Notes

BEYOND JURISPRUDENTIAL MIDRASH:[1] TOWARD A HUMAN SOLUTION TO TITLE IV-D CHILD SUPPORT ENFORCEMENT PROBLEMS ACROSS INDIAN COUNTRY BORDERS

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INTRODUCTION

Under Title IV-D[2] of the Social Security Act of 1935,[3] when a parent applies for assistance through the Aid to Families with Dependent Children (AFDC) program, she[4] must assign to the state her right to receive any sup-

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1. Vine Deloria, Jr. argues in his recent article that although Felix Cohen's *Handbook of Federal Indian Law* was meant to provide only a background from where to begin one's research, it has now achieved the status of a canon of federal Indian law. As a result, the concepts contained within it have become well-established legal doctrine with little examination of the historical, social, political, and moral factors that should enter into the discussion. Consequently, legal scholars have generated a massive amount of material that has become "a kind of midrash on Cohen's work" with little relation to actual Indian reality. Deloria, *Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law*, 31 ARIZ. L. REV. 203, 206-08, 211-12 (1989). This Note takes an initial step toward rethinking the midrash in the area of child support collection proceedings.

2. 42 U.S.C. §§ 651-69 (1988). Title IV of the Social Security Act sets forth the provisions of the Aid to Families with Dependent Children (AFDC) program. 42 U.S.C. §§ 601-87 (1988). The title is split into six parts, A through F. Part D, subtitled Child Support and Establishment of Paternity, was added to Title IV on January 4, 1975. It is commonly referred to as the Child Support Enforcement Act (CSEA). 42 U.S.C.A. § 651 (West 1983) (historical notes).

3. 42 U.S.C. §§ 301-1397(f) (1988).

4. As the following statistics indicate, it is most accurate to use feminine pronouns when referring to the parent who is receiving AFDC assistance and is owed child support.

From the period October 1985 to September 1986, the total number of female adult recipients of AFDC benefits was 3,171,665; the total number of male adult recipients was 401,600. Thus, mothers are the vast majority of those heads of households receiving AFDC assistance. STAFF OF COMMITTEE ON FINANCE, 100TH CONG., 2D SESS., DATA AND MATERIALS RELATED TO WELFARE PROGRAMS FOR FAMILIES WITH CHILDREN 46-49 (Comm. Print 1988). According to a report released by the U.S. Department of Commerce in 1982, more than 90% of AFDC recipients must seek government support because one of the parents (usually the father) has abandoned the family and left the children unsupported. U.S. DEPT. OF COMMERCE, POPULATION PROFILE OF THE U.S. 14 (No. 130 1982). Of 4.4 million women (both AFDC recipients and non-AFDC recipients) who were owed child support from absent fathers in 1985, only 48.2% received the full amount due, 25.8% received only partial payment,

port payments from the father of the child.[5] The state can then pursue support from the father through all available legal processes.[6] The effect is that the state becomes the plaintiff in a collection proceeding with the delinquent parent as the defendant.[7] When the defendant is an Indian residing in Indian Country,[8] pursuing collection requires crossing jurisdictional boundaries. When a tribal court is operating in Indian Country,[9] this necessitates a determination of the proper forum in which to bring the claim, the state court or the tribal court. Although the tribal court would probably have jurisdiction over such a proceeding,[10] there is a question of whether tribal court jurisdic-

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and 26%, or 1.1 million women, received no child support payment at all. U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS SPECIAL STUDIES 1 (No. 154 1989). How these statistics bear out within Indian communities is not indicated in the above studies.

5. *See* 42 U.S.C. § 602(a)(26) (1988) and 42 U.S.C. § 656 (1988). *See also* H. KRAUSE, CHILD SUPPORT IN AMERICA 320-22 (1981). "In approximately 45 states, the assignment exists by operation of state law." Roberts, *In the Frying Pan and in the Fire: AFDC Custodial Parents and the IV-D System*, 18 CLEARINGHOUSE REV. 1407 (Apr. 1985). It lasts only as long as the family continues to receive AFDC benefits. *Id.* at 1409.

6. 42 U.S.C. § 656(a)(1) (1988) states: "The support rights assigned to the State under section 602(a)(26) ... shall constitute an obligation owed to such State by the individual responsible for providing such support. Such obligation shall be deemed for collection purposes to be collectible under all applicable State and local processes."

7. The state appears not to act *on behalf* of the mother in a collection proceeding but *instead of* her. If a support obligation has not been established prior to the mother's application to receive AFDC benefits, "the IV-D agency will obtain such an obligation either by voluntary agreement or through judicial process." Roberts, *supra* note 5, at 1408. In a judicial proceeding the state files a claim against the alleged father and if paternity is established and a support duty found to be owing, the defendant father must pay the state IV-D agency. If the defendant pays the custodial parent instead, that payment must be turned over to the IV-D agency, which then disburses the money according to statute. *Id.* Under general contract theory, because partial assignors may retain the right to sue independently from the assignee, some courts have held that a custodial parent in AFDC cases may pursue collection on her own even after an assignment is made. *Id.* at 1415.

8. "Indian Country" encompasses not only Indian reservations but also Indian dependent communities and allotted Indian lands. It is the more accurate descriptive term and is generally preferred to "reservation." D. GETCHES & C. WILKINSON, FEDERAL INDIAN LAW 338-41 (1986).

9. There are 174 judicial systems throughout Indian Country. Twenty-one are Courts of Indian Offenses run by the Bureau of Indian Affairs through the authority of the Secretary of the Interior under 25 C.F.R. §§ 11.3-.21 (1989). The remaining courts in Indian Country are either tribal courts or what the BIA has called traditional courts. Tribal courts are typically established by tribal councils with judges either appointed by the council or elected by the tribal membership. Many are established pursuant to a tribal constitution if a constitution was adopted by the tribe under the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-79 (1988). Most tribal constitutions also contain provisions for the establishment of appellate courts. Traditional courts, currently found in the New Mexico pueblos, are usually set up either by tribal councils or by tribal religious leaders who are a part of the tribal government. Generally these courts operate without written law and according to the authority they have historically exercised. Presentation by Hilda Manuel, Chief of the Judicial Services Branch of the Bureau of Indian Affairs, Seminar on Child Support Enforcement for Indian Children — Intergovernmental Perspectives, in Phoenix, Arizona (June 18, 1990). The seminar was sponsored by the National Child Support Enforcement Association and took place June 17-19, 1990.

10. Aside from the dictates of federal law, tribal courts must also examine their own record to determine whether such adjudications are within their authority. Sources of tribal authority include treaties, the tribal constitution, the tribal code, tribal decisional law, tribal customary and traditional law and inherent judicial sovereignty. *See* Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 338 (1989). Tribes have broad powers over their members with regard to marriages, divorces, and child

tion is exclusive. When there is no tribal court, it is still necessary to determine whether or not the state court has jurisdiction over such a collection proceeding. In either case, determining whether the state court has subject matter jurisdiction over the claim becomes a question of how far the state can extend its adjudicatory authority[11] within Indian Country.

At the center of this question is the contest between tribes and states over the scope and the limits of their respective sovereign authority. Theoretically, the question can be answered by looking to the relationship between the federal government, the tribes, and the states as it is described in the doctrinal base and common law holdings of federal Indian law. But an examination of the cases reveals an overall confusion among the courts with regard to applying the "correct law" in state and tribe adjudicatory contests.

Reasons for the lack of consensus among the state courts include the anomolous legal status of the tribes, the unique histories of each state and tribe with regard to applicable treaties and statutes, the ambiguity of the legal "tests" designed to be applied to such situations, and the poor use of precedent by the state appeals courts. The fact that there are no clear answers has also affected states that have similar claims but have not actually taken the matter to court.[12]

In looking for a solution to the jurisdictional dispute within the realm of federal Indian law doctrine, the actual human problem — that an Indian family is unable to support itself and has been forced to seek outside financial assistance — tends to become abstracted and obscured. Once the human problem is made the center of the inquiry, however, it is possible to gain a different perspective on the dispute and suggest a solution that may be more satisfactory for both the states and the tribes.

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custody. Bransky, *Tribal Court Jurisdiction*, 67 MICH. B.J. 370, 374 (1988). Because child support cases also involve issues of tribal domestic relations important to the tribe, it is highly unlikely that a tribal court would *not* have subject matter jurisdiction over questions of child support.

11. . A state's adjudicatory authority in Indian Country must be distinguished from its regulatory authority. *See infra* note 70 and accompanying text. This Note proceeds from the premise that the state authority that is implicated when the Title IV-D system is applied across the jurisdictional boundaries of Indian Country is primarily the state's adjudicatory power rather than its regulatory power. The issue that arises in the Title IV-D cases is *not* whether, in order to reimburse the state, paternity can be established and support obligations determined and pursued *at all*, but whether the state court can be the forum to make such judgments and issue the collection order. *See infra* note 137 and text accompanying notes 137-42, 222-25. Ultimately, it is argued that regardless how the system is characterized, Title IV-D was not created with Indians in mind and it fails to address the unique problems that are presented when the system is administered across cultural and jurisdictional boundaries. *See infra* notes 256-60 and accompanying text. Furthermore, the distinction between adjudicatory and regulatory powers as delineated in the jurisprudence of federal Indian law becomes less important when the foundations of the law, itself, have been called into question. *See infra* notes 50, 51, 59, 71, 72.

12. *See infra* note 49. This Note considers the cases involving the first five states to have argued the jurisdictional question in court: New Mexico, North Carolina, Iowa, Utah and Minnesota.Only five states of the 26 who answered the child support questions of a survey conducted by the Inter Tribal Council of Arizona, Inc. have argued the jurisdictional question in court: New Mexico, North Carolina, Iowa, Utah, and Minnesota. *See* Inter Tribal Council of Arizona, Inc., Child Support Enforcement On Indian Reservations Survey Results (on file with author) [hereinafter Child Support Enforcement On Indian Reservations].

This Note first sets forth a brief history of the Title IV-D section of the Social Security Act, including the reasons behind its enactment, a general overview of the major provisions, and a review of subsequent Congressional action that has resulted in increasing pressure on the states to conform with the federal requirements of the Act. Next, it explores the general doctrinal basis of federal, state, and tribal relations giving specific attention to the common law development of state adjudicatory and regulatory authority, or lack of it, in civil matters within Indian Country. This section particularly notes the theoretical shift from notions of inherent tribal sovereignty to tribal sovereignty as a "backdrop" in the area of state regulatory authority over Indian affairs and its subsequent effect on adjudicatory questions. The Note continues with a summary of five state court opinions and one tribal court opinion considering the Title IV-D question. The Note next suggests a restatement of the problem that yields a more constructive search for a solution through the process of negotiation and agreement. This process presumes a vision of tribal sovereignty that is more responsive to historical and present reality, insures tribal involvement in any determination of the welfare of the Indian family, and serves to improve relations between the state and the tribe. The Note concludes with a description of a negotiated solution that has proven successful and a warning about federal barriers currently in place that render other, formerly successful, negotiated agreements unusable.

THE CHILD SUPPORT ENFORCEMENT ACT (CSEA)

Purpose of CSEA

The enactment of the AFDC program in 1935 marked the first time that the federal government became involved in child support matters, an area historically left up to the states as were most domestic relations issues.[13] When the federal government created the AFDC program as part of the Social Security Act,[14] it intended to help alleviate some of the community's burden in caring for children whose parents had died, by sending money to their relatives so that they could be cared for at home rather than in community-run orphanages.[15] The program was administered by the states, using grants of federal money to cover the major portion of assistance costs.[16] As time went on, however, AFDC assistance began to go to children "whose fathers had left home and refused to pay support."[17] At the end of World War II, the structure of the traditional American home became more fragmented, and the number of delinquent fathers increased, as did the number of children on welfare.[18] Several amendments were made to the Social Security Act both in 1950 and 1968 in an attempt to encourage states to improve their child support enforcement systems, but little improvement was evident.[19] By 1973,

13. J. LIEBERMAN, CHILD SUPPORT IN AMERICA 5 (1986).
14. 42 U.S.C. §§ 301-1397(f) (1988).
15. J. LIEBERMAN, *supra* note 13, at 5.
16. *Id.*
17. *Id.*
18. *Id.* at 6.
19. H. KRAUSE, *supra* note 5, at 308 n.4. Effective July 1, 1952, Congress amended § 402(a) of the Social Security Act to require states to provide for prompt notice to appropriate

"the AFDC program was costing the public $7.6 billion per year."[20] A 1974 congressional study of the problem revealed that one third of the welfare children who had absent parents were also covered by support orders or agreements.[21] As a result of the growing public sentiment against the high cost of welfare and the failure of the states to adequately address the issue,[22] Congress enacted the 1975 Child Support Enforcement Act (CSEA), which created Title IV-D of the Social Security Act.[23] Its purpose was twofold: to cut the cost of welfare and to give incentives to the states to go after delinquent fathers.[24]

Provisions of CSEA

The CSEA requires essentially two things of an applicant for AFDC. First, she must assign to the state any right she has to collect support from the absent father.[25] Second, she must cooperate with the states in locating the absent father, establishing paternity, obtaining a support judgment if none is outstanding, and securing payments.[26] Once the support obligation is assigned to the state, the AFDC agency informs the state IV-D agency, which then is authorized to collect through all available legal processes the debt now owing to the state.[27] Although the applicant can refuse to make the assignment and still receive "protective" payments[28] for her child(ren), she would no longer be

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law enforcement officials whenever aid was furnished to a child who had been abandoned by a parent. Social Security Act, § 402(a)(10), 64 Stat. 550 (1950) (current version at 42 U.S.C. § 602(a)(11) (1988)).

One provision of the 1968 amendments required states to establish "separate units" to enforce child support laws and allowed the utilization of available tax records of the Internal Revenue Service to help locate deserting fathers. H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 277-78 (1971). The provision was designed to establish "a closer relationship between the welfare agencies and the law enforcement agencies and courts of the states so that every reasonable effort will be made to locate and obtain support from the absent parent." *Id.* at 278 n.44 (citing HOUSE COMM. ON WAYS AND MEANS, SOCIAL SECURITY AMENDMENTS OF 1967, H.R. REP. NO. 544, 90th Cong., 1st Sess. 96, 102-03 (1967)).

20. J. LIEBERMAN, *supra* note 13, at 6. *See also* H. KRAUSE, *supra* note 5, at 307 n.2.

21. J. LIEBERMAN, *supra* note 13, at 6.

22. *Id.* at 6-7. *See also* H. KRAUSE, *supra* note 5, at 307-08. In addition, the RAND Corporation reported that state welfare agencies were lax in their collection efforts and most of the fathers could afford to pay. J. LIEBERMAN, *supra* note 13, at 6.

23. The primary enactment was Pub. L. No. 93-647, § 101, 88 Stat. 2337, 2351-60 (1975) with an original effective date of July 1, 1975, later changed to August 1, 1975, by Pub. L. No. 94-46, § 2. H. KRAUSE, *supra* note 5, at 308 n.5.

24. J. LIEBERMAN, *supra* note 13, at 7.

25. Roberts, *supra* note 5, at 1407. "The assignment covers rights to both spousal and child support, current rights and accrued arrears, and future rights as long as the family is receiving AFDC." *Id.* The provision is codified at 42 U.S.C. § 602(a)(26)(A) (1988).

26. Roberts, *supra* note 5, at 1408. For example, she may be called upon to attend appointments with an attorney at the state IV-D office, appear as a witness at a judicial or administrative proceeding, and provide information under oath. *Id.* The only excuse from this obligation is if she can show "good cause" for failure to cooperate. *Id.*; 42 U.S.C. § 602(a)(26)(B) (1988). *See also* H. KRAUSE, *supra* note 5, at 310, 322, 372-84.

27. H. KRAUSE, *supra* note 5, at 320-23. *See also* 42 U.S.C. §§ 602(a)(11), 656 (1988).

28. The protective payment system allows someone other than the custodial parent (who refused to make the assignment) to act for the recipient child in receiving and managing the state assistance. 42 U.S.C. § 602(a)(26)(B) (1988). The protective payee can be a relative, a

eligible to receive AFDC support benefits for herself and the state might still have the authority to pursue support under applicable state laws.[29]

Under the Act, the state must establish a plan approved by the Secretary of the United States Department of Health and Human Services (HHS), which is then administered on a state-wide basis by the state enforcement agency.[30] The states must continue to meet standards set out by the HHS's Office of Child Support Enforcement (OCSE) or they face losing up to five percent of their federal funding for the program.[31] On the other hand, if the state's enforcement program meets federal standards, HHS may pay up to sixty-six percent of the program's cost.[32]

Each state IV-D agency must also maintain a "parent locator service" that is capable of searching state and local records for any information on absent parents in efforts to track them.[33] If necessary, the state can tap into the federal parent locator service with access to Social Security, Internal

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staff member of a private agency or public welfare department, or any other appropriate organization. 45 C.F.R. § 234.60(a)(7)(i) (1988). The sanctioned custodial parent can receive the payments for her children *only if* the state fails to locate a suitable protective payee. 45 C.F.R. § 234.60(a)(13) (1988).

29. Roberts, *supra* note 5, at 1412. Use of state statutes in pursuing collection is authorized in the federal regulations. *See* 45 C.F.R. § 232.11(c) (1988) specifically provides: "If there is a failure to execute an assignment ..., the state may attempt to establish paternity and collect child support pursuant to appropriate State statutes and regulations."

The following law was added to the Arizona statutes in 1979: "Commencing with the payment of public assistance by the department, the director may take action as provided in this chapter to collect child support." ARIZ. REV. STAT. ANN. § 46-403 (1988). While appearing to be a simple way to avoid any jurisdictional problems under the Title IV-D system, an Indian woman's refusal to assign her rights to collect support would be counterproductive to her own interests. She would not receive support for herself and would probably lose control over the money her children would receive. *See supra* note 28 and accompanying text. Further, the state could still attempt to pursue collection and would face the same jurisdictional problem as before. Refusing to assign rights to support, then, has the effect of delaying the problem rather than avoiding it. Practically speaking, it is unlikely that a mother attempting to get financial support for herself and her family would be concerned about a jurisdictional contest between the state and the tribe.

This Note assumes that an assignment has been made in the AFDC/Indian cases because there is no indication in any of the cases to the contrary.

30. *See* 42 U.S.C. §§ 652, 654 (1982). If a state does not have a federally approved plan it is ineligible for any federal matching funds. *See* 45 C.F.R. § 301.15 (1988). Title IV-D differs from the previous congressional attempts to encourage states to improve their collection efforts in that the federal government has now become the active overseer and financier of the state systems. H. KRAUSE, *supra* note 5, at 308-10.

31. Once a state's plan is approved and in place it is subject to periodic audits by the federal government. If it fails to meet federal standards, penalties can be assessed which range from one to five percent of the federal government's matching grant. 42 U.S.C. §§ 652(a)(4), 603(h) (1988).

32. 42 U.S.C. §§ 655(a)(1), (a)(2)(C) (1988). Before the beginning of each quarterly grant period, the Secretary is authorized to estimate the specific percentage amount that a state is entitled to receive based on a report submitted by the state. 42 U.S.C. § 655(b)(1) (1988). For the period Oct. 1, 1990 through Sept. 30, 1991, Arizona is entitled to receive 57.46% federal matching funds. U.S. Department of Health and Human Services, AFDC Action Transmittal (Aug. 24, 1989) (No. FSA-AT-89-39).

33. 42 U.S.C. § 654 (1988); J. LIEBERMAN, *supra* note 13, at 7. *See also* H. KRAUSE, *supra* note 5, at 310.

Revenue, and other federal data files.[34] Once the alleged parent is found, the state establishes paternity, obtains a support judgment and enforces the obligation through in-state or interstate proceedings.[35] The federal OCSE closely coordinates its effort with the state agencies, maintaining ten regional offices to police the state agencies as well as to provide assistance to them in carrying out their plans.[36] There are federally approved IV-D programs in all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam.[37]

The Act also makes available the use of federal district courts by waiving the amount in controversy requirement if another state has not enforced the court order of the initiating state and if the use of the federal court is the only reasonable method of enforcement.[38] There is no mention in the Act of the use of tribal courts, nor are there provisions that guide the states in administering the program to eligible Indian recipients.

Subsequent Congressional Action

Under the 1975 legislation establishing Title IV-D, states retained a fair amount of freedom and flexibility with regard to how they went about collecting the owing support money.[39] However, when it became evident that some states were consistently more successful than others in their collection efforts because of certain enforcement techniques they had in place through their various state laws, the federal government acted to correct the state disparities.[40]

In 1984, Congress amended Title IV-D through the passage of the Child Support Enforcement Amendments of 1984 and for the first time established mandatory collection procedures for all the states to follow.[41] The amend-

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34. J. LIEBERMAN, *supra* note 13, at 7; H. KRAUSE, *supra* note 5, at 310-11. The provision of the Act that calls for the establishment of the federal Parent Locator Service is 42 U.S.C. § 653 (1988).

35. J. LIEBERMAN, *supra* note 13, at 7. *See also* H. KRAUSE, *supra* note 5, at 310-11.

36. H. KRAUSE, *supra* note 5, at 311-12.

37. *Id.* at 312.

38. 42 U.S.C. §§ 652(a)(8), 660 (1988).

39. Presentation by Craig Hathaway, Policy Specialist, OCSE Policy Branch, Family Support Administration, at Seminar on Child Support Enforcement for Indian Children — Intergovernmental Perspectives, in Phoenix, Arizona (June 17, 1990).

40. *Id.*

41. The Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984). *See also* Barber, *Update On Title IV-D*, 1 AM. J. FAM. L. 388 (Fall 1987). The primary procedure required of the states by the 1984 amendments was wage withholding. *See id.* at 389. States had to set up a system of wage withholding procedures that were followed when the obligor parent was one month behind in support payments. *Id.* The second key provision of the legislation required the states to provide expedited procedures for child support cases. *Id.* Currently, each state must have expedited processes for obtaining and enforcing support orders either under the judicial system or under an administrative system. Horowitz, *The Child Support Enforcement Amendments of 1984*, 36 JUV. & FAM. CT. J. 3 (Fall 1985) (citing 42 U.S.C. § 666(a)(2)). States were also advised to develop and implement guidelines for determining the amount of child support by October 1, 1987. *See* Barber, *supra*, at 390. Other provisions require states to establish liens on property and systems that require the obligor parent to post bond and extend the statute of limitations for paternity proceedings to 18 years. *Id.* For

ments further required that the states have all of the new mandatory procedures in effect by October 1, 1985.[42] Failure to adopt any one of the procedures or adopting a procedure deficient in some way would precipitate federal disapproval of the state plan.[43] As a consequence, and in accordance with the Title IV-D structure, if a state does not have a federally approved plan the federal government has no authority to fund *any* of that state's child support services.[44] Hence, the real effect of the 1984 amendments has been to put great financial pressure on the states to comply with the federal requirements and states have little actual choice whether or not to adopt the federal procedure.

The most recent federal legislation to impact the Title IV-D system is the Family Support Act of 1988 (FSA).[45] Like the 1984 amendments, the FSA establishes federal requirements that states must meet by certain deadlines in order to continue receiving federal funds.[46] The requirements are even more stringent than those provided for in the 1984 legislation.[47]

Thus, states now face ever-increasing pressure to conform with the federal standards and shrinking opportunities for flexibility within their child support enforcement efforts. Though Title IV-D began solely as an economic program whereby the federal government and the states could recoup some of

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a more detailed discussion of the amendments, see *Special Issue: Child Support Enforcement*, 36 JUV. & FAM. CT. J. (Fall 1985).

42. Horowitz, *supra* note 41, at 1.

43. *See* 42 U.S.C. §§ 654(20), 666 (1988).

44. Presentation by Craig Hathaway, *supra* note 39.

45. Pub. L. No. 100-485, 102 Stat. 2343 (1988).

46. *See* National Center on Women and Family Law, Inc., *The Impact of the Family Support Act of 1988 on Family Law Practice*, 22 CLEARINGHOUSE REV. 1098-1100 (Feb. 1989).

47. States are now required to have procedures implementing *immediate* wage withholding for every new support order and every order that is modified. Casey, *The Family Support Act of 1988: Molehill or Mountain, Retreat of Reform?*, 23 CLEARINGHOUSE REV. 943 (Dec. 1989). The only two exceptions are (1) when the court or administrative hearing officer finds good cause not to impose wage withholding and (2) when an alternate agreement is reached by the two parties. 42 U.S.C. § 666(b)(3) (as amended by Pub. L. No. 100-485, § 101(a) (1988)). The deadline for states to require immediate wage withholding differs depending on the type of support award. For those awards enforced under the Title IV-D system, the requirement applies to any such awards issued or modified on or after November 1, 1990. Casey, *supra*, at 943; 42 U.S.C. § 666(b)(3) (as amended by Pub. L. No. 100-485, § 101(a) (1988)). For those awards not enforced under the Title IV-D system, the requirement applies to any such awards issued on or after January 1, 1994. Casey, *supra*, at 943; 42 U.S.C. § 666(a)(8) (as amended by Pub. L. No. 100-485, § 101(b) (1988)). The FSA also requires that the child support guidelines developed by the states under the 1984 amendments be used as a "rebuttable presumption" of the correct amount of support in all child support cases. 42 U.S.C. § 667(a), (b) (as amended by Pub. L. No. 100-485, § 103 (1988)). Formerly the guidelines had no effect in setting or adjusting child support awards in either judicial or administrative proceedings and were considered advisory only. Casey, *supra*, at 943. Under the FSA, any paternity case that was *formerly* dismissed for exceeding the statute of limitations *prior to* the 18 year extension provided for in the 1984 amendments can now be reopened. 42 U.S.C. §§ 652(g), 666(a)(5)(A) (as added by Pub. L. No. 100-485, § 111(a) (1988)). States are also required to periodically review and possibly modify their support orders in order to monitor award fairness. Casey, *supra*, at 943; 42 U.S.C. § 666(a)(10) (as added by Pub. L. No. 100-485, § 103 (1988)).

their AFDC expenditures, it has now become a somewhat comprehensive child welfare system.[48]

STATEMENT OF THE PROBLEM: JURISDICTIONAL AMBIGUITY

The Doctrinal Basis for the Legal Status of Indian Tribes

When states must pursue a Title IV-D claim against an Indian defendant who resides within Indian Country, they find no clear direction on how to proceed. There is no consensus among states that have dealt with the problem and a variety of approaches have resulted.[49] This is due to the peculiar legal

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48. Presentation by Craig Hathaway, *supra* note 39. State IV-D agencies also serve custodial parents who do not receive AFDC assistance but who are, nonetheless, in need of child support enforcement services to get the money that is owed from the absent parent. In such cases support rights are not assigned to the state and the custodial parent receives the collected award minus the costs of enforcement. H. KRAUSE, *supra* note 5, at 323.

49. The following information regarding state approaches was gleaned from a 1988/89 survey, conducted by the Inter Tribal Council of Arizona, Inc., which polled all 50 states and American Samoa, Guam, Puerto Rico, Virgin Islands, and Washington, D.C. *See* Inter Tribal Council of Arizona, Inc., Child Support Enforcement On Indian Reservations Survey Results (on file with author) [hereinafter Child Support Enforcement On Indian Reservations]. Every state and territory responded except for Kansas, Maryland, New Mexico, Rhode Island, and Wyoming. Of those that responded, 26 states answered that they have Indian reservations within their boundaries. The questions regarding child support enforcement on reservations were directed to those 26 states with the exception of New Jersey, because no Native Americans reside on its only reservation, and included Oklahoma, which indicated that it has tribal and trust allotments that present the same jurisdictional problems as do reservations. *See supra* note 8 for the definition of Indian Country.

In response to a question regarding state enforcement procedure when the obligor parent is living and working on a reservation, seven states answered that they close the case. Two states considered these low or bottom priority cases (essentially this is the equivalent of closing the case because the reasons given for making it a low priority indicated that neither state had a procedure for enforcing the orders on the reservation). One state closes the case only when there is no court order and both parties are tribal members who reside on the reservation. If there is no court order and one of the parties either resides off the reservation or is not a tribal member, the state holds an administrative hearing (what happens after the hearing is not mentioned in the state's answer). If there is a court order, it is enforced regardless of party residency (again, there are no details provided as to the enforcement). Five states (including Arizona) did not answer the question. One state reported no actual cases while indicating that service of process was a "legal issue in other areas of litigation." Four states either routinely take the case to tribal court or do so only in certain instances. One of these states mentioned attaching off-reservation assets to satisfy the debt, provided such property exists. One state tries to "coordinate" through the Tribal Council. Two states indicated they have no problem enforcing the orders (without further elaboration), though service of process is mentioned as presenting "unique" problems. Another state follows routine procedure as in non-reservation cases, with the exception of receiving permission from the chief and being accompanied by a tribal marshal when serving process. Two states take remedial action such as obtaining IRS intercepts, payroll deductions, and voluntary wage assignments, or citing the defendant for contempt of court. Child Support Enforcement On Indian Reservations, *supra*, at 15-17.

The five principal cases in this Note involve New Mexico, North Carolina, Iowa, Utah, and Minnesota. *See infra* notes 149-52, 231-33 and accompanying text. Significantly, New Mexico did not respond to the survey and Minnesota was unable to answer the question as to its current procedure in handling the child support cases; North Carolina takes the cases to the Court of Indian Offenses; Iowa closes the case as a result of the ruling in State Dep't of Human Servs. v. Whitebreast, 409 N.W.2d 460 (Iowa 1987), and Utah engages in a rather complicated choice

status[50] of Indian tribes that has made them "a jurisdictional anomaly."[51] That legal status was originally described by Chief Justice Marshall in three major

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of forums due to a Navajo Supreme Court case, *see supra* notes 232-51 and accompanying text. Utah answered:

> If there is a valid support order and judgment (through the tribal court or through a district court), assets that are off the reservation may be executed upon to satisfy the obligation. If it is a tribal court order, obtaining judgement and executing on assets off the reservation must be done through the tribal court. If there is no order, or if the tribal court order does not specify an amount for child support, the case is closed or suspended while the obligor lives on the reservation, unless the office proceeds through a URESA or the tribal court to establish or modify the order.

Child Support Enforcement On Indian Reservations, *supra*, at 16.

Utah's dissatisfaction with this arrangement is patent. In reply to a survey question asking the states to indicate problems with child support enforcement "involving Native Americans" that they would like to see addressed, Utah stated impatiently:

> The Indians want to severely limit state procedures for collecting child support from obligated parents who happen to be reservation Indians. The Indians would prefer to require the state to petition the Tribal Courts for relief, and to use the collection procedures approved by the Tribal Court. The Indians do not even want the state to use basic remedies such as tax refund intercepts unless the state has a specific tribal court order authorizing it.
>
> We are required by federal IV-D program to be using certain expedited processes and other tools, yet the reservation Indians say the only remedy is to seek orders from the tribal court. To our knowledge, the Indian tribes in Utah do not have an expedited process such as that contemplated in the IV-D legislation and regulation. If the federal government were to decide to let the Indian tribes administer both the IV-A and IV-D programs and to allow the state themselves to step out of the picture, perhaps that would be an acceptable alternative but at the present time, inasmuch as the states are required to administer part of the federal program (IV-A) on reservations, we feel that the jurisdictional barriers should be let down so that the collection side of the federal program (IV-D) may operate both on and off the reservations.

Id. at 26.

Minnesota indicated that it had an "informal arrangement with one reservation" that was not working (there is no elaboration as to what that arrangement is) and that "reservation businesses" were not honoring the state's wage withholding provisions. *Id.* at 18, 24.

50. The legal status of tribes must be distinguished from their historical reality. Federal Indian law has largely been formed out of an effort by legal practitioners and scholars to make a rational structure out of "a conglomerate of data" that is best, and perhaps only, understood by its historical context and content. *See* Deloria, *supra* note 1, at 203-04. "Once history is discarded and a uniform interpretation of federal activities is substituted, [however], it begins to appear as though certain concepts were foremost in the minds of courts and Congress from the very beginning." *Id.* at 205. In actuality, doctrines that emerged from this inquiry had little evidentiary grounding in historical fact. *See id.* at 203.

The ultimate result of formulating law in a manner removed from its historical context is that the law, itself, takes on a life of its own and has little relationship with the actual lives of the people it is intended to describe. *Id.* at 204. "Legal doctrines frequently provide such a pervasive atmosphere for legal practitioners that they come to believe that doctrine and principle are real and that all other aspects of the human experience are a function of them." *Id.* at 214. This is particularly disturbing when the doctrinal explanations are informed by the ethnocentric and racist notions of the society promulgating the legal rationale. For a complete treatment of the racism inherent in the foundations of Federal Indian law, *see generally* Williams, *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219 [hereinafter Williams, *Algebra*], and R. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990) [hereinafter WILLIAMS, WESTERN THOUGHT]. As a result, "we have legal doctrines almost overcoming human reality." Deloria, *supra* note 1, at 214.

opinions in which he attempted to articulate the existing relationship among the federal government, the states, and the Indian tribes.[52]

In *Johnson v. M'Intosh*,[53] Marshall relied upon the Doctrine of Discovery[54] to justify the United States' ability to limit Indian "rights to complete sovereignty, as independent nations," while recognizing that they continue to possess those aspects of inherent sovereignty not divested by the United States.[55] In *Cherokee Nation v. Georgia*,[56] without reaching the merits of the Cherokees' claim against the right of Georgia to assert its authority within the Cherokee Nation,[57] Marshall elaborated upon his vision of tribal status. He determined tribes to be "domestic dependent nations" who were in

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51. Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051, 1053 (1989). Atwood describes the jurisdictional problems that plague the choice of forum for Indian child custody cases as stemming from the "unique status of Indian tribes within the federal polity." *Id. See also* McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 173 (1973) (quoting United States v. Kagama, 118 U.S. 375, 381-82 (1886)). The legal status of Indian tribes that has emerged out of efforts to find rational principles and apply ordered law has had the practical effect of making questions of jurisdiction central to an understanding of the nature of Indian sovereignty, instead of the other way around. *See* Deloria, *supra* note 1, at 213-14.

52. The three cases are Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).

53. 21 U.S. (8 Wheat.) 543 (1823). The case involved a dispute between white settlers who claimed title to the same tract of land. Johnson and other plaintiffs had purchased the land directly from the Illinois and Piankeshaw Indian Nations in 1773 and 1775. *Id.* at 550, 555, 571-72. M'Intosh purchased the same land 43 years later in 1818 from the United States, which had obtained it in a treaty cession with the Indians in 1795. *Id.* at 560. D. GETCHES & C. WILKINSON, *supra* note 8, at 37. The Supreme Court held that Johnson's title was not cognizable in a United States federal court. *Johnson*, 21 U.S. (8 Wheat.) at 604-05. *See also* Williams, *Algebra*, *supra* note 50, at 254.

54. Under the Doctrine of Discovery, once citizens of a European nation "discovered" a portion of the "New World," the nation of which they were citizens then had an *exclusive* right against all other European nations to extinguish the Indian "title of occupancy, either by purchase or by conquest." *Johnson*, 21 U.S. (8 Wheat.) at 573, 587. From this, Marshall inferred that Indian sovereignty was "necessarily" impaired and something less than "complete." *Id.* at 574. The effect of the doctrine was that Indian nations were accorded no independent right to their aboriginal lands or to sovereignty. *See* Williams, *Algebra*, *supra* note 50, at 254-55. On the doctrine's roots in the European "Law of Nations" and eurocentric medieval thought, *see generally* Williams, *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1 (1983), and WILLIAMS, WESTERN THOUGHT, *supra* note 50. *See also* Williams, *Algebra*, *supra* note 50, at 252-58.

55. *Johnson*, 21 U.S. (8 Wheat.) at 573-74, 587-88.

56. 30 U.S. (5 Pet.) 1 (1831). The Cherokees brought the case in the wake of a systematic war of terror waged against them by the state of Georgia. *See infra* note 63 and accompanying text. The Cherokee council, meeting in defiance of a Georgia law prohibiting their convening except to ratify land cessions, authorized their Chief to hire counsel to fight the state of Georgia in court. The tribe was forced to raise money for the case through private donations because President Andrew Jackson had stopped all annuities to the tribe on the ground that their tribal government was extinct. A. DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 121 (1970).

57. The Chief Justice dismissed the case for lack of federal subject matter jurisdiction by rejecting the Cherokees' characterization of themselves as a "foreign nation" in order to establish federal jurisdiction. *Cherokee Nation*, 30 U.S. (5 Pet.) at 16-20.

a "state of pupilage" under the guardianship of the United States.[58] Under this construction, tribes are at once independent sovereigns and dependent wards of the federal government. Thus, Marshall outlined two competing and inconsistent conceptual poles around which Indian law has come to revolve: the plenary power of the federal government over Indian affairs[59] and tribal sovereignty.[60]

One year after *Cherokee Nation*, Marshall again faced a question regarding permissible state authority over Indian Country in *Worcester v. Georgia*.[61] Two white missionaries challenged their conviction by a Georgia state court[62] that had found them guilty of residing on Indian lands without a state license even though they had been given permission to settle on

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58. *Id.* at 17. Out of this notion of tribes as "wards" of the federal government has evolved the "trust doctrine" under which the federal government has a fiduciary responsibility to the tribes. W. CANBY, JR., AMERICAN INDIAN LAW 34-35 (1988). This trust responsibility, however, is an extremely malleable concept and has served as much to limit tribal sovereignty as to enhance it. *See generally id.* at 32-43.

While elaborating upon the limitation of Indian sovereignty as "dependent nations", Marshall also reiterated that the Cherokees continued to be "a distinct political society ... capable of managing its own affairs and governing itself." 30 U.S. (5 Pet.) at 16.

59. The plenary power doctrine grew out of Marshall's description of diminished tribal sovereignty based on the Doctrine of Discovery. "Numerous late nineteenth and early twentieth century Supreme Court opinions freely extended Marshall's original limited recognition of an overriding sovereignty of the federal government in Indian affairs to entail a superior and unquestionable power on the part of Congress unrestrained by normal constitutional limitations." Williams, *Algebra*, *supra* note 50, at 261.

Deloria argues that if the data that makes up Indian law is examined within its historical context, "[o]verwhelming federal sovereignty does not become a plenary power because it is now possible to judge the exercise of such power in terms of avowed policy." Deloria, *supra* note 1, at 221. Such an approach would not allow the Court to make such sweeping statements as the one in Lone Wolf v. Hitchcock, 187 U.S. 553, 555 (1903), which declared that Congress has always had the authority to act in a plenary fashion in Indian affairs. Deloria, *supra* note 1, at 221. "This statement raised certain questions which, unfortunately, legal scholars have been unwilling or unable to ask. If there had always been a plenary power available to Congress, then why didn't it simply use that method from the beginning? Why all the hoopla over treaties and agreements?" *Id.*

For a complete consideration of diametrically opposed views on the viability of the plenary power doctrine, see the raging debate between Professor Robert A. Williams, Jr. and Professor Robert Laurence embodied in the following articles: Williams, *Algebra*, *supra* note 50; Laurence, *Learning to Live with the Plenary Power of Congress Over the Indian Nations*, 30 ARIZ. L. REV. 413 (1988); Williams, *Learning Not to Live with Eurocentric Myopia: A Reply to Professor Laurence's* Learning to Live with the Plenary Power of Congress Over the Indian Nations, 30 ARIZ. L. REV. 439 (1988); and Laurence, *On Eurocentric Myopia, The Designated Hitter Rule, and "The Actual State of Things"*, 30 ARIZ. L. REV. 459 (1988).

60. Atwood describes this as a "fundamental contradiction in the political status of tribes" and notes that recent Supreme Court cases have favored the notion of federal plenary power and described tribal sovereignty as possessing "inherent limitations." Atwood, *supra* note 51, at 1068 n.72 and accompanying text.

The trust doctrine is the key third concept in federal Indian law that serves as a flexible instrument for courts making what is essentially a political choice between these two competing poles. *See supra* note 58.

61. 31 U.S. (6 Pet.) 515 (1832).

62. This time the Supreme Court had no trouble finding federal subject matter jurisdiction because the *Worcester* case arose in a state court and the defendants thereafter appealed their conviction on constitutional grounds. *Id.* at 541. By contrast, in *Cherokee Nation*, the plaintiff tribe attempted to establish jurisdiction in a lower federal court. Atwood, *supra* note 51, at 1069 n.78.

Cherokee land by the tribe.[63] The Court agreed with the missionaries' argument[64] and declared that "the laws of Georgia can have no force" in Cherokee territory.[65] Marshall held that Georgia's actions violated superior federal law by interfering with relations between the United States and the Cherokee Nation.[66] In doing so, he essentially determined that states can only possess authority over the Indian tribes to the extent that the federal government grants them such authority. Furthermore, under this construction, the tribes retained whatever aspects of tribal sovereignty were left over from federal usurpation as vestiges of their inherent sovereign authority.[67] One such area of retained sovereignty is the tribes' ability to manage their internal affairs, specifically the domestic relations of their members.[68]

Because the federal plenary power precludes tribes from being complete sovereigns, while they retain certain aspects of sovereignty that enable them to be generally free from state regulation, tribal legal status falls somewhere in between that of states and foreign nations.[69] This hybrid classifica-

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63. The state of Georgia's charge against the missionaries was part of a scheme to enable it to exercise total jurisdiction over Cherokee territory. In exchange for giving up its western land claims, Georgia had received a federal promise to extinguish Indian title to lands within Georgia but no federal action was taken. W. CANBY, *supra* note 58, at 13. To hasten the agreement, the state passed a series of far sweeping and barbaric laws against the Cherokees from 1828-1830 and created the Georgia Guard to enforce the new laws. This Guard terrorized the Cherokees with whippings, jailings, and other atrocities. President Andrew Jackson encouraged the actions in his communications to Georgia officials while stating to the Cherokees that he was powerless to stop the operation of state law. A. DEBO, *supra* note 56, at 120-21.

The state planned "to divide (Cherokee) territory among several Georgia counties, to apply Georgia law to all persons within the area, and to prohibit the Cherokees from exercising any governmental powers of their own. It was made a crime for any person to hold court under color of Cherokee law for the purpose of hearing either criminal or civil cases." W. CANBY, *supra* note 58, at 108-09.

For a complete account of the events surrounding the two Cherokee cases and the tribe's subsequent removal from their ancestral lands, see A. DEBO, *supra* note 56, at 120-25. For a discussion of the persistance within federal Indian law of the same racist discourse that informed Jackson's Removal Era, see Williams, *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

64. The missionaries argued that the federal government had recognized Cherokee Nation sovereignty through treaties and therefore, state law could not be applied within Indian land. *Worcester*, 31 U.S. (6 Pet.) at 535, 537-40.

65. *Id.* at 561.

66. Marshall wrote that the tribal right of self-government and the federal government's exclusive right to govern the relations between the tribes and outsiders were both evidenced by the history of governmental relations with the tribes, treaties, and the commerce clause of the Constitution. *Id.* at 556-57. *See also* W. CANBY, *supra* note 58, at 108-09. President Jackson ignored the decision and advised Georgia officials to continue their planned persecution of the Cherokees. A. DEBO, *supra* note 56, at 122.

67. "As a sovereign, (a tribe) is free to act unless some federal intrusion has affirmatively modified that sovereignty." W. CANBY, *supra* note 58, at 72.

68. *See id.* at 71. This Note is concerned that even this area is now subject to state interference.

69. Passage of the Indian Reorganization Act in 1934, 25 U.S.C. §§ 461-79 (1988) further compounded this status. The Act allowed the Secretary of the Interior to approve or disapprove almost all actions of tribal government. Thus, the idea of Indian sovereignty within the historical context of the New Deal is markedly different from its original historical context. In the former, tribal sovereignty resembles "some strange version of a delegated authority" while the latter is based upon notions of inherent sovereignty, particularly in the ability of the tribes to

tion and the inherent inability to reconcile the two concepts that underlie the classification's doctrinal basis has generated great confusion in determining jurisdictional boundaries, particularly between the states and the tribes.[70] Such jurisdictional complexities are further compounded by the ad hoc character of Indian law,[71] the attempts of legal scholars to make Indian law into a coherent "field" of study,[72] the ever-changing political context of federal Indian policy,[73] and the unique histories of both states and tribes.[74]

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control their domestic relations. "This shift in emphasis drastically confuses the question of jurisdiction ... [s]o jurisdiction does become a contemporary problem." Deloria, *supra* note 1, at 213-14.

70. Two types of jurisdiction must be distinguished in federal Indian law. One is the governmental power to tax or regulate and the other is the power of the courts to adjudicate. *See* W. CANBY, *supra* note 58, at 201. This distinction is not always clearly articulated and as a consequence the courts often blur it by generalizing questions of "state authority" to include both types of jurisdiction. *See infra* notes 113-28 and accompanying text.

71. Although F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1942 ed.) contains a foreword written by the Solicitor of the Department of the Interior warning that the book was not to be considered "the last word" on the field of Indian law, it has since been treated as a "canon" of federal Indian law by legal practitioners, scholars, and commentaries. Deloria, *supra* note 1, at 207-08. Deloria describes the vast amount of material that makes up the written record of federal Indian law as a "very complicated, very diverse body of data." It includes "badly written, vaguely phrased and ill-considered federal statutes; hundreds of self-serving Solicitor's Opinions and regulations; and state, federal, and Supreme Court decisions which bear little relationship to rational thought and contain a fictional view of American history that would shame some of our country's best novelists." *Id.* at 203.

72. Writing the foreword for Cohen's original Handbook, Nathan Margold identified four basic principles that he felt to be recurrent throughout Indian law: (1) the principle of the political equality of races, (2) the principle of tribal self-government, (3) the principle of federal sovereignty in Indian affairs, and (4) the principle of government protection of the Indians. *See* F. COHEN, *supra* note 71, at xxiii. However, each of these principles is based on very divergent types of evidence and Margold warned that the historical context of each must be taken into account. *Id.* Regardless, with the publishing of Cohen's Handbook, not only did the "field" of federal Indian law become established but Margold's principles mistakenly became concrete and "reified." Deloria, *supra* note 1, at 206.

73. Generally, the historical context of federal Indian law is described as being divisible into five basic periods: the formative treaty-making years (1789-1871), the allotment era (1871-1928), the reorganization period (1928-1942), the termination era (1943-1961), and finally, the era of self-determination (1961-present). For more detail on each period, *see generally* F. COHEN, *supra* note 71, at 47-206, and D. GETCHES & C. WILKINSON, *supra* note 8, at 33-161. Deloria states that the current trend seems to be "moving back to a period of negotiated settlements which resemble the old treaty-making procedures." Deloria, *supra* note 1, at 205. For an historical account, *see generally* F. PRUCHA, THE GREAT FATHER (abr. ed. 1984).

74. Tribes existing on the continent when the Europeans first arrived represented a great diversity in lifestyle, custom, language, and physical features. *See generally* A. DEBO, *supra* note 56, at 3-18. The first European nations to contact the tribes were equally diverse. E. SPICER, A SHORT HISTORY OF THE INDIANS OF THE UNITED STATES 13-15 (1969). The interplay between these varied groups and the subsequent establishment of the United States with its expansion from the thirteen original colonies to the western states dictates that historical complexities cloud any possibility for the accuracy of sweeping generalizations. *See generally* A. DEBO, *supra* note 56; F. PRUCHA, *supra* note 73; E. SPICER, CYCLES OF CONQUEST (1962).

State Adjudicatory Authority Over Indians in Indian Country

Marshall's original rule was simple: the key factor in determining state jurisdiction was the geographic location of the incident or occurrence.[75] If it occurred within Indian Country, either the Indian tribe or the federal government had jurisdiction.[76] If it occurred outside of Indian Country, then the state had jurisdiction.[77] This rule was eventually eroded, however, by subsequent decisions and statutes that broadened the inquiry to include not only the location of the occurrence, but the nature of the subject matter and the identities of the parties.[78] The result is that whenever there are arguable

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75. W. CANBY, *supra* note 58, at 111-12.

76. Federal jurisdiction over incidents that occurred within Indian Country was limited to criminal matters only. Federal jurisdiction over crimes committed within Indian territory was acquired as early as 1790 and was limited to those crimes committed by non-Indians against Indians. It was extended to include crimes committed by Indians against non-Indians in 1817 with the passage of the Federal Enclaves Act, 18 U.S.C. § 1152. Up until the passage of the Major Crimes Act in 1885, 18 U.S.C. § 1153, crimes committed within Indian Country by an Indian against another Indian were under the *exclusive* jurisdiction of the tribe. *See* W. CANBY, *supra* note 58, at 103-05. When the Major Crimes Act created federal jurisdiction over seven crimes committed by an Indian against another Indian, "it was the first systematic intrusion by the federal government into the internal affairs of the tribes." *Id.* at 105. For a more complete consideration of the development of federal criminal jurisdiction, see *id.* at 119-33.

Interestingly, in 1956 a Senate Congressional Committee considering "Juvenile Delinquency Among the Indians" recommended that desertion of children by Indian fathers be included as a major crime and subject to federal jurisdiction. *See* S. Rep. No. 1483, 84th Cong., 2nd Sess. 46-47 (1956). Apparently this recommendation was rejected. "Desertion" is not on the list of crimes, which subsequently has been expanded to thirteen. *See* W. CANBY, *supra* note 58, at 128-30.

77. *See* W. CANBY, *supra* note 58, at 111-12.

78. *Id.* at 112. Fifty years after Marshall's decision in *Worcester* declaring that state laws generally could have no force in Indian Country, the Supreme Court decided two criminal cases that greatly modified the Marshall rule. United States v. McBratney, 104 U.S. 621 (1881), and Draper v. United States, 164 U.S. 240 (1896), both involved only *non-Indians* in criminal acts that occurred within the boundaries of an Indian reservation. The Court reversed both federal convictions and referred the cases to the respective state courts on the basis of highly questionable statutory interpretation and reasoning that clearly violated Marshall's principles in *Worcester*. See W. CANBY, *supra* note 58, at 109-11. The Court noted in *Draper* that Congress could never have "intended" to *entirely* exclude state power to punish wholly non-Indian crimes in Indian Country. *Id.* at 111. *See* Deloria, *supra* note 1, at 221 on the importance of historical context in deciphering Congressional "intent." States could now claim jurisdiction over events that occurred entirely within Indian Country. Although appearing to apply only to the limited circumstances of these two cases (crimes committed by and against non-Indians), these decisions greatly complicated the law of jurisdiction in Indian Country. W. CANBY, *supra* note 58, at 111.

This complication has by no means dissipated. In May 1990 the Supreme Court decided Duro v. Reina, 110 S. Ct. 2053 (1990), which held that an Indian tribe may not assert criminal jurisdiction over a non-member Indian even when the crime was committed within the tribe's reservation boundaries. The dissent, written by Justice Brennan, points out that this decision creates "a jurisdictional void in which neither federal nor tribal jurisdiction exists over non-member Indians who commit minor crimes against another Indian." *Id.* at 2070 (Brennan, J., dissenting). Interestingly, buried within the 1990 Defense Appropriations Act is a provision suspending the *Duro* decision until Sept. 30, 1992 by amending the Indian Civil Rights Act, 25 U.S.C. § 1301(2). Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1892 (1991). The temporary provision was included to address the "emergency situation in Indian Country" resulting from *Duro* until "the relevant committees of the Congress" working with "the Indian nations, the Departments of Interior and Justice, and the states"

determinations of any of the variables, courts are inclined to balance competing state and tribal sovereign interests.[79]

In the wake of the decisions grappling with this balancing approach, the Supreme Court addressed once more the question of how far state jurisdiction could extend into Indian Country in *Williams v. Lee*.[80] But the Court did little to clarify the issue. Mr. Williams, a non-Indian, owned a general store located on the portion of the Navajo Reservation that is within Arizona.[81] He brought suit in the Superior Court of Arizona against a Navajo man and his wife, residents of the reservation, to collect a debt on goods he had sold to them on credit.[82]

The Supreme Court of Arizona reasoned that because no act of Congress expressly forbade state courts from exercising jurisdiction over such actions, state jurisdiction was permissible.[83] The Supreme Court reversed in a unanimous decision and held that state courts could have no jurisdiction over such a case.[84] Justice Black characterized the state court's interpretation as a "doubtful determination of the important question of state power over Indian affairs" and reaffirmed *Worcester's* "basic policy" that state law can have no force in Indian Country.[85] Noting that there had been significant modifications made in the basic policy, Black stated that these were only made in cases that did not involve essential tribal relations or jeopardize Indian rights.[86] He summed up these clarifications in what has now become known as the "Infringement" or *Williams* test: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[87] He added that when Congress intended states to exercise civil and criminal jurisdiction over Indians, it had expressly granted such authority to the states by statute.[88] And, though Congress "did express a willingness" to

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develop more comprehensive legislation "within the coming year." Conference Report On S. 3189 (preliminary print, on file with the *Arizona Law Review*).

Congress has passed numerous statutes affecting jurisdiction over specific tribes but it was not until 1953 that it proceeded to do so through sweeping general legislation. W. CANBY, *supra* note 58, at 176. The Act of Aug. 15, 1953, Pub. L. No. 53-280, ch. 505, 67 Stat. 588 (1953) [hereinafter Public Law 280] enabled five (and later six) states to immediately acquire extensive criminal and civil jurisdiction over Indian Country and allowed other states to assume it in the future if they so decided. W. CANBY, *supra* note 58, at 176. *See also infra* notes 97-112 and accompanying text.

79. W. CANBY, *supra* note 58, at 112.

80. 358 U.S. 217 (1959).

81. *Id.* at 217-18.

82. *Id.*

83. *Id.* at 218.

84. *Id.* at 223. *See also* W. CANBY, *supra* note 58, at 73.

85. *Williams*, 358 U.S. at 218-19.

86. *Id.* at 219. The modifications that Black cites allow state courts to hear suits by Indians against outsiders and "to try non-Indians who committed crimes against each other on a reservation." *Id.* at 219-20. The exception to these modifications, according to Black, is "if the crime was by or against an Indian." In such a case, "tribal jurisdiction ... has remained exclusive." *Id.* at 220.

87. *Id.* at 220.

88. *Id.* at 220-21. Black specifically referred to Public Law 280, *see supra* note 78, as well as a 1952 statute granting broad civil and criminal jurisdiction to the state of New York and

have states assume such jurisdiction if they chose to, Arizona had not done so.[89] Black concluded that state jurisdiction in *Williams* would undermine tribal court authority over reservation affairs, thereby infringing on "the right of Indians to govern themselves."[90] It makes no difference, according to Justice Black, whether the plaintiff was Indian or non-Indian because he was on the reservation and the transaction, which involved an Indian, occurred there.[91]

The *Williams* case has generated confusion on two points. First, although the opinion appears to strongly affirm Marshall's original principles[92] and its ultimate outcome protects Indian sovereignty, the "test" sentence standing alone lends itself to a very expansive interpretation. It appears that instead of acting *only* upon federal grants of authority, the states are now virtually unrestrained in exercising authority over the tribes so long as it does not "infringe" on tribal self-government.[93] The second point of confusion flowing from the test is what exactly constitutes infringement. *Williams* never clearly elaborates whether infringement depends upon any or all of the factors present in the case, such as the identity of the parties, the location of the plaintiff, the site of the transaction, or the nature of the civil dispute.[94]

In addition to the case law, federal legislation had also expanded the ability of states to gain jurisdiction over Indian Country.[95] Though Justice Black mentions it only in passing, Public Law 280[96] allows states jurisdiction even over cases denied by the Court's decision in *Williams*. Public Law 280 expressly conferred upon the states power to adjudicate civil actions against

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a series of statutes granting Oklahoma extensive jurisdiction over Indians in that state. *Id.* at 221 n.6. *See also supra* note 76.

89. *Id.* at 222-23. Five "mandatory" states received Public Law 280 jurisdiction by operation of law: California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska was later added to that list in 1958. W. CANBY, *supra* note 58, at 177-79. Any other state that chose to acquire either partial or complete jurisdiction via the legislation was referred to as an "optional" state. *Id.* at 192. Arizona made a very limited assumption of jurisdiction in 1967 in order to regulate air pollution alone. Before that, Arizona had not assumed any jurisdiction under Public Law 280. *Id.* at 192 (citing ARIZ. REV. STAT. ANN. § 49-561).

90. *Williams*, 358 U.S. at 223.

91. *Id.*

92. Justice Black writes, "the cases in this Court have consistently guarded the authority of Indian governments over their reservations", *id.* at 223, and, in addition to jurisdictional protection, "Congress has also acted consistently upon the assumption that states have no power to regulate the affairs of Indians on a reservation." *Id.* at 220.

93. Ironically, this is the exact approach, albeit without the infringement restriction, that the Arizona Supreme Court took when it decided that Arizona state courts had authority over the Lees because no express Congressional action forbade such authority. Justice Black called this construction a "doubtful determination." *Id.* at 218.

94. Justice Black writes that what mattered was that the defendant was Indian and the transaction occurred on the reservation and that "there can be no doubt" that the exercise of state jurisdiction would infringe. *Id.* at 223. Certainly, the court fails to enunciate a principle as clear as that stated in Billie v. Abbott, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6021 (1988), where Associate Justice Austin, writing for the Navajo Supreme Court, held "state determinations of tribal domestic relations, no matter how narrow the intrusion, is always hostile to and in conflict with the needs of the Indian people." *Id.* at 6023. *See infra* note 258 and accompanying text.

95. *See supra* note 78.

96. *See supra* note 78.

Indians that arose in Indian Country.[97] In the area of criminal jurisdiction, state authority was extended to cover crimes "by and against Indians" and virtually supplanted prior federal authority.[98] As a result of much criticism from both states and tribes,[99] several amendments to the law were passed as a part of the Indian Civil Rights Act of 1968 (ICRA)[100] that required tribal consent to future assumptions of state jurisdiction and allowed states to retrocede jurisdiction to the federal government.[101]

Two subsequent decisions regarding the interpretation and effects of Public Law 280 have important implications for state adjudicatory power over Indian affairs. In *Kennerly v. District Court*,[102] the tribal council had passed a resolution granting the state civil jurisdiction over Indian defendants to be held concurrently with the tribal court.[103] The Supreme Court held that the state could *only* acquire such jurisdiction if it followed the requirements of Public Law 280 as amended in the ICRA.[104] Thus, the Court deemed even unilateral consent by the tribe an unacceptable method for the state to acquire such jurisdiction. Still, the failure of a state to acquire Public Law 280 authority is not determinable of a lack of state jurisdiction altogether; the court can look to the *Williams* test.[105] Hence, Public Law 280 is essentially a separate consideration from the *Williams* test approach.[106]

The second case important to Public Law 280's interpretation settled a controversy sparked by contradictory language in the statute with regard to whether Public Law 280 was intended to grant states merely adjudicatory

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97. W. CANBY, *supra* note 58, at 181. The state's adjudicatory power was not complete, however, by virtue of a provision that expressly prohibited state jurisdiction "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [trust] property or any interest therein." *Id.* at 181 (citing 28 U.S.C.A. § 1360(b)). Canby notes that the grant of state civil jurisdiction was added to the legislation as an afterthought. *Id.* at 180.

98. *Id.* at 179-80. Because states already had jurisdiction over crimes committed by non-Indians against each other after *McBratney* and *Draper*, Public Law 280 filled in the remaining gaps of state authority. It also expressly provided that the Federal Enclaves Act and the Major Crimes Act no longer applied in states that acquired Public Law 280 jurisdiction. *Id.* *See supra* notes 76, 78 and accompanying text.

99. The tribes located within the original five states, *see supra* note 89, criticized Public Law 280 because state jurisdiction had been forced on them without their consent. Other tribes resented the state's ability under the law to unilaterally acquire the jurisdiction without consulting them. State governments criticized the law for giving them the duty of law enforcement over the tribes without federal assistance to pay for it. W. CANBY, *supra* note 58, at 177.

100. 25 U.S.C. §§ 1301-41 (1988). Subchapter I of the ICRA, codified at 25 U.S.C. §§ 1301-03 (1988), is commonly referred to as "The Indian Civil Rights Act." D. GETCHES & C. WILKINSON, *supra* note 8, at 367.

101. W. CANBY, *supra* note 58, at 176-77. As a result of these changes, there has been virtually no expansion of Public Law 280 jurisdiction since 1968. *Id.* at 177. Those states who have opted to acquire it have done so in a variety of ways that range from total assumption, as in Florida, to very limited assumption, as in Arizona, to regulate air pollution. *Id.* at 192.

102. 400 U.S. 423 (1971).

103. *Id.* at 425.

104. *See* W. CANBY, *supra* note 58, at 196.

105. *See supra* notes 87-94 and accompanying text.

106. "The division of jurisdiction set forth in this chapter [discussing the *Williams* test among other things] is that which prevails in the absence of any federal statute such as Public Law 280." W. CANBY, *supra* note 58, at 97.

jurisdiction or full legislative authority over Indians.[107] In *Bryan v. Itasca County*,[108] Minnesota argued that its acquisition of Public Law 280 jurisdiction enabled it to assess a state and local property tax against personal property owned by an Indian in Indian Country.[109] After examining the legislative history of the civil provisions of the law, the Court concluded that the civil grant of authority under Public Law 280 was for adjudicatory jurisdiction only.[110] Hence, Minnesota's assessment was not authorized by the state's assumption of Public Law 280 jurisdiction.[111] The only civil laws of the state that could have effect in Indian Country were state rules of decision employed in deciding the disputes that came under the court's Public Law 280 jurisdiction.[112]

Differentiating State Taxation and Regulatory Power

The distinction between state adjudicatory power and state taxation and regulatory power in Indian Country is important even when Public Law 280 does not apply. Although both areas share roots in Chief Justice Marshall's statement in *Worcester* that state laws "can have no force" in Indian Country, the Supreme Court has tended to treat taxation and regulation issues differently from questions of adjudication.[113] Adjudicatory questions are generally resolved by the *Williams* test.[114] By contrast, the *Williams* test has come to be merely a secondary consideration when the state seeks to extend regulatory powers into Indian Country[115] because of the dramatic shift in the conception of Indian sovereignty that came about in *McClanahan v. Arizona Tax Commission*.[116]

In *McClanahan*, Arizona had imposed a personal income tax on Ms. McClanahan, an enrolled member of the Navajo tribe, who resided on the Navajo reservation and derived her entire income from reservation sources.[117] She instituted an action in the Superior Court of Arizona seeking the return of the money and a declaration that the state tax was without force against

107. *Id.* at 183.
108. 426 U.S. 373 (1976).
109. *Id.* at 375, 378-79.
110. *Id.* at 384. "This construction finds support in the consistent and uncontradicted references in the legislative history to 'permitting' '*State courts to adjudicate* civil controversies' arising on Indian reservations, and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations." *Id.* (emphasis in original).
111. "[N]othing in [Public Law 280's] legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist...." *Id.* at 388. On the contrary, Public Law 280 expressly provides for tribal ordinances and customs to be given full force and effect in civil cases before the state courts. However, this provision is limited because tribal ordinances and customs are enforced *only* if they are "not inconsistent with any applicable civil law of the State." 28 U.S.C. § 1360(c) (1988). *See also* W. CANBY, *supra* note 58, at 186.
112. *Bryan*, 426 U.S. at 384.
113. W. CANBY, *supra* note 58, at 201.
114. *Id.*
115. *Id.* at 202. The Court held in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980), that the *Williams* test still applied to state questions of regulatory power. *Id.* at 142.
116. 411 U.S. 164 (1973).
117. *Id.* at 166.

reservation Indians.[118] The trial court dismissed for failure to state a claim and the Arizona Court of Appeals affirmed, interpreting *Williams* to mean that the test was only concerned with cases that might infringe upon the *tribe's* right to govern itself, not upon the plaintiff's rights as an individual Navajo Indian.[119] Upon the Arizona Supreme Court's denial of a petition for review, the United States Supreme Court granted certiorari and found Arizona's contentions "simply untenable."[120] The Court flatly rejected the Arizona court's application of the *Williams* test to the situation in *McClanahan*.[121] It explained that the *Williams* test was intended to cover *only* those situations when states asserted jurisdiction over *non*-Indians in Indian country:

> In these situations [when a non-Indian is involved] both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the State could protect its interest up to the point where tribal self-government would be affected.[122]

Justice Marshall explained that a state's regulatory authority over Indians in Indian Country relies on federal preemption of state power rather than any "platonic notions" of inherent Indian sovereignty.[123] Marshall wrote, "the Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read."[124] Though seemingly protective of tribal authority, such a construction amounts to a reversal of the idea that state law does not apply to Indians in Indian Country and seems to say that it *does* apply so long as it is not preempted by Congress.[125] As a result, because federal law rarely preempts state law expressly, the analysis is largely one of balancing competing interests against the "backdrop" of tribal sovereignty.[126] This analysis would allow a state to interfere even with tribal self-government (regardless of infringement) if the state interest proved to be compelling enough.[127]

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118. *Id.*
119. *Id.*
120. *Id.* at 167, 179.
121. *Id.* at 179.
122. *Id.* The Court also sought to clarify their decision in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), which the Arizona court had cited as authority. *McClanahan*, 411 U.S. at 167, 179. This case implied that state law and state court jurisdiction could be extended to Indians in Indian Country as well as non-Indians so long as there appeared to be no direct interference with the tribal government. *McClanahan* sharply rejected this contention. W. CANBY, *supra* note 58, at 113-14.
123. *McClanahan*, 411 U.S. at 172.
124. *Id.*
125. *See* W. CANBY, *supra* note 58, at 115.
126. *Id.* In New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334 (1983), the Court wrote the formula as such: "State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority."
127. W. CANBY, *supra* note 58, at 76. In *Mescalero Apache Tribe*, the Court said that a state's interest arises when it can demonstrate "functions or services performed by the State in connection with the on-reservation activity" and increases "if the State can point to off-reserva-

This approach significantly broadens the state's authority over Indian Country even beyond an expansive interpretation of the *Williams* test. In the latter, the absolute barrier to state intrusion, though vaguely defined, was the infringement upon tribal self-government. Under *McClanahan*, even that barrier can be overcome. Theoretically, the result in the *Williams* case still controls questions of state adjudicatory authority and state courts have no jurisdiction when a non-Indian plaintiff attempts to sue an Indian defendant over a transaction occurring on the reservation.[128] In questions of a state's regulatory authority, on the other hand, the *Williams* test is applied alongside preemption analysis as an independent test, but the latter predominates as a result of the narrowed scope of what is considered tribal self-government interests.[129] In Title IV-D cases, however, the two tests are not always kept distinct.[130]

Although inherent tribal sovereignty appears to be eroding in the regulatory area, two Supreme Court cases, *National Farmers Union Insurance Cos. v. Crow Tribe of Indians* and *Iowa Mutual Insurance Co. v. LaPlante*,[131] involving civil jurisdiction of tribal courts, stress tribal judicial autonomy[132] at

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tion effects that necessitate state intervention." 462 U.S. at 336. *See also* Atwood, *supra* note 51, at 1072.

128. W. CANBY, *supra* note 58, at 116, 150.

129. *Id.* at 116.

130. *See infra* notes 154-201 and accompanying text.

131. In Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845 (1985), a non-Indian school district refused to use either the tribal court or the tribal Court of Appeals to challenge a default judgment entered against it in a tort action brought by a Crow tribe member in the tribal court. Instead, the district brought an action in federal court to seek injunctive relief based on the claim that the Crow Tribal Court lacked subject matter jurisdiction over a civil action against a non-Indian. The district court granted the relief but was reversed by the Ninth Circuit Court of Appeals, which ruled that the *district* court had no jurisdiction to enter the injunction. The Supreme Court reversed the Ninth Circuit, holding that federal jurisdiction was proper under 28 U.S.C. § 1331 because the issue as to whether a tribal court has exceeded it jurisdictional authority requires an examination of federal law. *Id.* at 852-53. The Court also indicated, however, that proceeding to a federal court is only authorized after exhausting all tribal remedies and remanded the case to the district court to determine, in the first instance, whether the federal action should be dismissed or "merely held in abeyance" pending further tribal court proceedings. *Id.* at 857.

In Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987), a member of the Blackfoot Tribe brought a tort action in the tribal court against a Montana corporate ranch for injuries he received while working on the reservation as a ranch employee. The ranch's insurer filed a motion to dismiss for lack of subject matter jurisdiction which the tribal court refused to grant. The insurer then filed in federal court on the basis of diversity jurisdiction, denying any liability to the ranch. *Id.* at 12-13. The district court dismissed for lack of subject matter jurisdiction on the basis that the tribal court must be given the opportunity to determine its own jurisdiction. *Id.* The Ninth Circuit affirmed but was subsequently reversed by the Supreme Court, which held that although tribal courts must have the first opportunity to hear the cases, the lower court should not have affirmed the dismissal for lack of subject matter jurisdiction. *Id.* at 19-20. In a footnote, the Court explained that the exhaustion rule, set forth in *National Farmers Union*, is required as a matter of comity, not as a "jurisdictional prerequisite." *Id.* at 16 n.8. Hence, the rule does not deprive the federal courts of subject matter jurisdiction as the Ninth Circuit had affirmed. *Id.* As in *National Farmers Union*, the case was remanded to the district court to determine whether the federal action should be stayed, pending further tribal court proceedings, or dismissed under the "prudential" rule. *Id.* at 20 n.14.

132. By holding that tribal courts are the primary forums for adjudicating civil disputes on the reservation and that tribal remedies must be exhausted first before a federal forum can be engaged, the Supreme Court has "vigorously reaffirmed the federal policy of encouraging tribal self-determination and tribal self-government." Pommersheim, *supra* note 10, at 363. *See also*

least in theory.[133] One commentator interpreted the cases to "clearly direct that all civil causes of action that arise on the reservation must be litigated, in the first instance, in tribal court."[134] Others are more cautious, noting that it is not yet clear what effect the cases will have on overall jurisdictional analysis.[135] Courts have not yet applied the principles of these cases to Title IV-D proceedings.[136]

EXAMINATION OF THE CASES: APPLYING THE AMBIGUITY

According to jurisprudential theory, somewhere amid this history of precedent and doctrinal foundations is an answer to whether or not a state court has subject matter jurisdiction over a Title IV-D collection proceeding against an Indian defendant residing in Indian country. It seems likely to be a question of the state's adjudicatory power and would therefore not involve the *McClanahan* analysis.[137] Because the debt collection situation in a Title IV-D

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id. at 362-63 (quoting Williams, *The Discourses of Sovereignty in Indian Country*, 11 INDIAN L. SUPPORT CENTER REP. 9 (Sept. 1988)).

133. While the decisions in *National Farmers Union* and *Iowa Mutual* present a unique opportunity for tribal courts to impact non-Indian federal court decisions with an Indian vision of tribal sovereignty, there remains the fact that the federal courts are not bound in any way by the tribal court decisions and may, in fact, refuse to affirm the tribal vision. Williams, *supra* note 132, at 9. *See also* Atwood, *supra* note 51, at 1077-80.

134. Pommersheim, *supra* note 10, at 347.

135. W. CANBY, *supra* note 58, at 149.

136. This is largely due to the timing of the case decisions. State *ex. rel.* Dep't of Human Servs. v. Jojola (*Jojola*), 99 N.M. 500, 660 P.2d 590, *cert. denied*, 464 U.S. 803 (1983), was decided before either Supreme Court decision. Jackson County v. Swayney (*Swayney I*), 75 N.C. App. 629, 331 S.E.2d 145 (1985), was decided the same year as *National Farmers Union*. Both State Dep't of Human Servs. v. Whitebreast (*Whitebreast*), 409 N.W.2d 460 (Iowa 1987), and Jackson County, Child Support Enforcement v. Swayney (*Swayney II*), 319 N.C. 52, 352 S.E.2d 413 (1987), were contemporaneous with *Iowa Mutual*. Becker County Welfare Dep't v. Bellcourt (*Bellcourt*), 453 N.W.2d 543 (Minn. 1990), decided after both Supreme Court decisions, makes no mention of either case. *See infra* notes 149-153 and accompanying text. The Navajo Supreme Court does mention *National Farmers Union* in Billie v. Abbott, 16 Indian L. Rep. (Am. Indian Law. Training Program) 6021 (1988), *see infra* note 231 and accompanying text, but in support of the point that suits against state political subdivisions have been heard in tribal courts. *Id.* at 6023.

137. The central theme of Title IV-D is enforcement of support orders through judicial processes, essentially an adjudicatory function for the state, although administrative processes are also an option for states pursuing collection according to the 1984 amendments. *See supra* note 41. When no order exists, the state courts are authorized by the Act to determine the amount of the support debt and pursue the claim through judicial proceedings. *See* 42 U.S.C. § 656(A)(1)(B) (1988). Canby states "because decrees for ... child support ... require *in personam* jurisdiction over the defendant, the jurisdictional rules for such orders are the same as those for general civil litigation [application of the *Williams* test]." W. CANBY, *supra* note 58, at 154.

In addition, even if the Title IV-D system is characterized as being more regulatory in nature, it is not at all clear that the analysis under this characterization would yield a different conclusion than the one reached by calling it adjudicatory. Despite treatment of the *Williams* test as only a secondary consideration after applying the more expansive *McClanahan* preemption analysis in questions of state regulatory authority, those instances allowing state regulation of Indians in Indian Country, to date, have been limited to rare and "exceptional circumstances." *Id.* at 116, 223, 226. Even when a state has civil jurisdiction under Public Law 280, the Court

proceeding is so similar to the facts in *Williams*, the question hinges upon whether the transaction arose on the reservation or not.[138] If it did, the tribal court would have exclusive jurisdiction under *Williams*.[139] If it did not, the state would have jurisdiction so long as the exercise of such would not infringe upon tribal self-government.[140] Because the case involves important questions of tribal domestic relations, it is unquestionable that an exercise of state court jurisdiction would be an infringement.[141] If this were true, it appears that the only way for a state to assume jurisdiction over such a proceeding, provided the pursuit of collection was considered an adjudicatory function of the state, would be if it had acquired civil jurisdiction under the rigors of Public Law 280.[142] The question, however, proves to be much more difficult.

The State Courts

Three state district courts in New Mexico, North Carolina, and Iowa dealt first with the question. Each agreed with the Indian defendant and dismissed for lack of subject matter jurisdiction.[143] The state appealed in each case: New Mexico and Iowa to their respective supreme courts, and North Carolina to its appeals court, which affirmed, and then to its supreme court. A fourth court in Minnesota denied the Indian defendant's motion to dismiss for lack of subject matter jurisdiction and awarded judgment to the county for pregnancy expenses and unpaid child support.[144] The defendant was also ordered to pay ongoing support. In that case the defendant appealed solely upon the issue of subject matter jurisdiction to the state's court of appeals.[145] With no decision on point from the United States Supreme Court,[146] all five appeals courts grappled with the ambiguities of jurisdictional analysis and reached varying conclusions.

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has limited that jurisdiction to adjudicatory rules of decision. *Bryan*, 426 U.S. at 384. *See also supra* notes 108-12 and accompanying text.

138. This would particularly be the case in light of *National Farmers Union* and *Iowa Mutual*, *see* discussion *supra* note 131, in addition to the usual adjudicatory analysis under the *Williams* test.

139. W. CANBY, *supra* note 58, at 157-58. *See also supra* note 91 and accompanying text.

140. *See supra* notes 87-91 and accompanying text.

141. The tribe's ability to decide the relations of its own members is at the core of tribal identity and notions of tribal sovereignty. Despite increasing limitations made upon the scope of the retained sovereign authority of tribes, they continue to possess inherent power to govern the affairs between members of the tribe. *See* W. CANBY, *supra* note 58, at 70-71. *See also supra* notes 67-68 and accompanying text.

142. *See supra* note 97 and accompanying text.

143. *Jojola*, 99 N.M. at 501, 660 P.2d at 591; *Swayney I*, 75 N.C. App. at 630, 331 S.E.2d at 146; *Whitebreast*, 409 N.W.2d at 461.

144. *Bellcourt*, 453 N.W.2d at 543.

145. *Id.*

146. The defendant in *Jojola* petitioned for certiorari after the New Mexico Supreme Court held that the state had jurisdiction over the proceeding. The petition was denied by the Supreme Court in 1983, two years before the decision in *National Farmers Union*. *Jojola*, 99 N.M. 500, 660 P.2d 590, *cert. denied*, 464 U.S. 803 (1983).

These cases share similar fact patterns. The parent who applied for AFDC assistance was the mother.[147] Hence, the state's child support enforcement agency brought suit for reimbursement against the father or alleged father under 42 U.S.C. § 634. Further, in each case the mother, child, and defendant father were all members of the same tribe and resided within their tribe's reservation boundaries.[148] In *State ex. rel. Department of Human Services v. Jojola* (*Jojola*),[149] *Jackson County v. Swayney* (*Swayney I*),[150] and *Becker County Welfare Department v. Bellcourt* (*Bellcourt*),[151] the suit included an initial inquiry to establish paternity before determining support owed and pursuing collection, whereas in *State Department of Human Services v. Whitebreast* (*Whitebreast*),[152] the suit was only for collection because there was no dispute over paternity. The court in *Jackson County, Child Support Enforcement v. Swayney* (*Swayney II*)[153] considered whether the North Carolina Court of Appeals erred in affirming the trial court in *Swayney I.*

Jojola, Swayney I, *and* Swayney II: *Determining Jurisdiction Based on the* Williams *and* McClanahan *Tests*

The courts in *Jojola, Swayney I,* and *Swayney II* approached the problem using a "Preemption/Infringement" analysis that appears to draw from both the *McClanahan* analysis and *Williams* test. As such, it enables the courts to take an extremely flexible approach to their doctrinal authority, yielding essentially three different answers from the three different courts.

In *Jojola*, the Supreme Court of New Mexico determined that the *Williams* test applied because the case involved a non-Indian, the plaintiff state.[154] Justice Riordan, writing for the majority, described that test as consisting of two parts, preemption and infringement.[155] The "preemption" part stemmed from the language "absent governing Acts of Congress" and

147. There is also no indication that any of the mothers refused to assign their rights to receive support to the state.

148. In *Jojola*, Diane Abeita, her son, Jonathan, and Jojola, the alleged father, are all members and residents of Isleta Pueblo. In *Swayney I* all three are members of the Eastern Band of Cherokee Indians and reside within the reservation. In *Whitebreast*, there is no dispute regarding paternity and both the parents and the child are members of the Sac and Fox Tribe of the Mississippi and reside on the tribe's Tama settlement in Tama, Iowa. The mother, alleged father, and child in *Bellcourt* are all enrolled members of the Minnesota Chippewa Tribe and the White Earth Band of Chippewa Indians and reside on the White Earth Reservation.

149. 99 N.M. 500, 660 P.2d 590 (1983).

150. 75 N.C. App. 629, 331 S.E.2d 145 (1985).

151. 453 N.W.2d 543 (Minn. 1990).

152. 409 N.W.2d 460 (Iowa 1987).

153. 319 N.C. 52, 352 S.E.2d 413 (1987).

154. The court cited Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), which quotes from *McClanahan* that the *Williams* test is to be applied "in situations involving non-Indians." *Jojola*, 99 N.M. at 502, 660 P.2d at 592. However, the court did not consider the context of the statement made in *McClanahan*. There the Court was explaining why the *Williams* test did *not* apply to situations involving Indian defendants, such as in the *Williams* case, with facts very similar to the case in *Jojola*. *See also supra* note 122 and accompanying text.

155. *Jojola*, 99 N.M. at 502, 660 P.2d at 592.

the second part from the latter half of the phrase that refers to infringement.[156] Riordan then briefly considered the preemption part and, with little analysis, found no "governing acts."[157] There is no evidence that the court looked to treaties or statutes that describe the relationship between New Mexico and Isleta Pueblo. Instead, Justice Riordan looked for a *specific* federal act concerning paternity determination or child support collection when "a state is a party and the other party is an Indian."[158] Riordan cited a section of the Indian Child Welfare Act (ICWA)[159] as the "closest" controlling statute that precludes state jurisdiction, but dismissed it as only applying to Indian adoption cases.[160]

Freed of the preemption barrier, Riordan considered the "second part of the *Williams* test" and borrowed three criteria set forth in another New Mexico case[161] to determine when "state involvement" would infringe on Indian self-government.[162] The first criterion is whether the parties are Indians or non-Indians.[163] The court had little problem coming to the conclusion that the plaintiff in *Jojola* was non-Indian because, as a result of the assignment of collection rights to the state under the provisions of Title IV-D, the state was "subrogated" to the mother's position.[164] The court made no mention of the fact that the defendant was an Indian residing within the reservation. The second criterion is whether the cause of action arose within the reservation.[165] The court decided it did not because the mother of the child filed for public assistance in an office located outside the reservation bound-

156. *Id. See supra* note 87 and accompanying text for the complete phrase from *Williams* that has come to be considered the *Williams* test.

157. *Jojola*, 99 N.M. at 502, 660 P.2d at 592.

158. *Id.*

159. 25 U.S.C. §§ 1901-63 (1988). Under the Act, tribal courts have exclusive jurisdiction over adoption and custody proceedings involving Indian children who reside or are domiciled on their tribe's reservation. W. CANBY, *supra* note 58, at 164.

160. *Jojola*, 99 N.M. at 502, 660 P.2d at 592.

161. In Chino v. Chino, 90 N.M. 203, 561 P.2d 476 (1977), Patricia Chino, a member of the Santa Clara Indian Pueblo, brought suit against her son in a New Mexico district court for forcible entry and wrongful detainer of her home located within the Mescalero Apache Indian Reservation. Mrs. Chino had acquired the home during her marriage with the defendant's father who was a member of the Mescalero Apache Tribe. After the couple's divorce, she was awarded the home by both the Mescalero Apache Tribal Court and a state district court and her son moved into the vacant home against her wishes. The district court granted an order for removal and the son appealed, contesting the district court's subject matter jurisdiction over the case and personal jurisdiction over him. The issue on appeal was whether state courts have jurisdiction over forcible entry and wrongful detainer actions involving fee patent lands lying within an Indian reservation. *Id.* at 204, 561 P.2d at 477. The Supreme Court of New Mexico found that state jurisdiction was precluded by the Treaty of 1852 between the United States and the Apache Nation of Indians. Treaty With the Apaches, 1852, United States Apache Nation of Indians, art. 1, 10 Stat. 979. Furthermore, the New Mexico Enabling Act disclaimed all state jurisdiction over the Indians within its boundaries and the state had not later assumed such jurisdiction under Public Law 280. *Chino*, 90 N.M. at 206, 561 P.2d at 479. Although *Chino* was decided on the basis of federal preemption, the opinion noted that even had there been no preemption, the state would be precluded from jurisdiction because of infringement on the tribe's right to self-government according to the "helpful" criteria that the court set out. *Id.*

162. *Jojola*, 99 N.M. at 502-03, 660 P.2d at 592-93.

163. *Id.* at 502, 660 P.2d at 592.

164. *Id.* at 503, 660 P.2d at 593.

165. *Id.* at 502, 660 P.2d at 592.

aries.[166] The third criterion involves the nature of the interest to be protected.[167] Using a balancing test approach, the court weighed the tribal right to regulate the domestic affairs of its members against the state's interest in conducting its state-wide public assistance program.[168] With very little analysis, the court found the state's interest in the "uniform enforcement of paternity determination and child support obligations within this State" so compelling that there was "no interference with tribal self-government."[169]

Without elaborating on the significance of the first two criteria, the court emphasized the third criterion of balancing interests.[170] Theoretically, the *Williams* test put an end to a balancing approach by precluding *any* state interference with tribal self-government regardless of the importance of the state's interest.[171] The only inquiry, then, should be whether tribal self-government interests are affected. Here, the court conceded that the tribe has a governmental interest but determined that the state interest outweighed even the tribe's control over its members' domestic relations.[172] In effect, the court took the most expansive interpretation of the *Williams* test and coupled it with the *McClanahan* notion of tribal sovereignty as a "backdrop", allowing the state to rush in and fill what the court saw as a void left by the "absent governing Acts of Congress" phrase in *Williams*.[173]

The defendant in the *Swayney* cases also argued that the case belonged exclusively in tribal court.[174] Unlike the court in *Jojola*, however, the North Carolina Court of Appeals agreed. It also applied "the two pronged infringement-preemption test"[175] but decided the matter on preemption grounds. The court held that federal preemption was evident in the 1980 enabling legislation of the federally created Court of Indian Offenses (CIO).[176] The court

166. *Id.* at 503, 660 P.2d at 593.
167. *Id.*
168. *Id.*
169. *Id.* The court reasoned that because there are 23 separate Indian jurisdictions within the state of New Mexico, it would be a great "burden on the aims of the public assistance program" to rule in favor of the defendant's argument of exclusive tribal court jurisdiction and be forced to litigate in each jurisdiction. This reasoning does not explain, however, why there is then "no" interference with tribal self-government as the court claims.
170. *See id.*
171. *See* W. CANBY, *supra* note 58, at 201-02. Balancing may tend to persist, however, partly because of the lack of clarity in *Williams* as to which factors necessitate a finding of infringement. *See supra* note 94 and accompanying text.
172. *Jojola*, 99 N.M. at 503, 660 P.2d at 593.
173. *Williams*, 358 U.S. at 220.
174. *Swayney I*, 75 N.C. App. at 630, 331 S.E.2d at 147. The "tribal" court in this case is a Court of Indian Offenses. *See supra* note 9 and accompanying text.
175. *Swayney I*, 75 N.C. App. at 630, 331 S.E.2d at 147.
176. *Id.* at 632, 331 S.E.2d at 147. The original Courts of Indian Offenses were first established in 1883 by the federal government as educational and disciplinary institutions set up to further efforts to "civilize" those Indians living on reservations. W. CANBY, *supra* note 58, at 18. The Court of Indian Offenses for the Eastern Band of Cherokees was authorized in 1979, partly in response to growing activism on the part of members of the Eastern Band who were dissatisfied with having to resort to state and federal courts in the absence of having their own formal court system. After the tribal court system was authorized by the federal government, the Cherokee Tribal Council enacted legislation creating the system on July 10, 1980. The court formally began operation on July 28, 1980. Wildcatt v. Smith, 69 N.C. App. 1, 3 n.1, 316

concluded that the only factor in determining the proper forum is the status of the defendant because the federal enabling legislation stated that "the Court of Indian Offenses shall have jurisdiction of all suits wherein the *defendant* is a member of the tribe...."[177] Hence, it was immaterial whether the plaintiff was Indian or non-Indian.[178] In addition, the court cited a section of the enabling legislation granting the CIO jurisdiction over all paternity and child support cases.[179]

The court largely based its decision upon *Wildcatt v. Smith*,[180] which it identified as the only North Carolina appeals court case involving litigation against an Indian who resided on the reservation.[181] The plaintiff in *Wildcatt* had attempted to obtain child support from the defendant in April 1980 when she filed an action in a state district court.[182] A default judgment was entered against the defendant on July 15, 1980. On July 28, 1980, the newly created Cherokee Court of Indian Offenses began operation and in September granted full faith and credit to the state's default judgment against the defendant. The Indian Appeals Court reversed this decision and held that the state court was without jurisdiction to enter the default judgment.[183] After several other filings in both the tribal and state courts, the plaintiff filed a motion with the state district court to enforce the original default judgment.[184] The state court found the defendant in contempt of the original order.[185] His appeal from this judgement then came before the North Carolina Court of Appeals.

The *Wildcatt* court was concerned with whether the state court had subject matter jurisdiction over a paternity and child support action *between* members of the Eastern Band of Cherokees *after* the creation of the tribal court system.[186] To reach its decision, the *Wildcatt* court turned to the history of the Eastern Band of Cherokees and considered their status as a result of the Treaty of New Echota in 1835.[187] The court had to determine whether the

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S.E. 2d 870, 872 n.1 (1984). There are currently 21 Courts of Indian Offenses operating in Indian Country. *See supra* note 9.

177. *Swayney I*, 75 N.C. App. at 631, 331 S.E.2d at 147 (quoting 25 C.F.R. § 11.22 (1984)) (emphasis in original).

178. *Id.*

179. *Id.*

180. 69 N.C. App. 1, 316 S.E.2d 870 (1984).

181. *Swayney I*, 75 N.C. App. at 630, 331 S.E.2d at 147.

182. *Wildcatt*, 69 N.C. App. at 1-2, 316 S.E.2d at 872.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 2-3, 316 S.E.2d at 872.

187. *Id.* at 4-5, 316 S.E.2d at 873-74. In the wake of the pressures on the Cherokees to move and relinquish their lands, *see supra* note 58, divisions in the tribe developed and the Treaty of New Echota of 1835 was signed by a small group that did not represent the vast majority of the Cherokees. Nevertheless, the Senate ratified the treaty and by its terms the Cherokee Nation ceded all lands east of the Mississippi River to the United States and agreed to move west. Those Cherokees who were not party to the document refused to go and were forcibly removed by the United States Army. Of approximately 18,000 who were moved west to what is now Oklahoma, an estimated 4,000 died either in the round-up stockades or on the journey. Several hundred managed to escape capture and lived in the hills of North Carolina. A. DEBO, *supra* note 56, at 122-25. Interestingly, in 1849, once the East was "nearly free" of tribal Indians, the Bureau of Indian Affairs was moved from the War Department to the Department of Interior. W. CANBY, *supra* note 63, at 17.

Band's later federal recognition had any effect on the terms of the treaty, which had made all Cherokees who remained in North Carolina after the Cherokee Removal members of the state and did not recognize their separate status.[188] In applying the "infringement/preemption" test, the court's inquiry focused on whether Public Law 280 acted as a federal statute that would preempt the state's prior rights of jurisdiction. The court decided that neither Public Law 280 nor the Indian Civil Rights Act divested the state of the jurisdiction that it assumed under the Treaty of New Echota.[189] Nevertheless, it found that the ability of the state court to enforce its default judgment would infringe on the newly created Indian court system.[190] The court did not consider whether state court jurisdiction was preempted by the creation of the tribal court system because the question could be resolved on the basis of infringement.[191]

When the *Swayney I* court decided that the creation of the tribal court system preempted the state courts from jurisdiction over any case in which the defendant was an Indian, it answered the question left open by *Wildcatt*. The court did not consider the infringement test of *Williams* nor did it mention Public Law 280.

The *Swayney II* court rejected *Swayney I*'s conclusion on preemption by arguing that the CIO regulations cited by the Court of Appeals merely indicated that the CIO is to have original, but not exclusive, jurisdiction.[192] Therefore, it found that the regulations were not pervasive enough to indicate an occupying of the field, nor did the "mere establishment" of such a court deprive the state of all its former jurisdiction.[193] Although the court adhered to the *Wildcatt* conclusion regarding Public Law 280,[194] it rejected that court's decision regarding infringement after the creation of the CIO.[195]

The court then turned to the *Williams* infringement test and cited *Jojola* for overall support, including using the three "criteria" for finding infringement. It came to a different conclusion from the *Jojola* court, however, regarding the second and third criteria.[196] The court strongly disagreed with *Jojola*'s rea-

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188. *Wildcatt*, 69 N.C. App. at 5-6, 316 S.E.2d at 874.
Despite North Carolina's attempt to dissolve their Indian status, those who escaped the removal received federal recognition as early as 1868. "Later acts of Congress confirmed that the 'Eastern Band' had been accorded full tribal status by the federal government." *Id.* at 5, 316 S.E.2d at 874 (citing Act of July 27, 1868, 15 Stat. 228, and Act of June 4, 1924, 43 Stat. 376). For more information regarding federal recognition, *see generally* W. CANBY, *supra* note 58, at 4-6.

189. *Id.* at 6-10, 316 S.E.2d at 875-77. *But see id.* at 11-38, 316 S.E.2d at 878-92 (Johnson, J., concurring) (arguing strongly that Public Law 280 *did* preempt the treaty).

190. *Id.* at 10-11, 316 S.E.2d at 877. The court found that the entry of the default judgment did not infringe upon Indian sovereignty until the Courts of Indian Offenses were created. But, if the state court retained jurisdiction in order to enforce the judgement, infringement would result. Hence, even the general rule that a court usually retains jurisdiction in order to enforce a judgment it has entered, was insufficient to override application of the preemption/infringement test. *Id.*

191. *Id.*

192. *Swayney II*, 319 N.C. at 57, 352 S.E.2d at 416.

193. *Id.*

194. *Id.* at 58 n.4, 352 S.E.2d at 417 n.4.

195. *Id.* at 57, 352 S.E.2d at 416.

196. *Id.* at 59-63, 352 S.E.2d at 417.

soning for deciding where the claim arose. Because the foundation of the cause of action in both *Jojola* and *Swayney II* was the determination of parentage and there could be no duty to support if the defendant was not the father, the court determined that the action arose on the reservation and that the location of the AFDC office was irrelevant.[197] In applying the third criterion, the court differentiated between paternity proceedings and child support determinations and came to different conclusions for whether the state interest could outweigh the tribal interest.[198]

Regarding paternity, the court held that concurrent state and tribal court jurisdiction "would create substantial risk of conflicting adjudication concerning respective rights of Indians living on the reservation and would undermine that authority of the tribal court."[199] The court analogized the case to a custody proceeding to emphasize that the determination of parentage is a crucial matter of "great importance to the internal and social relations of tribal members."[200] With regard to child support "debt collection," however, the court determined that the tribe's interest in self-governance would not be significantly affected by allowing concurrent state and tribal jurisdiction.[201]

As the cases illustrate, the courts have employed somewhat of a "hybrid" test that combines an expansive understanding of *Williams* with the preemption language of the *McClanahan* case. Although the courts appear to agree on the test to be used, they clearly differ as to the ultimate outcome. Though the North Carolina Supreme Court showed some sensitivity to the important tribal interests at stake, the final outcome in both cases reveals that such an expansive and flexible interpretation of the test further erodes tribal sovereign interests.

Whitebreast *and* Bellcourt: *Determining Jurisdiction Based On Public Law 280*

The final two state court cases to be examined are the Iowa Supreme Court's decision in *Whitebreast* and the Minnesota Court of Appeals' decision in *Bellcourt*. Both were decided on an entirely different basis than the prior cases because Iowa had accepted civil and criminal jurisdiction under Public Law 280[202] and Minnesota acquired Public Law 280 jurisdiction as one of the original "mandatory" states.[203] The two cases are in direct opposition to each other.

The *Whitebreast* court determined that, despite Iowa's assumption of jurisdiction under Public Law 280, there could be no state court jurisdiction over the AFDC case because such adjudications were outside the scope of Iowa's acquired jurisdiction for three reasons. First, the state can only hear a

197. *Id.* at 59-60, 352 S.E.2d at 418. The court also noted that the AFDC office in *Swayney* was located within reservation boundaries. *Id.* at 60, 352 S.E.2d at 418.
198. *Id.* at 60-61, 352 S.E.2d at 418-19.
199. *Id.* at 62, 352 S.E.2d at 419.
200. *Id.*
201. *Id.* at 60-61, 352 S.E.2d at 418.
202. *Whitebreast*, 409 N.W.2d at 462.
203. *See supra* note 89.

case if it is private civil litigation.[204] Child support collection, the court decided, is not a private civil action because of its regulatory nature and the fact that the state never abandons its public status even while characterizing itself as "standing in the shoes" of the child.[205] Such regulatory power would result in destruction of tribal institutions and values.[206] Second, the court observed that the IV-D collection scheme bore a "striking resemblence" to taxation of the Indian defendant because part of the child support collected from the father goes into the general treasury of the state to cover application fees and cost of services.[207] Citing *Bryan*, the court found that Public Law 280 did not grant states "general civil regulatory powers, including taxation."[208] Finally, the court identified no harm in denying state jurisdiction because Congress provided an alternative forum within the IV-D statute by allowing cases to be brought before the federal courts and waiving the amount in controversy requirement.[209]

Three years later, the Indian defendant in *Bellcourt* relied on *Whitebreast* to argue that the Title IV-D collection process was regulatory in nature, analogous to a tax, and therefore outside of the Minnesota's Public Law 280 jurisdiction.[210] He argued that, under *Bryan*, jurisdiction belonged with federal or tribal courts.[211]

Although the Minnesota court acknowledged the restriction in *Bryan*[212] and admitted that certain Minnesota statutes regarding AFDC contained regulatory aspects, it found *Whitebreast* unpersuasive and held that the paternity and collection proceeding in *Bellcourt* was a private civil cause of action.[213] Though the *Whitebreast* court decided that the state could not shed its governmental character by "standing in the shoes" of the child, the court in *Bellcourt* characterized the state's role in "a paternity action" as "*only* acting *on behalf of* a private party who has assigned her rights to establish paternity and recover child support."[214]

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204. *Whitebreast*, 409 N.W.2d at 463.

205. *Id.*

206. This argument resembles the infringement concepts within the *Williams* test approach. Interestingly, the dissenting opinion of *Whitebreast* expressed frustration with the majority's interpretation of the scope of Public Law 280 and suggested that the conclusion of the issue would have been much easier had the majority simply applied the "modern view" (i.e. the Preemption/Infringement test used in *Jojola*). *Id.* at 465 (Schultz, J., dissenting). This construction suggests that the infringement test is an even *easier* way to acquire jurisdiction than Public Law 280.

207. *Id.* at 464.

208. *Id. See supra* notes 108-112 and accompanying text.

209. *Id. See supra* note 38 and accompanying text.

210. *Bellcourt*, 453 N.W.2d at 544.

211. *Id.*

212. The court cited *Bryan* as standing for the proposition that Public Law 280 does not "confer general civil regulatory control over Indian reservations." *Id.*

213. *Id.*

214. *Id.* (emphasis added). This characterization of the state as a private actor in *Bellcourt* is in marked contrast to the state's role as it is described in the other state cases. For example, in *Jojola* the court described the cause of action as one between a non-Indian plaintiff and an Indian defendant because the state was "subrogated" to the mother's position. *See supra* note 164 and accompanying text. In *Swayney II* the court simply stated that Jackson County was

The court cited *Bryan* for the proposition that Public Law 280 was intended to remedy the problem of the lack of "adequate Indian forums" as was the case with the Minnesota Chippewa.[215] Unlike the court in *Whitebreast*, the *Bellcourt* bench did not find it significant that Title IV-D contained a provision authorizing the use of federal courts if they are the only reasonable method of enforcement. Indeed, without further elaboration, the court found that 42 U.S.C. § 660 did not give federal courts jurisdiction over paternity and child support actions such as the *Bellcourt* case.[216] Thus, the court reasoned, state jurisdiction was proper because Congress could not have intended there to be no forum for the state to carry out its mandate under Title IV-D.[217] Interestingly, the court seemed to implicate the infringement considerations embodied in the *Williams* test before noting its vision of congressional intent regarding the AFDC "reimbursement program."[218] Nevertheless, the court did not indicate whether its decision would have been different had there been a tribal court operating on the White Earth Reservation.

In sum, when Public Law 280 jurisdiction is involved, state court jurisdiction over the Title IV-D proceeding against an Indian defendant largely depends upon the court's characterization of the state's collection efforts under the Title IV-D system. As *Whitebreast* illustrates, when the Title IV-D system was characterized as a regulatory function of the state, an area that is theoretically governed by the more permissive *McClanahan* analysis,[219] the court found there to be no state jurisdiction.[220] Once the proceeding was characterized as merely a private civil action, as in *Bellcourt*, the court had little difficulty concluding that it was well within the scope of jurisdiction contemplated by Public Law 280.[221]

State court cases as to which forum is appropriate for a Title IV-D proceeding resulted in the following: New Mexico determined that the state has concurrent jurisdiction with the tribe.[222] In North Carolina, paternity must be litigated in the Cherokee Court of Indian Offenses and then child support determinations can be litigated in the state court.[223] In Iowa, the case must go

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a non-Indian plaintiff. *Swayney II*, 319 N.C. at 59, 352 S.E.2d at 418. It would appear that merely the mother's right to collect was assigned, not her status as a private actor/Indian plaintiff.

215. According to the court, the tribe's constitution did not authorize the creation of tribal courts to deal with domestic relations cases. *Bellcourt*, 453 N.W.2d at 544.

216. *Id. See supra* note 38 and accompanying text. The court also disagreed with Bellcourt's argument that the Indian Child Welfare Act gave federal courts jurisdiction over the case. *Bellcourt*, 453 N.W.2d at 544.

217. *Id.* at 544-45.

218. The court implied that Congressional intent was clear "even though the tribe has a strong interest in self-governance and in determining the parentage of Indian children." *Id.* at 544.

219. *See* W. CANBY, *supra* note 58, at 202.

220. At first blush, it would seem that under the more permissive *McClanahan* analysis, the court might come to the opposite conclusion. However, in light of the existing case law regarding a state's regulatory authority in Indian Country, the *Whitebreast* opinion appears to reflect a very accurate adherence to precedent in finding state jurisdiction to be nonexistent. *See generally* W. CANBY, *supra* note 58, at 221-27.

221. *See Bellcourt*, 453 N.W.2d at 544-45.

222. *See supra* notes 154-69 and accompanying text.

223. *See supra* notes 192-201 and accompanying text.

to the federal tribunal.[224] In Minnesota, only the state courts have jurisdiction over both paternity and child support proceedings.[225]

Although this discussion has centered upon subject matter jurisdiction, it should be noted that in order for a court to issue a child support order, it must also have personal jurisdiction over the defendant.[226] In all the cases except *Jojola*, however, the defendant failed to raise the claim and the courts never addressed the issue. The *Jojola* court found personal jurisdiction to exist because the defendant was served with process while he was attending a community college outside the reservation boundaries.[227] The traditional view is that state process does not run to Indians in Indian Country; modern decisions go both ways on the issue.[228]

In addition, even when subject matter and personal jurisdiction can be acquired by a state court, the problem of actual enforcement of the judgment remains. Authority is divided over whether a valid state judgment against an Indian arising from an off-reservation claim can be directly executed in Indian Country.[229] Even when a state tried to garnish the wages of a non-Indian creditor who resided on the reservation, at least one federal circuit court held the act invalid.[230] One case that deals with the efforts of a state to enforce its Title IV-D support judgment against reservation Indians is *Billie v. Abbott*,[231] decided by the Navajo Supreme Court.

The Navajo Supreme Court

One of two Title IV-D decisions on record from tribal courts,[232] *Billie* was a class action suit brought by enrolled members of the Navajo tribe who resided on the Utah side of the Navajo Reservation.[233] All the plaintiffs had their federal income tax returns intercepted by John Abbott, a Utah official with the state's child support enforcement agency, in order to repay the state of Utah for AFDC payments made to the spouses of the plaintiffs.[234] Billie and

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224. *See supra* notes 204-11 and accompanying text.

225. *See supra* notes 212-18 and accompanying text.

226. W. CANBY, *supra* note 58, at 154.

227. *Jojola*, 99 N.M. at 501-02, 660 P.2d at 591-92.

228. W. CANBY, *supra* note 58, at 151-52. Several of the states that took part in the Child Support Enforcement survey, *see supra* note 49, noted that service of process was a problem in their child support collection efforts.

229. W. CANBY, *supra* note 58, at 152.

230. *See* Joe v. Marcum, 621 F.2d 358 (10th Cir. 1980). *See also* W. CANBY, *supra* note 58, at 152.

231. 16 Indian L. Rep. (Am. Indian Law. Training Program) 6021 (1988).

232. The other reported tribal court case involving Title IV-D was decided by the Southern Ute Tribal Court in R.L.W. v. G.N.B., 18 Indian L. Rep. (Am. Indian Law. Training Program) 6048 (1991). In that case, the state of Colorado, acting through the La Plata County Child Support Enforcement Unit (CSEU) proceeded directly in tribal court, thus avoiding the jurisdictional conflict. Interestingly, the tribal court held that CSEU is not entitled to reimbursement for AFDC payments made prior to the time that paternity is established, particularly in light of the fact that the record reflected a considerable lag between the time AFDC assistance was first provided and paternity was finally established (five years in the case of one child). *Id.* at 6049. The court specifically refused to apply Colorado law allowing for retroactive support obligations, noting that there were no similar provisions in the Southern Ute Tribal Code. *Id.*

233. *Billie*, 16 Indian L. Rep. (Am. Indian Law. Training Program) at 6021.

234. *Id.*

his former wife, Patsy, also a Navajo, had been divorced in the tribal court.[235] Patsy was given custody of the children and, because Billie was unemployed, his child support obligation was fixed by the court to be a "reasonable" amount "when he is employed and the monthly amount to be arranged by the parties."[236] Neither Billie nor Patsy ever returned to court to decide the amount of the child support payments owed, and Patsy applied to a Utah office for AFDC benefits.[237] Upon processing Patsy's application, Utah applied the procedures it had set out in its plan for those situations when the state had to determine the amount of support in the absence of an existing court order.[238]

Billie sued, claiming that Utah's use of its administrative procedures[239] to determine his child support obligations was an invasion of his rights as a Navajo tribal member because Utah was barred from extending its laws into the Navajo Nation under the Navajo Treaty of 1868 and other federal acts.[240] Billie requested that all intercepted refunds be returned and that Utah pay his costs and attorney's fees.[241]

The Navajo Supreme Court discussed a number of issues in the case, including the subject matter jurisdiction of Navajo courts to decide child support obligations of its members.[242] Abbott conceded that the Navajo Nation had exclusive jurisdiction over the domestic relations of Navajos living on the reservation, but argued that AFDC legislation gave Utah preemptive and exclusive jurisdiction to decide support obligations in Title IV-D cases regardless of the residence of both parents and children.[243] The Navajo court rejected this argument and determined that the *tribal* courts had exclusive jurisdiction over Title IV-D cases and requested that state agency officials, in the future, send Indian AFDC applicants back to the tribal courts to get child support orders so that the state courts would not determine them.[244]

The Navajo Supreme Court framed its analysis under the original provisions set out by Chief Justice Marshall that described inherent aspects of tribal sovereignty as remaining intact so long as the federal government had not acted in such a way as to grant a usurpation of those rights.[245] Hence, the Navajo court's discussion began with a review of the Navajo treaty with the

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235. *Id.*
236. *Id.*
237. *Id.*
238. Drawing upon 42 U.S.C. § 656, which allows a state to collect child support "under all applicable State and local processes," Abbott applied directly to the United States Secretary of the Treasury under 42 U.S.C. § 664, to intercept Billie's federal income tax refunds. The Secretary then sent the amount determined to be owed by Billie to the state out of his 1984 and 1985 federal income tax refunds. *Id.*
239. Administrative processes are another option for the state to use in pursuing collection. *See supra* note 41.
240. *Billie*, 16 Indian L. Rep. (Am. Indian Law. Training Program) at 6021.
241. *Id.*
242. The court also considered whether the Navajo court had personal jurisdiction over Mr. Abbott, whether the United States was a dispensable party to the action, the propriety of the suit as a class action, the propriety of the default judgment entry, and the amount of the default award. *Id.* at 6023-25.
243. *Id.* at 6022.
244. The court showed some irritation over the fact that Patsy had not returned to the tribal court to enforce her child support rights and instead applied directly to Utah. *Id.* at 6021.

federal government made in 1868.[246] The court reasoned that the Navajo Nation has exclusive power to decide its members' domestic relations according to its inherent rights and according to the treaty, and that such a power is not abrogated by the general IV-D statute, which expresses no explicit intent that Indian sovereignty be so limited.[247] In support of this argument the court turned to the Navajo Treaty of 1868, the Navajo law and order code, Navajo common law and custom, federal common law and the tribe's inherent retained attributes of sovereignty.[248]

Noting that the Navajo court had continuing jurisdiction over Billie's support obligation, the court stated that "Utah, which had no jurisdiction, should have required Patsy to return to the Navajo court. Once a Navajo court has decided the amount of child support that should be paid, and after AFDC benefits are paid, Utah again must pursue its arrearage collection through the Navajo courts."[249] The court asserted that its holding was compatible with the language of the AFDC legislation, which allows for the use of other courts in order for a state to pursue collection.[250] Justice Austin, writing for the court, commented that "[c]ertainly, cooperation between the Navajo Nation and Utah would have far better results than costly litigation."[251]

Although the Navajo court cited the identical federal case law that the state courts based their Title IV-D decisions upon, its handling of Indian sovereignty contrasted markedly with the "backdrop" approach of the state cases. Notably, because key federal cases that inform the common law of federal Indian law in this area involve the Navajo tribe, the Navajo Supreme Court was able to specifically relate United States Supreme Court decisions to Navajo rights of sovereignty.[252] It is likely, however, that other tribal courts would draw upon the same federal cases and approach the problem in much the same way as the Navajo Supreme Court.[253] In other words, retained rights of Indian sovereignty would be the primary focus of the inquiry and any preemption analysis would take tribal governmental authority into full consideration before state authority. If the federal government had not acted to limit the tribe's sovereignty, the state could not automatically assume that its authority could then fill the preemptive "void" left by federal inaction. Rather,

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245. *See supra* note 67 and accompanying text.
246. *Billie*, 16 Indian L. Rep. (Am. Indian Law. Training Program) at 6022.
247. *Id.*
248. *Id.* at 6022-23.
249. *Id.* at 6023.
250. *See* 42 U.S.C. § 656(a)(1) (1988).
251. *Billie*, 16 Indian L. Rep. (Am. Indian Law. Training Program) at 6023.
252. Both *Williams*, 358 U.S. 217, and *McClanahan*, 411 U.S. 164, involved the Navajo Nation.
253. The idea of inherent tribal sovereignty, though significantly narrowed as a legal concept, has never been completely extinguished. It is counterintuitive that tribal courts, which are at the forefront of defining and protecting the tribe's rights of sovereignty, would embrace a limited view of the scope of tribal sovereignty. Further, the United States Supreme Court cases involving Indians are not interpreted as tribe specific decisions, rather they stand for general principles that inform the status of all the tribes. Thus, the *Cherokee Nation* cases and *Williams*, *McClanahan*, and *Bryan* apply to more tribes than merely the Cherokee, Navajo, and Chippewa respectively.

there would be *no* void, because the federal government's failure to act in an area meant that the area was left to the governmental control of the tribe.

TOWARD A HUMAN SOLUTION

Restatement of the Problem

As Justice Austin notes, litigation hardly seems the best way to handle the questions concerning Title IV-D administration in Indian Country. Indeed, concentrating only on the jurisdictional puzzles that plague the Title IV-D cases in an attempt to find the "correct" application of the "correct" legal test limits the inquiry to such a degree that the actual human problem is lost amid the legal discourse. The human problem at issue in all of the AFDC cases discussed is that an Indian family has been forced to seek outside financial assistance in order to support itself. In other words, the problem is not simply how the state can get its money back from Indian defendants in Indian Country but is more a question of seeing to the best interests of the Indian family.[254] Hence, the notion that simply finding the "correct" side of a jurisdictional boundary will solve the problem is demonstrably false. Furthermore, because the "test" for determining jurisdiction as defined by federal and state courts continues to move toward expanding state intrusions into Indian Country whenever there is a contest between state and tribal authority, the tribe has less and less opportunity to address the problems of its own people. With this in mind, in those cases that cross jurisdictional boundaries and involve both sovereigns, the legal problem should be restated as: How best can the tribe and the state assist each other in seeing to the welfare of the Indian family?

Such a restatement places the human problem at the focal point of the search for a solution and insures tribal involvement in that process. It also puts "the law" back into the position of being simply a problem-solving tool rather than existing as an end in itself. The problem to be solved then is not merely a legal question but a social question that has cultural, political, historical, economic, and even moral considerations.[255]

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254. Craig Hathaway, Policy Specialist for the OCSE Policy Branch of the federal Family Support Administration acknowledged that what was originally set up to be only an economic program for the states and the federal government to recoup some of the money they have "shelled out" for AFDC, has now become more oriented toward child welfare. *See supra* note 48 and accompanying text. He suggests that establishing and paying an award for support is one of the best ways to insure parental responsibility to children and urges that the "common ground" issue between the states and the tribes in cases dealing on Indian lands with Indian families is that people working on both sides want to make sure that the children are provided for. Presentation by Craig Hathaway, *supra* note 39.

255. This Note does not attempt to broach all of these considerations but seeks merely to point out that in recognizing the complexity of the problem, it may be possible to work toward a more comprehensive solution. Obviously, the long term goal of such a solution would be to reach the day when the Indian family must no longer seek outside support. The solution put forth in this Note deals with the more short term goals of insuring the welfare of the Indian family in their current situation and easing tension between the state and the tribe.

Tribal Involvement

Tribal involvement is essential to finding an effective solution that is truly in the best interest of the Indian family because the tribe has the most comprehensive understanding of the problems at issue. In other words, seeing to the welfare of the Indian family requires an intimate knowledge of the problems faced by the family seeking AFDC assistance, problems that are informed by an economic situation possibly unique to reservation life[256] and that arise within a cultural context best understood by the tribe itself.[257] Therefore, what constitutes the welfare of the Indian family on both a financial level and a cultural level is a determination that can only be made by the particular tribe(s) involved.[258] If the tribe finds that state AFDC payments are an important resource for the Indian family it may be interested in working with the state to devise a process that can alleviate the state's burden in administering an effective Title IV-D system, provided that such a process also responds to the tribe's cultural concerns.[259]

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256. In 1985, the BIA found a 39% unemployment rate among the Indians within the BIA service radius. They reported that 14.4% of reservation Indian households had incomes below $2,500 per year. In contrast, only 4.6% of American households in general were below that amount. Further, less than 20% of reservation households earned more than $20,000 per year, while 41% of all U.S. households earned over that amount. REPORT OF THE TASK FORCE ON INDIAN ECONOMIC DEVELOPMENT, U.S. DEPARTMENT OF INTERIOR, ch. 1, *The Socioeconomic Status of American Indians*, at 42 (July 1986). It must also be remembered that it was not until Europeans arrived in America that Indians first experienced poverty. *See generally* W. CRONON, CHANGES IN THE LAND (1983) and specifically Chapter 4, *Bounding the Land*. Tribes today are still coping with the effects of repeated land loss and forced acculturation programs that contributed to the destruction of traditional means of subsistence.

257.

> Many of the ways of thinking and the ways of reacting and interacting within Indian culture persisted on the reservation and were brought into modern tribal government. Many of the attitudes about the way Indian people should raise their children, many of the attitudes about the ways Indian people should organize their family lives — these things were not wiped out by a century and a half of assimilation. These things persisted. So naturally they found their way into the structure of contemporary tribal government as the basic philosophies which Indian people act upon.

Presentation by Professor Robert A. Williams, Jr., Seminar on Child Support Enforcement for Indian Children — Intergovernmental Perspectives, in Phoenix, Arizona (June 17, 1990). This is borne out in the Navajo Supreme Court's statements in the *Billie* opinion: "Only Navajo courts using Navajo law can decide Billie's child support obligation.... [Application of state law] would supplant Navajo laws and firmly established Navajo cultural practices on domestic relations." *Billie*, 16 Indian L. Rep. (Am. Indian Law. Training Program) at 6023.

258. The Navajo Supreme Court stated in *Billie* that the "Navajo statutes and case law reflect Navajo culture and the unique circumstances and needs of the Navajo people living on the reservation. State determinations ... no matter how narrow the intrusion, [are] always hostile to and in conflict with the needs of the Indian people." *Billie*, 16 Indian L. Rep. (Am. Indian Law. Training Program) at 6023.

259. Although not necessarily representative of all tribes, the Navajo Supreme Court's comments in *Billie* make it evident that it prefers cooperation between the Navajo Nation and the state of Utah in pursuing Title IV-D collection to "costly litigation." *See supra* note 251 and accompanying text. The Navajo Nation Judicial Branch recently responded to a questionnaire sent to it by the author that inquired about the Navajo judiciary's current practice in handling child support cases. One response indicated that the Nation is currently in the early stages of considering whether to pursue legislative action such as reciprocal agreements between the Nation and State governmental entities or other tribes in cross jurisdictional child support cases.

The state's problems in administering Title IV-D across Indian Country borders might have been avoided in the first place had there been tribal involvement when the CSEA was originally enacted, or at least when subsequent legislation affecting the Act was before Congress.[260] Because that was not the case, however, both the states and the tribes must work with the existing system and come to some solution that is agreeable to both. The best mechanism to reach such a solution is negotiation.[261]

Negotiation and Agreement: Respecting the Role of Tribes as Sovereigns

Using negotiation to resolve disputes with Indian tribes is hardly a new idea, though it is one that has regained popularity in the last two decades after more than a century of oppressive unilateral actions by the federal government.[262] The process of negotiation, itself, presupposes that tribal sovereignty exists *in fact*, a position that better reflects reality than the current description of tribal sovereignty posited in federal Indian law.[263] Although the plenary

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Child Support Enforcement Questionnaire 2 (Aug. 22, 1989) (on file with author). Currently, when a state court or non-Navajo tribal court seeks to enforce its own child support order against a person who is living within the Navajo tribal court jurisdiction, the Navajo courts use a petition procedure to recognize and enforce the state order as a foreign decree. *Id.* at 2, 4. The Judicial Branch answered affirmatively to a question as to whether a legislative solution to child support enforcement was favored. *Id.* at 5.

260. If tribes were involved in the formulation of legislation affecting them, there would no doubt be provisions that specifically applied the legislation to tribal situations. For example, any of the following suggestions could have been included in the original CSEA or subsequently added by amendment if they were found appropriate by the tribes: a requirement that states utilize tribal courts when pursuing collection against an Indian defendant residing on the reservation; an optional provision allowing states to negotiate other solutions with tribes without fear of losing federal funding if such efforts are unsuccessful; a provision granting tribes the ability to administer AFDC funds themselves if they so chose; a provision specifically allowing for state flexibility in working with the tribes to accommodate the diversity of tribal situations; or perhaps an exemption for tribes under the state's Title IV-D program if it is found that most of the families receiving assistance are doing so for reasons other than abandonment by a parent.

Efforts to include tribal voices on issues concerning national measures that will have impact in Indian Country would serve to alleviate the effects of unilateral legislation on the part of Congress. Several Indian participants present at the Seminar on Child Support Enforcement for Indian Children (June 17-19, 1990), *see supra* note 9, commented on the need to include Indian representatives and organizations in *any* working group dealing with this area, both on the federal and state level. An OCSE working group currently examining these issues has *no* Indian representatives as members. Presentation by Craig Hathaway, *supra* note 39.

261. Deloria writes that "[n]egotiation allows people to give and take, and they do not agree unless they feel they have done their very best to represent their case. The emotional feeling which participation in decision-making provides generates a sense that some measure of justice has been done." Deloria, *supra* note 1, at 218. This is in marked contrast to the methods of litigation and unilateral legislation, which "do not seek to resolve disputes as much as they seek to apply what is believed to be preexisting law to new fact situations and declare winners. Justice is rarely mentioned and few opinions of courts speak glowingly of having done justice to the parties." *Id.* Unfortunately, there are serious limits to state and tribal freedom to negotiate in the area of child support enforcement due to the current federal requirements that states must meet. *See infra* notes 276-91 and accompanying text.

262. *See* Deloria, *supra* note 1, at 217-18. The original negotiated agreements were, of course, treaties. More recently and partially as a result of Indian political activism during the 1970's, Congress enacted legislation embodying negotiated settlements to Indian land claims. *See id.*

263. Deloria notes the irony in the fact that "while Getches, Rosenfelt, and Wilkinson were busy at work on their casebook clarifying the problem of jurisdiction so that tribal

power doctrine in federal Indian law describes the ability of Congress to diminish tribal sovereignty and even eliminate the legal status of tribes if it so intends, in actual fact, tribes continue to exist as politically and socially distinct groups for reasons beyond mere legal recognition from Congress.[264] Efforts to demand recognition and respect from Anglo society for tribal identity and survival continue today in many forms and on many levels regardless of restrictive Supreme Court pronouncements.[265] As such, tribal sovereignty and identity is not merely a legal construct as tribes continue to operate and to think of themselves as entities with inherent sovereign powers.[266]

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sovereignty would stand out in all its splendor, the practical world of Indians and members of Congress were working out a method [negotiation] for resolving disputes that accepted as a historical fact the sovereignty of Indian tribes." *Id.* at 218. At the same time that federal representatives of the executive branch were referring to the "government to government" relationship between the Indian tribes and the United States, the state of Arizona attempted in *McClanahan* to unilaterally disregard "all pretensions of tribal political independence" and relegate tribes to minor subdivisions of the state. *Id.* at 217. Though the Supreme Court ruled against Arizona, it nonetheless described Indian sovereignty as a "platonic notion" relevant only as a "backdrop" for examining treaties and federal statutes. *Id. See also supra* notes 116-29 and accompanying text concerning the *McClanahan* case.

264. Throughout the 500 years that Europeans have occupied what is now considered the American continent and despite repeated attempts by the Anglo arrivals to assimilate and acculturate tribal people in order to dissolve tribal ties, Indian people and Indian tribes are still here. The 19th century notion that Indian tribes were "simply creatures of Congressional plenary power" failed over time "because Indian people resisted" that model. Presentation by Robert A. Williams, Jr., *supra* note 257.

265. The Indigenous Peoples Planning Conference for 1992, an organization of native peoples from North, Central, and South America, is organizing a continent-wide "counter celebration" in 1992 of the 500th anniversary of Columbus's landing in order to raise awareness of indigenous people's survival and struggles for self-determination. Efforts to preserve native languages, considered by many to be the essence of cultural identity, range from native speakers writing bi-lingual dictionaries (the native language and English) and grammar texts to establishing teacher licensing standards for a Native American language. *See, e.g.*, Bahti, *Creating A Written Language — The Hopi Dictionary Project*, 68 ARIZ. ALUMNUS 10 (Fall 1990); O. ZEPEDA, A PAPAGO GRAMMAR (1983); Landon, *Speaking Up for Navajo*, Albuquerque J., Mar. 1, 1987, at G3 (proposal before New Mexico Board of Eduction to establish licensing standards for teachers of Navajo, essentially recognizing Navajo to be of equal status with French, German, and Spanish). What started as a dispute over a plan by the province of Quebec to build a golf course on land claimed by the Mohawks escalated into a serious stand-off between the Canadian military and a group of militant Mohawks after the issue became one of Mohawk sovereign recognition. *See* L.A. Times, Sept. 8, 1990, at A3, col. 1. Tribes have won several major victories in response to their demands for the return of Indian skeletal remains from museums and universities so that the remains could be returned for proper burial and so that their ancestors would no longer be objects of desecration. In September 1989, the Smithsonian Institution, which houses up to 18,600 Indian remains, agreed to return to tribal descendants the human remains along with funerary materials found with the bones. *See* N.Y. Times, Sept. 13, 1989, at A14, col. 4. On October 27, 1990, Congress passed legislation that requires museums and universities to return Indian remains to tribes or face loss of federal funding. One Indian lobbyist called the measure "the nation's most important human rights legislation for native tribes and people." Ariz. Daily Star, Oct. 28, 1990, at A5, col. 1. Indian identity continues to flourish in the areas of art, literature, music, and dance.

266. Professor Williams poses the question thusly:

> When I talk about the future of tribalism in a multicultural society, what I mean is, where do peoples who were indigenous to this world fit in to the change in demographics of the United States society in the 21st century?... How do we learn to learn from difference? How do we learn to deal with one another?... We both must admit and concede that we are both here, forever, because we have been together for so long. You cannot ignore tribal sovereignty because the tribes

Nevertheless, in light of increasing federal pressure on the states to administer an effective state-wide system, it is no wonder that the state is tempted in AFDC collection cases to view tribal sovereignty as a barrier to get around rather than a status that affords the chance for bilateral solutions. But if the state is truly interested in working for the "welfare" of Indian families residing within its borders, it must act through the channels that can best insure that Indian interests will be represented and provided for: the tribes. Hence, the most constructive and responsible position for the state is to concede the existence of tribal sovereignty and tribal governmental authority and act upon that historical reality.

Several states have assumed this position and have successfully negotiated arrangements with tribes in the area of child support enforcement.[267] Though negotiation and agreement designed to work with the existing Title IV-D system may not fundamentally address the root causes for the human problem at issue,[268] it is an initial step that can be taken for the betterment of Indian families needing AFDC. Such an approach builds respect between the two sovereigns and enables a working relationship to develop that can be useful for tackling future or more lasting problems in this and other areas. Unfortunately, despite such positive aspects of possible negotiated solutions, federal child support legislation seriously limits state and tribal flexibility in negotiation, a result owing more to Congressional oversight than to Congressional "intent".[269]

Reciprocal Agreements, Cooperative Agreements, Agreements to Cooperate that are not "Cooperative Agreements", and Intergovernmental Agreements

Reciprocal agreements between the state and the tribe are one possible solution to the child support enforcement problem that can incorporate tribal involvement, acknowledge tribes as sovereigns, avoid litigation over jurisdictional questions, and focus tribe and state energy on cooperating with each other in order to insure the welfare of the Indian family. Agreements could establish procedures for the reciprocal recognition and enforcement of child support orders and judgments between state and tribal courts. Such an agreement would allow the state and the tribe to negotiate a solution that is at once responsive to both the state's interest in collection efficiency and the tribe's interest in maintaining control over the domestic relations of its members.

An agreement established along these lines in 1987 between the Colville Confederated Tribes and the Washington State Department of Social and Health Services has proven effective and satisfactory to both parties.[270] The

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believe in it, Indian people believe they are sovereign nations and that belief is backed up by law. It has been affirmed by the Supreme Court in this century and in prior centuries as well.

Presentation by Robert A. Williams, Jr., *supra* note 257.

267. *See infra* notes 270-75, 283-91 and accompanying text.

268. *See supra* note 255 and accompanying text.

269. *See infra* notes 276-91 and accompanying text.

270. Reciprocal Child Support Enforcement Agreement between the Colville Confederated Tribes and the Washington State Department of Social and Health Services (1987).

Colville agreement provides that full faith and credit will be granted by the tribal court to the state child support order or judgment provided that the Indian defendant may raise any defense he or she has, including tribal custom.[271] The agreement further requires that the State of Washington give full faith and credit to any child support order issued by the Colville Tribal Court.[272] If a custodian or dependant child is entitled to such an order, the agreement provides that he or she may apply to the state's Office of Support Enforcement free of charge and receive enforcement services against the responsible parent residing outside the reservation.[273]

Drafted as such, the Colville agreement ensures that cultural considerations are included in the proceedings. As the Colville example illustrates, the applicability of reciprocal agreements can extend beyond Title IV-D collection

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Chief Judge Anita Dupris stated in a recent interview that the tribe's working relationship with the state is very good and the agreement is working well. Many cases are, in fact, settled out of court partly due to the improvement in the state and tribe relationship. Telephone interview with Anita Dupris, Chief Judge, Colville Confederated Tribes (May 31, 1990). According to Alan Stay, an attorney with the Colville Tribe who worked to formulate the agreement, it was created out of a desire by the tribe to protect tribal jurisdiction without sacrificing the welfare of Indian children "on the altar of jurisdiction." The tribe wanted to see that parents were responsible but wanted a tribal mechanism to deal with the problem. Telephone interview with Alan Stay, Attorney, Colville Confederated Tribes (May 31, 1990).

David Orr, Program Administrator and Policy/Prosecutor Liaison with Washington State's Office of Support Enforcement, described the agreement as successful and added that "we are very hopeful that that sort of agreement can be extended to other tribes in the area as well." Presentation by David Orr, Seminar on Child Support Enforcement for Indian Children — Intergovernmental Perspectives, in Phoenix, Arizona (June 18, 1990).

271. Reciprocal Child Support Enforcement Agreement, *supra* note 270, ch. III, at 4-5. Procedurally, this section of the agreement works as follows: the state certifies that a support obligation exists and sends a copy of the order to the tribe, which then will schedule the matter on the tribal court docket and bring the Indian debtor into tribal court to determine whether there is any reason why the child support obligation should not be established under Indian law. *Id.*, ch. IV, at 5-6.

David Orr, Program Administrator and Policy/Prosecutor Liaison with Washington's Office of Support Enforcement, commented that the provision allowing for tribal traditional and customary defenses was a little "unusual" from the state perspective, but was certainly legitimate for the tribe to insist upon. Presentation by David Orr, *supra* note 270. The tribal customary defenses are largely rooted in the circumstances unique to an extended family network in which grandparents, uncles and aunts, as well as parents help to provide for and raise children. For instance, a father who is unemployed or non-wage earning may be providing in-kind services to the children. Another defense based on changed circumstances may apply when the child moves to the grandparents' home. Telephone interview with Alan Stay, Attorney, Colville Confederated Tribes (May 31, 1990). Chief Judge Dupris stated that the primary reason for non-support in the cases she has seen is unemployment. She stated that it was very rare that a father simply refused to pay even though he could afford to do so. One father told her he did not want his support obligation to be set too low based on his current situation because he knew that once he found a job he could pay more. Telephone interview with Anita Dupris, Chief Judge, Colville Confederated Tribes (May 31, 1990).

272. Reciprocal Child Support Enforcement Agreement, *supra* note 270, ch. III, at 5.

273. *Id.* Procedurally, when the State Office of Support Enforcement receives the tribal court order, a state order that is identical to the tribal court order is created through administrative processes and then enforced against the obligor residing off the reservation through various state mechanisms. Presentation by David Minikel, Assistant Attorney General, Washington State's Social and Health Services Division, Seminar on Child Support Enforcement for Indian Children — Intergovernmental Perspectives, in Phoenix, Arizona (June 18, 1990). Because the Indian obligee may apply for the service free of charge, this provision also eliminates application fees and costs as potential barriers to the indigent Indian obligee.

cases. With provisions granting full faith and credit to tribal court orders, a tribal court can, through the use of the state courts, enforce its own support order against an Indian defendant who has moved or lives off the reservation. Conversely, a non-Title IV-D state court case could also be pursued when an Indian defendant then moves onto the reservation, by the tribal court granting full faith and credit to the state court's order.

Reciprocal agreements can also be made flexible and responsive to changing circumstances or the need for improvements by including provisions that allow either party to initiate renegotiation of the agreement if some provision proves unsatisfactory.[274] There could also be a provision allowing either party to terminate the agreement if it proves entirely unsatisfactory.[275]

The Colville agreement has also been successful for another reason. Federal requirements do not hinder the negotiating process when the tribe is not seeking any federal Title IV-D funding via the states, for example when the tribe is using its own resources for any child support enforcement efforts.[276] If, on the other hand, a tribe is seeking a part of the federal share of funding for its support enforcement activities, any agreement negotiated between the state and the tribe must meet federal standards spelled out for such "cooperative agreements" or the state faces severe penalties and the possible loss of federal funding.[277]

The problem stems from the way the Title IV-D program is set up. There is nothing in the federal legislation that directly addresses funding on Indian lands. Only states with federally approved plans are eligible for funding.[278] However, the states can enter into "delegated agreements" with

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274. *See, e.g.*, Reciprocal Child Support Enforcement Agreement, *supra* note 270, ch. VII, at 7-8.

275. *See, e.g., id.* at 8, which states: "This agreement may be terminated by any party upon thirty (30) days written notice of the intent to terminate to the other party."

276.

> The only way you're going to have to comply, as I understand it, with the federal agreements on cooperation ... is if you expect to get any federal funding from that process. The Colvilles were not looking for any federal funding, they were looking for a mechanism where they could take our orders, help us enforce them, and we could take their orders and help them enforce their orders. So it was truly a reciprocal arrangement, no money exchanging hands, just an agreement to cooperate between two different jurisdictions."

Presentation by David Orr, *supra* note 270.

277. This proposition follows from the provisions outlined *infra* at notes 278-81 and accompanying text. As such, prospects for negotiation are hindered. "[States] know they are being audited by federal auditors from Title IV-D. They know that if they sign an agreement with an Indian entity that does not meet the IV-D requirements and an audit is done then they will suffer because of that, their funding will be reduced." Presentation by Craig Hathaway, *supra* note 39.

278. The federal government makes quarterly grants to states with approved plans equal to a certain specified percentage of the total state expenditures for that quarter. *See* 42 U.S.C. § 655(a)(1)(A) (1988); 45 C.F.R. § 301.15 (1988). The current percentage for the fiscal year 1990 is 66 percent. 42 U.S.C. § 655(a)(2)(C) (1988). "State" is defined as "the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam." 45 C.F.R. § 301.1 (1988).

In order for a state plan to be approved it must conform with all the requirements stipulated in Title IV-D. 42 U.S.C. § 654(20) (1988); 45 C.F.R. § 301.10 (1988). After the original plan is approved, the state must submit any plan revisions pursuant to new statutes, regula-

another entity, usually a court or law enforcement authority, in order to carry out a portion of the state's establishment or enforcement activities under the state's approved plan.[279] These agreements, now referred to as "cooperative arrangements or agreements", detail the contractual arrangement between the state and the delegated entity and, like the Title IV-D provisions themselves, have been subject to increasing federal requirements over the years.[280] One such requirement is that the agreement contain a stipulation by both parties that *all* Title IV-D requirements will be complied with.[281] Therefore, if a state and a tribe were to negotiate such an arrangement, the tribe must have all Title IV-D provisions, such as automatic income withholding, paternity establishment up to the age of eighteen, and expedited procedures, in its tribal code or court proceedures. Not surprisingly, these conditions have major repercussions on any negotiating possibilities between the state and the tribe.

First, states would be reluctant to enter into any cooperative agreement with tribes who do not have the provisions in place, for fear of their own loss of federal dollars. Hence, negotiation with the tribe is not only stymied but is even counterproductive to the state's position. Second, tribes that desire or need access to federal funding in order to manage any child support enforcement activities are forced to adopt provisions they may feel are offensive, inappropriate, or unnecessary in the tribal setting. At this juncture, from the tribal perspective, the process looks less like an opportunity for bilateral negotiations and more like a one way street to much needed resources. It follows that for tribes who either cannot or will not adopt such provisions, negotiation with the state is out of the question.

Finally, the federal requirements for cooperative agreements effectively void any existing arrangements between a state and a tribe that are no longer considered in compliance with federal standards. This happened in North Dakota. Agreements were in place with various tribes that provided for tribal cooperation in providing state child support services on the reservation so that North Dakota could administer its program on a "state-wide" basis as required by federal law.[282] The agreements allowed county staff members to

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tions, and court decisions to the federal government for a determination as to whether the plan *continues* to meet the federal requirements. 45 C.F.R. § 301.13 (1988).

279. 42 U.S.C. § 654(7) (1988); 45 C.F.R. § 302.34 (1988). Virtually every state has one form or another of this kind of agreement. Presentation by Craig Hathaway, *supra* note 39.

280. The most recent codification of the elements required in cooperative agreements can be found at 45 C.F.R. § 303.107 (1988).

281. Under 45 C.F.R. § 303.107 (1988), the state "must ensure that all cooperative arrangements (c) [s]pecify that the parties will comply with Title IV-D of the Act, implementing Federal regulations and any other applicable Federal regulations and requirements."

282. An excerpt from one of the agreements is illustrative: "The Devils Lake Sioux Tribe agrees to cooperate and support the Child Support Enforcement activities initiated by the Benson County Board of Social Services on the Fort Totten Indian Reservation." Cooperative Agreement between Devils Lake Sioux Tribe and Benson County Board of Social Services, Article 1 (1981).

North Dakota first entered into a cooperative agreement with a tribe as early as 1977. The North Dakota Title IV-D agency is a state-supervised, county administered program so the governmental entity that was party to the agreement(s) with the tribe(s) was either one county or a group of counties. Presentation by Marcellus Hartze, Director, Child Support Administration, North Dakota Department of Human Services, Seminar on Child Support Enforcement for

go before the tribal court and use the tribal code in pursuing the collection cases.[283] The tribal programs were funded through federal, state, and county monies,[284] and in some instances the county employed and trained Indian residents to run the reservation IV-D office.[285]

Ironically, after neighboring South Dakota decided to follow North Dakota's lead in working out similar agreements with the tribes in its state, North Dakota administrators discovered that their agreements made them ineligible to continue receiving federal funding.[286] The federal response specified that if the state wanted to provide IV-D services on the reservation as a state IV-D entity and utilize tribal laws to provide that service, the tribal laws had to meet all of the federal requirements.[287] This was also true when a contracting attorney used tribal law before the tribal court.[288] Second, if the tribe desired to provide the services itself under a contract with the state, the tribal code also had to meet the federal mandates unless the tribe allowed IV-D services on the reservation to be provided under the state's existing law.[289] Because none of the agreements worked out between the state and the tribes met these requirements, North Dakota risked losing sixty-six percent matching funds from the federal government. The state, therefore, terminated all the remaining agreements but one.[290] Efforts are in progress to reach new agreements that meet the requirements but the situation threatens to put a

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Indian Children — Intergovernmental Perspectives, in Phoenix, Arizona (June 18, 1990). "The reason the state basically entered into cooperative agreements was to meet the federal requirement of the IV-D regulations of being state-wide. We took that seriously. The tribal people ... are also citizens of North Dakota and I think that's where we were coming from: we had to be state-wide, they were citizens, let's see what we can do about entering into some agreements and also providing child support on the reservation." *Id.* The regulation that spells out the requirements of state-wide operations is 45 C.F.R. § 302.10 (1988).

283. *See, e.g.*, Devils Lake Sioux Agreement, *supra* note 282, at Articles I, II. North Dakota law was not utilized whenever the county went on to the reservations to pursue collection. Presentation by Marcellus Hartze, *supra* note 282.

284. *See, e.g.*, Devils Lake Sioux Agreement, *supra* note 282, at Article II and Cooperative Agreement between The Three Affiliated Tribes of the Fort Berthold Indian Reservation and Dunn, McKenzie, Mountrail, McLean, and Mercer County Social Services Boards and Contract for Services with the Tribal Prosecuting Attorney, Article II, North Dakota (1984). The tribes did not expend any money in these instances and the state agreed to provide matching funds to the counties for the non-federal portion of the funding. *See, e.g.*, Fort Berthold Agreement, *supra*, at Article IV. This was done in order to help those counties that encompassed reservations and could not support their local share of the AFDC costs due to a low tax base. Presentation by Marcellus Hartze, *supra* note 282.

285. *See, e.g.*, Devils Lake Sioux Agreement, *supra* note 282, at Article II.

286. Hartze shared the story that his counterpart in South Dakota contacted him to find out North Dakota's approach and at the same time wrote to the federal office in Washington in order to clarify some points on providing IV-D services on reservations. The letter's response from the federal office was a surprise. Presentation by Marcellus Hartze, *supra* note 282.

287. *Id.*

288. *Id.*

289. *Id.* "And all of you know that that would be very difficult for a tribe to do because they are a sovereignty and ... they don't necessarily want the state laws on the reservation." *Id. See also supra* notes 263-266 and accompanying text.

290. Presentation by Marcellus Hartze, *supra* note 282. *See also supra* notes 32, 278.

strain on the states' working relationship with the tribes and appears to favor form over human substance.[291]

Of course, negotiation can still be successful when a tribe is interested in accessing federal and/or state resources and agrees to incorporate federal or state requirements. An Arizona organization made up of nineteen tribes in the state[292] worked with the Arizona Department of Economic Security to devise a standard form for Intergovernmental Agreements that enable Arizona tribes to acquire federal and state money to provide needed human services for Indian populations in the state.[293] Efforts to negotiate some such arrangement began in the 1970's but were not successful until the state was willing to interrelate with the tribes on a government-to-government basis.[294] Once this working relationship was established and it was decided that Intergovernmental Agreements would be the mechanism for the states and tribes to work together, efforts began to draft an agreement that was "compatible to the status of the respective governments."[295]

Under one model agreement, the Department and a tribe can contract for the joint exercise of governmental powers in the area of public health, safety, and welfare.[296] The contracting tribe provides "contract services" to

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291. Prior to this time, the state was on very good terms with the tribal judges, the tribal prosecuting offices, and tribal police. Presentation by Marcellus Hartze, *supra* note 282. Although Hartze is hopeful that cooperative agreements that meet the federal requirements can be negotiated if the tribes are interested enough in maintaining the services, the end result is to remake agreements already in existence.

292. The organization is The Intertribal Council of Arizona, Inc., the same entity that conducted the survey on child support enforcement reviewed extensively at *supra* note 49.

293. The creation of the agreements is authorized by ARIZ. REV. STAT. ANN. § 11-952 (1990) which states: "If authorized by their legislative or other governing bodies, two or more public agencies by direct contract or agreement may contract for services or jointly exercise any powers common to the contracting parties and may enter into agreements with one another for joint or cooperative action...." "Public agency" is defined to include Indian tribes as well as federal and state departments and agencies. ARIZ. REV. STAT. ANN. § 11-951 (1990).

The Agreement consists of a front page to be filled in by the contracting tribe and signed by the designated representatives of the parties. The following pages spell out the rights and obligations of each party in standardized form. An Annex A and Annex B can then be added to the general form to detail the specifics of the particular services contracted for. Arizona Department of Economic Security, Tribal Government Intergovernmental Agreement (1987).

294. This change came about once the Arizona Department of Economic Security, in conjunction with the governor's office, set certain policies concerning how they would look at tribal governments, "not ... as ethnic groups, minority groups, or special interest groups, but as governments." Presentation by John Lewis, President, Intertribal Council of Arizona, Inc., Seminar on Child Support Enforcement for Indian Children — Intergovernmental Perspectives, in Phoenix, Arizona (June 18, 1990). In addition, then, to the land claim issues being negotiated on the federal level as Deloria notes in his article, *see infra* note 262, here is an instance when tribes actively sought that kind of relationship with a state government.

295. Presentation by John Lewis, *supra* note 294. The state attorney general's office and tribal attorneys worked to draft the "boilerplate" for the intergovernmental agreements that was specific to tribal government, addressing issues important to the tribes such as sovereignty, sovereign immunity, reporting procedures, the scope of audits and notifications, recognition of tribal laws when appropriate, Indian preference in hiring, and the Indian Civil Rights Act. *Id.*

296. Tribal Government Intergovernmental Agreement, *supra* note 293, at 1. The exact language of the provision is:

> Whereas the Department and the Provider [the tribe] are authorized by ARIZ. REV. STAT. ANN. § 11-951 *et seq.* to enter into agreements for the joint exercise of any power common to the contracting parties as to governmental func-

eligible recipients and can be reimbursed by the Department up to a particular amount specified in the contract.[297] The tribe must comply with all applicable state, federal, local and tribal laws, rules, regulations, standards and Executive Orders.[298] The agreement also contains very specific accounting and reporting requirements subject to inspection or audit by the Department.[299] To date an Agreement is not currently in place with any Arizona tribe in the area of child support enforcement but prior experience using the Agreements may provide a starting point for dealing with the federal requirements of Title IV-D.[300]

In sum, the opportunity for negotiation exists when tribes are not interested in receiving AFDC funds or when the tribe does not object to adopting certain federal or state requirements in order to access federal and state dollars. Unfortunately, for those tribes caught in between, the familiar problem of legal form overcoming human substance remains. In those instances, it is most urgent that the actual human problem behind the Indian Title IV-D cases become the center of the discussion. The central idea is to find a solution that works for both the tribe and the state that is in the best interests of the Indian family. Tribal involvement and the acknowledgement of tribal sovereignty are crucial first steps. Freedom and flexibility in negotiation is the best method. The goal remains: finding a human solution to child support enforcement across Indian Country borders.

CONCLUSION

The anomolous legal status of Indian tribes as defined in federal Indian law has resulted in numerous jurisdictional disputes between the tribes and the states. This jurisdictional ambiguity is evident in the state court opinions considering whether or not the state court has subject matter jurisdiction over a Title IV-D child support collection proceeding against an Indian defendant residing in Indian Country. Also evident in the opinions is the malleability of the definition of tribal sovereignty as interpreted in the case law. As a result, not only is there no clear answer to the state court's question, but tribal court authority is subjected to an ever-narrowing definition. At the same time, the human problem that prompted the proceeding in the first place is largely

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tions necessary to the public health, safety and welfare, and the proprietary functions of such public agencies;...

Therefore, the Department and Provider agree to abide by all the terms and conditions set forth in this Contract.

297. *Id.* at Sections 2.05; 4.04.

298. *Id.* at Section 3.02.

299. *Id.* at Sections 2.03, 2.06, 3.14, 3.15.

300. Other state departments such as the Arizona Department of Transporation and the Department of Education are using the intergovernmental agreement mechanism for various programs with tribes. Presentation by John Lewis, *supra* note 294. "It all goes back to how the tribes look at their relationship with the states and see it as government-to-government reflected through formal documents and agreements and periodic review of those agreements.... [W]e have reached some ways of having a vehicle to a very positive working relationship." *Id.* The different departments and the different tribes are free to negotiate any modifications in the basic Agreement. "So that gives a lot of flexibility to tribes but it also gives an opportunity for some state-wide policy in relation to tribal governments as well as meeting the individual and unique needs of tribal governments that are engaging in this particular activity." *Id.*

overlooked in the midst of the legal discourse. Finding a solution to child support enforcement across Indian Country boundaries lies in recognizing the human problem and restating the legal problem that flows from that recognition. Such a restatement encompasses a tribal determination of the welfare of the Indian family and the requirement that the tribe and the state work together through negotiation and agreement. The process of negotiation, in turn, presupposes the proper role and respect due Indian tribes as sovereigns, which exists beyond the limits of a legal construct.

Several tribes and states have already negotiated various agreements addressing both tribal cultural concerns and state efficiency concerns. Unfortunately, due to the funding structure of the Title IV-D legislation, negotiation opportunities are less flexible when the tribe seeks access to federal or state funding. How these barriers will be dealt with depends upon difficult tribal choices and the willingness of states to work with the tribes in devising creative solutions. Above all, if the human problem remains the focus of the inquiry, it is possible for the state and the tribe to act jointly, based on their common concern over the welfare of Indian families.

The problem of child support enforcement is capable of being solved on both the legal jurisdictional level and the human level. Through negotiation, the state and the tribe can expend their energy on working for the welfare of the Indian child and family rather than haggling over the anomaly of federal Indian law's jurisdictional analysis. These efforts, in turn, take a few tentative steps toward putting the Indian back in Indian law.[301]

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301. Deloria writes that "what is missing in federal Indian law are the Indians." Deloria, *supra* note 1, at 205.