# LESSONS FROM THE UNITED STATES ON BUILDING MORE EFFECTIVE MEANS OF ADDRESSING INDIGENOUS CHILD WELFARE ISSUES

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## I Introduction

As is unfortunately true for Indigenous children around the world, the statistics describing American Indian and Alaska Native children[1] are devastating. Thirty-six percent of American Indian and Alaska Native children live below the poverty line, as compared to 22 per cent for the population as a whole.[2] Native children have the highest rates of mental health and substance abuse problems;[3] the highest rate of alcohol abuse,[4] the highest rate of gang involvement, [5] and the highest rate of victimisation.[6] Native youth in the U.S. are twice as likely to commit suicide as white youth and three times as likely to commit suicide as other minority youth.[7]

It is imperative that effective methods be found to address these problems. Unfortunately, most efforts to date have focused on only one aspect of the problem (although *which* aspect has varied). This narrowed focus all too often results in an incomplete understanding of the root causes of the problem, which in turn results in solutions that are often simplistic and ineffective. These problems are further complicated by the friction that exists between the federal, state, and tribal governments as they compete for authority to handle a wide variety of matters, including family and child welfare cases. Two recent pilot programs, however, demonstrate both promising results and hope for the future. Both pilot programs focus on domestic violence and both take a more nuanced look at issues impacting child welfare. This article explores those programs, how they can be used to build more effective methods of improving the well-being of America's Indigenous children, and whether those methods are applicable outside the U.S. context.

Before addressing any of those questions, however, this paper must first take a brief tour through the history of federal Indian policy. This apparent detour is actually critical for two reasons. First, federal Indian law is inextricably linked to the history of federal Indian policy, and it is impossible to understand one without the other. Accordingly, Part II of this article begins by taking a closer look at tribes and Indigenous people within the United States; their relationship to the U.S. Government; and the role federal Indian policy has played in creating and attempting to address child welfare matters. This history also lays the groundwork for Part IV, which considers whether the two U.S. pilot projects are adaptable to the situation of Indigenous people found in other countries. Once the necessary history is explained, Part III then looks at major efforts to improve the welfare of America's Indigenous children and at whether those efforts have been successful. These efforts include the Indian Child Welfare Act, federal grant funding for tribal foster care, and the two domestic violence pilot projects mentioned above. Part IV concludes by examining the lessons learned from the two pilot programs and what methods they teach for building new solutions to child welfare issues.

## II A Brief Overview of U.S. Federal Indian Policy

U.S. policy toward Indigenous people is usually discussed in terms of five time periods (treaty-making, allotment, reorganisation, termination, and self-determination), two of which (allotment and termination) had a profound and long-lasting impact on Indian families and Indigenous children. It is important to note, however, that three groups of Indigenous people can be found within the borders of the United States —American Indians, Alaska Natives, and Native Hawaiians. Each group has a different history and somewhat different

relationship to the U.S. government. The five 'eras' of Indian law technically apply only to American Indian tribes, meaning the Indigenous people located in the 48 contiguous states, although they do apply to a lesser degree to Alaska Natives and Native Villages. They do not, however, apply to Native Hawaiians.

These differences are due to the timing and manner in which Alaska and Hawaii became part of the United States. Although the U.S. purchased Alaska from Russia in 1867, it was not until shortly after Alaska became a state in 1959 that the federal government paid much attention to the Indigenous people living in Alaska.[8] The discovery of oil and the need to build the Alaska pipeline focused the federal government's attention on the state and in 1971 Congress enacted the Alaska Native Claims Settlement Act (ANCSA) as part of a move to settle Native title claims prior to building the Alaska pipeline.[9] ANCSA created a hybrid corporate/government structure, which applies to both regional and village corporations.[10] Despite this hybrid structure, Alaska Native Villages are still considered to be governments (as opposed to business organisations). As a result, they are subject to the federal Indian policies of the self-determination era, including those addressing child welfare.

Since being American Indian or Alaska Native is generally tied to being a citizen of a federally-recognised tribal government or Alaska Native Village, that status is considered to be political rather than racial.[11] The same does not hold true for Native Hawaiians, at least not yet. Because the United States overthrew the Hawaiian monarchy and did not leave any portion of the Hawaiian government intact, Native Hawaiians are not citizens of any existing Indigenous government. This lack of political status puts them in a different position than American Indians and Alaska Natives.[12] On September 29, 2015, however, the U.S. Government officially proposed a path for re-establishing a government-to-government relationship with Native Hawaiians.[13] This process is still in progress; when and if it is successful, the resulting Native Hawaiian government would qualify to participate in the federal programs discussed in Part III.

Until that occurs, however, the federal policies and programs discussed in this article are relevant only to the 567 federally-recognised tribal governments and Alaska Native Villages, approximately one-half of which are located in the 48 contiguous states, with the rest in Alaska.[14] 'Federal recognition' is the touchstone for the ability of these entities to exercise governmental powers and requires that the U.S. government 'recognise' them by placing them on the official list of 'federally-recognised tribes'.[15] The concept is somewhat related to the international law principle of the need to recognise another nation state before diplomatic relations can occur. The difference is that the U.S. government controls more than the power of recognition; it also controls the boundaries of tribal government authority.[16]

Understanding where that control comes from takes us back to our quick tour through the five eras of federal Indian policy. The original policy, which lasted until 1871, was for first European and then the U.S. government to deal with the tribes they encountered by making treaties with them.[17] The first wave of these treaties sought to allocate lands and resources. The second wave sought to relocate tribes west of the Mississippi River, leaving the land east of the Mississippi river for European settlement. As the U.S. population began moving westward, the focus of those treaties shifted from relocating tribes to confining them on reservations.

With this westward expansion came actions by all three branches of the federal government to fold tribes into the political structure of the United States. The executive branch moved the Department of Indian Affairs from the Department of War to the Department of Interior in 1849 and began the process of creating an infrastructure to deal with the tribes as part of the United States.[18] The effort began with the election of President Ulysses S. Grant in 1869. In his inaugural address, President Grant stated, the 'proper treatment of the original occupants of this land—the Indians—is one deserving of careful study. I will favor any course toward them which tends to their civilisation and ultimate citizenship.'[19] Grant would fulfill this promise by appointing Ely S. Parker, a member of the Seneca Nation, to be Commissioner of Indian Affairs. Together, Grant and Parker would develop and implement a 'Peace Plan', which, while well-intentioned, would prove as devastating to tribes as the prior military actions.[20] A major plank of the Peace Plan was to remove corrupt political appointees from the position of Indian Agent and replace them with supposedly un-corruptible missionaries.[21] Many of these new agents were also corrupt, and even those who were not inflicted tremendous harm through their zealous attempts to stamp out all vestiges of 'savagery'.

The judicial branch decided a series of cases that would become known as the Marshall trilogy, which established

the foundational principles of federal Indian law and of the relationship between the tribal, federal, and state governments.[22] The Court labeled the tribes 'domestic dependent nations',[23] that is, governments which have been absorbed into the United States but which retain the aspects of their sovereignty that are compatible with their status. In other words, tribal governments possess executive, legislative, and judicial powers, but only to the extent those powers do not intrude upon the authority of the federal government (and the federal government gets to define the extent and degree to which tribes retain any sovereign powers).[24]

The legislative branch, which officially ended treaty-making in 1871,[25] enacted the General Allotment or Dawes Act, [26] which signaled the start of the second era of federal Indian policy, the Allotment Era. The Allotment policy was designed to break up tribal governments and incorporate individual Indians into the U.S. population as a whole.[27] One of the primary purposes of the Allotment policy was to 'civilise' Indians by turning them into farmers.[28] To accomplish this goal, reservation lands were divided into 40-160 acre parcels, which were then assigned or 'allotted' to heads of household.[29] The extra or 'surplus' lands were sold out of Indian hands, generally to white ranchers or businessmen.[30] The years 1887-1933 saw more than 90 million acres, or 65 per cent of reservation land, move out of Indian hands.[31]

Along with allotment came efforts by the executive branch to 'civilise' Indians by Christianising them.[32] These efforts built on the President Grant's earlier policies by enacting the Code of Indian Offenses and by creating the boarding school system. The Code of Indian Offenses was a schedule of infractions or crimes that applied only to Indians in Indian country and which were enforceable by Courts of Indian Offenses.[33] The Code punished those who engaged in many tribal religious and cultural practices by withholding rations or incarcerating the offenders.[34]

The first Indian boarding school, the Carlisle Indian Industrial School, opened in 1879, under the leadership of Richard Henry Pratt, a former army officer. Pratt's military background and his policy to 'Kill the Indian and Save the Man'[35] meant that boarding schools severely punished any speaking of Native language, dressing in Native clothes, or practice of Native religion.[36] The boarding schools were devastating to tribal culture, and not simply in terms of loss of language or religion.[37] By disrupting family patterns and raising children in barracks with harsh taskmasters, generations of Indian children grew up without ever seeing or being part of a family structure or learning parenting skills.[38]

The so-called Meriam Report in 1928, whose official name was *The Problem of Indian Administration*, documented the failure of these policies and led to the official abandonment of the Allotment policy and the enactment of the Indian Reorganisation Act (IRA) in 1934.[39] The IRA encouraged the re-forming of tribal governments and the adoption of tribal constitutions.[40] Most governments fund their infrastructure through a combination of taxes, including income, property, and sales taxes. The significant loss of land base and the devastating impact of Allotment on tribal economies meant that most tribes had no ability to fund a government using taxes. In recognition of the devastation wrought by federal policy, the IRA also contained provisions for tribal governments to organise as businesses under a charter of Incorporation issued by the Secretary of Interior.[41]

The United States would briefly abandon the policy of supporting tribal governments in the 1950's with the so-called Termination Policy, in which the federal government 'terminated' the federal recognition of tribes. Termination was accomplished on a tribe by tribe basis, and by the time the policy was abandoned, approximately 100 of the more than 500-federally recognised tribes had been terminated.[42] Although it was short-lived, some aspects of The Termination Policy had (and are still having) substantial impact on tribes and on Native children.

One such example is the Indian Relocation Act of 1956,[43] which attempted to move Indians off the reservation by offering individual tribal members a bus ticket to a major city, sometimes with $50 and a promise of vocational training. The Relocation Act created a large population of urban Indians in a handful of major cities. It is estimated that between 1950 and 1980, more than 750,000 Indians had relocated from reservations to major cities (not all as part of Relocation Act). US Census records show that approximately 8 per cent of Indians lived off the reservation in 1940 as compared to 67 per cent in the 2010 Census.[44]

One of the cities included in the Relocation Policy was Minneapolis, and three strands of events occurred in Minneapolis that exemplify the problems resulting from relocation.[45] First, as was intended, relocating individual tribal members from reservations to urban centers disrupted or severed contact with and participation in tribal culture.

This disconnection led to some of the mental health, substance abuse, and gang problems noted above. Second, the breakdown of traditional family roles helped create circumstances for domestic violence, and third, interactions between state social workers and urban Indian populations helped fuel the passage of the Indian Child Welfare Act. In Minnesota from 1971–1972, 13 per cent of all Indian Children (25 per cent of Indian Children under age one) were in adoptive homes and 90 per cent of placements were in non-Native homes.

The impact of federal policies, particularly the policies of the Allotment and Termination Eras, which sought to break up tribes and disrupt tribal culture, resulted in tremendous negative impacts on Indian children in the United States. The next section describes effort to address those problems and why those efforts have met with little success.

## III Programs Targeted at Improving Indigenous Child Welfare

Numerous attempts have been made by state, federal, and tribal governments to address child welfare issues in Native communities. These efforts have ranged from grant funding to support the development of specific programs, such as funds for children in tribal foster care, to a major federal statute known as the Indian Child Welfare Act ('ICWA'). Most of these efforts have had little, if any, impact on the welfare of Indigenous children, at least not as measured by the statistics cited in the first paragraph of this article or according to the data noted by Congress as part of enacting ICWA. One of the problems with crafting effective responses, however, is a lack of detailed data. The U.S. government recently promulgated new regulations aimed at collecting the necessary data.[46] In explaining the impetus behind the regulations, the government stated 'there is no comprehensive national data on the status of AI/AN children for whom ICWA applies at any stage in the adoption or foster care system.'[47] Despite the lack of any real data, governments have not sat idle, but have instead continued their efforts to address the problems. Two recent pilot programs have demonstrated potential to break through the existing obstacles and have a more lasting and positive impact. This section examines each of these approaches.

### A The Indian Child Welfare Act

The ICWA is a federal statute enacted by Congress in 1978.[48] It was passed in response to a series of congressional hearings establishing that Indian children were removed from their homes at staggering rates. The 'purpose' section of ICWA declares:

> Recognising the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—
> …
> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
> (5) that the States, exercising their recognised jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognise the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.[49]

Since the hearings that led to ICWA focused on misunderstandings and inappropriate actions by state social workers, attorneys, and judges, Congress chose to create a statute that applies to 'Indian children' who are the subject of an adoption or child welfare proceeding.[50]

One of the hallmarks of Western law, particularly Anglo-American common law, is the emphasis on process as the vehicle for achieving fair or 'just' results.[51] In keeping with this idea, Congress chose to achieve the objectives of ICWA by defining when state courts and when tribal courts have jurisdiction to decide foster care and adoption matters.[52] If an Indian child is domiciled on the reservation, the tribal court possesses exclusive jurisdiction to hear the case.[53] If the Indian child is domiciled off the reservation, the state and tribal courts have concurrent jurisdiction.[54] If the case is filed in state court, ICWA contains procedures for notifying the tribe, for the tribe to intervene in the case, and for removal of the case to tribal court.[55] If the case remains in state court, ICWA establishes procedural standards for the case, including heightened standards for the termination of parental rights.[56]

If the case is filed in or transferred to tribal court, the tribe determines the relevant standards and procedures.[57]

The balance struck by ICWA illustrates the concerns that limitations needed to be placed on the discretion of non-tribal actors when they are making decisions concerning the welfare of Indian children. These limitations were clearly prompted by the evidence presented to and considered by Congress as part of the creation and passage of ICWA. That mistrust of state actors has been confirmed and reinforced over the last three decades, as private litigants, state social welfare personnel, and state judges have continually sought to locate or create loopholes to avoid the application of ICWA.[58] In the almost four decades since ICWA became law, numerous studies have explored the implementation of the statute and whether its requirements are being followed.[59] Without exception, every study has found problems with its implementation, and almost every one of these problems rests in the knowledge and willingness of state employees (police, social workers, judges, etc.), to follow ICWA's procedural requirements.[60]

If the purpose of ICWA was to reduce the rate at which Indian children are removed from their parents, as well as reduce the number of Indian children in the system, the statute has failed to achieve that goal. At the time of ICWA's passage, evidence showed that 10–35 per cent (or more) of Native children were removed from their homes, with 90 per cent placed with white families. A report issued in 2005 showed that American Indian children were still in the foster care system in disproportionate numbers.[61] A look at the five states with the most disproportionate numbers in that report demonstrates that American Indian and Alaska Native children constituted 20 per cent of the population of children in Alaska but 51 per cent of the children in foster care; in Minnesota, they were 2 per cent of the population of children and 12 per cent of the children in foster care; in Montana they were 10 per cent of the state's population of children and 33 per cent of the children in foster care. In Nebraska, the numbers were 1 per cent of the population and 9 per cent of the foster care population, and in North Dakota the numbers were 9 per cent and 26 per cent. In 2013, the Department of Health and Human Services issued a Data Brief showing that 14 per cent of Native children were in the foster care system, and declared that '[s]ince 2009, Native American children have had the highest rates of representation in foster care.'[62] An 2011 investigative report by National Public Radio concluded that '32 states are failing to abide by [ICWA] in one way or another, and … nowhere is that more apparent than in South Dakota.'[63] The report went to declare that the 'state receives thousands of dollars from the federal government for every child it takes from a family, and in some cases the state gets even more money if the child is Native American. The result is that South Dakota is now removing children at a rate higher than the vast majority of other states in the country.'[64]

Even as the Bureau of Indian Affairs was preparing new regulations designed to correct many of these problems,[65] the U.S. Supreme Court was issuing an opinion that would undercut the efficacy of the statute. Since the passage of ICWA, the U.S. Supreme Court has twice been called upon to interpret its provisions. The first case, *Mississippi Band of Choctaw Indians v. Holyfield*, concerned an attempt by parents who were tribal members to place their newborn twins for adoption with a white family off the reservation.[66] The second case *Adoptive Couple v. Baby Girl* centered on efforts by a non-tribal mother to place her child for adoption with a white couple; the child's father was a tribal member and the child was eligible for citizenship in the Cherokee Nation, thus making the child an 'Indian child'.[67]

In *Holyfield*, the Court took a broad, holistic, common sense approach to interpreting ICWA. The issue in that case revolved around whether the infant children were 'domiciled' on the reservation. Many states had different definitions of 'domicile,' which could have resulted in different outcome depending on the location of the tribe. The Supreme Court rejected the state definitions and adopted a federal definition of 'domicile', declaring that a national standard was necessary to achieve the purposes of ICWA.[68] The *Holyfield* case resulted in a decision that the tribal court had exclusive jurisdiction over the adoption of children born to parents who were members of the tribe and who resided within the tribe's Indian country, something that was clearly within Congress' intent.[69] While that was the best result in keeping with the legislative history of the statute, it was not the only possible result, and precedent did exist that would have supported the opposite outcome.[70]

The Court's most recent ICWA decision, however, took a highly constrained interpretation of the statute, ruling that a biological father who had never had custody did not qualify as a 'parent', despite his active efforts to be involved with his child, which were blocked by legal maneuvers by

the non-Indian mother and the white adoptive parents.[71] The dissenting opinion of Justice Sotomayor perhaps best summarises the problems with the Court's decision:

> A casual reader of the Court's opinion could be forgiven for thinking this an easy case, one in which the text of the applicable statute clearly points the way to the only sensible result. In truth, however, the path from the text of the Indian Child Welfare Act of 1978 (ICWA) to the result the Court reaches is anything but clear, and its result anything but right.
>
> The reader's first clue that the majority's supposedly straightforward reasoning is flawed is that not all Members who adopt its interpretation believe it is compelled by the text of the statute, … nor are they all willing to accept the consequences it will necessarily have beyond the specific factual scenario confronted here … The second clue is that the majority begins its analysis by plucking out of context a single phrase from the last clause of the last subsection of the relevant provision, and then builds its entire argument upon it. That is not how we ordinarily read statutes. The third clue is that the majority openly professes its aversion to Congress' explicitly stated purpose in enacting the statute. The majority expresses concern that reading the Act to mean what it says will make it more difficult to place Indian children in adoptive homes, . . . but the Congress that enacted the statute announced its intent to stop "an alarmingly high percentage of Indian families [from being] broken up" by, among other things, a trend of "plac[ing] [Indian children] in non-Indian … adoptive homes." 25 U. S. C. §1901(4). Policy disagreement with Congress' judgment is not a valid reason for this Court to distort the provisions of the Act.[72]

Given the Court's distorted reading, the future of ICWA is certainly in doubt. The history of ICWA has been a history of state attempts to circumvent the demands of that statute, and the US Supreme Court has now essentially endorsed those attempts. It does not bode well for pending litigation over the legality of the new Bureau of Indian Affairs regulations.[73]

### B Grant Funded Programs

The federal government has created a number of grants to assist both states and tribes in developing their child welfare systems. Most of these programs, however, come with short, thick strings that dictate either the shape of their program or the ways in which success will be measured. These conditions are often based on programs used by the state systems or are developed by social welfare experts trained in the state system. These conditions are, accordingly, often unsuited for the tribal context. The Title IV-E funds for children in foster care present a prime example.

Title IV-E of the Social Security Act provide a substantial amount of funding to states and tribes to pay for children in foster care.[74] These funds are 'permanently authorised entitlements under which the federal government has a "binding obligation" to make payments to individuals or government entities that meet the eligibility criteria established by law.'[75] Title IV-E provides funds for:

1) monthly maintenance payments for eligible children in foster care;
2) monthly assistance payments for special needs children in adoptive placements;
3) administration costs associated with placement of eligible children; and
4) training costs for personnel administering the programs and for foster and
5) adoptive parents.[76]

These funds, however, were originally available to be disbursed to states.[77] Tribes could obtain access to the funds only by entering an agreement with the state in which they were located.[78] This proved problematic for tribes. In the words of one study, 'the failure of legislation and policy to fully address the rights and abilities of tribes to participate in federal domestic assistance programs, and ambiguous relationships between tribes and states have hampered tribes' abilities to fully implement needed services for children and families.'[79]

The passage of the Fostering Connections to Success and Increasing Adoptions Act in 2008, however, changed that process and authorised tribes to apply directly for and to receive Title IV-E funds.[80] Authorisation to pursue the funds, however, was just the first step. A number of obstacles still remained, as 'most of these programs were designed with little or no consideration given to issues of tribal culture, service delivery systems, or the government to government relationship that exists between tribes and the state and federal governments …'[81] Not only are the Title IV-E requirements structured for the state context, they are cumbersome and complex. One trainer noted that the required plan had 33 items, many with subparts, each of which required some form of written infrastructure on the part of tribes.[82] Indeed, an

entire book exists detailing these requirements and guiding the auditors who perform inspections.[83]

One of those requirements is that permanency planning begin for children who have been in the system for certain amount of time.[84] In state courts, 'permanency planning' generally means ceasing active efforts at reunification and beginning the process of terminating parental rights. This requirement posed a stumbling block for some tribes, as not all tribes terminate parental rights, and some that do have provisions for termination do not start those proceedings as quickly as required by Title IV-E.[85] After a good deal of discussion, and education, however, the federal government became more flexible about the definition of permanency planning, accepting the concept of a permanent guardian as an acceptable substitute for terminating parental rights.

This flexibility is a good first step, but too many of the Title IV-E requirements are structured for the states systems and lack the flexibility to accommodate other approaches and procedures.

### C Two Pilot Programs with Promising Results

Over the last few years, innovative programs have led to two promising pilot projects that address some of the root causes of child welfare issues, as opposed to treating only the symptoms. While the changes to the Title IV-E program are welcome, that program and its funds address children who are already in the system; they are not designed to prevent a child from entering the system in the first place. Indeed, even framing the problem as 'avoiding the child welfare system' is misleading. The child welfare system is one process for addressing child welfare issues; those issues could also arise in a juvenile delinquency proceeding or even conceivably in a matter between the parents, such as a custody proceeding or even a domestic violence protection order.

Domestic Violence is a problem that cuts across all segments of the population. Until the 1980's, the U.S. legal system tended to treat domestic violence as a private family matter. As a result of several high profile cases in the 1980's, however, that began to change, and domestic violence began to be treated as a crime. While states made significant progress in combatting domestic violence, tribal governments were hampered by a 1978 U.S. Supreme Court decision holding that tribes lacked the ability to criminally prosecute non-Indians for crimes committed within the tribe's territory.[86] This lack of jurisdiction was especially troubling in light of federal statistics showing that Native women were victims of violent crime at rates higher than any other group in the United States.[87] One in three Native women in the U.S. (and 2 in 3 Alaska Native women) were raped or sexually assaulted in their lifetimes.

Although it is difficult to make causal connections, it is clear that these statistics must be connected at least in part to colonisation and to federal Indian policies seeking to eradicate tribal culture and tradition. Domestic violence was virtually unknown in tribes before European invasion, and when it did occur, it was punished severely.[88] The breakdown of tribal culture, tribal governments, and tribal economies created a situation rife for domestic violence and other family problems.

Studies show that domestic violence is a problem in Native communities both on and off the reservation.[89] A recent study by the Center for Court Innovation, focusing on tribal communities in Northern California, reinforces these statistics.[90] That study surveyed both adult and youth members of the community and the results show that:

- 37 per cent of adult survey respondents (44 per cent of female and 19 per cent of male) reported being abused by a partner
- Alcohol was a significant factor in two-thirds of the cases
- Only 11 per cent of adults said DV is regularly reported to law enforcement
- Only 20 per cent said incidents involving children are reported
- 43 per cent said law enforcement officers did not do enough
- 42 per cent of youth reported witnessing one family member abusing another
- 17 per cent of youth say they have been abused by a family member.

When domestic violence and child neglect occur in one family, the system is often ill-equipped to deal with it. A study report by the Tribal Law and Policy Institute[91] revealed numerous problems in addressing these cases, including:

- Significant problems across professional lines—DV and Child Protection often working at odds, with the DV advocates approaching women as the victims, while

the child advocates held the mothers responsible for not protecting their children

- Multidisciplinary teams were not sufficiently cross-trained to understand others' roles, and conflict also existed internally as to whether a particular advocates' office took more of an advocacy or more of a social service approach to their work
- Insufficient numbers of trained law enforcement officers
- Lack of affordable housing is an issue, mothers often had to leave kids with abuser because they had no other choice
- Western service models did not work in tribal communities
- Small communities and complicated family relations meant that confidentiality was often a problem.[92]

Indeed, although the goal of the Tribal Law and Policy Institute's study was to identify potentially promising practices addressing the intersection of domestic violence and child maltreatment, the authors of the study declared that they 'did not find any systems that effectively collaborated to deal with this issue.'[93]

A recent initiative launched by the U.S. Department of Justice, entitled *Defending Childhood*, looks at the impact of domestic violence on children and has begun seeking both community-based and collaborative approaches to dealing with the issues.[94] *Defending Childhood* is not specific to Native communities, but rather is a nationwide program that was launched after a national survey reported that 60 per cent of American children have been exposed to violence, crime, or abuse in their homes, schools, or communities, with 40 per cent the direct victims of two or more violent acts.[95] Witnessing violence not only harms the children, it also puts them at risk of becoming part of the cycle of violence and perpetuating the harms. In an effort to avoid and/or prevent these harms, the Initiative funded eight demonstration sites.[96] Each site was charged with developing a community-based program to achieve the Initiative's goals. Two of those sites were on reservations —one on the Rocky Boy Reservation located in Montana and the other at the Rosebud reservation located within the borders of South Dakota. The Center for Court Innovation wrote the study reports analyzing each of the sites.[97]

The program at Rosebud encountered numerous obstacles, many of which were idiosyncratic, thus rendering the details of the Rosebud process unhelpful except as a cautionary tale that when working at the community level, a lack of cooperation or 'buy in' from one well-connected person can have a disproportionately negative impact.[98] The Rocky Boy project, however, was still very new when the study report was done, but was showing tremendous promise.[99]

The 170 square miles that constitute the Rocky Boy reservation are home to the Chippewa Cree tribe and are fairly isolated; they are located in north central Montana, almost at the Canadian border.[100] Approximately one-half of the tribe's 6300 citizens live on the reservation.[101] Those residing on the reservation have median household incomes that are one-third less than that of Montana as a whole, an unemployment rate that tops 65 per cent, and substance abuse problem that reaches almost 75 per cent of the adult population.[102]

The vision of the Rocky Boy's Children Exposed to Violence Project (RBCEVP) is that 'that all children will be protected and nurtured in a holistic, cultural, safe, and healthy community environment.'[103] The core of the project is a collaborative body with representatives from the schools, the child welfare system, social services, law enforcement, tribal courts, victim services, and Head Start.[104] The collaborative body worked closely to ensure that each participant was aware of what the others were doing, and also assisted in developing a culturally appropriate, unified set of advocacy activities to pro-actively address these issues for all ages. All agree that this collaborative body and its approach was core to the successes achieved to date. More time is needed to assess the true and lasting impacts of the program, but the preliminary report concluded that:

> Despite some staff turnover and challenges, Rocky Boy's Children Exposed to Violence Project produced important accomplishments: 1) bringing a strong advocacy program to the reservation and providing victims with assistance; 2) providing prevention programming and support services to Rocky Boy's youth; 3) providing greater access to training for local service providers; and 4) raising community awareness about children's exposure to violence through concerted awareness campaigns. According to staff and community feedback, the work has made a difference in people's lives.
>
> Throughout this work, the RBCEVP staff have infused a culture-based approach and have brought back a focus on Chippewa Cree language, spirituality, and tradition,

> reflecting the strengths of traditional culture as a protective factor. By helping youth and community members improve their connection to their culture and the Chippewa Cree way of life, they may be impacting children's exposure to violence in ways that are difficult to measure.[105]

Such community based programs often require that people consider themselves part of the community. For many Native communities, the domestic violence that fractures their wellbeing is committed by non-Native men against Native women. This abuse is difficult to process through the criminal justice system, as tribes lack criminal jurisdiction over non-Indians. It can also be difficult to address through civil means, either for jurisdictional reasons or because of a breakdown of tribal culture. These problems were at the heart of a report issued by Amnesty International, which concluded that the rates of sexual violence against Native women in the U.S. were so high, and the causes so attributable to the U.S. government that it amounted to a human rights violation.[106]

In response, Congress enacted the Violence Against Women Act of 2013, which restored to tribes who chose to opt in, the power to prosecute non-Indians who commit domestic violence, dating violence, or who violate a protection order in the tribe's territory.[107] As conditions for opting in, tribes had to meet specific procedural requirements. These requirements are designed to protect the rights of the non-Indian accused and are modeled on the procedural protections contained in the Anglo American criminal justice system. They can be cumbersome and they are certainly expensive, but they do restore to tribes the ability to prosecute non-Indian offenders, a power that is crucial to protecting the tribal community.

The restored powers took effect in March 2015, and the statute allowed for the creation of a pilot project during the time between the passage of the statute and full implementation. Three tribes were initially chosen for the pilot project—Pascua Yaqui, Tulalip, and the Confederated Tribes of the Umatilla Reservation. During the year of the pilot project,[108] Umatilla and Tulalip each had approximately 5 cases, while Pascua Yaqui had 18 cases involving non-Indians. The larger numbers experienced at Pascua Yaqui are the result of a number of factors, including its location adjacent to a major urban area.

In a preliminary report analysing its experiences during the pilot project, Pascua Yaqui concluded:

> *Most Pascua Yaqui VAWA SDVCJ cases involve defendants with significant ties to the community.* Most offenders had established themselves in our community and have some social connections to tribal members. At least nine offenders were living on the Reservation in Tribal subsidised housing; some were staying intermittently or for short periods of time. The majority of the incidents occurred in our low-income tribal rental units, where the defendants were residing. Two of the incidents involved married couples who lived on the Reservation. Eleven of seventeen incidents involved single tribal females in relationships with non-Indians. Eleven of the cases involved children in the home. In four incidents, the children belonged to the non-Indian offender. One of the offenders is a lineal descendant of a Tribal member, grew up on the Reservation, but does not qualify for tribal membership.
>
> *Pascua Yaqui children are being exposed to violence and are at a high risk for being physically abused, neglected, and witnessing intimate partner violence in our community.* A majority of our VAWA incidents involved children who were at home… during the domestic violence that occurred (a total of 17 children under the age of eleven). Our Social Services Department (CPS) was involved in some of the cases and children were removed from the home. These children have faced physical intimidation and threats, are living in fear, and are at risk for developing school related problems, medical illnesses, PTSD, and other impairments. In some of our cases, children were the "reporting party" and one child was assaulted by a victim for reporting the VAWA SDVCJ incident. Some of our children have experienced violence and psychological trauma. Unfortunately, tribes do not have the authority to charge for crimes that endanger, threaten, or harm children.[109]

Pascua Yaqui has robust child welfare and criminal justice systems, but as with any system they must first receive a report before they can investigate potential wrongdoing. They must also have jurisdiction to investigate that report. Because Pascua Yaqui did not previously have jurisdiction over non-Indian offenders they were unable to receive reports about what was happening inside those homes. The pilot project gave them access to those homes and the ability to protect the children in them. Pascua Yaqui is now in the process of developing better methods to reach and serve these members of their community.

## IV Lessons for the Future

Because both American Indian and Alaska Native governments possess sovereignty over lands and peoples, it would be very easy to stop at this juncture and declare that any solution to Indigenous child welfare developed in the United States would not be applicable in Australia, as Aboriginal and Torres Strait Islander people do not have the same governmental powers as tribes in the United States. That conclusion, however, would be premature.

The true lessons to be learned are not about who is operating the child welfare system but rather who has input into the structure and operation of that system. Even when tribes in the US are running their own system, when they do so according to the dictates of the federal government, the tribal system is less effective. Thus, despite the difference in governmental status the lessons from the two US pilot projects are transferrable to other indigenous peoples around the world - consultation and community involvement is critical to the success of any community welfare venture.

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1 This paper will not use the term "Native American," as that term is not generally accepted among those working in Native communities. Rather, this paper will use the term "Indian," or "Native" to refer collectively to the Indigenous people of the United States. When discussing federal programs, the terms "American Indian" and "Alaska Native" will be used, as those are the official terms used in federal legislation and regulations.

2 U.S. Department of Education, *The Conditions of Education 2015* (May 2015) <http://nces.ed.gov/pubs2015/2015144.pdf>.

3 Lenora M. Olson and Stephanie Wahab, 'American Indians and Suicide: A Neglected Area of Research'(2006) 7 *Trauma, Violence & Abuse* 19-33.

4 8.5 per cent as compared to 5.8 per cent for the general population. See, eg, National Indian Child Welfare Association, *American Indian Children and Families* <http://www.nicwa.org/children_families/>.

5 Caroline Glesmann, Barry Krisberg, and Susan Marchionna, 'Youth in Gangs: Who Is at Risk' (National Council on Crime and Delinquency, 2009).

6 U.S. Department of Health and Human Services, *Child Maltreatment 2013* (2015) <http://www.acf.hhs.gov/programs/cb/resource/child-maltreatment-2013>.

7 Attorney General's Advisory Committee on American Indian and Alaska Native Children Exposed to Violence, *Ending Violence So Children Can Thrive* (2014) 34 <https://www.justice.gov/sites/default/files/defendingchildhood/pages/attachments/2014/11/18/finalaianreport.pdf>.

8 William L. Iggiagruk Hensley, *Fifty Miles from Tomorrow: A Memoir of Alaska and the Real People* (Picador, 2010).

9 43 USC 1601-1624.

10 43 USC 1606.

11 *Morton v. Mancari*, 417 US 535 (1974).

12 See *Rice v Cayetano*, 528 US 495 (2000).

13 U.S. Department of the Interior, 'Interior Proposes Path for Re-Establishing Government-to-Government Relationship with Native Hawaiian Community' (Press release, 29 September 2015) <https://www.doi.gov/pressreleases/interior-department-proposes-pathway-re-establishing-government-government>.

14 For a map illustrating locations and populations of American Indian and Alaska Native groups, see <http://www.census.gov/geo/maps-data/maps/aian_wall_maps.html> at 29 April 2016)

15 The list of tribes who are federally recognised is published annually in the Federal Register by the Bureau of Indian Affairs. The 2015 list can be found at 80 Fed. R. 1942 (2015). There are three ways for a tribe to become federally recognised. The first is through an administrative process as part of the Bureau of Indian Affairs. The second is by federal statute. The third is through a court decision. Regardless of which avenue is followed in a particular case, the only way for a tribe to get on the list is by action of the Federal government.

16 See, eg, *Montana v. United States*, 450 US 544 (1981); *Strate v. A-1 Contractors*, 520 US 438 (1997).

17 Felix Cohen, *Cohens Handbook of Federal Indian Law* (LexisNexis, 2012) 1.02.

18 See *President Grant's Peace Policy* in Francis Paul Prucha, *Documents of United States Indian Policy* (University of Nebraska Press 2000) 81.

19 Ibid.

20 Cohen, above n 17.

21 Prucha, above n 18.

22 *Johnson v. M'Intosh,* 21 US 543 (1823); *Cherokee Nation v. Georgia*, 30 US 1 (1831); *Worcester v. Georgia*, 31 US 515 (1832).

23 *Cherokee Nation v. Georgia*, 30 U.S. 2 (1831).

24 See, eg, *Montana v United States*, 450 US 544 (1981).

25 25 USC 71

26 *General Allotment* Act, 25 USC 331 (8 Feb 1887).
27 Pub. L. 49-119, 24 Stat. 387 (1887).
28 For a history of Allotment and its impact on current law, see Judith V. Royster, 'The Legacy of Allotment' (1995) 27 *Arizona State Law Journal* 1.
29 See Cohen, above n 17.
30 Ibid.
31 Ibid.
32 See Royster, above n 28, 9.
33 U.S. Department of the Interior, Office of Indian Affairs, 'Rule Governing the Court of Indian Offenses' (2 December 1882. Professor Robert Clinton has located the original text of this code and made it available at <https://rclinton.files.wordpress.com/2007/11/code-of-indian-offenses.pdf >.
34 Ibid.
35 Pratt's explanation of his educational philosophy can be found at <historymatters.gmu.edu>.
36 See Cohen, above n 17.
37 Ibid.
38 Ibid.
39 25 USC 476 et seq.
40 25 USC 476. Organisation under the IRA and adoption of an IRA constitution is not, however, a requirement to having a government-to-government relationship with the United States. Indeed, two of the largest tribes in the United States, the Navajo Nation and the Cherokee Nation, are not organised under the IRA.
41 25 USC 477.
42 Some, though not all, would be reinstated: see, eg, Cohen, above n 17, 1.06.
43 Pub. L. 84-959 (1956).
44 US Census Bureau, *The American Indian and Alaska Native Population*, 2010. Not all Indians who live off the reservation live in cities, although most do. The census data, however, does not provide that level of detail. See National Urban Indian Family Coalitions, *Urban Indian America* (2007). Cf Timothy Williams, 'Quietly, Indians Reshape Cities and Reservations', *New York Times* (13 April 2013).
45 Minneapolis is not the only place these events occurred, but it was a focus of the information presented to Congress during the hearings that led to the Indian Child Welfare Act, and thus warrants mention.
46 See 81 Fed. R. 20283 (7 April 2016).
47 Ibid at 20284.
48 25 USC 1901-1963.
49 25 USC 1901.
50 25 USC 1902. The statute does not apply to juvenile delinquency matters or to custody decisions between biological parents.
51 Jennifer Hendry & Melissa Tatum, 'Human Rights, Indigenous Peoples, and the Pursuit of Justice' (2016) 34 *Yale Law & Policy Review* 351.
52 25 USC 1911.
53 Ibid.
54 Ibid.
55 25 USC 1912.
56 25 USC 1916.
57 Ibid.
58 See, Barbara Atwood, *Children, Tribes, and States* (Carolina Academic Press, 2010) 205-240.
59 See, eg, U.S. Government Accountability Office, *Indian Child Welfare Act: Existing Information on Implementation Issues Could Be Used to Target Guidance and Assistance to States* (Report to Congressional Requesters, GAO-05-290, April 2005) < http://www.gao.gov/new.items/d05290.pdf>; Marian Bussey and Nancy Lucero, 'A Collaborative Approach to Healing Substance Abuse and Child Neglect in an Urban American Indian Community' (2005) 20(4) *Protecting Children* 9-23; Matthew Fletcher, Wenona Singel, & Kathryn Fort (eds) *Facing the Future: The Indian Child Welfare Act at 30* (Michigan State University Press, 2009).
60 Ibid.
61 National Indian Child Welfare Association & The Pew Charitable Trust, *Time for Reform: A Matter of Justice for Americana Indian and Alaska Children* (2007) <http://www.nicwa.org/government/time-for-reform.pdf>. The reasons for this disproportionate representation are not clear, however, as there is currently "very limited data available to help understand the reasons for the varying degrees of disproportionality." See 81 Fed. R. 20285. There is similarly a dearth of information about tribal foster care placements.
62 Office of Data Analysis, Research, and Evaluation, *Data Brief 2013-1* (U.S. Department of Health and Human Services, September 2013) pt. 2.
63 Laura Sullivan and Amy Walters, 'Native Foster Care: Lost Children, Shattered Families' (NPR, *All Things Considered*, 25 October 2011) <http://www.npr.org/2011/10/25/141672992/native-foster-care-lost-children-shattered-families> at 8 May 2016.
64 Ibid.
65 Notice of and a link to the new rules can be found here: U.S. Department of the Interior, 'Indian Child Welfare Act (ICWA)' <http://www.indianaffairs.gov/WhoWeAre/BIA/OIS/HumanServices/IndianChildWelfareAct/index.htm> at 2 May 2015.
66 490 US 30 (1989).
67 570 US __ (2013).
68 490 US at 43-44

69 490 US at 44.

70 A line of cases exists declaring that parents have a constitutional right (rooted in the substantive due process right of family autonomy and privacy) to make decisions for their children, unless those decisions amounted to abuse or neglect.

71 570 US (2013).

72 *Adoptive Couple v. Baby Girl*, 570 US __ (2013).

73 A number of lawsuits have been filed across the U.S. seeking to block implementation of the new regulations.

74 Edith Brown et al., *Tribal/State Title IV-E Intergovernmental Agreements: Facilitating Access to Federal Resources* (National Indian Child Welfare Association, 2000) 9.

75 Ibid.

76 Ibid.

77 Ibid.

78 Ibid.

79 Cross, quoted in ibid.

80 PL 110-351; see also Casey Family Programs, American Indian Title IV-E Application Planning Process: Tribal Progress, Challenges, and Recommendations (2012).

81 Brown et al, above n 74.

82 Trope, Title IV-E: Federal Overview and Trial Access (2010).

83 U.S. Department of Health and Human Services, *Administration for Children and Families, Title IV-E Foster Care Eligibility Review Guide* (December 2010).

84 Although details may vary, generally speaking, Title IV-E requires a court to review: (1) within 60 days of a child's removal that reasonable efforts were made to avoid removal; (2) within 12 months that reasonable efforts are being made for permanency planning; and (3) an annual review thereafter regarding the sufficiency of efforts for permanency planning. Ibid.

85 See, eg, the Pascua Yaqui Tribal Code which explicitly does not terminate parental rights, but rather establishes a permanent guardianship. 5 PYTC § 6-120. See also Confederated Salish and Kootenai Tribal Code 3-2-611 and 612.; see also Native Nations Institute, 'New Findings in Tribal Child Welfare Study' (Press Release, 17 September 2015) <http://nni.arizona.edu/news/articles/new-findings-tribal-child-welfare-study>.

86 *Oliphant v. Suquamish Tribe*, 435 US 191 (1978).

87 Amnesty International, *Maze of Injustice*: *The Failure to Protect Indigenous Women from Sexual Violence in the USA* (2007).

88 Sarah Deer, 'Toward an Indigenous Jurisprudence of Rape' (2004) 14 *Kansas Journal of Law and Public Policy* 121.

89 This conclusion can be extrapolated from two Bureau of Justice Statistics reports. The first one, 'American Indians and Crime' (2004), focuses on American Indians as victims of crime, including domestic violence, regardless of location and therefore includes crimes that occur on and off the reservation. The second report, Non-Fatal Domestic Violence (2014), looks at domestic violence among all racial groups, including American Indians, and encompasses crimes on and off the reservation.

90 Center for Court Innovation, *Responses to Domestic Violence in Tribal Communities: A Regional Survey of Northern California* (2013).

91 Tribal Law and Policy Institute, *Responses to the Co-occurrence of Child Maltreatment and DV in Indian Country: Repairing the Harm and Protecting Children and Mothers* (December 2011) < http://www.tribal-institute.org/download/OVWGreenbookReportHVS_TD_7-18.pdf >.

92 Ibid.

93 Ibid 2.

94 For further information on this initiative see: U.S. Department of Justice, "About the Initiative" (2014) <https://www.justice.gov/defendingchildhood/about-initiative> at 10 May 2016.

95 Ibid.

96 Ibid.

97 Center for Court Innovation, *Nawicakiciji – Woasniye – Oaye Waste: A Process Evaluation of the Rosebud Sioux Tribe's Defending Childhood Initiative* (2015) ('Rosebud Report'); Center for Court Innovation, *Love One Another and Take Care of Each Other: A Process Evaluation of the Rocky Boy's Children Exposed to Violence Project* (2015) ('Rocky Boy Report').

98 Rosebud Report, above n 97.

99 Rocky Boy Report, above n 97.

100 Ibid.

101 Ibid.

102 Ibid.

103 Ibid.

104 Head Start is a federally funded program designed to ensure that young children are ready for school; the exact nature of the program varies by community, but generally includes nutrition and health services.

105 Rocky Boy Report, above n 97 at p 27.

106 Amnesty International, above n 87.

107 Pub. L. No. 113-4, 127 Stat. 54 (March 7, 2013).

108 Two additional tribes were approved for the pilot project, but their approval came less than 24 hours before the end of the project. Thus they generated no cases and no data.

109 Tribal Chairman Peter Yucupicio, (Statement delivered at the United States Department of Justice (Office of Tribal Justice) Violence Against Women Government-to-Government Consultation Conference, Rapid City SD, 15 October 2014).