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Schilfgaarde, Lauren van
Shelton, Brett

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ARTICLE

USING PEACEMAKING CIRCLES TO INDIGENIZE TRIBAL CHILD WELFARE

Lauren van Schilfgaarde*
& Brett Lee Shelton†

Historical child welfare policies explicitly aimed to exterminate Indigenous culture and disrupt tribal cohesion. The remnants of these policies form the foundation for the contemporary child welfare system. These policies view the child as an isolated and interchangeable asset, over which parents enjoy property-like rights, and in which the child welfare system is incentivized to "save" children from perceived economic, cultural, and geographic ills through an adversarial process. Extended family, community members,

* Lauren van Schilfgaarde (Cochiti Pueblo) is the San Manuel Band of Mission Indians Director for the Tribal Legal Development Clinic at the UCLA School of Law. The Clinic serves tribes and tribal organizations on a wide swath of project subject-matters, including family law, cultural resource protection, voting, justice systems, sacred places, and gender-based violence. van Schilfgaarde previously served as the Tribal Law and Policy Institute's Tribal Law Specialist, which included facilitating technical assistance to tribal courts, including Healing to Wellness Courts. van Schilfgaarde currently serves as Co-Chair of the American Bar Association's Native American Concerns Committee, as a Commissioner for the Lawyers Network Commission of the Center for Reproductive Rights, and as a Board Member of the Doris Duke Charitable Foundation Child Well-being Program. She previously served on the board of the National Native American Bar Association and the California Indian Law Association. van Schilfgaarde graduated from the UCLA School of Law in 2012 and from Colorado College in 2008. van Schilfgaarde was raised in Albuquerque, New Mexico, and is mother to Aurora and Jack Bear.

† Brett Lee Shelton (Oglala Sioux Tribe) is a Senior Staff Attorney at the Native American Rights Fund (NARF) and also serves as an appellate court justice for a variety of tribal nations. His work at NARF focusses on the Indigenous Peacemaking Initiative, Sacred Places protection, and other cultural protection and religious liberty issues. Brett has extensive experience representing and advising tribal governments, agencies, and enterprises in a wide variety of matters, as well as contributing legal advice and litigation support for various private individuals, businesses, tribal organizations, and development initiatives. He received his law degree from Stanford University, and a Master of Arts from the University of Kansas.

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and cultural connections have minimal voice or value. These underpinnings inform federal policies that influence all child welfare systems, including tribal child welfare systems. The result is that tribal child welfare systems perpetuate the individual, rights-centric, adversarial child welfare system that harms Indigenous families.

Indigenous children have the right to maintain connections to their Indigenous family, tribal nation, culture, and cultural education. These rights translate into obligations the community owes to the child to ensure that these connections are robust. Tradition-based systems of dispute resolution—frequently called "peace-making," among other names, but which we will call "circle processes"—offer a hopeful alternative.

Circle processes are rooted in an Indigenous worldview that perceives an issue, particularly a child welfare issue, as evidence of community imbalance that directly impacts the community, and conversely, imparts an obligation on the community to respond. Through the circle, family and community can complete their natural reciprocal relationship.

Tribal child welfare has the potential to be a transformative system that promotes community, family, and children's health and the self-determination and sovereignty of tribes. This Article outlines the ways in which the modern tribal child welfare system has been structured to compartmentalize families and perpetuate historical federal policies of Indian family separation. This Article then suggests that circle processes are a framework for re-Indigenizing the tribal child welfare system to not just improve outcomes (for which it has the potential to do), but to also honor the interconnected, responsibility-oriented worldview of Indigenous communities. Ultimately, however, tribes should lead that re-Indigenization process, whether through a circle process framework or otherwise.

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I. INTRODUCTION

COVID-19 has revealed a startling truth: the nuclear family cannot survive without the support of community and systems around it. For many Indigenous[1] communities, this truth is not so startling—it is obvious. The child's well-being is dependent on the community, and the community's well-being is dependent on the child. The connections and relationships between the child-parent nuclear family and the community should no longer be ignored; rather, they should be elevated and leveraged to once again support the family's survival.

Indigenous children have the right to maintain connections to their Indigenous family, to their tribal nation, and to their culture and education in that culture.[2] For Indigenous communities, these rights translate into obligations the community owes to the child to ensure these connections are robust. But, the child welfare system as applied to Indigenous communities originated with the goal to separate Indigenous children from their Indigenous parents and culture. The child welfare system today operates as a remnant instrument of colonization, prolonging outdated and misguided efforts to assimilate Indigenous children away from their own cultures. Moreover, continued utilization of adversarial and individual-centric principles in family matters tends to harm children more than help them, and this is true in both Indigenous and non-Indigenous settings. The result is additional unnecessary harms to the well-being of children that are already in harm's way. These harms could be avoided, and child welfare outcomes

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[1] We use the terms "Indigenous" and "Indigenous People" to refer to the American Indian, Alaska Native, and Native Hawaiian original inhabitants of what is now the United States of America. We additionally use terms such "Native," "Native American," and "Indian," particularly as they reference other documents and policies. We use these terms interchangeably, seeking to be inclusive and respectful of the Peoples and tribes that represent them. We note, however, that indigeneity is both a political and a racial status, with overlapping and distinct legal meanings. While federal policies frequently impact Indigenous children regardless of their political status, the ability of tribal child welfare systems to operate and respond depends on the political sovereignty of tribal nations.

[2] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, ¶ 12, (Sept. 13, 2007). *See also* Kristen A. Carpenter & Lorie M. Graham, *Human Rights to Culture, Family, and Self-Determination: The Case of Adoptive Couple v. Baby Girl*, *in* INDIGENOUS RIGHTS IN INTERNATIONAL LAW (Stefan Kirchner & Joan Policastri eds., forthcoming).

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actually supported and enhanced, if tradition-based systems of dispute resolution—frequently called "peacemaking," among other names, but which we will call "circle processes"—were employed in the child welfare context.

Many tribes operate their own child welfare systems, and many are attempting to employ circle processes in child welfare cases within their jurisdictions. Generally, circle processes are facilitated family forums in which, because of an issue or incident, the impacted parties and their families gather to discuss the issue(s) and develop a resolution by consensus. The extended family and community are included in the forum to actively participate within the assessment and case planning process, providing substance to the active efforts families are owed in their effort to reunify. Circle processes are rooted in an Indigenous worldview that perceives an issue, particularly a child welfare issue, as evidence of community imbalance that directly impacts the community, and conversely, imparts an obligation on the community to respond. Through the circle, family and community can complete their natural reciprocal relationship.

Tribal child welfare has the potential to be a transformative system that promotes community, family, and children's health and the self-determination and sovereignty of tribes. However, rather than centering a circle-like process, or even providing space for its inclusion, the tribal child welfare system is compelled to mirror its non-tribal child welfare system counterparts. The typical modern tribal child welfare system tends to be an outgrowth of colonial systems aimed towards separation and removal, and is thus detached from Indigenous child welfare practices and approaches. Contemporary federal funding requirements exacerbate this poor fit because they further pressure tribal systems towards a model of adversarial, permanency-oriented processing, similar to non-tribal systems. This Article outlines the ways in which the modern tribal child welfare system has been structured to compartmentalize families and perpetuate historical federal policies of Indian family separation. This Article then suggests that circle processes are a framework for re-Indigenizing the tribal child welfare system to not just improve outcomes (which it has the potential to do), but to also honor the interconnected, responsibility-oriented worldview of Indigenous communities. Ultimately, however,

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tribes should lead that re-Indigenization process, whether through a circle process framework or otherwise.

II. THE CHILD WELFARE SYSTEM IS AN EXTENSION OF ANTIQUATED AND ASSIMILATIVE COLONIAL POLICIES

A. Historical Federal Indian Child Welfare Policies

Government intrusion into Indigenous families is rooted in a long history of federal policies designed to separate Indigenous children from their families, communities, and cultures. The federal approach to Indigenous children either morphed or simply galvanized into a deep-seated perception that Indigenous parenting is problematic and should be liberally disrupted. The impacts of these policies are still being felt by Indigenous children today.[3]

Throughout the nineteenth and early twentieth centuries, official U.S. policy towards Indigenous communities, and more particularly their children, was forced assimilation,[4] save for occasional periods when extermination was the explicit goal.[5] As a component of assimilation, the U.S. Commission of Indian Affairs advocated for the forcible removal of Indigenous children from their tribes as "the only successful way to deal with the 'Indian problem."[6] Subsequently, of course, forcible removal of children from a group has been defined as genocide,[7] but it was

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[3] Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 48 (2008) (noting we are just one generation removed from the landmark enactment of the Indian Child Welfare Act. Under Haudenosaunee law, "we have six more generations to consider before we can truly understand the full impact of this law").

[4] *See* NATIVE AM. RTS. FUND, TRIGGER POINTS: CURRENT STATE OF RESEARCH ON HISTORY, IMPACTS, AND HEALING RELATED TO THE UNITED STATES' INDIAN INDUSTRIAL/BOARDING SCHOOL POLICY 5–17 (2019), https://www.narf.org/nill/documents/trigger-points.pdf [https://perma.cc/8KF6-5RV6] (encapsulating federal assimilation policies towards Native American children from 1618 through the 1970s).

[5] For an in-depth examination of extermination policies in just one region, see BENJAMIN MADLEY, AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE 1846–1873 (2016).

[6] H.R. REP. NO. 104–808, at 15 (1996) (citing an 1867 Report to Congress). *See also* NATIVE AM. RTS. FUND, *supra* note 4, at 6, 8–9.

[7] G.A. Res. 260 A (III), United Nations Convention on the Prevention and Punishment of the Crime of Genocide, art. 2 (Dec. 9, 1948); United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 2, art. 7.2.

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rationalized as the compassionate alternative to extermination in earlier times.

From early colonial missions to federally-sponsored boarding schools, education was the primary means of separating Indigenous children from their families and communities.[8] The explicit intent was to eradicate Indigenous culture, and it was accomplished through prohibitions on speaking Indigenous languages, practicing Indigenous religions, partaking in cultural practices, and visiting parents and families.[9] Cultural eradication was enforced through mandatory boarding school as well as through the creation of a separate court system, the Court of Indian Offenses, and the Department of Interior's promulgation of Civilization Regulations outlawing traditional cultural practices in 1884, 1894, and 1904.[10]

Conditions in the schools were frequently less than sanitary or humane, and efforts to disband them gained traction in the latter half of the twentieth century. However, rather than identify assimilation through the separation of families as a failed goal, schools were merely identified as a failed means. Assimilation transitioned to the realm of child welfare. The thinking was that Indigenous children would be better off in non-Indigenous households wherein they would be further exposed to American values, customs, and lifestyles. Their assimilation would thus be more successful.[11] Conversely, missing out on this Americanization opportunity by remaining in Indigenous communities and their attendant poverty was not just failed assimilation, but neglect. Between 1958 and 1967, the Children's Bureau, the Bureau of Indian Affairs, and the Child Welfare League of America facilitated the Indian Adoption Project.[12] Indigenous children were specifically identified and tagged for adoption, cultivating an adoption market specifically

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[8] Graham, *supra* note 3, at 51; NATIVE AM. RTS. FUND, *supra* note 4, at 5–13.

[9] Graham, *supra* note 3, at 52; NATIVE AM. RTS. FUND, *supra* note 4, at 5–6, 8–9, 12–13.

[10] MICHAEL MCNALLY, DEFEND THE SACRED: NATIVE AMERICAN RELIGIOUS FREEDOM BEYOND THE FIRST AMENDMENT 40–61 (2020).

[11] DAVID FANSHEL, FAR FROM THE RESERVATION 119 (1972).

[12] Press Release, U.S. Dep't of the Interior, Bureau of Indian Affs., Indian Adoption Project Increases Momentum (Apr. 18, 1967), https://www.indianaffairs.gov/as-ia/opa/online-press-release/indian-adoption-project-increases-momentum [https://perma.cc/ED3A-9GRZ].

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for Indigenous children.[13] During this time, child welfare systems were shockingly successful in removing children from their parents and cultures.[14]

B. Child Welfare as Child Saving

Indigenous child-rearing is not the only cultural practice to be devalued, perceived as in conflict with the dominant society, and subsequently conflated with child neglect.[15] But for Indigenous families, the stage has been set for hundreds of years; outside institutions, with both nefarious and altruistic intentions, have scorned, scrutinized, interfered with, and dismantled Indigenous families. This systemic invasion is rationalized in part by the system's perceived obligation to "save" Indigenous children through ensuring their exposure to "American values."

The contemporary child welfare system unfortunately is an outgrowth of its assimilation-driven past—structuring a system that is largely operated by community outsiders, with a high tolerance for removals, and a bias against the culture and contexts of these families. As Susan Brooks and Dorothy Roberts note, this is because the system at large, and in line with its application to Indigenous children, continues to be guided by a hubristic drive for "child saving."[16] The driving force to "save children" presumes a set of conditions from which children must

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[13] *Id.* ("It was a record year for the project … Temporarily, because of increased interest, there are more prospective parents than there are Indian children referred to the project for adoption.").

[14] *Problems That American Indian Families Face in Raising Their Children and How These Problems Are Affected by Federal Action or Inaction: Hearings Before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess., 4 (1974) The Association on American Indians Affairs submitted their 1969 report showing that in most states with large American Indian populations, roughly 25 to 35 percent of Indian young people had been separated from their families, and that Indian children were much more likely to experience out-of-home placement than non-Indian children. *Id.*

[15] Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (May 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/ [https://perma.cc/WEM7-CJH3] ("Parenting choices, such as whether to co-sleep with an infant or whether to leave an older child unattended at home, are routinely questioned and held against Black mothers in family court.").

[16] Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453 (2002).

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be saved. Today, those conditions are largely poverty-induced, which is used to justify taking children away from their families and communities, regardless of the extent of maltreatment or the trauma of removal (or the historical contexts that contribute to correlations between poverty, race, and tribal lands). The child welfare system often equates poverty with neglect, resulting in distressingly disproportionate removals.[17]

While the explicit goal of eradicating tribes might have dimmed by the time of the Indian Adoption Project, the underlying assumptions regarding Indigenous inferiority remain ingrained in child welfare to this day. Not only are Indigenous families most likely to live in poverty,[18] their customs and lifeways are also more susceptible to suspicion. Studies evaluating child welfare practices as applied to Indigenous children in the 1960s and 1970s found that the vast majority of removals were based on vague grounds like "neglect" or "social deprivation."[19] Congress noted in its 1978 legislative findings to support the Indian Child Welfare Act that non-Indian social workers were frequently not just culturally inept, but perceived Indigenous deviations from the nuclear family, including Western modes of parenting and discipline or even simply living on tribal lands, as grounds for removal.[20] Today, despite forty years of concentrated federal efforts to combat this bias,[21] removal of Indigenous children from their homes remains disproportionately and tragically high.[22]

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[17] *Id.*

[18] *American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 6, 2017), https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff20.pdf [https://perma.cc/84J9-GWAS]. American Indians and Alaska Natives have a poverty rate of 26.2 percent, the highest rate of any racial group. *Id.*

[19] MORRIS K. UDALL, ESTABLISHING STANDARDS FOR THE PLACEMENT OF INDIAN CHILDREN IN FOSTER OR ADOPTIVE HOMES, TO PREVENT THE BREAKUP OF INDIAN FAMILIES, AND FOR OTHER PURPOSES, H.R. REP. NO. 1386 at 10 (1978).

[20] *Id.*

[21] *See* Indian Child Welfare Act of 1978, 25 U.S.C. § 1901.

[22] NAT'L INDIAN CHILD WELFARE ASSOC., TIME FOR REFORM: A MATTER OF JUSTICE FOR AMERICAN INDIAN AND ALASKAN NATIVE CHILDREN 1 (2007) ("The over representation of AI/AN children can be two to three times the rate of other populations in some states.").

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C. Parental Rights as Property Rights

After identifying a child in need of saving, the system has eased the justification for the extreme remedy of removal by divorcing the family from their community and context and instead viewing them as isolated actors. Families are recast essentially into "property owners." This framework not only dehumanizes children and dilutes our duties owed to them as people, but it also undercuts any potentially meaningful community or extended family support system that might have otherwise been available to parents.

In the legal roots of the American system, children were considered to have no rights.[23] Instead, parents, fathers in particular, were considered to exert full dominion over their children.[24] Under ancient Roman law, fathers had the right to kill their children,[25] and in the Massachusetts Bay Colony, children could be put to death for disobeying their parents.[26] The legal concept of "family" is rooted in a property construct in which the rights are exclusively held by the parents to provide "care, custody, and control."[27] While contemporary parental rights are no longer expressed in explicit property terms, they are nevertheless still approached within this framework. To remove a child from a parent's custody is to challenge the parent's *right*

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[23] *See e.g.*, Skinner v. Oklahoma, 316 U.S. 535 (1942) (holding that the right to marry, establish a home and rear one's children as one deems fit are among one's basic civil rights guaranteed by the Fourteenth Amendment); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (finding that parents' rights to direct the upbringing and education of children under their control is fundamental); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that a parent has a fundamental constitutional right in directing the upbringing and education of their child).

[24] Samantha Godwin, *Against Parental Rights*, 47 COLUM HUM. RTS. L. REV. 1, 31 (2015).

[25] *Id.* (citing WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 452 (Edward Christian ed., 15th ed. 1809) ("The antient [sic] Roman laws gave the father a power of life and death over his children.")).

[26] *Id.* (citing ROBERT REGOLI ET AL., DELINQUENCY IN SOCIETY: THE ESSENTIALS 14 (2010)).

[27] Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. STATE U. L. REV. 645, 649 (2014) (citing Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing "care, custody, and control" as "perhaps the oldest of the fundamental liberty interests recognized by this Court.")). *See also Pierce*, 268 U.S. at 534–35 (holding that a statute requiring public school enrollment unconstitutionally and "unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 399–400 (holding that a statute barring foreign language instruction unconstitutionally violated parents' liberty interests).

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to exert decision-making control over that child. Indeed, the child welfare system purports to assume that same decision-making authority in such instances.

Framing parental rights as property rights creates a number of challenges for child welfare. First, a focus on the child's well-being quickly transforms into an antagonistic polarity between parents and the system. The adversarial framework pits the parents against the court and service providers. Like the criminal justice system, parents are compelled to deny all allegations, frequently delaying the provision of services because parents deny having any problems. Worse, for parents to even access some of these programs, including ones they seek and would benefit from, they are often forced to first relinquish custody of their children.[28] Compounding the adversarial conundrum, social workers troublingly operate as both coercive investigators and the provider of services.[29] Their ability to offer support is undermined by their intimidating role in initiating removal.[30] For Indigenous families, the threatening perception of social workers is all too familiar, reinforcing generations of mistrust.[31]

Second, the child welfare system frames parenting as an isolated system, occurring solely within the privacy of the home. Western values of individualism and self-efficacy reinforce this notion.[32] Challenges that parents may experience are seen as compartmentalized and private issues, devoid of any systemic influences, and thus parents are left to attempt to remedy them on their own. Child welfare responses are therefore structured as "programs," "classes," and "choices" that parents can use to *earn* back the right to care and control their child again. If parents

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[28] Dorothy E. Roberts, *Child Welfare's Paradox*, 49 WM. & MARY L. REV. 881, 893 (2007).

[29] *Id.* at 886.

[30] *Id.* at 887.

[31] *See* Terry L. Cross, *Child Welfare in Indian Country: A Story of Painful Removals*, 33 HEALTH AFFS. 2256 (2014); Angela Sterritt & Paisley Woodward, *'Judged and Ashamed': Indigenous Parents Describe Scrutiny, Mistrust of Social Workers*, CBC NEWS, https://www.cbc.ca/news/canada/british-columbia/judged-and-ashamed-indigenous-parents-describe-scrutiny-mistrust-of-social-workers-1.5059294 [https://perma.cc/E4SE-FF23?type=image] (Apr. 9, 2019).

[32] Sheri Freemont, *Gold Standard Lawyering for Child Welfare System-Involved Families: Anti-Racism, Compassion, and Humility*, GUARDIAN, Winter 2020, at 1.

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fail, they are perceived to lack commitment or willingness to do what it takes to get their children back, despite the lack of culturally appropriate services.[33] Removing the child is therefore not just in the child's "best interest": it is a punitive response to parents that no longer deserve the right to parent.

Third, by framing parental rights as property rights, the extended family and community are effectively barred from any role as relevant actors who might help the child. The tragedy of this shift stems from the fact that, in reality, communities impact children's development, well-being, and life chances.[34] Numerous Indigenous communities have codified the connection between children and the community as an explicit value.[35] Yet, the community is rarely considered when evaluating a child's removal or placement, or what responsibility the community has to the child, including ensuring a healthy placement and healthy reunification. Instead, social workers are often strangers to the community, and their cultural ignorance can lead to inappropriate removals.[36] Caseworkers exert extensive decision-making authority, with minimal accountability to the community they serve. Meanwhile, when children are removed, they tend to not just be removed from the family, but also from the entire community. Generations of systemic poverty, violence, and the myriad collateral consequences of these destructive cycles make

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[33] See, for example, the Family First Prevention Services Act of 2018, in which Congress seemingly acknowledged the inapplicability of evidence-based practices to Indigenous children by permitting tribal child welfare systems to operate "services and programs that are adapted to the culture and context of the tribal communities served." 42 U.S.C. § 679c(c)(1)(E).

[34] Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 26 (2005) [hereinafter Roberts, *Community Dimension*] (citing David B. Mitchell, *Building a Multidisciplinary, Collaborative Child Protection System: The Challenge to Law Schools*, 41 FAM. CT. REV. 432, 436 (2003)).

[35] *See, e.g.*, TULALIP TRIBES JUVENILE & FAM. CODE, ch. 4.05.020 ("The Tulalip Tribes endeavors to protect the best interest of Indian children by . . . maintaining the connection of children to their families, the Tribes, and Tribal community when appropriate); OGLALA SIOUX TRIBE CHILD & FAM. CODE, WAKANYEJA NA TIWAHE TA WOOPE § 401.4 (listing expressed purposes of the Child and Family Code, including "to provide services and cultural support to children and families to strengthen and rebuild the Oglala Lakota Nation").

[36] H.R. REP. NO. 1386, *supra* note 19, at 10 ("In judging the fitness of a particular family, many social workers, ignorant of Indian cultural values and social norms, make decisions that are wholly inappropriate in the context of Indian family life and so they frequently discover neglect or abandonment where none exists.").

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the availability of background check-proof households sparse in Indigenous communities.[37] This is exacerbated by the increased number of multi-generational, cohabitational households, further decreasing opportunity for community involvement by shrinking the pool of available foster care and permanent homes.

D. The Indian Child Welfare Act

These child welfare system deficiencies are not a mystery. In fact, Congress recognized these failings as they specifically applied to Indigenous people and enacted the Indian Child Welfare Act (ICWA). Stirred by the shocking extent to which Indigenous children were being removed, recognizing that cultural bias, the lack of a tribal role, and a systemic embrace for removal all converge to exacerbate this loss, and after years of advocacy by leaders from Indigenous communities,[38] Congress formally enacted ICWA in 1978.[39]

ICWA was a rare instance of the United States leading international evolution in legislation concerning Native affairs. Almost three decades later, the United Nations' 2007 Declaration on the Rights of Indigenous Peoples (the Declaration) called for not just preventing the removal of Indigenous children, but recognizing the right of Indigenous "families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child."[40] Thus, ICWA started the United States down a child welfare path that is now better illuminated by international normative guidance. That guidance provides that not only must the systemic removal of Indigenous children end, but Indigenous Peoples must be directly involved in the

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[37] Courtney Lewis, *Pathway to Permanency: Enact a State Statute Formally Recognizing Indian Custodianship as an Approved Path to Ending Child in Need of Aid Cases*, 36 ALASKA L. REV. 23 (2019).

[38] H.R. REP. NO. 1386, *supra* note 19, at 9 ("Surveys of States with large Indian populations conducted by the Association on American Indian Affairs (AAIA) in 1969 and again in 1974 indicate that approximately 25–35 percent of all Indian children are separated from their families and placed in foster homes, adoptive homes, or institutions. In some States the problem is getting worse: in Minnesota, one in every eight Indian children under 18 years of age is living in an adoptive home; and in 1971–72, nearly one in every four Indian children under 1 year of age was adopted.").

[39] Indian Child Welfare Act, 25 U.S.C. § 1901.

[40] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 2, at annex.

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reunification process. Today, ICWA is considered the gold standard of child welfare policy.[41]

Through ICWA, Congress attempted two critical structural changes to state court proceedings: (1) it affirmed the importance of tribal control and decision-making in child welfare;[42] and (2) it attempted to slow the high rate of removals by raising the standards to be met before children could be removed and by increasing the amount and quality of services offered to parents. Countering the lack of a community role in typical child welfare, ICWA provides standing for tribes through exclusive tribal jurisdiction for Indian children located on tribal lands[43] and the right to intervene[44] or have cases transferred to tribal court for children located off tribal lands.[45] Providing for tribal participation is seemingly nominal—responsive to the child's dual citizenship and respectful for their legal and cultural ties to the tribal community. But, it is also revolutionary, providing tribes a meaningful opportunity to ensure their children are not lost and to communally care for them—both of which are in line with the calls of the Declaration.

Beyond tribal participation, ICWA embraces a groundbreaking philosophical shift for child welfare. For example, ICWA requires that before an Indian family can be broken up, the court must prove that staying with their family would result in "serious emotional or physical damage" to the child, regardless of any conflicting lesser state standards.[46] This combats potential impacts of "feelings" that an Indigenous child might be better off in a non-Indigenous setting. The court must then use "active efforts" to provide remedial services and rehabilitative programs *and* prove that they were unsuccessful before terminating any parental rights.[47] "Active efforts" has been repeatedly held to be a higher standard than the

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[41] Freemont, *supra* note 32, at 2 (citing Brief for Casey Programs and 30 Other Organizations Working with Children, Families, and Courts to Support Children's Welfare as Amici Curiae Supporting Appellants at 2, 3, 5, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479) (en banc)).

[42] LYSCHA MARCYNYSZYN ET AL., AMERICAN INDIAN TITLE IV-E APPLICATION PLANNING PROCESS: TRIBAL PROGRESS, CHALLENGES, AND RECOMMENDATIONS (2012).

[43] 25 U.S.C. § 1911(a).

[44] 25 U.S.C. § 1911(c).

[45] 25 U.S.C. § 1911(b).

[46] 25 U.S.C. §§ 1912(e)–(f).

[47] 25 U.S.C. § 1912(d).

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"reasonable efforts" required under most state laws for all other child welfare cases,[48] countering inclinations that parents bear the burden of proving they have earned back the right to parent. Further, should terminating parental rights be unavoidable, ICWA provides for adoptive and foster care placement preferences that prioritize maintaining the child's connection to their extended family, other members of their tribe, or, if those placements are not feasible, other Indians.[49] ICWA explicitly acknowledges and values the relationship between the child and their extended family and community. Like the parents, the extended family and community have standing and accompanying obligations baked into the law.

Even after over forty years, ICWA provides a useful, forward-looking, human rights framework for conceptualizing and structuring tribal child welfare. Removal should be situated as a dire last resort. Systems should shoulder the burden of actively servicing families towards reunification. Extended families and communities should be prioritized as the optimal placements. Critically, tribes and their communities should have an active role in case-planning and decision-making. In both ICWA's focus on reunification and its space for tribal participation, there are structural opportunities for Indigenous innovations, such as a circle process.

However, since ICWA philosophy does not reflect mainstream child welfare, the implementation of ICWA has been met with resistance. ICWA compliance has been and continues to be sporadic,[50] and state systems continue to poorly serve Indigenous communities.[51] Among numerous calamitous

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[48] *See, e.g.*, State v. Jamyia M. (*In re* Jamyia M.), 791 N.W.2d 343 (Neb. Ct. App. 2010) (holding that exceptions in the state's "reasonable efforts" statute did not apply in ICWA cases, where the "active efforts" standard governs); State *ex rel.* C.D., 200 P.3d 194, 205 (Utah App. 2008) (noting that "the phrase active efforts connotes a more involved and less passive standard than that of reasonable efforts").

[49] 25 U.S.C. § 1915(a)–(b).

[50] *See* DAVID E. SIMMONS, NAT'L INDIAN CHILD WELFARE ASS'N, IMPROVING THE WELL-BEING OF AMERICAN INDIAN AND ALASKA NATIVE CHILDREN AND FAMILIES THROUGH STATE-LEVEL EFFORTS TO IMPROVE INDIAN CHILD WELFARE ACT COMPLIANCE 2 (2014); Kathryn E. Fort, *Observing Change: The Indian Child Welfare Act and State Courts*, N.Y. STATE BAR ASSOC. FAM. L. REV., Spring 2014, at 1.

[51] *See, e.g.*, Oglala Sioux Tribe v. Van Hunnik, 100 F.Supp.3d 749 (S.D. 2015) (holding that Pennington County, South Dakota, systematically violated

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consequences, this means notice to tribes and tribal participation are also sporadic. In addition, ICWA faces constant and numerous legal attacks, including challenges to its constitutionality.[52] Almost as if ICWA does not exist, the child welfare system continues to disproportionately remove children of color and those in poverty and process their cases with cool neutrality.[53] Even when states do attempt to implement the Act,[54] the provisions of ICWA and the child welfare policy they embody must compete with other conflicting federal child welfare policies that more closely resemble typical "child saving" tendencies to intervene and remove. These conflicting policies trickle down to tribes, impacting the child welfare systems operated by tribes.

E. Pressures on Tribal Child Welfare Systems to Westernize

Tribal child welfare and court systems are operated by hundreds of tribes, and are continuously growing in quantity, size, and sophistication. Tribes have experimented with adjustments to the child welfare model, such as embracing customary adoption, extended family care, and guardianship as culturally appropriate paths to permanency.[55] Yet, much like Indigenous families, tribal systems have been heavily pressured to assimilate to Western forms, despite ICWA. In effect, because of various modern and historical federal structures designed to

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the rights of Indian parents and tribes in state child custody proceedings). *But see* Oglala Sioux Tribe v. Fleming, 904 F.3d 603 (8th Cir. 2018) (dismissing the claims, holding that the district court should have abstained from exercising jurisdiction under principles of federal-state comity).

[52] *See, e.g.*, Brackeen v. Haaland, 994 F.3d 249 (5th Cir. 2021) (No. 18-11479) (en banc).

[53] Roberts & Sangoi, *supra* note 15 ("Every day . . . [families are subject] to extraordinary scrutiny and vilification. These judges and officials use consequences of poverty . . . as evidence of child neglect. Family members who have prior criminal or family court involvement are deemed risks to their children, without any consideration for the well-documented overcriminalization of poor Black communities.").

[54] For example, while all states are mandated to comply with ICWA, several states have enacted their own versions of ICWA into state law. *See, e.g.*, Michigan Indian Family Preservation Act, MICH. COMP. LAWS § 712B.3 (2012); Nebraska Indian Child Welfare Act, NEB. REV. STAT. § 43.1503 (2015); Minnesota Indian Family Preservation Act, MINN. STAT. ANN. § 260.755 (West 2017); Washington Indian Child Welfare Act, WASH. REV. CODE ANN. § 13.38.040 (West 2017).

[55] Barbara Ann Atwood, *Permanency for American Indian and Alaska Native Foster Children: Taking Lessons from Tribes* (Ariz. Legal Studs., Discussion Paper No. 08-22, 2008).

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maintain control, including funding streams, tribal child welfare systems often look more like federal systems operated by tribes rather than being tribal in nature. Tribes have had little to no choice in the matter.

Tribal governments were initially denied any recognition under U.S. law, the absence of which was used to justify the systemic dispossession of Indigenous land and sovereignty.[56] The modern advent of tribal courts was through the Court of Indian Offenses, which was originally designed to regulate away Indigenous culture.[57] After centuries of assault, removal, and diminishment, tribal self-government was finally acknowledged and encouraged under U.S. law in the 1934 Indian Reorganization Act (IRA).[58] The IRA promoted tribal self-governance, and often the reemergence of self-governance after centuries of assault. However, through template constitutions and model codes, the IRA promoted a particular Westernized flavor of tribal self-governance. It was thought that "legitimate" tribal governments should look like non-tribal local, state, and federal governments. Congress subsequently continued its pressure to Westernize tribal systems through statutes like the Indian Civil Rights Act of 1968.[59]

Tribal child welfare systems have similarly been pressured to operate in a palatable, Western format. Like many state systems, this pressure is most acutely felt when accessing federal funds. The federal government has a responsibility to assist tribes in meeting the service needs of tribal citizens pursuant to its federal trust responsibility.[60] The federal

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[56] *See, e.g.*, Johnson v. M'Intosh, 21 U.S. 543, 590 (1823) (holding that because Indians are "fierce savages" they lack property interests in their land beyond occupancy rights, and that Europeans and subsequently Americans, by nature of discovery, possess legal title); Cherokee Nation v. Georgia, 30 U.S. 1, 33 (1831) (holding that because tribes "are in a state of pupilage," their sovereignty is tempered and does not rise to the level of foreign nation to satisfy diversity jurisdiction).

[57] VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 113 (1983); MCNALLY, *supra* note 10, at 40–61.

[58] Pub. L. No. 73-383 (1934) (codified at 25 U.S.C. § 461 *et seq.*)

[59] 25 U.S.C. §§ 1301–04.

[60] The origins of the federal-tribal trust responsibility are indirect, but generally stem from treaty obligations and the "guardian-ward" dynamic articulated in *Cherokee Nation*, 30 U.S. at 17, 33 (1831). COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 5.04(3)(a) (Nell Jessup Newton et. al., eds., 2019). It has subsequently evolved into a federal trust responsibility towards tribes that includes "exacting fiduciary standards." Seminole Nation v. United States, 316

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government provides funding to tribal systems through a variety of different federal departments. In many ways, tribes are disproportionately dependent on federal funding, due in part to a lack of meaningful taxation revenues.[61] Tribal child welfare systems, predominantly via the tribal courts, have access to some funding through the Bureau of Indian Affairs[62] and the Department of Justice's Coordinated Tribal Assistance Solicitation.[63] But, these funds tend to be sporadic, minimal, and reserved for select federally-endorsed programming.

Beginning in 1975, in response to paternalistic and inefficient federal programs, the federal government altered its funding mechanism to allow for substantially more self-determination for tribes within select funding streams. The Indian Self-Determination and Education Assistance Act of 1975 and its progeny authorize the Department of Interior and the Department of Health and Human Services to contract directly with tribes.[64] Under these contracts, tribes use federal funds to operate the programs that federal agencies otherwise would provide, such as police departments and hospitals. Subsequent amendments allowed more flexibility in design of services delivered under the contracts. Known as self-governance, this federal framework allows for more localized control, and is considered to be a model for building culturally-responsive,

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U.S. 286, 297, 297 n.12 (1942) (payment of money to agents known to be dishonest violated private trust law standards). The trust responsibility is a lens through which federal legislation and policy aimed towards tribes should be evaluated, including child welfare.

[61] *See, e.g.*, Urging the Secretary of the Treasury to Assist in Ending Dual Taxation of Economic Activity in Indian Country, Nat'l Cong. of Am. Indians Res. #ABQ-19-015 (2019) (noting that current case law creates "an intolerable burden of dual taxation on tribal economic activity").

[62] The Bureau of Indian Affairs provides limited tribal court funding through Tribal Justice Support tribal court assessments. *See Tribal Court Assessments*, U.S. DEP'T OF INTERIOR, BUREAU OF INDIAN AFFS., https://www.bia.gov/CFRCourts/Assessments [https://perma.cc/L7M2-X6VA] (last visited Feb. 27, 2021).

[63] The U.S. Department of Justice offers short-term, competitive grants to tribes for a variety of justice-related programs. None of the programs are child welfare-specific, though funds could be used for court services which could include a child welfare docket. *See Grants/CTAS*, U.S. DEP'T OF JUST., TRIBAL JUST. & SAFETY, https://www.justice.gov/tribal/grants [https://perma.cc/VXW4-HU56] (last visited Feb. 27, 2021).

[64] 25 U.S.C. §§ 5301–423.

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efficient, and accountable systems that best serve tribal communities.[65]

Regrettably, though, tribes are not able to access federal funds for tribal child welfare through self-governance.[66] Instead, the limited funding that is provided in this area is dispersed primarily through Title IV of the Social Security Act.[67] Titles IV-B and IV-E of the Social Security Act[68] provide core funding for both state and tribal child welfare systems.

Title IV-E garners the far larger funding stream[69] and supports a behemoth bureaucracy for which tribes were likely an afterthought. As such, tribes did not have an opportunity to directly access funds in this system until 2008.[70] Even with this direct access, only one tribe has accessed funds and only seventeen tribal plans for access have been approved, leaving the

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[65] *See, e.g.*, Support for Tribal Self-Governance within the Department of Transportation, Nat'l Cong. of Am. Indians Res. MSP-15-016 (2015) (describing self-governance, in advocating for expanding self-governance to the Department of Transportation, as allowing "for greater tribal flexibility and effectiveness in the use of federal funds" and that "federal programs are more efficiently implemented and expended than when federal officials exercised oversight rather than direct administration").

[66] *See* 25 U.S.C. §§ 5381, 5399. Self-governance compacts with the Department of Health and Human Services (DHHS) are limited to programs administered through the Indian Health Service, and therefore do not include programs within the Children's Bureau. DHHS recommended a demonstration project to compact for these programs, but proposed legislation died after passing the Senate Indian Affairs Committee. *See* S. REP. NO. 108-412 (2004); *Hearing on Reforming the Indian Health Care System Before the S. Comm. on Indian Affs.*, 111th Cong. 8–10 (June 11, 2009) (statement of Valerie Davidson).

[67] BYRON L. DORGAN ET AL., ENDING VIOLENCE SO CHILDREN CAN THRIVE 147 (2014) (describing how states receive disproportionately more funding for prevention and child protection programs, while tribes receive minimal federal support). *See also* U.S. DEPT. OF HEALTH & HUM. SERVS. OFF. OF THE ASSISTANT SEC'Y FOR PLANNING & EVALUATION, FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD (2005).

[68] 42 U.S.C. §§ 620–29, 670–79.

[69] MARCYNYSZYN, *supra* note 42, at 9.

[70] The Fostering Connections to Success and Increasing Adoptions Act, 110th Cong., Pub. L. No. 110-351 (2008) The process for accessing Title IV-B funds is separate, and can be accessed directly, though after a tribe submits a five-year plan, annual progress and service reports, and meets mandated requirements. *See id. See also* BARBARA VAN ARSDALE ET AL., 17A FEDERAL PROCEDURE § 42:907 (2020). (Title IV-B funding is notoriously far less than Title IV-E funds.)

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opportunity largely unrealized.[71] Tribes that have gone through the process have identified numerous barriers to accessing the funds.[72] Tribes are essentially required to substantially meet the same requirements as states.[73] This includes the massive bureaucracy necessary to monitor and operate child welfare systems across a state as captured in the "pre-print" Title IV-E plan.[74]

The vast remainder of tribes, if they access Title IV-E funds at all, access those funds through tribal-state agreements.[75] While tribes have had some success in obtaining these agreements, the historical foundation underlying tribal-state collaboration is fraught with challenges.[76] For example, tribes are not components of the state government, and so states may be clumsy in coordinating with tribes as sovereign entities rather than subservient branches of state government. They may face logistical barriers such as incompatible computer systems.[77] States may feel compelled to require tribes to report outcomes to the state, to adopt state requirements even beyond federal requirements, or to waive tribal sovereign immunity.[78] Notably,

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[71] *See Tribes with Approved Title IV-E Plans*, CHILDREN'S BUREAU, ADMIN. FOR CHILD. & FAMS. (Feb. 27, 2021), https://www.acf.hhs.gov/cb/grant-funding/tribes-approved-title-iv-e-plans [https://perma.cc/8HZG-Q67S]; MARCYNYSZYN, *supra* note 42.

[72] MARCYNYSZYN, *supra* note 42.

[73] EMILIE STOLTZFUS, CONG. RSCH. SERV., R42792, CHILD WELFARE: A DETAILED OVERVIEW OF PROGRAM ELIGIBILITY AND FUNDING FOR FOSTER CARE, ADOPTION ASSISTANCE AND KINSHIP GUARDIANSHIP ASSISTANCE UNDER TITLE IV-E OF THE SOCIAL SECURITY ACT 4–5 (2012).

[74] CAPACITY BLDG. CTR. FOR TRIBES, PATHWAYS TO TRIBAL TITLE IV-E: TRIBAL TITLE IV-E OPTIONS 5–6 (2017).

[75] As of 2008, there were approximately ninety tribes with tribal/state agreements, and seventy of these allowed for either one of a combination of maintenance, administrative, or training activities funded by Title IV-E. *Tribal Child Welfare Funding Findings*, NAT'L CHILD WELFARE RES. CTR. FOR TRIBES, http://www.nrc4tribes.org/Tribal-Child-Welfare-Funding-Findings.cfm [https://perma.cc/KFP9-PFPE].

[76] *See generally* JACK F. TROPE & SHANNON KELLER O'LOUGHLIN, A SURVEY AND ANALYSIS OF SELECT TITLE IV-E TRIBAL-STATE AGREEMENTS (2014).

[77] *Id.* at 6 (noting a delay in the Navajo Nation receiving payment from the State of Arizona because their computer system was not sufficiently updated).

[78] *Id.* at 5, 7 (noting all eleven tribal-state agreements in Alaska require federally recognized tribes to waive sovereign immunity and comply with state law and that California's "Tribal Child Welfare Services Plan" includes requirements beyond federal law).

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Title IV-E includes a waiver provision for innovation demonstration projects (such as circle processes).[79] Yet, very few tribal-state agreements allow tribes to participate in such programs.[80] Tribal advocates have sought modifications to Title IV-E, largely unsuccessfully, to make the process more relevant to the realities of tribal characteristics and differences in structures of tribal governance.[81]

In addition to bureaucratic challenges, Title IV-E, far more than Title IV-B, requires the incorporation of a model of child welfare that prioritizes distant and urgent processing, which tends to expedite the termination of parental rights. For example, Title IV-E funding requires the termination of parental rights if a child has been in foster care for fifteen out of the last twenty-two months.[82] While such a requirement helps ensure children do not languish in the child welfare system, it also artificially pressures families. Not only does this "fifteen-month rule" seemingly conflict with ICWA's philosophy of supporting reunification and numerous tribal policies that explicitly denounce termination,[83] but it is also contradictory to recent trends in child welfare that deprioritize the termination of parental rights.[84]

Rather than empower tribes to design their own systems, as is especially needed to counter the impacts of decades of disastrous Indigenous child welfare policy, Title IV generally restricts funding through overwhelming bureaucracy, requires significant federal and state oversight, and requires the adoption of antiquated child welfare policies. However, while the funding streams should most certainly be updated to better respond to

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[79] 42 U.S.C. § 1320a-9.

[80] TROPE & KELLER O'LOUGHLIN, *supra* note 76 at 44 (noting the Oregon-tribal agreements allow tribal participation in the state federally-approved waiver programs).

[81] MARCYNYSZYN, *supra* note 42.

[82] 42 U.S.C. § 675(5)(E).

[83] *See e.g.*, *Tribal Customary Adoption*, NAT'L CHILD WELFARE RES. CTR. FOR TRIBES, http://www.nrc4tribes.org/Tribal-Customary-Adoption-Resources.cfm [https://perma.cc/XL2U-83YS] (last visited Feb. 19, 2021) ("[T]raditionally, . . . tribes did not practice termination of parental rights. Tribal customary adoption is the transfer of custody of a child to adoptive parents without terminating the rights of the birth parents.").

[84] *See e.g.*, Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 64 (2018) (authorizing for the first time the use of federal child welfare funding under Title IV-E for prevention services).

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tribal needs, such as through self-governance, there are current opportunities. Tribes are already demonstrating the capacity to run their own child welfare systems. The direct Title IV-E funding stream, once accessed, allows tribes significantly more flexibility to design their own systems. For example, tribes can develop their own standards for when a child is in need of care, and create whatever tribal court structure works best for them.[85] But, tribes require meaningful access to funds to design such tribal systems that offer culturally relevant family services within a responsive tribal, rather than state or federal, bureaucracy.

III. INDIGENIZING CHILD WELFARE

A. A Different World View (Re)Emerging

In the logging industry, commercial clearcutting used to be considered the healthiest strategy for harvesting timber. "Without any competitors, the thinking went, the newly planted trees would thrive."[86] Instead, they were frequently more vulnerable to disease and climatic stress than trees in old-growth forests. It turns out, seedlings severed from the forest's underground lifelines are much more likely to die than their networked counterparts.[87] Much like a child welfare system rooted in an individual-centric, property-based framework, specialists had emphasized the perspective of the individual while failing to account for the influence of the community. Like an old-growth forest, Indigenous families are not isolated trees. They are part of a vast, ancient, and intricate society that is connected, communicative, and interdependent. These connections should be leveraged.

The view of the interrelatedness of the various inhabitants of a forest is reflective of an Indigenous approach to the world in general, and this worldview carries over with respect to children. The core focus is on connection, rather than individualism. Fortuitously, though likely not coincidentally, the reemergence of this Indigenous perspective coincides with

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[85] JACK F. TROPE, TITLE IV-E: HELPING TRIBES MEET THE LEGAL REQUIREMENTS (2010).

[86] Ferris Jabr, *The Social Life of Forests*, N.Y. TIMES MAG. (Dec. 2, 2020), https://www.nytimes.com/interactive/2020/12/02/magazine/tree-communication-mycorrhiza.html [https://perma.cc/2MSX-FGEE].

[87] *Id.*

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burgeoning family systems theory.[88] Also like the forest, family systems theory requires the court to shift from viewing parents as isolated actors and instead see them as part of a living system, where members are its interacting parts. A family systems approach requires courts to take into consideration the whole family, broadly defined, in making decisions about a child.[89]

The very concept of rights can seem foreign to Indigenous thinking. Rather than based on rights, Indigenous worldviews[90] can broadly be described as based on four other "r-words": responsibilities, relationships, reciprocity, and respect. From an Indigenous perspective, rights are only relevant when there is a corresponding responsibility. That is, a "right" is really just what one might use to describe what should happen, if another person upholds a responsibility towards the first person. The responsibility is primary and rooted in the relationship between the parties. In fact, in typical Indigenous worldviews, the responsibilities are primary elements, while rights are derivative.

Increasingly aware of the ill fit and inherent flaws of the colonial social constructs and structures they have been encouraged to adopt for centuries, many Indigenous communities now seek to return to ways that reflect their own worldviews, cultures, and spiritual understandings.[91] This is true with

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[88] Similarly, the growth of restorative or therapeutic justice is coinciding with the reemergence of Indigenous traditional dispute resolutions. Scholars are just beginning to study the complex influences restorative justice movements are having on tribal systems, and vice versa. The development is promising for both Indigenous Peoples and non-Indigenous people alike. *See* JUSTICE AS HEALING: INDIGENOUS WAYS (Wanda D. McCaslin ed., 2005); Joseph Thomas Flies-Away & Carrie Garrow, *Healing to Wellness Courts: Therapeutic Jurisprudence+*, 2013 MICH. STATE L. REV. 403 (2013).

[89] Brooks & Roberts, *supra* note 16, at 455.

[90] It is, of course, impossible to distill a continent and millennia of Indigenous wisdom. It is not even desirable. Indigenous Peoples comprise thousands of distinct cultures, languages, and philosophical approaches. Nevertheless, particularly in contrast to Western values and norms, and after centuries of being lumped together, we endeavor to promote a "pan-Indian" child welfare perspective solely to argue for the opportunity for tribes to be allowed to further experiment with their own approaches.

[91] Tribes thread a difficult needle: they must build tribal law that is both responsive to traditional needs, customs, and traditions, while also relevant and tolerable to federal Indian law pressures. Tribes are nevertheless thriving. *See generally* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW (2d ed. 2020).

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respect to child welfare, perhaps most markedly. Rather than orient around rights to children, Indigenous systems orient around duties owed to children. These duties not only include ensuring children's safety, but also ensuring children's meaningful access to their families, tribes, and culture. Thus, what the colonial models frame as rights should be re-framed, through the recovering of Indigenous lifeways and worldviews, as responsibilities.

These responsibilities exist because we are connected. Kinship is one of the main ways that tribal duties and rights are expressed. An individual's relationships to the people in one's family, including extended family and sometimes clans, bring certain responsibilities and expectations. Extended family, such as grandparents, aunts, uncles, and cousins, often play a part in the life of a child. Further, tribal relations extend out to include clans, lineages, and tribe. Dispute and conflict among tribal members are often expressed as a violation of the norms surrounding the rights and duties they owe each other as kin.[92]

The Oglala Sioux Tribe's child protection code, *Wakanyeja na Tiwahe Ta Woope*, provides one example of these epistemological differences in practice.[93] In overhauling its own children's code, the Tribe replaced discussion of parental rights with sections comprehensively outlining "Traditional Children's Rights" and "Traditional Family Rights."[94] Closer examination reveals that those sections describe important relationships that are to be preserved, values to be applied, and responsibilities deriving from the values and responsibilities described.[95]

The important inquiry, in these efforts, is what is most needed by the child or children at issue. This Article proposes that a facet of this reorienting include a diversion away from the adversarial and coldly neutral court to a circle process addressing child welfare concerns. By allowing emphasis on the duties that parents, extended families, and communities owe to children, tribes can use systems that will prove more beneficial overall to their children, and provide models for states and other tribes to

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[92] JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 220–22 (3d ed. 2016).

[93] *See* OGLALA SIOUX TRIBE CHILD & FAM. CODE, WAKANYEJA NA TIWAHE TA WOOPE § 403 (2007).

[94] *Id.*

[95] *Id.*

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consider. Such innovation will have the added benefit of facilitating the implementation of the rights conceived under the Declaration, including the child's right to their family, tribe, and culture.[96]

Critically, this same reorientation is not exclusive to Indigenous children and has already benefitted child welfare cases elsewhere. For example, out of home placements reduced significantly once a circle process program was implemented in Washtenaw County Court in Michigan.[97] This is hopefully only the tip of a continent-sized iceberg of promising potential.

B. Operationalizing Duties: The Circle

Removal of family and community from natural roles as decision-makers in matters of child welfare and replacing them with third parties with no relationship to the children involved is one of the more fatal flaws of the current child welfare system. Alleviating this flaw will result in more beneficial decisions, and more support for implementation of those decisions. Circle processes of various sorts—sometimes called, for example, peacemaking or family group decision-making—provide process alternatives to the federally-mandated succession of review hearings. Circle processes are quite simple in that the basic model is to gather people together to have honest discussions about difficult issues and seek resolutions. The goal is to achieve consensus about what should be done moving forward.[98] Because consensus is the basis of the final outcome, that outcome has full support of all involved.[99]

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[96] United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 2. *See also* CARPENTER & GRAHAM, *supra* note 2.

[97] *See, Selected KIDS COUNT Indicators for County in Michigan*, KIDS COUNT DATA CTR., ANNIE E. CASEY FOUND., https://datacenter.kidscount.org/data/customreports/3824/any [https://perma.cc/2U98-Z7AZ] (last visited June 14, 2021) (providing data for Washtenaw County, Michigan, compared to Michigan as a whole).

[98] Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 242 (1997).

[99] *Id.* at 243. *See also* Ada Pecos Melton, *Indigenous Justice Systems and Tribal Society*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS 108, 116 (Wanda McCaslin ed., 2005) ("The agreement reached in family and community forums are binding. The same interlocking obligations established in individual and community relationships compel participants to comply.").

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Roughly put, a circle process can be seen as a restorative justice alternative to the "hammer" of the court. The circle process demotes court actors that are intentionally unfamiliar with the family and gives primacy back to non-neutral stakeholders who frequently are excluded from, or have diminished roles in, child welfare hearings—such as extended family and community members.[100] These stakeholders are naturally more motivated to look after their own relative's well-being, and more capable and motivated to hold others accountable to finalized decisions.[101] The circle provides those persons, along with the parent(s), the space to speak as a core component of the analysis and the process, rather than as ancillary parties. They, as opposed to the court, collectively design a case plan. Similarly, the circle, as opposed to the court, is empowered to hold itself accountable pursuant to their duties owed to the child.[102]

The hammer of the court can continue to exist, an opt-out option for cases when the circle is unsuccessful, and consensus decisions of circle processes can be adopted as court orders.[103] By allowing the circle process a chance to operate before formal court hearings, not every family issue is automatically treated as a

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[100] Incorporating the extended family and community is not just about leveraging the resources of the community, but comporting to an Indigenous worldview about how the community is impacted and the corresponding duties the community owes to the family. *See* Wanda D. McCaslin, *Introduction: Reweaving the Fabrics of Life*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 99, at 87, 89 ("Indigenous people tend to interpret hurtful actions less individualistically and more as signs of imbalances within the community as a whole—imbalances that affect everyone.").

[101] Melton, *supra* note 99, at 117 (noting the "distributive nature of this process engages the extended family as a resource for the offender, the victim, and the community. The community joins in the effort to resolve problems, to ensure compliance, to provide protection, and to retain ownership of the problems").

[102] *Id.* at 115 ("[I]n many tribal communities, parents and the extended family are expected to nurture, supervise, and discipline their children. When parental misconduct occurs . . . the family forum . . . extensively invokes the distributive aspect of responsibility to ensure the children's protection and to monitor and enforce proper parental behavior and responsibility, which the family regulates.").

[103] Judge L.S. Tony Mandamin, *Peacemaking and the Tsuu T'ina Court*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 99, at 349, 354 (noting "if an offender decides not to enter peacemaking, then the matter stays in court. If the matter is not accepted into peacemaking or if the offender fails to cooperate with the peacemaking process, then the peacemaker coordinator will return the matter to court.").

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nail. When circle processes are implemented this way, the benefits to children are underscored by research establishing factors that promote childhood well-being.[104] Simply put, circle processes promote well-being.

Traditional Indigenous dispute resolution yields outcomes that are more sustainable in and of themselves.[105] The basis of outcomes is consensus—all those involved must agree to what will happen, including the parents.[106] This, in turn, provides an entire circle of support and accountability, which helps make sure responsibilities identified and assigned as part of a solution to a problem are indeed fulfilled. For example, grandparents and other extended family members, in a child welfare case, will have been part of the discussion of the problem and development of the solution. They are aware of the circumstances leading up to the failure to provide for the child, including the systemic and generational challenges pressing on the family. If the solution requires certain things of the parents to better serve the children, those other relatives are there to ensure that the parents uphold their responsibilities. Perhaps more importantly, those same circles of relatives are also there to provide support so that everyone, including the parents, can uphold their responsibilities to the children. And those support circles will have already been alerted to the heightened possibility that such support might be needed.

As connected components of the family, connected to and thereby owing duties to the child(ren), the participants of the circle are bound by the circle just like the parents. They are also more likely to be culturally competent, circumventing the explicit biases of the nineteenth century, and the more implicit but still harmful biases of the twentieth and twenty-first centuries. As an

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[104] Roberts, *Community Dimension*, *supra* note 34, at 28 (noting community-based initiatives that leverage the strengths of families and communities, that try to respect cultural norms, and engage in partnerships with neighborhood organizations, are taking hold in some pilot projects).

[105] Porter, *supra* note 98, at 255 ("Prior to contact with the European colonists, indigenous people had little choice but to accept and live by the norms established by their communities."). *See also* Majidah M. Cochran & Christine L. Kettel, *Rehabilitative Justice: The Effectiveness of Healing to Wellness, Opioid Intervention, and Drug Courts*, 9 AM. INDIAN L. J. 75 (2020).

[106] Robert Yazzie, *"Life Comes from It": Navajo Justice Concepts*, 24 N.M. L. REV. 175, 185 (1994) ("Consensus makes the process work. It helps people heal and abandon hurt in favor of plans of action to restore relationships.").

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added process, serving an intermediary role in the otherwise still adversarial child welfare case, the circle is an opportunity with minimal risk. They manifest the active efforts that state courts so frequently dread providing.[107] The circle offers the community an opportunity to participate, and thereby leverage opportunities to ensure the child remains connected to the community. In line with the Declaration, the community is directly involved in the child welfare process.

In fact, the collaborative and supportive problem-solving focus on which circle processes are based likely augments resilience (that is, the ability to manage future challenges) in both child and parent. Commonly recognized resilience factors that might be fostered for parents in circle processes include emotional regulation, perception of control and ability to impact one's own life, self-efficacy, social and communication skills, and likely others. [108] These benefits, in turn, make the parent(s) better able to create resilience factors commonly recognized as beneficial within a child's family, including lower family stress, better parenting skills, and parental mental health. Finally, to the extent that circle processes involve others beyond the nuclear family, they can foster resilience factors for children and parents both that flow from the community, including supportive extended family engagement, close community, social support, possibly spiritual community connections, and others.[109] To summarize, then, employing circle processes can foster resilience factors in the lives of children and parents both, on multiple levels, and improvements for parents also flow through to the children.

IV. CONCLUSION

Allowing circles processes to operate with respect to tribal children is a natural continuation of momentum that resulted in

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[107] *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, §§ 11.01, 11.07 (Nell Jessup Newton et al., eds., 2019) (noting state and federal courts have taken opportunities to interpret ICWA narrowly, such as through the judicially-created ICWA exception known as the "existing Indian family doctrine").

[108] *Parenting for Brain, Resilience in Children and Resilience Factors, 2021*, https://www.parentingforbrain.com/resilience/ [https://perma.cc/RK93-55SR] (May 15, 2021) (listing commonly recognized resilience factors).

[109] Phil Lane, Jr., et al., *Mapping the Healing Journey: First Nations Research Project on Healing in Canadian Aboriginal Communities*, *in* JUSTICE AS HEALING: INDIGENOUS WAYS, *supra* note 99, at 369 (noting personal and community healing journeys go hand in hand).

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the enactment of ICWA. Moreover, this is actually part of a larger push, worldwide, to turn back colonial systems that have perpetrated genocide, sometimes cultural, sometimes full-scale, against any Indigenous Peoples that stood in resistance. Actions such as the Declaration reveal a push to correct what may be corrected among the impacts of the errant colonial policies. These errant policies have seeped into the entire child welfare system, pressing for a stranger-led, adversarial, individual- and rights-centric inquisition over the recognition of our connections. Tribes have been pressured into this Western format. The way out of the antiquated child welfare system is to allow tribes to lead. Tribes can, by reinvigorating their traditional child welfare systems, and thereby re-Indigenizing those systems, show others what a child welfare system premised on interrelationships, and on honoring responsibilities to children, can do. The need to throw out antiquated child welfare systems will be even more clear once more examples of success have developed. Such development can be nurtured through targeted funding and the dampening of conflicting policies. Laws such as ICWA demonstrate how these international human rights precepts might be implemented through domestic action.[110] Implementation of circle processes will be another step in the same healing direction.

[110] Graham, *supra* note 3, at 50.

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