Making the "Best" Better: Transferring Best Interests Determinations to Tribes as a Solution to the Ongoing Post-colonial Indigenous Child Welfare Crisis

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I. INTRODUCTION

"Kill the Indian in him, and save the man."[1] "[C]ontinue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department."[2] "[T]he destiny of the natives of aboriginal origin . . . lies in their ultimate absorption by the people of the Commonwealth . . . "[3] These sentiments, as stated by government officials in the United States, Canada, and Australia respectively, undergirded the assimilationist and genocidal[4] policies of these colonial powers towards the

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1. Richard Pratt, *The Advantages of Mingling Indians with Whites*, *in* AMERICANIZING THE AMERICAN INDIANS 261 (Francis Paul Prucha ed., 1973).

2. *Duncan Campbell Scott*, ENCYC. BRITANNICA (Dec. 15, 2020), https://www.britannica.com/biography/Duncan-Campbell-Scott.

3. NAT'L INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES, BRINGING THEM HOME (1997) [hereinafter BRINGING THEM HOME] (excerpts from resolution adopted by the first Commonwealth-State Native Welfare Conference).

4. Whether treatment towards indigenous peoples by colonial powers amounted to genocide is the subject of some debate. *Compare* Guenter Lewy, *Were American Indians the Victims of Genocide?*, HIST. NEWS NETWORK (Sept. 2004), https://historynewsnetwork.org/article/7302 (arguing that the fate of America's Indians was an irreconcilable collision of cultures and values, not genocide), *with* TRUTH AND RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE 1 (2015) [hereinafter TRUTH AND RECONCILIATION] (stating that practices against the First Nations people in Canada amounted to cultural genocide).

indigenous peoples living on the land prior to the settlers' arrival. State officials seized the land of indigenous peoples in these three countries, banned their languages, and prevented them from following their spiritual practices.[5] But the focus of this note is on another practice that was equally damaging, if not more so, towards Indigenous communities: governmental policies of breaking up families and removing children from their homes in order to force them through a "civilizing" process.[6] The forcible removal of children from families caused inter-generational trauma, the ripple effects of which still affect indigenous people today.[7] This trauma is further compounded by the continued removal of indigenous children from their families. Although the practice of placing indigenous children in schools designed to eliminate their culture has now been discontinued by all three countries previously mentioned, a disproportionately large number of indigenous children exist in all three countries' child protection systems.[8]

This note analyzes the "best interests of the child" principle under international law, its relationship to indigenous self-determination, and whether shifting jurisdiction from colonial powers to tribes can adequately address the human rights issues with modern day indigenous child welfare. Part I briefly discusses the historical underpinnings of indigenous child welfare and the international agreements related to indigenous children. Part II describes how those international agreements create tensions between indigenous groups' right to self-determination and a conception of universal children's rights. This part analyzes attempts by states to adopt child welfare systems that embrace indigenous self-determination by transferring jurisdiction over child welfare to tribes, and what, if anything, would make this jurisdictional shift effective in keeping children both safe and at home.

5. *See* SONIA HARRIS-SHORT, ABORIGINAL CHILD WELFARE, SELF-GOVERNMENT AND THE RIGHTS OF INDIGENOUS CHILDREN 22–23 (2012); Christie Renick, *The Nation's First Family Separation Policy*, IMPRINT (Oct. 9, 2018), https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431.

6. *See* HARRIS-SHORT, *supra* note 5, at 22–23; Renick, *supra* note 5.

7. *See* HARRIS-SHORT, *supra* note 5, at 9; Renick, *supra* note 5.

8. *The Growing Over-representation of Aboriginal and Torres Strait Islander Children in Care*, AUSTL. INST. FAM. STUD. (May 7, 2018), https://aifs.gov.au/cfca/2018/05/07/growing-over-representation-aboriginal-and-torres-strait-islander-children-care [hereinafter AIFS].

II. BACKGROUND

The term "indigenous peoples" includes diverse groups of people with different cultural practices, laws, and social values.[9] Because of this diversity, the United Nations has not adopted a single, official definition of "indigenous."[10] States themselves refer to indigenous people within their borders in various ways: Native American/American Indian in the United States,[11] Aboriginal andTorres Strait Islander in Australia,[12] and First Nations peoples in Canada.[13] On the international level, indigenous groups are identified through multiple characteristics, including self-identification, historical continuity with pre-colonial societies, links to territories and natural resources, and distinct language, culture, and beliefs.[14] The United Nations Development Programme estimates there are currently 370–500 million indigenous people spread across 90 countries and representing 5,000 different cultures.[15] However, marginalization by European settlers and undermining of cultural traditions unite many indigenous groups under a shared experience.[16] European settlers viewed indigenous people as inherently inferior,[17] which led to policies designed to assimilate indigenous peoples into the settlers' populations and ultimately eliminate native culture

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9. TERRI LIBESMAN, DECOLONISING INDIGENOUS CHILD WELFARE: COMPARATIVE PERSPECTIVES 5 (2014).

10. UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, INDIGENOUS PEOPLES, INDIGENOUS VOICES: FACTSHEET, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last visited Jan. 22, 2020).

11. *See generally* Patrice H. Kunesh, *A Call for an Assessment of the Welfare of Indian Children in South Dakota*, 52 S.D. L. REV. 247 (2007) (referring to indigenous people in the present-day U.S. as both Native American and American Indian).

12. *Family Law Act 1975* (Cth) s 60CC 3(h) (Austl.) (referring to indigenous people as aboriginal/Torres Strait Islander).

13. PROVINCIAL ADVOCATE FOR CHILDREN & YOUTH, FEATHERS OF HOPE: A FIRST NATIONS YOUTH ACTION PLAN 10 (2014), https://cwrp.ca/sites/default/files/publications/en/Feathers_of_Hope.pdf.

14. *See* UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, *supra* note 10.

15. *10 Things to Know About Indigenous Peoples*, UNITED NATIONS DEV. PROGRAMME (Jan. 25, 2019), https://stories.undp.org/10-things-we-all-should-know-about-indigenous-people.

16. LIBESMAN, *supra* note 9, at 21.

17. Bethany R. Berger, *Savage Equalities*, 94 WASH. L. REV. 583, 598 (2019).

altogether.[18] This marginalization still exists, as indigenous children are currently considered one of the most discriminated-against groups in the world.[19] Section A of this Part provides background on the treatment of indigenous families prior to the modern child protection system while Section B describes the lasting effects caused by the inter-generational trauma it inflicted upon its victims and how that trauma manifests itself in current child welfare systems. Section C then provides context of the international agreements relating to the treatment of indigenous children.

A. COMMONALITIES IN TREATMENT OF INDIGENOUS CHILDREN IN AUSTRALIA, CANADA, AND THE UNITED STATES: FORCED REMOVALS AND RESIDENTIAL SCHOOLING

The motives behind the cultural genocide against indigenous people perpetuated by the United States, Canada, and Australia share common features. In Australia, indigenous people were viewed as destined to die out naturally due to their supposed inferiority, so they were moved to specifically designated "reserves" to "protect" them from violence by the settlers and "protect" the settlers from degradation of the white race by potential race-mixing.[20] By 1911, every Australian state (with the exception of Tasmania, which refused to acknowledge the existence of aborigines in their state altogether)[21] had a chief protector.[22] Canada, likewise, claimed isolation of indigenous people was to "protect" them.[23] The United States embarked on

18. *Id.* at 609.

19. Urszula Markowska-Manista, *Determining Marginalized Children's Best Interests Through Meaningful Participation*, *in* THE BEST INTERESTS OF THE CHILD – A DIALOGUE BETWEEN THEORY AND PRACTICE 47, 51 (Milka Sormunen ed., 2016).

20. HARRIS-SHORT, *supra* note 5, at 24–25; *The Nation's First Family Separation Policy*, IMPRINT (Oct. 9, 2018), https://imprintnews.org/child-welfare-2/nations-first-family-separation-policy-indian-child-welfare-act/32431.

21. *See generally* William Price, Extinct No More: Discourses on Tasmanian Aboriginal Heritage (Jan. 30, 2014) (Ph.D. dissertation, University of Kansas) (on file with the University of Kansas) (describing how Tasmanian aborigines were labelled as "extinct" despite a group of Tasmanian aborigines surviving European colonialization).

22. BRINGING THEM HOME, *supra* note 3, at 23.

23. HARRIS-SHORT, *supra* note 5 at 36.

a quest to solve the "Indian problem"[24] through religion and patriotism, with the Commissioner of Indian Affairs in 1889 stating, "This civilization may not be the best possible, but it is the best the Indians can get. They can not escape it, and must either conform to it or be crushed by it."[25]

Eventually, missions and residential schools[26] were established in each country to "civilize" the children of indigenous groups.[27] The common goal of these policies was clear: to eliminate indigenous races within the countries altogether.[28] The features of the schools and policies surrounding them in each country varied slightly. In Australia, a "protector" was put in charge of all aspects of aborigines' lives and given the power of "sole legal guardian" of all aboriginal children within his state.[29] This gave the protector the power to remove children from their families as he saw fit.[30] This ended up occurring frequently, especially in the case of mixed race children whom the government viewed themselves as obligated to remove to prevent the "corrupting" influence of their aboriginal families.[31] Once children were placed in residential schools, contact with their family was severely limited.[32] Children in the schools were also frequently subjected to sexual and physical abuse.[33] One aboriginal woman recalled a story in which a girl at a mission[34] was tied to a post and belted continuously for moving too slowly.[35] The girl died that night,

24. Pratt, *supra* note 1, at 1.

25. *Id.*

26. Residential schools are similar to boarding schools in that children live at the schools. However, unlike a boarding school, children were generally not allowed to leave and had limited contact with their families, if they had any contact at all. *See generally* BRINGING THEM HOME, *supra* note 3, at 137–40.

27. HARRIS-SHORT, *supra* note 5, at 27, 36.

28. TRUTH AND RECONCILIATION, *supra* note 4, at 3; *see* Pratt, *supra* note 1, at 7.

29. HARRIS-SHORT, *supra* note 5, at 25.

30. *Id.* at 25.

31. *Id.* at 28.

32. *Id.* at 31. *See generally* BRINGING THEM HOME, *supra* note 3, at 137–140.

33. HARRIS-SHORT, *supra* note 5, at 32.

34. Government-sponsored residential schools were frequently administered by Christian missionaries determined to Christianize indigenous persons in addition to their civilizing mission. While not all residential schools were "missions," many of them were. ANDREA SMITH, INDIGENOUS PEOPLES AND BOARDING SCHOOLS: A COMPARATIVE STUDY 14 (2009), https://www.un.org/esa/socdev/unpfii/documents/IPS_Boarding_Schools.pdf.

35. BRINGING THEM HOME, *supra* note 3, at 45.

and none of the girls at the mission knew what happened to her body.[36]

Residential schools in Canada recruited in a different manner. Instead of creating a "protector" to be a sole legal guardian for First Nations children, First Nations families were originally encouraged to send their children to the residential schools.[37] If parents refused, the government would then resort to methods more similar to those undertaken in Australia: kidnapping and bribery.[38] However, while the initial method of placing children in the schools varied slightly, the experience inside the schools was similar. Children were isolated, the buildings were poorly built and maintained, food was scarce, and physical abuse was commonplace.[39] The number of deaths in the schools was so large that by the 1920s, the Canadian Government stopped recording the number of deaths and utilized unmarked graves to bury children's bodies.[40] The educational goals of the schools were limited, and clearly secondary to the primary purpose of eliminating native culture.[41] Indigenous children were prevented from speaking their languages or engaging in their spiritual practices, were kept away from their brothers and sisters, and were married off to people selected by the schools.[42]

The U.S. began its residential schooling program in Pennsylvania in 1875 with a militaristic program that cut captive Native Americans' hair, exchanged their traditional clothing with military uniforms, and forced them to drill like soldiers.[43] A residential school that used the same model was established four years later.[44] In 1889, the Commissioner of Indian Affairs decided to adopt a universal government school

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36. *Id.*

37. HARRIS-SHORT, *supra* note 5, at 34–35.

38. *Id.* at 36.

39. TRUTH AND RECONCILIATION, *supra* note 4, at 3.

40. Maclean's, *Why Indigenous Children Are Overrepresented in Canada's Foster Care System*, YOUTUBE (Nov. 29, 2017), https://www.youtube.com/watch?v=MBLCd7yle8g.

41. TRUTH AND RECONCILIATION, *supra* note 4, at 3–4.

42. *Id.* at 4.

43. ROXANNE DUNBAR-ORTIZ, AN INDIGENOUS PEOPLES' HISTORY OF THE UNITED STATES 151 (2014); *see also* Ranjani Chakraborty, *How the US Stole Thousands of Native American Children*, VOX (Oct. 14, 2019), https://www.vox.com/2019/10/14/20913408/us-stole-thousands-of-native-american-children.

44. DUNBAR-ORTIZ, *supra* note 43.

system for Indians that would turn out patriotic citizens.[45] The number of children in the schools increased dramatically between 1900 and 1925, likely due to the threat of consequences like incarceration or withholding of food rations for families who refused to send their children.[46] Like Australia and Canada, officials in the schools would beat children who spoke their native language or tried to partake in religious practices.[47] Reports from the school detail troubling incidents of mental, physical, and sexual abuse resulting in neglect, starvation, trauma, and death.[48]

Residential schools were closed in Australia in the 1980s,[49] Canada in the 1990s,[50] and the United States in the 1970s.[51] However, a troubled legacy of residential schooling followed. Once the children within these schools became parents, they could no longer pass down to their children aculture from which they were estranged thereby creating a cultural void.[52] The schools also left the children with no positive models of parenting and family, but instead taught them to raise children through violence and abuse.[53] So while the governments of Australia, Canada, and the United States could eliminate the practice of residential schooling, those governments could not eliminate the harm the residential schools had already caused.

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45. Pratt, *supra* note 1, at 7.

46. Chakraborty, *supra* note 43 (noting that the number of indigenous children in residential schools increased from 20,000 in 1900 to over 60,000 in 1925).

47. DUNBAR-ORITZ, *supra* note 43, at 151.

48. Chakraborty, *supra* note 43.

49. *See* BRINGING THEM HOME, *supra* note 3, at 127.

50. Katie Hyslop, *How Canada Created a Crisis in Indigenous Child Welfare*, TYEE (May 9, 2018), https://thetyee.ca/News/2018/05/09/Canada-Crisis-Indignenous-Welfare/ (although the final school was closed in 1996, the program began winding down in the 1970s); *see also* Maclean's, *supra* note 40.

51. *See* Terri Libesman, *Child Welfare Approaches for Indigenous Communities: International Perspectives*, AUSTL. INST. FAM. STUD. (Apr. 2004), https://aifs.gov.au/cfca/publications/child-welfare-approaches-indigenous-communities-international-perspectives. *But see* Chakraborty, *supra* note 43 (noting that around 1970, all boarding schools that were not closed were turned over to tribal leadership to run).

52. HARRIS-SHORT, *supra* note 5, at 39.

53. *Id.*

B. THE PROBLEM PERSISTS: THE AFTERMATH OF RESIDENTIAL SCHOOLING AND THE CONTINUING INDIGENOUS CHILD WELFARE CRISIS

After the residential schools closed, indigenous children were absorbed into the child protection systems of each country. However, this did little to solve the problems that had been created by residential schooling, and in many cases states still practiced assimilation policies under a different name. All Australian provinces transferred legal custody back to aboriginal parents by the end of the 1960s.[54] The government then enacted new ordinances that resulted in aborigines falling under the same child protection scheme as non-aboriginal children.[55] Therefore, Indigenous children had to be found to be "neglected" or "destitute" to justify their removal.[56] However, courts were far more likely to find justifications for removal in aboriginal homes than in non-indigenous homes due to cultural biases and disproportionate rates of poverty in aboriginal communities, thereby causing the large-scale removal of indigenous children from their family once again.[57] This disparity continues to this day; aboriginal children in Australia are 9.8 times more likely to be placed into out-of-home care than their non-Indigenous peers.[58]

As the use of residential schools faded in Canada, the government continued to remove children from homes on a large scale through the child protection system. In 1951, the federal government changed the law to allow social services agencies to provide services to families on First Nations reservations.[59] At that point, indigenous children made up approximately one percent of the children in government care.[60] In the 1960s, the Canadian Government enacted a policy known as the "Sixties Scoop" that sought to remove indigenous children from their homes to place them with non-indigenous families.[61] As part of this policy, over 20,000 indigenous children were removed from

54. *Id.* at 42.
55. BRINGING THEM HOME, *supra* note 3, at 124.
56. *Id.* at 27.
57. HARRIS-SHORT, *supra* note 5, at 42–43.
58. AIFS, *supra* note 8, at 2.
59. Hyslop, *supra* note 50.
60. *Id.*
61. *See* Maclean's, *supra* note 40.

their families and placed with non-indigenous families.[62] By the 1970s, 20 percent of all children in government care were First Nations children.[63] As of 2019, over half of the children in government care were native, despite making up only 7.7 percent of the population.[64] Beyond the disproportionality, a lawsuit alleging racial discrimination against indigenous children in Canada's child protection system was substantiated in 2016.[65] One advocate in the case stated that, "the patterns . . . in residential schools are being perpetuated again in child welfare, and the relationship requires fundamental transformation."[66] The Canadian Human Rights Tribunal agreed that Canada's modern child welfare system did suffer from inequity, specifically that Aboriginal Affairs and Northern Development Canada failed to provide culturally appropriate child and family services to First Nations families living on reserves that were "reasonably comparable" to services provided off the reserves.[67] The Tribunal declined to answer the remedy questions set forth by the advocates, who claimed the Canadian government should pay up to $20,000 per affected child for their "willful and reckless" conduct.[68]

The disproportionality in Australia and Canada is similarly reflected in the proportions of native children in the child protection system in the United States. After the residential school program ended, the United States embarked on a new process of assimilation focused on promoting adoptions of indigenous children by non-indigenous families.[69] The Indian

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62. *Id.*

63. Hyslop, *supra* note 50.

64. Jeffrey Schiffer, *Spotlight Needed on Urban Indigenous Child Welfare*, TORONTO STAR, (Oct. 15, 2019) https://www.thestar.com/opinion/contributors/2019/10/15/spotlight-needed-on-urban-indigenous-child-welfare.html.

65. First Nations Child and Family Caring Society of Canada v. Attorney General of Canada, 2016 CHRT 2, para. 456 (Can.).

66. WE CAN'T MAKE THE SAME MISTAKE TWICE (Canada Film Association 2016), 37:52.

67. First Nations Child and Family Caring Society of Canada, 2016 CHRT para. 269, 456. *See generally* WE CAN'T MAKE THE SAME MISTAKE TWICE, *supra* note 67.

68. First Nations Child and Family Caring Society of Canada, 2016 CHRT para. 486–90.

69. Chakraborty, *supra* note 43 (discussing how indigenous children were marketed to non-indigenous families as "unwanted" children needing the opportunity for "new lives").

Child Welfare Act[70] was passed in 1978 as a response to the devastating impact this type of large-scale removal was having on indigenous communities.[71] Yet the disproportionate representation of indigenous children removed from their home persists. One study shows that Native American children are four times more likely to be placed in foster care than white children.[72] This rate also differs drastically by state: in Minnesota, for example, only 1.4 percent of children in the state are Native American, but Native American children constitute 23.9 percent of the foster care system; in South Dakota, 12.9 percent of children in the state are Native American, but Native American children constitute 47.9 percent of the foster care system.[73]

In sum, though the use of residential schooling began declining in the 1960s, the legacy of these removal policies still exists in the form of disproportionate removals of indigenous children in Australia, Canada, and the United States.

C. AGREEMENTS FORMING THE INTERNATIONAL FRAMEWORK OF INDIGENOUS CHILDREN'S RIGHTS

Two international agreements directly pertain to indigenous children, although neither heavily focuses on the intersection of infancy and indigeneity. The United Nations Convention on the Rights of the Child (UNCRC), adopted in 1989, provides recognition and guiding principles for international children's rights.[74] Article 30 of the UNCRC refers specifically to indigenous children, and states that these children must not be denied the right to their culture, religion, or language.[75] But the thrust of the UNCRC is its articulation of the best interests of the child as the primary consideration in

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70. Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963 (1978).

71. H.R. REP. NO. 95-1386, at 27 (1987); *see also About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N https://www.nicwa.org/about-icwa/ (last visited Mar. 13, 2021).

72. ROBERT B. HILL, AN ANALYSIS OF RACIAL/ETHNIC DISPROPORTIONALITY AND DISPARITY AT THE NATIONAL, STATE, AND COUNTY LEVELS 12 (Casey Family Programs 2007); *see also About ICWA*, *supra* note 71.

73. ALICIA SUMMERS, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (FY 2014) 42, 60 (National Council of Juvenile and Family Court Judges 2016); *see also About ICWA*, *supra* note 71.

74. G.A. Res. 44/25, annex, Convention on the Rights of the Child, at 167 (Nov. 20, 1989) [hereinafter UNCRC].

75. *Id.* at 170.

any action regarding children.[76]

The concept of "best interests" was not created by the UNCRC, but incorporating it into the UNCRC elevated the principle to international prominence.[77] It is one of the most important concepts in the realm of child welfare, as it provides the underpinning for the entirety of the UNCRC,[78] and yet does not have a workable, comprehensive definition.[79] One of the reasons for this lack of definition might be that its prominence among nations domestically left UNCRC delegates comfortable accepting a concept with which they already felt familiar.[80] Other scholars describe it as a purposefully-designed "notion with variable content" – similar to words like equality, proportionality, or justice.[81] Essentially, that the phrase "best interests" itself, in the context of the UNCRC, is undefinable until applied to a specific situation.[82] The UNCRC also departs slightly from the typical domestic understanding of best interests that preceded its creation. Best interests in the UNCRC is described as having a threefold nature: it is a right, a principle, and a procedural rule.[83] The UNCRC recognizes best interests as a substantive right in that every child has the right to have their best interests taken as a primary consideration

76. *Id.* at 167.

77. COUNCIL OF EUROPE, THE BEST INTERESTS OF THE CHILD – A DIALOGUE BETWEEN THEORY AND PRACTICE 5 (Milka Sormunen ed., 2016).

78. *See, e.g.*, MICHAEL FREEMAN, ARTICLE 3: THE BEST INTERESTS OF THE CHILD 2 (André Alen et al. eds., 2007) (recognizing that best interests determinations can be used to hide prejudice against homosexual or Muslim couples).

79. Olga Khazova, *Interpreting and Applying the Best Interests of the Child: The Main Challenges*, *in* THE BEST INTERESTS OF THE CHILD – A DIALOGUE BETWEEN THEORY AND PRACTICE 27 (Milka Sormunen ed., 2016); *see also* Comm. on the Rights of the Children, General Comment No. 14 (2013): On the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration, 80, CRC/C/GC/14 (May 29, 2013) [hereinafter General Comment No. 14].

80. *See* Jacques Fierens, *Alpha Ursae Minoris – The North Star and the Child's Best Interests Among Competing Interests*, *in* THE BEST INTERESTS OF THE CHILD – A DIALOGUE BETWEEN THEORY AND PRACTICE 36, 38 (Milka Sormunen ed., 2016) (expounding on the origins of the term "best interests" that predate the convention).

81. *Id.* at 37.

82. General Comment No. 14, *supra* note 78, 1.

83. Jorge Cardona Llorens, *Presentation of General Comment No. 14: Strengths and Limitations, Points of Consensus and Dissent Emerging in its Drafting*, *in* THE BEST INTERESTS OF THE CHILD – A DIALOGUE BETWEEN THEORY AND PRACTICE 11, 16 (Milka Sormunen ed., 2016).

when determinations are made regarding their welfare.[84] As a legal principle, if one interpretation of a rule more effectively serves a child's best interests, that interpretation should be chosen over any competing interpretation.[85] And as a rule of procedure, groups making a decision involving children must consider the best interests of the child when reaching their decision.[86]

The Committee on the Rights of the Child, tasked with assessing states' implementation of the UNCRC, immediately identified four primary requirements for implementation: non-discrimination; the right to life, survival, and development; the right to be heard; and guarantees to use best interests as a primary consideration in child welfare decisions.[87] The Committee's ability to enforce these requirements is limited; it receives reports from state parties to the UNCRC and can make suggestions and general recommendations based on the information it receives.[88] The state parties over which the Committee has jurisdiction includes all countries with the exception of the U.S., the only country that has not ratified this convention.[89] However, even though the UNCRC has not been ratified by the United States, all states within the U.S. statutorily require courts to consider a child's best interests in child protection cases.[90]

The Declaration on the Rights of Indigenous Peoples (UNDRIP) provides more protections for indigenous individuals, including children. Unsurprisingly, the only countries to vote against the declaration when it was first passed in 2007 were Australia, Canada, the United States, and New Zealand – four countries that had records of assimilationist policies and forced

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84. General Comment No. 14, *supra* note 78, 6.

85. *Id.*

86. *Id.*

87. Nigel Cantwell, *The Concept of the Best Interests of the Child: What Does it Add to Children's Human Rights?*, *in* THE BEST INTERESTS OF THE CHILD – A DIALOGUE BETWEEN THEORY AND PRACTICE 18, 20 (Milka Sormunen ed., 2016).

88. UNCRC, *supra* note 74, at 172.

89. Amy Rothschild, *Is America Holding Out on Protecting Children's Rights?*, ATLANTIC (May 2, 2017), https://www.theatlantic.com/education/archive/2017/05/holding-out-on-childrens-rights/524652/.

90. *Determining the Best Interests of the Child*, CHILD. BUREAU 1, 1 (June 2020) https://www.childwelfare.gov/pubPDFs/best_interest.pdf#page=2&view=Best interests definition.

removal of indigenous children.[91] As of 2016, the four original holdouts all signed on to the UNDRIP.[92] The UNDRIP establishes both individual and collective rights of indigenous peoples to all freedoms listed under the Universal Declaration of Human Rights.[93] It further declares that indigenous peoples have the right to self-determination and self-government.[94] Finally, it explicitly states that states will provide "effective mechanisms for prevention of, and redress for" actions promoting forced assimilation or destruction of indigenous culture.[95] The UNDRIP does not specify how it will ensure states implement these mechanisms, nor does it provide any penalty for non-compliance.[96]

The UNDRIP is considered groundbreaking in its inclusion of indigenous people during negotiations regarding the content of the document.[97] It is also somewhat unique in that modern international law typically recognizes the rights of individuals and nation-states, but rarely recognizes particular social groups.[98] However, in the context of indigenous people, group recognition is extremely important as it is inextricably linked to their identities as individuals.[99]

The international framework created by these two agreements is complex and largely non-binding on states. However, the agreements set out principles of self-determination and recognize the importance of allowing indigenous children to actively learn about and embrace their culture and heritage.

91. Gloria Galloway, *Canada Drops Opposition to UN Indigenous Rights Declaration*, GLOBE & MAIL (May 9, 2016), https://www.theglobeandmail.com/news/politics/canada-drops-objector-status-on-un-indigenous-rights-declaration/article29946223/.

92. *See id.*

93. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 1 (Sept. 13, 2007) [hereinafter, UNDRIP].

94. *Id.* at art. 3–4.

95. *Id.* at art. 8(2).

96. *See* UNDRIP, *supra* note 93.

97. Julie Rowland, *The New Legal Context of Indigenous Peoples' Rights: The United Nations Declaration on the Rights of Indigenous Peoples*, 37(4) AM. INDIAN CULTURE & RES. J. 142 (2013).

98. *Id.*

99. *Id.*

III. TRANSFERRING INDIGENOUS CHILD WELFARE TO TRIBES AS A SOLUTION TO THE CURRENT CHILD WELFARE CRISIS

Given the disappointing outcomes of the current child welfare systems,[100] reform ideas have been floated and enacted to try to better outcomes for indigenous families. Reforms and reform ideas have largely focused on a need to balance the individual "best interests" of the child with an indigenous group's collective need for self-determination. Part A discusses the issue with using a "best interests" principle to guide treatment of indigenous children in child protection. Part B discusses a way to reconcile the idea of "best interests" within the UNCRC with the right to self-determination under the UNDRIP through transfers of child welfare jurisdiction to indigenous groups. Part C assesses the current strengths and weaknesses of jurisdictional transfers and posits that transferring jurisdiction to indigenous groups, if done properly, could help reduce the disproportionality of indigenous children in the child welfare system.

A. THE PROBLEM OF "BEST INTERESTS"

"Best interests" is the principle meant to guide child welfare determinations under international and national law.[101] The problem with "best interests" determinations, however, is the phrase's history prior to its incorporation into the UNCRC: the phrase itself is distinctly tied to a European colonial ideology.[102]

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100. *See* Hill, *supra* note 72; Schiffer, *supra* note 64; Summers, *supra* note 73.

101. UNCRC, *supra* note 744, at art. 3(1). The reforms transferring jurisdiction to tribes also put "best interests" as a primary consideration in child welfare cases. *See* Indian Child Welfare Act, 25 U.S.C. § 1911(b) (1982); An Act respecting First Nations, Inuit and Métis children, youth and families, S.C. 2019, c 24 (Can.).

102. The development of best interests as a legal standard was based on the historical development of a conception of childhood that began in Europe in the sixteenth and seventeenth centuries. This ultimately led to the creation of a "best interests" principle which understands children as decontextualized individuals. Marlee Kline, *Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations*, 30(2) OSGOODE HALL L.J. 390–95 (1992); *see also* PHILIP ALSTON & BRIDGET GILMOUR-WALSH, THE BEST INTERESTS OF THE CHILD 3 (1996) (stating that the emergence of the best interests principle internationally is largely due to its existence as a feature of domestic family law).

While the phrase may seem neutral and commonsensical, it is not.[103] A child's best interests are not "easily assessable, definable, quantifiable, or immune to the sociographic and historical contexts in which they are circulated."[104] Thomas Hammarberg, the Commissioner for Human Rights for the Council of Europe, defended the best interests principle by stating:

> Governments – or individual adults – have sometimes misused the 'best interests of the child' to justify actions that in reality have violated the rights of the child . . . Children of indigenous peoples have been forcefully removed from their families and placed in boarding schools so that they could be introduced to 'civilization', again in the name of their 'best interests' . . . Such actions are based on extreme patronizing and not on any genuine concern for children's interests; they have no support in the Convention on the Rights of the Child. Excuses for violations of children's rights are clearly not what the principle of the best interests is about.[105]

Where this defense falls short is that the "misuse" of this principle was viewed by governments as culturally justifiable at the times to which Hammarberg is referring.[106] The United States, Australia, and Canada all at one time viewed the removal of indigenous children from their families as not only in the child's "best interests," but a noble, godly, and patriotic pursuit.[107] In retrospect, prior policies of removal and assimilation appear reprehensible and patronizing. But those policies were justified at the time using benevolent language and common-sense.[108]

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103. Sarah de Leeuw, *State of Care: The Ontologies of Child Welfare in British Columbia*, 21(1) CULTURAL GEOGRAPHIES 59, 65 (2014).

104. *Id.*

105. Thomas Hammarberg, Comm'r for Hum. Rts., Council of Eur., The Principle of the Best Interests of the Child – What It Means and What it Demands From Adults 4 (May 30, 2008) (transcript available with Council of Europe).

106. *See* de Leeuw, *supra* note 103, at 72.

107. The evidence of this perception can be witnessed throughout the rhetoric surrounding native children in that era. Discussion of "saving" native children or "protecting" them was commonplace and frequently used to justify assimilationist policies. *See generally* Pratt, *supra* note 1 (providing speeches and letters documenting the rhetoric used to justify the assimilation of American Indians); BRINGING THEM HOME, *supra* note 3 (providing anecdotes and quotes from Chief Protectors in Australia that demonstrate their perception on aborigines).

108. de Leeuw, *supra* note 103, at 72.

To his credit, Hammarberg continues on to say that "best interests" is not an obvious idea in all situations.[109] He acknowledges that cultural differences may justify different approaches to education about children's rights, and that different family structures and standards of living cannot be ignored in best interests determinations.[110] This acknowledgement is essential for implementing child protection systems that are culturally appropriate: while the best interests language is universal, the understanding of what it means is not. While certain acts that violate the physical autonomy and safety of a child are clearly against a child's best interests, and constitute a human rights issue, as articulated by the United Nations High Commissioner for Refugees (UNHCR), other acts may be seen as culturally problematic in one society but not in others.[111] Human rights in general, but especially children's rights, were created by Western culture – a culture that is by no means universal.[112]

The "best interests" principle is fraught with cultural assumptions and a negative history where an individual's status as indigenous alone could justify removal of the individual's children.[113] Even now, when indigenous identity is incorporated into a best interests determination, it is only done so as an additional factor in a larger best interests analysis.[114] To truly conduct a culturally appropriate best interests analysis, the

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109. Hammarberg, *supra* note 105, at 4.

110. *Id.* at 5.

111. U.N. High Comm'r for Refugees, UNHCR Guidelines on Determining the Best Interest of the Child (May 2008) [hereinafter UNHCR], https://www.unhcr.org/4566b16b2.pdf; *see* Karen Pauls*, Plan to Give Indigenous Governments Control Over Child Welfare Draws Mixed Reviews*, CBC NEWS (Nov. 30, 2018, 11:10 PM) (stating that indigenous tribes have a broader understanding of family that extends beyond the nuclear family and relatives) https://www.cbc.ca/news/canada/manitoba/child-welfare-overhaul-manitoba-reaction-1.4928753; *cf.* David Simmons, *Federal Law is Still in the Best Interests of Indian Children* THE IMPRINT (Mar. 13, 2019, 5:37 AM) (stating best interests determinations vary from state to state) https://chronicleofsocialchange.org/child-welfare-2/federal-law-is-still-in-the-best-interests-of-indian-children/34205.

112. Fierens, *supra* note 80, at 39.

113. *See* BRINGING THEM HOME, *supra* note 3.

114. *Family Law Act 1975* (Cth) pt VII div 1 sub-div 60CC para 3(h) (Austl.) (listing whether a child is aboriginal or Torres Strait Islander as an additional consideration in child welfare determinations); Muriel Bamblett & Peter Lewis, *Detoxifying the Child and Family Welfare System for Australian Indigenous Peoples: Self-Determination, Rights and Culture as the Critical Tools*, 3 FIRST PEOPLES CHILD & FAM. REV. 45–46 (2007).

analysis must be done with the recognition that culture extends to every other factor in a best interests analysis.[115] In this way, indigeneity is not another factor to be considered in an "objective" "best interests" checklist, but is actually the lens through which best interests should be determined.

B. RECONCILING BEST INTERESTS IN THE UNCRC WITH THE UNDRIP

The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) emphasizes the right of self-determination for indigenous groups.[116] Included within the right to self-determination is the ability to "freely pursue their economic, social and cultural development."[117] This appears to create tension with the UNCRC, which, according to a 1993 UN conference on human rights[118] is conceived, like all human rights, under a universal rights theory.[119] Universal rights theory is a view of human rights where all rights have a uniform interpretation and application.[120] Opposing that is a relativist version of human rights, where local variations can inform the interpretation and application of human rights.[121] A universal interpretation and application of "best interests" is problematic as "best interests" in the past has typically justified removal of indigenous children, and to this day continues to institutionalize cultural biases.[122] However, it is further problematized when considered in conjunction with UNDRIP, because the right to

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115. Bamblett & Lewis, *supra* note 114, at 46.

116. UNDRIP, *supra* note 93, at annex ¶ 16.

117. *Id.*

118. The Vienna Declaration, the document resulting from this conference, states that "[a]ll human rights are universal . . . [t]he international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/CONF. 157/23 (June 25, 1993).

119. JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 10 (3d ed. 2013); *cf.* Hammarberg, *supra* note 105, at 5 (arguing that including basic human rights in a best interests of the child analysis "has the advantage of providing a universal interpretation" of a child's best interest).

120. *See* DONNELLY, *supra* note 118, at 93–99 (contrasting concepts of universality and relativity and providing three examples of how human rights are universal).

121. TREVOR BUCK, INTERNATIONAL CHILD LAW 37–39 (3d ed. 2014).

122. *See* Freeman, *supra* note 78**Error! Bookmark not defined.**, at 2; *supra* Section II(A).

cultural development is intricately linked to child-rearing practices.[123] The UNDRIP further provides indigenous groups with the right to self-determination of their internal affairs, which would logically include families.[124] Applying a universal definition of "best interests" under UNCRC would necessarily prevent indigenous groups from fully realized self-determination if their concept of "best interests" clashed with the universal definition as defined by countervailing Eurocentric ideologies. This inherently jeopardizes indigenous communities' right to self-determination over cultural development as assured in the UNDRIP. The presumption inherent in the UNCRC is that the state will effectuate the "best interests" standards, which has traditionally infringed on indigenous rights.[125]

It may seem that the only way to reconcile these two concepts is to either adopt a qualified view of the self-determination guaranteed in UNDRIP or to adopt a culturally relative understanding of the UNCRC. However, the best interests principle in the UNCRC, if considered to be a notion with variable content, can exist paradoxically as both a universal and culturally relative principle.[126] The principle can be viewed as universal in its threefold implementation as right, principle, and procedural rule.[127] This is to say that every group in implementing best interests must recognize a child's right to have their best interests considered, must make decisions most effectively promoting the best interests of children, and must consider best interests as a factor to guide the group's decision-making.[128] While the role a child's best interests plays in a society is therefore consistent, the definition of what constitutes a child's best interests is left to the implementing society to determine. This would give indigenous groups the power to define the term "best interests" thus satisfying the self-determination goals UNDRIP, but would also satisfy the UNCRC as long as the group's definition was applied to all decisions involving their children.

The importance of this type self-determination is huge: the

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123. *See* BUCK, *supra* note 121, at 38 (noting that different cultures will interpret underlying assumptions and concepts behind the standards of the Convention on the Rights of the Child differently).

124. UNDRIP, *supra* note 93, at annex ¶ 13, art. 4.

125. BUCK, *supra* note 121, at 137–38, 141–42; Section II(A).

126. Fierens, *supra* note 80**Error! Bookmark not defined.**, at 39.

127. General Comment No. 14, *supra* note 78, ¶¶ 6–7; *see* Llorens, *supra* note 83, at 17.

128. General Comment No. 14, *supra* note 78, ¶¶ 6, 10.

more involved a community is in developing social programs and procedures, the less invasive a program feels to the community and the more willing people are to cooperate.[129] Professionals in healthcare and childcare are recognizing the importance of "cultural safety" as a tool in rebuilding relationships between professionals and marginalized communities suffering from a lack of trust.[130] Cultural safety recognizes the need to integrate indigenous knowledge and perspectives into the design of social and health programs, privileging the views of indigenous clients to make obtaining social services feel safe.[131] Alternatively, using a universal definition of best interests designed for and by non-indigenous populations resulted in, and continues to result in, disproportionate removals of indigenous children.[132]

It is true that indigenous groups suffer disproportionately from poverty, violence against women, and lower life expectancy.[133] However, severing parent-child relationships frequently leads to inter-generational cycles of removal, where children subject to removal become more likely to have their own children removed.[134] Giving indigenous groups the power of self-determination in the context of child welfare likely would not solve inter-generational trauma or issues of poverty and violence overnight. However, it could at least limit harmful, culturally-biased removals of children from their families by giving the power of making child welfare determinations and defining best interests to individuals situated within the same cultural context as the families they are evaluating.

C. JURISDICTIONAL TRANSFERS AS A SOLUTION TO THE INDIGENOUS CHILD WELFARE CRISIS

Moves towards self-determination for indigenous groups have met opposition from countries concerned with possible

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129. HARRIS-SHORT, *supra* note 5, at 126.

130. Alison J. Gerlach et al., *Engaging Indigenous Families in a Community-Based Indigenous Early Childhood Programme in British Columbia, Canada: A Cultural Safety Perspective*, 25 HEALTH SOC. CARE CMTY. 1763, 1764 (2017).

131. *Id.*

132. *See supra* Section II(C). It is important to recognize that although the definitions of best interests that result in disproportionate removals of native children are created at the domestic level, they find justification through their international counterpart, the UNCRC.

133. *10 Things to Know About Indigenous Peoples*, *supra* note 15.

134. HARRIS-SHORT, *supra* note 5, at 40.

secession of those indigenous groups.[135] However, these concerns are largely unfounded as most indigenous groups do not want nation-state status due to the logistical complications that would follow.[136] Transfers of jurisdiction can be a good compromise for indigenous groups who do not want to take on nation-state status, but are opposed to the extent of the political, legal, and economic control states exercise over their communities.[137] By transferring jurisdiction over child protection matters, indigenous groups are given the ability to develop their own culturally-appropriate child welfare systems but still remain under the umbrella of their corresponding nation-state.

While transfers of jurisdiction have enjoyed limited success,[138] turning over child welfare systems to indigenous groups and allowing those groups to define their own best interests is the best way to effectuate change among indigenous children in need of protection. The self-determination transferring jurisdiction would provide is compliant with the UNDRIP. Transferring jurisdiction would also allow for a culturally appropriate application of the "best interests of the child" principle in the UNCRC, as indigenous communities could make their own determinations grounded within their own culture. However, the failure of this policy so far is largely due to inconsistent implementation, a lack of funding, and fears of indigenous communities' abilities to administer child welfare systems.[139] Countries should devote time and resources to supporting these fledgling systems. In the meantime, a more widespread use and unequivocal acceptance of the testimony of Qualified Expert Witnesses (discussed in Part 4) could provide a temporary measure to aid courts in determining a child's best interests while jurisdiction is transferred to tribes.

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135. Duane Champagne, *What Is Indigenous Self-Determination and When Does it Apply?*, INDIAN COUNTRY TODAY (Oct. 4, 2014), https://indiancountrytoday.com/uncategorized/what-is-indigenous-self-determination-and-when-does-it-apply.

136. *Id.* (stating that "most indigenous nations are small, not market-based, and cannot compete politically, economically, or militarily with nation states.").

137. *Id.*

138. *See generally* RUTH TEICHROEB, FLOWERS ON MY GRAVE (1998) (discussing issues with an indigenous-run child protection system).

139. *Id.*; Jorge Barrera, *Child advocates worry about funding for Canada's 'path-breaking' Indigenous child welfare bill*, EYE ON THE ARCTIC (Mar. 1 2019, 10:27 AM), https://www.rcinet.ca/eye-on-the-arctic/2019/03/01/indigenous-children-canada-bill-c92-welfare-funding/.

1. Contemporary Approaches to Jurisdictional Transfers

Attempts to transfer jurisdiction to indigenous groups have been limited in terms of the actual power transferred and its success. In the United States, the Indian Child Welfare Act was passed as a way to combat the indigenous child welfare crisis by enacting procedural and substantive requirements for child welfare cases involving indigenous children.[140] The main provisions related to jurisdiction state that tribal governments have exclusive jurisdiction over indigenous children who live on reservations.[141] Tribes are also given concurrent jurisdiction for indigenous children who do not live on the reservation.[142]

In Canada, provincial governments enacted limited attempts prior to 2019 to transfer jurisdiction over child welfare to First Nations people.[143] A new bill, C-92, is designed to enact a sweeping jurisdictional change in indigenous child welfare throughout the country.[144] The law, which went into effect January 2020, sets up national principles judges and social workers must apply to indigenous child welfare cases.[145] The law also recognizes the inherent jurisdiction of tribes over indigenous children, and allows them to create coordination agreements with provinces in order to transition into handling their own child protection cases.[146] It recognizes the government's role in intergenerational trauma among First Nations peoples caused by residential schools and takes accountability for that trauma.[147] The Wabaseemoong Independent Nations was one of the first indigenous groups to submit their child and family services code to the Canadian government to have federal recognition and enforcement.[148]

140. Kasey D. Ogle, *Why Try to Change Me Now? The Basis for the 2016 Indian Child Welfare Act*, 96 NEB. L. REV. 1007, 1010 (2018).

141. Indian Child Welfare Act, 25 U.S.C. § 1911(b) (1982).

142. *Id*. § 1911(a).

143. *See* LIBESMAN, *supra* note 9, at 13.

144. Barrera, *supra* note 139.

145. Brett Forester, *Federal Indigenous child welfare Bill C-92 kicks in – now what?*, APTN NAT'L NEWS, (Jan. 1, 2020), https://aptnnews.ca/2020/01/01/federal-indigenous-child-welfare-bill-c-92-kicks-in/.

146. An Act respecting First Nation, Inuit and Metis children, youth and families, S.C. 2019, c 24, art 19 (Can.).

147. *Id.* at pmbl.

148. Logan Turner, *Wabaseemoong Independent Nations will have Anishinaabe law on Child Welfare Start in New Year*, CBC NEWS (Jan. 1, 2021, 7:00 A.M.), https://www.cbc.ca/news/canada/thunder-bay/wabaseemoong-child-

Their code was officially implemented on January 8, 2021, making the Wabaseemoong Independent Nations one of the first indigenous groups to officially transfer jurisdiction through the provisions in C-92.[149]

In Australia, although groups have recognized the importance of self-determination in indigenous child welfare, there have been limited attempts to enact it.[150] Self-determination guided aboriginal policy between 1972 and 1996, but it was limited to land right legislation and also frequently resulted in feelings of abandonment by indigenous groups, who through years of subjugation had come to rely on the settlers.[151] It was thereafter abandoned as a policy principle, and, despite the *Bringing Them Home* report emphasizing the need for self-determination,[152] the policy has not taken hold with federal reforms as in the United States and Canada.[153] Reforms in Australia, Canada, and the United States have been unsuccessful insofar as indigenous children are still disproportionately represented.[154]

While jurisdictional transfers appear in theory to be positive ways of following the international call for indigenous self-determination, the implementation of these laws frequently fail to live up to their potential. The United States' implementation of ICWA's concurrent jurisdiction among states, and even among counties within the same state, varies drastically; guidelines on its implementation by the Bureau of Indian Affairs in 1979 and 2015 are both non-binding and nothing else sets uniform standards for states to follow.[155] Furthermore, states can refuse transfers of jurisdiction for "good cause" which is not defined in the statute.[156] This "good cause" provision represents a stopgap

welfare-law-1.5854482.

149. *Id.*

150. *See generally* BRINGING THEM HOME, *supra* note 3.

151. Bamblett & Lewis, *supra* note 114, at 47–48.

152. *See generally* BRINGING THEM HOME, *supra* note 3 (showcasing and exploring various movements, programs, and rationale pursuing greater autonomy of indigenous people).

153. Although an Aboriginal Child Placement principle exists in which aboriginal children must be placed within their cultural group, this reform only relates to placement of children in care and does nothing in the way of jurisdiction and/or self-determination. S*ee* Bamblett & Lewis, *supra* note 114, at 48.

154. HARRIS-SHORT, *supra* note 5, at 119.

155. Ogle, *supra* note 140, at 1012.

156. Jeanne Louise Carriere, *Representing the Native American: Culture, Jurisdiction, and the Indian Child Welfare Act*, 79 IOWA L. REV. 585, 598 (1994).

mechanism in an act that otherwise depicts itself as providing tribes with self-determination over child welfare, when the stopgap actually prevents tribes from having complete control.[157] Finally, for indigenous children who do not live on a reservation, the "best interests" standard used to assess their case is one set by the state, and the child's status as Native American is just a factor to consider in that assessment.[158]

In Canada, C-92 lacks the funding necessary for indigenous groups to actually implement their own child protection systems.[159] The estimated cost indigenous groups would need to create their own systems is estimated at 3.5 billion Canadian dollars over five years.[160] With no statutory funding provided in the bill, C-92's grant of jurisdiction is largely symbolic.[161] This is not altogether surprising, as Canada has previously passed toothless federal guidance recognizing that indigenous people have the right to self-government.[162] Following federal recognition of this right, the federal government made clear that this "inherent right" is a subordinate right that can only be exercised within the existing Canadian governmental framework.[163] If jurisdiction is being transferred in name only, indigenous groups are not being given a meaningful opportunity to engage in self-determination. Furthermore, indigenous groups seeking to exercise the rights recognized in C-92 will face provincial opposition.[164] The Quebec government has already signaled their opposition to a transfer of indigenous child welfare jurisdiction by filing a constitutional challenge claiming federal infringement on provincial jurisdiction.[165] Even if no other provinces follow suit, they can use the constitutional challenge as justification to delay implementation indefinitely.[166] While transfers of jurisdiction have the potential to make meaningful progress in the context of international

157. *Id.* at 599.

158. Indian Child Welfare Act, 25 U.S.C. § 1911(b) (1982).

159. Forester, *supra* note 145.

160. Jorge Barrera, *First Nations Need Billions in Funding to Take Over Child Welfare Services, Says AFN Regional Chief*, CBC NEWS (Dec. 3, 2019, 4:00 AM), https://www.cbc.ca/news/indigenous/afn-special-chiefs-assembly-1.5381566.

161. *Id.*

162. HARRIS-SHORT, *supra* note 5, at 152–53.

163. *Id.* at 153.

164. Forester, *supra* note 145.

165. *Id.*

166. *Id.*

goals of indigenous self-determination, as in the cases of Canada and the United States, they frequently fail to do so.

2. Concerns with Transferring Jurisdiction

Part of the concern with a full transfer of jurisdiction to indigenous groups is a fear that indigenous groups do not have the resources to handle child welfare cases. Self-determination is "not a panacea" due to the socio-economic marginalization of the indigenous peoples.[167] Aboriginal women sometimes express concerns that transferring more power to the tribe could have negative consequences, as they allege tribal leadership fails to adequately respond to intra-familial violence.[168] Additionally, children in indigenous-run child welfare systems have experienced issues with violence, poverty, abuse, and sexual assault.[169] One often-cited example involves the death of 15-year-old Lester Dejarlais in Canada.[170] Lester's suicide led to an inquiry which revealed a large-scale attempt by tribal leaders to prevent social service workers from protecting children against known sexual predators.[171]

While these issues are concerning, to suggest that these concerns justify restraints of full jurisdiction transfers or a denial of transfers altogether is disingenuous. Lester's death, while tragic, pales in comparison to the number of indigenous children who die in provincial foster care systems every year. In Alberta, indigenous children account for 78 percent of the children who have died in foster care since 1999.[172] In Manitoba, 546 children died in child protection between 2008 and 2016.[173] It is hypocritical to judge indigenous child welfare systems as somehow less capable when they suffer from the same problems that exist in the provincial child welfare systems. Furthermore, the concerns regarding the sexual exploitation of indigenous

167. HARRIS-SHORT, *supra* note 5, at 124.

168. *Id.* at 128.

169. *Id.* at 128–32.

170. *Id.*

171. *See generally* TEICHROEB, *supra* note 138 (using the Dejarlais case to illustrate and expose issues within an indigenous-run child protection).

172. Kyle Edwards, *The Stunning Number of First Nations Kids in Foster Care – And the Activists Fighting Back*, CHATELAINE (Jan. 10, 2018), https://www.chatelaine.com/living/first-nations-fighting-foster-care/.

173. These figures come from the Assembly of Manitoba Chiefs Manitoba Advocate for Children and Youth, which places the number at 13 per year between 2009 and 2018. Pauls, *supra* note 111.

children exist in non-indigenous child welfare systems just as much as in indigenous child welfare systems. Half of the sex trafficking victims in Canada are indigenous, with the majority of victims coming from foster care.[174] A report from British Columbia, Canada found indigenous children are four times more likely to be sexually abused in foster care than non-indigenous children.[175] The United States has also faced allegations that indigenous children are subject to abuse while in foster care, and that the abuse is not taken seriously by the state.[176] Again, while the end goal is to protect all children in foster care from harm, to suggest that indigenous communities are somehow less capable than non-indigenous ones at implementing their own child welfare systems when both suffer from the same issues is at best, ignorant, and at worst, imperialist.

3. The Imperative of Nations to Act to Facilitate True Transfers of Jurisdiction

As a matter of justice, governments have a responsibility to develop indigenous child welfare systems.[177] Before they were colonized, indigenous people had their own system of child-rearing practices.[178] Their family structures and ability to care for their children were diminished by colonialism and cultural genocide perpetrated by colonial nation-states, and it is therefore the responsibility of the governments who perpetrated such crimes to work with the communities they affected to find solutions and approaches for effective self-determination.[179]

Despite this imperative to act, countries may still be resistant to fully transferring jurisdiction to indigenous communities over fears that they will lose the ultimate power to intervene if children are suffering. However, international law can serve as a fallback option for nations who still feel the need

174. Pamela Palmater, *Foster Care System One of the Paths to Murdered and Missing Indigenous Women*, CBC NEWS (Feb. 27, 2018, 4:00 AM), https://www.cbc.ca/news/indigenous/opinion-foster-care-system-path-to-mmiwg-1.4552407.

175. *Id.*

176. Laura Sullivan, *Native Foster Care: Lost Children, Shattered Families*, NPR (Oct. 25, 2011, 12:01 PM), https://www.npr.org/series/141763531/native-foster-care-lost-children-shattered-families.

177. Bamblett & Lewis, *supra* note 114, at 43, 49.

178. *See generally* HARRIS-SHORT, *supra* note 5, at 51–54.

179. *Id.* at 49, 52.

to have some level of oversight of indigenous child welfare.

Colonial powers could condition their transfers of jurisdiction based on the adoption of the best interests principle found within the UNCRC.[180] The best interests principle is a vague and flexible one, meaning that issues with its implementation have to do with those doing the implementation, not the principle itself.[181] One may question in what ways do tribal "best interests" differ from the current "best interests" standards set by colonial powers. Although there are ways in which best interests diverge between indigenous peoples and current post-colonial child welfare systems,[182] that is ultimately a minor factor in why jurisdiction should be transferred. By giving tribes agency in setting "best interests" standards, it increases their feelings of cultural safety and promotes self-determination.[183] Indigenous people largely see the child welfare system as inherently adversarial due to years of intergenerational trauma perpetrated in the name of child welfare.[184] Allowing friends, neighbors, and other members of indigenous communities to administer it would therefore help promote the legitimacy of the system and increase institutional buy-in.[185] Additionally, social workers and judges, in implementing "best interests," are inherently measuring parents against some kind of norm, or "best parent."[186] This ideal parent is typically white, heterosexual, monogamous, with stable finances and a tidy home.[187] By shifting jurisdictions to indigenous groups, it would allow them to not only redefine best interests, but consequently the ideal parent, so indigenous parents in the system would not feel as though they were being

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180. G.A. Res. 44/25, at art. 3, cl. 1 (Nov. 20, 1989).

181. *See* Fierens, *supra* note 80, at 38.

182. *See, e.g.*, Maureen Long & Rene Sephton, *Rethinking the "Best Interests" of the Child: Voices from Aboriginal Child and Family Welfare Practitioners*, 64 AUSTL. SOC. WORK 96, 100 (2011) (recognizing aboriginal families differ from non-aboriginal families in their collective nature and emphasis on independence and autonomy in child-rearing). Other practices that Aboriginal people viewed as "normal" but felt were perceived negatively by non-indigenous persons include co-sleeping and having multiple households living under one roof.

183. *See* Gerlach, *supra* note 130, at 1768.

184. *Id.* at 1765.

185. *Id.* at 1768.

186. Kyllie Cripps, *Indigenous Children's 'Best Interests' at the Crossroads: Citizenship Rights, Indigenous Mothers and Child Protection Authorities*, 5 INT'L. J. CRITICAL INDIGENOUS STUD. 25, 27 (2012).

187. *Id.*

measured against non-indigenous ideals.[188] If those subjected to the child protection system feel empowered and understood, it stands to reason that outcomes of the system would correspondingly improve.

The United Nations High Commissioner for Refugees has its own criteria for when a child's removal from their family is in the child's best interests.[189] Citing removal of children from their families without justification as "one of the gravest violations that can be perpetrated against children," the UNHCR's determination to remove children is limited to cases of "severe abuse or neglect."[190] The UNHCR defines severe abuse or neglect as:

> "[S]erious physical or emotional damage caused, for example, by, severe beating, death threats, maiming, lengthy confinement by the parents as punishment, coercion to engage in the worst forms of child labour, continuous exposure to severe domestic violence within the home; sexual abuse or exploitation, such as the inducement or coercion of a child to engage in any unlawful sexual activity; exploitative use in prostitution or other unlawful sexual practices; exploitative use in pornographic performances and materials."[191]

The UNHCR is limited in scope in that it deals only with forcibly displaced children and may only remove children if one of these issues occurs and state authorities are unwilling or unable to act.[192] However, the UNHCR's best interests can establish a baseline for what is minimally acceptable. If this definition is adopted, groups with cultural practices that are physically harmful to the child (such as Female Genital Mutilation or female infanticide) are prevented from shielding themselves from international scrutiny, but cultural practices that do not involve maiming or severe harm are not subject to review if a tribe deems the practice acceptable.

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188. *Cf.* Michael E. Connelly, *Tribal Jurisdiction Under Section 1911(b) of the Indian Child Welfare Act of 1878: Are the States Respecting Indian Sovereignty*, 23 N.M. L. REV. 479, 481 (1993).

189. UNHCR, *supra* note 111, at 37.

190. *Id.* at 38.

191. *Id.*

192. *Id.* at 30; *see also* United Nations High Comm'r for Refugees, A Framework for the Protection of Children (2012), https://www.unhcr.org/50f6cf0b9.pdf.

Although the UNHCR is limited in their scope and is more useful as a reference for fledgling child welfare systems to establish their child protection minimum protections, other international organizations can work with nations to develop their child protection systems. Countries in Europe and Central Asia have worked with UNICEF to strengthen their national child protection systems.[193] UNICEF recognizes that culture is an inherent component of child-rearing, as culture provides "standards of conduct that regulate society."[194] Indigenous groups could work with international groups like UNICEF and the UNHCR to help develop their own child protection systems, which would prevent colonial interference and bias, but could also assuage fears of allowing practices that are harmful to children to occur.[195]

4. Where Jurisdictional Transfers Are Not Feasible, Qualified Expert Witnesses Can Help Courts Properly Consider Cultural Factors

Transferring jurisdiction to tribes is the ideal method to reconcile a child's right to have a court act in their "best interests" with indigenous people's right to self-determination. Ensuring those with the power to make decisions regarding an individual's family and culture are themselves immersed within that culture promotes legitimacy and understanding within the system. However, this change will likely take a great deal of time

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193. *Child Protection*, UNICEF, unicef.org/eca/child-protection (last visited Mar. 1, 2020). For more information regarding how UNICEF interacts with child protection systems, *see Child Protection*, UNICEF (last updated Sept. 3, 2020), https://www.unicef.org/protection/57929_57990.html (describing the ways UNICEF works with governments and civil society to develop child welfare systems).

194. United Nations Children's Fund, Hidden in Plain Sight: A Statistical Analysis of Violence Against Children, at 146 (2014).

195. In fact, a group including UNICEF, the UNHCR, and the international organization Save the Children have already worked together to form a culturally-sensitive systems approach to child welfare. Fred Wulczyn et al., *Adapting a Systems Approach to Child Protection: Key Concepts and Considerations* 1 (United Nations Children's Fund, Working Paper, 2010). This approach recognizes that "every family, community, and nation has a child protection system in place that reflects the underlying cultural value base and diversity within that context" and therefore focuses not on evaluating those determinations, but rather "highlight[ing] the key components that will be found in any child protection system and [encouraging] a robust and transparent conversation among key stakeholders as to how the definition of these components will impact child protection." *Id.* at 2.

and resources, especially as there are no current models on which to base a large-scale transfer of child protection systems from the state to tribes.[196] While the logistics of such transfers are worked out, there is one particular mechanism that could improve the child welfare system for indigenous families: Qualified Expert Witnesses (QEW).

A QEW is required under the United States' Indian Child Welfare Act before foster care placement is ordered or parental rights are terminated.[197] The purpose of QEWs is to prevent indigenous children from being removed from their families, "solely on the basis of testimony from social workers who lacked familiarity with Native American culture."[198] During a court proceeding, a QEW would provide testimony on a child's "best interests" given their knowledge of the "prevailing social and cultural standards" of the child's tribe in an attempt to combat cultural bias.[199] This approach is better than a judge simply trying to take a child's culture into account during their deliberative process because a QEW's testimony explicitly recognizes potential differences in child-rearing practices cross-culturally and gives the judge an informed perspective on a particular indigenous culture instead of allowing the judge to rely on their own intuition. However, it is secondary to a complete transfer of jurisdiction because (a) judges are allowed to decide how much weight to give the testimony of a QEW, if any at all,[200] (b) a QEW's testimony will not eliminate the ambiguity of culture in the same way having a decision made by someone from the same culture would,[201] and (c) using a QEW firmly positions culture as one item for consideration, instead of using it as a lens to view all aspects of a child protection proceeding.[202] It is possible that these shortcomings are one reason why disproportionality continues to exist in the United

196. *Cf.* Barrera, *supra* note 138.

197. Indian Child Welfare Act, 25 U.S.C. § 1912(e)–(f) (1982).

198. Kurtis A. Kemper, *Who Are "Qualified Expert Witnesses" Under Indian Child Welfare Act (ICWA), 25 U.S.C.A. § 1912(e), (f) and State ICWA Statutes, Requiring Certain Testimony by Such Witnesses Before Foster Care Placement or Termination of Parental Rights May Be Ordered,* 38 A.L.R.7TH 1, at § 2.

199. *Id.*

200. *In re* Welfare of Children of J.B., 698 N.W.2d 160, 167 (Minn. Ct. App. 2005).

201. Kacy Wothe, Note, *The Ambiguity of Culture as a Best Interest Factor: Finding Guidance in the Indian Child Welfare Act's Qualified Expert Witness*, 35 HAMLINE L. REV. 729, 775 (2012).

202. *Id.* at 772.

States between native and non-native children in foster care. However, as an intermediary between current systems and full jurisdictional transfers, QEWs could inject necessary cultural discourse into child protection systems.

IV. CONCLUSION

As indigenous peoples gain more recognition in the international community, most notably under the UNDRIP, they are still denied the ability to exercise full control over one of the most fundamental aspects of their culture and internal affairs: the ability to determine the "best interests" of their children. Denying indigenous groups this power frustrates the efficacy of the UNDRIP and results in a perpetual cycle of removal and abuse.

Indigenous children in Canada, the United States, and Australia endured removal from their families in the late 1800s and early 1900s due purely to the colonial belief that it was the colonizers' duty to "civilize" indigenous people. Once the colonial powers officially terminated the policy of removal of indigenous children from their families, newly-formed child protection agencies continued to remove indigenous children at disproportionately high rates, a problem that persists today.

This note proposes that the solution to the disproportionality of native children in foster care is to reconcile the typically Eurocentric notion of a child's "best interests" under UNCRC with the indigenous people's right to self-determination as articulated by UNDRIP. The most effective way to do this is to transfer jurisdiction over child welfare from the state to indigenous groups. This note proposes that the only way these transfers of jurisdiction will succeed is if they are done with proper funding and without reservation of power for the state. Although colonial powers may demonstrate reluctance to give up control over indigenous child protection, it is essential for the system's legitimacy, and oversight and guidance can be provided by international organizations such as UNHCR and UNICEF. While key stakeholders work out the logistics of these transfers, Qualified Expert Witnesses can serve as a bridge in providing more cultural context in child removal proceedings. However, the best way to break the cycle of removal in indigenous communities is to transfer the power of decision-making in child protection cases to those communities. Culture is not simply a factor to be considered in determinations of "best

interests," but provides a lens through which to view child-rearing; a lens which can only be fully known and assessed by members of the cultural community itself. Until the people with the power to make determinations are the same people affected by those determinations, disproportionality in the system will continue to exist.