Keeping Them Home: The Best Interests of Indigenous Children and Communities in Canada and Australia

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1. The Massacre at Wounded Knee and The Fate of the Sacred Tree

> I did not know then how much was ended. When I look back now from this high hill of my old age, I can still see the butchered women and children lying heaped and scattered all along the crooked gulch as plain as when I saw them with eyes still young. And I can see that something else died there in the bloody mud and was buried in the blizzard. A people's dream died there. It was a beautiful dream ... the nation's hoop is broken and scattered. There is no centre any longer and the sacred tree is dead — Black Elk.[1]

First Nations and Aboriginal communities in North America and Australia have been deprived of their children from the time of European invasion.[2] During much of the 18th and 19th centuries, First Nations and Aboriginal children were victims of violent battles over land and resources. The Wounded Knee of more recent history is the removal or separation of First Nations and Aboriginal children from their communities. This continuing practice endangers both the children and the

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This article was researched and written during a period of study in south-east Canada. I am indebted to Professor Shauna Van Praagh and certain members of the Kahnawake Mohawk community of Quebec with whom I studied and who provided the impetus and encouragement to write in this area. I do not purport to speak for these people, nor for any of the Indigenous peoples of Canada or Australia. The powerful and often poignant voices of many of those peoples do, however, speak through the direct quotes.

I am also indebted to the *Sydney Law Review*'s anonymous referees for their constructive and insightful comments. All errors and omissions remain my own.

1 Black Elk quoted in Dee Brown, *Bury My Heart at Wounded Knee* (1971) at 353.

2 Throughout this article I have used 'First Nations' to describe the Indigenous peoples of Canada and 'Aboriginal' to describe the Indigenous peoples of Australia. I accept that both of these terms have been conferred by non-Indigenous discourse and may connote a non-existent commonality of Indigenality. I too am guilty of this. However, as I am as yet unaware of an Indigenous word for all of the Indigenous peoples of Canada or Australia, I use 'First Nations' and 'Aboriginal' as generally accepted terms.

future of First Nations and Aboriginal communities themselves.[3] This article will examine the role that child welfare law, policy and practice has played, and continues to play, in the removal of First Nations and Aboriginal children from their families and communities. It will examine, in particular, the application of the 'best interests of the child' test in the determination of placement decisions and custody disputes in Canada and Australia. Such focus is warranted as it seems that this test will remain the yardstick, notwithstanding that the history of its application to First Nations and Aboriginal children is broadly one of dispossession, dislocation and, ultimately, near destruction.

While acknowledging the plurality of cultures and experiences of Indigenous peoples in Canada and Australia, there has been a remarkable similarity in the application and effect of child welfare law and practice on Indigenous children in those nations.[4] A Canadian report on First Nations adoptions and placements speaks in terms strikingly remnant of the experiences of many Aboriginal children in Australia:

> For the past two hundred years the children of Indians have been the innocent victims of a cultural war waged against them by society. Christian missionaries, Indian Agents, school teachers, and politicians have all argued that Indian children must be taught to be something other than Indian, to be something they are not and never can be. These perceived pillars of society have tried, usually misguidedly, but nevertheless relentlessly, to indoctrinate in these children the belief that the customs, the values and traditions of their people must be discarded if Indians were ever to take their place in the majority community. To achieve this goal, children were removed from their homes and placed arbitrarily in residential schools with only brief continuing contact with their families. More recently, children have been removed and placed in non-aboriginal, middle class homes for adoption. While neither the literature nor the research into this issue is as yet extensive, indications are that children are subject to periods of identity crisis particularly during their teenage years. Over the past years, these collective efforts have profoundly scarred the hearts and minds of too many Indian people.[5]

Although the customs, laws and traditions of Indigenous peoples in Canada and Australia are characterised by diversity and complexity, the effects of the application of general child welfare law to those peoples have been sufficiently similar to warrant comparative analysis. Even then, not all effects speak to all peoples and the reader must bear this in mind. However, in undertaking this analysis I am not attempting to impose or suggest some pan-Indigenous culture or prescribe some pan-Indigenous solution. The purpose of my comparative analysis is merely to draw on some of the experiences of Indigenous persons in each jurisdiction in order to inform the reader of the need for law reform therein. Crucially, the direction and shape of that law reform must be determined by the Indigenous peoples affected.

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3 P Zylberberg, 'Who Should Make Child Protection Decisions for the Native Community?' (1991) 11 *Windsor Yearbook of Access to Justice* 74 at 75.

4 *In the Marriage of B and R* (1995) 19 Fam LR 594 at 615–616.

5 Manitoba Community Services, *No Quiet Place: Interim Report of the Review Committee on Indian and Metis Adoptions and Placements* (Manitoba: Manitoba Community Services, 1983).

Officially and ostensibly, the practice of removing First Nations and Aboriginal children from their homes in the interests of 'merging', 'absorbing' or 'assimilating' those children into the non-Indigenous population ceased in the 1970s.[6] However, general child welfare law today continues to disproportionately separate First Nations and Aboriginal children from their families and peoples.[7]

> Whether we talk about the 1910s or 1940s or 1970s or even the 1980s, the tragic scenario is that Aboriginal children have, in large numbers, been separated from their families. In the past the dominating force was the assimilation policy. Now, it is contact with the child welfare and juvenile justice systems which leads to many Aboriginal children being removed from their families.[8]

In 1983, a comprehensive report prepared for the Canadian Council on Social Development by Patrick Johnston estimated that, while First Nations peoples constitute approximately 3.5 per cent of the total population, First Nations children represent almost 20 per cent of the total number of child welfare placements.[9] In 1980–81, 4.6 per cent of all First Nations children were in agency care, compared with less than 1 per cent of the general Canadian juvenile population.[10] By 1992–93, this figure had only declined to 4.1 per cent, despite the enactment in most provinces of legislation requiring that courts and other decision makers consider the cultural identity of a First Nations child in the assessment of his or her best interests.[11] During the same period, the percentage of non-First Nations children in agency care declined to 0.6 per cent.[12] Once apprehended, it is unlikely that a

6 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (Sydney: RHEOC, 1997) at 29–35 (hereinafter *Bringing Them Home*).

7 Christine Davies, 'Native Children and the Child Welfare System in Canada' (1992) 30(4) *Alberta LR* 1200 at 1205.

8 Aboriginal Legal Services of WA Inc. Submission 127, quoted in *Bringing Them Home*, above n6 at 425.

9 Patrick Johnston, *Native Children and the Child Welfare System* (Ottawa: Canadian Council on Social Development, 1983) at Chapter 2. See also H P Hepworth, *Foster Care and Adoption in Canada* (Ottawa: Canadian Council on Social Development, 1980) at Chapter 8. It should be noted that, as with many statistics concerning First Nations, Inuit and Metis peoples in Canada, Johnston's statistics relate for the most part only to First Nations peoples ordinarily resident on reserves. Statistics on services rendered to off-reserve Indians, non-status Aboriginal persons, Metis persons, and Inuit persons outside the Northwest Territories and territories over which native title exists or has been negotiated, are not gathered separately from data on the general population. Some of Johnston's statistics on those areas are based on estimates provided by service agencies. Given the methodological difficulties associated with collecting comprehensive data, the statistics in Johnston's report are the most recent and recognised available: see generally Canadian Royal Commission on Aboriginal Peoples. *Gathering Strength* (vol 3): Final Report (Ottawa: Canadian Royal Commission on Aboriginal Peoples, 1996) at 2.2.

10 Johnston, id at 57. See also Royal Commission on Aboriginal Peoples, ibid.

11 Royal Commission on Aboriginal Peoples, above n9 at 2.3. See also Statistics Canada, Population Estimates Division, *Population Estimates for Canada and Selected Provinces and Territories 1971–93* (Ottawa: Statistics Canada).

12 Royal Commission on Aboriginal Peoples, above n9 at 2.3. See also Statistics Canada, Population Estimates Division, ibid.

First Nations child will be adopted or fostered by a First Nations home. In 1983, only 22 per cent of First Nations placements were into First Nations homes.[13] The effects of such dispossession and dislocation are devastating. First Nations children, torn and secluded from their cultural identity and heritage, are five to six times more likely to commit suicide than the general Canadian populace.[14] According to one commentator, in 1991 only 10 per cent of First Nations youth graduated from high school, whereas 35–40 per cent engaged in alcohol abuse and 20–25 per cent in substance abuse.[15] These indictable statistics are similar in the United States,[16] where it has been acknowledged that '[t]he wholesale separation of Indian children from their families is perhaps the most tragic and destructive aspect of American Indian life today.'[17]

The situation in Australia is remarkably similar. While Aboriginal children comprise only 2.7 per cent of Australian children, they comprised 20 per cent of children in care in 1993.[18] Aboriginal children are particularly over-represented in long-term foster care arrangements and a high percentage of Aboriginal children in long-term foster care live with non-Aboriginal carers.[19] In May 2001, the Victorian Child Care Agency stated that although Aboriginal peoples make up 0.6 per cent of Victoria's population, Aboriginal children comprise 8.3 per cent of children in the protection system. More than half of those Aboriginal children who had been permanently removed were placed with non-Aboriginal families.[20] A February 2001 report on Aboriginal child welfare in Victoria found that Aboriginal children are up to 10 times more likely to become involved in the child protection system than non-Aboriginal children.[21] For many Aboriginal children, the effects of separation or removal are multiple and damaging. The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families accepted evidence that Aboriginal children removed in childhood are twice as likely as those who were raised by their families or communities to have been arrested or to report current use of illicit substances.[22]

The situation is bleak and demands fundamental reform of Canadian and Australian law and practice. In this respect, it is crucial to situate the analysis in the context of the broader issue of First Nations and Aboriginal self-determination. Many First Nations and Aboriginal peoples argue that the only culturally appropriate approach to child placement and custody determination involves First

13 Johnston, above n9 at 176. See also Royal Commission on Aboriginal Peoples, above n9 at 2.2.

14 Above n3 at 76.

15 Above n7 at 1202.

16 M C McMullen, 'Preserving the Indian Family' (1981) 2(6) *Children's Legal Rights Journal* 32 at 34.

17 Ibid.

18 Above n6 at 430.

19 Id at 429.

20 J Davies, 'Black Child Abuse Alarm', *The Age* (Melbourne) (9 May 2001) at 1 (hereinafter 'Black Child Abuse Alarm').

21 G Atkinson, D Absler & L Campbell, *Final Report on Aboriginal Family Preservation Pilot Program Evaluation* quoted in 'Black Child Abuse Alarm', ibid.

22 Above n6 at 13.

Nations and Aboriginal peoples making decisions for themselves from within their own legal, political, cultural and social frameworks.

> The Aboriginal right of self-government encompasses the right of Aboriginal nations to establish and administer their own systems of justice, including the power to make laws within the Aboriginal nation's territory.
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> ...
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> The right to establish a system of justice inheres in each Aboriginal nation. This does not preclude Aboriginal communities within the nation from sharing in the exercise of this authority. It will be for the people of each Aboriginal nation to determine the shape and form of their justice system and the allocation of responsibilities within the nation.[23]

I support the goal of eventual transfer of responsibility for child welfare law, policy and practice to the Aboriginal and First Nations communities to which such law, policy and practice relate.[24] However, for as long as the dominant legal paradigm resists legal pluralism and First Nations and Aboriginal peoples are denied the right to self-determination — including the right and resources to apply their own child placement and protection principles and laws, and to manage their own child welfare agencies and services — there is a need to adapt the prevailing best interests principle. Moreover, this need will subsist for some time after the right to self-determination is meaningfully accorded:

> Unless we are given the right and we are entrusted and given the opportunity to build up mechanisms within our community to deal with these issues there is no end in sight.
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> ...
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> If we are going to break down [the dominant] system there has got to be a beginning where the Aboriginal community is able to build up the mechanisms.[25]

Even when the goal of self-determination is achieved, it is possible that First Nations and Aboriginal persons living in a context removed from customary principles, laws and services will continue to be dealt with in the mainstream legal system. In some instances, the exercise of the right to self-determination may

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23 Canadian Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Canada Communication Group, 1996) at 177.

24 In the United States, the *Indian Child Welfare Act of 1978* (25 USC 1901 et seq) goes at least some way towards achieving that goal. For example, s1911(a) of the Act provides that 'An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.'

25 Michael Mansell, Tasmanian Aboriginal Centre, evidence 325, quoted in *Bringing Them Home*, above n6 at 576.

involve First Nations or Aboriginal communities opting to submit child welfare law and practice to the mainstream legal system, as the level of responsibility for child welfare which First Nations and Aboriginal communities accept should be determined by those communities themselves. Indeed, it is arguable that the option to be dealt with by the mainstream legal system should remain available to all First Nations and Aboriginal persons regardless, including those with the capacity to be dealt with by a specifically First Nations or Aboriginal framework.

In light of the above, this article will examine whether the best interests principle can be adapted and applied by courts and decision makers so as to acknowledge the unique nature of Indigenous culture, identity and child care practices, and the concomitant conceptions of where a First Nations or Aboriginal child's best interests may lie. I will suggest that, given the distinctive position of First Nations and Aboriginal peoples and their relationship with the child welfare system, the legal response should be similarly distinct. The standards and interests of the dominant paradigm have been applied to First Nations and Aboriginal peoples, particularly children, with insidious effect. I will contend that, given the extent to which culture is constitutive of Indigenous identity and the capacity of Indigenous peoples to be free to conceive and pursue meaningful lives, and given the fundamental importance of children to the survival of First Nations and Aboriginal culture, the 'best interests of the community' must inform the 'best interests of the child' in placement and custody decisions.

I will examine two approaches in this respect. The first approach articulates a separate 'best interests of the community' test to be balanced on the placement or custody determination scales with that of the 'best interests of the child'. The danger here is that such an articulation may reinforce the notion that the interests of the First Nations or Aboriginal community and its children are somehow separate and distinct rather than interdependent and interrelated. The second approach incorporates the consideration of the 'best interests of the community' into that of the 'best interests of the child'. This approach is cognisant of the ineluctable interdependence of First Nations and Aboriginal culture, identity and survival. However, as existing jurisprudence demonstrates, it suffers from the problem that where community interests are not separately articulated and considered, they are likely to be subverted or ignored.

The article will then turn to focus on the broad dangers of using the 'best interests of the community' to inform the 'best interests of the child'. Such dangers include: the obvious physical, emotional and psychological dangers of leaving a child in a potentially abusive environment; the danger of 'freezing' culture and community; the danger of elevating collective rights at the expense of denying individual rights; the danger to First Nations and Aboriginal communities of submitting their interests to the definitional power of the courts; the danger of removing a child from a family with which s/he has bonded and is comfortable; and the danger of imposing an identity on the child when the very role of rights and the 'best interests of the child' is to make space for people(s), particularly children, to conceive of and create their own identities. I will argue that these risks militate against community interests peremptorily dictating the outcome of First Nations

or Aboriginal child placement and custody decisions. The aim of meeting the best interests of both the child and the community may be better achieved through the incorporation of a 'community's best interests' analysis into the 'child's best interests' analysis.

The article will conclude that, while giving greater and more explicit consideration to 'community interests' may serve the purpose of protecting and promoting Indigenous identity, interests and rights, it does little to address the pressing problems underlying the disproportionate number of First Nations and Aboriginal children who come into contact with the child welfare system. Law and society must address the pressing issues of racism, cultural insensitivity and imperialism, poverty, unemployment, poor education, ill-health, and substance abuse afflicting First Nations and Aboriginal communities if the 'sacred tree' is to survive.

2. *First Nations and Aboriginal Children and the 'Best Interests of The Child' Test*

The primacy of the 'best interests of the child' principle in relation to all institutional, administrative, judicial and legislative responses to the care of children is recognised in the *United Nations Convention on the Rights of the Child* at Article 3(1) as follows:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[26]

In the landmark case of *King v Low*, the Supreme Court of Canada articulated the 'best interests of the child' principle thus:

> [T]he dominant consideration to which all other factors must remain subordinate must be the welfare of the child. That is not to say that the question of custody will be determined by weighing the economic circumstances of the contending parties. The matter will not be determined solely on the basis of the physical comfort and material advantages that may be available in the home of one contender or the other. The welfare of the child must be decided on a consideration of these and all other relevant factors, including the general psychological, spiritual and emotional welfare of the child. It must be the aim of the Court, when resolving disputes between rival claimants for the custody of a child, to choose the course which will best provide for the healthy growth, development and education of the child so that he [sic] will be equipped to face the problems of life as a mature adult.[27]

Writing extra-curially, Justice Chisholm of the Family Court of Australia has explained the 'best interests of the child' as covering,

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26 *United Nations Convention on the Rights of the Child*, 20 Nov 1989, GA Res 25 (XLIV), UN Doc A/RES/44/25 (1989), reprinted in (1989) ILM 1457.

27 *King v Low* [1985] 1 SCR 87 at 101.

> ... a wide range of matters. It is not to be measured by money only, nor by physical comfort only ... The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded ... [It includes] all factors which affect the future of the child ... It includes the child's happiness ... It includes both the immediate well-being of the child and matters relevant to the child's healthy development.[28]

On its face, this test appears to permit consideration of the constitutive importance to a First Nations or Aboriginal child of remaining within his or her own community. This is particularly so when, as in the Australian case of *Re CP*,[29] judicial notice is taken of the myriad of spiritual and emotional disadvantages associated with not bringing up an Aboriginal child within his or her own community of kin. Such disadvantages might include:

> ... the loss of relations with a vast range of kin who will perform a wide variety of roles associated with social relations, emotional and physical support, educative knowledge, economic interactions and spiritual training ... loss of knowledge which stems from the social interactions mentioned above; *ambiguities in or loss of identity with one's own kin and country, features I understand as essential to identity from an Indigenous point of view.*[30]

The reality of the application of the test is, however, somewhat different:

> There can be little argument that the "welfare principle" should apply in cases of Aboriginal children. The problem, however, is who decides what is in the best interests of an Aboriginal child and what standards are used in reaching this decision.[31]

As Kline notes, the application of the test in the determination of placement decisions and custody disputes involving First Nations children has excluded wholesale any account of the child's identity and culture; placed a heavy evidentiary burden on any applicant seeking to assert the relevance of First Nations identity and community; and conceptualised as wholly distinct the notions of culture, context and the child's best interests.[32]

To understand the necessity of reconceptualising the 'best interests of the child' test in respect of First Nations and Aboriginal children, it is appropriate to explore the fundamental links between culture and identity and the concomitant

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28 Submission 645 at 5–6, quoted in *Bringing Them Home*, above n6 at 482. See also *B and B* [1997] FLC 84,171 at 84,197; *AMS v AIF and AIF v AMS* (1999) 199 CLR 160.

29 (1997) 21 Fam LR 486.

30 Id at 502 [emphasis added].

31 J R Crawford, *Aboriginal Customary Law: Child Custody, Fostering and Adoption* (Sydney: Australian Law Reform Commission, 1982) at 17.

32 Marlee Kline, 'Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations' (1992) 30(2) *Osgoode Hall LJ* 375 at 400. See, for example, *David Wayne Hoskins v Michelle Renee Boyd*, Court of Appeal for British Columbia, Vancouver Registry, CA022297 (24 April 1997): <http://www.courts.gov.bc.ca/jdb%2Dtxt/ca/97/02/c97%2D0292.txt> (5 November 2000) (hereinafter *Hoskins v Boyd*).

importance of family and community to the meaningful existence and survival of First Nations and Aboriginal children.

3. Community, Culture and Indigenous Identity

That people are bound in a definitive way to their own cultural community and that this community provides the normative spectacles through which we see the self and what it means for the self to be free, can be heard in the proud but poignant and pained words of Wadjularbinna Nulyarimma. She speaks as an Aboriginal Australian and a woman. She tells the story of the rape of her mother by white men as a result of which she was conceived — the only mixed ancestry child in an Aboriginal family. She tells the (not uncommon) story of how her mother rubbed goanna fat and charcoal into her skin to make her blacker but how, nonetheless, she was stolen from her family and put in a missionary home where she was forbidden to speak her own language. She tells how she came to marry:

> I was just called in one day by the superintendent, "we're marrying you off into a white family". And I was absolutely shocked. "No, I don't want to go", I said, "I don't want to go". "This is the best thing for you. You are not a black person; you have white blood in you". I came from a black woman's womb. They are my family, my people and I have some white person, superintendent, telling me what is best for me and his best for me to marry into a white family was added stress, added pain, added trauma.[33]

People are bound — in a very essential way — to the constituents of their context, delineated in terms of, inter alia: race, gender, ethnicity, sexuality, class, physical and mental firmity, religious belief, and community and culture. The terms of a person's context are a very constitutive part both of who that person is and the extent to which they are afforded the fundamental right of conception and choice of the good life. As Will Kymlicka has averred:

> In deciding how to lead our lives we do not start *de novo*, but rather we examine "definite ideals and forms of life that have been developed and tested by innumerable individuals, sometimes for generations." The decision about how to lead our lives must ultimately be ours alone, but this decision is always a matter of selecting what we believe to be the most valuable from the various options available, selecting from a context of choice which provides us with different ways of life.[34]

Jeremy Waldron has argued that, although choice takes place in a cultural context among options that have culturally defined meanings, this context can unproblematically derive from a variety of cosmopolitan cultural sources.[35] The destructive experiences of the Stolen Generations in both Canada and Australia, however, testify otherwise:

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33 *Nulyarimma v Thompson* (1999) 165 ALR 621 at 625 (Wilcox J) (hereinafter *Nulyarimma*).

34 Will Kymlicka, *Liberalism, Community and Culture* (1989) at 165 (citations omitted).

35 Jeremy Waldron, 'Minority Cultures and the Cosmopolitan Alternative' (1992) 25 *U of Michigan J of Law Reform* 751 at 783.

> We can't just transplant people from one culture to another, even if we provide the opportunity to learn the other language and culture. Someone's upbringing isn't something that can just be erased; it is, and will remain, a constitutive part of who that person is. Cultural membership affects our very sense of personal identity and capacity.[36]

Confidence in our identities and capacities, whether as individuals or members of a community, is largely contingent upon comprehension of ourselves in relation to our cultures:

> [M]eaningful affiliations during childhood contribute to a personal sense of self ... Those affiliations ... interact with each other to create a complex web within which the child's identity evolves ... [C]onnections are crucial to developing a sense of self.[37]

As Webber contends, cutting peoples off from their cultures and histories has a devastating impact upon the self, dividing peoples from 'the wealth of experience and reflection that constitutes the language in which we understand ourselves in the world'.[38]

This reality is of especial importance to First Nations and Aboriginal children, many of whom, although born into a biological family, are also born into a kinship network, clan or band.[39] It is the extended family that can give true shape to the First Nations or Aboriginal child's character and identity, both as an individual and as part of a community.

> ... [E]ven though I had a good education with [adoptive family] and I went to college, there was just this feeling that I did not belong there. The best day of my life was when I met my brothers because I felt like I belonged and I finally had a family.[40]

While clearly individuals are constitutive of their community, what is often ignored is the extent to which the First Nations or Aboriginal community may, at least partially, constitute the individual: 'Indian children develop a strong sense of community because individual goals intertwine with the community goals.'[41] It is for this reason that the well-being of the community and the well-being of the individual are so interdependent.[42] Indeed, 'failing to recognise extended family

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36 Above n34 at 175. See generally *Cubillo v Commonwealth* (2000) 103 FCR 1 (hereinafter *Stolen Generations Case*).

37 Shauna Van Praagh, 'Religion, Custody, and a Child's Identities' (1997) 35(2) *Osgoode Hall LJ* 309 at 357–58 (hereinafter 'Religion, Custody, and a Child's Identities').

38 J Webber, 'Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice' in Canadian Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: RCAP, 1993).

39 L K Uthe, 'The Best Interests of Indian Children in Minnesota' (1992) 17 *American Indian LR* 237 at 252.

40 Confidential submission 384, Tasmania, quoted in *Bringing Them Home*, above n6 at 13.

41 Above n39 at 252.

42 Mudrooroo Narogin, *Us Mob: History, Culture, Struggle: An Introduction to Indigenous Australia* (1995) at 139.

and extended-responsibility patterns might be the greatest failing of the child protection system, as its consequence has been the removal of children not merely from their natural parents but from the community altogether.'[43]

Ironically, it is recognition, not ignorance, of the interdependence of First Nations and Aboriginal culture, community and identity that has shaped — and continues to shape — much Aboriginal child welfare policy. Policies of child removal evince 'the way in which the state implicitly understood — and attacked — the significance of children's membership to the continuation of the communities in question' and, it might be added, to the continuation of the children themselves.[44] Residential schools in both Canada and Australia aimed to sever the constitutive cultural ties between First Nations and Aboriginal children and their families, and by extension, their communities.[45] No less was required to 'kill the Indian in the child' or to solve the 'Indian problem'.[46] Russell Means, an Oglala Lakota patriot, writes of the effect of such separation on his father and his community:

> In the boarding schools, Indians were taught to abuse other Indians, a legacy of violence that is now firmly ingrained among Indians on reservations, where incest and child abuse, once unthinkable among my people, are rampant. Through such beatings and threats ... *a boarding school took away my father's Lakota language skills, and with them, most of his identity.*[47]

The residential school and missionary home experiences affected each First Nations and Aboriginal child differently. Each child experienced and coped with the varied abuses in his or her own way.[48] What was, and remains, common to their experiences however, is that the children, the families, and their communities suffered. 'The impact on the children and their families was no less than devastating. Of the children that survived, many were rendered dysfunctional.'[49] In Australia, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families found that in most cases, the removal of Aboriginal children from their families had ongoing impacts and compounding effects causing a cycle of psychological and emotional damage from which it is extremely difficult to escape.[50] This experience is consistent with Neil Bissoondath's observation that a sense of one's race and culture is essential to an

43 Above n3 at 77.

44 Shauna Van Praagh, 'Faith, Belonging, and the Protection of "Our" Children' (1999) *17 Windsor Yearbook of Access to Justice* 154 at 187 (hereinafter 'Faith, Belonging, and the Protection of "Our" Children').

45 Ibid. See generally *Bringing Them Home*, above n6 at 202; P Read, *A Rape of the Soul So Profound* (1999).

46 D Soroka, 'Residential Schooling: Judicial Developments and Spiritual Healing', address to the Aboriginal Law Student's Association, McGill Faculty of Law, 15 November 1999.

47 Russell Means, *Where White Men Fear to Tread: The Autobiography of Russell Means* (1995) at 20 [emphasis added].

48 See generally *Bringing Them Home*, above n6 at 178.

49 Above n46. See generally *Stolen Generations Case*, above n36.

50 *Bringing Them Home*, above n6 at 178.

individual sense of self.[51] The violence, anger, alcoholism, substance abuse and self-destructive behaviour rife amongst First Nations survivors of the residential school holocaust in Canada are testimony to the assertion that 'confusion over one's ethnicity, the desperate search for a personal centre and a meaning to one's life'[52] leads to a kind of despair and low self-esteem.[53] Contemporaneously, First Nations and Aboriginal children placed in non-First Nations or Aboriginal homes, even those cared for by 'well intentioned foster or adoptive parents' are too often similarly subject to 'ethnic confusion and a pervasive sense of abandonment'.[54]

> I've got everything that could reasonably be expected: a good home environment, education, stuff like that, but that's all material stuff. It's all the non-material stuff that I didn't have — the lineage. It's like you're the first human being at times. You know, you've just come out of nowhere; there you are. In terms of having a direction in life, how do you know where you're going if you don't know where you've come from.[55]

Although devastating, the First Nations and Aboriginal experiences of residential schools, missionary homes and child removal and placement in non-Indigenous homes are, paradoxically, perhaps the most powerful and simplest exposition of the interdependence of First Nations and Aboriginal community, culture, identity and meaning. The natural state and right of peoples to be free is confirmed, according to Noam Chomsky, by 'the fact that, despite all efforts to contain them, the rabble continue to fight for their fundamental human rights'.[56] For at least one hundred years First Nations and Aboriginal children had their language and culture literally beaten out of them.[57]

> I got told my Aboriginality when I got whipped and they'd say, "You Abo, you nigger". That was the only time I got told my Aboriginality.[58]

All were victims, many perished,[59] but some survived. And, with the surviving victims and the communities from which they were torn, many of the First Nations and Aboriginal cultures have lived on. Duclos is correct when she writes that, '[p]eople throughout history have fought successfully to preserve their cultures against all odds, in the face of the most unyielding oppression.'[60] In no case has

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51 Neil Bissoondath, *Selling Illusions: The Cult of Multiculturalism in Canada* (1994) at 103.

52 Ibid.

53 Above n46.

54 *Indian Child Welfare Act* of 1977: Hearing on s1214 before the Senate Select Committee on Indian Affairs, 95th Congress, 1st Session (1977) quoted in Russell Barsh, 'The Indian Child Welfare Act of 1978: A Critical Analysis' (1980) 31 *Hastings LJ* 1287 at 1291. See also above n33 at 625.

55 Confidential submission 136, Victoria, quoted in *Bringing Them Home*, above n6 at 13.

56 Noam Chomsky, *Deterring Democracy* (1992) at 398.

57 Soroka, above n46.

58 Confidential evidence 139, Victoria, quoted in *Bringing Them Home*, above n6 at 157.

59 Soroka, above n46, estimates that almost 50% of First Nations children entering residential schools died therein.

60 Nitya Duclos, 'Lessons of Difference: Feminist Theory on Cultural Diversity' (1990) 38 *Buffalo LR* 325 at 327.

the oppression been more systemic and sustained than in the case of First Nations and Aboriginal peoples. Yet, First Nations and Aboriginal peoples continue to assert their identity. Indeed, the very assertion of identity seems to me an assertion of dignity — a source of strength with which to face persistent discrimination by, and exclusion from, the dominant society.[61] The positing of First Nations and Aboriginal identity and the tenacious survival of First Nations and Aboriginal cultures strongly demonstrates that culture is inseparable from the identity, vision and survival of First Nations and Aboriginal peoples. In the words of Mudrooroo, a leading Aboriginal writer, activist and commentator:

> This is the unity which underlies the diversity of Us Mob — the family, the kinship patterns which I find in all the countries I have visited. This is the enduring structure of Us Mob which continues to survive, though it has been constantly under threat from the Master, who sought to destroy it and replace it with his own type of family in which he was the ruler, the father, the protector, the station owner, the missionary, the police sergeant, the premier, the prime minister, the king.[62]

Seen this way, the maintenance of familial and community links is absolutely fundamental if First Nations and Aboriginal children are to be allowed to 'be who they are'.[63]

4. *Raised White: The Experiences of Indigenous Children in Non-Indigenous Care*

The fundamental roles played by culture and community membership in a First Nations or Aboriginal child's conception of meaning and self-worth are particularly important when First Nations or Aboriginal identity, whether assumed by the child or not, is imposed from outside. Here, a First Nations or Aboriginal child will often be caught in a dislocating contest between normative spheres.[64] Consider for example, the experience of an Aboriginal child who suffers from discrimination on the ground of his or her Aboriginality but does not identify with or receive support from his or her Aboriginal culture.[65] Ms CMB, a First Nations woman from Bella Coola, was adopted as an infant by a non-First Nations couple in Dawson Creek. She had troubled teenage years resulting in drug and alcohol abuse:

> The Ministry of Social Services took me from my mother at birth on the 9th day of March 1975 and sentenced me to a life without an identity. This is an identity

61 A similar assertion can be made with respect to both the Muslim community (see Shahnoz Khan, 'Canadian Muslim Women and Shari'a Law: A Feminist Response to "Oh! Canada" ' (1993) 6 *Canadian Journal of Women and Law* 52 at 53) and the 'Gypsy' or Roma community (see Walter Otto Weyrauch & Maureen Anne Bell, 'Autonomous Lawmaking: The Case of the "Gypsies"' (1993) 103 *Yale LJ* 323 at 341, 372).

62 Above n42 at 20–21.

63 Above n60 at 327.

64 See, for example, *Jacobs v Mohawk Council of Kahnawake* [1998] CHRD No 2.

65 Above n39 at 254.

> that I searched for twenty years until I returned to my family 3 years ago ... My daughter ... like myself at one point in her life ... will face racism as she is different than the others on the reserve. I have already faced prejudice in Bella Coola because I am different (I was raised white) ... I am an apple, red on the outside but, pure white on the inside.[66]

As Karst maintains, 'the individual's identification with cultural groups ... plays a major part in the process of self-definition. In defining ourselves, we rely heavily on other's views of us ... and on our connections with others.'[67] For First Nations and Aboriginal children — so often viewed as a group, treated as a group, and oppressed as a group — external identification may become both socially and legally constitutive. Some sense of culture and community is essential to a child if she is going to interpret herself in a world interpreting her.[68] Consider the tragic example of Cameron Kerley, a First Nations child removed from his family and community, who today languishes alone in a prison cell as punishment for the brutal murder of his adoptive father following years of sexual abuse:

> On bad days he wishes he'd never been born. On good days he dreams of another life, "a house, a job, a car, some quiet place in the country." *He's convinced that someday, somehow, he'll find a place where he belongs.*[69]

Many children who know they are of First Nations or Aboriginal descent have 'considerable difficulty in growing up in white society'.[70] An Aboriginal woman removed at eight years of age and placed in Cootamundra Girls' Home reflects:

> Most of us girls were thinking white in the head but were feeling black inside. We weren't black or white. We were a very lonely, lost and sad displaced group of people. We were taught to think and act like a white person, but we didn't know how to think and act like an Aboriginal ...
>
> We were completely brainwashed to think only like a white person. When they went to mix in white society, they found they were not accepted because they were Aboriginal. When they went and mixed with Aborigines, some found they couldn't identify with them either, because they had too much white ways in them. So they were neither black nor white. They were simply a lost generation of children. I know. I was one of them.[71]

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66 *CMB v Ministry for Children and Families*, Supreme Court of British Columbia, Prince George Registry, Docket 06763 (28 January 2000): <http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/00/07/s00%2D0774.htm> (5 November 2000) at [4].

67 Kenneth Karst, 'Paths to Belonging: The Constitution and Cultural Identity' (1986) 64 *North Carolina LR* 303 at 307. See also above n37 at 357–358.

68 J Halley, 'The Politics of the Closet: Legal Articulation of Sexual Orientation Identity' in Danielson & Engle (eds), *After Identity: A Reader in Law and Culture* (1995) at 30.

69 P A Monture, 'A Vicious Circle: Child Welfare and the First Nations' (1989) *3 Canadian Journal of Women and the Law* 1 at 2.

70 Frank Bates, 'Maintaining a Child's Links with Native Parents as a Factor in Custody Decisions' (1986) 35 *ICLQ* 461 at 462. See also above n54 at 1290–1291.

71 Confidential submission 617, New South Wales, above n6 at 152.

Zylberberg identifies two factors that may exacerbate the confusion of First Nations and Aboriginal children in non-First Nations or Aboriginal families and communities with respect to critical notions of self and belonging.[72]

First, racial prejudice against First Nations and Aboriginal peoples remains common. First Nations and Aboriginal children in non-First Nations or Aboriginal families must stand alone in the struggle against this prejudice. An adopted Aboriginal woman reflects:

> Oh I got heaps at school. "Abo". "Black". It's really hard if you don't come from a black family, 'cause you can't go home and say, "Mum, they called me an Abo". If you did she'd say "Oh the silly white bastsards, don't worry about them". That would have made me feel proud of what I was. But if I went home and said "They called me an Abo today" my foster parents would either just say nothing or they'd say "You have to put up with it". I used to think I was a real reject. I ended up doing bad at school just because of it.[73]

Absent similar life experience, 'even the best intentioned foster or adoptive parents will be unable to offer more than sympathy.'[74] Given the myriad forms in which people oppress and are oppressed, even those parents with experience of discrimination and oppression may not be able to respond adequately.[75] Faced, however, with fundamental challenges to their senses of self, identity, worth and possibilities, First Nations and Aboriginal children in these abusive situations need more than sympathy; 'they need the understanding and support that come from the ability to fully empathise, to truly know what the child is living through.'[76]

Second, despite a history of attempted co-option by, and assimilation into, the dominant paradigm, many First Nations and Aboriginal communities have retained distinctive ways of talking to and about themselves and society.[77] These conversations are fundamental to First Nations and Aboriginal children both as 'interpreters' and 'interpreted'. The extent to which First Nations and Aboriginal children who are unable to listen to or participate in these conversations experience solitude and dislocation must not be underestimated.[78] The case of an Aboriginal man removed and placed in a Church of England boys' home in the 1950s is illustrative:

> When we left Port Augusta, when they took us away, we could only talk Aboriginal. We only knew one language and when we went down there, well we had to communicate somehow. Anyway, when I came back I couldn't even speak my own language. And that really buggered my identity up. It took me 40 odd years before I became a man in my own people's eyes, through Aboriginal law. Whereas I should've went through that when I was about 12 years of age.[79]

72 Above n3 at 78–79.

73 Adopted Aboriginal woman quoted in Read, above n45 at 41.

74 Above n3 at 78.

75 See generally Andrew Solomon, 'Defiantly Deaf', *New York Times Magazine* (28 August 1994) at 38.

76 Above n3 at 78.

77 See generally, above n38.

78 Above n3 at 78–79.

79 Confidential evidence 179, South Australia, above n6 at 203.

As Shauna Van Praagh has written:

> [C]ommunities, tangibly present in the lives of many children, may play a positive role in their growth, development, and self-perception. Severing ties between even very young children and other members of their ... community or communities may cut off an important source of personal development and of intellectual, imaginative and social enrichment.[80]

On rare occasions, the courts have been sensitive to the ineluctable links between culture, self-identification and external identification. In *Re HIR*,[81] the Court ordered that it was in the best interests of the First Nations child that the child's mother and grandmother be granted access, notwithstanding a determination that the mother was not a fit parent, because the child needed exposure to the First Nations community:

> The child is a member of a visible minority. He must, some day, adjust to that fact. It is a fair and respectable point of view that adjustment will be made easier if he has grown up in a happy acquaintance with the native community and the native culture.[82]

In *NH and DH v HM, MH and the Director of Child, Family and Community Services*, the Court of Appeal for British Columbia overturned the decision of a trial judge to award custody of a First Nations child to the child's maternal adoptive grandparents rather than his First Nations biological grandfather. The Court of Appeal was of the view that 'the trial judge placed undue emphasis on economic matters and underemphasised ties of blood and culture'.[83] The Court of Appeal stated that:

> While there are doubtless many successful instances of cross-cultural adoption and custody situations involving children of aboriginal descent and non-aboriginals, there also exists a very considerable history of unsuccessful outcomes.[84]

The Court of Appeal further stated that:

> ... the words of Scott CJM in the recent case of *EJT v PMVP and TVP*, (1996) 110 Man R (2d) 219 (Man CA) at 233, are apposite here:
>
> ... no authority is required to make a convincing argument that culture and heritage are significant factors in the development of a human being's most fundamental and enduring attributes. For anyone, aboriginal or otherwise, they

80 Above n44 at 177. See also above n37 at 336, 357.

81 [1984] 3 WWR 223 (Alta CA).

82 Id at 234–235 (Kerans JA).

83 *NH and DH v HM, MH and the Director of Child, Family and Community Services*. Court of Appeal for British Columbia, Vancouver Registry, Docket CA023739 (4 February 1998): <http://www.courts.gov.bc.ca/jdb%2Dtxt/ca/98/00/c98%2D0046.txt> (5 November 2000) at [13] (hereinafter *NH and DH v HM*).

84 Id at [16].

> are the stuff from which a young person's identity and sense of self are developed.[85]

In *Sandy v Nootchtai*,[86] the Ontario Provincial Court, in awarding custody of a First Nations child to a maternal aunt rather than a foster mother who had cared for the child for over a year, took this analysis a step further:

> Familial relationships among kin are important for they consolidate a sense of identity which otherwise may be lacking in a child's upbringing ... Donna Nootchai [the maternal aunt] would ensure that the child would experience and be raised as best she is able in the proud tradition of a noble past with support of relatives and extended family. *His past will become part of self. That past struggles in the ferment of the present, but then do we not all? The Ojibway past is the present of all and the future of all.*[87]

A decision of the Full Court of the Family Court of Australia — *In the Marriage of Goudge*[88] — expresses a similar reality:

> [T]he matters ... are not to be seen as the remnants of a vanishing culture which will be obliterated in time by a process of assimilation. On the contrary they are to be seen as important in regard to the sense of identity and development of these children, as part of their links to an Aboriginal culture and heritage which has come to them through their mother.[89]

Applied in this way, the 'best interests of the child' test allows First Nations and Aboriginal conversations with past, present and future to continue. Unfortunately, however, these cases are exceptional rather than paradigmatic. Too often, as the cases discussed below illustrate, consideration of the welfare of the child is abstracted from consideration of the child's community and culture. The common adverse (if not devastating) effects of the placement of First Nations and Aboriginal children in non-First Nations or Aboriginal homes demand that we ask the question as to whether the best interests of the child may actually lie in the promotion and protection of First Nations and Aboriginal rights, cultures and communities. I will suggest that our answer to this question will very much depend upon the extent to which we either celebrate and respect, or decry and subvert, culture and difference.

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85 Id at [18]. See also above n47 at [19]; *In the Matter of the Children NP and BP: NP and SM v The Director of Child, Family and Community Services*, Supreme Court of British Columbia, Prince George Registry, Docket 03998 (5 February 1999): <http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/99/03/s99%2D0318.txt> (5 November 2000) at [23] (hereinafter *In the Matter of the Children NP and BP*).

86 *Sandy v Nootchai* [1989] 3 CNLR 190.

87 Id at 196 [emphasis added].

88 [1984] FLC ¶91–534 (hereinafter *Goudge*).

89 Id at 79, 319 (Evatt CJ).

5. *'Children are Our Heartbeat, Our Future': First Nations and Aboriginal Community Welfare*

> Children are our heartbeat, our future. When our children are taken away we have our spirituality taken away, our self-esteem taken away, our belief in human nature and life itself taken away.[90]

Just as the future welfare of First Nations and Aboriginal children is, to a significant degree, dependent upon the future welfare of their communities and cultures, so too is the future welfare of such cultures and communities dependent upon that of their children.[91] Children are the future of First Nations and Aboriginal communities — repositories and transmitters of culture and identity.[92] Russell Means talks of the way in which his kin and community imbued him with a sense of identity and meaning:

> Before I was six, my grandparents gave me a sense of my heritage, of my duties to my people and to my culture ... Because of my extended family — especially Grandpa John Feather — there has always been a spiritual dimension to my life.[93]

As First Nations and Aboriginal communities are robbed of their children, both the children and the communities are robbed of their futures.[94] When First Nations and Aboriginal children are removed from their homes and communities:

> The traditional circle of life is broken. This leads to a breakdown of the family, the community and breaks the bonds of love between the parent and the child. To constructively set out to break the Circle of Life is destructive and is literally destroying native communities and Native cultures.[95]

The removal of First Nations and Aboriginal children from their homes has a devastating impact upon those who remain. The family unit, so often the primary vehicle for the transmission of identity, meaning, love and, ultimately, meaningful life, is destroyed.[96] An Aboriginal woman removed in the late 1950s with her three siblings recalls:

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90 A Delaronde of the Mohawk Nation, 'Residential Schooling: Judicial Developments and Spiritual Healing', address to the Aboriginal Law Student's Association, McGill Faculty of Law, 15 November 1999.

91 Above n39 at 250.

92 Above n69 at 8, 12. See also Canadian Royal Commission on Aboriginal Peoples, above n9 at 2.2.

93 Above n47 at 535.

94 See above n37 at 336 for a more detailed exposition of the interdependence of the futures of children and (religious) communities:
'For any given religious community — whether large, generally integrated, and liberal, or small, insulated, and traditional — ongoing existence and strength depend literally and rhetorically on "its" children. Accordingly, it is extremely important to each community that it be able to welcome and retain child members. At the same time, the affiliations that children have with their communities (for example, cultural, ethnic, and linguistic, as well as religious) have a significant impact on their development and sense of identity.'

95 J Hill, *Remove the Child and the Circle is Broken* (1983) at 55 (quoted in Monture, above n69 at 3).

96 I acknowledge also recent research that has clearly established the link between domestic violence and homicide, revealing the family relationship as potentially the most lethal in society: see generally Julie Stubbs & Alison Wallace, 'Protecting Victims of Domestic Violence' in Mark Findlay & Russell Hogg (eds), *Understanding Crime and Criminal Justice* (1998). See also above n44 at 178.

> My parents were continually trying to get us back. Eventually they gave up and started drinking. They separated. My father ended up in jail. He died before my mother. On her death bed she called his name and all us kids. She died with a broken heart.[97]

Often, the factors and problems resulting in the removal are exacerbated.[98] With children gone, the shared goal of raising children disintegrates. Parents give up: 'if you lose your children you are dead.'[99] As the family disintegrates, so too the community — that 'meaningful space and touchstone for identity formation and personal network [which] depends on ... the lives and development of its youngest members'[100] — disintegrates. The net effect, felt both by those who are removed and those who remain, is a sense of instability, loss, confusion and abandonment.

> Because the family is the most fundamental economic, education, health-care unit in society and the centre of an individual's emotional life, assaults on Indian families help cause the conditions that characterise those cultures of poverty where large numbers of people feel hopeless, powerless and unworthy.[101]

Carasco discusses the impact on those First Nations and Aboriginal children who are removed:

> [M]any ... grow up being so dislocated in terms of their culture, their race and their family, that they have no clear sense of their identity and no home to which they can return: the circle has been broken.[102]

Russell Means talks of the impact on those who remain:

> We are losing our roots. Nowadays, when I meet so-called traditional Indians and they share their culture, they always say their grandmothers or grandfathers told them this or that. Only a few years ago, the elders I met never felt the need to justify themselves by citing experts who were no longer around. They said, "This is the way it is. This is the way things are." *They knew who they were and what they were.*[103]

First Nations and Aboriginal communities know what is at stake. They know that there is nothing more vital to their dignity, integrity and continued existence than their children.[104] They know that a horrifying number of families and communities are broken by the removal of their children, and that an alarming proportion of these children are placed in non-First Nations or Aboriginal homes, thereby depriving the children of a constitutive part of their identity and the

97 Confidential submission 106, New South Wales, above n6 at 213.

98 Above n16 at 34.

99 Above n54 at 1292.

100 Above n44 at 174.

101 W Byler, 'The Destruction of American Indian Families' in S Unger (ed), *The Destruction of American Indian Families* (1977) at 8.

102 Emily F Carasco, 'Canadian Native Children: Have Child Welfare Laws Broken the Circle?' (1986) 5 *Canadian Journal of Family Law* 111 at 114. See also, above n7 at 1207.

103 Above n47 at 539 [emphasis added].

104 See generally, above n6 at 212–221.

community of its fundamental right to self-determination and survival. They know that, historically, child removal policies were predicated on assimilation and cultural genocide and that, contemporaneously, the effect — if not the intention — is much the same.

The challenge for non-Indigenous persons, particularly non-Indigenous lawmakers, is to confront this knowledge. It must be recognised that the law — and its institutions — exercises an often insidious normative power.[105] The 'otherisation' and consequent devaluation of First Nations and Aboriginal cultural and social standards — particularly as they relate to the care, education, protection and welfare of children — leads to the removal and devastation of First Nations and Aboriginal children and their communities. Non-Indigenous persons must recognise their role in the construction of the 'other' and the consequent destruction of traditional First Nations and Aboriginal cultures and conversations. We must acknowledge the difference that difference makes in formulating a response that reflects adequately the myriad unique ways in which First Nations and Aboriginal peoples understand and talk about life.[106] As Chief Jake Swamp has stated:

> Our cultures, our religions, our governments and our ways of life are all in danger. *We are not simply individuals with individual groups. We are a peoples ... For these reasons we face unique problems. Special measures are required to meet these problems.* If these measures are not taken, more and more Indigenous people may be destroyed their cultures vanished forever.[107]

6. *'Best Interests' Ideology and the Abstraction of Indigenous Children, Community and Culture*

If we are to survive as a people our future must be our past — rejoining the family circle. Return to our traditional clan system. Because it resolves conflict peacefully, the clan system also ensures individual liberty. The extended family and the core family unit ... are essential in building community self-determination, and it is the community that provides the only means for us to preserve the institutions that traditionally guided every aspect of our lives as human beings.[108]

The dominant conceptualisation of best interests ideology as applied by the courts tends to construct the best interests of First Nations and Aboriginal children as separate, distinct and abstracted from their constitutive familial, cultural and racial contexts.[109] The jurisprudence of First Nations and Aboriginal child custody

105 See for example, above n37 at 359.

106 See generally, above n69 at 6.

107 Chief Jake Swamp of the Mohawk Nation, 'Address to United Nations Commission on Human Rights in Support of the Establishment of a Working Group on Indigenous Peoples and Rights' (7 May 1982) UN Doc E/Cn.4/sub. 2/1982/33 annex; above n39 at 237 [emphasis added].

108 Above n47 at 542. This contention was also central to views expressed by many Aboriginal elders — including Isaac Brown, Theodora and Bill Harney — at 'Where the Waters Meet: A Conference on Community Solutions to Indigenous Youth Justice' (Mandorah, Northern Territory, 1–3 June 2001) [conference papers forthcoming].

109 See generally Kline, above n32.

determinations and placements overwhelmingly 'privileges an understanding of children as *decontextualized individuals* whose interests are separate and distinct from those of their families, communities, and cultures'.[110] As Kline notes, this *conceptual* construction of First Nations and Aboriginal children as separate from their cultures and communities may tend to deproblematise their *actual* removal.[111] Hence, in *Natural Parent v Superintendent of Child Welfare*, the statement of the trial judge that the case 'could only be resolved in the light of the best interests of the child himself ... considered as an individual' meant considering the child 'not a part of a race or culture'.[112] By decontextualising the First Nations child, the Court could blind itself to the probably devastating impact of removal on the sense of identity, stability and belonging of the child, his family and his community.

The abstraction of First Nations and Aboriginal children from their families and communities both reflects and reinforces the law's normative construction of the 'ideal environment' for the upbringing of a child; namely, an environment involving two biological parents, a stable home, and financial security.[113] By constructing First Nations and Aboriginal children as 'not a part of a race or culture',[114] and by conceptualising custody disputes involving First Nations and Aboriginal children as having 'nothing to do with race, absolutely nothing to do with culture ... nothing to do with ethnic background',[115] the courts can deny distinctly First Nations and Aboriginal conceptions of kinship and child-rearing structures or practices. As Hudson and McKenzie argue, the child welfare system devalues Indigenous culture by not recognising and using traditional Indigenous systems of child protection, making judgments about child care based on dominant norms, and persistently using non-Indigenous foster and adoption placements.[116]

A. Parenting Roles and Extended Familial and Kinship Obligations

In both First Nations and Aboriginal communities, responsibility for child welfare and nurturing often resides with an extended family or kinship network and the community as a whole.[117] Parenting roles, and nurturing, teaching and socialising responsibilities are often widely shared in Indigenous communities. In the case of the Mohawk Nation, for example, the restriction of the term 'mother' to mean 'biological mother' does not reflect the reality that all mothers within a clan are mother

110 Id at 395–396.

111 Id at 396.

112 [1976] 2 SCR 751 at 768 (hereinafter *Natural Parent*).

113 See, for example, *Canada (Attorney-General) v Mossop* (1993), 100 DLR (4th) 658. See also *NH and DH v HM*, above note 83 at [50].

114 Above n112 at 768.

115 *Racine v Woods*, [1983] 2 SCR 173 at 188 (Wilson J quoting expert testimony with approval) (hereinafter *Racine*).

116 B McKenzie & P Hudson, 'Native Children, Child Welfare, and the Colonization of Native People' in KL Levitt & B Wharf (eds), *The Challenge of Child Welfare* (1985) at 125–141. See also Canadian Royal Commission on Aboriginal Peoples, above n9 at 2.2.

117 Above n6 at 451.

to all of the children of that clan.[118] Similarly, in the case of the Nyungar mob in Australia, in which all communities are divided into Wardangmaat or Manitjamaat moeties, the dominant understanding of 'mother' or 'father' fails to recognise that a Manitjamaat woman with a Wardangmaat mother and a Manitjamaat father would accept all Wardangmaat women as 'mother' and all Manitjamaat men as 'father'.[119]

By privileging the dominant conception of 'parent', child welfare law and practice relegates the rights of other Indigenous family members and the community itself, and conflicts with many First Nations and Aboriginal laws and values. In Australia, for example, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families reported that, in reported cases, the Family Court of Australia has yet to prefer an Aboriginal child's grandparent over that child's biological, non-Aboriginal mother or father.[120]

B. Mobility and Autonomy

In the case of many First Nations and Aboriginal nations in Canada and Australia, the privileging of stability of residence systemically entrenches a bias against the 'Aboriginal practice of mobility of children amongst responsible adults and their households'.[121] Thus, for example, in *DH and NH v HM and MH*, the trial judge awarded custody of Ishmael, whose mother was a member of the Swan Lake Band of Manitoba, to his adoptive non-First Nations grandparents (NH and DH) over his biological First Nations grandfather (HM). Justice Bauman held that:

> In favour of DH and NH are the ties of adoption, their obvious love and affection for Ishmael, their desire and demonstrated willingness to encourage Ishmael in the appreciation of all facets of his heritage, *the stability of their home and their apparent economic ability to provide Ishmael with many advantages.*[122]
>
> ...
>
> In favour of HM are ties of blood, his obvious love and affection for Ishmael, his Aboriginal heritage, his demonstrated ability to provide a home and care for his family. *On the less positive side are his lack of employment, the potential unsettling move to Manitoba and the uncertainties attendant upon it, and the problems Amanda has lately experienced and HM's response to them.*[123]

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118 Ellen Gabriel of the Mohawk Nation, 'The Role and Responsibilities of Women of Iroquois Matrilineal Society', address to the Aboriginal Law Student's Association, First Peoples' House, McGill University, 21 October 1999.

119 Above n42 at 23–26.

120 Above n6 at 486.

121 Id at 486. See also *Re CP*, above n29 at 502–503.

122 *DH and NH v HM and MH*, Supreme Court of British Columbia, Vancouver Registry, Docket F950814 (26 September 1997): <http://www.courts.gov.bc.ca.jdb%2Dtxt/sc/97/13/s97%2D1357.txt> (5 Nov 2000) at [50] [emphasis added] (hereinafter *DH and NH v MH and HM*).

123 Id at [49] [emphasis added].

Justice Bauman had previously implicitly criticised HM's 'laissez-faire approach to parenting' which could be viewed as too 'hands off'.[124] Criticism of inadequate supervision and excessive autonomy accorded to children has also been levelled at Yonglu communities in the Northern Territory.[125] There is, again, a conflict of laws, lores and values. In broader Canadian and Australian society, lack of close parental supervision, a child's absence from biological family and geographic mobility are considered symptomatic of problems in the family environment. In First Nations and Aboriginal communities such factors may be indicative of a 'normal' family environment in which the child is accorded all necessary care, comfort and affection.

C. The Application and Effect of Paradigmatic Norms

Having regard to the discussion above, it is difficult to resist the conclusion that much policy underlying even contemporary child welfare law and practice is aimed at 'normafication' — assimilation in a veiled guise as the values of the dominant group are imposed on First Nations and Aboriginal peoples.[126] What should be a loud and telling clash between appropriate child-rearing and associated normative orders[127] is, instead, muffled as the 'best interests ideology' listens to the dominant voice whilst it strangles the 'other'.

Such cultural insensitivity and imposed norms manifest at two important levels in respect of First Nations and Aboriginal children.

First, cultural misunderstanding, combined with the powerful normative force of child welfare law, means that many First Nations and Aboriginal children have been — and continue to be — removed from their homes on the basis of paradigmatic findings of neglect or abandonment where, appropriately understood, none exists. The grounds of neglect 'justified' 40 per cent of Aboriginal children care and protection orders in Australia in 1992–93, compared with 23 per cent of care and protection orders in respect of all children.[128] As the *Bringing Them Home Report* stated, definitions of neglect are more subjective, malleable and culturally particular than definitions of abuse, particularly where cultural difference is not understood and does not inform policy development and implementation.[129] The normative model has been, and remains, insensitive to the types of parenting practices referred to by Russell Means of the Oglala Lakota Nation:

> Once, we all lived among our kin in communities of people that raised their own children and set their own standards of conduct. We knew everyone and everyone knew us, so we behaved with respect toward one another.[130]

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124 Id at [36].
125 Above n6 at 451–452.
126 Id at 545.
127 Above n44 at 186.
128 Above n6 at 431–432.
129 Id at 453, 545.
130 Above n47 at 536. See also Kline, above n32 at 411; above n69 at 6.

Typically applied and (mis)understood, the 'best interests of the child' ideology does not make space for the cultural differences of the 'other'. Hence, in *Tom v Winnipeg Children's Aid Society*, the Big Grassy Band was refused standing in its application for guardianship of a child member of the band who was found to have been neglected by his mother.[131] The child was instead retained in a ward of the Children's Aid Society of Winnipeg. The crucial issue here is not so much that the child was separated from his mother, but that he was cut off from a community that could not only have cared for him but may have provided him with the space and meaning to rightfully realise a sense of self, identity and belonging.

The second level at which cultural insensitivity and imposed norms manifest involves those occasional cases in which the welfare and protection of First Nations and Aboriginal children does actually require removal from their families — whether temporarily or, more rarely, permanently. In determining what should be done with the child, cultural misunderstanding often results in wholly inappropriate placement. Hence, for example, in *In the Matter of the Children NP and BP*, continuing custody of the abused children was granted to a non-First Nations couple rather than their First Nations aunt and uncle.[132] In its decision, the Supreme Court of British Columbia afforded significant weight to the 'greater understanding' of the non-First Nations couple of the special educational needs of children suffering learning disorders.[133] Comparatively little consideration was accorded to the presumably far greater understanding of the First Nations aunt and uncle of the special *cultural* needs of First Nations children. In another paradigm example, Wilson J stated in *Racine* that:

> In my view, when the test to be met is the best interests of the child, the significance of cultural background and heritage as opposed to bonding abates over time. *The closer the bond that develops with the prospective adoptive parents the less important the racial element becomes.* [134]

As with the residential schools and missionary homes, the underlying notion is that, with time, First Nations and Aboriginal peoples can somehow become less Indigenous; that, with time, Indigenality somehow becomes less constitutive and important; that, with time, if First Nations and Aboriginal children are separated from their families and communities, they can be 'successfully assimilated'.[135] Madame Justice Wilson then went on to say:

> I believe that interracial adoption, like interracial marriage, is now an accepted phenomenon in our pluralist society. The implications of it may have been overly dramatized by the respondent in this case.[136]

The jurisprudence is not, however, entirely bleak.

131 [1982] 2 WWR 212. See also *In the Matter of the Family and Child Service Act* (1982) (unreported, Prov Ct BC); above n102 at 128.

132 Above n85 at [46].

133 Id at [34].

134 Above n155 at 188 [emphasis added].

135 See also *Hoskins v Boyd*, above n32 at [11–14].

136 Above n115 at 188. See also id at [12].

D. Sensitive Deployment of 'Best Interests' Ideology: A Step in The Right(s) Direction

In Evatt CJ's dissenting judgment in *Goudge*, Her Honour considered that a number of factors need to be weighed in determinations of whether to remove an Aboriginal child and what to do with him or her if a decision to remove is made:

> These include the effects of loss of contact with an Aboriginal parent's traditions and culture, the Aboriginal origins of the child, the extent of discrimination in a particular situation and the difficulties encountered by part-Aboriginal children in integrating into the society of a European parent ... .[137]

Her Honour concluded that the trial judge had given insufficient weight to these aspects and ordered a re-trial.

In *Sanders*, Evatt CJ and Watson J, the judges in the majority, said, 'it would be wrong to fall into the trap of concluding that white Australian suburban values are to be preferred',[138] whilst in *Torrens v Fleming*, the trial judge stated that 'the child should be afforded the opportunity of enjoying the culture of her race through being placed in the care and control of her [Aboriginal] mother'.[139]

Following the decision of the Full Court of the Family Court of Australia in *In the Marriage of B and R*,[140] it is to be hoped that the Aboriginality of a child, and the recognition of the profound difficulties so often faced in adolescence and later life by Aboriginal children raised in non-Aboriginal families, will more properly inform child placement and custody decisions. In that case, which considered custody applications by both the child's Aboriginal mother and non-Aboriginal father, the following exchange occurred between the trial judge and counsel for the mother:

> His Honour: [S]he has a white father, has she not?
> Mrs Mandelert: Yes, she does.
> His Honour: And she has a black mother?
> Mrs Mandelert: Yes ...
> His Honour: ... Again, I repeat, this is a normal custody case between two parents, both of whom are Australian citizens ... There is nothing special about it [Aboriginality].[141]

Ordering a re-trial, the Full Court of the Family Court criticised this view as 'factually incorrect'.[142] After summarising a number of factors which they considered 'so notorious that it would be expected that a trial judge would take

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137 Above n88 at 79, 320. But see *Hoskins v Boyd*, above n32 at [12].

138 *In the Marriage of Sanders* (1976) FLC ¶90-078 at 75, 374.

139 (1980) FLC ¶90–840 at 75, 309 NSW Sup Ct. See also *McL* (1991–92) 15 Fam LR 7; *F v Langshaw* (1983) 8 Fam LR 833 (confirmed on appeal: *Rushby v Roberts* [1983] 1 NSW LR 350).

140 Above n4.

141 Id at [15].

142 Id at [144].

judicial notice of them'[143] (including: that racism remains a marked aspect of Australian society; that the removal of an Aboriginal child from his or her community to a white environment is likely to have a devastating effect on self-esteem and identity; and that generally an Aboriginal child is better able to cope in an Aboriginal community), Their Honours held that the Aboriginality of a child is a matter which is deep, unique, and very relevant to the best interests of that child.[144] However, although the Court concluded that this fact should require the appointment of a 'separate representative' for every Aboriginal child in a parenting dispute, the Court refused to import a presumption that an Aboriginal child should, all other things being equal, be placed with an Aboriginal parent.[145] Thus, evidence establishing the relevance and importance of Aboriginality in each case still needs to be adduced.

In Canada, in the cases of *Fitzgerald v Sagiatook*[146] and *Re DAA*,[147] both of which awarded custody of children to First Nations parents, the courts seemed to be swayed by the 'Indigenous factor'. In the latter case, the Court stated: 'In my view the child's interests will be better served, albeit marginally, by allowing the child to live and grow with her own relatives, who wish to have her so much.'[148] Similarly, in cases such as *Re HIR*,[149] *Sandy v Nootchai*[150] and *NH and DH v HM*,[151] Canadian courts have deployed the best interests principle with relative sensitivity to the interdependence of community, culture and the best interests of a First Nations child.

Sadly, however, these cases are the exception rather than the norm, and, just as commonly, the 'Indigenous factor' militates against granting custody to the First Nations or Aboriginal parent on the basis of pervasive racist ethnocentric stereotypes such as 'drunkenness' and 'tolerance to violence'.[152]

Clearly, the prevailing 'best interests of the child' ideology is not in the best interests of either First Nations or Aboriginal children, or their families and communities. It is simply not enough that the judiciary express 'regret'[153] with respect to the removal of First Nations and Aboriginal children or 'compassion and sympathy'[154] for the First Nations and Aboriginal parents and communities from

143 Id at [150].

144 Id at [38].

145 Id at [150–151]. See also *Director-General, Department of Families, Youth and Community Care & Bennett* (2000) 26 Fam LR 71 in which the Full Court of the Family Court of Australia held that, in most cases, Aboriginality is not so important as to import a presumption that an Australian court is better equipped than a foreign court to determine custody of an Aboriginal child.

146 (1979) 4 CNLR 17.

147 (1980) 31 NBR (2d) 676.

148 Id at 678.

149 [1982] 3 WWR 223.

150 Above n86.

151 Above n83.

152 *Re Eliza* [1982] 2 CNLR 53 at 54. See also *John v Superintendent of Child Welfare* [1982] 1 CNLR 47 at 49; above n85 at [34–37].

153 See, for example, *Tom v Children's Aid Society*, [1982] 1 CNLR 172.

154 *John v Superintendent of Child Welfare*, above n152.

whom the children (and, with them, so much more) are stolen.[155] In the context of Indigenous children, at the least, the arguably Orwellian child welfare paradigm must be re-envisioned and re-thought. The normative power of the law places this onus fairly on those who make and adjudicate the law. For, what is at stake here is not 'merely' the best interests of each individual Indigenous child coming before the courts. What is at stake here is the fundamental human right of First Nations and Aboriginal peoples and cultures to regeneration and self-determination. What is at stake here is the space and respect that the state accords to diverse normative approaches to life for both children and their communities.[156] Even more, what is at stake here is the future each of us imagines for ourselves, and the space that each of us affords others to do the same. In the sage words of Duclos:

> [T]he way to begin to resolve issues of difference without oppressing those who are labelled different is to notice them. *The challenge is not to see our own reflections in their eyes, or to imagine what we would want if we were they, but actually to pay attention to what they are saying about who they are.*[157]

7. *The Use of the 'Best Interests of the Indigenous Community' to Inform the 'Best Interests of the Indigenous Child'*

> In a diverse society in which different faiths and cultures can flourish in co-existence, and in which individuals can grow and develop partly through connections and affiliations ... claims on behalf of communities may deserve recognition.[158]

In the context of child welfare and the determination of placement decisions and custody disputes, it seems that the 'best interests of the child' test is, and will foreseeably remain, the yardstick. The dislocating and often destructive history of the application of this test to First Nations and Aboriginal children demonstrates, however, that the 'best interests of the child' are not necessarily the 'best interests of the First Nations or Aboriginal child', far less those of his or her family and community. The challenge is thus to adapt and apply 'best interests ideology' so as to acknowledge the unique nature of Indigenous culture, identity and child care practices, and the concomitant conceptions of where a First Nations or Aboriginal child's best interests may lie.

It seems to me that, given the extent to which culture is so often constitutive of an Indigenous child's identity, esteem and possibilities, and, given the obvious importance of children to the survival of First Nations and Aboriginal culture and communities, the 'best interests of the Indigenous child's community' must inform the best interests of that child and any associated placement or custody decisions. Recognition must be afforded to the fact that 'the best interests of the child and the

155 See generally, above n36.

156 Above n37 at 314.

157 Above n60 at 380 [emphasis added].

158 Above n37 at 338.

community are profoundly intertwined and inseparable'.[159] Two approaches to the promotion of legislative and judicial recognition of the inextricable link between the interests of Indigenous children and their communities present themselves.

The first approach is the articulation of a separate 'best interests of the Indigenous community' test to be balanced on the placement or custody determination scales alongside the 'best interests of the Indigenous child' test. Such an approach assumes a significant coincidence between the best interests of the First Nations or Aboriginal community and that of the child. It suggests that the determination of a First Nations or Aboriginal child's best interests be based on: an appreciation of diverse approaches to child-rearing and upbringing;[160] an understanding of the importance of community and cultural membership to a child's identity growth and development;[161] and, importantly, a recognition of the rights of First Nations and Aboriginal communities (not just individuals) to protection. However, while this approach may ensure consideration of Indigenous communities and contextualisation of Indigenous children in placement decisions and custody determinations, it suffers from the danger that it may reinforce the notion that the interests of the Indigenous community and the interests of the children thereof are somehow distinct rather than interrelated. Moreover, the articulation of what is effectively a 'collective rights' or 'collective interests' test runs counter to the paradigmatic predilection of the western legal tradition to 'individual rights' and 'individual interests'.[162] In a society and tradition in which the 'trumping' of 'collective rights' by 'individual rights' is systemically and systematically entrenched,[163] the legislature and judiciary may be reluctant to attach any sort of weight to the consideration of community interests. For example, in *Racine*, Wilson J, writing for the Supreme Court of Canada, suggested that the rights of the 'parent' and, by extension, the 'community' are largely irrelevant: 'the law no longer treats children as the property of those who gave them birth but focuses on what is in their best interests.'[164] Certainly, children must not be seen as property. To ignore the rights of the collective is, however, to invalidate the structure of many First Nations and Aboriginal societies which are based on cooperation and consensus and in which 'the collective's rights are the focus'.[165] To ignore the rights and interests of the First Nations and Aboriginal communities may, moreover, culturally destabilise the community in such a way as to further impede the growth of individual rights. Perhaps most importantly, to ignore Indigenous collective rights on the grounds of the protection of individual liberty

159 C Beamish, 'Parenting Disputes: Across Cultural Lines' (1993) Special Lecture LSUC at 125.

160 Above n37 at 339.

161 Ibid.

162 Duclos suggests that the law's emphasis on individual rights may be a strategy by which the dominant group maintains its dominance: 'If only individuals have rights and not groups, power is so dispersed that no significant threat can be posed to the hegemonic power of the dominant group': Duclos, above n60 at 350.

163 See, for example, *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess, Supp. No 13, UN Doc A/810 (1948).

164 Above n115 at 174.

165 Above n69 at 6.

is to ignore the extent to which the fundamental liberty of First Nations and Aboriginal children to imagine and make themselves is so bound up in the fundamental liberty of Indigenous communities to do the same.

The second approach to legislative and judicial recognition of the link between the best interests of First Nations and Aboriginal children and their communities is to incorporate consideration of the 'best interests of the Indigenous community' into that of the 'best interests of the Indigenous child' him or her self. To the extent that this model makes space for the consideration of community in the sense of the rights of the Indigenous child to his or her community rather than the rights of that community to the child, it resists succumbing to the intractable debate between liberalism and communitarianism, and between individual and collective rights. (One must ask, however, whether, by giving up the struggle for collective rights, we give up the struggle for the tools with which it may be possible to implement instrumental change.) Further, this approach, by considering the interests of the First Nations or Aboriginal child and his or her community together, encourages cognisance of the interdependence of Indigenous culture, identity and survival. As the discussed jurisprudence demonstrates, however, where 'community interests' are not separately articulated and considered they are likely to be subverted, if not ignored.[166]

Before considering which of the two approaches may be the preferable, it is perhaps appropriate to examine some of the potential difficulties — both for the children and their communities — associated with the use of the 'best interests of the Indigenous community' to inform the 'best interests of the Indigenous child'.

A. The Danger of Exposing a First Nations or Aboriginal Child to an Abusive Situation

Perhaps the most pressing of these problems is the very real danger that where consideration of the best interests of the child as an abstracted individual is supplemented by consideration of not only the interests of the child as part of a community but the interests of the community itself in that child, the child may be exposed to or remain in a potentially abusive situation. While the importance of community and cultural membership to a First Nations or Aboriginal child can not be overstated, neither can the critical issue of protecting children from physical, emotional or psychological harm.[167] As Razack states, '[t]he risks of talking culture are immense. What is too easily denied and suppressed in this discussion is power.'[168] Power and voice are things that most children, especially First Nations and Aboriginal children, lack.[169] Some children, Indigenous and non-Indigenous, *do* need protection from their families or communities and they need it now. For, even as families, communities and cultures provide space and

166 See, for example, above n70 at 469.

167 Above n37 at 317.

168 S Razack, 'What is to be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence' (1994) 19 *Signs* 894 at 918. See generally, above n44 at 197–199.

169 But see above n37 at 344–348 for an encouraging discussion as to how children may be given a voice in the articulation and determination of their own best interests.

identifiers for definition and development of the self, they may threaten and damage that very self. As Van Praagh states:

> The same ties that have been sketched as worthy of recognition, may need to be readjusted or even severed in the name of protecting the integrity, needs and interests of children.[170]

The 'integrity' of the child must be non-derogable. For, the integrity and identity of the child are interdependent: '[T]he child's development thrives on connections that enrich her identity and, at the same time, depends on protection from damage or harm.'[171] Hence, even where complex issues such as First Nations and Aboriginal sovereignty, values and the right to self-determination are involved, the rights of the child in such circumstances must remain paramount. As Van Praagh correctly elucidates, that state must not abdicate its interest in and responsibility to children:

> Autonomous aboriginal tribunals may be desirable, and greater understanding of the beliefs and practices of religious communities may be necessary, but abdication to communal jurisdictions without adequate insurance for members, especially women and children, is irresponsible.[172]

In considering community interests and standards, there must be no scope for leaving children in potentially abusive situations or relationships. Where there is a real apprehension of harm, then the paramount concerns of safety and security should generally override concerns for the preservation of cultural links, affiliation and identity.[173] I agree that:

> [R]elationships that damage the integrity of a child cannot be justified by a child's identity interests: membership in a community, or involvement in identity-related practices or beliefs, does not eliminate a concern for the dignity of the child.[174]

I also maintain, however, that once a child is removed, urgent work must be done to safely repatriate the child and put the family back together. The courts, in considering and applying community interests, must not lower the minimum level of protection and care afforded to First Nations and Aboriginal children.[175] Minimum — albeit culturally sensitive — standards need to be met.[176] As will be

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170 Above n44 at 178.

171 Above n37 at 360.

172 Shauna Van Praagh, ' "Bringing the Charter Home": Book Review of JT Syrtash, *Religion and Culture in Canadian Family Law* (1992)' (1993) 38 *McGill LJ* 233 at 242.

173 *In the Matter of the Children NP and BP*, above n85 at [43].

174 Above n37 at 360.

175 See generally, above n102 at 131–132. See also Razack, above n168, for a discussion of cases in which the courts have, arguably inappropriately, effectively lowered the standard of protection afforded to Aboriginal women in respect of sexual violence.

176 See W Michael Reisman, 'Autonomy, Interdependence, and Responsibility' (1993) 103 *Yale LJ* 401 at 413–417 for a more detailed discussion of this assertion in respect of 'Gypsy' or Roma children. I acknowledge the critical need to undertake any 'minimum standards analysis' in a rigorous, disciplined and culturally sensitive manner such as to ensure it does not become an exercise in inappropriate paternalism, imperialism or intrusion.

discussed below, however, the abuse of any First Nations or Aboriginal child must invite two fundamental questions. First, what factors — whether individual, familial, societal or structural — underlie the abuse of the child? For, in most cases of child abuse in First Nations and Aboriginal communities, the abuser is also a victim and the abuse is not a function of Indigenous culture but of the structural context of Indigenous life. Second, what can be done to alleviate or eradicate the identified factors?

B. The Danger of 'Freezing' First Nations and Aboriginal Culture and Reinforcing the Status Quo

A further danger associated with the consideration of Indigenous community and cultural interests is that, where the courts have invoked First Nations or Aboriginal culture as a relevant consideration, they have often done so in such a way as to 'freeze' that culture as it existed 'pre-contact'. In *R v Van der Peet*,[177] for example, the Supreme Court of Canada limited the First Nations rights to be recognised and protected under section 35(1) of the *Charter*[178] as those deriving from 'the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.'[179] *In CJK v Children's Aid Society of Metropolitan Toronto*,[180] the Court, in affirming the removal by the Society of a child from a First Nations grandmother, dismissed the importance of racial origins and heritage to the child. It stated, of the position that the First Nations grandmother would best ensure the retention and respect for First Nations culture that the child deserved, that:

> That argument is attractive on its face but is not borne out by the evidence. It seems to me that there is very little in the life of Mrs K which recognizes or maintains a native tradition, beyond her knowing some words of her native tongue.[181]

In *In the Marriage of R*,[182] the Federal Court of Australia awarded custody to an Aboriginal mother on the condition that she and the child live on the remote Aboriginal settlement on which the mother had been born, reared and educated. Indeed, the Court stated that, were it not for the mother's promised return, the decision may have been otherwise.[183]

The legal tendency to conceive culture in static rather than dynamic and fluid terms may hence militate against advocacy of the explicit consideration of the interests of First Nations and Aboriginal cultures and communities given the

177 [1996] 2 SCR 507.

178 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act* 1982, being Schedule B to the *Canada Act 1982* (UK) 1982, c11 (hereinafter *Charter*).

179 Above n177 at 539 (per Full Court).

180 [1989] 4 CNLR 75.

181 *CJK v Children's Aid Society of Metropolitan Toronto*, id at 81 (Vopelsang PCJ).

182 [1985] FLC 91–615.

183 Id at 79,978 (Haese J). See also *Re W: R v W* (1982) 32 RFL (2d) 153 at 168, 180 (Man CA) (Matas JA).

importance of adapting child-rearing and child-protection policies to change. Cultures, traditions, norms, and customs come from — and are positioned by and within — histories.[184] They are also, however, 'manifestly dynamic'.[185] The invocation of culture as a consideration in the determination of First Nations and Aboriginal child custody disputes must not submit to the essentialisation of First Nations or Aboriginal children and their communities.

C. *The Danger of Submitting the Determination of Indigenous Community Interests to the Definitional Power of the Courts*

Just as the law has the power to freeze and stultify culture and identity, so too it has the power to construct.[186] Unfortunately, the effect of the legal consideration of First Nations and Aboriginal culture is, too commonly, the construction of that culture as the dominant culture interprets it, rather than the provision of space for the culture to construct and interpret itself. For Patricia Williams, the promise of rights resides in their capacity to accord us the space to be who and what we want to be. To a group of young white males who afforded her no room to pass on the footpath, she exhorted 'Don't I exist for you? See me! And deflect, godammit! ... I have my rights!'[187] Minority groups are granted rights, however, not on the basis that there might be something problematic with prevailing roles, relationships, powers and hierarchies,

> but on the basis that they constitute a fixed group of "others" who need and deserve protection. Arguably, then, human rights frameworks thus regulate new identities in ways that constrain their challenge to dominant social relations.[188]

To claim rights in a court is to submit those rights to the definitional power of that court. For example, in *Mashpee Tribe v Town of Mashpee*,[189] a US Federal District Court held that a group of peoples who self-identified — and were in turn identified — as Indian, were not, in legal terms, an 'Indian tribe'. As Torres and Milun aver, the definitions of 'Indian' relied upon by the Court not only devalued the lived experience of the Mashpee peoples to the extent that it did not conform, but, by arguing that the Mashpee had renounced their Indian identity by adopting some forms of the dominant culture, denied the right of the Mashpee peoples to evolve, even where such change may have been necessary for their very cultural survival.[190] For First Nations and Aboriginal communities to submit culture and

184 Leti Volpp, '(Mis)Identifying Culture: Asian Women and the "Cultural Defense"' (1994) 17 *Harvard Women's LJ* 57 at 100.

185 Above n38 at 274.

186 See, for example, above n37 at 359.

187 Patricia Williams, *The Alchemy of Race and Rights* (1991) at 235–236. See also Martha Minow, *Making All the Difference* (1990) at 382–383, 389.

188 Didi Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (1994) at 44. See also Martha Minow, 'Rights and Cultural Difference' in A Sarat & T R Hearns (eds), *Identities, Politics and Rights* (1995) at 355.

189 447 F Supp 940 (D Mass 1978).

190 G Torres & K Milun, 'Stories and Standing: The Legal Meaning of Identity' in Danielson & Engels (eds), *After Identity: A Reader in Law and Culture* (1995) at 137.

identity to the definitional power of the law, as, indeed, they would be doing by inviting the courts to consider the best interests of the community in their assessment of the best interests of the Indigenous child, is, at best, problematic. First Nations and Aboriginal communities seeking to have their interests considered on the court's child custody or placement scales will have to strategically navigate the treacherous legal waters constructing (and closing) identity and the interests of Indigenous communities.

D. The Danger of Breaking Established Bonds

In both *Natural Parents* and *Racine*, the bond established between the First Nations children and their adoptive parents, and the separation of the First Nations children from their cultural heritage, combined to tip the scales in favour of the adoptive parents.[191] What impact would the consideration of the best interests of the First Nations or Aboriginal community have upon those children already established in non-First Nations or Aboriginal homes? On the one hand, a First Nations or Aboriginal child torn from his or her own Indigenous family and community may suffer from 'a sense of abandonment and confusion'.[192] On the other hand, the severance of an established bond between a First Nations or Aboriginal child and his or her substitute parent may inflict 'irreparable psychological harm and damage upon the child'.[193] It is crucial that community interests proponents hear and heed the warning of Louis La Rose, chairperson of the Winnebago Tribe:

> I think that the cruelest trick that the white man has ever done to Indian children is to take them into adoption courts, erase all of their records and send them off to a nebulous family ... in the State of Nebraska and that child reaches 16 or 17, he is a little brown child residing in a white community and he goes back to the reservation and he has absolutely no idea who his relatives are, and they effectively make him a non-person and I think ... they destroy him.[194]

However, the advocacy of community interests considerations need not have as a concomitant the advocacy of a policy of repatriation whereby Indigenous children already 'established in white homes [are] suddenly uprooted and returned to a native culture that has become alien to them'.[195] In such cases, the First Nations or Aboriginal child him or herself must be given the voice and space to articulate his or her own identity, affiliations, hopes, fears and best interests.[196] Instead, the consideration of community interests has as a concomitant the result that many

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191 See also *DH and NH v HM and MH*, above n122; *CMB v Ministry for Children and Families*, above n66.

192 Barsh, above n54 at 1290.

193 Above n39 at 251.

194 *Mississippi Choctaw v Holyfield* 104 L Ed 2d 29 (1989) at 47 (quoted in judgment of Brennan J). See also above n66 at [4].

195 Above n7 at 1212. See, for example, *Jane Doe v Awasis Agency of Northern Alberta* (1990) 72 DLR (4th) 738 (Man QB).

196 But see above n75.

First Nations and Aboriginal children stolen from their families and communities under existing child welfare law would not be removed in the first place. Moreover, consideration of the interests of the culture and community in the child — in addition to consideration of those of the child in the culture and community — may encourage the courts to adopt a longer term view of the best interests of First Nations and Aboriginal children. For, even in a paradigm in which permanency and stability are deemed essential to the welfare of the child,[197] there is still scope for recognition that the benefits of a stable non-First Nations or Aboriginal home in the short term may be offset by the destabilising long-term impact of removing First Nations and Aboriginal children from a context and culture which allows for the meaningful formation of identity and the liberal imagination of possibility.

8. *Law, Culture and the 'Difference That Difference Makes'*

> Once we see that light reflect our various colours; when we feel complexity clear as an orange sun moving into the morning maybe we can sit here in the shade and talk meeting each other's eyes with a sparkle ...[198]

Existing child welfare laws are clearly not in the best interests of First Nations and Aboriginal children. Indeed, as one author puts it, '[c]hild welfare practices have been a major factor in the deterioration of aboriginal cultures'.[199] However, although all too often the law is used as a tool of the empowered, it is also a repository of liberty, containing values that can be used by all.[200] We must not forget the role that law, especially child welfare law, has played in the oppression, both historic and contemporary, of First Nations and Aboriginal peoples, communities and cultures. Yet, as Bruce Kercher writes, 'law is not merely a bludgeon for beating people; it is a two-edged sword.'[201] I agree with the observation that: '[t]he law which has often been an instrument of injustice to Aboriginal [peoples] can also, in proper cases, be an instrument of justice in the vindication of their legal rights.'[202]

Placement decisions and custody dispute determinations concerning First Nations and Aboriginal children raise questions concerning perhaps the most fundamental and inalienable rights of all: the right to life, liberty and security of person; the rights of children; the right to a language, culture and identity; the right

197 Elizabeth Bartholet, 'Race Matching in Adoption: An American Perspective' in Ivor Gaber & Jane Aldridge (eds), *In the Best Interests of the Child: Culture, Identity and Transracial Adoption* (1994) at 164.

198 J Kay, 'We are Not All Sisters Under the Same Moon' in G Somerville-Arjat & R E Wilson (eds), *Sleeping with Monsters: Conversations with Scottish and Irish Women Poets* (1990) at 129–130. See generally Stephen J Toope, 'Cultural Diversity and Human Rights (F R Scott Lecture)' (1997) 42 *McGill LJ* 169.

199 M J Sinclair, D Phillips & N Bala, 'Aboriginal Child Welfare in Canada' in N Bala, J Hornick & R Vogl (eds), *Canadian Child Welfare Law: Children, Families and the State* (1991) at 171.

200 Diane Kirkby, *Sex, Power and Justice: Historical Perspectives of Law in Australia* (1995) at xi.

201 Bruce Kercher, *An Unruly Child: A History of Law in Australia* (1995) at xx.

202 *Thorpe v The Commonwealth (No 3)* (1997) 71 ALJR 767 at 775 (Kirby J).

to self-determination; the right and freedom to be and choose who and what you are. Hence, as First Nations and Aboriginal peoples increasingly turn to the law for the vindication of their rights, much will depend upon the legislature and judiciary and their recognition of the inextricable intersection between law, culture and the 'difference that difference makes'. It is thus crucial that we agitate and struggle for the aspirations, enunciated by Dickson CJ in *R v Oakes*, that:

> The [law] ... be guided by the values and principles essential to a free and democratic society which I believe to embody, to name but a few, *respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs [and] respect for cultural and group identity.*[203]

What is clear from the impact of child welfare law on First Nations and Aboriginal children is the imperative that each First Nations and Aboriginal community be accorded its right to self-determination and empowered to make decisions in its own, and its children's, best interests. As discussed above, however, even when such rights and resources are fully accorded, there will subsist a need to reform the application of the best interests principle by mainstream courts to First Nations and Aboriginal children.

In my view, the malleability of the best interests principle and its space for the potential invocation of cultural and community interests make it a possible vehicle for the vindication of First Nations and Aboriginal rights, particularly as they pertain to children. Whilst the previously discussed dangers of the slide into cultural relativism should be avoided, as Dewar writes, '[d]eployed sensitively, and with a consciousness of Indigenous child-rearing practices, it [the best interests principle] can avoid the imposition of one set of values on another.'[204]

9. *Assessing the Best Interests of Indigenous Children and Their Communities*

The sensitive and efficacious application of best interests ideology so as to promote both the best interests of First Nations and Aboriginal children and their communities and cultures will depend upon a number of factors.

A. Consideration of Indigenous Community Interests and Rights

First, any consideration of the best interests of a First Nations or Aboriginal child should involve a consideration both of the rights and interests of the child in his or her community and culture, *and* the rights and interests of the First Nations or Aboriginal community and culture in its children. Whether the change is effected through legislative amendment or common law adjudication, judicial consideration of these factors should be compulsory in any case involving a First Nations or Aboriginal child. Recent legislative amendments in both Australia and

203 [1986] 1 SCR 103 at 136 [emphasis added].

204 John Dewar, 'Indigenous Children and Family Law' (1997) 19 *Adelaide LR* 217 at 228.

Canada go some way towards satisfying the first limb of this submission; namely, that the courts should consider the rights and interests of a First Nations or Aboriginal child in his or her community. In Australia, section 68F(2)(f) of the *Family Law Act* 1975 (Cth), which governs the placement and care of Aboriginal children when parenting disputes come before the Family Court, provides that, in determining what is in a child's best interests, 'the court must consider the child's maturity, sex and background (including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders) and any other characteristics of the child that the court thinks are relevant.' In Ontario, the *Child and Family Services Act* requires recognition of 'Indian' or 'Native' status as a 'best interests' category which is separate and paramount to the obligation to consider cultural background.[205] Legislation in Alberta requires that a First Nations child be informed of his or her status and that the chief and council of the child's community be consulted prior to any permanent wardship hearings.[206] The *Youth Protection Act* in Quebec stipulates that:

> Every person having responsibilities towards a child under [the] Act, and every person called upon to make decisions with respect to a child under [the] Act shall, in their interventions, take into account the necessity ... of opting for measures in respect of the child and the child's parents ... which take into consideration ... the characteristics of Native communities.[207]

British Columbia has enacted arguably the most extensive provisions in its *Child, Family and Community Service Act*.[208] Section 2 of that Act provides that it must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the principles that, inter alia, 'kinship ties and a child's attachment to the extended family should be preserved if possible'[209] and 'the cultural identity of aboriginal children should be preserved'.[210] Section 4 of the Act applies these guiding principles to the determination of 'best interests of the child':

> 4(1) Where there is a reference in this Act to the best interests of a child, all relevant factors must be considered in determining the child's best interests, including for example:
>
> ...
>
> (e) the child's cultural, racial, linguistic and religious heritage;
>
> ...
>
> 4(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.

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205 *Child and Family Services Act* RSO 1990, c. C–11, s37(4).
206 *Child Welfare Amendment Act* 1985, SA, c. C–8.1, s73.
207 *Youth Protection Act*, RSQ, cP–34.1, s2.4 (5o)(c).
208 *Child, Family and Community Service Act* RSBC 1996, c46.
209 Id at s2(e).
210 Id at s2(f).

In my view, these legislative amendments, while a step in the right(s) direction, do not go far enough. The lists of matters to be taken into account merely require the courts to 'consider' how Indigenality may be relevant to a custody, placement or care determination. In no instance is Indigenality considered peremptory or presumptive, contrary to the fundamental right of a child to enjoy his or her own culture in community with other members of his or her group.[211] Further, with the arguable exceptions of Alberta and Quebec, the various Acts considered require only that the courts consider the rights and interests of a First Nations or Aboriginal child in his or her community, but not the rights and interests of a First Nations or Aboriginal community in its children. This fails to recognise the intertwining relationship between the rights of Indigenous children and their communities.

This situation may be contrasted with that prevailing in the United States under the *Indian Child Welfare Act of 1978*, pursuant to which it is recognised that 'there is no resource more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest ... in protecting Indian children who are members of or are eligible for membership in an Indian tribe.'[212] Further to this recognition, section 1902 of the Act evinces a policy to 'protect the best interests of Indian children *and to promote the stability and security of Indian tribes and families*'. While each of the Australian and Canadian Acts considered requires the court or decision maker to merely 'consider' or 'take into account' the child's First Nations or Aboriginal heritage or identity, the practical effect of the United States legislation is to require meaningful recognition and application of the rights and interests of an Indian child in his or her community, and vice versa.

An unacceptably high percentage of First Nations and Aboriginal families and communities are broken up by the removal, often unwarranted, of their children. An alarmingly high percentage of such children are placed in non-First Nations or Aboriginal foster or adoptive homes and institutions. Subject to my comments below, it is crucial that both the interests of First Nations and Aboriginal children in retaining a connection with their families and cultures, and the interests of the families and communities in retaining their children, be substantially determinative in any adoptive, preadoptive, foster care or custody placement. No less is required to ensure the survival and future of First Nations and Aboriginal cultures and communities and the control of such communities over their own membership and identity.

B. Sensitivity to Customary Traditions, Laws and Practices

Second, in any consideration of alleged neglect or abandonment of a First Nations or Aboriginal child, the courts should, while adhering to minimum standards and practices, be culturally sensitive to Indigenous child-raising practices.[213] The

211 Above n26, Article 30.

212 *Indian Child Welfare Act of 1978* 25 USC 1901 et seq at s1901(3).

213 *Child and Family Services Act* RSO 1990, c. C–11, s208.

initial presumption should be that the best interests of the First Nations or Aboriginal child is to remain with his or her own family and kin. Too many First Nations and Aboriginal children have been stolen from their homes by consequence of the ignorance of social workers and judges who determined that the child was 'neglected', without regard to alternative — yet manifestly acceptable — cultural differences and practices.[214] Extensive education of decision-makers is imperative if their reaction to 'benign difference' is not to attack and erode First Nations and Aboriginal cultures and to separate First Nations and Aboriginal children from the peoples and communities that provide the spaces and signifiers in and from which they develop.[215]

Most often the First Nations or Aboriginal community itself will be best positioned to determine whether a child has been neglected, especially when that community is cognisant of the dependence of its own future on that of the child. This requires a legislative or judicial prerogative that no placement of a First Nations or Aboriginal take place except on the advice, recommendation and instruction of that child's Indigenous community. The meaningful involvement of First Nations and Aboriginal communities in this decision-making process is imperative once it is recognised that only Indigenous people are qualified to determine how best to confront problems confronting them, drawing on customary law and lore, and that only Indigenous people have the right to make decisions concerning their own lives and communities. It is not enough that, as under the *Child Welfare Amendment Act* 1985 (Alta), the *Children (Care and Protection) Act* 1987 (Cth) or the *Children and Young Person's Act* 1989 (Vic), welfare departments 'involve' or 'consult' members of an Indigenous child's community. Nor is it satisfactory that, where Indigenous communities are actually involved, Indigenous agencies are inadequately funded and equipped to properly attract, assess and train alternative First Nations or Aboriginal carers. As Kline asserts, Indigenous communities must 'be empowered, financially, politically, and otherwise, to develop their own child welfare services outside the framework of existing ... schemes'.[216] This is part of the project of self-government and self-determination.

C. Consideration of Long-Term Interests in Permanency Planning

Third, the courts, in making a placement or custody determination, must look beyond the immediate interests of the First Nations or Aboriginal child, and take into account both the long-term interest of the child in maintaining a meaningful

214 Above n16 at 32. See generally, above n44 at 196–197. See also s1901(5) of the *Indian Child Welfare Act of 1978* 25 USC 1901 et seq which refers to the failure of decision makers to recognise the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. See also s1915(d) of the Act which, in relation to placement preference requirements, stipulates that the standards to be applied are the social and cultural standards prevailing in the Indian community in which the parent or extended family member resides or with which the parent or extended family members maintain social and cultural ties.

215 Above n204 at 230. See also, above n6 at 487.

216 Kline, above n32 at 424.

connection with his or her culture, and the probable long-term impact on the child of being deprived of his or her culture, and with it, signifiers, identity and heritage. The decision of the Ontario Supreme Court in *Re SD* provides some hope here:

> Although permanency is important, cultural heritage is also important. In fact there is good reason to infer that without cultural heritage being recognized as integral to human growth, permanency will never succeed. One cannot deny what one is; we cannot deny what these children are. They are Ojibway, and unless that is an integral part of our decision making, there is little hope that permanency planning will succeed.[217]

The legislatures and judiciaries must explicitly recognise that every First Nations and Aboriginal child has a need to maintain a connection with his or her culture and community; that, for individuals, a strong connection with one's Indigenous community is crucial and that, for communities, the ability to converse with and renew through the next generation is fundamental. This requires legislative and judicial action to ensure that placements and orders provide for the child to remain in contact with his or her family and kin. His or her spiritual and emotional well-being will generally demand no less.[218]

D. Entrenchment of the Indigenous Child Placement Principle

Fourth, the removal of Aboriginal children from their homes should be a last resort. When removal is essential for the safety and protection of the child, every effort should be made to place the child within his or her extended family, kin, clan or tribe. This requires that all child welfare legislation stipulate that, where it is necessary that a First Nations or Aboriginal child be removed, placement is to be made, having regard to customary law and practice: first, with the child's extended family; second, with members of the child's Indigenous community; and, third, with another Indigenous caregiver. While this Indigenous child placement principle has been legislatively enshrined in some jurisdictions,[219] it is mere policy in others.[220] Further, Indigenous communities and organisations are often not empowered or enabled to participate in its application. Their empowerment and involvement is crucial if the Indigenous child placement principle is to be applied 'respecting law' and 'keeping law strong' by making correct placements and recognising ties and responsibilities in defining extended family and caregivers.[221] In many cases, this will require that First Nations and Aboriginal

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217 (1989) Ont Fam LR 38 at 39.

218 Above n6 at 589–590.

219 See, for example, *Child and Family Services Act* RSO 1990, c. C–11, s57(5) which requires that an Aboriginal child be placed: first, with the extended family; second, with Aboriginal members of the community with the same cultural and linguistic identification; third, with other alternative Aboriginal caregivers; and, as a last resort, with a non–Aboriginal caregiver. See also *Children (Care and Protection) Act 1987* (NSW) s87; *Indian Child Welfare Act of 1978* 25 USC 1901 et seq, s1915(a)–(b).

220 For example, the Indigenous child placement principle is not legislatively recognised in Tasmania, Western Australia, Queensland or the Australian Capital Territory.

221 Above n6 at 588.

persons and groups be given standing in respect of custody or placement applications concerning their children.[222] Where possible and appropriate, First Nations and Aboriginal children removed from their families must be repatriated, at least with their communities and kin, as soon as is safely possible.[223]

E. Addressing Underlying Causes

Finally, and perhaps most importantly, any and every case of alleged neglect or abandonment of a First Nations or Aboriginal child must act as an invitation to the courts and the broader community to examine underlying causes. For, the scope of the law to vindicate the rights of First Nations and Aboriginal children should not be overestimated. Didi Herman is correct when she writes that 'courts are not "neutral arbiters"; rather, they exist within a state structure and operate with all of the constraints and functions appropriate to their role — namely, facilitating the reproduction, rather than the subversion, of the status quo.'[224] The status quo in Canada includes: an infant mortality rate four times higher for First Nations than non-First Nations children; a life expectancy at least 10 years shorter for a First Nations than a non-First Nations child; and a likelihood of dying from curable disease that is 10 times higher for First Nations than non-First Nations children.[225] The status quo in Australia is strikingly similar. Numerous studies confirm a close correlation between poverty and child neglect.[226] Thus, to advocate only piecemeal legislative or judicial changes, 'is to effectively accept that the lives of First Nations [or Aboriginal] individuals who fall prey to the instruments of the child welfare system will not substantially change ... The inevitable consequence will be the genocide of First Nations [or Aboriginal] people.'[227]

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222 See *Pitzel and Pitzel v Children's Aid Society of Winnipeg* [1984] 5 WWR 474 for an example of a case in which a band, the Little Saskatchewan Indian Reserve Band, was vested with standing in respect of a custody application. See also *Indian Child Welfare Act of 1978* 25 USC 1901 et seq, s1911(c) which stipulates that, '[i]n any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.'

223 See, for example, *Sandy v Nootchai*, above n86; *JTK v Kenora-Patricia Child and Family Services* [1985] 4 CNLR 76 (Ont Prov Ct Fam Div). See also *Indian Child Welfare Act of 1978*, 25 USC 1901 et seq, s1922 of which requires any authority, official or agency involved in an emergency removal to ensure that the removal or placement terminates immediately when it is no longer necessary to prevent imminent physical damage or harm to the child. The obligation thereafter is to expeditiously initiate a child custody proceeding, transfer the child to the jurisdiction of the appropriate Indian tribe, or restore the child to the parent or Indian custodians, as may be appropriate.

224 Didi Herman, 'The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms' (1994) 14 *Oxford J of Legal Studies* 589 at 601. See also Uthe, above n39 at 251.

225 Above n7 at 1201–1202.

226 See, for example, National Council of Welfare, *In the Best Interests of the Child: A Report by the National Council of Welfare on the Child Welfare System in Canada* (1979) at 4–8; Pelton & H Leroy (eds), *The Social Context of Child Abuse and Neglect* (1981) at 22–38.

227 Above n69 at 6–7.

The challenge, as Audre Lord so compellingly puts it, is to acknowledge and act upon the role that the mainstream legal system and its advocates have played — and continue to play — in the affirmation and maintenance of prevailing conditions and structures:

> For, we have, built into all of us, old blueprints of expectation and response, old structures of oppression, and these must be altered at the same time as we alter the living conditions which are a result of those structures. For the master's tools will never dismantle the master's house.[228]

For this reason, if child welfare law and practice is to address the needs and rights of First Nations and Aboriginal children and communities, it needs to be fundamentally overhauled. And this overhaul needs to have regard to broader social, economic, political, historical and cultural issues including health, employment, housing, education, alcohol and substance abuse, marginalisation, dislocation and disenfranchisement. As the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families found, 'unless these conditions are altered and living conditions improved, social and familial disruption will continue.'[229]

Crucially, this overhaul needs to have regard to First Nations and Aboriginal conversations and aspirations. As a Nyungar Elder reflects:

> What I'm saying, you listen. You'll feel your strength, you feel your body, you'll feel yourself. Might be morning, you feeling ... Arrh, I want to understand that. I want to listen.[230]

The only appropriate reform will be built on the right to self-determination[231] — on First Nations and Aboriginal peoples seeing things with their own eyes, thinking their own thoughts, and doing things their way.[232] The words of Larissa Behrendt are apposite here:

> A community must always decide for itself what is best for its members. Only the community knows what is best for the community.[233]

Grounding a right for First Nations and Aboriginal peoples to exercise control over matters affecting their children, families and communities, is the *only* response consistent with the best interests of First Nations and Aboriginal children.

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228 Audre Lorde, 'Age, Race, Class, and Sex: Women Redefining Difference' in Audre Lorde, *Sister Outsider: Essays and Speeches* (1984) at 123.

229 Above n6 at 557.

230 Unnamed Nyungar Elder quoted in above n42 at 237.

231 Above n6 at 557.

232 Above n42 at 3.

233 Larissa Behrendt, *Aboriginal Dispute Resolution* (1995) at 108.

10. First Nations and Aboriginal Children and the Regeneration of the Sacred Tree

Following the massacre at Wounded Knee over one hundred years ago, Black Elk despairingly wrote that 'the sacred tree is dead.'[234] More recently and optimistically, however, Russell Means has written that:

> In the first half of this century, Black Elk was led down the path blazed by Red Cloud, Crow Dog, Crazy Horse, Sitting Bull, and others of their generation. I feel that Black Elk's purpose was to save our nation's sacred tree of life. He was partly successful ... *I believe the last root of our tree still lives — just enough to regenerate the tree, and with it, our people's spiritual survival.*[235]

I believe that the last root to which Means was referring are today's First Nations and Aboriginal children.[236] In the words of the Opaskwayak Elders of the Cree Nation: 'A child is a gift or loan from the Great Spirit, and one is given the responsibility to raise and care for that child. Since a child is a gift from the Great Spirit, the child is sacred and must be treated with dignity and respect.'[237] Much depends upon children. First Nations and Aboriginal cultures and communities have the fundamental right to raise their own children and First Nations and Aboriginal children have the fundamental right to be brought up in their own cultures and communities.[238] And much depends upon us. As lawyers and individuals, we have the fundamental duty to advocate the promotion and protection of these rights. We must obey the 'duty to lift our voices'.[239]

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234 Black Elk quoted in Brown, above n1 at 353.

235 Above n47 at 543 [emphasis added].

236 'We need healthy children if we are to have healthy families, healthy communities and healthy nations. My people want a healthy nation.': above n90.

237 Quoted by The Hon Lloyd Axworthy, 'Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, to the Conference on Children's Rights in the New Millennium', address to the Conference on Children's Rights in the New Millennium, McGill Faculty of Law, 24 November 1999.

238 See generally D M Johnston, 'Native Rights as Collective Rights: A Question of Group Self-Preservation' (1989) 2 *Can J of Law & Jur* 19 at 32. See also Donna J Goldsmith, 'Individual vs Collective Rights: The Indian Child Welfare Act' (1990) 13 *Harvard Women's LJ* 1 at 12.

239 Justice Michael Kirby, 'Global Moves to Legal Protection of Human Rights': <http:www.hcourt.gov.au/speeches/kirbyj/belfast.htm> (30 September 1999). See also Robert Cover, 'Obligation: A Jewish Jurisprudence of the Social Order' in Martha Minow, Michael Ryan & Austin Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (1993) at 248.