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COMMUNITIES AS CARETAKERS: THE INDIAN CHILD WELFARE ACT AS AN ANTIRACIST FRAMEWORK FOR ALL CHILD WELFARE CASES

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INTRODUCTION

"Americans have long been trained to see the deficiencies of people rather than policy. It's a pretty easy mistake to make: People are in our faces. Policies are distant. We are particularly poor at seeing the policies lurking behind the struggles of people."
— Ibram X. Kendi[2]

The child welfare system is racist.[3] As with all systems in the United States, the system charged with protecting children is not exempt from the racist policies, practices, and mindsets that created and justified colonialization and slavery. Black, Indigenous, and other communities of color continue to fall prey to the harsh realities of child welfare involvement, finding themselves disproportionately represented in this system.[4] Historically, the child welfare system has attempted to rectify this issue by implementing policies and practices that consistently fall flat. Perhaps one of the most comprehensive attempts at rectifying these wrongs involved the Indian Child Welfare Act (ICWA) enacted in 1978.[5] ICWA was created to protect Indigenous[6] communities

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[2] IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 27 (2019).
[3] *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001); DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); *Racism in Child Welfare and Juvenile Justice Systems*, CHILD.'S RIGHTS, https://www.childrensrights.org/racism-in-child-welfare-and-juvenile-justice-systems/ (last visited Apr. 19, 2022); Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021), https://time.com/5946929/child-welfare-black-families/.
[4] *Child Welfare and Juvenile Justice Systems*, *supra* note 3.
[5] *See* Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978).
[6] Throughout this Note, the term "Indigenous" is used to represent communities with origins in North America prior to colonization. This term is used in place of other terms such as "Indian" and "Native American." The author of this Note recognizes and wishes to acknowledge the complexity that comes with labeling identities, as well as the painful histories associated with these labels. This footnote hopes to highlight that communities and people are too diverse for our present terminology to hold. Understanding that current solutions are imperfect and conversations around labeling remain ongoing, the author clarifies that she opted to use the term "Indigenous," in recognition that it is not the only term used by those who identify with these

devastated by extraordinarily high rates of removing Indigenous children from their families and Tribes and adopting them out to non-Indigenous families.[7] In 2013, eighteen of the United States' most prominent child welfare organizations collectively asserted in an amicus brief that through the creation of ICWA, "Congress adopted the gold standard for child welfare policies and practices that should be afforded to all children."[8] Specifically, they asserted that ICWA serves as "a model for child welfare and placement decisionmaking [sic] that should be extended to all children."[9]

Through providing context on the reality of racism within the child welfare system historically and today, and through exploring gaps in current federal provisions, this Note identifies aspects of ICWA's antiracist framework that should be adopted for all children entering the child welfare system. The proposed expansion of specific ICWA mandates and provisions allows for greater accountability to both Indigenous communities, for which ICWA was created, as well as Black and other communities of color that are overrepresented in the child welfare system. In adopting the suggested mandates, the child welfare system is held to account for the wrongdoings that have plagued, and continue to plague, Black, Indigenous, and other communities of color.

Part I of this Note highlights the presence of racism in the child welfare system. It outlines current statistics around disparity at all levels of child welfare involvement, as well as the history of family separation for Black and Indigenous families specifically.

Part II covers the adoption of ICWA in 1978. This section discusses the creation and adoption of ICWA as a direct response to trauma inflicted upon Indigenous children and families for centuries. Additionally, this section provides an overview of the principles and mandates, as well as the current challenges to the application of ICWA.

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specific communities. *See* Samantha Vincenty, *Should You Use Native American or American Indian? That Depends on Who You Ask*, OPRAH DAILY (Oct. 13, 2021), https://www.oprahmag.com/life/a34485478/native-american-vs-american-indian-meaning/.

[7] *Indian Child Welfare Resources*, NAT'L CONF. STATE LEGISLATURES (Nov. 12, 2019), https://www.ncsl.org/research/human-services/ncsl-state-Tribal-institute-intersection-ec-cwp.aspx.

[8] Brief of Casey Family Programs et al. as Amici Curiae in Support of Respondent Birth Father at 8, Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013) (No. 12-399).

[9] *Id.* at 9.

Part III proposes specific mandates from ICWA that should be adopted for all children within the child welfare system to resolve the gap in protection provided by current federal legislation and policies. This section seeks to demonstrate how ICWA serves as an antiracist framework within the child welfare system that should be adopted for all children. Specifically, this section highlights the benefits of increased involvement of a child's specific community in regulation and placement; inclusion of qualified expert witnesses in placement and termination of parental rights determinations; and higher burdens of proof and standards for removal, termination of parental rights, and provision of services.

Finally, Part IV acknowledges how expansion of ICWA to all children could both positively and negatively impact the Indigenous communities that this Act was created to serve. This section seeks to highlight how the benefits, such as a clearer understanding and uniform usage of heightened requirements for removals, should not outweigh the specific necessity of ICWA. For Indigenous communities, ICWA continues to serve an important role in acknowledging sovereignty, which must be preserved. The additional antiracist reforms proposed for all children and families within the child welfare system should not come at the cost of repealing ICWA, but rather additional federal legislation should be formulated to incorporate the aspects discussed in Part III.

I. RACISM & THE CHILD WELFEARE SYSTEM

Race and socioeconomic status are known to be implicated in almost every part of the child welfare system—reporting, foster care placements, termination of parental rights, and more.[10] Many studies have focused on how this system disproportionately impacts certain racial and ethnic populations, specifically Black and Indigenous families.[11] In 2021, the federal Children's Bureau published a bulletin

[10] Krista Ellis, *Race and Poverty Bias in the Child Welfare System: Strategies for Child Welfare Practitioners*, AM. BAR ASS'N (Dec. 17, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/race-and-poverty-bias-in-the-child-welfare-system---strategies-f/.

[11] CHILD WELFARE INFO. GATEWAY, CHILD.'S BUREAU, DEP'T HEALTH & HUM. SERVS., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 5 (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf.

for professionals on precisely this issue.[12] The bulletin highlights that racial disparities can be found at almost all major decision-making points in the child welfare system, resulting in Black families being overrepresented in reports, investigations, findings of confirmed maltreatment, and out-of-home placements.[13] Population statistics from 2019 revealed that Indigenous children made up only 1% percent of the child population but accounted for 2% percent of the foster care population, and Black children made up about 14% of the child population and 23% of the foster care population. .[14] Research published by the American Journal of Public Health indicates that, before their eighteenth birthday, more than half – 53% – of all Black children will experience a child abuse or neglect investigation.[15] Additionally, once in foster care, children of color are found to experience "higher rates of placement disruptions, longer times to permanency, and more frequent re-entry than their white counterparts."[16]

It is important to note that overrepresentation and disproportionality is not due to higher incidence of abuse and neglect in families of color compared to white families.[17] Instead, it has become

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[12]*See id.*

[13] *Id.* at 3.

[14] *Id*. at 2-3 (citing The Annie E. Casey Found., *Child Population by Race in the United States*, KIDS COUNT DATA CTR., https://datacenter.kidscount.org/data/tables/103-child-population-by-race (last visited Apr. 19, 2022); CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., NO. 27, THE AFCARS REPORT (June 23, 2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf).

[15] Bryan Samuels, Opinion, *Addressing Systemic Racism in Our Child Welfare System*, IMPRINT (Sept. 15, 2020, 5:56 AM), https://imprintnews.org/opinion/addressing-systemic-racism-in-our-child-welfare-system/47430.

[16] *Id.*

[17] Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, APPEAL (Mar. 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/; *see, e.g.*, Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 J. AM. MED. ASS'N 1603, 1608 (2002) (showing doctors less likely to report white children with fractures of indeterminate origin than minority children); Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENGLAND J. MED. 1202, 1204 (1990)

widely known and accepted that families of color, as compared to white families, are simply disproportionately represented in the child welfare system and are more likely to experience adverse outcomes once within it. [18] The issue is so pervasive that the National Conference of State Legislatures has tracked both multiple federal acts and over 29 enacted state bills specifically dedicated to addressing disproportionality in child welfare.[19] However, in cities such as Philadelphia, where the Department of Human Services removes children from their families at the highest rate of all major cities,[20] it still remains that two-thirds (66%) of dependent placements involve youth who identify as Black, while only 12% of placed youth identify as white.[21] These numbers stand in stark contrast to the overall demographic data for Philadelphia, where representation of white and Black communities is almost equal at 40.7% and 42.1% respectively.[22] Thus, it is clear that families of color are targeted by the system. The overcriminalization and punishment of parenting choices made by women of color has led to the coining of the term "Jane Crow."[23] One public defender working in this system described it as follows:

(showing black mothers are 10 times more likely to be reported for substance abuse during pregnancy than white mothers); Stephanie L. Rivaux et al., *The Intersection of Race, Poverty and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, 87 CHILD WELFARE 151, 152 (2008) (caseworkers are more likely to perceive Black children as being at risk and in need of removal over provision of services than white children).

[18] *Disproportionality and Race Equity in Child Welfare*, NAT'L CONF. STATE LEGISLATURES (Jan. 26, 2021), https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx.

[19] *Id.*

[20] Courtenay Harris Bond, *'The Kids Are Crying': Three-Part Series Chronicles Despair, Displacement and What DHS Plans to Do*, PHILA. WKLY. (Nov. 15, 2019), https://philadelphiaweekly.com/the-kids-are-crying/.

[21] DEP'T HUM. SERVS. PHILA., QUARTERLY INDICATORS REPORT: FISCAL YEAR 2021 QUARTER 1, at 26 (Mar. 29, 2021), https://www.phila.gov/media/20210329163818/Quarterly-Indicators-Report-FY21-Q1.pdf.

[22] *Quick Facts: Philadelphia City, Pennsylvania*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/philadelphiacitypennsylvania,US/PST045219 (last visited Feb. 21, 2021).

[23] Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 21, 2017),

> There's this judgment that these mothers don't have the ability to make decisions about their kids, and in that, society both infantilizes them and holds them to superhuman standards. In another community, your kid's found outside looking for you because you're in the bathtub, it's 'Oh, my God' — a story to tell later. In a poor community, it's called endangering the welfare of your child.[24]

And once a child is involved in the child welfare system, outcomes can become even more devastating. Children in foster care have been found to have higher delinquency rates, higher teen birthrates, lower economic status, and a higher likelihood of encountering the adult prison system.[25] Given the disproportionate presence of Black, Indigenous, and other families of color in the child welfare system, these aforementioned outcomes are also disproportionately impacting communities of color.

Analysis of racial disparities in child welfare has led to a plethora of potential explanations, such as disparate needs of children and families experiencing poverty, racial bias and discrimination, child welfare system factors (i.e., lack of resources for certain families), and geographic context.[26] Perhaps one of the most important considerations in understanding racism's role in child welfare involves looking to the past. Systemic separation of families of color is a reality that can be traced back to devastating historical injustices, such as slavery and boarding schools.[27] Looking at the current disparities, it is no surprise that, historically, two communities in the United States experienced the brunt of this racism through the child welfare system—Black and Indigenous communities.

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https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html.

[24] *Id.*

[25] *Id.*

[26] CHILD WELFARE INFO. GATEWAY, *supra* note 11, at 5.

[27] Samuels, *supra* note 15.

A. Historical Separation of Black Families

In the 1800s, separating Black families was common practice, especially given the lucrative market created around the enslavement of children.[28] Black children as young as seven years old are recorded as having understood that at any moment they could have been devastatingly ripped from their mother's arms and gifted to white families or sold at slave markets.[29] These violent instances of enslavement of children and separation of Black families occurred until the end of the Civil War in 1865.[30] While separation occurred throughout this time period, Black children were excluded from the developing orphanage system.[31] Instead, separate services were established for these children, including institutions such as the Association for the Care of Colored Children founded by the Society of Friends in 1822.[32] These separate services were typically designed and run by white people.[33]

Following the Civil War and emancipation, newspaper articles were riddled with ads from separated Black families searching for lost family members[34], many of which were never reunified. The Freedman's Bureau was created and signified the first sign of federal efforts to assume responsibility for the social welfare of Black children.[35] The child welfare services provided to these children included educational programs, protective services, placement services, and assistance with reuniting children who had experienced enslavement with their parents.[36] Throughout the last half of the 1800s, Black children remained excluded from the continuously developing foster care system.[37] In response to this exclusion, the Black community

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[28] Vanessa M. Holden, *Slavery and America's Legacy of Family Separation*, AFR. AM. INTELL. HIST. SOC'Y: BLACK PERSPS. (July 25, 2018), https://www.aaihs.org/slavery-and-americas-legacy-of-family-separation/.
[29] *Id.*
[30] DeNeen L. Brown, *'Barbaric': America's Cruel History of Separating Children from Their Parents*, WASH. POST (May 31, 2018), https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents/.
[31] Patricia Turner Hogan & Sau-Fong Siu, *Minority Children and the Child Welfare System: An Historical Perspective*, 33 SOC. WORK 493, 493 (1988).
[32] *Id.*
[33] *Id.*
[34] Brown, *supra* note 30.
[35] Hogan & Siu, *supra* note 31, at 493.
[36] *Id.*
[37] *Id.*

provided their own child welfare services through the establishment of mutual aid associations and service agencies.[38]

Then, following World War II, Black children began to find themselves more involved in the white child welfare system.[39] At the time, this was attributed to the northern migration of Black families, the decrease of poor white children being cared for by the public system, and the effects of new national efforts to prioritize integration.[40] However, even as Black children became increasingly involved in this white system, the leadership roles were maintained by white people.[41] While there were increased efforts to include Black communities in the control of these services through employment and participation in voluntary agency boards during the civil rights movements of the 1960's, Black children continued to be disproportionately impacted by the devastating impacts of family separation.[42] During this time, Black children had less access to more costly child welfare services, were more likely to stay in foster care longer, were less likely to be adopted, and remained overrepresented in child abuse and neglect reporting.[43] Many of these disheartening trends are still in existence today for Black children and families facing the child welfare system.[44]

B. Historical Separation of Indigenous Families

In addition to Black families, historical separation has similarly had a devastating impact on Indigenous families. For many Indigenous communities in the United States, 16th and 17th century interactions with European colonizers were marked by violence in the form of raiding, murder, rape, and kidnapping.[45] From the late 1800's to 1970's, the United States' historical inclination to separate families of color

[38] *Id.* at 494.
[39] *Id.*
[40] Hogan & Siu, *supra* note 31, at 494.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *See, e.g. Disproportionality and Race Equity in Child Welfare*, *supra* note 18 (highlighting that "children of color are more likely to experience multiple placements, less likely to be reunited with their birth families, more likely to experience group care, less likely to establish a permanent placement and more likely to experience poor social, behavioral and educational outcomes.").
[45] *See generally*, Elizabeth Prine Pauls, *Native American: Indigenous Peoples of Canada and United States*, ENCYC. BRITANNICA (Aug. 17, 2021), https://www.britannica.com/topic/Native-American.

heavily impacted Indigenous communities.[46] The U.S. government, fearing that they were running out of land to send Indigenous communities to, decided to shift its policy from relocation to assimilation.[47] During this time, Indigenous children were forcibly removed from their families and sent to "Indian schools."[48] This boarding school system began in 1879 and involved Indigenous youth ranging in age from five to twenty.[49] The original boarding school, founded by Army Officer Richard Pratt, was modeled off of social experiments conducted with Apache prisoners of war.[50] In 1892, Richard Pratt notably remarked the following:

> A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.[51]

These schools worked to "kill the Indian"[52] by requiring Indigenous children to assimilate to whiteness, forcing them to abandon their native language and culture.[53] The students' religious practices were replaced with Christianity, and teachers often mocked and talked down upon all Indigenous traditions and names.[54] Records indicate that these boarding schools affected tens of thousands of Indigenous children,[55] with reports in 1971 indicating that 34,538 Indigenous children remained in

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[46] Brown, *supra* note 30.
[47] Becky Little, *How Boarding Schools Tried to 'Kill the Indian' Through Assimilation*, HIST. (Nov. 1, 2018), https://www.history.com/news/how-boarding-schools-tried-to-kill-the-indian-through-assimilation.
[48] Brown, *supra* note 29.
[49] Hogan & Siu, *supra* note 31, at 495.
[50] *Colonel Richard H. Pratt's 1892 Speech*, UPSTANDER PROJECT, https://upstanderproject.org/firstlight/pratt (last visited Feb. 21, 2021).
[51] Captain Richard H. Pratt, *The Advantages of Mingling Indians with Whites, in* OFFICIAL REPORT OF THE NINETEENTH ANNUAL CONFERENCE OF CHARITIES AND CORRECTION 45, 46 (1892), https://quod.lib.umich.edu/n/ncosw/ACH8650.1892.001?rgn=main;view=fulltext.
[52] Little, *supra* note 47.
[53] Brown, *supra* note 29.
[54] *Id.*
[55] Little, *supra* note 47.

institutional facilities.[56] The history of what happened to these children and their families continues to be exhumed as Indigenous Tribes across the country search for the child graves of those who attended these schools.[57]

As the boarding-school era began to end in the 1970's, with many of these schools being closed or turned over to Tribes, another method of Indigenous family separation was also taking place.[58] From 1958 to 1967, the Indian Adoption Project was a federal program administered by the Child Welfare League of America,[59] with the purpose of promoting the adoption of Indigenous children from sixteen western states by white adoptive families.[60] Both the United States Children's Bureau and Bureau of Indian Affairs partnered on this effort, assisting with the adoption of Indigenous children and providing financial support.[61] Originally, this project was designed as an experiment to remove 50 Indigenous children for adoption, seeking to determine how they fair in non-Indigenous homes.[62] This project sought out white families to adopt by advertising with headings such as: "My forty-five Indian godchildren," "God forgotten Children," "Indian children find homes," and "Interracial Adoption."[63] Many survivors of this era share stories about how their adoptive parents constantly pushed assimilation, with one individual sharing how their adoptive mother continued to remark that she was from a "pagan race whose only hope for redemption was to assimilate to white culture."[64] The Indian Adoption Project was considered by white society to be a solution to the

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[56] Hogan & Siu, *supra* note 31, at 495.
[57] Little, *supra* note 47.
[58] Stephanie Woodard, *Native Americans Expose the Adoption Era and Repair Its Devastation*, INDIAN COUNTRY TODAY (Dec. 6, 2011), https://indiancountrytoday.com/archive/native-americans-expose-the-adoption-era-and-repair-its-devastation-Uinpv-VkFka0KeFfoMD4eQ.
[59] *Id.*
[60] *Indian Adoption Project*, UPSTANDER PROJECT, https://upstanderproject.org/firstlight/iap (last visited Mar. 6, 2022).
[61] Claire Palmiste, *From the Indian Adoption Project to the Indian Child Welfare Act: The Resistance of Native American Communities*, 22 INDIGENOUS POL'Y J. 1, 1—2 (2011).
[62] *Id.* at 3.
[63] *Id.* at 2.
[64] *Indian Adoption Project*, *supra* note 60; *see also*, Woodard, *supra* note 58 (highlighting the issue of "Split Feather Syndrome," which is the "damage caused by loss of Tribal identity and growing up 'different' in an inhospitable world").

"Indian problem," namely the dire conditions of poverty that Indigenous communities were facing at the time.[65] Indigenous parents were presumed incapable of taking care of their children.[66] It is predicted that approximately 12,486 Indigenous children were adopted between 1961-1976 as a result of this project.[67]

The devastating impact of removal of Indigenous children from their families and communities was not formally acknowledged as an issue until the Congressional hearings of 1974 and 1977.[68] These hearings were established to analyze these adoption practices following pressure from various Indigenous organizations.[69] At the time of these hearings, 25-35% of all Indigenous children were being removed from their families, and, of these, 85% were being placed outside of their families and Tribes.[70] During the hearings, testimony provided by psychiatrists outlined the devastating consequences for children experiencing these separations, highlighting increased instances of running away, attempting suicide, using drugs, and being truant from school among Indigenous adolescents adopted outside of their reservations.[71] Legislation to protect Indigenous children was initially proposed in 1976, and rejected.[72] Due to the persistence of the Association on American Indian Affairs, another bill was submitted in 1977, finally leading to the enactment of the Indian Child Welfare Act (ICWA) in 1978.[73]

II. INDIAN CHILD WELFARE ACT

In 1978, the Indian Child Welfare Act (ICWA) was federally enacted as a means of addressing the disproportionate representation of Indigenous children in the child welfare system.[74] Through ICWA, Congress recognized the following concerns: that children are a

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[65] Palmiste, *supra* note 61, at 2.
[66] *Id.* at 3.
[67] *Id.* at 5.
[68] *See id.* at 6.
[69] *Id.*
[70] *About ICWA*, NAT'L INDIAN CHILD WELFARE ASS'N, https://www.nicwa.org/about-icwa/ (last visited Feb. 21, 2021); WILLIAM BYLER, *The Destruction of American Indian Families*, *in* THE DESTRUCTION OF AMERICAN INDIAN FAMILIES 1, 1 (Steven Unger ed., 1977).
[71] Palmiste, *supra* note 61, at 6.
[72] *See id.* at 7.
[73] *Id.* at 6—7.
[74] *Indian Child Welfare Resources*, *supra* note 7.

valuable resource to Indigenous Tribes that must be preserved and protected; that Indigenous families were being devastated by removal, often unwarranted, at an alarming rate by non-Tribal public and private agencies; that Indigenous children were then being placed at alarming rates in non-Indigenous foster and adoptive homes and placements; and that state intervention failed to recognize the importance of essential Tribal relations of Indigenous people, as well as the cultural and social standards prevailing in these communities and families.[75] ICWA, which is still in effect today, governs the removal and out-of-home placement of Indigenous children.[76] The Congressional intent is clear:

> to protect the best interests of Indian children and to promote the stability and security of Indian Tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian Tribes in the operation of child and family service programs.[77]

When an Indigenous child who is a member or citizen of a federally recognized Tribe, or is eligible for membership in and is the biological child of a member or citizen of the Tribe, becomes involved in the child welfare system, ICWA's federal requirements regulate the state process.[78] Specifically, ICWA applies whenever an Indigenous child is the subject of a child-custody proceeding or an emergency proceeding.[79] At the commencement of these proceedings, the State is required to inquire about whether a child fulfills the requirements to be deemed an

[75] 25 U.S.C.A. § 1901 (West 2020).
[76] *Indian Child Welfare Resources*, *supra* note 7.
[77] 25 U.S.C.A. § 1902 (West 2020).
[78] 25 C.F.R. § 23.2 (2020).
[79] 25 C.F.R. § 23.103(a) (2020). There are specific instances where ICWA does not apply, including in proceedings that involve a Tribal court, criminal acts that are not status offenses, an award of custody of an Indigenous child to one of the parents, or a voluntary placement that either parent, both parents, or an Indigenous custodian chooses without the threat of removal from the State. 25 C.F.R. § 23.103(b) (2020).

Indigenous child under ICWA.[80] This section outlines what it means for a case to fall under the purview of ICWA.

A. Bureau of Indian Affairs (BIA)

Before delving into the statutes and regulations that govern ICWA, it is vital to highlight the role of the Bureau of Indian Affairs (BIA) in this context. The BIA is a United States federal agency within the Department of Interior that is tasked with navigating relations between the federal government and Indigenous Tribes and Alaska Natives.[81] Created in 1824, the BIA has changed forms many times over the years, with its current mission being "to enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian Tribes and Alaska Natives."[82] Currently, the BIA serves 574 federally-recognized Tribes through four offices: Indian Services, Justice Services, Trust Services, and Field Operations.[83] Under the Office of Indian Services, which is tasked with supporting families and making communities safer for Indigenous people, the Division of Human Services leads efforts pertaining to ICWA.[84] This specific division is run by BIA staff as well as over 900 Tribal staff contracted specifically to assist with these human services programs in their respective Tribes.[85] The social workers among these staff members work directly with Tribal courts, state courts, and Indigenous families to promote the placement and adoption of Indigenous children in Indigenous homes.[86] Additionally, these social workers are contacted to advise and train other social service agencies on matters of child protection, placement, and adoption of Indigenous children.[87] In understanding ICWA and how it differentiates from general child welfare policies, it is crucial to

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[80] 25 C.F.R. § 23.107 (2020).
[81] *Bureau of Indian Affairs (BIA)*, U.S. DEP'T INTERIOR BUREAU INDIAN AFFS., https://www.bia.gov/bia (last visited Feb. 21, 2021).
[82] *Id.*
[83] *Id.*
[84] Off. of Indian Servs., *Overview*, U.S. DEP'T INTERIOR BUREAU INDIAN AFFS., https://www.bia.gov/bia/ois (last visited Feb. 21, 2021).
[85] Div. Hum. Servs., *Division of Human Services Mission*, U.S. DEP'T INTERIOR BUREAU INDIAN AFFS., https://www.bia.gov/bia/ois/dhs (last visited Feb. 21, 2021).
[86] *Id.*
[87] *Id.*

acknowledge the presence and role of this federal agency specifically tasked with its implementation.

B. Principles & Mandates

In analyzing ICWA, it is important to look to the Act[88] as well as the implementing regulations.[89] A core tenet of ICWA is to protect the best interests of Indigenous children by "ensuring that, if possible, children remain with their parents and that, if they are separated, that support for reunification is provided."[90] Throughout the regulations, the best interest of Indigenous children is defined by prevention of removal.[91] If removal is deemed necessary, the preferred placement, at every level, is a member of the Indigenous child's family or Tribe.[92] Given the history of the subjective application of "best interests" failing Indigenous children and families, ICWA seeks to provide courts with "objective rules that operate above the emotions of individual cases" and facilitate better State-court practices to protect Indigenous children, families, and Tribes.[93] This section outlines some of these important objective rules implemented pursuant to ICWA.

1. Expansion of Tribal Court Jurisdiction & Tribal Standing

One way in which ICWA works to keep Indigenous children with their families and communities is through ensuring that the child's Tribe is involved in the majority of the child welfare decisions.[94] ICWA

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[88] 25 U.S.C.A. §§ 1901-1963 (West 2020).

[89] 25 C.F.R. pt. 23 (2016).

[90] OFF. ASSISTANT SEC'Y – INDIAN AFFS., U.S. DEP'T INTERIOR, GUIDELINES FOR IMPLEMENTING THE INDIAN CHILD WELFARE ACT 89 (2016), https://www.bia.gov/sites/bia.gov/files/assets/bia/ois/pdf/idc2-056831.pdf.

[91] 25 C.F.R. § 23.3 (2020) ("…it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and Indian families by the establishment of minimum Federal standards to prevent the arbitrary removal of Indian children from their families and tribes and to ensure that measures which prevent the breakup of Indian families are followed in child custody proceedings (25 U.S.C. §1902).").

[92] 25 C.F.R. § 23.130 (2020); 25 C.F.R. § 23.131 (2020).

[93] *Id.*

[94] Marcia Zug, *ICWA Downunder: Exploring the Costs and Benefits of Enacting an Australian Version of the United States' Indian Child Welfare Act,* 33 CAN. J. FAM. L. 161, 184 (2020).

recognizes Tribes as "possessing the inherent right to make decisions concerning the care and welfare of their members."[95] If, in the course of an involuntary proceeding, a State court "knows or has reason to know" that an Indigenous child is involved, notice must be provided to the parents, the Indigenous custodians, and the child's Tribe of the pending proceedings and their right to intervene.[96] Under ICWA, Tribal courts have exclusive jurisdiction over any child custody proceeding that involves an Indigenous child who resides or is domiciled within a reservation, or when an Indigenous child is the ward of the Tribal court.[97] The one caveat to this involves situations in which "such jurisdiction is otherwise vested in the State by existing Federal law."[98] If an Indigenous child does not reside or domicile within a reservation, then the State court, "in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the [T]ribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's [T]ribe."[99] This applies to proceedings for foster care placement or termination of parental rights.[100] Collectively, these provisions emphasize the concurrent jurisdiction that Tribes maintain over child welfare matters involving Indigenous children.[101]

In addition to expansion of Tribal Court jurisdiction, ICWA also expands Tribal standing. If an Indigenous child is adopted, the BIA must receive a copy of the decree or order within thirty days.[102] The State is also responsible for sending the BIA a copy of the following information: child's birth name, birthdate, Tribal affiliation, name of child after adoption, names and addresses of biological parents, names and addresses of adoptive parents, name and contact information of the agency with information regarding the adoption, any affidavits signed by the biological parents regarding remaining confidential, and any

[95] *Id.* at 185.
[96] 25 C.F.R. § 23.11(a) (2020).
[97] 25 U.S.C.S. § 1911(a) (LexisNexis 2020).
[98] *Id.*
[99] *Id.* § 1911(b).
[100] *Id.*
[101] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 47. While Tribal Courts maintain the right to jurisdiction over these matters, they also reserve the power to decline jurisdiction over cases transferred to them as well. 25 U.S.C.S. § 1911(a), (b).
[102] 25 C.F.R. § 23.140(a) (2020).

information relating to Tribal membership or eligibility.[103] This provision of information to the BIA allows for Indigenous children to have a resource to access information on their adoption when they become adults.[104]

Additionally, an Indigenous child's Tribe is granted standing to object to certain ICWA violations pertaining to foster care placement and termination of parental rights.[105] Specifically, Tribes are able to petition the court to invalidate actions in violation of 25 U.S.C. §§ 1911, 1912, or 1913.[106] This standing to challenge does not rest upon a violation of the petitioner's rights, but rather can be based on any violation of these aforementioned statutory provisions during the course of a child custody proceeding.[107] In this way, Tribal courts maintain unique jurisdiction and standing in cases typically completely controlled by the State courts.

i. Heightened Evidentiary Standards: Clear and Convincing Evidence for Placements, and Beyond a Reasonable Doubt for Termination of Parental Rights

In general, child abuse and neglect proceedings are considered civil matters, meaning the standard is preponderance of the evidence. Under this low standard, the State must prove that "it is more likely than not that the facts presented are true" or, in other words, that the likelihood is above 50 percent.[108] Under ICWA, this evidentiary burden is heightened for Indigenous children and families. Instead of a demonstration by preponderance of the evidence, the State must present clear and convincing evidence[109] to place Indigenous children into foster care, and evidence beyond a reasonable doubt[110] to terminate Indigenous parents' parental rights.

In order for placement of an Indigenous child to occur, the parties seeking placement must present clear and convincing evidence that the child's continued residence with the parent or custodian is

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[103] *Id.*
[104] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 71.
[105] 25 C.F.R. § 23.137(a)(3) (2020).
[106] § 23.137(a).
[107] § 23.137(c).
[108] Kailyn Champlin et al., *Preponderance of Evidence*, LEGAL DICTIONARY (Sept. 10, 2015), https://legaldictionary.net/preponderance-of-evidence/.
[109] 25 U.S.C.S. § 1912(e) (LexisNexis 2020).
[110] 25 U.S.C.S. § 1912(f) (LexisNexis 2020).

"likely to result in serious emotional or physical damage to the child."[111] Compared to the preponderance standard, the clear and convincing burden of proof requires a demonstration that the contention is "far more likely to be true than false ."[112] The evidence provided must demonstrate a causal relationship between the home conditions and likelihood that continued residence in this home will result in the aforementioned emotional or physical damage.[113] In other words, there must be particular conditions in existence within the child's home that are likely to result in serious emotional or physical damage for that child specifically.[114]

The regulation makes clear that without this demonstration of a causal relationship, it will not be sufficient to merely prove "the existence of community or family poverty, isolation, single parenthood, custodian age, crowded or inadequate housing, substance abuse, or nonconforming social behavior."[115] These factors specifically highlight the types of situations that were historically used as reasons for unjustly removing Indigenous children from their families, as each of these factors alone is not likely to cause serious emotional or physical damage.[116] By acknowledging that "nonconforming social behavior" alone is not a basis for removal, ICWA aims to protect Indigenous families from being punished for exhibiting behaviors that do not comply with society's norms, such as "dressing in a manner that others perceive as strange, an unusual or disruptive manner of speech, or discomfort in or avoidance of social situations."[117] In practice, these regulations illustrate that ICWA recognizes cultural differences, as well as the reality that "children can thrive when they are kept with their parents, even in homes that may not be ideal in terms of cleanliness, access to nutritious food, or personal space, or when a parent is single, impoverished, or a substance abuser."[118] Thus, as a means of undoing the harm caused by historical excessive removal of Indigenous children

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[111] 25 U.S.C.S. § 1912(e) (LexisNexis 2020); 25 C.F.R. § 23.121(a) (2020).
[112] *Clear and Convincing Evidence*, THOMSON REUTERS: PRAC. L., https://content.next.westlaw.com/3-501-6612?__lrTS=20201114085125988&transitionType=Default&contextData=(sc.Default)&firstPage=true (last visited Apr. 13, 2022).
[113] 25 C.F.R. § 23.121(c).
[114] OFF ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 52.
[115] 25 C.F.R. § 23.121(d).
[116] OFF ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 53.
[117] *Id.*
[118] *Id.*

for baseless causes, the burden of proof for removing an Indigenous child from their home is higher and requires demonstration of causation.

In regard to termination of parental rights (TPR), the evidentiary standard for non-Indigenous cases is clear and convincing evidence.[119] In non-Indigenous TPR cases, the United States Supreme Court heightened this standard from preponderance of the evidence to clear and convincing evidence after finding that the Due Process Clause of the Fourteenth Amendment requires more in these instances of complete and irrevocable severance of parental rights.[120] ICWA raises this standard even further to the highest possible evidentiary standard: beyond a reasonable doubt.[121] Prior to terminating the parental rights to an Indigenous child, it must be established beyond a reasonable doubt that that the child's continued residence with the parent or custodian is likely to result in serious emotional or physical damage to the child.[122] The definition for beyond a reasonable doubt is generally understood in the criminal context to mean that there is "no 'reasonable doubt' in the mind of a 'reasonable person.'"[123] Additionally, similar to with foster care placements under ICWA, TPR proceedings require a demonstration of a causal relationship,[124] and poverty, isolation, age, single parenthood, housing constraints, substance abuse, and nonconforming behavior alone will not suffice.[125]

In general cases, placement and TPR proceedings are greatly influenced by the Adoption and Safe Families Act of 1997 (ASFA).[126]

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[119] Santosky v. Kramer, 455 U.S. 745, 747-48 (1982).
[120] *Id.*
[121] 25 U.S.C.S. § 1912(f) (LexisNexis 2020); 25 C.F.R. § 23.121(b) (2020).
[122] § 1912(f); § 23.121(b).
[123] Kailyn Champlin et al., *Beyond a Reasonable Doubt*, LEGAL DICTIONARY (Dec. 16, 2014), https://legaldictionary.net/beyond-a-reasonable-doubt/.
[124] 25 C.F.R. § 23.121(c) (2020).
[125] § 23.121(d).
[126] *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997). In 1997, ASFA was enacted as a response to the high numbers of children in foster care and concerns around these children's safety remaining with or returning to their families after placement in foster care, specifically aiming to increase child safety and expedite permanency. CONG. RSCH. SERV., CHILD WELFARE: IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT (P.L. 105–89) 1 (2004). One of the most frequently referenced provisions of ASFA involves creation of a permanency timeline—generally mandating that the State file for termination of parental rights if a child has been in foster care for fifteen of the most recent twenty-two months. *See* 42 U.S.C.S. § 675(5)(E) (LexisNexis 2020).

Although the United States Supreme Court has not taken up the issue of determining how ASFA and ICWA must interface, a few state courts have found that ASFA does not override ICWA, but rather there must be dual compliance.[127] As long as a case is not being held in a Tribal court, where the ASFA state regulation is not applicable, the court and child welfare professionals need to remain in compliance with both ASFA and ICWA.[128] Under ASFA, a permanency hearing must be held for a child within twelve months of the child entering foster care.[129] For Indigenous children, this means that a permanent placement alternative that complies with ICWA must be secured within twelve months, or the state may be forced into placing the child in a non-conforming placement to remain in compliance with ASFA.[130] Additionally, ASFA creates questions around licensing for placement options under ICWA, as it is unclear if Tribal licensing fulfills ASFA's strict state licensing requirements.[131] Specifically, Tribal licensing of homes is often less stringent, allowing homes to be approved for placement where they may not be under state law (i.e., caregiver has a juvenile criminal violation).[132] Lastly, ASFA establishes clear timelines for when the state must proceed with TPR.[133] However, ASFA creates an exception for compelling reasons to deviate from the timeline, such as placement of the child with a relative.[134] If a case is in compliance with the ICWA placement preferences,[135] which are outlined later in this section, then the case often falls within a compelling reason to deviate from the timeline.[136] Therefore, ASFA timelines do not generally constrict

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[127] *See* South Dakota *ex rel.* J.S.B., Jr., 691 N.W.2d 611, 620 (S.D. 2005); *In re* Nicole B., 927 A.2d 1194, 1205–06 (Md. Ct. Spec. App. 2007).
[128] NATIVE AM. RTS. FUND, *Topic 16: Placement*, *in* A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT 123, 130 (2007), https://www.narf.org/nill/documents/icwa/print/placment.pdf.
[129] 42 U.S.C.S. § 675(5)(C) (LexisNexis 2020).
[130] NATIVE AM. RTS. FUND, *supra* note 128.
[131] *Id.*
[132] *Id.* at 130-31.
[133] 42 U.S.C. § 675(5)(E) (outlining that TPR proceedings must be initiated when a child is in foster care for 15 of the most recent 22 months or if the parent committed certain criminal actions).
[134] § 675(5)(E)(i).
[135] *See generally* 25 C.F.R. § 23.131 (2020).
[136] NATIVE AM. RTS. FUND, *Topic 19: Application of Other Federal Laws*, *in* A PRACTICAL GUIDE TO THE INDIAN CHILD WELFARE ACT 154, 156 (2007), https://narf.org/nill/documents/icwa/print/applicationfederal.pdf.

ICWA efforts towards reunification.[137] Overall, the extremely high burden for TPR cases, combined with the heightened standard for placements, demonstrates Congress' intention under ICWA to utilize evidentiary standards to promote reunification efforts for Indigenous families.

ii. Qualified Expert Witnesses

Additionally, one or more "qualified expert witnesses" must testify to fulfill the burdens for foster care placement[138] and termination of parental rights.[139] The regulations provide as follows:

> A qualified expert witness must be qualified to testify regarding whether the child's continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child and should be qualified to testify as to the prevailing social and cultural standards of the Indian child's Tribe. A person may be designated by the Indian child's Tribe as being qualified to testify to the prevailing social and cultural standards of the Indian child's Tribe.[140]

In identifying individuals qualified to fulfill this role, the court or any party may request assistance from the child's specific Tribe or the BIA.[141] However, the social worker who is regularly assigned to work with the child cannot serve as the "qualified expert witness."[142] Congress made clear that in including the phrase "qualified expert witness," it was intended that these individuals would have a particular expertise beyond that of the average social worker qualifications.[143] There was a concern about leaving this determination up to State social workers who potentially have a stake in the action on behalf of the State.[144] While the State social worker would not qualify as an expert witness under this provision, other social workers, such as a Tribal

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[137] *See* NATIVE AM. RTS. FUND, *supra* note 128.
[138] 25 U.S.C.S. § 1912(e) (LexisNexis 2020); 25 C.F.R. § 23.121(a) (2020).
[139] § 1912(e)-(f); § 23.121(a)-(b).
[140] 25 C.F.R. § 23.122(a) (2020).
[141] § 23.122(b).
[142] § 23.122(c).
[143] H.R. REP. NO. 95-1386, at 22 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530, 7545.
[144] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 54.

social worker, may testify so long as their expertise extends beyond the "normal social worker qualifications."[145]

It is particularly relevant to note that the "qualified expert witness" should have knowledge of the specific Tribe's prevailing social and cultural standards. Congress clarified that Indigenous child welfare determinations should not be made off of "a white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."[146] This clarification highlighted Congress' concern for States' historical failure to recognize Indigenous cultural and social standards, resulting in excessive removal and termination of parental rights for Indigenous families.[147] So, questions around a child's potential risk of serious emotional or physical damage should be examined in the context of the Tribe's prevailing cultural and social standards.[148] However, this specialized knowledge of the social and cultural norms is not required when clearly irrelevant, such as when an expert is called to testify about the effects of sexual abuse on children and the dangers of returning a child to a parent who is sexually abusing them.[149] Yet, when the expert witness is testifying about the cultural and social norms, they must be knowledgeable and experienced in the specific Tribe's reality regardless of whether they are a formal citizen of the Tribe or not.[150] In fact, Tribes themselves may designate witnesses who are qualified as experts for this purpose.[151]

Lastly, it is recommended that the expert witness is familiar with the specific child.[152] The more that the expert is provided the opportunity to interact with the parents and observe interactions between the parents and child, the better prepared the expert will be to provide the court with a full picture of the circumstances.[153] This may also include meeting with extended family members in the child's life.[154] Through incorporating these requirements, ICWA's provision regarding expert witnesses furthers the goal of centering the Indigenous community in child welfare decisions pertaining to Indigenous children.

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[145] *Id.* at 55 (referencing H.R. REP. NO. 95-1386, at 22 (1978)).
[146] H.R. REP. NO. 95-1386, at 24 (1978).
[147] *See* 25 U.S.C. § 1901(5).
[148] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 54.
[149] *Id.*
[150] *Id.* at 54-55.
[151] *Id.* at 54.
[152] *Id.* at 55.
[153] *Id.*
[154] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 55.

iii. Active Efforts

"Active efforts" is codified as a part of ICWA in 25 U.S. Code § 1912 (d). This section addresses remedial services, rehabilitative programs, and preventive measures.[155] The Act reads as follows:

> Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.[156]

In application, prior to ordering an involuntary foster care placement or terminating parental rights for Indigenous children, the state court "must conclude that active efforts have been made to prevent the breakup of the Indigenous family and that those efforts have been unsuccessful."[157] These efforts must be documented in detail for the record.[158]

For all children, including Indigenous children, the basic standard is "reasonable efforts."[159] "Reasonable efforts" is the standard for efforts that State social service agencies shall take to preserve and reunify families "(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home; and (ii) to make it possible for a child to safely return to the child's home."[160] This requirement is fiscally reinforced under the Federal title IV-E program, as State agencies receive cuts in foster care maintenance funding if they are found to be in noncompliance with this standard.[161] Although "reasonable efforts" are not specifically defined, it is generally understood that "active efforts" under ICWA is a higher standard.[162] Where "reasonable efforts" may require the State agency

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[155] 25 U.S.C.A. § 1912 (d) (2020).
[156] *Id.*
[157] 25 C.F.R. § 23.120(a) (2020).
[158] § 23.120(b).
[159] Adoption Assistance Child Welfare Act (AACWA) of 1980, Pub. L. No. 96-272, 94 Stat. 503.
[160] 42 U.S.C. § 671(a)(15)(B).
[161] 45 C.F.R. § 1356.21(a)-(b) (2020).
[162] NATIVE AM. RTS. FUND, *Topic 12: Active Efforts Requirement*, NAT'L INDIAN L. LIBR., https://www.narf.org/nill/documents/icwa/faq/active.html (last visited Mar. 6, 2022).

to offer referrals to a family, "active efforts" is often interpreted to mean that the State agency will fully engage with the family beyond merely providing referrals.[163]

More specifically, "active efforts" are "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with his or her family."[164] For child welfare agencies, "active efforts" require them to assist the parent(s) or Indigenous custodian(s) through the steps of a case plan, as well as with the accessing or developing of any resources necessary to satisfy this case plan.[165] The "active efforts," "to the maximum extent possible," should be "provided in a manner consistent with the prevailing social and cultural conditions and way of life of the Indian child's Tribe and should be conducted in partnership with the Indian child and the Indian child's parents, extended family members, Indian custodians, and Tribe."[166] The federal regulations outline various examples of how "active efforts" must be tailored to the specific facts and circumstances of the case.[167] These examples are as follows:

> (1) Conducting a comprehensive assessment of the circumstances of the Indian child's family, with a focus on safe reunification as the most desirable goal;
> (2) Identifying appropriate services and helping the parents to overcome barriers, including actively assisting the parents in obtaining such services;
> (3) Identifying, notifying, and inviting representatives of the Indian child's Tribe to participate in providing support and services to the Indian child's family and in family team meetings, permanency planning, and resolution of placement issues;
> (4) Conducting or causing to be conducted a diligent search for the Indian child's extended family members, and contacting and consulting with extended family members to provide family structure and support for the Indian child and the Indian child's parents;
> (5) Offering and employing all available and culturally appropriate family preservation strategies and

[163] *Id.*
[164] 25 C.F.R § 23.2 (2020).
[165] *Id.*
[166] *Id.*
[167] *Id.*

> facilitating the use of remedial and rehabilitative services provided by the child's Tribe;
> (6) Taking steps to keep siblings together whenever possible;
> (7) Supporting regular visits with parents or Indian custodians in the most natural setting possible as well as trial home visits of the Indian child during any period of removal, consistent with the need to ensure the health, safety, and welfare of the child;
> (8) Identifying community resources including housing, financial, transportation, mental health, substance abuse, and peer support services and actively assisting the Indian child's parents or, when appropriate, the child's family, in utilizing and accessing those resources;
> (9) Monitoring progress and participation in services;
> (10) Considering alternative ways to address the needs of the Indian child's parents and, where appropriate, the family, if the optimum services do not exist or are not available;
> (11) Providing post-reunification services and monitoring.[168]

It is important to note that with these examples and clearly outlined intentions, there are no exceptions to the ICWA mandate.[169] Thus, even if a party lacks the resources to provide "active efforts," this is not a valid argument to circumvent the "active efforts" requirement.[170] Additionally, where federal statutes have allowed for certain circumstances to permit courts to waive "reasonable efforts,"[171] these exceptions have not been permitted to waive "active efforts."[172] The requirement for "active efforts" was implemented in direct response to the outrageous removal rates of Indigenous children from their homes due to "poverty, joblessness, substandard housing, and other situations

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[168] *Id.*
[169] NATIVE AM. RTS. FUND, *supra* note 162.
[170] *Id.*
[171] 42 U.S.C. § 671(a)(15)(D) (2020).
[172] *See In re* J.S.B., 691 N.W.2d 611, 618-19 (S.D. 2005) (reasoning that ICWA clearly does not provide any exceptions to "active efforts," and AFSA, which was enacted after ICWA, never mentions ICWA nor the intention to modify any provision in ICWA).

that could be remediated through the provision of social services."[173] The United States Supreme Court has asserted that statutes created to protect Indigenous communities, such as ICWA, "are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[174] Therefore, the requirement to provide services to Indigenous families and children in a more thorough and engaging fashion is a key part of ICWA.

iv. Placement Preferences

If an Indigenous child enters a foster-care or preadoptive placement, the ICWA regulations specify that the child must be placed in the "least-restrictive setting" that: "(1) Most approximates a family, taking into consideration sibling attachment; (2) Allows the Indian child's special needs (if any) to be met; and (3) Is in reasonable proximity to the Indian child's home, extended family, or siblings."[175] Specifically, the placement options for children facing this situation should be considered in the following order:

> (1) A member of the Indian child's extended family;
> (2) A foster home that is licensed, approved, or specified by the Indian child's Tribe;
> (3) An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
> (4) An institution for children approved by an Indian Tribe or operated by an Indian organization which has a program suitable to meet the child's needs.[176]

This order must be followed for placing an Indigenous child unless the child's Tribe has "established by resolution a different order of preference," and the Tribe's alternate proposed placement is the "least-restrictive setting" appropriate to address the particular child's needs.[177] A "resolution," as recognized under ICWA, would need to be "a legally binding statement by the competent Tribal authority that lays out an objective order of placement preferences," such as a Tribal-State

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[173] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 39.
[174] Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985); *see, e.g.*, *In re* J.S.B., 691 N.W.2d 611, 619 (S.D. 2005) (upholding this interpretation in the context of "active efforts").
[175] 25 C.F.R. § 23.131(a) (2020).
[176] § 23.131(b).
[177] § 23.131(c).

agreement.[178] Where appropriate, it is incumbent upon the court to also consider the preferences of the child or child's parents.[179] This requirement does not mandate the court to follow the child's or parent's preference, but these preferences must be considered where appropriate.[180]

If the case progresses beyond foster-care and preadoptive placements to adoption, adoptive placement options must be considered in the following order: (1) an extended family member, (2) other members of the Indigenous child's Tribe, or (3) other Indigenous families.[181] In ascribing this preference order, ICWA was clearly designed to prioritize keeping Indigenous children with their families and Tribes. Similar to foster-care and preadoptive placements, this adoptive placement preference must be followed unless the child's Tribe has an alternate "resolution."[182] Again, where appropriate, the court must consider the preferences of the child or parents.[183]

Although in some jurisdictions judges may defer to the State agencies for placement orders, these statutes require the court to review placement decisions for Indigenous children and to ensure that departure from these placement preferences only occurs where "good cause" exists.[184] A request for "good cause" to depart from preferred placement must be made on the record or in writing.[185] Once a request is made, the party seeking the departure should bear the burden of proving by clear and convincing evidence that "good cause" exists.[186] Although this evidentiary standard is not required, the majority of courts that have encountered this issue have determined that the "clear and convincing" standard should apply, as it is most in line with Congress' intent to keep Indigenous families and Tribes together.[187] When a court determines that "good cause" exists, this determination must be made on the record or in writing, and it should be based on one or more of the following:

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[178] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 56.
[179] 25 C.F.R. § 23.131(d) (2020).
[180] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 57-58.
[181] 25 C.F.R. § 23.130(a) (2020).
[182] § 23.130(b).
[183] § 23.130(c).
[184] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 58.
[185] 25 C.F.R. § 23.132(a) (2020).
[186] § 23.132(b).
[187] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 61.

> (1) The request of one or both of the Indian child's parents, if they attest that they have reviewed the placement options, if any, that comply with the order of preference;
> (2) The request of the child, if the child is of sufficient age and capacity to
> understand the decision that is being made;
> (3) The presence of a sibling attachment that can be maintained only through a particular placement;
> (4) The extraordinary physical, mental, or emotional needs of the Indian child, such as specialized treatment services that may be unavailable in the
> community where families who meet the placement preferences live;
> (5) The unavailability of a suitable placement after a determination by the
> court that a diligent search was conducted to find suitable placements meeting the preference criteria, but none has been located. For purposes of this analysis, the standards for determining whether a placement is unavailable must conform to the prevailing social and cultural standards of the Indian community in which the Indian child's parent or extended family resides or with which the Indian child's parent or extended family members maintain social and cultural ties.[188]

The party seeking a "good cause" finding is responsible for providing the documentation available to prove one of these aforementioned factors.[189] Even if a party can demonstrate "good cause" under these factors, the court is not required to make a finding of "good cause," as there may be compelling disagreement among the parties.[190]

The factors, while not an exhaustive list, help demonstrate that Congress intended for "good cause" to be a limited exception to placement preferences.[191] The rule specifically highlights that a finding of "good cause" cannot be solely based on the "socioeconomic status of any placement relative to another placement"[192] nor solely on the

[188] 25 C.F.R. § 23.132(c) (2020).
[189] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 60.
[190] *Id.* at 61.
[191] *Id.*
[192] 25 C.F.R. § 23.132(d) (2020).

"ordinary bonding or attachment that flowed from time spent in a non-preferred placement that was made in violation of ICWA."[193] These prohibitions arise from concerns specifically raised by Congress in the creation of ICWA.[194] The decision around whether a placement of a child was "made in violation of ICWA" is fact-specific and requires analysis of the statutory and regulatory mandates.[195] In practice, State agencies and courts are encouraged to facilitate connections and bonding with extended family and Tribes even if a child is placed in a non-preferred placement due to legitimate considerations, such as geographic limitations based in reunification efforts.[196]

As noted in the "good cause" exception, finding preferred placements requires State agencies to conduct "diligent search[es]" that are "thorough, ongoing and in compliance with child welfare best practices."[197] These searches should involve good-faith efforts to discuss extended family members with parents and contact all of these known family members.[198] The State agencies should also identify all Tribes that the child is affiliated with and contact them for assistance with placement.[199] If the aforementioned preferred placements are not viable options, agencies should contact Tribe-approved-or-operated institutions for children.[200] However, if any individual identified in the preferred placement categories expresses a desire to be a an adoptive or foster-care placement for a child, then the court should not make a finding that there are no available preferred placements, even if the individual is not timely in complying with the formal process (i.e., "filing a petition for adoption").[201] The Bureau of Indian Affairs' Guidelines for Implementing ICWA state that best practice is for States to have clearly established policies that recognize testifying in court about one's intention to adopt or providing a written statement to the same effect will suffice in place of a formal petition for adoption.[202] These exceptions to standard, formal practices are in response to the reality that family members, or other preferred placement options, may

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[193] § 23.132(e).
[194] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 63.
[195] *Id.*
[196] *Id.*
[197] *Id.* at 58.
[198] *Id.* at 58, 62.
[199] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 58.
[200] *Id.* at 59.
[201] *Id.*
[202] *Id.*

not have knowledge of the legal process, may experience language or education barriers, or may not live in close proximity to the State court where documents must be filed.[203] It is clear from looking at the placement preference rules that extended family is prioritized and efforts to preserve family and Tribe, regardless of barriers, should be made. This prioritization emphasizes Congress' underlying goal to respect the particular importance that family holds for Indigenous communities.[204] These outlined preferences directly address the pre-ICWA failure of non-Indigenous child welfare workers to understand the importance of family and Tribe for Indigenous communities.[205] In all of these aforementioned outlined mandates and principles, ICWA is clear in its intention to preserve Indigenous families.

III. ANTIRACIST PRINCIPLES & MANDATES FROM ICWA TO BE ADOPTED WIDELY

In acknowledging the longstanding crisis of disproportionality in the child welfare system, as well as the failure of federal legislation to rectify this issue,[206] it is incumbent upon the child welfare system to adopt specific antiracist policies and practices. One potential antiracist framework to consider adopting more widely is that outlined by ICWA. The use of ICWA to combat racial transgressions in the child welfare system is not a new idea. In 1986, the National Association of Black Social Workers (NABSW) proposed the National Black Heritage Child Welfare Act (BCWA) as an amendment to ICWA, later named the National African American Heritage Child Welfare Act in 1991.[207]

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[203] *Id.*

[204] *Id.* at 57.

[205] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 58.

[206] Over the years, federal legislation has attempted to address racial disproportionality mainly in the areas of adoptions and foster care placements, kinship, and prevention efforts. Pertinent legislation includes the Multi-Ethnic Placement Act of 1994, Pub. L. No. 104-188, 108 Stat. 4056 (MEPA), the Inter-Ethnic Placement Provisions of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1903 (IEPP), the Fostering Connections to Success & Increasing Adoptions Act, tit. II, sec. 202, §475(5), 122 Stat. 3959 (2008) ("Fostering Connections"), and the Family First Preservation Services Act, Pub. L. No. 115-123, §§ 50701-82, 132 Stat. 232 (2018) ("Family First"). However, this Note asserts that these efforts have not done enough, which is where ICWA-inspired federal legislation would be beneficial.

[207] NAT'L ASS'N OF BLACK SOC. WORKERS, PRESERVING AFRICAN AMERICAN FAMILIES: RESEARCH AND ACTION BEYOND RHETORIC 6 (1991),

BCWA originated from similar concerns that Indigenous communities faced, namely the overrepresentation of Black children in the child welfare system, which at that time was noted by the author's of BCWA to be "by a margin of more than two to one."[208] The NABSW viewed out-of-home foster care placement as "one more way to systemically undermine and destroy the African American family structure."[209] Under BCWA, ICWA was viewed as a "normative model," mandating efforts such as same race placements for Black children,[210] and highlighting the importance of child welfare agencies giving "due consideration" and a "high priority" to the race, ethnic, and cultural heritage of children entering the system.[211] The NABSW intended to provide a framework for a new child welfare system that focused less on removal and more on family preservation and reunification.[212] Although BCWA was not passed,[213] today efforts continue to implement similar legislation, such as the African American Family Preservation Act (AAFPA) in Minnesota.[214] Additionally,

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https://cdn.ymaws.com/www.nabsw.org/resource/collection/0D2D2404-77EB-49B5-962E-7E6FADBF3D0D/Preserving_African_American_Families.pdf.

[208] *Id.* at 5.

[209] *Id.* at 7.

[210] Jacinda T. Townsend, *Reclaiming Self-Determination: A Call for Intraracial Adoption*, 2 DUKE J. GENDER L. & POL'Y 173, 182—83 (1995).

[211] NAT'L ASS'N OF BLACK SOC. WORKERS, *supra* note 207, at 6.

[212] *Id.* at 1.

[213] Townsend, *supra* note 210, at 183.

[214] Kenya Franklin & Robbyne Wiley, *Push Continues for Minnesota's African American Family Preservation Act: Q & A with Kelis Houston*, RISE (March 13, 2020), https://www.risemagazine.org/2020/03/african-american-family-preservation-act/. AAFPA was introduced in 2019 legislation session as HF 342/SF 730, but no efforts to enact the bill resulted. COUNCIL FOR MINNESOTANS OF AFRICAN HERITAGE, EMPOWERMENT 2020: ANNUAL REPORT 9 (2020), https://mn.gov/cmah/assets/CMAH%20Annual%20Report%202020%20-%20Website%20Version_tcm32-464274.pdf. However, efforts continue in Minnesota to enact this bill, with plans to re-propose it during the 2021 legislative session. Statement in Support, The Council for Minnesotans of Afr. Heritage, Statement in Support of HF3973 Minnesota African American Family Preservation Act (Apr. 16, 2018), https://mn.gov/cmah/assets/Statement%20in%20support%20of%20the%20Minnesota%20African%20American%20Family%20Preservation%20Act_tcm32-356850.pdf.

organizations such as Movement for Family Power[215] and upEnd[216] continue to work on policy and community activism to dismantle the racist and disproportionate nature of the child welfare system. By analyzing ICWA, as well as similarly attempted legislation and community efforts, this section outlines four main areas that should be expanded through federal legislation[217] for all children as a means of achieving a more antiracist child welfare system: involvement of the child's specific community, expert witnesses, higher evidentiary standards, and the active efforts standard.

A. Involvement of the Child's Specific Community

The reality is that one's race and culture heavily impact how they navigate society. Although a white family may be able to provide a Black child with material or economic advantages, they are not necessarily equipped to support this child with developing coping skills or the ability to "maneuver in circles of power and privilege."[218] The complexity of taking pride in one's racial identity, while navigating how racism may result in differential treatment because of it, is something that only those who experience this same racial reality can fully comprehend and explain.[219] In a society where many Black children are still not able to safely buy skittles from the corner store,[220] play with toy

[215] *Vision and Values*, MOVEMENT FOR FAM. POWER, https://www.movementforfamilypower.org/indexa (last visited Mar. 6, 2022).
[216] UPEND, https://upendmovement.org/ (last visited Mar. 6, 2022).
[217] While this Note specifically proposes changes to federal legislation due to the universal need for child welfare reform, much of what is proposed in this Note can also be implemented through state legislation. Adopting this framework on the state-level could be a good first step in sparking larger, systemic change.
[218] Townsend, *supra* note 210, at 178.
[219] *Id.*
[220] *Florida Teen Trayvon Martin is Shot and Killed*, HIST., https://www.history.com/this-day-in-history/florida-teen-trayvon-martin-is-shot-and-killed (last updated Feb. 24, 2021).

guns,[221] or sleep in their own homes[222] without being killed, it is unrealistic and dangerous to say that ignoring a child's race is within their best interest. In the same way that ICWA acknowledges that Indigenous communities are best equipped to understand the cultural needs and plight of Indigenous children,[223] Black, Latinx, and other communities of color are best equipped to understand the needs and experiences of children of color.[224] Therefore, ICWA's inclusion of the Indigenous community through the entire child welfare process, especially at placement, for Indigenous children, is a valuable framework that should be expanded to all cases.

ICWA very clearly encourages Indigenous Tribes and the State to work together in developing specific procedures to follow in Indigenous child custody proceedings.[225] In this way, the localized Indigenous community and the State are entering into cooperative agreements. Practice guidelines highlight that these agreements can include procedures for the State to follow in notifying Tribes about emergency removal and initial hearings, financial arrangements regarding care of children, mechanisms for identifying and locating placements, etc.[226] This framework for encouraging specific communities to work with states in developing community-centered plans for children entering foster care would be greatly beneficial to all children in the system.

Additionally, cultural and racial communities throughout the United States should be given opportunities to establish agencies like

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[221] Samaria Rice, *My 12-Year-Old Son, Tamir Rice, Was Killed by Police. I'm Not Allowed to Be Normal*, ABC NEWS (July 13, 2020, 4:27 AM), https://abcnews.go.com/GMA/News/12-year-son-tamir-rice-killed-police-im/story?id=71654873.

[222] Kate Abbey-Lambertz, *How a Police Officer Shot a Sleeping 7-Year-Old to Death*, HUFFPOST, https://www.huffpost.com/entry/aiyana-stanley-jones-joseph-weekley-trial_n_5824684 (last updated Dec. 6, 2017).

[223] *See* 25 U.S.C.S. § 1901(5) (2020) (stating that "the States . . . have often failed to recognize the essential Tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.").

[224] *See* Lorraine Devon Wilke, *No, White People Will Never Understand the Black Experience*, HUFFPOST: THE BLOG (July 26, 2015, 6:28 PM), https://www.huffpost.com/entry/no-white-people-will-neve_b_7875608.

[225] 25 U.S.C. § 1919(a) (The regulation makes clear that the mandatory dismissal provisions in 25 C.F.R. §23.110 (2016) are "[s]ubject to 25 U.S.C. § 1919 (Agreements between States and Indian Tribes).").

[226] OFF. ASSISTANT SEC'Y – INDIAN AFFS., *supra* note 90, at 8.

the BIA to assist in navigating the child welfare system. Whether these agencies take on a neighborhood specific model, similar to the one utilized by child welfare service providers in Philadelphia,[227] or a more regional approach, the agencies should be operated and/or advised by members of the specific racial or cultural community. One specific example can be found in the proposed Minnesota AAFPA, which outlines the creation of an African American Child Welfare Oversight Council.[228] This council, which would be tasked with formulating policies and procedures relating to child welfare services for African American children, would be composed of fifteen African American members appointed by the commissioner that include child welfare professionals, social workers, community members, community leaders, and African American parents.[229] Where the BIA is consulted on matters of training and advising in child welfare proceedings involving Indigenous children, similar representatives should be identified for the various cultural and racial communities throughout the United States, such as the proposed African American Child Welfare Oversight Council in Minnesota. In this way, individual communities will be able to better inform the outcomes and needs of the children within their communities. Each community will be able to provide perspective on how cultural and social norms influence perceptions of child safety, while assisting in formulating solutions rooted in their unique understanding of their own realities. As with the common slogan, the child welfare system should similarly subscribe to the notion of "nothing about us without us."[230]

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[227] Dep't of Hum. Servs., *Improving Outcomes for Children: Community Umbrella Agency Map*, CITY OF PHILA. (May 31, 2019), https://www.phila.gov/media/20190531132547/DHS_CUA_map_2019_external_053019.pdf.

[228] *See* Minnesotan African American Family Preservation Act, S.F. 730, 2019 Leg., 91st Sess. (Minn. 2019).

[229] *Id.* § 9, subdiv. 2.

[230] *See*, Dep't of Econ. & Soc. Affs., *International Day of Disabled Persons 2004*, UNITED NATIONS, https://www.un.org/development/desa/disabilities/international-day-of-persons-with-disabilities-3-december/international-day-of-disabled-persons-2004-nothing-about-us-without-us.html (last visited Apr. 19, 2022).

B. Expert Witnesses

As previously outlined, placement[231] and termination of parental rights[232] under ICWA require proof supported by testimony from a "qualified expert witness."[233] Testimony from these witnesses can highlight the specific intricacies of Indigenous culture, such as whether an Indigenous parent's behavior is in accordance with acceptable Indigenous cultural practices and what an Indigenous child's cultural needs are.[234] This requirement is an important part in filtering out the bias of judges and other child welfare professionals who may be unfamiliar with Indigenous cultural norms, such as the reliance on the entire Tribe as extended family members responsible for raising Indigenous children.[235]

Expert witnesses can play a large role in facilitating cultural competency for judges and child welfare professionals. Cultural competence is "the ability to understand, communicate with and effectively interact with people across cultures."[236] In child welfare, the level of cultural competence that a judge or child welfare professional possesses will directly impact their ability to respond to individuals of different races, genders, socio-economic statuses, etc.[237] There are four main components to cultural competence: awareness, attitude, knowledge, and skills.[238] All of these components require learning and recognizing the inherent tendency of a child welfare professional to project their worldview onto the children and families that they encounter.[239] As noted in the prior section about involvement of the community in child welfare proceedings, those with closer proximity to the identities that a child possesses will be better equipped to gauge the needs, and portray the culturally acceptable reality, for that child. In

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[231] 25 U.S.C. § 1912(e).
[232] *Id.* § 1912(f).
[233] *Id.* § 1912(e), (f).
[234] Kacy Wothe, Note, *The Ambiguity of Culture as a Best Interests Factor: Finding Guidance in the Indian Child Welfare Act's Qualified Expert Witness*, 35 HAMLINE L. REV. 729, 743 (2012).
[235] *Id.* at 742–43.
[236] *The Importance of Cultural Competence*, CASA FOR CHILD. (July 11, 2018), https://casaforchildren.wordpress.com/2018/07/11/the-importance-of-cultural-competence/.
[237] *Id.*
[238] *Id.*
[239] *Id.*

this way, a qualified expert would be greatly beneficial in combatting many of the innate biases that cultural competency works to mitigate.

In some states, the reliance on testimony from qualified experts around multiculturalism and family development in non-ICWA cases has already begun to occur. In one case out of Illinois, during the initial custody hearings, the trial court permitted testimony from an expert witness regarding cultural concerns that should have been considered in determining the proper placement for the couple's biracial child.[240] The couple involved in this case was interracial, with the father identifying as Caucasian and the mother identifying as African-American.[241] The expert witness specifically testified about "(1) cultural variables that commonly affect African-American women; (2) using these cultural variables to score personality tests; and (3) child development concerns such as health care, spirituality, and racial identity."[242] The Appellate Court upheld this testimony as proper and relevant expert testimony.[243] This expert's testimony permitted the trial court to critically analyze the recommendations of other expert witnesses who failed to utilize the proper cultural lens, as well as to consider the benefit of the child residing with the mother, who could provide her with the "'breadth of cultural knowledge' as to her African-American heritage."[244] This case illustrates the value of expert witnesses in providing the court with a more complete picture of the reality that children and families face. The child welfare system at large should expand its reliance on expert witnesses to reduce the impacts of implicit biases and increase cultural competence.

C. Higher Evidentiary Standards

Across all facets of the statute and regulations, ICWA sets high burdens of proof and standards for compliance that should be emulated for all children. Nowhere under ICWA is preponderance of the evidence an acceptable burden of proof.[245] The preponderance of the evidence standard is a concerningly low standard for cases in which parents are not always entitled to attorneys nuanced in the intricacies of

[240] *In re* Marriage of Gambla, 853 N.E.2d 847, 858 (Ill. App. Ct. 2006).
[241] *Id.* at 849.
[242] *Id.* at 864-65.
[243] *Id.* at 865.
[244] *Id.* at 867-68.
[245] *See generally* Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978).

child welfare law.[246] While the common misconception of the child welfare system is that it primarily services children who suffer physical and sexual abuse at the hands of a parent, the reality is that these cases only comprise around 16% of those in the foster care system.[247] The remaining 84% of cases of children entering foster care are due to neglect, parental substance abuse, child substance abuse, child disabilities, behavioral concerns, death or incarceration of a parent, inability of a caretaker to cope, relinquishment, or inadequate housing.[248] Many of these concerns are linked to poverty, which is intimately tied to racism in our country. The fact that the majority of the cases in child welfare are rooted in poverty and racism, as opposed to physical and sexual violence against children, highlights the necessity for evidentiary burdens to be raised. In an effort to combat racism and classism within the child welfare system, the standards of clear and convincing evidence for placements and beyond a reasonable doubt for termination of parental rights should be adopted for all children.

Requiring clear and convincing evidence of risk factors necessitating placing children outside of their home will likely result in a reduction in unnecessary and traumatic out-of-home placements. The majority of cases that close with the foster care system end in reunification, meaning that children are removed and then returned to their homes at a later date (approximately 49%).[249]

While it is positive that children are returning back to their homes, the initial removal can be traumatic for children and families. Multiple studies indicate that children suffer complex and long-lasting harms when they are removed from their homes.[250] Even when there are some justified concerns around safety, the bond between children and their parents is so strong that disrupting it can be more damaging than the potential neglect or abuse itself.[251] Understanding the racial

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[246] Molly Schwartz, *Do We Need to Abolish Child Protective Services? Inside One Parent's Five-Year Battle with the "Family Destruction System,"* MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/.

[247] *State-by-State Data*, CASEY FAM. PROGRAMS, https://www.casey.org/state-data/ (last visited Mar. 6, 2022).

[248] *Id.*

[249] *Id.*

[250] Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 526 (2019).

[251] *Id.* at 527.

disproportionality existent in the child welfare system, removals for Black, Indigenous, or other children of color present unique cultural and communal harms.[252] While these harms are ever-present, the current standards allow for children to be removed in some circumstances without even as much as a court order to do so.[253] While raising the standard for placement to clear and convincing evidence will not completely eradicate the racial and class biases that impact child removals, it will hopefully make it harder to justify with evidence their persistence in removal decisions. As highlighted in the proposed Minnesota AAFPA, there should be clear and convincing evidence of multiple risk factors, which do not include risk factors that a local social service agency could solve through provision of in-home services.[254] This framework is helpful for envisioning how raising this evidentiary standard could combat harms imposed on communities and children via out-of-home placements.

Additionally, combatting racism and classism in the child welfare system would likely benefit from raising the evidentiary standard for TPR to beyond a reasonable doubt. Given that parental rights are seen as a "fundamental liberty interest,"[255] the burden should be high for all families when discussing termination of these rights. Raising the burden would allow for TPR, or what has been termed the civil "death penalty," to be treated in a fashion proportional to its severity and irreversibility.[256] As with ICWA, this elevated standard would require the State to prove beyond a reasonable doubt that the conduct of a parent is likely to cause their child serious emotional or physical harm, and the parent is unlikely to change their harmful conduct.[257] Additionally, there would need to be a demonstration of a causal relationship,[258] and poverty, isolation, age, single parenthood, housing constraints, substance abuse, and nonconforming behavior alone would not suffice.[259] Given that the majority of cases within the child welfare system fall into the prohibited considerations for TPR under ICWA, expanding the heightened burden of proof to all children could significantly reduce TPR cases. While beyond a reasonable doubt

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[252] *Id.* at 540—41.
[253] Schwartz, *supra* note 246.
[254] S.F. 730, 2019 Leg., 91st Sess. (Minn. 2019).
[255] Troxel v. Granville, 530 U.S. 57, 65-66 (2000).
[256] Schwartz, *supra* note 246.
[257] 25 U.S.C. § 1912(f); 25 C.F.R. § 23.121(b) (2020).
[258] 25 C.F.R. § 23.121(c) (2020).
[259] § 23.121(d).

is a high burden of proof, it is proportional to the severity of permanently severing parental rights. In failing to raise this burden for all children, our system has fallen susceptible to permanently severing parental rights simply because a parent is poor, suffering from mental health, struggling to address challenges in parenting, or facing other non-abuse-related barriers. Under ICWA, the burdens of clear and convincing evidence for placements and beyond a reasonable doubt for TPR more accurately convey the severity and gravity of removals and terminations, and thus should be applied to all cases within the child welfare system.

D. Active Efforts Standard

Additionally, although various child welfare professionals believe in the possibility of using the "reasonable efforts" standard to encourage prevention and reunification efforts,[260] the "active efforts" standard under ICWA would be a much clearer standard to adopt in all cases. Under the proposed Minnesota AAFPA, "active efforts" is defined as:

> a rigorous and concerted level of effort that is ongoing throughout the involvement of the local social services agency to continuously use culturally appropriate services to preserve the African American child's family and prevent out-of-home placement of an African American child and, if placement occurs, to return the African American child to the child's family at the earliest possible time that return is safe. Active efforts sets a higher standard than reasonable efforts to preserve the family, prevent breakup of the family, and reunify the family. Active efforts includes reasonable efforts . . .[261]

This definition of "active efforts" closely mirrors that of ICWA and demonstrates how ICWA's standard could be adopted to serve various other communities.

Currently, states vary in treatment of both "reasonable efforts" and "active efforts." For example, California and Colorado are states

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[260] *See, e.g.*, Jerry Milner & David Kelly, *Reasonable Efforts as Prevention*, AM. BAR ASS'N (Nov. 5, 2018), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december-2018/reasonable-efforts-as-prevention/.

[261] S.F. 730, 2019 Leg., 91st Sess. (Minn. 2019).

that treat "active efforts" the same as the "reasonable efforts," while states like Utah and Oklahoma agree that "active efforts" require more than just "reasonable efforts" but disagree on exactly what this means.[262] In analyzing outcomes for children exiting foster care, there appears to be a correlation between states that do not differentiate between these two standards and increased rates of reunification and kinship care. For example, in California, where "active efforts" and "reasonable efforts" are treated synonymously in practice, 61% of children exiting foster care are either reunited with their families or placed with relatives or guardians, while 25% are adopted.[263] Similarly, in Colorado, another state where the standards are treated synonymously, 72% of children are either reunited with their families or placed with relatives or guardians, with only 19% exiting via adoption.[264] In states where "reasonable efforts" is not held to the same heightened standard of "active efforts," it appears that more adoptions and less reunifications or kinship placements are occurring. For example, in Utah, 29% of children exiting foster care are adopted, while 62% are reunited or placed with relatives or guardians.[265] Another state that exemplifies this heightened reliance on adoption is Oklahoma, where 42% of children exiting foster care are adopted, 45% are reunited, and only 8% are placed with relatives or guardians.[266] These numbers may provide insight into the benefits of applying the "active efforts" standard universally, demonstrating that in states where this is already happening in practice, children are being reunified and placed with family at higher rates.

Currently, the upEND movement, which is dedicated to reimagining the foster care and child welfare system[267], asserts that in

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[262] Megan Scanlon, Note, *From Theory to Practice: Incorporating the "Active Efforts" Requirement in Indian Child Welfare Act Proceedings,* 43 ARIZ. STATE L.J. 629, 630 (2011).

[263] *State Fact Sheet: California*, CASEY FAM. PROGRAMS, (Apr. 2021), https://caseyfamilypro-wpengine.netdna-ssl.com/media/california-fact-sheet-2021.pdf.

[264] *State Fact Sheet: Colorado*, CASEY FAM. PROGRAMS, (Apr. 2021), https://caseyfamilypro-wpengine.netdna-ssl.com/media/colorado-fact-sheet-2021.pdf.

[265] *State Fact Sheet: Utah*, CASEY FAM. PROGRAMS, (Apr. 2021), https://caseyfamilypro-wpengine.netdna-ssl.com/media/utah-fact-sheet-2021.pdf.

[266] *State Fact Sheet: Oklahoma*, CASEY FAM. PROGRAMS, (Apr. 2021), https://www.casey.org/media/oklahoma-fact-sheet-2021.pdf.

[267] UPEND, *supra* note 216.

moving towards abolition, the more "proactive, comprehensive, and enforceable" "active efforts" standards should be applied to all children in foster care.[268] Unlike "reasonable efforts," the State cannot argue that they lack the resources to provide "active efforts," making it a more enforceable standard that is not easily sidestepped.[269] Additionally, the "active efforts" standard is more "proactive" and "comprehensive" because it requires the State to go beyond just merely making a referral and instead mandates that the State fully engage the family in remedying the basis for the underlying proceeding.[270] Furthermore, whenever possible, "active efforts" are supposed to be catered to the prevailing social and cultural conditions of the community, making these efforts more likely to get to the root of the problem and generate sustainable solutions.[271] By raising the responsibility of the State to do its part to mend family separation in all cases, the system will be better equipped to uphold its commitment to reunification for all children and families.

IV. HOW EXPANDING ICWA PRINCIPLES COULD IMPACT INDIGENOUS COMMUNITIES

While adopting ICWA principles as an antiracist framework for all children will impact the child welfare system at large, it is also necessary to acknowledge the potential implications of this approach for Indigenous communities. In universally adopting some of the principles outlined in ICWA, Indigenous communities may be impacted both positively and negatively. This section outlines some of the ways in which adopting ICWA's antiracist framework more broadly may impact Indigenous communities, and how these implications should be considered in crafting federal legislation.

It is clear that ICWA provides a revolutionary approach to child welfare for Indigenous children and families, but Indigenous children remain overrepresented in the child welfare system.[272] Indigenous children are overrepresented in the foster care system at a rate of 2.6

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[268] *What Does It Mean to Abolish the Child Welfare System as We Know It?*, CTR. FOR THE STUDY OF SOC. POL'Y (June 29, 2020), https://cssp.org/2020/06/what-does-it-mean-to-abolish-the-child-welfare-system-as-we-know-it/.

[269] NATIVE AM. RTS. FUND., *supra* note 162.

[270] *Id.*

[271] *See* 25 C.F.R. § 23.2 (2020).

[272] NAT'L INDIAN CHILD WELFARE ASS'N, WHAT IS DISPROPORTIONALITY IN CHILD WELFARE? (2019), https://www.nicwa.org/wp-content/uploads/2019/08/Disproportionality-Table-2019.pdf.

times greater than their representation in the general population.[273] Although ICWA provided some progress in rectifying the massive injustices that plagued the Indigenous community during the boarding-school and adoption eras, there is still much work to be done to improve the outcomes for Indigenous children and families. One area in which this work could be improved is through clearer federal monitoring and enforcement of ICWA.

Since the enactment in 1978, the United States Supreme Court has only ever heard two cases about ICWA,[274] resulting in state and Tribal courts being left to their own devices to interpret the Act. Per the regulations, it is clear that ICWA sets the minimum federal standards that States must meet, but States are able to provide greater protections to parents or Indigenous custodians.[275] Given this, the definition and application of standards such as "active efforts" largely fluctuate depending on jurisdiction. As previously noted, this is evidenced by states like California and Colorado treating "active efforts" the same as the "reasonable efforts" standard, while states like Utah and Oklahoma agree that "active efforts" require more than just "reasonable efforts" but disagree on exactly what this means.[276] Although ICWA references assigning responsibilities to the Secretary of the United States Department of Interior, there is no explicit language that requires that Department, or any other federal agency, to monitor or enforce compliance.[277] The implementation of various tools developed across the country to measure compliance are largely left up to local courts.[278]

If ICWA principles are expanded more broadly to all children, it is undeniable that the child welfare system as a whole would develop a better understanding of these principles. The regulatory power that backs a federal legislative effort such as ASFA, which is broadly applied and has financial penalties for noncompliance, could similarly reenforce the mandates of ICWA. This does not require that ICWA itself is amended, but rather that through the expansion of applying principles such as "active efforts," the States will be forced to identify a unified

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[273] *Id.*

[274] *See* Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989); Adoptive Couple v. Baby Girl, 570 U.S. 637 (2013).

[275] 25 C.F.R. § 23.106 (2020).

[276] Scanlon, *supra* note 262, at 630.

[277] Jason R. Williams et al., *What is Measured is What is Done: Methods to Measure Compliance with the Indian Child Welfare Act*, 4 AM. INDIAN L. J. 503, 505 (2016).

[278] *Id.* at 506.

approach to defining and applying these practices. In this way, it will be easier to determine what compliance looks like, how it can be measured, and what the consequences for noncompliance are. Therefore, the expansion of ICWA to all children in the child welfare system could benefit Indigenous communities through increased clarity in federal regulation.

However, while applying ICWA principles in more cases would be a valuable step in antiracist reform within the child welfare system, it is important to caution against revocation of ICWA itself. ICWA incorporated long-standing ideas around Indigenous sovereignty, specifically through recognition that care and control of Indigenous children is a core function of sovereignty.[279] It is important to clarify that this Note does not propose to amend ICWA to include all children, but rather to develop new federal legislation inspired by the antiracist values of ICWA. Additionally, it is hoped that in expanding the use of ICWA principles to more children, there will be a similar expansion of protections for Indigenous children and families through increased federal regulation and commitment to implementation, while maintaining Tribal sovereignty.

V. CONCLUSION

While expanding the ICWA framework to more child welfare cases would likely result in movement towards equity, it also must be emphasized that this will not solve the deep-rooted issue of racism within the child welfare system. Racial disproportionality in child welfare is part of the foundation that built our current child welfare system, and it will likely take multiple approaches to address it, including, but not limited to, the federal investments in adoptions and placements, kinship, and prevention that currently exist, as well as measures beyond the enactment of legislation. However, by implementing ICWA's framework for community inclusion, expert witnesses, and heightened burdens and standards, the child welfare system would take a beneficial step forward in making some progress. This progress has the potential to strengthen ICWA's current impact on Indigenous children and families, clarifying the role of federal regulation and enforcement. However, it is crucial that efforts to apply the ICWA framework to all children must not corrupt the important Tribal political sovereignty that Indigenous communities rely on today. Outside of ICWA, child welfare policies neglect to plainly acknowledge

[279] Zug, *supra* note 94, at 186.

family separation's racist origins, instead often times perpetuating racism through disproportionate representation and outcomes. Adopting an antiracist framework rooted in community is clearly necessary and well overdue.