109 Nw. U. L. Rev. 445 (2015).

14 25 U.S.C.A. § 1903(4) (1978) ("'Indian child' means 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."); Adoptive Couple v. Baby Girl, 133 S.Ct. 2552 (2013).

15 Kruck, *supra* note 13; In re Parental Rights as to S.M.M.D., 272 P.3d 126, 128 Nev. Adv. Op. no. 2 (Nev. 2012).

16 Jane M. Smith, Tribal Sovereignty over Nonmembers: A Legal Overview (Congressional Research Service, 2013).

17 Montana v. U.S., 450 U.S. 544 (1981).

such problems by unraveling the hard-won rights embodied in the Indian Child Welfare Act, but seeks to create a compromise through mediation for Native American and non-Native American parents of children not domiciled within the reservation under the Indian Child Welfare Act.

The ICWA has also created a unique problem for some Native American parents who are tribal members, but do not wish to comply with the Act and who have sought to have their children adopted by non-Native American parents outside the jurisdiction of the ICWA and the tribe.[18] Indeed, an unfortunate consequence of the ICWA is it seems to occasionally pit tribes against their own members, as it codifies the interest of tribal communities in keeping children within the community, and that empowering tribes to do so, even above the objections of parents, is essential to cultural survival.[19] Amid these consequences of the implementation of the Act, there is growing concern among supporters of the ICWA that it is under attack,[20] particularly in the wake of *Adoptive Couple v. Baby Girl*.[21]

This note proposes a solution to the current crisis of the Indian Child Welfare Act, by establishing mediation forums both for parents of Native American children not domiciled on the reservation, and for tribal members and tribes wishing to utilize state courts when seeking to have their children adopted by non-Native American families. Part A of Section II provides clarification on the definitions of Native American for the purpose of the Act. Part B of Section II discusses the common law origins of the Act and court created exceptions to it. Part C of Section II discusses jurisdiction over Non-Native American parents by Native American tribes. Part D of Section II describes mediation programs used by Native American Tribes, with a focus on Navajo Peacemakers. Part E of Section II discusses the legislative foundation for cooperation between tribes and states. Section III examines some of the potential pitfalls of mediation in ICWA cases and potential solutions. Sec-

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18 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); In re Adoption of Halloway, 732 P.2d 962, 968 (Utah 1986).

19 H.R. REP. NO. 95-1386.

20 Bill John Baker, *It Takes a Tribe*, BUDGETEER NEWS (Jan. 8 2016), http://www.duluthbudgeteer.com/opinion/columnists/3920241-it-takes-tribe (last visited Jan. 31, 2017); Michael Overall, *One Year Later, Baby Veronica Case Still Resonates*, TULSA WORLD (Sept. 21, 2014), http://www.tulsaworld.com/news/courts/one-year-later-baby-veronica-case-still-resonates/article_2b85eeef-72c5-50cb-b3e8-74f9dfe7355e.html (last visited Jan. 31, 2017).

21 *Adoptive Couple*, 133 S. Ct. 2552.

tion IV proposes mandatory mediation in cases falling under 1911(b) of the Indian Child Welfare Act.

II. Background

A. *Defining Native American*

To eliminate confusion regarding definitions, of which precise understanding is key to the Indian Child Welfare Act, the relevant definitions are provided here exactly as they appear in the ICWA. Under the ICWA an "Indian" (which has the same definition as any person defined in this note as "Native American" is "any person who is a member of an Indian tribe."[22] An "Indian child" is "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."[23] An "Indian tribe" is, "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians."[24] A "parent" is defined as "any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established."[25] As the court held in *Miss. Band of Choctaw Indians v. Holyfield*, the domicile of a parent is imputed to the parent's child.[26]

B. *The Courts and Exceptions to the Act*

The principles embodied in the Indian Child Welfare Act predated it by nearly a century.[27] In the late 19th century a woman named Lelah Puc Ka Chee petitioned for a writ of habeus corpus after she was removed from her family and forcibly placed in a

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22 25 U.S.C.A. § 1903(3).

23 *Id.* at (4).

24 *Id.* at (8).

25 *Id.* at (9).

26 *Holyfield*, 490 U.S. 30.

27 Patrice H. Kunesh, *Borders Beyond Borders—Protecting Essential Tribal Relations Off Reservation Under the Indian Child Welfare Act*, 42 New Eng. L. Rev. 15 (Fall 2007).

white-run boarding school.[28] In granting her petition the court recognized several important principles that would be codified in the act: first, that states do not have authority over Native American children residing on tribal lands, second that tribes are necessary parties in decisions involving Native American children, and third, that the integrity of the Native American family is entitled deference by the state.[29] While the first principle, that tribes have exclusive authority over Native American children residing on their land, is explicitly embodied in the ICWA, the second principle should guide a reading of the portions of the ICWA that pertain to concurrent jurisdiction, that is, situations where both the state and tribal government may assert that they have a right to hear the case.[30] As that provision is not exclusively applied to children residing or domiciled on tribal lands, but guides the spirit of Native American jurisdiction over even those cases where their connection to a Native American child might seem tenuous.[31]

The concurrent jurisdiction portion of the ICWA has been significantly eroded in recent years. The Supreme Court has substantially adopted state-created exceptions to the ICWA.[32] These exceptions are notably the Existing Indian Family Exception and the Good Cause Exception.[33] The Existing Indian Family Exception, which "allows a court to first determine whether a child was removed from an existing Indian family before applying the ICWA" is particularly ambiguous, as it often puts a state court in the position of determining what the boundaries are of Indian Families.[34] This often includes cases where a parent who gave up her rights to a child in a state court later petitions to have the case removed to the tribal court.[35]

The Existing Indian Family Exception is dangerous, as it reinforces the primary issue the ICWA sought to prevent, specifically,

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28 *Id.*; In re Lelah-Puc-Ka-Chee, 98 F. 429 (N.D. Iowa 1899).

29 Kunesh, *supra* note 27.

30 25 U.S.C.A. § 1911(b).

31 *Id.*

32 Kruck, *supra* note 13.

33 *Id.* at 454 ("States continue to deplete Indian tribes through two judicial maneuvers. First, state courts often use the '[E]xisting Indian [F]amily Exception' (EIFE). The EIFE allows courts to avoid application of the ICWA altogether. Second, state courts will often apply a lenient "good cause" standard to avoid the placement preferences required by § 1915. Importantly, although many states apply these exceptions, others have explicitly declined to do so.").

34 Kruck, *supra* note 13.

35 In re Adoption of T.R.M., 525 N.E.2d 298 (Ind. 1988) (holding that where a Native American mother abandoned her child at the earliest practical moment after child birth, hearing the case in state court did not violate the ICWA in that no Native American family was broken up).

that state social services may apply a white middle-class standard in making discretionary decisions, which will ultimately have a negative impact on Native American families.[36] This may occur even over the protests of the child's Native American family.[37] The Good Cause exception likewise puts a state court in a position to make broad discretionary decisions, frequently based on what are perceived to be the best interests of a child.[38] This is an incentive for the parents with custody of the child at the time of the proceeding, who are often the non-Native American adoptive parents of a Native American child, to prolong a proceeding and thus form an attachment to a child that would be disruptive and potentially upsetting to the child if broken.[39] As we will discuss in greater depth later, this point is not lost on judges, and often colors a judge response to a case, be it on a visceral level or in the opinion of the case itself.[40] Retaining this ambiguity and these exceptions to the portion of the ICWA that allows concurrent jurisdiction places Native American parents residing off the reservation, and Non-Native American parents of Native American Children not domiciled on the reservation in a hopelessly confusing position, with their status unclear and thus their rights unknown.

Further, the discretionary nature of the Good Cause and Existing Families exceptions in application may delay child custody proceedings, as it is not unheard of for a parent with no substantiating evidence to raise an ICWA issue in the eleventh hour, or even after their parental rights have been terminated.[41] While these challenges are often unsuccessful on the parts of parents who failed to raise them, it should be noted that such challenges do not affect the right of a tribe to intervene.[42] Thus it is that heartbreaking cases like that of *Adoptive Couple v. Baby Girl* occur.[43] In that

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36 H.R. REP. NO. 95-1386; Kruck, *supra* note 13, at 456 ("[A] common problem with using the EIFE to avoid application of the ICWA [is] it places the determination of what constitutes an Indian family—a determination based largely on cultural values—with the state courts. This application is especially damaging to the ICWA's purposes because it necessarily involves determining what constitutes a family unit and cultural membership.").

37 *T.R.M.*, 525 N.E.2d 298.

38 Kruck, *supra* note 13.

39 *Id.*

40 Adam Liptak, *Case Pits Adoptive Parents Against Tribal Rights*, N.Y. TIMES (Dec. 24, 2012), http://www.nytimes.com/2012/12/25/us/american-indian-adoption-case-comes-to-supreme-court.html?_r=1 (last visited Jan. 31, 2017).

41 In re Pedro N., 35 Cal. App. 4th 183, 185–86, 41 Cal. Rptr. 2d 819, 821 (1995); In re L.B., No. F071657, 2015 WL 8773127, at *3 (Cal. Ct. App. 2015).

42 *Id.*

43 *Adoptive Couple*, 133 S. Ct. 2552.

case, a child with less than 2% Native American ancestry was given up for adoption by her mother to a Non-Native American couple.[44] The child's father, whose tribal membership status was at the time uncertain, though the mother had some information that he might be a member of the Cherokee nation, had indicated to the mother via text message that he did not want to raise the child, and did not support the mother through the pregnancy, as she expressed doubts about marrying the child's father.[45] The adoptive couple sought to determine his status and contacted the Cherokee nation to that end, but as the father's name was spelled wrong in the inquiry, his status as a member of the Cherokee nation was not discovered at the time.[46] The father had a change of heart sometime subsequent to the child being placed in custody of the couple seeking to adopt her, and after nearly two years in their custody, he successfully regained custody of the child.[47] Famously and rather controversially, the adoptive couple prevailed in their challenge to that placement, winning a 5-4 majority in the Supreme Court.[48] The court found that the father never had custody of the child, and thus he did not have a right to invoke the ICWA.[49] The child was later retransferred into the custody of her adoptive parents, after nearly 2 years living with her biological family.[50] It was the third time custody of the child was changed. First, from the mother to the adoptive family,[51] then, from the adoptive family back to the father,[52] and, then again, from the biological family to the adoptive couple.[53]

Supporters of both parties in this case were steadfast and both undoubtedly felt a palpable sense of injustice for the party they supported. Those in South Carolina, where the adoptive couple resides, held vigils and handed out bracelets.[54] Supporters of the Father in Oklahoma set up a Facebook page that eventually be-

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44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 *Id.*

49 *Adoptive Couple*, 133 S. Ct. 2552.

50 Overall, *supra* note 20.

51 *Adoptive Couple*, 133 S. Ct. 2552.

52 *Id.*

53 Overall, *supra* note 20.

54 Jane Burke, *The "Baby Veronica" Case: Current Implementation Problems of the Indian Child Welfare Act*, 60 WAYNE L. REV. 307 (2014) ("'Save Veronica' has become a common phrase in the American South over the past year. It appears on the signs of local businesses, is stamped on light purple bracelets, and is the rallying cry for fundraisers, candlelight vigils, and

came a movement aimed at not merely this case, but many similar cases.[55] Those supporters seek a change in the law, however, amid concerns that a change in law might cause Congress to further weaken the act, they have turned to state laws instead of federal.[56] Ultimately, however, there is no single solution to such a heart-breaking tug of war between adoptive parents who have formed a bond with a young child, and a desperate father who did not understand he could relinquish his rights to raise his own daughter via a text message, and who further did not understand that that text message meant that he was surrendering custody of the child not to the mother, who one might reasonably assume he might be able to have some kind of continuing relationship with, but to strangers, which likely meant he would never see his daughter again.[57]

C. *Jurisdiction Over Non-Native Parents*

A primary concern with a measure ostensibly aimed at amending a part of the ICWA is that such an amendment may dismantle or weaken tribal sovereignty, which was never robust to begin with.[58] The converse, however, might also be true. If the answer to the confusion surrounding the concurrent jurisdiction provision of the ICWA is to simply eliminate the good cause exception and allow for unqualified tribal jurisdiction over children with at least one Native American parent regardless of domicile, it may frustrate long-held principles surrounding tribal jurisdiction over non-Native American people.[59] Further, although many tribes have provisions for due process that track closely with those guaranteed by the U.S.,[60] non-Native American parents will likely be con-

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cupcake sales on holidays. It is the topic of many newspaper articles and television news broadcasts and was recently featured on an episode of the television show 'Dr. Phil.'").

55 Overall, *supra* note 20 ("Stand Our Ground for Veronica Brown began as a Facebook page where supporters of the Brown family vented their outrage. Over time, it evolved into an organized movement that staged rallies and protests. Some members were outside the house in Tahlequah where the Brown family was staying on the night of the handover.").

56 Overall, *supra* note 20 ("Kats [an activist] helped draft the proposed Oklahoma Truth in Adoption Act, which would require biological fathers to appear in front of a judge to relinquish rights before an adoption could proceed.").

57 *Adoptive Couple*, 133 S. Ct. 2552.

58 Smith, *supra* note 16.

59 *Id.*

60 Miles v. Chinle Family Court, No. SC-CV-04-08 (Navajo Rptr. Feb. 21, 2008), http://www.navajocourts.org/NNSC2008/01Willie%20Edward%20Miles%20v%20Chinle%20Family%20Court%20and%20concerning%20Bertha%20James%20Miles.pdf (last visited Feb. 1, 2017).

cerned with how their rights might be dealt with by tribal court and whether it will be possible for them to get a fair hearing, especially in light of the statutory placement preferences outlined in the ICWA.[61]

As a general rule, Native American tribes do not have civil or criminal jurisdiction over non-Native Americans.[62] For civil jurisdiction, there are two exceptions.[63] Tribes can, through regulation, exercise civil jurisdiction over non-members where a non-Indian enters into a consensual relationship with a member of the tribe or the tribe itself.[64] A consensual relationship might, in a broad sense, mean the same legally as colloquially: to describe a romantic relationship one has voluntarily entered into with a member of a tribe. Further, where the conduct of non-Indians on Indian lands threatens the welfare or integrity of the tribe in some way, the tribe has authority to exercise civil jurisdiction over such conduct.[65] Perhaps in light of the threat identified by Congress to Native Americans in enacting the ICWA,[66] one who seeks to remove a Native American child from tribal lands is then, in a sense, threatening the integrity of the tribe.

Given the difficulty tribes have in securing jurisdiction over nonmembers, they might not have or ought to not have the authority to adjudicate the parental rights of non-Native Americans. The ICWA, however, explicitly grants tribes the authority to adjudicate such cases provided the child in question is domiciled on the reservation.[67] Thus, in a case involving a non-Native American parent with a Native American partner living on tribal lands, a tribe would be able to adjudicate the parental rights of a non-Native American person.[68] Such situations are not uncommon, and given the clear application of the exclusive jurisdiction portion of the ICWA, relatively straightforward.[69] Further, Congress has recognized explicitly in the text of the ICWA that Native American tribes have an interest in maintaining their own identity by preventing the forcible removal of Native American children from their lands.[70] Though

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61 25 U.S.C.A. § 1915.

62 Smith, *supra* note 16.

63 *Id.*

64 *Montana*, 450 U.S. 540.

65 *Id.*

66 H.R. REP. NO. 95-1386.

67 *Id.*

68 *Id.*

69 *Miles*, No. SC-CV-04-08 (Navajoe Rptr. Feb. 21, 2008).

70 H.R. REP. NO. 95-1386.

the concerns of non-Indian parents who will have their parental rights adjudicated in a forum that might have a preference for maintaining its own integrity should not be pushed aside entirely, these jurisdictional exceptions demonstrate a preference for maintaining the integrity of the tribe and a historical sensitivity for the prevailing impulse of the federal government toward the removal of Native Americans from their lands and the destruction of tribal identity.[71] Federal courts have also held that in cases involving Native American children with a non-Native American parent, the question of the child's race may be considered given the fact that such a child is likely to experience racism and that a Native American parent might be better equipped to prepare their children for such a reality.[72] Though such a ruling is controversial for obvious reasons it does highlight some of the unique and delicate difficulties surrounding children who, though American, belong to a culture distinct from what is broadly considered "American" culture and who, by virtue of being a part of this culture, may have legal rights that similarly situated children without such a heritage might not enjoy.

For some non-Native Americans who have had their rights adjudicated in tribal courts, it is not merely a suspicion that they will be treated unfairly. It is reality.[73] Bob and Susan Burrell leased farmland from the Puebla tribe beginning in the 1980s, but in the late 1990s they tired of what they considered discriminatory treatment at the hands of tribal officials, and attempted to sell the lease back to the tribe.[74] The tribe resolved to buy the lease, but then delayed and eventually began baling the Burrell's hay crop and distributing it to tribe members before the Burrells were bought out.[75]

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71 *Id.*; *Montana*, 450 U.S., at 566 ("A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.").

72 Jones v. Jones, 542 N.W.2d 119, 123–24 (S.D. 1996) ("We hold that it is proper for a trial court, when determining the best interests of a child in the context of a custody dispute between parents, to consider the matter of race as it relates to a child's ethnic heritage and which parent is more prepared to expose the child to it.").

73 Burrell v. Armijo, 456 F.3d 1159 (10th Cir. 2006).

74 *Id.* at 1162 ("The Burrells assert . . . that over the years Pueblo officials subjected them to various forms of discrimination. For example, the Burrells claim that Pueblo officials prohibited them from driving their farm equipment along paved roads, prevented them from using more than a couple of horseback riders to move their cattle, and refused to permit construction of concrete ditches in their fields—all while allowing tribal members these privileges.") (citations omitted).

75 *Burrell*, 456 F.3d 1159.

Understandably, the Burrells were not pleased by this inauspicious turn of events and eventually brought an action in federal court alleging, among other things, that:

> the tribal court refused to allow discovery pertaining to the tribal council's records of its meetings; the Pueblo's form of government, including the separation of powers between the tribal council, tribal officials, and the cacique that appoints them; the tribal court's code of laws; and the existence of a tribal court system based on principles of *stare decisis.* The Burrells assert that the Pueblo has a corrupt, totalitarian form of government that lacks a regular code of laws and allows tribal judges to serve entirely at the whim of tribal officials. The Burrells point out that the first tribal judge failed to make any rulings for almost four years, and they assert that the second tribal judge acted upon an incomplete record, ignored their motions, and simply issued a one-page order dismissing their case on sovereign immunity grounds. Finally, the Burrells argue that they were entitled to basic due process rights, including rights to a fair hearing and an impartial tribal judge.[76]

While the Court of Appeals agreed with the Burrells that their due process rights were violated, they upheld the District Court's holding that before filing a challenge in federal court, the Burrells must exhaust all remedies offered by the courts of the Puebla tribe.[77] While this may seem like a fair conclusion for a couple who elected to enter into a relationship with the tribe by virtue of leasing farmland from them, it is worth noting that almost a decade passed between the commencement of their actions in the tribal court and the ruling from the federal Court of Appeals.[78] And that discounts the years of alleged discrimination.[79] Surely such a massive violation of one's rights to property he has legally should not be dealt with in a manner that offends reasonable people's fundamental notions of fairness.

However, it is not only non-Native Americans who often seek to escape tribal jurisdiction. Native American parents often, under heart-wrenching circumstances, go to great lengths to subvert the ICWA.[80] An unwed Native American couple did just that in 1985 when they consented to having their twin infants adopted by a non-

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76 *Id.* at 1170–71 (citations omitted).

77 *Id.*

78 *Id.*

79 *Id.*

80 *Holyfield*, 490 U.S. 30; *Halloway*, 732 P.2d at 968.

Native American couple in nearby Harrison County.[81] Even though the children in question had never set foot on tribal lands, because the parents were members of the tribe, the case was, several years after the adoption took place, resolved in favor of the tribe.[82] Justice Scalia, who was in the majority in the case, and who notably joined the three liberal justices in a dissent in *Adoptive Couple v. Baby Girl*,[83] later described the decision as one of the most difficult in his time on the court, stating, "The kid was, I think, 5 years old or so . . . . And we had to turn that child over to the tribal council. I found that very hard. But that's what the law said, without a doubt."[84]

Fortunately for Justice Scalia's troubled conscience, the tribe did ultimately award custody to the adoptive family and was quoted by the New York Times as saying, "it would have been cruel to take them from the only mother they knew."[85] This result should at least demonstrate that in spite of the preferences outlined in the ICWA and the tribe's strong interest in children being raised in their native culture, that issues such as the child's bonding to its adoptive parents, which seemed to be the crux of Antonin Scalia's sleepless nights, are hardly negligible to tribal authorities. However, it remains the case that Native Americans seeking to raise children outside of reservations, like the parents in *Holyfield*, seek to subvert the ICWA.[86]

Indeed, with the endemic poverty that exists on many tribal lands, it is no surprise that many Native American parents seek to have their children adopted off the reservation, hoping, perhaps, to break the cycle of poverty and escape those social problems often associated with extreme poverty.[87] And these social problems are not negligible. Many reservations have staggeringly high rates of alcoholism, and many tribes have banned the sale of alcohol on

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81 *Holyfield*, 490 U.S. 30. This case is notable for reasons mentioned earlier, as it was the case that defined the domicile of a child as the domicile of a parent.

82 *Id.*

83 *Adoptive Couple*, 133 S. Ct. 2552.

84 Liptak, *supra* note 40.

85 *Id.*

86 *Holyfield*, 490 U.S. 30; *Halloway*, 732 P.2d 962 (Where the grandmother of a child who was placed in foster care and adopted outside of the reservation testified that, "she did not want him [the child, named Jeremiah] placed in an Indian home because she thought that other Indian homes would have drinking problems similar to those plaguing Jeremiah's family and that Jeremiah could learn about his Indian heritage later.").

87 Jens Manuel Krogstad, *One-in-Four Native Americans and Alaska Natives are Living in poverty*, Pew Research Ctr. (Jun. 13, 2014) http://www.pewresearch.org/fact-tank/2014/06/13/1-in-4-native-americans-and-alaska-natives-are-living-in-poverty/ (last visited Jan. 31, 2017).

tribal lands as a result.[88] Many reservations also have staggeringly high rates of sexual abuse and rape, which overburdened tribal police forces have few resources to investigate.[89] However, in mentioning this impulse among many Native American parents to sever their children's relationship with the tribe, it must be recalled that many of these problems, though perhaps not exclusively a result of the massive removals of Native American children from their homes as a result, may have been exacerbated by such removals, which many activists have likened to cultural genocide.[90] Thus, it is perhaps a cruel irony that some Native American parents and guardians now consider it in the best interests of their children to escape the very thing that sought to remedy the conditions that make their lives on tribal lands worthy of escape. This Note does not presume to make any kind of moral judgments about tribes who wish to end this cultural genocide by keeping children on tribal lands, nor of parents whose experiences on such lands make them search for non-Native American families to raise their children, but merely to acknowledge how complicated and unbearably sad is a state of affairs that pits the survival of a community against what parents see as the survival of their own children.

Though heartbreaking, though gut-wrenching, this suggests at the very least that deferring to some degree to the parents of children caught in the middle of custody proceedings may be a welcome change for all the parties involved, and not simply a concession to non-Native American, often white, individuals who find themselves at the mercy of tribal courts.[91] After all, what prompted the enactment of the ICWA was not custody battles between parents, but the removal of Native American children from their homes by state social services at rates far higher than those of similarly situated whites in their area—an involuntary and often brutal process that was not only a trauma to the community, but undoubtedly to the individual parents whose children were stolen from them.[92]

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88 David Martin, *On Pine Ridge Reservation, Sioux Take a Stand Against Alcoholism*, AL JAZEERA AM. (Aug. 28 2014), http://america.aljazeera.com/watch/shows/america-tonight/america-tonight-blog/2013/8/28/on-pine-ridge-reservationalcoholismabounds.html (last visited Jan. 31, 2017).

89 Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), http://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html (last visited Jan. 31, 2017).

90 Lewis, *supra* note 5, at 262.

91 *Holyfield*, 490 U.S. 30; *Halloway*, 732 P.2d 962.

92 *Id.*

It must be noted, however, that deliberate actions by Native American parents to remove their children from the land still fall under the exclusive jurisdiction section of the ICWA.[93] Thus, this note will also propose a kind of mediation between parents seeking to give up their children for adoption who wish to do so outside of the bounds of the ICWA. Native American parents who used to live on the reservation, but moved off—even if this occurred during the pregnancy—are likely not to fall under the exclusive jurisdiction section of the ICWA.[94]

D. *Tradition of Peacemaking*

Scholars exploring mediation within Native America are quick to note that mediation has a long tradition in Native American communities, and was historically favored over the adversarial process commonly preferred by the American and English common law traditions.[95] The process itself is often considered empowering.[96] A robust mediation process was implemented in the Navajo Nation in 1982 utilizing traditional mediation methods of dispute resolution.[97] The Navajo court system promotes this program by urging pre-trial peacemaking opportunities for Navajo people involved in disputes.[98] The courts may also refer a case before it into peacemaking.[99] However, most peacemaking cases began as a remedy of choice between the parties, often before the case goes to court.[100] The process involves

> [f]ixing the parties' minds to the seriousness of the ceremony through prayer; allowing the participants to put facts on the table and vent about them; guidance and teaching (based on traditional values) by the peacemaker; and a consensual process of reaching a decision about what to do about the situation to

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93 *Id.*; 25 U.S.C.A. § 1911(a)

94 Navajo Nation v. Norris, 331 F.3d 1041 (9th Cir. 2003).

95 Robert D. Garrett, *Mediation in Native America*, 49 DISP. RESOL. J. 38, 43 (Mar. 1994).

96 *Id.*

97 Hózhóji Naat'aah, *Peacemaking Program of the Judicial Branch of the Navajo Nation, Plan of Operations* 1, NAVAJO COURTS (July 30, 2012), http://www.navajocourts.org/Peacemaking/Plan/PPPO2013-2-25.pdf.

98 *Id.*

99 James W. Zion, *Symposium: The Varieties of Therapeutic Experience Excerpts from the Second International Conference on Therapeutic Jurisprudence: Navajo Therapeutic Jurisprudence*, 18 TOURO L. REV. 563 (2002).

100 *Id.*

> "make good" for a wrong and plan a means of avoiding the situation in the future.[101]

This process operates heavily within the context of Navajo beliefs, and as parties are typically all tribal members such context has a healing effect on participants.[102]

The endurance of this program over a few decades suggests its success, as do Law Review articles touting its efficacy not just for the sake of efficiency, but also for the aforementioned healing aspects of mediation.[103] It must be noted however, that much of the legitimacy of such a program rests on its position within its own culture.[104] This undoubtedly makes cross-cultural mediation a much more difficult prospect, though Natives and non-Natives have successfully utilized mediation forums in resolving disputes.[105]

Notably, practice guides and treatises on the subject suggest that non-Native Americans who enter into contractual commercial relationships with Native Americans often prefer arbitration, citing the limited experience tribal judges might have in adjudicating such matters.[106] Federal Courts too have noted the potentially limited experience of tribal courts noting that, "federal courts should 'be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems.'"[107] While non-Native Americans might not find traditional peacemaking attractive in a spiritual sense, perhaps non-Native American parents would find mediation a practical alternative to a forum in which they might not feel entirely comfortable.

Further, a form of mediation called "Family Group Conferencing," that proved successful in New Zealand native populations, has been suggested as an appropriate mechanism under the Indian Child Welfare Act's "active efforts" requirement to use in custody determinations in Alaskan Native populations.[108] As Part IV will discuss, this suggestion, however, does not go far enough.

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101 *Id.* at 629–30.

102 *Id.*

103 *Id.*; Garrett, *supra* note 95, at 43.

104 Zion, *supra* note 99.

105 *Id.* at 629–30; Garrett, *supra* note 95, at 43.

106 Thomas H. Oehmeke, J.D. & Joan M. Brovins, J.D., *Arbitration in Indian Country—Settling Business Disputes with Native American Tribes*, 116 AM. JUR. TRIALS 395 (2010).

107 *Burrell*, 456 F.3d at 1172.

108 Laverne F. Hill, *Family Group Conferencing: An Alternative Approach to the Placement of Alaska Native Children Under the Indian Child Welfare Act*, 22 ALASKA L. REV. 89 (2005).

E. *Cooperation*

In examining the Indian Child Welfare Act, it is not only the portion of the act pertaining to concurrent jurisdiction that often creates confusion. Section 1919(a) provides that Native American tribes may allow states to take jurisdiction in cases of concurrent jurisdiction.[109] Though this seems like a straightforward rule, it relies on the consent of tribal authorities to grant state authority over proceedings.[110] Such agreements are revocable and may sometimes be complicated by changes in tribal law subsequent to the commencement of a custody proceeding.[111] In a state court proceeding involving children affected by a change in tribal law as to the blood quantum required for eligibility for tribal membership, the Supreme Court of Nevada held that, "a tribal-state agreement respecting child custody proceedings may vest a Nevada district court with subject matter jurisdiction to take a relinquishment of parental rights under circumstances where section 1911(a) of the ICWA, 25 U.S.C. § 1911(a), would otherwise lay exclusive jurisdiction with the tribal court."[112] This was described as preserving tribal autonomy, as it empowered tribes to enter into consensual agreements with states as to who might exercise jurisdiction.[113] While perhaps such a rosy view of the ruling is not warranted, it does at least suggest that when jurisdiction is uncertain tribes and states should be permitted to decide together—though with deference to the tribe's ultimate decision—where a case might be adjudicated. Using such agreements to make custody battles less fraught may have the same positive outcomes that arbitration often has for businesses that enter into arbitration with Native American tribes regarding contracts or other business interests.[114]

III. Discussion

Given the successes of mediation in Native American cultures,[115] and the fact that giving tribal courts uncertain jurisdiction

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109 25 U.S.C.A. § 1919(a).
110 *Id.*
111 *S.M.M.D.*, 272 P.3d 126.
112 *Id.*
113 *Id.*
114 Oehmeke & Brovins, *supra* note 106.
115 Zion, *supra* note 99, at 629–30; Garrett, *supra* note 95, at 43.

over custody disputes between Native and non-Native parents involving children not domiciled on the reservation tends to favor a reinforcement of the ills at which the ICWA was aimed,[116] another process might help parents—biological or adopted—who find themselves in such a dispute. Child custody battles are often extremely acrimonious. Were parents to skip the courthouse and instead find themselves at a table with an experienced, empathetic mediator, the parents might have a better chance at working out a mutually beneficial agreement that respects both parents' rights to their child.[117] Further, as the problems inherent in the current scheme of the concurrent jurisdiction portion of the ICWA suggest, a mediation forum in such cases is likely to promote greater efficiency in the resolution of disputes where a party often has incentive to drag out the proceeding for the sake of forming a more credible bond to the child.[118] One might note, however, that there are four key complicating issues here: participation, culture, structure and the problem of the good faith exception.

The issue of participation is one that is not unique to this topic but is common in custody battles.[119] For mediation to be successful, both parties must come to the table willingly and with openness to the position of the other party.[120] Further, mediation is more likely to be successful when parties seek to preserve a relationship with each other.[121] A non-Native American parent who removes a child from the reservation on which the child was raised, for example, would likely not be a good candidate for mediation.[122] Acrimony is no small hurdle in family law and assuming mediation is unsuccessful, where might a case go? If the case returns to the Native American courts after an unsuccessful mediation, this gives the parent who prefers that forum a distinct advantage and could ultimately lead to bad faith attempts at mediation by one of the parties. This is especially relevant given the unique posture of custody disputes involving Native Americans, many of which involve the non-Native parent unilaterally removing the child from tribal lands and filing a proceeding for custody in whichever county they

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116 H.R. REP. NO. 95-1386.

117 *ADR Types & Benefits*, CALIFORNIA COURTS, http://www.courts.ca.gov/3074.htm.

118 Kruck, *supra* note 13.

119 David A. Hoffman, Esq., MEDIATION: A PRACTICE GUIDE FOR MEDIATORS, LAWYERS, AND OTHER PROFESSIONALS (MCLE) § 1.8.1 (2013).

120 *ADR Types & Benefits*, supra note 117.

121 *Id.*

122 *Miles*, No. SC-CV-04-08.

reside in at the time.[123] This could also give the parent who has custody of the child at the time the mediation takes place a distinct advantage.[124] As the tactics of King Solomon[125] are frowned upon in the present day, there is no clear way for a mediator to encourage or test the good faith participation of one with little incentive to participate.

It is undoubtedly true that a willingness to come together in good faith is essential to the success of mediation. Recommending mediation where a custody battle has already been tainted with bad faith is risky. However, having a mediation period where a parent is concerned about the forum in which his or her rights will eventually be decided might incentivize cooperation from parents who, like the non-Native parent in *Miles v. Chinle Family Court*, took drastic measures to remove the child from tribal lands.[126] While one might be concerned with the possibility that this rewards bad faith on the part of parents who remove children from tribal lands, one of the features of mediation is that it seeks not to punish, but to make all parties whole.[127] Thus the bad actions of one parent, foster or adoptive parents, or the Native American tribe prior to the mediation should not unduly color the proceeding, which should aim to meet the needs of those involved.

This again recalls *Adoptive Couple v. Baby Girl*.[128] As discussed earlier, the child with remote Native American heritage was found not to be a Native American child under the act because she did not have a relationship with her father prior to the adoption even though an earlier state court ruling had awarded custody to the child's part-Native American father and thus the child had lived with the father for a substantial part of her infancy.[129] Subsequent to that ruling, mediation was ordered between the father and the adoptive couple.[130] No resolution was reached.[131] With a ruling from the Supreme Court in hand affirming the rights of the

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123 *Id.*

124 *T.R.M.*, 525 N.E.2d 298. Where the court did not allow a proceeding to be transferred to tribal jurisdiction, noting, among other things, that the Native American child had bonded to its non-Native American parents and further had no meaningful contact with the Native American tribe.

125 1 *Kings* 3:16–28 (King James).

126 *Miles*, No. SC-CV-04-08.

127 Garrett, *supra* note 95 at 43.

128 *Adoptive Couple*, 133 S. Ct. 2552.

129 *Id.*

130 *Id.*

131 Michael Overall, *Adoptive Parents Take Custody of Veronica from Biological Father*, TULSA WORLD (Sept. 23, 2013), http://www.tulsaworld.com/archives/adoptive-parents-take-cus-

adoptive parents to the child, mediation was doomed due to the drastically unfair bargaining position of the victorious couple.

What might have happened in that case before the protracted court battle? The adoptive couple's lawyer did inquire into the Native American status of the father, apparently seeing this as a potential obstacle to the adoption.[132] Perhaps that the father's name was misspelled by the attorney conducting the inquiry into the father's Native American status could not have been solved by mediation,[133] but one wonders what might have happened if both biological parents, and the adoptive parents had a chance to hold a meeting, perhaps one facilitated by a neutral party from the Cherokee nation and one representing the interests of the adoptive couple and biological mother. This seems like the kind of common sense reform that would have applications beyond custody disputes under the ICWA. It bears some resemblance to the reforms advanced by supporters of the father in the Adoptive Couple case to ensure that a father appears before a judge before he can truly relinquish his rights to his child.[134] Such an arrangement is likely to produce a better result for all parties than a protracted court battle in which the child is moved several times before she is placed again in the hands of her adoptive parents.[135] In that case, it is not surprising that the adoptive parents and father could not come to a mutually agreeable solution, as both sets of parents had formed a bond with the child, which neither party wanted to concede. Solving the custody dispute before such bonds are formed would serve to simplify such disputes—at least as much as such a dispute might be made simple.

This does not, however, solve the problem of confusion inherent in the vague provisions of 1911(b). If mediation then fails, where might the case be finally adjudicated? In such a scenario the case would go back to the tribal court to be adjudicated in compliance with the ICWA.[136] While this is ostensibly unfair to the non-Native parent who might not have expected his or her rights to be adjudicated in such a forum, their rights are, under 1911(b), likely to be adjudicated in such a forum anyway.[137] Such a provision,

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tody-of-veronica-from-biological-father/article_5eac54ef-c6eb-5a97-b559-667f2bdcf53b.html (last visited Jan. 31, 2017).

132 *Adoptive Couple*, 133 S. Ct. 2552.

133 *Id.*

134 Overall, *supra* note 20.

135 Overall, *supra* note 131.

136 25 U.S.C.A. § 1911(b).

137 *Id.*

though it provides that non-Natives be haled in front of a court that is likely foreign to them, gives them certainty over where the case will be finally adjudicated, which is arguably a better position than one of limbo and looming uncertainty. Part of the issue with *Adoptive Couple* was, after all, that the jurisdiction was unclear.[138] Simplifying this process would undoubtedly reduce the time and resources that might otherwise be consumed in a protracted court battle. If litigation over the custody of a child lasts for years, then the child is in limbo for that time. As she or he grows older, the value of the continued battle might diminish for one of the parties as the child becomes attached to the other. This will lead to better outcomes in mediation as it will reduce the bitterness and help parties come to a speedy resolution that serves their interests.

Another potential issue with this Note's solution is cultural. Navajo Peacemaking is successful largely because of its focus on cultural traditions.[139] The process is steeped in Navajo culture, with one of its healing elements being, "[c]onnecting with the past, one's history, and one's culture through the teachings of the peacemaker."[140] Success relies on the parties to such forms of mediation being Navajo, and able to connect to the peacemaker's teachings in a meaningful way. Grounding a mediation forum in a way that does not disregard Native American cultural identity but also allows a space for the non-Indian parent to connect with the process would be difficult to say the least. Stripping the forum entirely of references to the cultures of the participants would likely create a system that defaults to the practices of the broader American culture and American cultural assumptions. This would be a system with implicit biases against Native American parents and the tribe.

To remedy this issue, mediators familiar with and comfortable in both Native American and Non-Native American forums, or individual mediators from both cultures could be scouted as cross-cultural mediators. Though participants would not be expected to connect with the relevant Native American spirituality, as the Navajo peacemaking process demands,[141] having a forum that is less impartial than it is mutually inclusive would give both participants an opportunity to understand each other's positions without fearing a disregard for their own concerns, giving them an opportunity

138 *Adoptive Couple*, 133 S. Ct. 2552.

139 Zion, *supra* note 99.

140 *Id.* at 630.

141 *Id.*

to resolve their disputes while avoiding being haled before a court that might feel foreign to them.

One might argue that finding a mediator respectful of the cultural assumptions of non-Natives does nothing to serve the purposes of the ICWA. The act was, after all, aimed at curtailing the primacy of the dominant white American culture that allowed social workers to make assumptions that resulted in the removal of shocking numbers of Native American children from their homes.[142] One must remember, however, that mediation seeks to create a forum where a solution might be reached that is amenable to all participants.[143] By granting tribal jurisdiction over cases where mediation fails, the purposes of the ICWA are served by empowering tribal courts in a situation where they would generally be empowered, but this might serve to close the loopholes whereby states might be in a position to decide what, in fact, constitutes a Native American family. Thus, the right of the tribe to intervene in a case is not entirely disregarded, though it is admittedly treated as secondary to what the parents determine the best interests of their child might be. Notably, however, the interests of the tribe are only treated as secondary vis-à-vis the rights and desires of the parents. The tribe is still given jurisdiction in the absence of a resolution, and thus its rights trump that of a state to hear the case. Though this does not address situations where the desires of Native American parents and their tribes conflict, the tribe's interest in the child, though it might not trump that of a biological parent, must be acknowledged as tribes often have an interest in keeping the child on tribal lands for the sake of preserving community.

Finally, this addresses the practical problem of children being taken from tribal lands by a non-Native parent, or by the parent who is subsequently residing outside the reservation to make a case for the child's not being domiciled on the reservation, as it mandates that such parties go before a mediator rather than rely on a state court to contort their case to fit one of the exceptions.[144] This would expand, rather than contract, tribal jurisdiction and remove an ambiguity that has plagued the application of the ICWA.[145]

The final problem is a structural one, as it would demand the participation of both states and tribes in creating and maintaining this forum. The participation of the state would likely be less con-

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142 H.R. REP. NO. 95-1386.

143 *ADR Types & Benefits*, supra note 117.

144 Kruck, *supra* note 13.

145 *Id.*

tentious than that of the tribe. Such a forum would arguably add a layer of protection to the parental rights of residents of the state, and thus would be ultimately advantageous and likely to receive support. Native American tribes, however, would be harder to persuade as this measure arguably rolls back the jurisdiction of the tribes over Native American children and thus is not necessarily advantageous. It is not, however, outright impermissible in many Native American jurisdictions.[146] The Navajo Code, for example, authorizes the tribal courts, "to cooperate fully with any federal, state, Navajo Nation, public or private agency to participate in any diversion, rehabilitation, training, peacemaking programs and to receive grants in aid to carry out the purposes of this Chapter."[147] It is explicitly permissible under section 1919 of the ICWA.[148] Though there is no evidence that the framers of the ICWA contemplated mediation for such disputes, such a measure seems tacitly in compliance with the ICWA as it uses a method of determining parental rights that is traditionally—though admittedly such tradition varies significantly from tribe to tribe—a foundation of tribal dispute resolution, certainly more so than the adversarial process in which disputes adjudicated at the state level often become mired.[149]

Such a forum might also be advantageous to Native American parents as well as non-Native parents in that it might foster cross-cultural understanding and help parents implement a co-parenting system that fosters the well-being of their children. Further, in cases where the true domicile of a child is uncertain, this could have the effect of strengthening the jurisdiction of the tribe; rather than these cases being adjudicated by the state in a lengthy and potentially acrimonious proceeding, these cases could be referred to mediation, thus giving Native American parents and Native American culture a fair opportunity to assert their rights.

The final potential complicating issue involves the Good Cause exception. Unlike the Existing Indian Family Exception, the Good Cause exception is present explicitly and unequivocally in the Act.[150] The mere presence of such an exception in the Act suggests that there are some cases in which a state should exercise

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146 9 N.N.C. § 1003(a), NAVAJO COURTS, http://www.navajocourts.org/Resolutions/CO-38-11%20ABBA.pdf.

147 *Id.*

148 25 U.S.C.A. § 1919 (a).

149 Garrett, *supra* note 95, at 43.

150 25 U.S.C.A. § 1911(b).

jurisdiction over custody proceedings involving Native American Children. The provision, however, might be read in tandem with section 1919, which states,

> States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements, which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.[151]

This later provision seems to suggest that good cause might be narrowly interpreted to apply only to cases in which Native American tribes elect to transfer jurisdiction to states. Thus, good cause is perhaps not a provision to be interpreted by state courts as to their own discretion, but one that tribal courts need to take notice of before surrendering their own jurisdiction. Though often in these cases the concurrent jurisdiction provision involves proceedings that originated in state courts and were transferred after an ICWA inquiry, so Native American tribal courts would not typically be in a position to surrender jurisdiction, but might decline a case involving a Native American child if they don't wish to hear it.

Finally, the primary issues here, of participation and state and tribal resources, would best be addressed by making the mediation mandatory. Mandatory mediation can be successful even when parties are initially resistant to it.[152] Many counties that have implemented mandatory mediation in civil litigation have reported high settlement rates.[153] It can also encourage parties who were not initially aware of the option to take advantage of the benefits of mediation, rather than becoming immediately mired in an adversarial process.[154] Further, if the mediation is mandatory, whatever resources are invested into the forum initially might pay for themselves as a major advantage of mandatory mediation is a drastic reduction in overcrowded court dockets, which will reduce

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151 25 U.S.C.A. § 1919(a).

152 Christy L. Hendricks, *The Trend Toward Mandatory Mediation in Custody and Visitation Disputes of Minor Children: An Overview*, 32 U. LOUISVILLE J. FAM. L. 491, 494 (1994) ("Mandatory mediation in custody or visitation disputes is helpful in demonstrating to initially resistant parents that cooperation and compromise are feasible means of resolving their differences.").

153 *Id.* at 495 ("Jurisdictions that require mediation report settlement rates as high as ninety percent in San Francisco, eighty-six percent in Dade County, Florida and more than fifty-four percent in Los Angeles County.") (Citations omitted).

154 *Id.*

the volume of potentially lengthy, expensive litigation.[155] This would be key to the program's success, as simply implementing an avenue to mediation, rather than mandating it, would likely create an added burden to both tribe and state, as the burden on the crowded court systems would not be alleviated in such a dramatic fashion.

IV. Proposal

Section 1911(b) of the Indian Child Welfare Act should be amended to include mandatory mediation for custody disputes involving Native American Children not domiciled on reservations.[156] Such an amendment will eliminate the broad exceptions to the ICWA often invoked at the state court level to disempower Native American tribes from properly adjudicating cases that should be under their jurisdiction.[157] Such an amendment comports with the spirit of state and tribal agreement already codified in the ICWA.[158] This will prevent non-Native parents from having their rights determined by a tribunal that might feel foreign to them as a first step, and provide greater certainty as to who has jurisdiction over their rights.[159] This mediation forum will use mediators familiar both with the Native and non-Native cultures, providing a place where the parties' expectations might be fully heard and their rights fairly considered. This forum will not subvert the system that the ICWA laid out, as tribes will receive jurisdiction following the mediation. Further, if such a forum were created, it would be explicitly permissible under section 1919.[160]

Although section 1911(b) applies specifically to the termination of parental rights to children and foster care arrangements, this amendment to the ICWA should be extended to also include custody disputes involving Native American children not domiciled on tribal lands with one non-Native parent.[161] This would help strengthen the rights of Native American tribes to better determine the fate of its members and as such, would help them maintain the sense of community the ICWA sought to defend.

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155 *Id.*
156 25 U.S.C.A. § 1911 (b).
157 Kruck, *supra* note 13.
158 25 U.S.C.A. § 1919 (a).
159 Kruck, *supra* note 13.
160 25 U.S.C.A. § 1919 (a).
161 25 U.S.C.A. § 1911 (b).

The ICWA should be further amended to include a mediation forum, not merely to handle custody disputes between Native American and non-Native American parents, but to mediate disputes between tribal members domiciled on the reservation to seek to have their children adopted utilizing state, and not tribal channels. This would undoubtedly tilt the scales in favor of the rights of parents over the rights of the community, but as the ICWA was aimed at reaffirming both the rights of individual Native American parents and the community,[162] removing tension between the two would serve the interests the ICWA sought to protect. Further, not only would such a forum respect those decisions by parents like those in *Holyfield* case,[163] or the grandmother in the *Halloway* case,[164] but it might give the tribal authorities a forum in which to persuade parents who wish to use state courts to find a home for their children that the children will be as well looked after by a Native American adoptive couple as a non-Native American adoptive couple. This would allow tribes and parents to work together to find a placement that is in the best interests of the child, and will not doubt give peace of mind to parents who wish only for those interests to be served.

V. Conclusion

The aims of the Indian Child Welfare Act would not be subverted by amending section 1911(b) to include a mandatory mediation forum for cases implicating the concurrent jurisdiction section of the ICWA. Rather they would be strengthened.[165] This would allow both Native and non-Native parents, and foster and adoptive parents, to have their voices heard in a culturally sensitive manner, and promote cross-cultural understanding. Further, amending the ICWA to require a mediation forum for Native American parents domiciled on tribal lands who wish to have their children adopted by non-Native Americans and the tribe itself would better help address the struggles faced not only by the tribal community at large, but also individual parents within that community. This would strengthen the autonomy of individual parents to make child rearing decisions about their own children, while not ignoring the

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162 H.R. Rep. No. 95-1386.
163 *Holyfield*, 490 U.S. 30.
164 *Halloway*, 732 P.2d 962.
165 25 U.S.C.A. § 1911(b).

strong interest Native American tribal authorities have in protecting Native American children and strengthening their communities.