

Your Money or Your Life: Indian Parents and Child Support Modifications

by
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In 2013, Jolene Sharp was miserably unhappy. Her marriage was over, she hated her job and she was abusing alcohol. Recognizing this lifestyle was unsustainable, Jolene decided to make a change. She quit her job, moved back home to her native village of Stebbins, in rural Alaska, and began practicing a traditional, subsistence lifestyle. This move was good for Jolene, and good for her tribe; the question however, was whether it was good for her daughter. According to The Alaska Supreme Court, it was not. The problem for the court was child support. When Jolene's marriage ended, her husband was given primary custody of their ten-year-old daughter and Jolene was ordered to pay child support. Jolene's support award was based on her salary as an oil executive with Alyeska, but when Jolene left her job and adopted a subsistence lifestyle, she could no longer meet her previous child support obligation.¹ Jolene requested a modification, but it was denied. According to the court, the benefits of Jolene's child support payments outweighed the benefits of returning to her tribe.

The *Sharpe* court's decision is not surprising. Courts routinely deny modification requests based on a parent's voluntary reduction in income. Nevertheless, *Sharpe* is far from a traditional modification case. *Sharpe* concerns an Indian family therefore, it should not have been analyzed under traditional family law principles. A common mantra among Indian law scholars is "Indian law is different." The unique status of tribes, as well as the special federal tribal relationship, means that cases concern-

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¹ Specifically, Jolene requested that her child support obligation be reduced from \$1507.00 per month, which had been calculated based on her \$120,000 salary, to \$50 per month, the minimum allowed under the Alaska child support guidelines. *Sharpe v. Sharpe*, 366 P.3d 66, 68 (Alaska 2016).

ing the best interest of Indian tribes, Indian children, and the preservation of Indian culture cannot be assumed to mimic normal family law outcomes. When viewed through an Indian law lens, *Sharpe v. Sharpe* is not simply about an individual parent's request for child support modification. Rather, it is about the right of native communities to preserve their traditions and the obligation of the state and federal governments to help them. The fact that the *Sharpe* court failed to recognize this is deeply troubling.

This essay explores the Indian law implications of the *Sharpe* decision and argues that both law and policy require Indian child support cases to be analyzed differently from non-Indian cases. Part I of this article discusses the typical goals of child support and its relationship to protecting children's best interests. It then argues that under these well-established family law principles the *Sharpe* decision was incorrect. Part II examines how the best interest analysis changes in the context of Indian children and suggests that *Sharpe* was incorrectly decided because it failed to protect Jolene's daughter's interests as an Indian child. Lastly, Part III explores how the federal trust relationship impacts Indian child support modification cases and suggests that even if the *Sharpe* court's analysis was correct under state law, the federal government still has an obligation to step in and facilitate modification requests like Jolene's.

I. Child Support vs. Parental Rights

When the interests of parents and children conflict, the law typically favors children's interests.² In the case of child support

² See generally *In re R.E.S.*, 19 A.3d 785, 789 (D.C. 2011) (explaining that "[p]arental rights 'are not absolute, and must give way before the child's best interests'" (quoting *In re A.B.E.*, 564 A.2d 751, 755 (D.C. 1989)). See also Margaret F. Brinig, *From Contract to Covenant: Beyond the Law & Economics of the Family*, 3 J. L. & FAM. STUD. 103, 138 (2000) ("[W]hen parents' and children's interests partially or totally conflict, [the parental presumption] may not be the best rule, even for fit parents."); Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1376 (2014) ("The legal system has carved out exceptions to the parental rights paradigm, acknowledging that, occasionally, not only do the interests of parents and children diverge, but following the parental rights paradigm may be detrimental to the child.").

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this is particularly true. There is a long-standing practice of equating robust child support awards with children's best interests.³ As a result, state courts are reluctant to grant requests for child support reductions based on a parent's voluntary act.⁴ These courts acknowledge that allowing such reductions would greatly help many struggling parents. However, because child support reductions are assumed to be contrary to a child's best interest, courts typically deny them.⁵

A. Imputation of Income

Most states permit courts to impute income to voluntarily unemployed or underemployed parents based on the belief that this practice protects the best interests of children even if it restricts or harms the parents. The decision in *Sharpe* followed this pattern. The lower court told Jolene that it had "heard [her] testimony and . . . [did not] question . . . [her] sincerity and . . . the value [she] place[d] in reconnecting with [her] . . . cultural . . . roots."⁶ On appeal, the Supreme Court cited this statement and agreed that returning to Stebbins was beneficial to Jolene. It

³ *Houghton v. Houghton*, 157 N.W. 316, 317 (S.D. 1916) ("It is the welfare of the children that the court is concerned with, not the wishes of either of the parents, and we do now declare that parents are powerless to provide by irrevocable contract what the future financial liability of either shall be with relation to the support, maintenance, and education of the children."). *See also* *White v. Shalit*, 1 A.2d 765, 767 (Me. 1938) (explaining that judgment on a petition to modify custody or support will be controlled by the best interests of the children, even if the parties join in the petition); *Mallina v. Mallina*, 4 N.Y.S.2d 27, 31 (N.Y. Fam. Ct. 1938) ("A child will not be permitted to be deprived of its [maintenance and support] rights even if the deprivation is at the hand of a parent or parents.").

⁴ This is particularly true with parents' desires for modification. *See, e.g.*, John Healy, *Following His Heart: Representing the Child Support Obligor Who Wants to Change Professions*, 11 J. CONTEMP. LEGAL ISSUES 403, 405 (1999) (discussing the "extent to which the courts favor the children's interests over the obligor parent's desire to change professions."). *See also* Catherine Moseley Clark, *Imputing Parental Income in Child Support Determinations: What Price for a Child's Best Interests*, 49 CATH. U. L. REV. 167 182 (1999) ("Although the courts have been sensitive to the fact that an assessment of earning capacity requires an intrusion into previously private employment decisions, divorced parents relinquish the autonomy of decisionmaking that exists in an intact marriage in favor of the over-arching goal of serving children's best interests.").

⁵ *See infra* section I.A.

⁶ *Sharpe*, 366 P.3d at 74.

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noted that by moving back home, Jolene “is finding sort of a spiritual awakening, reconnecting with Native Dance, Native culture, [and] subsistence lifestyle.”⁷ Nonetheless, it still held that “given her background and previous earnings” it would be incorrect to conclude Jolene “does not have any income capacity simply because she chose to relocate to the village of Stebbins and earn nothing.”⁸ Weighing what it perceived to be the competing interests of Jolene and her daughter, the court concluded that although moving to Stebbins was “rehabilitative for [Jolene],” it would harm her child. The court then refused her modification request.

The *Sharpe* court’s approach to the issue of income imputation is commonly referred to as the “strict rule” test.⁹ This is the approach least likely to result in modification and it is also the approach increasingly favored by state courts.¹⁰ Under the strict

⁷ *Id.* at 74.

⁸ *Id.* at 68. Under Alaska’s child support rules:

The court may calculate child support based on a determination of the potential income of a parent who voluntarily and unreasonably is unemployed or underemployed. A determination of potential income may not be made for a parent who is physically or mentally incapacitated, or who is caring for a child under two years of age to whom the parents owe a joint legal responsibility. Potential income will be based upon the parent’s work history, qualifications, and job opportunities. The court also may impute potential income for non-income or low income producing assets.

ALASKA R. CIV. P. 90.3 (4).

⁹ See Lewis Becker, *Spousal and Child Support and the “Voluntary Reduction of Income” Doctrine*, 29 CONN. L. REV. 647, 658 (1997) (defining the strict rule test as one where “a reduction of income which results from a voluntary act of a party is disregarded and the court instead looks at the party’s earning capacity in fashioning a support order. The fact that one has acted in good faith is irrelevant because the sole focus of the test is whether the conduct in question was voluntary.”); Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: The Century Ends with Unresolved Issues*, 33 FAM. L.Q. 865, 890 (2000) (“The strict rule test disregards any income reduction produced by voluntary conduct and looks at earning capacity.”).

¹⁰ David Griffin, *Earning Capacity and Imputing Child Support for Child Support Calculations: A Survey of Law and Outline of Practice Tips*, 26 J. AM. ACAD. MATRIM. LAW. 365, 373 (2014) (noting that “courts have generally shifted the analysis from requiring a specific intention to avoid the support obligation to a more generalized look at whether a party is earning at or near full capacity.”).

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rule test, courts focus exclusively on the parties' earning capacity and refuse to consider the reasons underlying the parent's income reduction.¹¹ This means that if a parent voluntarily reduces his or her income, a strict rule court will continue to calculate child support based on what the court believes the parent could make (typically the parent's previous income), rather than what the parent is actually making. The reasons for the income reduction are considered irrelevant.

The strict rule test represents the view that maximizing child support awards is the most effective means of protecting children's best interests and that children's best interests should be the primary consideration in child support determinations.¹² As

¹¹ See *supra* note 8. See also Griffin, *supra* note 10, at 381 (noting the "clear trend toward removing intention to avoid a child support obligation and focusing instead on the restriction of income following a party's intentional choices.").

¹² See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 28 (1987) (stating "given that a basic interest of the child is to reach maturity with as many potentialities as possible, a parent has to be very affluent before further wealth makes no difference in this respect."); Carolyn Frantz, *Eliminating Considerations of Parental Wealth in Post Divorce Child Custody Disputes*, 99 MICH. L. REV. 216, 221 (2000) ("Except for children of very affluent parents increasing availability of financial resources also increases their access to opportunities for autonomous choice—through access to education, travel, and cultural activities, as well as the more basic human goods."). See also CAL. FAM. CODE § 4058, subd. (b) ("The court may, in its discretion, consider the earning capacity of a parent in lieu of the parent's income, consistent with the best interests of the children."); *In re Hinman*, 64 Cal.Rptr.2d 383 (Cal. Ct. App. 1997) (noting, "an "emerging consensus . . . that the only limitations against imputing income to an unemployed or underemployed parent is where the parent in fact has *no* 'earning capacity' . . . or relying on earning capacity would not be consistent with the children's best interests."); (noting, "[t]he Legislature did not include in the statute any mention of "purpose," "design," or even "intent" to avoid or reduce child support" and adding that the "paramount guiding principle" of the trial court should always be the best interest of the child).

For criticisms of this assumption that maximizing child support can be presumed to be in a child's best interest, see *Little v. Little*, 975 P.2d 108 (Ariz. 1999) (stating that the strict rule "allows no consideration of the parent's individual freedom or of the economic benefits that can result to both parent and children from additional training or education."); *Illiff v. Illiff*, 339 S.W.3d 74, 80 (Tex. 2011) (refusing to adopt Attorney General position that "other things being equal, receiving more child support will always be in the best interest of the child.").

this view becomes more widespread, it is increasingly replacing another, more flexible, method for considering modification known as the “good faith” test. Unlike strict rule, good faith permits courts to consider parental intent.¹³ Specifically, the good faith test allows courts to consider whether parents intentionally reduced their income to deprive their child of support. If they did not, modification is permitted. Good faith protects the personal preference of the parent, but is criticized for not doing enough to protect the best interest of the child.¹⁴ The growing replacement of good faith with the strict rule test can be viewed as a prioritization of children’s interests over those of their parents. Still, this does not mean voluntary reductions in support are always harmful to children. Even under the strict rule test, courts consistently recognize that voluntary reductions can benefit children.

B. *Best Interest Exceptions*

The strict rule test reflects the idea that maximizing child support is in a child’s best interest, but even strict rule jurisdictions recognize exceptions to this presumption. Money is not everything and there are circumstances where strict rule courts acknowledge that greater benefits are produced by permitting parents to reduce their income than by forcing them to continue paying high child support awards. One common example is parents wishing to reduce their income in order to spend more time with their children.¹⁵ A second involves parents who are active in

¹³ Griffin, *supra* note 10, at 374 (noting the “shift away” from the consideration of intention and stating “The more generally accepted approach is that intention to avoid is not a necessary predicate finding.”).

¹⁴ See *Little*, 975 P.2d at 111 (describing “the primary shortcoming of the good faith test as being its focus upon the parent’s motivation for leaving employment rather than upon the parent’s responsibility to his or her children and the effect of the parent’s decision on the best interests of the children.”).

¹⁵ See, e.g., *Kondamuri v. Kondamuri*, 852 N.E.2d 939 (Ind. Ct. App. 2006) (finding imputation was error where the father had adjusted his schedule to accommodate child’s schedule, and there was no evidence that he manipulated his work schedule to avoid paying child support); *Abouhalkah v. Sharps*, 795 N.E.2d 488 (Ind. Ct. App. 2003) (finding that a father who voluntarily left his employment when his employer relocated out of state to remain close to his children’s home was not voluntarily underemployed); *Gould v. Gould*, 687 So. 2d 685, 693 (La. Ct. App. 1997) (holding that a non-custodial father was not voluntarily underemployed for purposes of determining his child support obli-

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religious or philanthropic communities. In both instances, courts grant the parents' modification requests because they determine that the benefits of income reduction outweigh the potential harms.

1. *Income Reduction vs. Quality Time*

When parents seek child support modifications based on the desire to spend more time with their children courts frequently permit such reductions. For example, in *Mullin v. Mullin*, an Indiana court found that a father who reduced his overtime work in order to increase visitation with his children was not voluntarily underemployed. According to the court, “[a] high value should be placed on visitation between the children and the noncustodial parent. In the vast majority of cases, maintaining a close relationship and frequent contact between the children and both parents is recognized as being in the best interest of the children.”¹⁶ Other courts echo this conclusion. In *Mohammadu v.*

gation when he reduced his work hours by taking off every other Friday in order to make a bi-weekly ten hour drive to visit his children).

¹⁶ *Mullin v. Mullin*, 634 N.E.2d 1340, 1342 (Ind. Ct. App. 1994). These sentiments are similar to those made by courts applying the good faith test. *See e.g.*, *Saussy v. Saussy*, 638 So.2d 711, 714 (La. Ct. App. 1994) (“A father’s children benefit not only by the money he is able to earn, but by the presence of his company, and nowhere does the law require that a parent work 60-70 hours to the detriment of his children’s right to the parent’s company.”). Nevertheless, Indiana can be considered a strict rule jurisdiction. Indiana looks at the obligor’s capacity to earn and will impute income to a voluntarily unemployed or underemployed parent. In fact, Indiana’s policy of imputing income is so strict that a number of courts concluded it even applied to incarcerated parents, reasoning that committing crimes could be considered a voluntary act. The decisions pertaining to incarcerated parents were eventually overturned. *See Lambert v. Lambert*, 861 N.E.2d 1176, 1181 (2007) (overturning lower court decision imputing income to incarcerated parent). *See also In re Paternity of Pickett*, 44 N.E.3d 756 (2015) (explaining, “While the Guidelines clearly indicate that a parent’s avoidance of child support is grounds for imputing potential income, it is not a necessary prerequisite. For example, the relevant commentary states, “When a parent is unemployed by reason of involuntary layoff or job termination, it still may be appropriate to include an amount in gross income representing that parent’s potential income.” Ind. Child Support Guideline 3(A)(3), cmt 2c(4). Thus, it is within the trial court’s discretion to impute potential income even under circumstances where avoiding child support is not the reason for a parent’s unemployment.”).

Olsen,¹⁷ the obligor father's salary was reduced due to his decision to move closer to his child.¹⁸ Initially, the father's modification request was denied because, despite recognizing the reduction "might have been a good parental decision,"¹⁹ the lower court found a voluntary reduction could not support modification. The Connecticut Supreme court disagreed. It stated, "[n]early every human action is voluntary, but not every voluntary action is fault worthy."²⁰ According to the court, "the crux of the inquiry is culpability and not voluntariness."²¹ Similar views were expressed in *In re Marriage of Lim & Carrasco*.²² In that case, the mother, a partner in a law firm, decided to reduce her billable hours from more than 2,000 per year to approximately 1,600. This change reduced her salary and the father sought an order imputing income associated with the mother's prior pattern of billings. The California court refused noting, "no authority permits a court to impute earning capacity to a parent unless doing so is in the best interest of the children."²³ The court then denied the father's request, determining "it was not in the children's best interest to impute earning capacity to Lim based on her previous income as a full-time law partner."²⁴

¹⁷ 81 A.3d 215 (Conn. 2013).

¹⁸ *Id.* at 218.

¹⁹ The court of appeals affirmed for similar reasons noting, "although the trial court noted that there might have been a good parental motivation underlying the defendant's relocation, the court was correct not to reach the defendant's motivations in its determination that that defendant failed to prove a substantial change in circumstances." *Id.* at 219.

²⁰ *Id.* at 225. Such statements sound like an application of the good faith test, yet Connecticut is not a good faith jurisdiction. For an example of Connecticut courts applying the strict rule test, see *Creaturo v. Creaturo*, 2000 WL 1974703 (Conn. 2000) (suggesting that the father, who had always worked as a teacher, increase his income with a summer job noting that "while the court cannot order the defendant to find a better job that is more suitable to his qualifications, the court can impute the earning capacity to the child support obligation.").

²¹ *Id.*

²² 214 Cal. App. 4th 768 (2013). For a discussion of California's application of the strict rule test see, *In re Marriage of Bardzik*, 165 Cal. App. 4th 1291, 1302 (2008) (rejecting the good faith test and stating the current test for imputing income is now solely the obligor's "ability and opportunity" to earn income).

²³ *Id.* at 775 (citing *Cheriton v. Fraser*, 92 Cal. App. 4th 269, 301 (2001)).

²⁴ *Id.* at 777.

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The above cases recognize that the best interests of children are not always served by requiring the maximum amount of child support²⁵ and they therefore, grant child support modifications despite the parents' voluntary reduction in income. However, although these cases permit reductions for voluntary acts, they still prioritize children's interests. The second exception to the strict rule test is different. It involves cases in which courts have granted support modifications that solely benefit community interests. In these cases, courts hold that even when a support modification does not produce benefits for the child, it may still be permissible if it leads to substantial community and societal benefits.

2. Community Benefits and Child Support Modification

In cases like *Lim* and *Mullin*, courts approved child support reductions that were found to benefit the child. These cases present exceptions to the presumption that high child support is always in the child's best interest, but they still turn on a determination of the child's interest. The more unexpected exceptions are cases where courts have permitted, or suggested they would permit, child support reductions based solely on a benefit to the larger community. These cases demonstrate that even in strict rule jurisdictions, societal benefits alone can justify child support modifications.²⁶

²⁵ A similar line of cases concerns the "nurturing parent doctrine." These cases hold that income may not be imputed to a custodial parent who remains at home, or works less than full time if they are doing so in order to provide a nurturing environment for young children or to provide for a child with particular health or other special needs. *See, e.g., Commonwealth ex rel. Wasiolek v. Wasiolek* 380 A.2d 400 (Pa. Super. Ct. 1977) ("It would surely be ironic if by its support order a court were to dictate that a parent desert a home where very young children were present when the very purpose of the order is to guarantee the welfare of those same children. Such an order would ignore the importance of the nurture and attention of the parent in whose custody the children have been entrusted and would elevate financial well-being over emotional well-being."). *See also* VT. STAT. ANN. tit. 15, § 653(5)(A)(iii)(c) (1994) (noting a court need not consider a parent's earning capacity if the voluntary unemployment or underemployment is in the best interests of the child).

²⁶ *See, e.g., Becker, supra* note 9, at 680 (asking whether a class of designated activities such as lower paying public service jobs or religious pursuits should be given a preference when considering the effect of a voluntary reduction of income).

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For instance, in *In re Marriage of Meegan*,²⁷ a California family court reduced the obligor husband's support payments to zero after he joined a monastery and took a vow of poverty. The trial court found the decision to pursue a religious life justified a support modification. In addition, it noted a number of other hypotheticals that could warrant a reduction including "a trial attorney making \$250,000 a year deciding to become a judge and earn \$80,000 a year."²⁸ On appeal, the California Court of Appeals upheld the modification agreeing with the trial court that the support reduction was justified by the father's decision to devote his life to a "path of good works and services."²⁹ In *Ullery v. Ullery*, the Indiana Court of Appeals expressed similar sentiments stating, "surely a lawyer's move from a lucrative private practice to a lower paying public service position or judgeship would not compel the court to conclude the move necessarily resulted in the parent's voluntary underemployment."³⁰ And in *In re Marriage of Padilla*, the California Court of Appeals again stated it would be unlikely to impute income to "a highly paid lawyer or business executive who accepts a government position resulting in a significant reduction of income."³¹

²⁷ *Marriage of Meegan*, 13 Cal. Rptr. 2d 799, 801 n.1 (Cal. Ct. App. 1992).

²⁸ *Id.* at 801 n.1.

²⁹ *Id.* The court approved the modification noting there was no intent by the father to evade his support obligations. This makes it appear like the court was applying the good faith test but California is a strict rule jurisdiction. *See supra* note 22. *See also In re Marriage of Ilas*, 12 Cal. App. 4th 1630, 1638-39 (1993) (holding that "While deliberate avoidance of family responsibilities is a significant factor in the decision to consider earning capacity . . . the statute explicitly authorizes consideration of earning capacity in all cases Accordingly, the trial court's consideration of earning capacity is not limited to cases in which a deliberate attempt to avoid support responsibilities is found.").

³⁰ *Ullery v. Ullery*, 605 N.E.2d 214, 216 (Ind. Ct. App. 1992)(Baker, J., concurring).

³¹ *Padilla*, 38 Cal. App.1212, 1220 n.7.(Cal. Ct. App. 1995) (noting "We do not imply a former income level will always be imputed to a parent who voluntarily leaves a high paying job for one paying less.) *But see Perry v. Perry*, 382 N.W.2d 628, 630 (N.D. 1986) (the court held that obligor who travelled around the country providing paralegal assistance to financially troubled farmers was voluntarily unemployed); *Robinson v. Tyson*, 461 S.E.2d 397, 399 (S.C. Ct. App. 1995) (imputing an income based on potential and probable earning levels; "[w]hile we applaud the husband's law firm's resolve to provide legal services to those in poverty, he is required to be responsible to his children before he is charitable to others.").

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As the above cases indicate, even in strict rule jurisdictions, exceptions will be made when child support reductions benefit the child or the wider community. In the case of Indian obligor parents, modifications often accomplish both. Allowing tribal members to return home produces substantial benefits for tribes while also helping native children. The *Sharpe* case exemplified these combined benefits. Jolene sought a child support modification so she could return to Stebbins and adopt a subsistence lifestyle. The court should have granted her request because modification would have benefitted both Jolene's tribe and her Indian daughter.

II. Culture, Child Support, and the Best Interests of Indian Children

It is easy to presume that maximizing child support is in a child's best interest, but as the above cases demonstrate, there are exceptions. When the benefits of modification outweigh the negatives, modification should be permitted. This is true for all child support cases, but especially those pertaining to American Indian families. When considering modification requests made by Indian obligors, family courts must be particularly sensitive to the effects of income imputation on individual Native families as well as the effects of imputation on their tribes more broadly. If the benefit of modification relates to the child's or the parent's unique status as a member of a federally recognized tribe, this fact should be given substantial, perhaps even decisive, weight in the court's modification decision. As discussed in Part I, courts applying the strict rule test have permitted modification when it benefits the child or the greater community. Supporting native subsistence lifestyles does both.

A. Subsistence Lifestyles and Native Communities

For Alaskan natives, subsistence and culture cannot be separated. As a former chairperson of the Alaska Native review commission explained, "for Alaska Natives, the term 'subsistence' connotes a unique way of existence that has been, and continues to be, passed down from generation to generation for as long as

they can remember.”³² Jonathon Solomon, a member of the Fort Yukon tribe explained it similarly:

When we talk about subsistence, . . . we should be talking about Native culture and their land. . . . You cannot break out subsistence or the meaning of subsistence or try to identify it, and you can't break it out of the culture. The culture and the life of my Native people are the subsistence way of life. And that's what we always used, the subsistence way of life. It goes hand in hand with our own culture, our own language, and all our activities.³³

Thomas R. Berger, former chairman of the Alaska Native Review Commission, echoed these sentiments stating, “for Alaska Natives, subsistence lies at the heart of culture, the truths that give meaning to human life of every kind. Subsistence enables the Native peoples to feel at one with their ancestors, at home in the present, confident of the future.”³⁴ Such statements demonstrate that subsistence is a central component of Alaskan Inuit culture, identity, and economy.³⁵ Indeed, as law professor David Case has explained, for Alaska Natives, “the very acts of hunting, fishing, and gathering, coupled with the seasonal cycle of these activities and the sharing and celebrations which accompany

³² Greg Egan, *Sustained Yield: How the Dynamics of Subsistence and Sport Hunting have Affected Enforcement and Disposition of Game Violations and Wounded Alaskan Culture*, 28 *HAMLIN J. PUB. L. & POL'Y* 609, 626 (2007). Many similar statements were made during the Alaska review Commission hearing regarding the Native Claims Settlement Act. For example, one man stated, “Us Natives, we should have the right to live out our culture . . . to take away our culture would be to take away our lives, everything we know, everything our parents knew, everything our children should know.” Mary Kancewick & Eric Smith, *Subsistence in Alaska, Toward Native Priority*, 59 *UMKC L. REV.* 645, 649 (1991). Another stated “The relationship between the Native population and the resources of the land and the sea is so close that an entire culture is reflected.” *Id.* at 650.

³³ KATE BERRY & MARTHA HENDERSON, *GEOGRAPHIC IDENTITIES OF ETHNIC AMERICA: RACE, SPACE AND PLACE* 160 (2002) (noting many additional testimonies linking the connection between subsistence and native culture including the telling statement, “subsistence is a world that means . . . my way of life.”).

³⁴ William M. Bryner, Note, *Toward a Group Rights Theory for Remedying Harm to the Subsistence Culture of Alaska Natives*, 12 *ALASKA L. REV.* 293, 295-96 (1994).

³⁵ These statements are far from unique. See Kancewick & Smith, *supra* note 32, at 649-51 and accompanying notes (describing the numerous similar comments made regarding the cultural importance of subsistence).

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them are intricately woven into the fabric of their social, psychological, and religious life.”³⁶

Congress, federal agencies and the courts have all recognized the cultural importance of subsistence to Alaska Natives. One of the clearest examples of this governmental recognition is the Alaskan Native Claims Settlement Act (ANCSA).³⁷ ANCSA specifically highlighted the importance of subsistence, emphasizing “the continuation of the opportunity for subsistence uses by rural residents of Alaska, including both Natives and non-Natives, on the public lands and by Alaska Natives on Native lands is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence.”³⁸ The Alaska National Interest Lands Conservation Act (ANILCA),³⁹ which passed shortly after ANCSA, also explicitly protected native subsistence uses “mandating a hunting and fishing preference for rural residents in Alaska,”⁴⁰ and describing subsistence as “essential for rural Alaskans—spe-

³⁶ DAVID S. CASE, *ALASKA NATIVES AND AMERICAN LAWS* 275, 276 (1984). See also Gigi Berardi, *Natural Resource Policy, Unforgiving Geographies and Persistent Poverty in Alaska Native Villages*, 38 NAT. RESOURCES J. 85, 99 (1998) (“subsistence has important cultural as well as nutritional value due to spiritual linkages to some subsistence activities, the narrow distinction between work and leisure (subsistence harvest work is often pleasurable) and the scarcity of steady wage employment.”).

³⁷ Pub. L. No. 92-203, 85 Stat. 688 (1971) (codified as amended at 43 U.S.C. §§ 1601-1629(e) (1988)). The Act was intended give Alaska natives control over their land and other natural resources. See generally Berardi, *supra* note 36, at 91.

³⁸ 16 U.S.C. § 3111(1) (1994).

³⁹ 50 C.F.R. § 100.5(a) (2012).

⁴⁰ The Act was passed in large part was passed in part because ANCSA did not do enough to protect native subsistence rights. See, e.g., Karen Bridges, Note, *Uncooperative Federalism: The Struggle over Subsistence and Sovereignty*, 19 PUB. LAND & RES. L. REV. 131, 136 n.30 (1998) (noting “Congress passed Title VIII of ANILCA in part because the state failed to take any real steps to protect subsistence for Natives or in rural areas”) and Sophie Theriault *et al.*, *The Legal Protection of Subsistence: A Prerequisite of Food Security for the Inuit of Alaska*, 22 ALASKA L. REV. 35, 42-44 (2005) (discussing the passage of the Alaska National Interest Lands Conservation Act in 1980, which was designed in part to protect the subsistence lifestyles of Alaska Natives).

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cifically Alaska Natives⁴¹—to maintain physical, economic, traditional, and cultural existence.⁴²

The history of ANILCA enforcement further illustrates the federal government's strong commitment to protecting native subsistence. Originally, ANILCA offered Alaska the option of managing subsistence on federal public lands if the State would adopt a law granting "rural" users, primarily Alaska natives, subsistence priority.⁴³ When Alaska refused, declaring the preference for rural residents impermissible under the Alaskan constitution, the federal government intervened and took back management authority over fish and wildlife on federal lands.⁴⁴ By resuming management of these lands, the federal government

⁴¹ An earlier draft of the law would have made this preference for native subsistence even more explicit. The initial bill for ANILCA suggested an Alaska Native subsistence priority to protect Alaska Natives' subsistence access. Section 21 of the Senate Bill directed the Secretary of the Interior to withdraw "public lands" surrounding Native villages as "Subsistence Use Units" and, where necessary, to forbid non-residents from taking fish or game from those units. S. Rep. No. 405, 92d Cong., 1st Sess., 43-44 (1971). However, the State of Alaska balked at the proposed Alaska Native priority and successfully appealed to Congress to establish a rural priority instead. See generally Kancewick & Smith, *supra* note 32, at 659.

⁴² 16 U.S.C. § 3111(1) (2012).

⁴³ Miranda Strong, *Alaska National Interest Lands Conservation Act Compliance & Nonsubsistence Areas: How Can Alaska Thaw Out Rural & Alaska Native Subsistence Rights?*, 30 ALASKA L. REV. 71, 76 (2013) ("ANILCA's rural priority grew out of Congress's attempt to protect Alaska Natives' subsistence practices. The initial bill for ANILCA suggested an Alaska Native subsistence priority to protect Alaska Natives' subsistence access. The State of Alaska balked at the proposed Alaska Native priority and successfully appealed to Congress to establish a rural priority instead. The rural priority includes rural non-Alaska Natives, but it was intended to protect Alaska Natives' subsistence use and attempted to replace Alaska Natives' aboriginal hunting and fishing rights.").

⁴⁴ In 1989, the Alaska Supreme Court ruled in *McDowell v. State*, 785 P.2d 1 (Alaska 1989), that ANILCA's rural priority violated the "common use," "no exclusive right," and "equal application" provisions of the Alaska Constitution. This ruling ended the state's compliance with ANILCA. See Jeffrey Aslan, *Building Alaska Native Village Resilience in a Post-Peak World*, 37 VT. L. REV. 239, 244 (2012) (noting "*McDowell* initiated the state's 'all Alaskans' subsistence policy, which gives subsistence priority to every resident in the state. In essence, this is no priority at all.").

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ensured that rural users, particularly Alaskan native communities, would continue to have subsistence preference.⁴⁵

Like Congress, federal courts, agencies, and state courts have also acknowledged the extreme importance of subsistence to native culture and community. For example, in *Katelnikoff v. United States Dep't of Interior*, the Alaska district court described subsistence as the right of native communities “to be left alone and to continue their centuries-old way of life.”⁴⁶ Similarly, in *North Slope v. Borough of Andrus*, a case concerning the effect of oil and gas leases on the traditions and lifestyles of the Inupiat Eskimo people, the Department of the Interior issued a Final Environmental Impact Statement recognizing “the importance of subsistence activities to the Inupiat culture, and the substantial impact on the Inupiat society which would result from significant reductions in their subsistence resources.”⁴⁷ In *State v. Tanana Valley Sportsmen's Ass'n*, the Alaska Supreme Court further echoed these sentiments, noting, “[S]ubsistence hunting is at the core of the cultural tradition of many [Alaska Natives].”⁴⁸ Lastly, commentators in many other fields including anthropology,⁴⁹ so-

⁴⁵ Aslan, *supra* note 44, at 245 (explaining, “The federal government has a two-tiered system for managing subsistence resources that asks two questions. The first question is whether the person is a ‘rural’ Alaskan citizen, as only citizens from ‘rural areas or rural communities’ may take fish or wildlife for subsistence uses. The next question is whether the Federal Subsistence Board has designated a given fish or wildlife population as only available for ‘customary and traditional use’ by certain communities. If so, only residents of the listed communities may take the fish or wildlife for subsistence purposes.”).

⁴⁶ 657 F. Supp. 659, 665 (D. Alaska 1986).

⁴⁷ Specifically, in that case, the Department defined Alaskan native subsistence as “the socio-cultural identification of a traditional and unique lifestyle.” *North Slope Borough v. Andrus*, 486 F. Supp. 332, 342 (D.D.C. 1980) (quoting an environmental impact statement prepared by the Department of Interior). *See also* *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (stating “If [Alaska Natives’] right to fish is destroyed, so too is their traditional way of life.”).

⁴⁸ 583 P.2d 854, 859 n.18 (Alaska 1978).

⁴⁹ ANN FIENUP-RIORDAN, *WHEN OUR BAD SEASON COMES: A CULTURAL ACCOUNT OF SUBSISTENCE HARVESTING AND HARVEST DISRUPTION ON THE YUKON DELTA* 322-23 (1986).

ciology,⁵⁰ and psychology,⁵¹ have likewise acknowledged the cultural significance and importance of native subsistence.⁵²

B. *Subsistence Lifestyles and the Best Interests of Indian Children*

Today, tribal elders increasingly worry about the future of native subsistence and fear that without members willing to practice subsistence, this knowledge will soon be lost.⁵³ Traditional subsistence knowledge is vital to the cultural and economic survival of native communities, but as fewer native parents pursue subsistence lifestyles, it is increasingly difficult for tribes to pass these skills on to the next generation. As one Levelock elder explained, “[p]eople are changing. Like my grandchildren, the way of subsistence for them is ‘umpa, do you got a dollar, I wanna go to the store.’ That’s their way of subsisting.”⁵⁴

By returning to Stebbins and practicing a subsistence lifestyle, Jolene helped preserve her tribe’s traditions and ensure that the subsistence skills and customs of her people would continue into the next generation. Enabling tribal members like Jolene to return home and practice subsistence provides a vital benefit to

⁵⁰ See, e.g., Christopher L. Dyer, *Tradition Loss as Secondary Disaster: Long-Term Cultural Impacts of the Exxon Valdez Oil Spill*, 13 *SOC. SPECTRUM* 65, 75 (1993) (“[S]ubsistence . . . provide[s] the primary means of cultural existence.”); Christopher L. Dyer et al., *Social Disruption and the Valdez Oil Spill: Alaskan Natives in a Natural Resource Community*, 12 *SOC. SPECTRUM* 105, 110 (1992) (“A subsistence lifestyle practiced by ancestors defines the contemporary cultural identity of [Alaska Native] communities.”).

⁵¹ See, e.g., Lawrence A. Palinkas et al., *Community Patterns of Psychiatric Disorders After the Exxon Valdez Oil Spill*, 150 *AM. J. PSYCHIATRY* 1517, 1522 (1993) [hereinafter Palinkas et al., *Community Patterns*] (“[S]ubsistence activities . . . provide the foundation for social support and community cohesion.”); Lawrence A. Palinkas et al., *Social, Cultural, and Psychological Impacts of the Exxon Valdez Oil Spill*, 52 *HUM. ORGANIZATION* 1, 3 (1993) [hereinafter Palinkas et al., *Social, Cultural, and Psychological Impacts*] (“[T]he social processes of taking, processing, and distributing [subsistence] foods has cultural significance beyond the importance of the food consumed.”).

⁵² Bryner, *supra* note 34, at 301 and nn. 30-37.

⁵³ Aslan, *supra* note 44, at 266.

⁵⁴ *Id.* (noting that “Some parents and elders still teach their children subsistence skills; however, these parents may be in the minority. Many parents do not pursue a subsistence lifestyle themselves, and do not instill the value of subsistence in young people.”).

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native communities. In fact, without members like Jolene, many of these communities may not survive.

i. *Native Poverty*

Most native villages are located in harsh climates, with few local employment opportunities and far from commercial food sources.⁵⁵ Not surprisingly, these communities are home to more than 50% of the poverty population in Alaska.⁵⁶ Subsistence provides a means of reducing this poverty.⁵⁷ Moreover, current subsistence practices are already vital to the native economy. As James Fall of the Subsistence Division of the Alaska Department of Fish and Wildlife has calculated, it would require a yearly subsidy of \$134-\$268 million to purchase enough store bought food to replace the current subsistence resources harvested in rural Alaska.⁵⁸ The following statement from one Newhalen parent further highlights the long-term economic importance of subsistence:

Eat what you can from the land. Learn how to do it. Put it away, and in the long run everybody is going to be looking for food and you're the only one that's gonna have it. You know how to can it, put it away, store it. We survived with nothing for thousands of years. It is knowledge. Know where to go, go out there and find out. Where is the best place to put out a trap? Where is the best place to gather? Where is the best place to go during a certain time of the year to get what you need? If we have education on subsistence, in the long-run I think all

⁵⁵ Bryner, *supra* note 34, at 297. *See also* Berardi, *supra* note 36, at 87 (noting that Alaskan tribal villages have few options for economic development coupled with a high cost of living and economies that are often dependent on single resources).

⁵⁶ Berardi, *supra* note 36, at 87.

⁵⁷ The poverty in Alaskan native communities is high and for many there is little likelihood of significant industry or economic growth. Given the remoteness, products are also extremely expensive and this cost is exacerbated as the quantity of purchased goods increases when native communities cannot provide for themselves. *Id.* at 87 (noting that “transportation costs alone doublet the price of goods and services, since virtually all materials must be flown in.”). *See also* Tracy-Lynn Humby, *Law and Resilience, Mapping the Literature*, 4 SEATTLE J. ENVTL. L. 85, 104 (2014) (noting “dependence on fossil fuel revenues and subsidies has reduced the resilience and changed traditional subsistence economies of indigenous communities.”).

⁵⁸ Aslan, *supra* note 44, at 251.

the kids, I don't care what race they come from, they'll learn how to live in Alaska without barely nothing.⁵⁹

ii. *Native Health*

Subsistence plays a crucial role in the native economy, and supporting subsistence is one of the most feasible and lasting means of reducing native poverty.⁶⁰ Nevertheless, the benefits of subsistence are more than economic. Subsistence is also vital to the mental, physical and emotional health of many native people. In fact, the strains placed on Native people due to the loss of subsistence resources and the ability to practice a subsistence lifestyle have been specifically shown to foster self-destructive behavior such as suicide and alcoholism.⁶¹ As Jolene told the court, life in Anchorage was incredibly hard for her. Far from her family and community she developed dangerous and destructive behaviors. It was only by returning to Stebbins and adopting a subsistence lifestyle that she was able to heal. Subsistence saved Jolene, but the advantages of her return also extended to her daughter and her tribe. In the non-native context, substantially smaller benefits have justified deviations from the strict rule test.

In *Sharpe*, the court failed to understand the benefits that Jolene, her daughter, and the Stebbins community received from her subsistence lifestyle. The court denied Jolene's modification request stating that children should not be forced to bear the burden of their parent's lifestyle change.⁶² However, it failed to understand that Native children may benefit more from healthy parents, a connection to their tribe, and the subsistence knowledge their parents can provide, than from actual monetary support. In order to protect these non-monetary benefits, state courts must permit, perhaps even encourage, native parents to practice subsistence. In fact, because these benefits are so important to native communities, the federal government may actually

⁵⁹ *Id.* at 267-68.

⁶⁰ The Alaska Native Commission emphasized the need for the Alaska Native education system to embrace "an integrated education that encompasses two sets of skills and two sets of values." *Id.*

⁶¹ Bryner, *supra* note 34, at 304.

⁶² *Sharpe*, 366 P.3d at 70-74 (citing *Pugil v. Cogar* and noting the "court was unwilling to 'shift any of the consequent burden [of the career change] to the narrow shoulders of [the] child.'").

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have an obligation to support native subsistence, and replace the child support payments that are lost when Indian parents pursue subsistence lifestyles.

III. The Trust Relationship and the Government's Role in Indian Child Support

The U.S. government has a unique relationship with American Indian tribes. In *Cherokee v. Georgia*, Chief Justice Marshall likened this relationship to that of a guardian and its ward, explaining that Indian tribes are “nation[s] claiming and receiving the protection of one more powerful” but not “submitting as subjects to the laws of the master.”⁶³ This trust relationship imbues the federal government with specific obligations toward Indian nations, including the obligation to help preserve their culture and traditions.⁶⁴ This obligation is so important, that famed Indian law scholar, Felix Cohen, described it as “one of the primary cornerstones of Indian law.”⁶⁵

In *Sharpe*, the court found that Jolene and her daughter derived cultural benefits from Jolene's move to Stebbins. It also found that the Stebbins community benefited from her adoption of a traditional subsistence lifestyle. These are the types of individual and community benefits that justify an exception to the strict rule test and the *Sharpe* court should have granted Jolene's modification request. Still, regardless of state law, the *Sharpe* de-

⁶³ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 555 (1832).

⁶⁴ *See, e.g.*, Executive Order 13336 on American Indian and Alaska Native Education, declaring support for tribal sovereignty, tribal traditions, languages and cultures. *See also* *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216-17 (5th Cir. 1991) (“the governmental objective of preserving Native American culture . . . is fundamental to the federal government's trust relationship with tribal Native Americans”). *See also* *Northern Cheyenne Tribe v. Hodel*, 12 Indian L. Rep. (Am. Indian Law. Training Program) 3065, 3071-72 (D. Mont. May 28, 1985) (mem.), *remedy modified*, No. 82-116-BLG (D. Mont. Oct. 8, 1985) (mem.), *modified remedy rev'd*, 851 F.2d 1152 (9th Cir. 1988).

⁶⁵ This relationship has been described as “one of the primary cornerstones of Indian law.” FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 221 (2005); Robert Oliver, *The Legal Status of American Indian Tribes*, 38 OR. L. REV. 193, 197 (1959) (suggesting that Marshall's words in *Cherokee Nation* have become the cornerstone of Indian law).

cision is problematic under federal law. The trust relationship between the U.S. and Indian nations requires the federal government to help preserve Indian culture and traditions. Because decisions like *Sharpe* threaten these traditions, the federal government may have an obligation to intervene and ensure native subsistence lifestyles are protected.

A. *The Best Interest of Indian Children are the Best Interests of Tribes*

The trust responsibility describes the fiduciary and moral obligations the U.S. government owes Indian tribes and their members.⁶⁶ This obligation can affect numerous areas of the law, but is particularly robust in relation to the protection of Indian children and families. More than thirty years ago, Congress passed the Indian Child Welfare Act (ICWA), because it recognized that preserving Indian children's connection to their tribe and their heritage is a vital part of protecting their best interests.⁶⁷ As the preamble to ICWA states, the purpose of the statute is to:

protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.⁶⁸

⁶⁶ See COHEN, *supra* note 65, at 221. Other federal statutes recognizing this trust relationship include the Snyder Act, 25 U.S.C. § 13 (1994) (authorizing sufficient appropriations for the benefit, care and assistance of Indians throughout the United States), and the Indian Self-Determination Act, 25 U.S.C. § 450 (1994) (authorizing Indian tribes to operate programs formerly operated by the Bureau of Indian Affairs and the Indian Health Service).

⁶⁷ It also recognized that this relationship was vital for the tribe. In fact, one of the Congressional findings that led to the enactment of the ICWA was acknowledgement of the connection between the future of Indian tribes and the exposure of Indian children to their native culture and heritage. For example, during the ICWA hearings, Chief Calvin Isaac testified regarding the impending annihilation of Indian culture if Indian children continued to be removed and placed in non-Indian homes. He warned that "Culturally, the chances of Indian survival are significantly reduced if our children, the only means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People." Hearings Before the Subcomm. on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs, 95th Cong. 191-92 (1978), quoted in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-35 (1989).

⁶⁸ 25 U.S.C. § 1902 (2000).

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ICWA explicitly links best interests with maintaining ties to Indian culture and numerous post-ICWA court decisions affirm this connection. For example, in *Yavapai-Apache Tribe v. Mejia*, the Texas appeals court explained that “[u]nder the ICWA, what is best for an Indian child is to maintain ties with the Indian Tribe, culture, and family.”⁶⁹ Similarly, in *Chester County Dept. of Social Services v. Colman*, the court of appeals of South Carolina specifically noted, “The Act is based on the assumption that protection of the Indian child’s relationship to the tribe is in the child’s best interest.”⁷⁰ In addition, the recently enacted ICWA guidelines, which strengthen ICWA’s applicability, further demonstrate the federal government’s continuing commitment to keeping Indian children connected to their tribes and their heritage.⁷¹

Some ICWA critics have suggested the Act puts the tribe’s interests above the child’s, but this is inaccurate.⁷² As the Supreme Court explained in *Mississippi Band of Choctaw Indians v. Holyfield*, “The Act is based on the fundamental assumption that it is in the Indian child’s best interest that its relationship to the tribe be protected.”⁷³ As the *Holyfield* court recognized, the purpose of ICWA is to promote the best interests of Indian children by protecting their relationship to their tribes. Unfortunately, cases like *Sharpe* threaten such relationships and Indian chil-

⁶⁹ 906 S.W.2d 152, 169 (Tex. App. 1995). The court further stated that relying on the assumption that the Indian determination of what is best for the child would not truly result in what is best for the child, is an “arrogant idea that defeats the sovereignty of Indian tribes in custody matters; the very idea for which ICWA was enacted.” *Id.* at 170.

⁷⁰ *Chester Cnty. Dep’t of Soc. Serv. v. Coleman*, 372 S.E.2d 912, 914 (S.C. Ct. App. 1988).

⁷¹ See Guidelines for State Courts and Agencies in Indian Child Custody Proceedings, 80 Fed. Reg. at 10,149. (noting “[I]t is inappropriate [for courts] to conduct an independent analysis, inconsistent with ICWA’s placement preferences, of the ‘best interest’ of an Indian child.”).

⁷² Professor Clark argued that “[t]hese and other provisions of the Act effectively give tribal political interests priority over the interests of Indian children where adoption is concerned.”

⁷³ See also *In re Adoption of T.N.F.*, 781 P.2d 973, 977 (Alaska 1989) (for example, the court noted that “in enacting ICWA, Congress did not seek simply to protect the interests of individual Indian parents. Rather, Congress sought to also protect the interests of Indian tribes and communities, and the interests of the Indian children themselves.”).

dren's best interests. Given this threat, the federal government may, once again, need to intervene. Specifically, if decisions like *Sharpe* become common, the federal government may have an obligation to step in and assume the child support obligations of Indian parents wishing to return to their native villages and tribes.

B. *Trust Responsibility and Federal Child Support Funding*

The potential conflict between maximizing child support and reducing awards in favor of social benefits has led a number of prominent family law scholars to suggest that child support should be viewed as a societal debt rather than an individual one. The late Professor Harry Krause wrote that “[s]ociety owes a more active role in supporting the rearing of children” and he posited that “[s]ociety should recognize this as a debt, not as reluctant charity.”⁷⁴ Dean Martha Minow and Professor Deborah Rhode have echoed this sentiment, suggesting that the public/private distinction regarding child support is problematic because it “assigns childcare responsibilities to parents, and thereby avoids public responsibility for children.”⁷⁵ These scholars have advocated for a more communal role in child support generally,⁷⁶ but their arguments are particularly compelling in the American Indian context.

Both children and tribes benefit when Indian parents return to their native villages and practice subsistence lifestyles. Nevertheless, the question facing the *Sharpe* court was not whether such benefits existed, but whether these benefits outweighed the potential harm a child experiences from the loss or reduction of child support. The *Sharpe* court concluded that they did not. This

⁷⁴ Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 FAM. L.Q. 1, 25 (1990).

⁷⁵ Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 7-8 (1986). See also Krause, *supra* note 74, citing Martha Minow & Deborah Rhode, *On Divorce Reform: Reforming the Questions, Questioning the Reformers* 21-27 (draft Oct. 1988).

⁷⁶ Krause, *supra* note 74, at 299 (“David Chambers and I have thought for some time that, in a few decades, our society may conclude that the enforcement of individual parental child support obligations, at least at full support levels, may no longer be good social policy.”). See also David Chambers, *Comment—The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982).

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was the wrong decision, but the Alaska family court should not have been forced to make this choice in the first place. The federal government has an obligation to support native culture and traditions and in the context of Indian child support, this could mean the government has a duty to supplement the financial support lost when Indian parents return to their native tribes or villages.

Federal subsidies are common in Alaska native villages, which, due to their remote locations, often require “large infusions of public monies for fixed capital improvements and income assistance.”⁷⁷ Providing this money is part of Congress’s trust responsibility.⁷⁸ Unfortunately, this assistance has also left native communities financially vulnerable and too dependent on the government.⁷⁹ Child support subsidies would be different. Like other financial assistance to tribes, these payments would be justified by the trust relationship and Congress’s responsibility to preserve native culture and traditions, but they would differ by

⁷⁷ Federal money enables these communities to survive, *See* Lee Huskey, *The Economy of Village Alaska* 9 (Mar. 1992), http://www.iser.uaa.alaska.edu/Publications/fuelcosts_viabilityref/Huskey%20Economy%20of%20Village%20Alaska.pdf (finding that federal and state subsidies such as welfare, pension, and other payment programs accounted for nearly 60% of per capita personal income in western coastal Alaska). *See also* Berardi, *supra* note 36, at 97-98 (noting the problem with such subsidies is that that they can “increase[e] the level of population in a region beyond its economic viability.”).

⁷⁸ There are numerous programs funded by the federal government as part of its trust responsibility. For example, consider cases concerning the funding to AIAN health care. *See, e.g.,* McNabb v. Bowen, 829 F.2d 787, 792 (9th Cir. 1987); White v. Califano, 581 F.2d 697, 698 (8th Cir. 1978), *aff’g per curiam* 437 F. Supp. 543, 555 (D.S.D. 1977). *See also* Native American Programs Act of 1974, 42 U.S.C. § 2991(b) (1996) (authorizing financial assistance to public and nonprofit agencies of governing bodies serving Native Americans, Native Alaskans, Native Hawaiians and Pacific Islanders (including American Samoan Natives)); 20 U.S.C. § 7601 (1994), Strengthening and Improvement of Elementary and Secondary Schools (indicating the need for bilingual education programs that develop the native languages skills of limited English proficient students, or ancestral languages of American Indians, Alaska Native, Native Hawaiians, and native residents). *See also* Barbara L. Creel, *The Right to Counsel for Indians Accused of a Crime: A Tribal and Congressional Imperative*, 18 MICH. J. RACE & L. 317, 358 (2013) (arguing that the trust responsibility requires funding of an independent tribal defense organization).

⁷⁹ Berardi, *supra* note 36, at 107.

ultimately decreasing tribal reliance on federal aid.⁸⁰ Consequently, child support subsidies to encourage native subsistence are a win/win. They benefit the tribe, the child, and the federal government.

Conclusion

Jolene Sharpe wanted to return to her ancestral village. She also wanted to reconnect with her native heritage and adopt the traditional lifestyle of her tribe. Returning members like Jolene help preserve tribal traditions and they encourage strong connections between native children and tribal culture. These connections are vital to the survival of native communities; thus, when child support obligations prevent native parents from returning home, the harms are substantial. They are also unnecessary. State courts may modify child support awards to protect the best interest of children or to benefit the larger community. Eliminating the child support obstacle to native subsistence does both, and state courts should permit such modifications. Moreover, the federal government should actively support native parents wishing to practice subsistence by agreeing to assume their child support obligations. In the end, it is a small price to pay to protect the best interests of native children, their families, and their tribes.

⁸⁰ *Id.* at 100 (noting that individual Alaska Natives often “have used the funds from the settlement and income transfer programs for equipment, travel and other expenses related to subsistence.”).